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Introduction

In spring 2012, the Hungarian Academy of Sciences decided to establish the Media Studies Research Group for the management of various social scientific research activities related to the media. Activities related to media law are of paramount importance among these, not least because of the rapid and major changes taking place in the field of media regulations, the many open questions that arise both on the national and the European level and the disputes related to the media regulations. The Academy hopes that this initiative will enable the research team to conduct studies that are significant on a European scale, as well as to participate in international exchanges related to the subject.

In 2013 the research group launched a research programme entitled 'The fundamentals of European thought on media law, with special respect to certain issues related to the freedom of speech', which is scheduled to run until the end of 2015. The programme includes the publication of several independent papers and volumes of studies, as well as the organisation of conferences. It consists of several research projects covering several distinct legal fields. We hope that this diverse approach will allow both the researchers and their readers to define the fundamentals of European thought on media law, to identify the possible models for the resolution of the various questions that arise, to understand the 'common minimum' of European regulations that is present in all countries and to establish whether 'best practices' exist in these areas and, if so, what they are. Besides identifying the various European approaches, it is at least as important to examine the legal system of the United States and, possibly, some other legal systems that are relevant from the European viewpoint (eg Canada, Australia, New Zealand, etc), and to study the interactions between them.

The Academy invited distinguished scholars from many countries working in the field of media and free speech law to take part in the research programme and send manuscripts for the planned publication of a collection of essays. The participation of diverse authors from various countries and backgrounds greatly contributed to the value of the research. The compiled papers are published in this book as a first step to promote the research on an international level.

The book is made up of seven structural units, which encompass a significant part of the current issues of the freedom of speech and media law. The first unit (Fundamental issues of media regulation) deals with the basic theoretical issues of media regulation. The theoretical / philosophical grounds of the freedom of speech and the freedom of the

press in Europe mainly originated from the legal system of the United States and the jurisprudence of the US Supreme Court; therefore, the summary papers of an American (Russell L Weaver) and a European (Balázs Fekete) author are interesting contributions to the discussion of this topic, analysing their subject from different perspectives on the two sides of the Atlantic Ocean.

The second unit (Regulation of the new media) discusses the issues that arise from new media services, including the questions related to the digitalisation of traditional services (Katrin Nyman-Metcalf's paper) and the internet (the joint paper by Rolf H Weber and Ulrike I Heinrich on the regulatory structure of the new services). The article by Vincenzo Zeno-Zencovich discusses anonymity rights on the internet, a topic that goes beyond the enforcement of the rules ensuring the rights of 'traditional' journalists, and raises the difficult question of just who qualifies as a journalist or, rather, just who is entitled to special protection in the field of the media and on what grounds. Balázs Bartóki-Gönczy's paper examines the current challenges of net neutrality in the US and within the EU law.

The third unit (Special issues in media regulation) consists of papers examining issues of media regulation that have been with us for a long time but are especially acute today. Among these is Professor Peter Leyland's article about the aftermath of the British *News of the World* scandal and, in relation to that, the evolution of British press regulation. In the summer of 2011 the affair had suddenly highlighted the desirable limitations of the operation of the press as well as the general issues of regulation. Lorna Woods wrote an article on the relationship between the regulation of public service media and the law of the European Union, a problematic relationship, full of uncertainties, that is far from settled yet. The paper by Petra Láncos examines the scope of the jurisdiction of the European Union in issues of media freedom, not independently from the international echoes of Hungarian media regulations. A question that must be examined and answered in detail prior to dwelling on jurisdictional issues is what the common European values are that can orient decision makers, are there any such and, if so, whether they can serve as the basis of the further expansion and strengthening of EU law.

The book's fourth unit (Defamation issues) deals with the evergreen topic of the law of libel. John Campbell's paper provides an interesting and detailed overview of almost all common law legal systems, with special emphasis on the analysis of the last fifteen years' British developments in this area. As is well known, the law of libel is undergoing an exciting transformation in common law countries, which may have important lessons for the whole of Europe as well as the United States. Ursula Cheer's article reviews these developments in the light of the New Zealand legal system. Anne Cheung discuses an interesting aspect of the relationship between the new media and the traditional law of libel, namely the problem of the liability of internet hosting providers with regard to the anonymously published comments of others. After providing a comprehensive European overview, my paper aims to analyse Hungarian regulations and jurisprudence that have taken a direction that may be interesting for the legal systems of other countries, too, and the libel cases decided by ECtHR of Hungarian concern that are relevant at the European level, too.

The papers in the fifth unit of the book (The protection of privacy) analyse the issues of the protection of privacy that are closely related to certain aspects of the law of libel. Val Corbett's article presents the current problem of publicity rights, while Ashley Packard examines the uncertainties of the protection of personal data from both a European and a US perspective.

The issue of hate speech is one that cannot be omitted from a volume depicting the various areas of the freedom of speech. Four papers provide a treatment of this topic in the sixth structural unit of the book (Hate speech and terrorism). The article of Robert A Kahn discusses the relationship between and possible restriction of symbols and hate speech on the basis of the analysis of the jurisprudence of both the United States and ECtHR. Jeroen Temperman describes the international regulations on the restriction of incitement to hatred, with special respect to hate speech related to religious convictions. Professor Clive Walker presents a particular and relatively new area of hate speech (or, at least, one that has unfortunately gained new impetus in the twenty-first century), namely the rather complex relationship between speech supporting terrorism and the democratic freedom of speech. Bernát Török provides a critical analysis of the vast Strasbourg practice and attempts to identify, from the layers of the various decisions, the often not easily perceptible theoretical foundations and considerations upon which future decisions are based.

The seventh and last unit of the book (Commercial communications and political advertising) discusses commercial communications from two entirely different aspects: Irini Katsirea and Thomas Gibbons analyse the adoption and practical application in the United Kingdom and Germany of the rules on a special instance of commercial communication, product placement as introduced to all of Europe by the AVMS Directive, while Tom Lewis presents the practice of ECtHR on political advertisements, one that is not entirely free from contradictions.

The book is thus not only thick in size, but it presents a wide variety of issues as well. The objective of the editor was to ensure that this collection of papers contributes to the debates conducted in Europe, America, and other continents too, that are common to us. The papers provide snapshots of various problems that may, due to the continuous formation of the regulations and practice, fade somewhat in a couple of years; however, in my opinion their important theoretical foundations and in-depth analyses will ensure that they remain important sources for a long time. The arguments over freedom of speech and media regulation will probably not be settled for a long time yet. Some of them, in fact, cannot even be settled, while there are others where closure once and for all would cause us significant loss. It is with respect to all of this that I wish readers traversing the pages of the book a good journey, as well as a lot of exciting and interesting debates about the issues raised—it was just such debates to which the authors wished to contribute.

Budapest
6 April 2014

András Koltay
editor

1.
Fundamental issues of media regulation

Russell L Weaver

The press and freedom of expression

Johannes Gutenberg's invention of the printing press in the fifteenth century revolutionized communication.[1] Prior to that time, most books were handwritten, a process that was extremely slow and time consuming,[2] and only a small number of people (usually monks) could devote the time needed to create books.[3] As a result, it could take years to create a single book, and many decades to create a relatively modest number of books,[4] most of which were religious rather than political in nature.[5] Although universities started producing written works in the thirteenth century, the writers of these university-created books were generally scribes rather than creators of original content.[6]

Although Gutenberg's movable type printing system was relatively straight-forward,[7] it was revolutionary because it allowed printers to mass produce written works.[8] The printer would arrange the movable type in boxes to compose a page of text. Once the page was prepared, the printer would apply ink to the printing press and slowly crank the press down onto the paper in order to make an impression on a piece of paper.

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[1] I Fang, *A History of Mass Communication: Six Information Revolutions* (Focal Press 1997) 40; CT Meadow, *Making Connections: Communication Through the Ages* (Scarecrow Press 2002) 64–65; D Crowley and P Heyer, *Communication in History: Technology, Culture, Society* (5th edn, Pearson 2007) 82; RL Weaver and DE Lively, *Understanding the First Amendment* (4th edn, LexisNexis 2013).

[2] R Lasso, 'From the Paper Chase to the Digital Chase: Technology and the Challenge of Teaching 21st Century Law Students' (2002) 43 *Santa Clara Law Review* 1, 4 n 2; PK Yu, 'Of Monks, Medieval Scribes and Middlemen' (2006) *Michigan State Law Review* 1, 7.

[3] K Lula, 'Neither Here Nor There But Fair: Finding an International Copyright Legal System Between East and West, Past and Present' 8 (2006) *Asian-Pacific Law & Policy Journal* 96, 101; JH Perlman and LT Greenberg, 'The Internet Reformation: Gutenberg and Martin Luther on Wall Street' (2000) 4 *Wall Street Lawyer* 9.

[4] See Yu (n 2) 7 ('When Bishop Leofric took over the Exeter Cathedral in 1050, he found only five books in its library').

[5] ibid.

[6] ibid 10.

[7] Gutenberg forged lead pieces representing every letter of the alphabet, both lower- and upper-case. He kept this type in cases that separated the lower-case letters from the upper-case letters. See Fang (n 1) 40; see also P Linzer, 'From the Gutenberg Bible to Net Neutrality: How Technology Makes Law and Why English Majors Need to Understand It' (2008) 39 *McGeorge Law Review* 1, 4–5.

[8] Fang (n 1) 40.

By repeating this process, the printer could create multiple copies of a single page. To create a book, the printer would repeat this process for each subsequent page, and then assemble the completed pages and bind them into books.

The Gutenberg press had a profound effect on society because it expanded communications possibilities beyond the monks, governmental officials and universities that had previously created written works.[9] As a result, the printing press quickly spread from Germany to other cities and countries,[10] and printed works assumed an increasingly important role in the communications process.[11] By 1499, the quantity of books rose dramatically to some 15 million books representing approximately thirty thousand book titles, and some 2,500 European cities had printing presses.[12]

Gutenberg's invention revolutionized society, leading to the development of a new type of intellectual, and a shift from entirely religious books to texts addressing a variety of subjects, including texts on the 'new science and philosophy'.[13] Over time, the printing press altered the 'entire fabric of society', and had the effect of 'encourag[ing] literacy' and 'broaden[ing] knowledge',[14] and had a direct impact on the 'world of ideas by making knowledge widely available and creating a space in which new forms of expression could flourish.'[15] The printing press impacted society by contributing to the Renaissance, the Scientific Revolution, and the Protestant Reformation.[16] The Roman Catholic Church, which had dominated medieval society,[17] was directly challenged by ideas disseminated through the medium of the press,[18] as Martin Luther's handwritten theses were translated into German, reproduced, and widely circulated.[19]

The press as an institution

Over time, the printing press led to the creation of 'the press' as an institution in its own right,[20] and one that had a significant impact on political thought and the broader social fabric. For example, the printing press played a role in helping to bring about the

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9 RJ Zecchino, 'Could the Framers Ever Have Imagined? A Discussion on the First Amendment and the Internet' (1999) *Detroit College of Law at Michigan State University Law Review* 981, 983.

10 See Yu (n 2) 11.

11 ibid 12.

12 JK Grant, 'Shattering and Moving Beyond the Gutenberg Paradigm: The Dawn of the Electronic Will' (2008) 42 *University of Michigan Journal of Law Reform* 105, 111–12.

13 Crowley and Heyer (n 1) 83.

14 Fang (n 1) 46.

15 Crowley and Heyer (n 1) 82.

16 Lasso (n 2) 4 n 2; G Paul and J Baron, 'Information Inflation: Can the Legal System Adapt?' (2007) 13 *Richmond Journal of Law & Technology* 1, 8.

17 Crowley and Heyer (n 1) 82.

18 HJ Graff, 'Early Modern Languages' in Crowley and Heyer (n 1) 106.

19 ibid 105.

20 JB Thompson, 'The Trade in News' in Crowley and Heyer (n 1) 114.

American Revolution by enabling the reproduction (and, ultimately, the dissemination) of the writings of Europeans, including *Cato's Letters*,[21] as well as the thoughts of political philosophers such as Locke,[22] Paine[23] and Baron de Montesqieu,[24] all of which helped shape eighteenth century political thought.[25] In addition, the printing press provided revolutionaries with a way to communicate with each other, and was used during the American Revolution to create and mass distribute copies of the Declaration of Independence, and ultimately the Federalist Papers.[26] The printing press also played a role in the French Revolution.

One might have guessed that Gutenberg's invention would have had a limited impact on eighteenth century society because literacy rates were so low. Indeed, until the Industrial Revolution, many ordinary people lacked the ability to read and write,[27] and therefore were unable to prepare or read letters, circulars and petitions.[28] However, the evidence suggests that the printing press had a significant impact on society and politics even among the illiterate. During the American Revolution, although print runs for newspapers were often quite low by modern standards—a single newspaper might produce only 400 copies per day—newspapers had greater impact than the extent of their press runs might indicate. Many newspapers were read by more than one person, and were also read to groups of people in communal settings like taverns.[29] During the French Revolution, when many ordinary Frenchmen could not read or write, posters were placed in public squares, and a literate person might read the contents to an interested group of listeners.[30]

Is the press entitled to special privileges?

The modern press is viewed as an essential component of a modern democracy, serving as a so-called 'watchdog' against governmental corruption and abuse by investigating

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[21] MK Curtis, 'St. George Tucker and the Legacy of Slavery' (2006) 47 *William & Mary Law Review* 1157, 1206.

[22] DL Doernberg, '"We the People": John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action' (1985) 73 *California Law Review* 52, 57, 64–65; D Konig, 'Thomas Jefferson's Armed Citizenry and the Republican Militia' (2008) 1 *Albany Government Law Review* 250, 262.

[23] AE Shoenberger, 'Connecticut Yankee in Europe's Court: An Alternative Vision of Constitutional Defamation Law to *New York Times v Sullivan*?' (2010) 28 *Quinnipiac Law Review* 431, 432.

[24] D Adair, 'That Politics May Be Reduced to a Science: David Hume, James Madison and the Tenth Federalist' reprinted in Douglass Adair and Trevor Colbourn (eds), *Fame and the Founding Fathers* (WW Norton 1974) 93, 94–95.

[25] Fang (n 1) 49.

[26] PJ Weiser, 'The Ghost of Telecommunications Past' (2005) 103 *Michigan Law Review* 1671, 1675.

[27] N Wade, 'In Dusty Archives: A Theory of Affluence' *The New York Times*, 7 August 2007, F1 (reviewing G Clark, *A Farewell to Alms: A Brief Economic History of the World* (Princeton University Press 2008).

[28] G Nunberg, 'Reading, Writing and Thinking' *The New York Times*, 13 December 1981, A3.

[29] Fang (n 1) 115.

[30] ibid 47.

and reporting on governmental officials and prominent individuals. For example, in US history, the press has informed the nation about 'governmental corruption, the greed of industrialists, and the need for pure food laws and child labor laws.'[31] Perhaps the most famous example of this watchdog function is provided by Woodward and Bernstein's Watergate investigation for *The Washington Post*; an investigation that ultimately led to President Richard Nixon's resignation from the presidency.[32] But numerous other examples abound in the sense that media investigations are a proud tradition among newspapers. For example, investigations by the *Hartford Courant* led to corruption charges against a former Connecticut governor.[33] The paper's 'tenacious coverage compelled authorities to investigate' the governor, and 'exposed polluters and the deployment of mentally ill soldiers to Iraq.'[34]

In addition, the press serves as a critic of government and society. Even as early as the eighteenth century, there were numerous examples of the press serving this critical function. For example, in the British colonies, John Peter Zenger of New York[35] published 'anti-British song-sheets and mock advertisements describing an associate of the royal governor as "a large Spaniel, of about 5 feet 5 inches high … lately strayed from his kennel with his mouth full of fulsome panegyricks," and also described the associate as a "monkey … lately broke from his chain and run into the country."'[36] Similarly, James Franklin of Boston, Massachusetts,[37] Benjamin Franklin's brother, published an article suggesting that colonial authorities were not pursuing pirates with sufficient vigor.[38] Even Benjamin Franklin joined the fray as a teenager when he ran his brother's newspaper during the latter's imprisonment for criticizing governmental officials.[39] Later, when Franklin owned his own press, he used it to comment freely on society, and to critique and challenge government.[40]

However, in order to perform this watchdog function, the press must function free of governmental interference. Because of the potential of the printing press, speech repression was a recurring theme following Gutenberg's invention of the device. Indeed, throughout history, as new forms of speech technology were developed, they were usually accompanied by governmental efforts to restrict or control the use of those technologies.[41] Following Gutenberg's invention of the printing press, European

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[31] ibid 56.

[32] AC Shepard, 'Deep Throat's Legacy to Journalism' National Public Radio (19 December 2008). <http://www.npr.org/templates/story/story.php?storyId=98532461>.

[33] D Folkenflik, 'Imagining a City Without its Daily Newspaper' National Public Radio's *Morning Edition* (5 February 2009), <http://www.npr.org/templates/story/story.php?storyId=100256908>.

[34] ibid.

[35] WR Glendon, 'The Trial of John Peter Zenger' (1996) 68 *New York State Bar Journal* 48, 49.

[36] EI Haynes, '*United States v Thomas*: Pulling the Jury Apart' (1998) 30 *Connecticut Law Review* 731.

[37] HW Brands, *The First American: The Life and Times of Benjamin Franklin* (Doubleday 2000) 25, 181.

[38] ibid 29–30.

[39] ibid 30–31.

[40] ibid 144–45, 188.

[41] E Townsend Gard, 'Conversations with Renowned Professors on the Future of Copyright' (2009) 12 *Tulane Journal of Technology and Intellectual Property* 35, 101.

governments did not willingly or readily embrace the potential of the printing press in the hands of private citizens.[42] Indeed, because of the potential for 'subversion' of the established order, many European governments sought to restrain what they regarded as the 'evils' of the printing press.[43]

Restrictions on the printing press took various forms. In England, the Crown imposed significant restraints on press freedom. In addition to limiting the total number of presses that could exist,[44] the English government controlled the content of printing through licensing schemes.[45] Under the Printing Act of 1662, Parliament 'prescribed what could be printed, who could print, and who could sell.'[46] The British licensing scheme also prohibited the publication of any book or pamphlet without a license, and required those who wished to obtain a license to submit their work for review.[47] Of course, if a proposed publication contained material that the censor deemed objectionable, the license could be denied.[48] Under the Stamp Act of 1712, taxes were levied on each page as well as on each advertisement that a newspaper contained.[49]

Previously, in 1606, England had created the crime of seditious libel in the Star Chamber's decision in *de Libellis Famosis*.[50] That decision replaced, in part, the criminal offense of constructive treason,[51] and made it a crime to criticize the government or governmental officials (and, at one point, the clergy as well).[52] The crime was enforced by 'threats of punishment, litigation costs, and stigma',[53] and was justified by the notion that criticism of the government 'inculcated a disrespect for public authority.'[54] 'Since maintaining a proper regard for government was the goal of this new offense, it followed that truth was just as reprehensible as falsehood' and therefore was not a defense.[55]

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[42] There were some exceptions, notably Italy and Germany, which gave the press greater latitude to discuss events occurring in other countries. Crowley and Heyer (n 1) 2.

[43] See *First National Bank of Boston v Bellotti*, 435 US 765, 800–801 (1978); See also WT Mayton, 'Seditious Libel and the Lost Guarantee of a Freedom of Expression' (1984) 84 *Columbia Law Review* 91, 97–98; NL Rosenberg, *Protecting the Best Men: An Interpretive Theory of the History of Libel* (UN Carolina Press 1986); ML Kaplan, *The Culture of Slander in Early Modern England* (CUP 1997).

[44] E Lee, 'Guns and Speech Technologies: How the Right to Bear Arms Affects Copyright Regulations of Speech Technologies' (2009) 17 *William and Mary Bill of Rights Journal* 1037, 1072.

[45] *Thomas v Chicago Park District*, 534 US 316, 320 (2002).

[46] ibid.

[47] *Thomas v Chicago Park District*, 534 US 316, 320 (2002); see also F Siebert, *Freedom of the Press in England 1476–1776* (University of Illinois Press 1952) 240.

[48] *Lovell v City of Griffin*, 303 US 444, 451 (1938); see also *City of Lakewood v Plain Dealer Publishing, Co*, 486 US 750, 757 (1988); *Lowe v Securities & Exchange Commission*, 472 US 181, 205 (1985).

[49] Thompson (n 20) 2.

[50] 77 Eng Rep 250 (Star Chamber 1606).

[51] See WT Mayton, 'Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine' (1982) 67 *Cornell Law Review* 245, 248.

[52] ibid. Indeed, in *de Libellis Famosis,* the defendants had ridiculed high clergy.

[53] ibid.

[54] ibid 103; see also MJ O'Laughlin, 'Exigent Circumstances: Circumscribing the Exclusionary Rule in Response to 9/11' (2002) *University of Missouri-Kansas City Law Review* 707, 720–21.

[55] ibid. See also Glendon (n 35) 49.

Indeed, truthful criticisms were punished more severely than false criticisms because truthful criticisms were regarded as potentially more damaging to the government.[56]

Although licensing expired in the late eighteenth century,[57] there was significant evidence of speech repression in the American colonies.[58] Perhaps the most famous seditious libel prosecution in the American colonies involved the case of John Peter Zenger.[59] Zenger, a New York publisher, who had published stories mocking the royal Governor and his administration, was prosecuted for seditious libel.[60] Zenger languished in jail for ten months awaiting trial, and the Governor arranged for the disbarment of his lawyers for stating exceptions on Zenger's behalf.[61] When the case was finally tried, Zenger's lawyer admitted that Zenger had published the allegedly libelous statements, and offered to concede the libel if the prosecution could prove that the allegations were false. When the prosecution declined, the lawyer offered to prove that the statements were true. Although the court disallowed both types of evidence, on the then valid legal basis that truth was immaterial to libel, Zenger was acquitted in what was an early and significant exercise of jury nullification.[62]

In the American colonies, there were other significant examples of British attempts to control content through licensing, or through seditious libel prosecutions. For example, James Franklin (Benjamin's brother), who ran the *Courant*, was jailed at one point for showing 'disrespect'.[63] In addition, because James had a tendency 'to mock religion and bring it into disrespect', a court ordered that '"James Franklyn, the printer and publisher [of the Courant], be strictly forbidden by this court to print or publish the New England Courant" unless he submitted each issue of the paper to the censor for prior approval.'[64] James Franklin was also prosecuted for printing a fake letter to the editor (fake in the sense that James was the real author of the letter, but he sought to attribute the letter to someone else) that implied that the authorities were not pursuing pirates (operating off the New England coast) with sufficient vigor.[65] In the article, James reported (sarcastically suggesting that the authorities were not moving in haste to catch the pirates) that the captain heading up the expedition against the pirates 'will sail sometime this month, if wind and weather permit.'[66] James was jailed, and Ben was questioned, but ultimately

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[56] SD Krauss, 'An Inquiry into the Right of Criminal Juries to Determine the Law in America' (1998) 89 *Journal of Criminal Law & Criminology* 111, 183 n 290; see also Glendon (n 35) 48.

[57] For a thorough discussion of the history of seditious libel, see Law Commission Working Paper No 72, 'Treason, Sedition and Allied Offences' (1977); J Schenck Koffler and BL Gershman, 'The New Seditious Libel' (1984) 69 *Cornell Law Review* 816; see also JK Walker, 'A Poisen in Ye Commonwealthe: Seditious Libel in Hanoverian London' (1996) 25 *Anglo-American. Law Review* 3, 341–66.

[58] *Thomas v Chicago Park District*, 534 US 316, 320 (2002).

[59] ibid.

[60] Haynes (n 36) 731.

[61] *Cohen v Hurley,* 366 US 117, 140 (1961) (Black J, dissenting).

[62] Haynes (n 36) 731.

[63] Brands (n 37) 30 (he was ultimately imprisoned for about 30 days).

[64] ibid 31.

[65] ibid 29–30.

[66] ibid.

released. Many believed that the arrest was politically motivated, and was designed simply to silence James for his stinging political commentaries. Benjamin Franklin continued publishing the newspaper during the month that James was confined.[67] When Benjamin Franklin decided to leave Boston for New York and (ultimately) Philadelphia, one of the motivating factors was the possibility of prosecution by Boston's elite.[68] Well aware of what had happened to his brother, Benjamin Franklin was more careful about using his newspaper to provoke the authorities.[69]

In some nations, the institutional press is accorded special treatment because of its watchdog, investigative and criticism functions. For example, in *Branzburg v Hayes*,[70] Powell J asserted that 'the press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know. The right to know is crucial to the governing powers of the people. . . . Knowledge is essential to informed decisions.'[71] Potter Stewart J of the US Supreme Court made a similar argument: 'The Free Press Clause extends protection to an institution. The publishing business is, in short, the only organized private business that is given explicit constitutional protection. [If] the Free Press guarantee meant no more than freedom of expression, it would be a constitutional redundancy.'[72]

However, there is hardly agreement on the question of whether the press should be accorded a special status. In *First National Bank of Boston v Bellotti*,[73] then Burger CJ of the United States Supreme Court, after noting that the court had not yet squarely resolved whether the Press Clause conferred upon the 'institutional press' any freedom from government restraint, not enjoyed by everyone else, concluded that there was no indication that the drafters of the First Amendment to the US Constitution contemplated a 'special' or 'institutional' privilege for the press. Andrew Bradford, a colonial American newspaperman, argued that freedom of expression is hardly limited to the media: '[By] Freedom of the Press, I mean a Liberty, within the Bounds of Law, for any Man to communicate to the Public, his Sentiments on the Important Points of Religion and Government; of proposing any Laws, which he apprehends may be for the Good of his Countrey, and of applying for the Repeal of such, as he Judges pernicious. This is the Liberty of the Press, the great Palladium of all our other Liberties.'[74]

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67 ibid 30.
68 ibid 34.
69 ibid 114.
70 408 US 665 (1972).
71 ibid.
72 Potter Stewart, '"Or of the Press"' (1975) 26 *Hastings Law Journal* 631.
73 435 US 765 (1978).
74 A Bradford, 'Sentiments on the Liberty of the Press' in L Levy, *Freedom of the Press From Zenger to Jefferson* (1966) 41–42 (first published in Bradford's *The American Weekly Mercury*, a Philadelphia newspaper, 25 April 1734).

Other justifications for protecting the press

Even if the press is not accorded a special status in every society, it is accorded special protection under general free speech principles. Over the centuries, free speech theorists have offered various theories regarding the special status of speech and the press in most Western-style democracies.[75] These theories, to the extent that they have influenced courts or policymakers, have helped shape the meaning and content of speech protections. In addition, even though those justifications apply to the press, they justify providing special protection to all speakers in society.

'Democratic process' theory (aka 'self-governance' theory)

Even if there is disagreement regarding the justifications for protecting free expression, most authorities recognize that freedom of expression is essential to the democratic process, and should be protected for that reason.[76] As democratic principles replaced monarchial principles and the concept of divine right, a compelling reason began to emerge for protecting freedom of expression: if the citizenry is expected to engage in self-governance—in the sense of having the populace vote on candidates and sometimes on issues—then a free flow of information among citizens is essential to the effective functioning of the process.

Numerous commentators have extolled the importance of free expression to the democratic process.[77] As one prominent US commentator stated:

> Every government must have some process for feeding back to it information concerning the attitudes, needs and wishes of its citizens. … The crucial point [is] not that freedom of expression is politically useful, but that it is indispensable to the operation of a democratic form of government. Once one accepts the premise of the Declaration of Independence—that governments derive 'their just powers from the consent of the governed'—it follows that the governed must, in order to exercise their right of consent, have full freedom of expression both in forming individual judgments and in forming the common judgment. … [O]nce a society was committed to democratic procedures, or rather in the process of committing itself, it necessarily embraced the principle of open political discussion.[78]

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[75] CE Baker, 'Scope of the First Amendment Freedom of Speech' (1978) 25 *UCLA Law Review* 964; RH Bork, 'Neutral Principles and Some First Amendment Problems' (1971) 47 *Indiana Law Journal* 1; TI Emerson, 'Toward a General Theory of the First Amendment' (1963) 72 *Yale Law Journal* 877; Alexander Meiklejohn, 'The First Amendment as an Absolute' (1961) *Supreme Court Review* 245; Weaver and Lively (n 1) 10–13.

[76] ibid. See also Baker (n 75); Bork (n 75); Emerson (n 75); Meiklejohn (n 75); Brands (n 37) 115; Weaver and Lively (n 1) 10–13.

[77] Baker (n 75) 1027; Bork (n 75) 20; Emerson (n 75) 883; Meiklejohn (n 75) 255; Weaver and Lively (n 1) 10–13.

[78] Emerson (n 75) 883–84.

Indeed, former federal judge and law professor, and one-time US Supreme Court nominee, Robert Bork argued that the democratic process theory provides the only defensible justification for protecting freedom of expression, and argues that other theories are indefensible.[79]

Democratic process principles are recognized in many countries. In the US, these principles are frequently relied on by the United States Supreme Court in construing the First Amendment protections for freedom of speech and of the press. For example, in *Garrison v Louisiana*,[80] the Court stated that 'speech concerning public affairs is more than self-expression; it is the essence of self-government.'[81] In *McDonald v City of Chicago*,[82] the Court stated that freedom of expression is 'essential to free government' and 'to the maintenance of democratic institutions.'[83] In *Federal Election Commission v Massachusetts Citizens for Life, Inc*,[84] the court recognized that freedom of speech 'plays a fundamental role in a democracy; as this Court has said, freedom of thought and speech "is the matrix, the indispensable condition, of nearly every other form of freedom."'[85]

The 'marketplace of ideas' theory

The 'marketplace of ideas' theory has also been advanced as one of the primary justifications for according special protection to freedom of expression. This theory, in its strict sense, suggests that ideas should 'compete' with each other in the 'marketplace of ideas', and assumes that the best ideas will ultimately triumph. Justice Oliver Wendell Holmes' dissenting opinion in *Abrams v United States*[86] is widely regarded as the source of this theory. In that opinion, he stated as follows:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some

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79 Bork (n 75) 20–22.
80 379 US 64, 74–75 (1964).
81 ibid 74–75; see also *Snyder v Phelps*, 131 S. Ct. 1207, 1215 (2010).
82 130 S. Ct. 3020 (2010).
83 ibid 3098.
84 479 US 238, 264 (1986).
85 ibid (Quoting *Palko v Connecticut,* 302 US 319, 327 (1937)).
86 250 US 616, 630 (1919).

> prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.[87]

In fact, the 'marketplace of ideas' theory preceded Holmes J. Indeed, there is evidence suggesting that Benjamin Franklin articulated a version of the marketplace of ideas theory as early as the eighteenth century.[88] A biography of Franklin quotes him as saying that 'when truth and error have fair play, the former is always an overmatch for the latter.'[89]

The marketplace of ideas theory itself is often extolled by free speech theorists, but is sometimes stated in different ways. C. Edwin Baker stated the theory as follows:

> The classic marketplace of ideas model argues that truth (or the best perspectives or solutions) can be discovered through robust debate, free from governmental interference. Defending this theory in *On Liberty*, John Stuart Mill argued that three situations are possible: 1) if heretical opinion contains the truth, and if we silence it, we lose the chance of exchanging truth for error; 2) if received and contesting opinions each hold part of the truth, their clash in open discussion provides the best means to discover the truth in each; 3) even if the heretical view is wholly false and the orthodoxy contains the whole truth, the received truth, unless debated and challenged, will be held in the manner of prejudice or dead dogma, its meaning may be forgotten or enfeebled, and it will be inefficacious for good. Moreover, without free speech, totally false heretical opinions which could not survive open discussion will not disappear; instead, driven underground, these opinions will smolder, their fallacies protected from exposure and opposition. In this model, the value of free speech lies not in the liberty interests of individual speakers but in the societal benefits derived from unimpeded discussion. This social gain is so great, and any loss from allowing speech is so small, that society should tolerate no restraint on the verbal search for truth.[90]

Emerson essentially agrees with Baker's summary, but describes the theory a bit differently:

> Freedom of expression is … the best process for advancing knowledge and discovering truth. [The] soundest and most rational judgment is arrived at by considering all facts and arguments, which can be put forth on behalf of or against any proposition. [S]uppression of information, discussion, or the clash of opinion prevents one from reaching the most rational judgment, blocks the generation of new ideas, and tends to perpetuate error. … The theory demands that discussion must be kept open no matter how certainly true an accepted opinion may seem to be. Many of the most widely acknowledged truths have turned out to be erroneous. Many of the most significant advances in human knowledge—from Copernicus to Einstein—have resulted from challenging hitherto unquestioned assumptions. … The process also applies regardless of how false or pernicious the new opinion appears to be. [For] there is no way of suppressing the false without suppressing the

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87 *Abrams*, 250 US, 630.
88 Brands (n 37) 115.
89 ibid.
90 Baker (n 75) 964–65.

> true. Furthermore, even if the new opinion is wholly false, its presentation and open discussion serves a vital social purpose. It compels a rethinking and retesting of the accepted opinion. It results in a deeper understanding of the reasons for holding the opinion and a fuller appreciation of its meaning. … The only justification for suppressing an opinion is that those who seek to suppress it are infallible in their judgment of the truth. But no individual or group can be infallible, particularly in a constantly changing world. … Through the acquisition of new knowledge, the toleration of new ideas, the testing of opinion in open competition, the discipline of rethinking its assumptions, a society will be better able to reach common decisions that will meet the needs and aspirations of its members. [91]

The marketplace of ideas theory has been frequently cited and relied on in judicial opinions,[92] For example, in *United States v Alvarez*,[93] a case in which the US Supreme Court held that an individual was protected against prosecution even though he lied about having won the Congressional Medal of Honor, the Court paid homage to the 'marketplace of ideas' theory stating: 'The dangers of suppressing valuable ideas are lower where, as here, the regulations concern false statements about easily verifiable facts that do not concern such subject matter. Such false factual statements are less likely than are true factual statements to make a valuable contribution to the marketplace of ideas.'[94] Nevertheless, in *Alvarez*, the Court held that lies about having won the Congressional Medal of Honor constitute protected speech. In *Reno v American Civil Liberties Union*,[95] the Court referred to the Internet as a 'new marketplace of ideas', and one that is dramatically expanding, and concluded that 'governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it.'[96] The opinion concludes by noting that the 'interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.'[97]

Even though the 'marketplace of ideas' theory is widely accepted, the theory is essentially unsound to the extent that it suggests that 'truth' will necessarily emerge from the competition of ideas. As Baker noted, the 'assumptions on which the classic marketplace of ideas theory rests are almost universally rejected today.'[98] Why? There are a number of reasons. First, as some commentators have noted, 'truth' is hardly objective.[99] Second, even if the theory could lead to 'truth', how would we know it?

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91 Emerson (n 75) 881–82.

92 *United States v Alvarez*, 132 S. Ct. 2537, 2545 (2012); *Citizens United v Federal Election Commission*, 558 US 310, (2010); *Davis v Federal Election Commission*, 554 US 724, 755–56 (2008); *Reno v American Civil Liberties Union*, 521 US 844, 885 (1997); See also *Davenport v Washington Education Association*, 551 US 177, 188 (2007); *Perry Education Association v Perry Local Educators Association*, 460 US 37, 71–72 (1983).

93 132 S. Ct. 2537, 2545 (2012).

94 ibid 2552.

95 521 US 844, 885 (1997).

96 ibid.

97 ibid; see also *Davenport v Washington Education Ass'n.,* 551 US 177, 188–89 (2007).

98 Baker (n 75) 964.

99 ibid.

In the US, there is no truth commission which tells us which ideas are 'true' or 'false'. Unlike France and Germany, which prohibit denial of the Holocaust, the US does not allow government to declare historical truths. So, it is difficult to know whether 'truth' has prevailed in the marketplace of ideas. Third, even if truth were objective, it is not clear that the 'marketplace of ideas' will lead us to 'truth' because there is a 'risk of distortion in that emotional or irrational arguments can distort the perception and evaluation of information, as can individual phobias, desires and repressions.'[100] Indeed, individuals may 'maintain perspectives which promote one's interest even when presented with contrary information or alternative perspectives.'[101]

Despite the fact that the underlying premises of the marketplace of ideas theory do not necessarily hold together, the theory itself retains value in a democratic system. In essence, the marketplace of ideas theory requires that government admit all ideas into the marketplace for the public to consider and evaluate. In other words, the theory prohibits government from prohibiting certain political ideas or historical facts as heresy. Given that a democracy involves the citizenry in voting on candidates and issues, a free flow of information is essential. If government is allowed to control the flow of ideas into the 'marketplace of ideas', then the democratic process would be subject to governmental control and could not function effectively.

'Individual self-realization' or 'liberty interest' theory

The 'individual self-realization' theory (aka the 'individual autonomy' or 'liberty' theory) has been recognized by commentators,[102] as well as by courts, but has been rejected by some commentators.[103] Emerson summarized this theory as follows:

> The right to freedom of expression is justified first of all … from the widely accepted premise of Western thought that the proper end of man is the realization of his character and potentialities as a human being. … The achievement of self-realization commences with development of the mind. But the process of conscious thought … can have no limits. … It is an individual process. … Every man 'in the development of his own personality' has the right to form his own beliefs and opinions [and] the right to express these beliefs and opinions. … For expression is an integral part of the development of ideas, of mental exploration and of the affirmation of self. … [T]here follows the right of the individual to access knowledge; to shape his own views; to communicate his needs, preferences and judgments; in short, to participate in formulating the aims and achievements of his

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[100] ibid 976.

[101] ibid 977.

[102] Emerson (n 75) 879; See also RG Larson, III, 'Forgetting the First Amendment: How Obscurity-Based Privacy and a Right to be Forgotten are Incompatible with Free Speech' (2013) 18 *Communication Law and Policy* 91; Y Barkai, 'The Child Paradox in First Amendment Doctrine' (2012) 87 *NYU Law Review* 1414, 1440; A Bhagwat, 'Details: Specific Facts and the First Amendment' (2012) 86 *Southern California Law Review* 1, 32.

[103] Bork (n 75) 25.

> society and his state. To cut off his search for truth, or his expression of it, is thus to elevate society and the state to a despotic command and to reduce the individual to the arbitrary control of others. … [F]reedom of expression, while not the sole or sufficient end of society, is a good in itself, or at least an essential element in a good society. … [A] society or the state is entitled to exercise control over action—whether by prohibiting or compelling it—on an entirely different and vastly more extensive basis. But expression occupies a specially protected position.[104]

Redish referred to the concept as 'individual self-realization', but he defined the term broadly: 'The term ["individual self-realization"] can be interpreted to refer either to development of the individual's powers and abilities—an individual "realizes" his or her full potential—or to the individual's control of his or her own destiny through making life-affecting decisions—an individual "realizes" the goals in life that he or she has set.'[105] He defines the concept broadly enough to sweep in democratic process principles.[106] However, he defines it more broadly to include a wide variety of activities that affect individuals in their day-to-day lives.

For most commentators, the self-realization theory encompasses several different and distinct ideas.[107] First, some argue that the purpose of society is to 'promote the welfare of the individual', and therefore 'every individual is entitled to equal opportunity to share in decisions which affect him.'[108] Second, it has been argued that an individual is not only entitled to access to ideas (so that he/she can formulate his beliefs and ideas),[109] but to express his/her own ideas.[110] Finally, some argue that individuals possess an inherent right to share their thoughts and emotions with others.[111]

Meiklejohn takes a similar view, but argues that citizens have the right to access a broad array of information, including the following:

> 1. Education … is the attempt to so inform and cultivate the mind and will of a citizen that he shall have the wisdom, the independence, and, therefore, the dignity of a governing citizen. Freedom of education is, thus, as we all recognize, a basic postulate in the planning of a free society.
> 2. The achievements of philosophy and the sciences in creating knowledge and understanding of men and their world must be made available, without abridgement, to every citizen.
> 3. Literature and the arts must be protected by the First Amendment. They lead the way toward sensitive and informed appreciation and response to the values out of which the riches of the general welfare are created.[112]

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104 Emerson (n 75) 879–81.
105 MH Redish, 'The Value of Free Speech' (1982) 130 *University of Pennsylvania Law Review* 591, 592.
106 ibid.
107 Emerson (n 75) 879–81.
108 ibid 880.
109 Meiklejohn (n 75) 880.
110 Emerson (n 75) 880.
111 ibid.
112 Meiklejohn (n 75) 880.

Although the US Supreme Court relies more frequently on the democratic process and marketplace of ideas theories, the Court sometimes invokes liberty interests in its analysis of free speech issues. For example, in *McDonald v City of Chicago*,[113] the Court stated that, in addition to being justified by democratic process theory, freedom of expression is 'implicit in the concept of ordered liberty'.[114] Professor Baker views this self-fulfillment or liberty interest as a 'key value' along with the right of individuals to seek social change.[115] He believes that, in order to 'justify legal obligation, the community must respect individuals as equal, rational and autonomous moral beings', and must respect people's 'autonomy' and 'equal worth'.[116]

The problem with the self-realization theory, as Redish defines it, is that it construes the range of protected speech very broadly. This is both the strength and the weakness of Redish's approach. It is a strength because his theory suggests that a much broader array of speech activities should receive constitutional protection. Indeed, Redish argues that his theory precludes courts from treating some types of speech (eg political speech) as more valuable than other types of speech.[117] As Redish expands the range of speech activities that receive special constitutional protection, he seems to undercut the special place in the constitutional scheme, and therefore he is willing to subject speech to greater restrictions. Redish argues that speech might be forced to give way in the face of other competing values: although he contends 'that all forms of expression are equally valuable for constitutional purposes,' he rejects the idea that 'all forms of expression must receive absolute, or even equal, protection in all cases.'[118] He claims that 'in extreme cases, full constitutional protection of free expression may be forced to give way to competing social concerns.'[119]

The 'safety valve' theory

The 'safety valve' theory suggests that, by allowing individuals to vent their grievances or dissent against society, free speech serves as a 'safety valve' that allows individuals to vent their concerns or anger, and thereby discourages them from engaging in violence.[120]

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[113] 130 S. Ct. 3020 (2010).

[114] ibid 3098; See also *City of Boerne v Flores*, 521 US 507, 563 (1997) (O'Connor J, dissenting); *Capitol Square Review and Advisory Board v Pinette*, 515 US 753, 801 (1995) (Stevens J, dissenting).

[115] Baker (n 75) 991.

[116] ibid.

[117] See Redish (n 105) 594–95. ('Any external determination that certain expression fosters self-realization more than any other is itself a violation of the individual's free will, recognition of which is inherent in the self-realization principle. This Article therefore argues that the Supreme Court should not determine the level of constitutional protection by comparing the relative values of different types of speech, as is the current practice.')

[118] ibid.

[119] ibid.

[120] See Larson (n 102) 109.

In other words, if individuals feel that they have the opportunity to advocate for their views and positions, without fear of repression, then they may feel that they have a greater stake in society and societal decision-making (even if their ideas do not prevail), and will attempt to change society through peaceful means. Emerson explained the theory in the following way:

> Suppression of discussion makes a rational judgment impossible. In effect it substitutes force for logic. Moreover, coercion of expression is likely to be ineffective. While it may prevent social change, at least for a time, it cannot eradicate thought or belief; nor can it promote loyalty or unity. … [S]uppression of expression conceals the real problems confronting a society and diverts public attention from the critical issues. It is likely to result in neglect of the grievances which are the actual basis of the unrest, and thus prevent their correction. … Further, suppression drives opposition underground, leaving those suppressed either apathetic or desperate. It thus saps the vitality of the society or makes resort to force more likely. And finally it weakens and debilitates the majority whose support for the common decision is necessary. For it hinders an intelligent understanding of the reasons for adopting the decision. … In short, suppression of opposition may well mean that when change is finally forced on the community it will come in more violent and radical form. … [A]llowing dissidents to expound their views enables them 'to let off steam'. … This results in a release of energy, a lessening of frustration, and a channeling of resistance into courses consistent with law and order. It operates, in short, as a catharsis throughout the body politic. … The principle of political legitimation … asserts that persons who have had full freedom to state their position and to persuade others to adopt it will, when the decision goes against them, be more ready to accept the common judgment. They will recognize that they have been treated fairly, in accordance with rational rules for social living. … Only a government which consistently fails to relieve valid grievances need fear the outbreak of violent opposition.[121]

However, this theory is rarely referenced by the US Supreme Court, although it has been used by some lower courts.[122] In addition, it has been explicitly rejected by Robert Bork.[123] He contends that the safety valve theory does not provide a justification for giving speech a privileged status in the constitutional structure. He notes that this theory 'raises only issues of expediency or prudence, and, therefore, raises issues to be determined solely by the legislature or, in some cases, by the executive. The legislature may decide not to repress speech advocating the forcible overthrow of the government … because it thinks repression would cause more trouble than it would prevent.'[124] He argues that only 'explicitly political' speech deserves special constitutional protection.

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121 Emerson (n 75) 884–85.

122 See eg *JS* ex rel *Snyder v Blue Mountain School Dist,* 650 F3d 915 (3rd Cir 2011); *Journal-Gazette Co, Inc v Bandido's Inc*, 712 NE2d 446 (Ind 1999).

123 Bork (n 75) 25–26.

124 ibid.

Conclusion

In modern Western societies, the press is an institution that serves a variety of important societal functions. First, and foremost, the press serves as the 'watchdog of democracy' by investigating, reporting on, and criticizing government. Throughout the centuries, the press has performed this essential function in numerous nations.

However, in some respects, the press serves many of the critical functions provided by free speech in modern democratic societies. It is essential to the democratic process, and is the way that individuals (including the press) express their preferences, criticisms and attitudes. It also serves the 'marketplace of ideas' in the sense that freedom of expression requires that virtually all ideas and opinions be allowed into the marketplace. Finally, freedom of expression serves as a 'safety valve' in society, and serves the liberty / self-fulfillment of individuals in society.

Over the centuries, as technology has advanced, the term 'press' has expanded in scope. Although the term initially referred only to the printing press, and the newspapers that spawned from that technology, the broader term 'media' has come to be used as new forms of technology became available, including radio,[125] television, including cable television,[126] satellite communications,[127] and the Internet.[128]

[125] See Crowley and Heyer (n 1) 204.
[126] ibid 172–74.
[127] ibid 313.
[128] RL Weaver, *From Gutenberg to the Internet: Free Speech, Advancing Technology and the Implications for Democracy* (Carolina Academic Press 2013).

Balázs Fekete

Argumentation typologies in the jurisprudence of the US Supreme Court related to the foundations and limitations of the freedom of expression, and their relevance to the sociology of values

Introduction

Methodology

The purpose of the present paper is to investigate the considerations upon which the decisions of the United States Supreme Court (SC) regarding the freedom of opinion are based, and to identify the general, mainly socio-philosophical, principles underlying them. Any reasonable answer to the above question requires the assumptions of the research to be clarified and formulated, since the selection of the methodology in itself determines both the subject of the research and the major characteristics of its results.

As the first step, the research will apply the methodology of document analysis to the various SC decisions. Our starting point is that court judgements may not only be read as texts with normative relevance in the given legal system—ie as 'legal texts'—but also as simple texts in which, similarly to any other types of text, the expressions of certain values may be identified.[1] That is, it is not the legal aspects of SC judgements (the position of the court, the relationship of the judgement to previous decisions, the legal constructs used in the argumentation) that are important for our research, but their nature as carriers and mediators of values.[2]

The underlying values and their constellations are, however, only very rarely obvious from the texts of these judgements. It is a characteristic of legal texts, especially court decisions, that they are governed by various constructs of argumentation. These, of course, may be grouped along the lines of several different principles according to the characteristics of legal logic.[3] Nevertheless, however we approach these arguments, there is always one common feature: their objective is to achieve the acceptance of a

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[1] See R Rezsőházy, *Sociologie des valeurs* (Armand Colin 2006) 48–54.

[2] On the nature of legal texts see in detail JB White, 'Reading Law and Reading Literature' in JB White, *Heracles' Bow. Essays on the Rhetoric and Poetics of Law* (University of Wisconsin Press 1995) 77–106.

[3] See in detail M Szabó, *Trivium: grammatika, logika, retorika joghallgatók számára* (Bíbor 2001).

given position. This position, by its very nature, means a choice between the possible and adequate answers to the given statement of the facts and the legal problem based on it.[4] As such, the arguments of court judgements are always position statements too, in favour of a certain value as opposed to other values that could equally be 'defended' with similar arguments.

On the basis of the above, the present paper attempts to carry out an analysis of certain SC judgements from the aspect of the sociology of values. It tries to identify those values that are fundamental in the field of the freedom of expression. In the interest of this:

(i) as a first step, we shall identify the the major argumentation paradigms present in the judgements that are relevant from the aspect of the freedom of opinion;[5] then
(ii) we shall examine the values and other socio-philosophical assumptions these indicate;
(iii) comparing the thus identified values may show a value constellation—if any—along which the relevant case law of the SC operates, ie the way the legal culture of the United States regards the theoretical issues relating to freedom of expression.

The importance of the findings goes without saying, since the American solutions in the field of the freedom of the press and freedom of expression constitute one of today's definitive paradigms in respect of the right to freedom of speech. Understanding the theoretical foundations may thus bring us closer to understanding other—similar or different—national regulations and legal practices that evolved under the influence of this paradigm. The influence of American jurisprudence on European legal thought on the freedom of speech is well shown by the fact that these arguments are relevant and very much alive in debates, even if a given piece of legislation or a particular decision is based on different foundations.[6]

The characteristics of American judicial style

Within the limits of the present paper it would be impossible—and unnecessary—to give an exhaustive presentation of the characteristics of American judicial style. Nevertheless, since it is essential to be aware of the given context, some of its features need to be mentioned. The first such important point that should be recorded is that, although the judicial style applied in the United States originates from the common law legal culture,[7]

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[4] Cf M Villey, 'Questions de logique juridique dans l'histoire de la philosophie du droit' (1967) *Logique et Analyse* 37, 3–22.

[5] On the analysis of the argumentation paradigms of SC in Hungarian literature, see A Molnár, 'Érvelési minták a "Lochner-bíróság" munkaidő- és minimálbér-szabályozás alkotmányosságát vizsgáló döntéseiben' (2009) *Jogelméleti Szemle* 4.

[6] For a summary of the influence of the First Amendment abroad, see T Zick, *The Cosmopolitan First Amendment. Protecting Transborder Expressive and Religious Liberties* (CUP 2013).

[7] As a starting point, see B Rudden, 'Courts and Codes in England, France, and Soviet Russia' (1974) 48 *Tulane Law Review* 1010.

it is not wholly identical to that culture. The analogy with common law only holds water insofar as, up until the first half of the nineteenth century, American court judgements mostly shared the features of British judgements. From the second half of the nineteenth century, however, their argumentation and style have become increasingly independent, leading to the evolution of a distinct American style.[8] That is, assumptions related to common law judgements should not be automatically relied upon when examining the American decisions.

The most important features of modern American court decisions with an effect on their manner of argumentation are the following: (i) judges have an affinity towards so-called statistical syllogisms, ie if there exist a significant number of decisions in similar cases, they tend to decide on future cases similarly;[9] (ii) judges usually treat the sources of their decisions as equivalent and therefore, besides legal provisions, other sources (eg Restatements, encyclopaedias, textbooks or scholarly articles) may also be relevant to a decision, although, from the continental perspective, these have no legal binding force and may even seem to be inadequate components;[10] (iii) on average, the decisions of the SC are shorter than the average British high court decisions, although there are exceptions to this of course, and it may be said that SC judges do not indulge in lengthy statements of the facts and argumentations characteristic of British courts.[11] Hence, whilst the common law roots of American court decisions should be borne in mind, it is better to understand the judgements of SC and the argumentation of the judges as a separate style with independent features, and to treat any British analogies with caution.

Analysis

The starting point—the First Amendment

Before examining the definitive argumentation patterns of the decisions, we must dwell upon their starting point, the First Amendment. It is this constitutional provision that defines the initial legal situation on the basis of which judges are required to assess the specific facts of the case.

The First Amendment, attached to the text of the Constitution of 1791 as part of the Bill of Rights, names three fundamental rights, one of which is the freedom of speech and the freedom of the press. With regard to each of these rights, the Amendment follows the principle of negative regulation, ie it expressly prohibits Congress from adopting any legal provisions that would limit or circumscribe these rights. That is, the regulation

[8] J-L Goutal, 'Characteristics of Judicial Style in France, Britain and the USA' (1976) 24 *The American Journal of Comparative Law* 55.

[9] ibid 51–52.

[10] ibid 53.

[11] ibid 56.

reflects classical fundamental law dogmatics; the First Amendment binds the legislator to abstain from passing any legislation that would limit this right of the citizens or inhibit its exercise.[12]

In any specific case brought before the SC, therefore, the judges must ensure the prevalence of this prohibition; this is what constitutes the final limitation of their freedom of argumentation. The text itself, however, provides significantly greater leeway to judges as, apart from the prohibition of the limitation of these rights, it practically gives no directions to follow when passing judgements. As such, it leaves it to the judges to continuously develop the various principles and tests. It was not by chance that, in a critical comment, a prominent expert on the issue, Thomas Irwin Emerson, expressly called attention to the fact that the SC has no coherent and general theory on how it must apply this passage in reality.[13] Not only judges, but scholars, too, have proposed several different interpretations of the 'exact' meaning and application of this Amendment, as a result of which the literature on the subject is practically infinite. The provisions of the First Amendment on the freedom of speech have thus often been the centre of legal debates, and many conflicting positions have been argued for in relation to the problems that arise.

As such, the First Amendment is actually an infinite treasury of legal issues and problems, since life itself constantly produces new phenomena (eg the explosive development of media technology) that affect the freedom of speech; moreover, the level and sensitivity of public thought and speech towards problems is also constantly changing. This abundance of problems that presents a major challenge to jurisprudence and academic research, however, is actually rather advantageous from the aspect of the present study, since the new facts and the changes of public thought demand continuous reflection from the judges of the SC and inspire the continuous renewal of their legal argumentation. In other words, there are even examples when certain social-cultural changes have caused the previous interpretation of the law to be overruled entirely.

The various types of arguments

On the basis of the sociology of values analysis of the most important case law decisions related to the freedom of speech and the freedom of the press described above, six distinct types of arguments may be identified. Since the research did not analyse all the judgements of the SC related to this area, we naturally may not claim that these six types of arguments are the only ones; however, it may perhaps be asserted that these are the most significant.

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[12] Verbatim, the text provides that: 'Congress shall make no law … abridging the freedom of speech, or of the press.'

[13] TI Emerson, *The System of Freedom of Expression* (Random House 1970) 15.

The six arguments types may be grouped as follows:

(i) Arguments providing the grounds for the freedom of speech and the freedom of the press. Common to these is that they strive to formulate arguments that justify the existence of these freedoms and the general prohibition of their limitation.

(ii) Arguments providing the grounds for the limitation of the freedom of speech and the freedom of the press. This set of arguments is not only significant in that it points out the limits of these freedoms and, thereby, highlights how political, social, and cultural realities influence the operation of such an abstract fundamental right. It is also significant because the nature of the various limitations actually casts light on the foundation of these rights, since by pointing out their limitations they render the arguments in favour of the fundamental rights more distinct and understandable.

Two arguments belong to the first group: 1) the prevalence of the truth via the free market of ideas and ideals; 2) the claim of the right of the public to information. By contrast, we find four independent arguments in the second group: 3) the reference to a state of war; 4) the denial of the absolute nature of the freedom of speech; 5) the emphasis on technological development and the scarcity of resources; 6) the performance of or incitement to clear and immediate illegal acts.

Ad 1. We may find the first classic argument for the freedom of expression in a dissenting opinion of Holmes J in the *Abrams*[14] case, brought before the SC in 1919. The court had to decide on the constitutionality of a sentence of imprisonment imposed because of the distribution of a revolutionary pamphlet in English and Yiddish in New York in 1918. The authors of the pamphlet based their claim on the freedom of expression, while the lower level court convicted the defendants for conspiracy, violating and endangering the war interests of the United States.

Although the court upheld the previous judgement and accepted the argument that the right of the freedom of expression may be limited in a state of war, since the extraordinary situation overrules the usual regulations, in his dissenting opinion[15] Holmes J disputed this, and thereby created the foundations for a line of argumentation that has become the starting point and almost constant *topos* of all judgements related to the freedom of expression.

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment.[16]

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[14] *Abrams v United States*, 250 US 616 (1919).

[15] For a description of the philosophical foundations of Holmes' thought, see A Koltay 'Justifications for Freedom of Speech' in A Koltay, *Freedom of Speech. The Unreachable Mirage* (CompLex 2013) 3–8.

[16] *Abrams* (n 14) 630.

As we can see, Holmes J believed that the sense of the freedom of expression is that it ensures that truth shall prevail. According to him, the free competition of thoughts and ideas necessarily leads to the gradual extinction of erroneous or 'untrue' thoughts as, due to the competition, they are gradually forced out of public thinking. On the basis of the obvious economic analogies—market, competition, efficiency—this line of thought is easy to understand and offers suitable grounds for a rather strict attitude towards possible limitations, since such limitations—irrespective of their bases—render the recognition and understanding of the truth impossible, ie they distort the conditions of the prevalence of the truth, the market itself.

In his dissenting opinion in the *Whitney* case,[17] supported by Holmes J as well, Brandeis J projected this concept upon the world of politics. In this case, the justices of the SC examined the constitutionality of the law under which a citizen may be convicted for criminal syndicalism simply because of their membership of the 'California branch of the Communist Labor Party'. The SC found the California law providing the legal basis to be constitutional; however, the concurring opinion of Brandeis J very aptly pointed out the connections between the freedom of speech and political public speech.

According to him, while considering such issues it must always be borne in mind that the final end of the State is to make men free to develop their faculties. Liberty is thus both an end and a means to realising these objectives. In the world of politics this is also necessary because the freedom of expression is indispensable to the discovery and spread of political truth. That is, not only truth in general, but political truth in particular can only rise to the surface and reach the members of society via free and unlimited debates.[18] Any limitations must be tailored to fit this eminent interest and may only be justified in the most extreme of cases. According to Brandeis J, only the doctrine of 'clear and present danger' may justify such limitations.[19]

Subsequent judgements have refined this concept in several directions. Taking the political interpretation further, for example, they have pointed out that ensuring the free flow of ideas significantly contributes to future political and social changes, therefore—when all is said and done—the free marketplace of ideas is a precondition of social and political progress.[20] That is, content must be treated in the most permissive manner possible, but this—as the SC expounded in the *Miller* case—does not mean that there are no limitations at all. For example, the business of pornography may not be treated in the same way as the fundamental issues of the freedom of expression, as this could 'devalue' the essence of the First Amendment and the struggle for freedom underlying it. Rather, it should be regarded as an abuse of rights.[21] That is, communications with expressly obscene content must be regulated in the States, but the above objective

17 *Whitney v California*, 274 US 357 (1927).
18 ibid 375.
19 ibid 374.
20 *Miller v California*, 413 US 15 (1973), 35.
21 ibid 34.

has to be borne in mind at all times, and intervention should be as limited as possible; moreover, in keeping with this, the measure of the intervention must be distanced as much as possible from continuously changing moral value judgements.[22]

In the social sense, the notion has also appeared in the argumentation of the various judgements that the free flow of ideas and thoughts (although not expressly used here, it is impossible not to notice the analogy with the free market) is indispensable to the common search for the truth and the viability of society.[23] Hence, irrespective of whether they are true or not, communications must be provided the broadest possible protection, as this ensures social existence based on respect for the value of freedom.

One can hardly ignore a sense of mission in the above, according to which the prevalence of the truth—be it of a general or a political nature—must be ensured at all costs, and the most efficient vehicle for this is unlimited competition. Whichever idea withstands the test of public speech and is able to get itself accepted by the majority of the people may be regarded as the truth of social and political development. The role of the law in this process is to ensure that the system of mechanisms is in place whereby this 'free marketplace' of ideas may be maintained and harmonised with other relevant values (eg government interests, external conditions, etc).

Ad 2. The other strategy of the foundation of the freedom of expression is quite different from the one described in the previous section as regards its loftiness. Logically, however, they are closely related. The rather complex 1969 *Red Lion Broadcasting* case explored whether the so-called fairness doctrine, on the basis of which the authority responsible for the utilisation of frequencies may prescribe that radio and television stations must provide all parties concerned with a fair possibility to present their opinions, conformed with the First Amendment. It provides a comprehensive overview of the problems of the freedom of expression and the argument appears that the purpose of the constitutional provisions ensuring the freedom of expression is actually the creation of a well-informed public.[24]

According to the SC, on the basis of the above, it is expressly 'the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experience.'[25] It is only in possession of such information that a community is able to decide upon its own issues. In the final analysis (although this was not stated by the court, but is clear from the wording), the ideal of democracy can only be realised if citizens possess real information. According to the court, in order to achieve the most comprehensive information of the citizens, freedom of expression needs to be protected not only from government intervention—and at this point the argument transcends the confines of the free marketplace of ideas—but also from private censorship of content.

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[22] The court argued that there exist no national standards, but only contemporary community standards, that may change from place to place. ibid 37.

[23] Eg *Hustler Magazine v Falwell*, 485 US 46 (1988) 51.

[24] *Red Lion Broadcasting Co, Inc etc et al v Federal Communications Commission et al / United States et al v Radio Television News Directors Associations et al*, 395 US 367 (1969), 393.

[25] ibid 390.

The requirement of an informed public thus provides the grounds for the justification of action against both governmental and private intervention into the freedom of expression.

In the eyes of the SC, therefore, a public well informed about the broadest possible set of issues is indispensable for the operation of democratic social processes, for only such a public is able to pass decisions for or against the various thoughts appearing in the free marketplace of ideas. Informing the public is thus a prerequisite of the operation of a free market that is capable of bringing the truth to the surface, ie it is in an instrumental relationship with its operation.

Ad 3. One of the earliest accepted instances of the limitation of the freedom of expression is with reference to a state of war. The opposition between the state of war and the 'normal' situation has been an important element of constitutional law thought since the institution of the ancient Roman dictatorship and so the limitations of rights based on this argument are—in general—acceptable to the constitutional law scholarship, too. During the military conflicts of the twentieth century, the SC of the United States has applied this system of arguments several times when assessing the expressions of opinions related to those conflicts.

In the 1919 *Schenck* case[26] the SC provided a precise formulation of the principle to be applied for resolving conflicts between states of war and the freedom of expression. In this case, a decision had to be passed on the constitutionality of a punishment imposed as a result of a process initiated because of a socialist flyer printed in 1917 that called the draft a form of despotism and contained passionate agitation against the war. The defendants had been found guilty and were convicted for distributing the flyers. That is, the court had to define where the limits of the freedom of expression lie in a state of war and whether the constitution protects the expression of anti-war sentiments. Holmes J provided a crystal clear answer to the above question:

> We admit that, in many places and in ordinary times, the defendants, in saying all that was said in the circular, would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. … When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right.[27]

Holmes J further elucidated this idea in his dissenting opinion in the *Abrams* case we have already cited. There, he expressly refers to the fact that[28] 'war opens dangers that do not exist at other times.' That is, even in his eyes, the subject of the debate is not whether in such circumstances a constitutional right may be limited, but only the exact definition of the conditions of such a limitation. According to his position, in this case the

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[26] *Schenck v United States*, 249 US 47 (1919).
[27] ibid 52.
[28] *Abrams* (n 14) 628.

measure is the 'present danger of immediate evil or an intent to bring it about'.[29] If this is the case, then the limitation of the freedom of expression is legitimate even according to Holmes J, who—as we have seen—regarded this right as a value in itself and argued for its broadest independence and freedom from any restriction.

In a case related to the Vietnam war, besides the exceptional nature of war situations, the other major element of the argument appeared as well: the interest of the nation. In the *O'Brien* case,[30] O'Brien and three friends burned their draft cards (Selective Service registration certificates) in front of a mass of people and claimed, in their defence, that this act was meant to express their anti-war sentiments. For this act the lower courts convicted O'Brien of violating certain provisions of the relevant act. As such, the court had to decide whether this act—the burning of an important military certificate in the presence of others—may be regarded as the exercise of free speech and deserves, therefore, constitutional protection.

The SC declared this period to be one of 'national crisis', and claimed that 'the Nation has a vital interest in having a system for raising armies that functions with maximum efficiency;'[31] therefore, the section providing for the indictability of acts of destruction of draft cards was not unconstitutional in itself. A further issue, and one which weakens the argumentation based on constitutional rights, is whether the act itself—the burning of a certificate—may be regarded as symbolic speech that is protected by the First Amendment. At this point the court noted that it cannot accept that any act qualifies, in itself, as such a symbolic expression, and even if O'Brien's act did, it is still questionable whether it deserved constitutional protection.[32] Finally the SC found the constitutional scruples to be unfounded and argued that, given the circumstances and the nature of the act, the 'performance' of O'Brien and his friends did not deserve constitutional protection.

These two examples, taken from historically very different epochs, clearly show that a state of war is one of the classic arguments on the basis of which the Constitutional Court allows the limitation of otherwise broadly interpreted freedom of speech, albeit only under precisely defined circumstances (the existence of clear and present danger and the constitutionality of the legal provision on which the limitation is based). Among the principles underlying this we may clearly identify the utilitarian notion according to which, in war situations, a stricter measure has to be applied against actions that endanger the primary interests of the nation in the interest of victory.

Ad 4. An argument on the limitation of the freedom of expression different in quality from the previous ones appeared in the practice of the Constitutional Court during the period between the two World Wars. In the already mentioned *Whitney* case, the plaintiff had been sentenced to imprisonment based on a conviction of criminal syndicalism for having played an active role in the California Communist Workers' Party. The aim of this

[29] ibid.
[30] *United States v O'Brien*, 391 US 367 (1968).
[31] ibid 381.
[32] ibid 376.

party, which had joined the Moscow based International via the American Communist Workers' Party, was the political organisation and unification of the working class and it expressly strove to achieve the dictatorship of the proletariat.

The defence disputed the constitutionality of the decision, both on the basis of the Fourteenth Amendment with respect to the generality and uncertainty of the formulation of the offence, and on the basis of the First Amendment. As for the freedom of expression, the court formulated the theoretical proposition that 'the freedom of speech which is secured by the Constitution does not confer an absolute right to speak, without responsibility,'[33] nor, furthermore does it give 'an unrestricted and unbridled license giving immunity for every possible use of language.'[34] That is, even though the fundamental right of the freedom of expression plays an extremely important role in the constitutional order and the operation of society, according to the reasoning of the decision it does, naturally, have its limits.

On the basis of their police power, the member states of the USA are free to decide whether they wish to punish those abusing this fundamental right. According to the reasoning of the court, this is conceivable under the following circumstances: in respect of utterances (i) that are inimical to the public welfare, (ii) that incite crime, (iii) that disturb the public peace, or (iv) that endanger the foundations of organised government and incite its unlawful overthrow.[35] It may be seen that public safety and public peace are the measures which the member states may apply to certain expressions in the light of this decision.

On the one hand, this decision is significant from the aspect of constitutional theory, as it declares that even the freedom of expression is not a wholly absolute right and may be limited on the basis of other, primarily community interests. On the other hand, it is also relevant from the aspect of constitutional law, since the SC left the application of the above general tenet to the States rather than setting up a unified, federal norm. Thus, the creation of the legal provisions that limit the freedom of speech on the basis of a public interest belongs to the police power[36] of the member states, therefore if such provisions are enacted then they may be understood as the expression of the public opinion and value commitments of the given State.

The federal level implementation of fundamental rights after World War II has gradually diminished the independent regulatory powers of the member states.[37] It may be regarded as part of this process that, from the 1950s onwards, the SC has discarded the above argument and has overruled as unconstitutional the punishment of any general type of expressions by the member states. That is, the *Whitney* formula has been repealed. The SC only regarded limitations to be acceptable if the given expression contained

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33 *Whitney v California* (n 17) 371.

34 ibid.

35 ibid.

36 As a starting point, see S Legarre, 'The Historical Background of the Police Power' (2007) 9 *University of Pennsylvania Journal of Constitutional Law* 745–96.

37 ibid.

direct incitement to illegal acts or if it was highly probable that it would result in such. On the basis of this argumentation the SC found unconstitutional an Ohio act, on the basis of which a Ku Klux Klan leader had been sentenced to a fine and imprisonment for subversion, as he had proposed that African-Americans be sent back to Africa and Jews to Israel, and had intended to avenge the government for the oppression of the whites.[38]

Ad 5. The *Red Lion Broadcasting* decision passed in 1969 is a fine illustration of the openness of the SC towards considering external circumstances and its resulting lack of dogmatism. In this case, the court had to decide whether the provision according to which the government organ responsible for allocating frequencies (the Federal Communications Commission) provides for certain content requirements towards the winning radio stations was constitutional or not. Central to these requirements was the so-called fairness doctrine, which provided that in matters of public interest all concerned parties must be given the chance to expound their opinions (under certain conditions). The Commission expressly provided that in the case of personal attacks during public debates or political notes and opinions, the above opportunity must always be provided.

It is especially noteworthy that the court essentially based its argument on a factual rather than a legal starting point, and deduced, in several steps, the constitutionality of the provisions on fair presentation from there. This starting point was the limited number of frequencies available for radio broadcasting, ie the scarcity of the resources essential to broadcasting. In the final analysis it is this factual issue that justifies the limitation of a fundamental right in the field of radio broadcasting. The court argued that, if the state were not to intervene on the basis of the public interest in the allocation of frequencies and regulate their utilisation, it would render radio broadcasting itself impossible, and the resulting chaos and cacophony would prevent the freedom of expression over the radio.

The court justified the constitutionality of the stricter than average content requirements in the field of radio broadcasting using a chain of arguments consisting of several steps. To start with, the court referred to the fact that the characteristics of the 'new' electronic media justify the differentiated application of the First Amendment, especially since only a small fraction of the existing frequencies can be used efficiently for the purpose of radio broadcasting. Here it should also be noted that a part of the available spectrum cannot be used for the purposes of the media as it is required in other fields (eg aviation, shipping, etc).

A further important point of fact is that, due to the scarcity of the frequencies, many more actors would like to broadcast radio programmes than is actually possible, and so it would be nonsensical to compare the right to broadcast with the individual rights enshrined in the First Amendment. It is worth noting that if—purely as a matter of speculation—we were to adopt a verbatim interpretation of the First Amendment, the system of concessions would qualify as illegal, and this would frustrate radio communication in its entirety; external circumstances cannot therefore be simply

[38] *Brandenburg v Ohio*, 395 US 444 (1969).

excluded from consideration. It is also important that the First Amendment does not grant anyone the right to monopolise a frequency and thereby to bar others from expressing their opinions.

In other words—and this is the crucial point of the decision—among these factual circumstances, the First Amendment actually provides the basis for the government's right to impose 'restrictions' upon frequency right holders while observing the general constitutional requirements of legitimate and serious interest, appropriately accurate regulation, and proportionality. The purpose of this is precisely to ensure the prevalence of the objectives of the First Amendment: to ensure that diverse opinions are featured in the media.[39] That is, when adjudging constitutionality, the interest of the audience rather than the interest of the frequency right holders is paramount, for it is only on the basis of this that the effective prevalence of the freedom of expression can be ensured.[40]

The court thus made clear its position that, among the special conditions of radio broadcasting, the standards applicable to the freedom of expression should be interpreted differently from the usual ones and should be adapted to the specific circumstances. The essence of this is that, given the scarcity of frequencies, only government-imposed restrictions are able to ensure the prevalence of the fundamental right, since, in the absence of government control the public interest would fall prey to the broadcasting monopoly. This monopoly would put an end to the free marketplace of ideas, resulting in devastating socio-political consequences.[41]

If, therefore, special circumstances are coupled with legitimate interests, even an extremely detailed government intervention into content issues is not necessarily contrary to the First Amendment. This is something that could be especially important for the legal consideration of the new state of affairs brought about by the explosive technological development of the media. That is, the SC maintained the possibility of assessing issues related to the freedom of expression in a manner different from the 'classic' test of constitutionality if this is required by the different physical and technical conditions and, obviously, always in keeping with the spirit of the First Amendment.

Ad 6. According to the practice of the SC, the final limit of the freedom of expression is causing clear and present danger or an express intent to do so. Although, at the time of the original conception of this formula, several different terms were used to define this limit,[42] by today the doctrine of clear and present danger has become prevalent.[43]

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[39] Curiously, in the case of the printed press the SC rejected the possibility of such restrictions based on the requirement of the diversity of opinions and referred to editorial freedom instead. Cf. *Miami Herald Publishing Co v Tornillo*, 418 US 241 (1974).

[40] *Red Lion Broadcasting* (n 24) 390.

[41] ibid.

[42] Eg 'speech that produces or is intended to produce a clear and imminent danger' and 'the present danger of immediate evil or an intent to bring it about' (*Abrams*); 'words used … are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent' (*Schenck*).

[43] On its origins, see A Koltay, 'Restriction of Hate Speech and the Clear and Present Danger Principle' in Koltay (n 15) 127–32.

The exposition of the formula as a fundamental principle is related to Holmes J, who had first referred to this possibility in his dissenting opinion in the *Abrams* case. In keeping with his perception, according to which the guarantee of the achievement of the public good is the free marketplace of ideas, Holmes J held that the freedom of expression could only be restricted under the strictest of conditions. If such conditions were met, however, he accepted such restriction without reservations. Clear and present danger to others or the intent to cause such danger was, in Holmes' eyes, the limit which, when reached, justifies the government's restriction of the fundamental right that is otherwise beyond all restriction.[44] This argument is of an individualistic nature, as it is meant to prevent direct harm or lethal danger to others.

The verdict passed in the *Schenck* case in 1919 used an example to cast light on how the above formula should be understood.

> But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. … The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.[45]

According to the *Schenck* decision, therefore, this measure does not mean a universal and clearly defined limit, but only demands that the various expressions be assessed within their own, specific contexts. If an expression is capable of causing such clear and present danger (as in the theatre example), it deserves no constitutional protection. The most important consequence of this is that, if the expression in question is qualified by the criminal law provisions of the various member states, the constitutionality of these provisions may not be challenged on the basis of the freedom of expression granted by the constitution.

This 'final' test was further developed in the *Brandenburg* case in relation to the constitutionality of the conviction of a Ku Klux Klan leader. The argumentation of the court based the already crystallised doctrine on a new element, upholding the requirement of imminence. Instead of causing clear and present danger, the court spoke about lawless action and, in essence, defined the new measure as incitement to imminent lawless action.[46] It is an interesting question: to just what degree did this mean the creation of a new test; can we speak, for example, of a *Brandenburg* test instead of the clear and present danger doctrine?[47] Naturally, several different answers are possible, but it is important to take into account that unlawful acts, as they are always directed against a protected value, most probably cause clear and present danger as well—eg attempted manslaughter—therefore, even despite the differences between the two formulations, the

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[44] *Abrams* (n 14) 627.
[45] 249 US 52.
[46] *Brandenburg v Ohio* (n 38) 447.
[47] Cf. Koltay (n 15) 131–32.

Brandenburg decision does not appear to have replaced the basis of the previous practice. What could be more problematic is that mentioning lawless action probably decreases the scope of the restriction based on the previous formulation, as it is by no means certain that all instances of clear and present danger also involve a criminal act. To take the classic example, crying 'Fire!' in a theatre is not a crime. This problem becomes especially conspicuous if we recall the argument of Holmes J, according to whom the assessment of an act from this aspect should always take into consideration the specific circumstances.

Very interesting is the dissenting opinion of Douglas J, as he expressly proposed discarding the clear and present danger principle. According to him, ideas and action must be distinguished, and only the latter may be restricted. Ideas and their expression, however, cannot be subjected to government control, as these exclusively belong to the realm of the individual. Furthermore, maintaining this requirement leads to problems in legal argumentation, since the distinction between the various disputed expressions requires the creation of artificial legal categories. Such an artificial and overcomplicated solution is, for example, to assess cases from the constitutional aspect on the basis of the distinction between active and inactive members of the Communist Party, according to which the strength of their conviction can be decided (serious or uncertain). The position of Douglas J, which may appear to be rather radical at first sight, shows well the original problem that was already conspicuous in Holmes' formulation: this principle can only be applied on a case-by-case basis; it has no substance suitable for generalisation other than that an expression results in clear and present danger.

The values underlying the arguments

In the introduction to the paper I already noted that, following the identification of the major types of arguments related to the freedom of expression, the next step of the research is the identification of the values underlying these arguments.[48] In certain cases these values may appear in the text of a decision in a very direct manner (eg the truth as the basis of human life, *Abrams* case), while in other cases they operate indirectly (eg the protection of individuals, also the *Abrams* case);—nevertheless, they are clearly discernible. From the methodological aspect, it should be noted that the argumentation paradigms defining the limits of the freedom of expression are, in the sociology of values sense, equally as important as the paradigms providing the foundation of that freedom, for the fact that this fundamental right is regarded to be open to restriction on the basis of certain considerations also indicates a value, the prevalence of which is important in this area.

[48] RL Weaver's paper *The Press and Freedom of Expression* also included in the present volume examines the theoretical background and value-system of the freedom of the press from a similar aspect.

In my view, on the basis of the above argumentation paradigms, eight values may be clearly identified as underlying the practice of the SC related to the freedom of expression. This list is not exhaustive, and in all probability further values may be discerned; however, these eight are certainly the most significant in the given area.

The truth. The role of the truth as a fundamental value providing the sense of the freedom of expression is indisputable in the reasoning of the SC. This value is the final goal of constitutional regulation. The purpose of the freedom of expression is to ensure that its exercise leads to the prevalence of the truth, ie it is assumed that, in the course of social and political debates, if they are not distorted by any external circumstances and restrictions, the truth will 'surface' from among the many competing opinions, since its convincing power will vanquish all other opinions.

Social and political progress. Examining the argumentation of the court, we may also observe that, besides being the final goal of constitutional regulation, the truth is also in an instrumental relationship with other values. In an abstract manner, the ideal of political and social progress is also present in the arguments of the justices, and in respect of the prevalence of political truth, they expressly emphasise that this is a precondition to progress as well. That is, by ensuring the prevalence of the truth, the constitutional guarantees of the freedom of expression actually serve social and political progress. Only the truth may lead to the development of a society; several decisions reflect that the justices of the SC subscribed to this tenet.

Competition. The freedom of expression that may only be limited under very strict conditions creates the free marketplace of ideas and opinions, where they are in perfect competition with each other. This competition is a value in itself, because the convincing power and, thus, the truth of an idea is measurable only in an environment of free competition. The value role of free competition may be one of the important reasons for the strict and consistent abstinence from constitutional restrictions, as without it truth and progress both become illusory.

Information. Adequate information is fundamental to the operation of a democratic society, as only citizens equipped with adequate knowledge are able to decide about their lives on the merits. Information is also manifested as an independent value within the operation of the freedom of expression since, in theory, the constitutional guarantees also warrant the achievement of such an informed state. If necessary, in extraordinary situations this value could even serve as legitimation for government intervention, especially if such intervention is in the interest of this.

The public interest in general. Decisions related to the state of war pointed out that one of the inherent limitations of the freedom of expression is the interest of the community or, to put it differently, the interest of the nation. That is, during the exercise of this freedom, it must always be borne in mind that it cannot violate the fundamental interests of the community (the nation), such as the efficient and smooth operation of the military

draft mechanisms. If an expression that may be considered to be a statement of opinion goes against such a fundamental national interest, the constitutional guarantees are not applicable in every case.

Public peace. Albeit with lesser intensity, public peace still plays a role in the assessment of the problems related to expressions of opinion. If an expression were to jeopardise the bases of the social or political system, an argument in favour of restriction could be based on the values of public peace and, thus, stability. Furthermore, it is also clear that, within the SC's system of values, a distinction must be made between social progress and subversion of the bases of society. The latter is not entitled to constitutional protection, especially because it would jeopardise the exercise of the freedom of expression as well.

Adaptation. The SC clearly advocated that, while guaranteeing constitutional protection, external—technical and other—conditions must always be taken into account. If the external conditions radically differ from the traditional set of conditions of the exercise of the fundamental right (see, eg, the differences between the printed press and radio broadcasting), the prevalence of the fundamental right demands adaptation to these conditions; rigid and dogmatic solutions should be avoided.

The protection of individuals. Finally it should be noted that, underlying the argumentation of the SC, we may often discover the motive of the protection of individuals. The clear and present danger principle expressly posits the safety and protection of the individual as one of the bases of restriction. That is, danger to the individual justifies the restriction of the freedom of expression in all cases; however, the integration of particular, individual situations into a constitutional doctrine requiring a higher level of abstraction causes difficulty.

Conclusions, philosophical echoes

The above analysis supports the thoughts of András Koltay, according to which, in the philosophical sense, the freedom of expression as a fundamental right may be both coherently argued for and against from three main directions—the search for the truth, the service of democracy and the individualistic approach—but in practice we see the amalgamation of the values underlying these.[49] Further, this analysis has shown that these values do not influence the thinking of the judges as such; rather, they are interconnected at several points and presuppose each other's existence, and it is in this way that they exert their effect upon the judges' arguments. A good example of this could be the relationship between truth, progress, and competition. Without the prevalence of the truth, progress is impossible; without competition, however, the truth cannot surface

[49] A Koltay, *A szólásszabadság alapvonalai* (Századvég 2009) 43–47.

(according to this system of thought). It is therefore more apt to say that underlying the relevant arguments of the SC there is a distinct universe of values, the elements of which are mutually interconnected.

While maintaining the above, on the philosophical level it is nevertheless worthwhile to add one point to Koltay's argument. Analysing the practice of the SC specifically, it is conspicuous that the individualistic justification is given the most limited role in it, and even when it does play a role it only appears as a value providing the grounds for the constitutionality of a possible restriction. Although at first sight it may seem strange, the judicial practice of the USA is primarily based on the philosophical basis of the search for the truth and the service of democracy, in comparison with which the individualistic element only plays a relatively minor role in the arguments. That is, in the philosophical sense, the SC is primarily committed to the prevalence of the truth and mainly adopts philosophical assumptions based on the community principle; in comparison with these, individualistic considerations are secondary.

Finally, it is worthwhile to place the above identified base of values into a broader context. Rudolf Rezsőházy has reconstructed the development of European values and has categorised them through the eyes of a historian.[50] Taking as our starting point the analysis and categorisation of Rezsőházy, we may say that the system of values underlying the argumentation paradigms of the SC related to the freedom of expression originates from the seventeenth-nineteenth centuries, ie it is basically modern. According to Rezsőházy, the truth had become a generally accepted value in Europe with the advent of Christianity, while the central role of the individual started to gain ground in European public thought during the period of the Renaissance and the age of the Reformation. Naturally, these two values have remained integral to European public thinking since. Progress and competition have been part of our thinking since the seventeenth century;[51] the notion of democracy,[52] which cannot operate without informed citizens, is the product of the Age of Enlightenment, while community values, ensuring the public peace and governmental adaptation to external conditions are all part of the heritage of the socialist movements[53] of the nineteenth century. In summary, the decisions of the SC related to the freedom of expression all clearly reflect a modern and European set of values and so they can only be properly understood against the related philosophical background.

[50] R Rezsőházy, *Émergence de valeurs communes aux Européens à travers l'histoire* (L'Harmattan 2012) 31–211.

[51] ibid 99–109.

[52] ibid 118–25.

[53] ibid 164–66.

2.
Regulation of the new media

Katrin Nyman-Metcalf

Digitalisation and beyond: Media freedom in a new reality

Introduction

Ever since people started communicating with one another in any other fashion than just speaking face to face, there have been constant changes to communications technologies. In recent decades the changes have been more rapid and encompassing than ever before. It is very difficult to predict what may happen in the coming few years. Generally with the rapid development of modern technologies we need to imagine changes we cannot yet properly anticipate, which is approximately how the European Court of Human Rights formulated this challenging exercise in a different context.[1] Furthermore, many recent changes in the communications sphere have entailed not just improvements to existing communications technologies (like better radio quality, colour instead of black-and-white television) but rather meant profound changes to the way people communicate, how they get access to information and what their expectations are of communications technologies.

In all areas of technological change, there is the largely unanswerable question of what should come first: technology or law? It is unanswerable as it is impossible to regulate technology that we do not yet fully know, while it may be just as hard to change an established situation, so the only answer is that the two must go hand-in-hand. This, however, is much easier in theory than in practice. In practice, legislators and regulators try as best they can to fit new phenomena into legislation and regulation created in a different situation. This may work very well and is the way all developments of society—not just technological ones—have been dealt with. Law can be interpreted to fit another reality than that for which it was written. Still, the more complex and rapidly changing the reality gets, the more risks there are that the legal and regulatory system does not manage to keep up with developments, not least technological ones. The result can be over-regulation that stifles innovation or instead under-regulation that allows harmful lacunae to occur.

The reason to take an interest in the technological changes to the communications landscape from a freedom of expression viewpoint may not be immediately obvious.

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[1] '[T]he Court cannot discount the possibility that in the future the private-life interests bound up with genetic information may be adversely affected in novel ways or in a manner which cannot be anticipated with precision today.' Case of *S and Marper v the United Kingdom*, App Nos 30562/04 and 30566/04, 4 December 2008, para 71.

It may appear as if the concerns related to the right of persons to be able to express their opinion as well as receive information imparted by others are fundamentally the same regardless of the technical means used. Indeed, as far as fundamental principles and the philosophy of freedom of expression and access to information are concerned, this is the case: philosophy can survive many changes. But the way a philosophy is implemented in practice is something else. Broadcasting, and its regulation, has developed in a setting of some 'given truths' of more or less universal application. It is an important means of communication, not least from the authorities to the people. It can be a tool of democracy or of propaganda; a main channel for access to news, education and information as well as entertainment; contributing to a sense of community and often also national unity.[2] What of this remains and in what form if broadcasting is only consumed '*à la carte*' with everyone picking what they want to see or hear and when, selecting from a global menu, furthermore expecting interactivity and personal influence on the medium?[3]

So far, the regulatory and legal questions that legislators and regulators are dealing with are mainly linked to how to make existing rules fit new technologies so as to better preserve the existing legal and regulatory environment. In the context of digitalisation of broadcasting this can be seen in recommendations on how the public service broadcasters should still have a role in the digital environment, how the different players in the modern broadcasting landscape can be equated with traditional roles so as to fit into the regulatory framework and so on. As technological developments and also the behavioural developments they bring about are so difficult to predict, it is hard to predict how long this way of dealing with the regulation of modern communications will be tenable. It can only be presumed that there comes a point when the old clothes just do not fit any more, however many times they have been re-fitted.

This article highlights primarily one element of the many changes to the communications landscape in recent years, namely the ongoing process of digitalisation of broadcasting transmission. The article discusses how such a technical process can have bearing on questions of freedom of expression, including access to information. However, although selecting this particular technological change for analysis, the discussion also serves as an example of how technological developments may bring about a need to consider a range of social, economic, and legal matters in order to preserve policy choices made in a different environment—and poses the question, if such preservation is a tenable way forward?

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[2] K Nyman-Metcalf, 'Media Policy Through Regulation: Freedom of Expression in a Process of Change' in Å Frändberg, S Hedlund, and T Spaak (eds), *Festskrift till Andres Fogelklou* (Iustus 2008) 203–17 on possibilities—if any—in the modern communications landscape to use media policy for integration or similar policy aims.

[3] AM Schejter and M Yemini, '"Justice, and Only Justice, You Shall Pursue": Network Neutrality, the First Amendment and John Rawls's Theory of Justice' (2007) 14 *Michigan Telecommunications and Technology Law Review* 137, 137–74 (especially 139) for a philosophical approach to new media.

From broadcasting to audiovisual media services

The modern communications landscape is full of buzzwords. Broadcasting has become audiovisual media services,[4] telecommunication is information and communication technologies (ICT);[5] all of this is brought about because of convergence, necessitating interoperability,[6] and should be handled with technology neutrality.[7] We have over-the-top television (OTT), split screens, mobile devices and many other new terms that buzz around the communications sphere—entailing legal and policy changes of a speed and ubiquity that can be difficult to follow. To add to the complication, legislators and regulators have to recognize that the technology moves so quickly that even when implementing new rules for new technologies, one needs to be open to the possibility that these will be replaced very soon. Behind the buzzwords are changes to the communications technologies, so not just a change for the sake of change lies behind the new terminology, but rather an attempt to emphasize such changes by making them apparent through the new words.

Generally, the principle of technology neutrality[8] should help to deal with the fast-changing technical environment in that rules and regulations should not focus on the technology used to deliver a message or service, but rather on what the activity is: is it sending a message to a large, unknown group of people (resembling broadcasting) or is it rather a closed communication between parties? Are there implications for data protection because personal data is transferred by some means using ICTs? Such questions and not those of what technology is used should decide which law and regulations are applicable and what legislative or regulatory activities should be undertaken. In this way, rules do not date too quickly and a level playing field can hopefully be achieved for different players, using different means to do essentially the same thing.

The idea of not prescribing too closely how something should be done and what it should look like is also important from the viewpoint of globalisation.[9] On the one hand, modern technologies have meant that geographical location and distances have lost much of their importance. This should inspire international rules—global or at least regional—so as to provide a larger and thus more attractive market. At the same time, the

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[4] 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 (Audiovisual Media Services Directive).

[5] See for example <http://europa.eu/legislation_summaries/information_society/index_en.htm#s_1244>.

[6] TA Beydogan, 'Interoperability-Centric Problems: New Challenges and Legal Solutions' (2010) 18 *International Journal of Law and Information Technology* 4, 301–31, especially 304.

[7] ibid 311.

[8] See for example <https://ec.europa.eu/digital-agenda/en/easier-access-radio-spectrum-eus-electronic-communications-framework>.

[9] M Schneiberg and T Bartley, 'Organizations, Regulation, and Economic Behavior: Regulatory Dynamics and Forms from the Nineteenth to Twenty-First Century' (2008) *Annual Review of Law and Social Science* 4, 31–61, 38–39.

need to find flexible and workable regulations speaks against very high level rule-making, as this can be slow and not very dynamic. Some organisations such as the European Union have a set framework for regulatory activities and a clearly defined competence, complementary to that of the Member States. Also EU rule-making is however criticised as being slow. When looking at global organisations such as for example the International Telecommunications Union (ITU) it would be unworkable to expect such an organisation to adopt detailed rules for the fast-moving world of communications.

New communications are not only changing the way we make telephone calls or watch television—changes brought about by various forms of communication affect society more deeply. New forms of entertainment and social interaction have been created but also new possibilities of benefiting from ICTs for regulation, encouraging self-regulation through new ways for sector participants to be informed and to interact. In all contexts, distances are reduced and much more information can be handled. Communication and the indirect pressure it may result in can be a way to regulate behaviour by enriching the information available to a targeted audience, enabling them to make more informed choices through which regulatory objectives can be obtained, as Morgan and Yeung put it.[10] Disclosure of information by public bodies, requirements of transparency in decision-making processes, creation of a proper marketplace of ideas, can be enforced or encouraged by law but can be made to work through ICTs.[11]

This new content of old concepts, illustrated by new terminology, is still in a relatively early stage and there are many attempts, despite new terminology brought in, to squeeze new concepts into old ones, as a total rethinking of the communications landscape is too difficult. The discussion on how much, if anything, needs to change in our understanding of law because of the cyber-revolution or if legal concepts can remain the same while their function transforms is still ongoing[12] (and perhaps always will be, even if the concepts discussed may change).

Digitalisation of broadcasting transmission

The term digitalisation means that information is made into a digital form, ie it is converted into digits (numbers) that need to be read with certain equipment to see the full content.[13] Documents as well as film or sound can be digitalised, which means that the content is saved in a digital form rather than the traditional one. The terms 'digitalisation' and 'digitation' are used sometimes interchangeably, especially when the terms were

[10] B Morgan and K Yeung, *An Introduction to Law and Regulation. Text and Materials* (CUP 2007) 96.

[11] ibid 102.

[12] S Larsson, 'Metaphors, Law and Digital Phenomena: The Swedish Pirate Bay Court Case' (2013) *International Journal of Law and Information Technology* 1–26, 3–4, quoting especially Easterbrook and Lessig but also Renner.

[13] <http://www.webopedia.com/TERM/D/digital.html>.

new. Most often, digitation is used for information (documents and the like) whereas digitalisation is used for broadcasting. In this article as in most material relating to digitalisation of broadcasting, the term refers to the process of changing the transmission of broadcasting content from analogue to digital.[14] To receive such content and re-transfer it to a viewable form, special receiving equipment is needed—decoders, often referred to as set-top boxes.

Against the backdrop of technology neutrality and the need for flexibility in regulation of modern communications, digitalisation of broadcasting transmission appears to stand out as an exception. This process has been decided by the ITU for all its Member States (which includes more or less the entire world) with a set deadline. For Europe as well as Africa and parts of Asia by 2015 broadcasting transmission should be digital.[15] This looks like an exception to technology neutrality as here an international body has determined a technological matter.

Such a contradiction with modern trends however only applies if looking at the matter in a more superficial manner. Going deeper into the substance and taking a longer time-perspective helps us to understand why this process is going on. The idea of digitalisation is that there will be more room in the frequency spectrum, enabling more content.[16] This means that many more users, including broadcasters, can fit into the spectrum and perhaps the practice that spectrum users have to apply for licences that only some can get will disappear. The mentioned trend of convergence means that not only are broadcasters competing with one another for spectrum but other users can use the freed spectrum, for faster and better ICTs. After the process of digitalisation of broadcasting transmission has been completed, the idea is that technology neutrality and freedom to communicate will apply even better than now. Such a positive end-result should justify the apparent contradictions of the process. However, the process is not necessarily easy and the beneficial end-result not obvious.

The issues that states have to deal with when undertaking the process of introducing digital broadcasting include various technical matters but also a range of other social, economic and media-freedom related questions.[17] It can be questioned if even the states that have already completed the switchover process have taken a total view, in which the digitalisation of broadcasting is a step in a general communications paradigm change. Rather, the matter tends to be seen in a more specific manner, often trying to soften the impact of change by re-creating the pre-digitalisation environment as much as possible.

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[14] *Digital Guide to Digital Switchover* <http://www.digitag.org/Guide_to_Digital_Switchover_v1.0.pdf>, especially 4.

[15] Press Release (ITU) Geneva 16 June 2006 'Digital Broadcasting Set to Transform Communication Landscape by 2015: Accord is Major Step in Implementing World Summit on the Information Society Objectives', <http://www.itu.int/newsroom/press_releases/2006/11.html>. See also Digitag (n 14) 8.

[16] K Nyman-Metcalf and A Richter, *Guide to the Digital Switchover* (OSCE: The Representative on Freedom of the Media 2010) 34.

[17] Council of Europe Recommendation Rec(2003)9 of the Committee of Ministers to member states on measures to promote the democratic and social contribution of digital broadcasting.

The same broadcasters as those that broadcast analogue channels get the first digital licences, infrastructure is owned or operated by public service broadcasters or other firms that also had a role in the analogue environment and so on.

Finland was one of the first countries to digitalise broadcasting transmission and the first country to complete the country-wide process, in 2007, although Berlin in 2006 was the first major area to complete the process. Another early adopter was Sweden.[18] For the early adopters there were no examples to study and technology was less advanced, so the technologies used were not the most efficient, which has meant these countries are now faced with having to consider how to upgrade to a more efficient system. Almost everywhere, the new technology struggled to become popular and most people did not see the benefit of it. This is likely to have been a consequence of the lack of a total, big picture or at least a lack of ability to make such a big picture known. Benefits presented of higher quality or more choice of programming did not appear to be very attractive, as so many different ways to receive broadcasting existed already before digitalisation, through cable, satellite or more recently, the Internet. People interested in a lot of broadcasting content (or some special form of such content) already had some means to receive it, which left those most directly concerned by the digital switchover the people who just receive regular free-to-air broadcasting and who also after switchover did not have access to much additional content. In Sweden and Finland all users of the basic free-to-air package got a 24-hour news channel in addition, but the number of freely available channels remained quite small. Only in the UK did the Freeview platform become a success,[19] by making a wide variety—about 40 channels—of extra content available also for those who only have the basic digital platform. The UK is special in that the number of free-to-air channels exceeds the number of pay-TV channels. The income of Freeview is from advertising and other sources (like selling programmes), with the viewer only paying for the basic set-top box (as well as the regular licence fee for the public service broadcaster).[20]

New legal and regulatory issues of digitalisation: The importance of access

A key feature of the digital environment is that the role of operating the transmission facility has been separated from the role of the content provider. This means that one of the key considerations in broadcasting regulations in the digital era is the question of

[18] Nyman-Metcalf and Richter (n 16) 38. See also MAVISE Database on TV and on-demand audiovisual services and companies in Europe, <http://mavise.obs.coe.int/>.

[19] A consortium of BBC and other public service broadcasters and a satellite operator provides the so-called Freeview platform, which is received by more than 17 million households, <http://www.freeview.co.uk>; Digitag (n 14) 13.

[20] ibid.

access to the transmission network. Such legal and regulatory questions resemble those of telecommunications after the liberalisation of telecommunications services[21] and thus a different kind of convergence is apparent: that of regulatory thinking. Access to the transmission infrastructure (multiplexes) can act as a bottleneck in the digital broadcasting environment.[22] As opposed to the analogue environment where transmission facilities were relatively cheap and accessible, in the digital environment content providers will in a majority of cases not have their own facilities but will need to have access to those of other owners. Such access is an essential facility in order to be able to compete in the broadcasting content sector—without access it will be impossible to provide content. Thus the matter is essential also from the viewpoint of plurality and diversity of content.

The EU Access Directive[23] stipulates that in an open and competitive market there should be no restrictions that prevent companies from negotiating access and interconnection agreements, including cross-border agreements. In principle, all requests for access made in good faith should be met on a commercial basis. The matter is thus one for market participants to deal with, but there are dangers that the market will not deal adequately with the matter on its own.[24]

To avoid the situation where the providers of the essential facility are tempted to abuse their dominant position in order to reduce competition, in most countries owners of transmission facilities are not allowed also to provide content. This way there is no risk that they favour their own content and offer less favourable terms to others. In any event, there is an important role for regulators in the context of access. It is notoriously difficult to set a reasonable price for access to networks and infrastructure, as so many different factors need to be taken into consideration: historical costs, investment for improvement, etc. The involvement or at least the possibility of involvement by the regulator and, as a final measure—if parties cannot reach an agreement—of imposition needs to be there to prevent deadlock.

Another measure to avoid abuse of a dominant position is to have legislation that limits how many multiplexes one operator can own and operate. Ownership restrictions in the digital era are generally more flexible and based on competition considerations than was the case earlier, where the media plurality angle was the only reason for the

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[21] L De Muyter, 'Regulatory Asymmetry? The Competition Between Telecommunication Operators and Other ICT Players' (2012) 3 *Journal of European Competition Law & Practice* 5, 452–64, 453–54.

[22] G Knieps and P Zenhäusern, 'Phasing out Sector-Specific Regulation in European Telecommunications' (2010) 6 *Journal of Competition Law & Economics* 4, 995–1006, 1001, 1003. On bottlenecks and the role of regulation generally (seen primarily through the aviation sector, but with generally applicable principles) see R Nitsche and L Wiethaus, 'Competition Law in Regulated Industries: On the Case and Scope for Intervention' (2012) 3 *Journal of European Competition Law and Practice* 4, 409–14, especially 411.

[23] Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communication networks and associated facilities (Access Directive) as amended by Directive 2009/140/EC.

[24] M Arino, 'Digital War and Peace: Regulation and Competition in European Digital Broadcasting' (2004) 10 *European Public Law* 1, 135–60, 143–44.

rules.[25] To allow for flexibility licences should be limited in time and the situation be reviewed for plurality and diversity when the period expires. At the same time, the period must not be too short as that would discourage companies from making the necessary investments, and if there has been no abuse there should be a presumption for renewal of the licence.

The situation is from a legal and practical viewpoint in many respects similar to that of telecommunications since the liberalisation of that sector. Also here the issue of access to networks is essential. Many countries have legislation on structural separation of networks and service providers. There is no binding international law on structural separation but the EU has various rules in different sectors where there are network-dependent service providers in a liberalised market, like communications or energy.

The access to transmission facilities, which is a competition law matter, is one side of the access issue. There is also the question of real access for people to broadcasting. The background to this concern is that separate equipment is needed to receive digital broadcasting. If ensuring access to broadcasting is seen as a role of the state, there may also be a role of the state to see to it that people have such equipment. The same philosophical question as in relation to the role of public service broadcasting (discussed below) arises: is there a reason for the state to concern itself with this particular means of communication and people's access to it?

Early switchover countries like Finland or Sweden did not provide free set-top boxes but did put emphasis on interoperability of the equipment so that consumers would not be locked in with one provider and that the market would be as large as possible, encouraging the provision on business principles of more or less advanced and costly set-top-boxes. Thus, the role of the state to take an interest in the matter was not negated, but it was felt that in the socio-economic conditions of the countries in question, no direct state action was needed. Poorer countries have come to the conclusion that the state needs to pay for receiving equipment for some groups, as they would otherwise be cut off from broadcasting.[26] The idea of a public responsibility for access to a form of communications is not unique to broadcasting, although most established for this form of communications. However, there are also examples—albeit rather few—of public policy to enable Internet access. Estonia stands out in this regard, having introduced legislation already in the 1990s on the need for publicly available computers with free Internet access in any conglomeration of people of a certain size. This went hand in hand with the early and rapid construction of e-governance in Estonia.[27] This idea of a public responsibility for Internet access has not been copied by very many countries, whereas

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[25] ibid 138–43.

[26] In Lithuania for example, people on a very low income (less than about €125 per month) will be subsidised from the state budget for the cost of decoders. J Iešmantait, 'Order on Remuneration of the Acquisition Costs of Set-Top-Boxes Approved' *IRIS* 2010-3/30, <http://merlin.obs.coe.int/iris/2010/3/article30.en.html>. The first Baltic state to complete the process—Estonia—did not pay any subsidies. In general, the economic situation in Estonia is however stronger than in Lithuania.

[27] <http://e-estonia.com/e-estonia>.

the idea that the state must ensure that broadcasting is available is still common. This philosophy entails the need to have a policy on digital broadcasting receivers (decoders) for individuals, suitable to the socio-economic level of the country.

Digital divide and other risks of digitalisation

Modern ICTs bring with them many benefits. Commentators tend to be enthusiastic about all the potential positive effects they can have on society. One reason the benefits normally get more press when something new is introduced is that technical people are the first to discuss the new technology (likely being the only ones at first to know anything about it) and it would not have been introduced had not the general attitude to it been positive—not disregarding that there may also be lively debates about details or exact uses of the new technology among the technical experts. With time, when the technology becomes a part of society, a wider range of opinions appear, with people evaluating it from a range of viewpoints.[28] The recent publicity about ubiquitous interception of communications by security agencies is one such example. Privacy concerns about online social networks is another.[29]

Another risk can be descried by another catchphrase, the digital divide. This is the term used to describe differences between countries, regions or between people caused by uneven access to modern ICTs. It means that some are left behind and are not able to benefit from new technologies. This may be because of a lack of education, no access to necessary hardware, no electricity and Internet access, or for other reasons that lead to some enjoying the benefits of modern technologies to make their life easier, more enjoyable and also more efficient and safe, while others not only cannot enjoy these benefits but actually lag even more behind, as those who can profit from modern technology move forward rapidly. The digital divide is a concern for individual countries as well as globally. It cannot be tackled with one measure only but requires almost as many tools as there are aspects of the problem. This means that such tools will vary just as the examples of the digital divide vary, with one issue being the access to broadcasting in the digital era.

The reasons for the risk of a digital divide in the broadcasting sphere come from the fact mentioned above that special decoding equipment is needed to received digital broadcasting (which at the moment is still almost exclusively affecting television). Television ceased to be a luxury some time ago, with very poor people also having some access to it—often using old and simple equipment, sharing a television among many families or in a public place and similar. With digitalisation such old, maybe often

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[28] R Brownsword and M Goodwin, *Law and the Technologies of the Twenty-First Century* (CUP 2012) 19–21.

[29] A Marsoof, 'Online Social Networking and the Right to Privacy: The Conflicting Rights of Privacy and Expression' (2011) 19 *International Journal of Law and Information Technology* 2, 110–32.

repaired, receivers will not be able to receive programmes but a special set-top-box and/or a new television set will be needed. The potential problems of access to broadcasting that this brings with it are the greatest for the most vulnerable groups, as these are the most likely to have old equipment and receive broadcasting with a simple terrestrial antenna. An important channel of information as well as entertainment can thus be cut off, if the process of digitalisation does not take this into regard.

Even if digital broadcasting eventually will mean many more possibilities for interactivity and other ideas not previously part of the broadcasting experience,[30] the discussion around the transition mainly remains focused on the traditional broadcasting elements. Larsson[31] uses other examples of digital information (mainly music on the Internet) to emphasize how legislators, courts and society in general tend to take earlier concepts and reuse them in new contexts, even if the conditions and constraints in the new context are quite different. He feels that the benefits of this are obvious, as it permits a functional transition to the new technology, but the downside, albeit less visible, may be considerable if the new context really is different.[32] The rather limited discussion around digitalisation of broadcasting illustrates this, as the use of traditional concepts fits well as long as the matters discussed are not formulated too broadly.

With the development of broadcasting to an interactive communications experience, there may also be privacy concerns in this context that were hardly an issue with traditional broadcasting. As for other potential negative effects, some of these have been brought up by the planning process—once the process left the purely technical area—whereas other vulnerabilities of the system may not be understood yet.[33] The perception of dangers related to new technologies should not be disregarded. It is in the nature of things that such perceptions are not just relevant if there is a real risk: indeed, a strong perception of a danger may hinder technical development, lead to various negative consequences and even to dangers, regardless of the fact that there was really nothing to be afraid of in the first place. The complexity of many modern technologies together with the fact that they are supposed to be used by everyone means that such perceptions are more important than in an era where only a few people came into direct contact with new inventions. For legislators one way to deal with the issue of public perception is the precautionary principle, used by eg the EU. This principle entails a need for risk assessment based on objective information and a proper and transparent decision-making process, to enable a proper balance between benefits and risks, and proportional measures to reduce risks.[34]

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[30] Apart from in a small way, through call-in programmes or telephone voting, that has existed for some time.

[31] Larsson (n 12) 24.

[32] ibid.

[33] Schejter and Yemini (n 3).

[34] Brownsword and Goodwin (n 28) 142–43.

The role of the public service broadcaster

Perhaps the best illustration of the stated tendency to reduce the discussion around digital broadcasting to traditional concepts of broadcasting rather than to see this as an entirely new phenomenon in the communications sector is the way public service broadcasting is seen in the digital environment. The philosophy behind public service broadcasting is that the state should have a role in deciding what citizens see and hear. Paternalistic assumptions of the state are better than the collective outcomes of individual choices, to paraphrase the argument presented by Keller.[35] The state makes active use of freedom of expression itself, through intervening in media markets by subsidising a certain type and content of broadcasting even if this distorts the market. The potential benefits of this broadcasting type and content, including pluralist news and information, justifies this even in liberal market economies.[36] Such presumptions have developed in Europe as well as in many other parts of the world (although not in the USA) since television was introduced and even if there have always been some critics of the idea of public broadcasting, the concept is well established and often taken for granted.[37] This can be observed for example in how East and Central European countries that became free from Communism only in the 1990s established public service broadcasters,[38] even if at the time private broadcasting was well established in Europe and the state was no longer the primary actor in the broadcasting sphere.

However, public service broadcasting does rely on certain presumptions and there is a big question-mark over whether these presumptions stand up in the light of changes to the communications landscape. The most important such presumption is the idea mentioned above that the state can and should care about what its subjects see on television. It does not actually matter if citizens do in fact watch the content, as a democratic state cannot force its subjects to see a certain programme, but by making pluralistic and high-quality programming available—and perhaps promoting it through education and campaigns—the state has fulfilled its role. Even when the broadcasting choice grew through more national private channels as well as satellite and cable channels from all over the world, it was still possible to maintain the idea of the responsibility of the state to ensure certain content.[39] Legislation and regulatory decisions underlined this, through must-carry provisions for cable and satellite operators, obliging them to make

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[35] P Keller, *European and International Media Law* (OUP 2011) 49.

[36] ibid 84.

[37] K Jakubowicz, 'Endgame? Contracts, Audits, and the Future of Public Service Broadcasting' (2003) 10 *The Public* 45–62, 46.

[38] 'The Financing of Public Service Broadcasting in Selected Central and Eastern European States' *IRIS Legal Observations of the European Audiovisual Observatory* 2000-6.

[39] Price states that decisions about allowing or prohibiting satellite signals were strategic business decisions rather than being based on national interests and free-expression values. ME Price, 'Orbiting Hate? Satellite Transponders and Free Expression' in M Herz and P Molnar, *The Content and Context of Hate Speech. Rethinking Regulation and Responses* (CUP 2012) 514–37, 514. Even with much choice, terrestrial (traditional) broadcasting was regarded differently from other forms of broadcasting.

public service broadcasting part of their offering.[40] Similar notions are applied for digital broadcasting and so far the structure of such broadcasting fits well with these ideas.[41] Indeed, the role of public service broadcasters has been strengthened in some countries by giving them ownership and/or the right to operate the transmission platforms for digital broadcasting. In the future, digitalisation is supposed to allow for a great increase in the number of channels available and that, together with all the other changes in how broadcasting content is delivered and consumed, makes it likely that the idea of a state role to provide some content will look more and more arcane.[42]

Information moves in many different ways in modern society. Younger generations in developed countries mainly use the Internet as their primary source of information. Also for entertainment, the Internet is taking over the role of television, music-CDs (or records) and DVD (or video) films plus adding new means of using ICTs for entertainment, such as social networks. Against this background the role of television at least in developed countries can be questioned. In such a context, many of the policy choices and potential areas for involvement of authorities must be questioned, as these build on a presumption that television fulfils a special role in society. The fairness of the common practice of financing public service broadcasting through a special compulsory fee for everyone or at least for everyone who has a television receiver, regardless of whether they ever watch public service broadcasting, has been questioned ever since alternative television content became available and it became likely that people might well have a television set but never tune in to any national or local channels, let alone public service. However, despite politicians occasionally questioning the idea of a subscription fee and individual people being unhappy with having to pay for something they do not want, it has been possible to defend the model based on the importance of broadcasting as a source of information, news and other important messages. That people were also obliged to sponsor entertainment and educational programmes even if they themselves may pay for more specialised such programmes via cable or satellite—or may simply not use such programmes at all—has been regarded as not disproportional or unfair, as the role of television is important and a special tax (which is what the fee is) can be justified.[43] It is questionable whether such an argument still holds if television is just one of many different means of information and communication.

Access to information has changed practically in the era of digital, Internet-based information. It has become easier for people to gain access to public information, as it is not necessary to travel to special locations to consult it or to have copies made and sent

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[40] Article 31 Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive); De Muyter (n 21) 460.

[41] See eg the European Broadcasting Union (EBU) 'EBU contribution to the European Commission calls for input on the forthcoming review of the EU regulatory framework for electronic communications and services' 30 January 2006.

[42] Jakubowicz (n 37) 48.

[43] ibid 59–60.

by post or some other means. Technology can allow people to gain access easily from wherever they are. At the same time, the rules for what information should be accessible, how and for whom, do not necessarily change. Such rules should not depend on the technology used but on the content of the information. However, as it is so easy to get direct access to information that is publicly available, the need for intermediaries such as journalists to make information public also changes. Their role does not disappear, as most people want to have information presented in a prepared manner rather than to go through random pieces of information themselves. But as it is so much easier for anyone to access material there will be many more people doing this, with less and less of a special role for professional journalists. One consequence of this is also a changed role for television as a channel to provide information prepared by journalists. People may have so many other ways to access information and others can prepare and package it for them. This takes away another justification for public service broadcasting, as its role as a source of news is changing.

Koltay mentions the need for a common minimum of values, cultural understanding and similar for the idea of public service broadcasting to be tenable.[44] If such a common minimum is at hand, the cultural mission of the state in relation to broadcasting, carried out by public service broadcasters, makes sense. Koltay puts the 'crisis' of public service broadcasting in inverted commas and sees its origin in liberalisation and the growing popularity of commercial channels,[45] but presumably the inverted commas are there as he does not feel the multitude of channels manages to carry out the task previously executed by the few public service channels—thus leading to a belief in a continued role for public service broadcasting that stays even with the advent of new media. His argument that the responsibilities of public service broadcasters remain even with the Internet as well as a multitude of (post-digitalisation) broadcasting channels is solid as is the analysis that until now, the role remains.[46] However, this is the case because the audiovisual landscape although having changed still fundamentally resembles the situation of some years or even decades back. We have many more channels of information and entertainment, but the landscape has not yet changed profoundly—maybe only because all but the youngest generation tend to consume media in a somewhat similar fashion as before. But it is hard not to conclude that such fundamental similarity will not remain indefinitely, nor even for very long.

The need to take a different view on television as a communications medium rather than just adjusting rules to new television technologies has not had much impact on regulatory systems. Rather the opposite: In digitalisation plans it is stressed that it is essential that the public service broadcaster is guaranteed space on a multiplex and can

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44 A Koltay, *Freedom of Speech. The Unreachable Mirage* (CompLex 2013) 228.
45 ibid 236.
46 ibid 237.

reach the entire population.[47] It must be included in free-to-air packages but also via must-carry provisions in other packages. It is common in Europe to give the public service broadcaster an important role in the digitalisation process, not just as a content provider but also as an operator of multiplexes and as a participant in the planning as well as information campaigns linked to the process. Some countries (such as Finland[48] and the UK) introduced increases to the subscription fee to help fund the extra activities. Not only does this not deal with the more fundamental changes that are occurring in the understanding of television, but it poses problems in the actual digitalisation process itself. If private companies are to carry some of the cost for the transition, as is almost always the case, distorting the market further by strengthening the public service broadcaster will make it even less attractive for the private firms to carry their part of the burden. Traditional disputes such as whether it is fair to let the public service broadcaster have advertising are likely to re-surface. The proportionality of any extra funding for the tasks given is essential. In low-income countries it may in any event not be advisable to increase the subscription fee at a time when people are expected to buy new equipment (the set-top box or even a new television). Thus additional funding must most probably be found in some other manner. What attitude to adopt to these issues boils down to the basic question of whether and why there needs to be public involvement with broadcasting in the modern communications landscape.

Consumers or audience? Competition or plurality?

Another question highlighted by digitalisation of broadcasting is whether the special role of broadcasting in relation to both consumer protection and competition law issues is still legitimate.[49] There are many examples from the law and its application of how media markets were seen to be different from other markets, even after liberalisation and with predominantly private players. The reasons for the difference were that in relation to media, pluralism and diversity is something else than just a multitude of providers. People are not just consumers but audience; the content of what they see and hear matters and not just that they have a choice. The more choice there is, the more difficult it becomes to uphold these distinctions. Digitalisation has, as mentioned, pushed at least one feature of the broadcasting sector closer to that of other ICTs, namely the idea of transmission and access to transmission facilities. This has led for example to the French

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[47] Recommendation 1641 (2004) Public Service Broadcasting of the Parliamentary Assembly of the Council of Europe and Recommendation Rec. (2007)3 of the Committee of Ministers of the Council of Europe to member states on the purpose of public service media in the information society; Nyman-Metcalf and Richter (n 16) 61–62.

[48] M Österlund-Karinkanta, 'Finland: Higher Television Licence Fees in Finland as of 1 January 2005' *IRIS* 2004- 9:10/18. See <http://merlin.obs.coe.int/iris/2004/9/article18.en.html>.

[49] Knieps and Zenhäuser (n 22) 995–96.

competition authority in 2008 gaining competence also over broadcast transmission facilities whereas previously no media-related matters had fallen under its competence, being in the competence solely of the sector-specific regulator.[50]

Competition law is potentially very important for digital broadcasting and how it is applied can decide the success of the digitalisation process.[51] In almost all countries it has been necessary for private investors to carry at least some of the cost for the digitalisation, as otherwise the costs for the public sector would simply be too high, and in any case, with the audiovisual sector largely in private hands in most parts of the world, there is no political will for too much state involvement. This leads to a situation where it is essential to provide incentives to private firms, which in turn leads to potential competition law issues if certain private firms are somehow promoted, perhaps receiving state aid in the form of subsidies or other preferential treatment. It is not illegal to give such aid or preference, as long as it is done in a transparent and objective manner. The EU Court of Justice has examined various projects of support for digitalisation in for example Germany, Italy and Sweden. In all of these cases, the issue has been whether the support given was favouring one undertaking or one technical solution over others, or similar matters on alleged lack of transparency and objectivity.[52]

Incentives for private firms do not have to be in the form of money or transfer of other assets. One idea to consider can be if the use of the digital dividend (the spectrum freed thanks to digitalisation) can somehow benefit firms involved the process, by giving them access to additional spectrum. Many of the commercial enterprises active in different European countries have various activities in the communications field, not just broadcasting transmission. While states may in the planning for digitalisation tend to take insufficient consideration of the total picture of the process and focus on just the broadcasting issue, private firms are more ready to embrace a total look at what digitalisation can bring with the extra spectrum being a clear incentive—provided of course that some mechanism exists to ensure that firms making investments will be able to benefit from this dividend.

Digitalisation of broadcasting transmission offers examples of how something apparently as specific and technical as competition law can influence freedom of expression. This is another aspect of the much talked about convergence: issues that previously appeared to be far apart and related to different things start impacting on one another as technology brings matters together. It is the essential matter of access mentioned above that comes to the forefront again. If the infrastructure owner or operator—the multiplex—does not permit broadcasters access they will not be able to provide their content to viewers. It is not feasible that every content provider has its own infrastructure. It could thus be a clever way of an (semi-)authoritarian regime that wants

[50] Nyman-Metcalf and Richter (n 16) 43.

[51] Arino (n 24) 143–44.

[52] C Koenig, 'A Plea for a more Refined State Aid Law Approach after a Crude Switch Over to Digital Broadcasting' (2012) 3 *Journal of European Competition Law and Practice* 1, 49–51.

to appear as if they support freedom of the media to influence in one way or another the multiplex owners (public or private) and thus to prevent some content from reaching the audience, but masqueraded as a business decision. Or it could just be pure business decisions leading to poorer, more specialised or regional content providers being excluded from the broadcasting market as they cannot compete. This illustrates the important role of independent regulators who can monitor the market and react if the criteria are prohibitive, discriminatory and so on. Competition law needs to be applied in a responsible fashion, to prevent abuse of a dominant position but also to look properly at cooperation between firms, as this may be needed to survive in the market and may not in fact be against the interests of competition. It matters less if it is a sector-specific or a competition regulator that has competence but some regulator must do it and it must be clear which one this is.

Another important legal area that influences the media market in the digital era is the issue of state aid. The initial cost of the digital transition is high and it is most probable that the state will have to support the process.[53] It may do so though owning infrastructure itself, giving an important role to the public service broadcaster or by state aid to private companies—or most likely, through a combination of these measures. Of course, such subsidies open up the possibility of discrimination. Several cases have been decided by the EU competition authorities, the Commission, and the European Court of Justice. Schemes that fell foul of the rules included subsidising certain firms to produce receiving equipment that was not compatible with other providers and thus would lock people in to one provider (*Mediaset*);[54] schemes that subsidised just one technology (*Germany v Commission*);[55] or state influence over the selection of channels giving too much power to certain providers. It is a balance between sponsoring enough to enable the process but not too much.

The classical test for state aid is if the aid adequately and proportionally deals with a matter of common interest, tackling a certain market failure. In the context of digitalisation of broadcasting the basic fact that this is a matter of common interest is known as there are Commission policies and other documents on the matter. Such instruments set out certain desirable features of the process, such as technology neutrality. It is accepted that there are market failures in the context of the digital switchover: Such a process where new investment is needed to obtain a more distant goal is a common example of a context where state aid is legitimate. However, this does not mean that any aid is allowed and for example to influence the choice between different technologies by state aid has

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[53] JF MacLennan, 'Facing the Digital Future: Public Service Broadcasters and State Aid Law in the European Union' in A Dashwood and A Ward (eds), *Cambridge Yearbook of European Legal Studies* (Hart 1999) vol 2, 159–202, 193–95.

[54] Case T-177/07 *Mediaset SpA v Commission*, decided in 2010.

[55] Case T-21/06 *Germany v Commission*, decided in 2009; appeal decided in 2011, Case C.544/09P. On the latter case, see Koenig (n 52) 49–51. Also C Schoser (DG Competition), 'Commission Rules Subsidy for Digital Terrestrial Television (DVB-T) in Berlin Brandenburg Illegal' (2006) *Competition Policy Newsletter* 1, 93–96.

not been seen as legitimate by the General Court.[56] What is stated in the cases in addition to determining the matter of technology neutrality is also that processes of digital switchover have been possible without subsidies, and the fact that it is decided by statutory elements and is not a choice for private firms also takes care of some market failures, ie the process does not depend on the market for it to happen.[57] The fact that the process is enforced does not deal with the high cost for private subjects, so some state aid can still be legitimate.

The support to broadcasting can fit well in the underlying theory for state intervention in the market, namely that there are certain market failures that it is in the general interest of the community to correct. This increases the general welfare so it is thus in the public interest, as what the market has created (monopolies or other anti-competitive behaviour) can have negative effects on the general welfare.[58]

As an illustration it may be interesting to mention the development of the ownership structure in Estonia. The first three multiplexes for digital terrestrial television were all awarded to Levira under a provision in the Electronic Communications Act, as a political decision to launch the new technology. The company was obliged to develop the infrastructure to technically facilitate the digital switchover even if there was not much demand from commercial players for multiplex licenses. However, the Estonian Competition Authority in 2011 found that Levira being a dominant company in the broadcasting transmission market had to provide greater accessibility for other market participants with non-discriminating service conditions and greater transparency. Such a situation is likely to occur if one company is given an important role in the switchover process and although it may be inevitable to give such a role so that the process is facilitated, the potential negative consequences for competition must be carefully balanced against the benefits the business model provides.[59]

A right to receive broadcasting?

Freedom of expression as protected by Article 10 of the ECHR protects both rights to receive and to impart information. The limits to these rights in practice may look different if seen from the viewpoint of the speaker or the hearer. Freedom of expression itself does not lead to a right for all people to have access to a specific type of information, although the principal underpinning of access to information is also to be found in the general right of freedom of expression. This basic right is complemented by other principles of

[56] The main issue was a preference through state aid for digital terrestrial broadcasting as compared with eg satellite.

[57] A Winterstein, 'General Court Upholds Commission Digital Decoders Decision' (2010) 1 *Journal of European Competition Law and Practice* 6, 507–9.

[58] Morgan and Yeung (n 10) 18.

[59] 'Mapping Digital Media: Estonia', Open Society Foundations, January 2013.

good administration, transparency of public administration and ideas of democracy. The right to receive broadcasting has to be seen against the full spectrum of such rights. In Europe there is a well-established understanding that the state has a role in providing information, education and also entertainment through broadcasting, expressed in the creation of public service broadcasters. With these ideas in mind, it is not hard to see why the idea of access to broadcasting content is not just a personal matter for each individual, but a matter of public concern.

Authors use various classifications and terms to designate rights of different kinds, from the basic human rights and freedoms to political and social rights or on to collective rights.[60] Another distinction is between utility rights and autonomy rights, where utility rights means rules justified by promoting social welfare or in any case collective goals, whereas autonomy rights are those rights that protect individual choices. Such a distinction in relation to freedom of expression indicates that if this right also includes a utility right, rather than just having a right to speak freely there is also an element of expression fulfilling a collective goal.[61] Ramsay discusses these matters as part of a (primarily US-centred) critical analysis of different theories (Shiner, Alexander) of hearer's rights—rights that can add another dimension to freedom of expression not least through another potential party to challenge any limitations on free speech.[62] The recognition of the hearer—the audience, the recipient of a message—as an important party to consider in the freedom of expression context would indicate that in any legislation or regulation of speech, the way the message reaches the audience is relevant. As Ramsay says, if the preferred audience chooses not to listen or the government does not assist the intended or preferred audience, this does not amount to a limitation of freedom of expression. There is also no right to an audience of a certain size. It would be hard to imagine that someone could have the right to compensation based on that they were intending to watch a broadcast and organised themselves to that end but were deprived of it because the broadcast was prohibited—even if the prohibition as such would be illegitimate and violate freedom of expression. The matter is however less clear if there are restrictions that make it difficult to reach an audience, that maybe actively prevent that an audience can be reached.[63]

This argument is not discussed here because digitalisation would be a conscious attempt by any government to restrict audiences, but instead to suggest that a failure to be even potentially able to reach an audience eventually can amount to a limitation of freedom of expression. Thus this supports the idea that digital switchover is a matter of interest from a freedom of expression viewpoint.

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[60] K Nyman-Metcalf, 'The Future of Universality of Rights' in T Kerikmäe (ed), *Protection of Human Rights in the EU: Controversies and Challenges of the Charter of Fundamental Rights* (Springer 2013) 21–35, 26–27.

[61] M Ramsay, 'The Status of Hearers' Rights in Freedom of Expression' (2012) *Legal Theory* 18, 31–68, 33.

[62] ibid 37.

[63] ibid 41–42, 48.

Concluding remarks

We understand new things by relating them to things we already know, we shape our understanding of change by relativizing it to the pre-existing situation—this is human nature. Whatever the exact position one takes on the fascinating question of how technological and legal change should interact, it is clear that new laws cannot be made immediately when some new technology appears. Existing rules can be interpreted to fit something other than what they were exactly written for, just as all regulations should be abstract enough to fit different situations. It is in the framework of an existing legal system that we can determine what gaps or situations there are where rules lead to undesirable results because of technological or other changes to reality.

The first challenge posed by digitalisation of broadcasting is that this new technology means that existing regulatory systems may need to be adjusted to achieve the results they are expected to receive. Access to transmission networks must be ensured for broadcasters and access to receiving equipment for people. New legal and regulatory issues are added or old ones changed. In addition to changes to rules, financial incentives and similar may be needed at different levels to keep everyone in a position in which they can continue to exercise the role they have traditionally held in the communications landscape. This challenge is important enough in its own right and may have been underestimated by decision-makers in many countries. The benefits that the process will eventually lead to will not be reached without active measures of different kinds. There is a real danger that plurality and diversity of broadcasting content will suffer if the process is not well handled and even that sections of the population will be cut off from broadcasting. These challenges are important enough in their own right and many states have started too late to think about them—given that the switchover deadline is set by the ITU and approaching fast. Many matters need careful consideration and action if all the promises brought about by new technologies are to be realised rather than the risks of a digital divide between people or countries materialising.

The bigger question to which digitalisation of broadcasting is one of several possible illustrations is whether this adaptation of existing rules and regulations, and/or of modern technologies, to these rules and regulations is a tenable way forward. Changes to communications technologies do not just bring about new tools for communicating in the traditional ways, but instead they may bring entirely new ways to communicate that also mean new expectations—new attitudes to privacy, to the role of the state including to that of national borders, to the role of audience as opposed to that of partner, and so on. The idea that the state takes a benevolent, paternalistic interest in the communications activities of its citizens may not fit with an individualistic, multi-choice, globally increasingly borderless communications sphere. Digital broadcasting transmission is not just the need to have yet another remote control to press to watch the nine-o'clock news: it is one of many processes that needs to be understood and carefully considered by everyone engaged in communications.

Rolf H Weber and Ulrike I Heinrich

Governance issues of the new media environment

Introduction

Due to extensive developments in the information and communication technologies within the last two decades communication practices substantially changed and the traditional media environment underwent profound modifications. The established media, like newspapers, books, films, and broadcast, were complemented by the Internet, a valuable tool in everyday life and a phenomenon encompassing social, cultural, economic, and legal facets. This new medium helped to open new horizons for connections between people. Within the last years the Internet's development culminated in the emergence of a global network for sharing information and ideas.[1]

Being 'one of the principal agents of globalisation'[2] the (new) media provide a substantial contribution to governance and democracy. In this context a first distinction has to be made between governance through the media and governance for the media. In the case of the latter already existing media governance regulations need to be critically reflected and examined as to whether they are still applicable in view of the newly evolved media environment's needs and which changes eventually need to be reasonably implemented.

Technological developments towards a new media environment

For understanding the media's development in its entirety, the changes in human communication need to be addressed more closely.

Communication in general

Stemming from the Latin word 'media', loosely to be translated as 'go-between', media serve the purpose to carry information between sender and recipient. Being defined as

[1] The article is partly based on RH Weber, 'International Governance in a New Media Environment' in ME Price, S Verhulst, and L Morgan (eds), *Routledge Handbook of Media Law* (Routledge 2013).

[2] Swiss Agency for Development and Cooperation (SDC), 'Media and Governance: A Guide' (2004) 4, <http://www.deza.admin.ch/ressources/resource_en_24143.pdf>, accessed 23 June 2014.

both the specific communications technology and the social, political, and economic structure within which these technologies are used,[3] the 'media environment' substantially changed within the last three decades especially caused by the rise of the World Wide Web, an international online databank allowing the sharing of linked multimedia documents.

After electronic communications and new forms of visual media complemented and partly transformed the existing print culture in the middle of the nineteenth century[4] the continuous development of the Internet starting after the mid-twentieth century, again resulted in major changes of the media environment by creating new forms of communications. Even if the rise of these new forms of information exchanges does not automatically eliminate older forms, their appearance leads to the need of adapting given media structures. Therefore, hereinafter light will be shed on the form of communications' developments from (i) offline to online, (ii) mass to individual, (iii) written to visual, and (iv) local to global or glocal communication.

From offline to online communication

Dating back to the late 1960s when US researchers first developed protocols that allowed the sending and receiving of messages by use of computers, the term 'online communication' was coined, referring to communicating via networked computers.[5] In contrast, forms of communication outside the Internet area that indicate a disconnected state like talking on the telephone, writing letters or even talking face to face are referred to as 'offline communication'.

With regard to the development and spread of personal computers in the 1980s online communication was made available to the public at large. Thereafter, in recent years the percentage of people having Internet access and using web-based systems for the search and purchase of products or the cultivation of contacts has grown vastly since civil society started to replace traditional face-to-face communication by using e-services.[6] By now, working without Internet access is almost inconceivable, at least in developed countries. Rather, the Internet became so important for the societal communication that the participation of all became a substantial political task.[7]

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[3] AL Press and BA Williams, *The New Media Environment: An Introduction* (Wiley-Blackwell 2010), 8.

[4] ibid 12.

[5] M Warschauer, 'Online Communication' in R Carter and D Nunan (eds), *The Cambridge Guide to Teaching English to Speakers of Other Languages* (CUP 2001) 207.

[6] G Van Dijk, S Minocha, and A Laing, 'Consumers, Channels and Communication: Online and Offline Communication in Service Comsumption' (2007)19 *Interacting with Computers* 1, 7.

[7] B Holznagel and P Schumacher, 'Die Freiheit der Internetdienste' in W Kleinwächter (ed), *Grundrecht Internetfreiheit* (Eurocaribe Druck 2011) 14.

From mass communication to individual (mass) communication

Beyond that, a further alteration of communication concerns the parties involved. Originally, 'simple' communication took place between a sender and one or more personally defined receivers. In contrast, the later established mass communication, founded on the idea of mass production and distribution,[8] namely newspapers, radio, television and cinema, takes place between a source and a large number of receivers, ie messages are indirectly and unilaterally mediated to a disperse public; this form of communication is classed as one-to-many communication. Despite its large reach the traditional mass communication by print and electronic media faces a lack of scope for feedback by the audience.

Aiming at filling this gap, individual mass communication mechanisms need to be developed; in this context the Internet platforms and bulletin boards can be mentioned, representing a many-to-many communication. Within these communication models each 'member' has the ability to react immediately on the published information and therewith continuously changes its role from a receiver to a sender of information or even can be both.[9] Every participant of the Internet has the ability to do both, reading, viewing and contributing, the latter without any substantial financial effort. Uniting all kinds of stakeholders the Internet's range of services and information is continuously growing, granting all the possibility to participate, regardless of geographic or social barriers.[10]

From verbal / written to visual communication

Additionally, the development of verbal / written to visual communication needs to be looked at more closely. Although communication originally started with paintings, for a long period of time verbal and written information exchanges can be considered as the dominant forms of communication, namely the spoken word, newspapers, and books. Later on, with the emergence of electronic media, the radio and as a new form of visual media the television, transferring information through the creation of visual representation, were developed. These new forms of media transformed the existing print culture and also altered oral communications.[11]

Today visual communication is omnipresent, including among others electronic media like web pages and television screens, but also road signs or drawings. Bearing in mind that people rather learn and remember information that they see than what they hear[12] especially television and Internet are benefitting in attraction. Hence, a picture can be more powerful than a thousand words.

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[8] K Suresh, *Journalism and Mass Communication* (2003) ch 2 ('Theories of communication').

[9] A Freude, 'Das Internet und die Demokratisierung der Öffentlichkeit' in Kleinwächter (n 7) 46.

[10] HP Dittler, 'Besonderheiten der Internetkommunikation' in Kleinwächter (n 7) 40.

[11] Press and Williams (n 3) 15.

[12] PM Lester, *Syntactic Theory of Visual Communication* (2006), <http://commfaculty.fullerton.edu/lester/writings/viscomtheory.html>, accessed 23 June 2014.

From local to global (or glocal?) communication

Finally, in particular with regard to the dominant and ubiquitous medium the Internet, global communication as a new form of communication evolved. Emerging in the early 1980s[13] the term 'globalization' altered communication from a local to a worldwide level. By means of new media technologies such as films, television, and other media, informational goods and services produced in one particular country can be consumed internationally[14] in a timely manner. Even though communication via broadcast might be considered as global (but unilateral), the real globalization of communication occurred with the invention of the Internet and its development towards a global valuable tool in everyday life[15] linking people from all over the world independent of any geographic barriers.

Effectively placing local and global communication on the same level, this seeming removal of distances creates a new form of communication—'glocal' communication. Stemming from the phrase 'think globally, act locally', the term 'glocalization' originated in Japan as a popular business strategy.[16] Defining glocalization as 'the practice of conducting business according to both local and global considerations' (Oxford Dictionaries Online), such kind of media glocalization occurs when globalization and localization join up reflecting the wide-spread media consumption.

Social developments

Social networks and other technologies

Social networks are currently one of the most discussed phenomena in the online world. With regard to their increased importance, new aspects in the creation of an international media governance framework are to be taken into account.

In this context, among others Facebook and Twitter are of utmost significance. Facebook is one of the most frequented social networks, constantly gaining new market share. In June 2014, Facebook was considered to be the third most popular website.[17] For becoming part of this community, Internet users must register for creating a personal profile. Thereafter, they can add other users as friends, communicate by exchanging messages, pictures or even files and join common-interest user groups. Many people

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13 M Shamsuddoha, *Globalization to Glocalization: A Conceptual Analysis* (2008) 4, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1321662>, accessed 23 June 2014.

14 Press and Williams (n 3) 162.

15 RH Weber and T Schneider, *Internet Governance and Switzerland's Particular Role in its Processes* (2009), Preface.

16 Shamsuddoha (n 13), Abstract.

17 Following Google with 1,1b estimated unique monthly visitors and YouTube with 1b estimated unique mothly visitors, see <http://www.ebizmba.com/articles/most-popular-websites>, accessed 23 June 2014.

make use of Facebook several times a day and disclose a wide range of personal data with their virtual friends or even the whole community; according to their own statistics, more than 800 million people use Facebook every month, which represents a twenty-three percent growth from a year earlier.[18]

A further similar important network is Twitter. This social networking and microblogging service enables its registered users to post and read (unregistered users may only read) so called 'tweets', text messages limited to 140 characters. Being one of the top ten Internet sites, Twitter combines more than 550 million registered users.[19] Just like on Facebook, Twitter users share pictures or other personal information with the audience.

Beyond that, additional developments in the media landscape bearing challenges for a future media governance framework concern the control of the media: the acquisition of Skype by Microsoft as well as the announced acquisition of Motorola by Google are worth mentioning. The continuing convergence of media sectors obviously leads to 'new' media enterprises offering their services in a broad variety of communications fields.

Social networks and other new technologies connect a large part of the world's population. They provide for an extremely fast spread of information about people and events,[20] but involve the risk of infringing personality rights and provoking data abuse. Therefore, the call for more transparency about available data in social networks is growing within the Internet community.[21]

The Arab Spring and the role of the (new) media

The Arab Spring

The social networks' political relevance came into the picture during the so-called Arab Spring, also referred to as the 'Jasmine Revolution'. Starting at the end of 2010 in Tunisia, caused by the self-immolation of Mohammed Bouazizi for reasons of disaffection about the Tunis work system, political corruption and increasing poverty of the population, the protests are still ongoing. Following the events in Tunisia and later Egypt, a vast number of revolutions started within many countries of North Africa and the Middle East. The Arab world's autocratic systems were (and still are) shaken by protests and riots. After insurgents deposed the governments in Tunis and in Egypt (twice), Libya fell into a civil war, and in Syria, the bloody conflict between government and opposition

[18] See <http://newsroom.fb.com/company-info/>, accessed 23 June 2014.

[19] See <http://www.statisticbrain.com/twitter-statistics/>, accessed 23 June 2014.

[20] A Kolb, 'Internet, Recht, Internetrecht und die Medien' in Kleinwächter (n 7) 26.

[21] M Taddicken, 'Privacy, Surveillance, and Self-Disclosure in the Social Web: Exploring the User's Perspective via Focus Groups' in C Fuchs, K Boersma, A Albrechtslund and M Sandoval (eds), *Internet and Surveillance: The Challenges of Web 2.0 and Social Media* (Routledge 2012) 255.

is still lasting. Therefore, this 'Arab Spring' can be seen as a historic turning point in the Arab world entailing far-reaching consequences in political, economic, and geostrategic terms.

Role of the media within the Arab Spring

The media's role is to inform the population, to comment on political or societal occurrences and to entertain their recipients. In the course of the subsequent uprising, citizens of Arab states (in winter 2011 particularly in Tunisia and Egypt) organized demonstrations against the authorities, in large part through social media networks.[22] At the revolution's beginning, Facebook was the most important medium to mobilize citizens and organize demonstrations. In this context, the controversial term 'Facebook Revolution' emerged.[23] Besides Facebook also Twitter and YouTube played an important role, allowing the Arabs to spread pictures and video messages in order to reflect the events uncensored.

The aforementioned developments in Arab lands have shown that new communication channels (mobile phones, social networks) have facilitated the 'organization' of civil society by allowing a timely exchange of opinions and ideas. Nonetheless, some people argue the mass media's role within the Arab Spring would be overestimated to some extent.[24] In fact, it is still questionable, to what extent the Internet's impact on the proceedings existed in reality since the political regimes did not collapse because of posts on Twitter and Facebook but because of people's attendance on mass demonstrations.[25]

Governance through the media?

Every medium has its own particularities. In this context, the new media's potential for governance is enormous, among others offering more transparency, more consultation and more information.[26] Nevertheless, there is a tendency of governments to control their media and use them for regulating their own objectives.

In this sense, modern information and communication technologies also enable governments to apply them to their benefits. In so doing, governments of Arab states (among others) impeded the free flow of information when political considerations

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[22] A Meddeb, *Printemps de Tunis. La métamorphose de l'histoire* (Albin Michel 2011) 96–100.

[23] A El Difraoui, 'Die Rolle der neuen Medien im Arabischen Frühling' (Bundeszentrale für politische Bildung 2011) <http://www.bpb.de/internationales/afrika/arabischer-fruehling/52420/die-rolle-der-neuen-medien?p=all>, accessed 23 June 2014.

[24] M Penke, 'Like and Strike: Die Bedeutung der Neuen Medien im Arabischen Frühling' 18 *IFAR Working Papers* (June 2012) 26, <http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?lng=en&id=152397>, accessed 17 October 2013; S Aday, H Farrell, M Lynch, J Sides, and D Freelon, 'New Media and Conflicts after the Arab Spring' 80 *USIP Peaceworks* (July 2012) 16, <http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?id=150696>, accessed 23 June 2014.

[25] Penke (n 24) 26.

[26] SDC (n 2) 8.

seemed to call for such measures. Egypt, by way of example, succeeded in shutting down Internet and mobile communications for a brief period of time. Notwithstanding this, people's desire to exchange messages and ideas prevailed. During the Internet's shutdown insurgents tried to connect with foreign nets to stay connected with their fellow citizens and the rest of the world.

Legal developments within the last decades

From NWICO to MacBride

During the last years the media landscape underwent significant changes resulting in the call for the creation of a new adequate governance framework. However, similar to the new online medium, traditional media also exercise cross border information services that have called for an applicable legal framework. The attempt of introducing principles of governance in respect to information services, now transmitted by way of the Internet, is insofar not completely new as the issue of the information flow has been a discussion topic for the last forty years.[27]

First attempts regarding the calling for united action in the field of mass communication already started in the early 1970s when a group of block-free countries discussed the idea of a New World Information and Communication Order (NWICO).[28] After the NWICO-debate did not return the desired results the initiative was later replaced by the activities of the MacBride Commission. Based on the fundamental ideas of the NWICO, the Commission published a report ('Many Voices One World') in 1980 defining a possible 'new world information and communication order' as a process, not actually as a given set of conditions and practices (MacBride Report 1979, Foreword). Due to UNESCO's financial crisis in the 1980s, only a fairly limited discussion took place within UNESCO and the information and communication order temporarily disappeared from the political agenda.

Establishment of a common market in broadcasting

The early 1980s were characterized by a relatively limited choice of television programmes for viewers and most channels were state-owned. Hence, a discussion started regarding the establishment of a competitive open information market. In this context, the European Commission presented two Green Papers, namely the Green Paper on the establishment of a common market in broadcasting, especially by Satellite and

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[27] RH Weber, *Shaping Internet Governance: Regulatory Challenges* (Schulthess 2009) 25–28.

[28] C Padovani and K Nordenstreng, 'From NWICO to WSIS: Another World Information and Communication Order?' (2005) 1 *Global Media and Communication* 3, 267.

Cable (COM(84) 300) in 1984 and the Green Paper on the development of the common market for telecommunications services and equipment (COM(87) 290) in 1987. Additionally, for remodelling the existing regulatory framework of telecommunications for the purpose of making the electronic communications sector more competitive, the European Union published a Regulatory Framework for Electronic Communications and Services in 2002 (2002/21/EC), incorporating a significant range of social and cultural policy objectives.[29]

From transborder television to tele-media

In 1989, the European Commission adopted the Television without Frontiers Directive (TVWF) (89/552/EEC) that was later followed by the Open Network Provision (90/387/EEC) in 1990. Resting on two keynotes, the free movement of European television programmes within the internal market and the requirement for TV channels to reserve more than half of their transmission time for European audiovisual programmes, the TVWF aimed at creating a single market in television broadcasting by encouraging the exploitation of (at that time) new technologies, namely cable and satellite, through deregulation.[30]

By adopting the Audiovisual Media Services Directive (AVMSD)[31] in 2007, the European Union updated its TVWF Directive. Having been codified in 2010,[32] the new AVMSD covers all audiovisual media services, namely linear services (traditional radio and television) and non-linear services like video-on-demand (such as the downloading of films and broadcast programmes via satellite, cable, and the Internet), and provides a more flexible legal framework than its predecessor.[33] For giving them legal certainty, service providers are still only subject to the rules applicable in their own country. According to the AVMSD, EU countries, among others, can restrict broadcast of unsuitable on-demand audiovisual content (Article 2) by having recourse to the introduced control mode (Article 4).[34]

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[29] P Keller, *European and International Media Law: Liberal Democracy, Trade, and the New Media* (OUP 2011) 121.

[30] A Harcourt, 'Introduction', in G Terzis (ed), *European Media Governance: The Brussels Dimension* (Intellect 2008) 17.

[31] 2007/65/EC.

[32] 2010/13/EU.

[33] See also M Burri, 'Controlling new media (without the law)' in ME Price, S Verhulst, and L Morgan (eds), *Routledge Handbook of Media Law* (Routledge 2013) 330.

[34] See in general HJ Kleinsteuber and S Nehls (eds), *Media Governance in Europa: Regulierung – Partizipation – Mitbestimmung* (VS Verlag 2011).

WSIS and IGF

In the late 1990s, the International Telecommunications Union (ITU)[35] revitalized the discussions on a global regime for an information and communication society by passing a resolution in 1998 (Resolution 73 of the ITU Plenipotentiary Conference) that proposes the idea of a World Summit on the Information Society (WSIS) under the auspices of the United Nations.[36] The major objectives are summarized in the Geneva Declaration of Principles of the World Summit on the Information Society held in Geneva in December 2003 (see WSIS-03/GENEVA/DOC/4-E) which defines this common vision and a framework for measures to be taken in order to make this vision a reality. The subsequent WSIS in Tunis (WSIS II) in November 2005 was designed to discuss the development of the principles established in Geneva.

The guarantee of the freedom of media and of information is a key issue in the relation between media and democracy that has been reconfirmed in the context of the WSIS II and particularly within the Tunis Commitment.[37] The strengthening of self-reliance of countries, the democratization of communication and the provision of more extensive financial resources, as proclaimed in the context of the NWICO, have become an actual 'digital divide' topic in the WSIS discussions. Despite such developments, however, media and democracy were not key issues of the WSIS, and more attention was paid to the 'governance aspects' of the Internet.[38] Numerous socio-political transformations have taken place in the period between the NWICO and the WSIS.[39] Whereas the NWICO predominantly followed a political approach, the WSIS rather built on an information technologies approach that allowed it to reach a broader part of civil society.[40] But the outcomes of the MacBride Report and the WSIS principles underscore the fundamental meanings of the freedom of information and the right to access to information.[41]

New online media—new challenges?

The development of the new media has created new challenges to the protection of freedom of expression or the protection of data published online. Since the existing media governance regulations turned out to be (partly) unsuitable, they got replaced by newly established Internet Governance Principles. In this context, a wide range of organizations and States developed and released Internet Governance Principles.

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35 RH Weber and M Grosz, 'Legal framework for media and democracy' (2009) 34 *Communications* 2, 223.

36 For further details on the historical development of the WSIS, see J Malcolm, *Multi-Stakeholder Governance and the Internet Governance Forum* (Terminus Press 2008) 324–29.

37 Weber and Grosz (n 35) 224.

38 ibid.

39 Padovani and Nordenstreng (n 28) 266.

40 ibid 268.

41 Weber and Grosz (n 35) 224.

In so doing, the 2009-issued Brazilian Principles for the Governance and Use of the Internet encompass ten principles, among others concerning the freedom of expression and individual privacy,[42] universality,[43] neutrality of the network[44] and the stability, security, and overall functionality of the network.[45] Two years later the Council of Europe (CoE) released its Declaration by the Committee of Ministers on Internet governance principles in September 2011[46] followed by the Organization for Economic Cooperation and Development's (OECD) Principles for Internet Policy Making in December 2011.[47]

Requirements of an adequate media governance framework

The new media have their own special characteristics and therefore require special regulations. In this context, first of all the conceptual and political perspectives of a new framework and the weaknesses of the present absence of a universal media governance framework merit further elaboration, followed by remarks on the need for increased cooperation between international bodies, the necessity of including private actors and the legitimacy and accountability of a sustainable legal media framework.

Conceptual and political perspectives

By referring to mass media often a differentiation is made between the traditional, hierarchically oriented 'governments' and the 'governance' describing the general process of overcoming problems among the various actors involved.[48] Discussions around the keyword 'media governance' deal with the question of how developed governance principles can be used for the regulation of media, especially with regard to the fact that media regulation ranges between state control (particularly applied to broadcasting) and self-regulation. Encompassing co-regulation[49] and self-regulation,

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[42] Brazilian Internet Steering Committee, 'Principles for the Governance and Use of the Internet' (2009), resolution CGI.br/RES/2009/003/P <http://www.cgi.br/english/regulations/resolution2009-003.htm>, accessed 17 October 2013, Principle 1.

[43] ibid Principle 3.

[44] ibid Principle 6.

[45] ibid Principle 8.

[46] CoE, 'Declaration by the Committee of Ministers on Internet governance principles' adopted 21 September 2011, <https://wcd.coe.int/ViewDoc.jsp?id=1835773>, accessed 23 June 2014.

[47] OECD, 'Council Recommendation on Principles for Internet Policy Making' adopted 13 December 2011 <http://www.oecd.org/internet/ieconomy/49258588.pdf>, accessed 23 June 2014; <http://www.uta.fi/laitokset/tiedotus/laitos/From_NWICO_to_WSIS.pdf>, accessed 23 June 2014.

[48] WA Meier and J Trappel, 'Medienkonzentration und Media Governance' in P Donges (ed), *Von der Medienpolitik zur Media Governance?* (Halem 2007) 253.

[49] The Interinstitutional Agreement on Better Lawmaking of 16 December 2003 (2003/C 321/01) defines co-regulation as 'the mechanism whereby a Community legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognised in the field (such as economic operators, the social partners, non-governmental organisations, or associations).'

media governance refers to (i) both private actors and the state that align their media policy, and (ii) media organizations that develop and implement their own internal regulations.[50]

According to Denis McQuail[51] media policy should focus on certain problem areas that arise from the nature of communication, namely (i) the achievement of due accountability for ethical, moral, and professional standards of media performance, (ii) the protection of both individuals and society from potential harm in the context of communication systems, (iii) the definition of positive expectations and goals for public social and cultural communication, (iv) the maintenance of essential freedoms of communication under conditions of total surveillance and registration, and (v) the relationship management according to democratic principles between state and political power on the one hand and communicative power on the other.

The media environment is characterized by diverse aspects, such as journalistic, political, social, economic, and legal elements, that deny the assumption of the existence of only one media market. Although media policy occurs not only at the national but also at the regional and international level[52] for the time being a universal media governance framework does not exist. Despite the aforementioned efforts of the European Union to regulate elements of the communications industry, media governance is handled differently both in the various domains in Europe and worldwide since each national and regional entity adopted its own regulations.

Weaknesses and incoherencies in the media governance framework

With regard to the aforementioned large number of domestic media regulations and the absence of a universal media governance framework, uniform arrangements regarding many relevant regulatory areas, for example media ownership, Internet filtering[53] or censorship are missing.

Media ownership refers to a process through which individuals or organizations control increasing shares of the mass media. This development leads to a powerful position of media groups allowing them to exercise undue influence over media consumers. *Filtering*[54] enables the 'controller' to decide which data packages are allowed

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[50] WA Meier, 'Demokratie und Media Governance in Europa' in Kleinsteuber and Nehls (n 34) 43–44.

[51] D McQuail, 'The Current State of Media Governance in Europe' in G Terzis (ed), *European Media Governance: National and Regional Dimensions* (Intellect 2007) 25.

[52] Meier (n 50) 37.

[53] Filtering describes the process of blocking an Internet user from visiting specific websites, for example by DNS tempering, URL filtering, IP address filtering, deep packet inspection, HTTP proxy filtering, geolocation filtering, content filtering software, denial of service attacks; EU Parliament (Directorate-General for External Policies), 'Information and Communication Technologies and Human Rights' (2010) <http://www.europarl.europa.eu/activities/committees/studies/download.do?language=it&file=31731>, accessed 23 June 2014, 26–27.

[54] Burri (n 33) 332–33.

to be sent and is generally accomplished by Internet programs like firewalls. For example, programmers of web pages could install filters to restrict employees' access to distracting entertainment sites for ensuring the staff's labour productivity. Reasons of governments to engage in online *censorship*[55] range from social, cultural, and security reasons to political reasons.[56] Internet censorship is a subject of growing concern around the world since governments of countries such as China, Vietnam, Iran or Syria very often use this tool to fight their opponents.[57] With regard to the aforementioned Jasmine Revolution, governments (unsuccessfully) tried to silence the political opposition by filtering their political statements and therewith barring them access to the media of any kind.

Due to the fact that there is a lack of harmonized rules (public order) related to the above described important aspects especially in view of the corresponding risks, the creation of a universal media governance framework comprising appropriate regulations is needed to create legal certainty. Public order depends on the given circumstances and the national appreciation of State interests; the term 'refers to the preservation of the fundamental interests of a society, as reflected in public policy and law. These fundamental interests can relate, inter alia, to standards of law, security and morality.'[58] In so doing, the focus is on societal interests, similar to those in international private law. The objective of harmonized rules aims at not jeopardizing cross-border Internet traffic. For these reasons it is of utmost importance to remove the existing democratic deficits which accrue from media ownership, filtering, and censorship.

Increased co-operation between international bodies needed?

Besides that, light should be shed on the necessity of the international bodies' integration into a new media governance framework. In this regard the Internet Society (ISOC) and the Internet Corporation for Assigned Names and Numbers (ICANN) must be looked at closely.

ISOC, founded in 1992, is a global non-profit organization with 100 organizational and more than 44,000 individual members. The organization aims at providing leadership in Internet related standards, education and policy for ensuring unrestricted access to the Internet for the benefit of all interested parties throughout the world (ISOC, Internet presence); besides that, there are no arrangements made regarding proper handling of the medium Internet. Being established in 1998 as a private non-profit organization

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[55] The term 'censorship' characterizes the control or the suppressing of the publishing or accessing of information on the Internet often undertaken by governments to filter out unwanted information and to prevent the information's spread throughout the World Wide Web.

[56] EU Parliament (n 53) 26.

[57] See <http://woorkup.com/2010/06/27/internet-censorship-report/>, accessed 23 June 2014.

[58] United States, 'Measures affecting the cross-border supply of gambling and betting services (US-Gambling)', WT/DS285/R, Panel Report, para 6.467.

headquartered in Marina del Rey, California, ICANN aimed (and still aims) at keeping the Internet secure, stable and interoperable by promoting competition and developing policies on the Internet's unique identifiers.

Although both organisations are part of the media landscape by considerably exercising influence on the Internet there are practically no points of contact between them and the traditional media environment since specific regulations regarding the collaboration among the two sectors does not exist. This fact hinders the creation of a coherent and accepted regulatory framework and, consequently, raises the question of how and under what terms to cooperate; as to that, targets need to be fixed and complemented by propositions of how to achieve this framework.

With regard to the issue of 'multistakeholder governance' within the ongoing Internet governance discussions[59] the cooperation between the aforementioned international bodies and the media landscape could rest upon their involvement in laying down media governance rules including sanctions against violators. Giving the international bodies a 'voice' would entail a broader acceptance of the new media governance framework especially with regard to the scale of influence they exert on the media environment.[60]

Necessity of inclusion of private actors (media enterprises and recipients)

A dominant attribute of today's media environment consists in the concentration of media ownership. Over the last century, a large number of independent media enterprises evolved into a small number of dominant media groups regardless of nation state borders or continents,[61] granting a few media owners such as Rupert Murdoch significant access to the public.[62] Aiming at the concentration of economic and societal power, these media enterprises focus on the enhancement of their productions to arouse the interest of the largest possible amount of receivers, though without giving them a vote.

To date, the consumers as the most important actors are practically voiceless within the whole media area; insofar the inclusion of civil society (multi-stakeholderism) needs to be forwarded. At this, the demand for an involvement of the civil society refers to both the contribution to the organization and control of media institutions as well as the participation in the media's 'dialogue' with the broad public.[63]

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[59] See eg Weber (n 27).

[60] RH Weber, 'Visions of Political Power: Treaty Making and Multistakeholder Understanding' in R Radu, J-M Chenou, and RH Weber (eds), *The Evolution of Global Internet Governance: Principles and Policies in the Making* (Schulthess 2013) 102–5, 108–10; A Doria, 'Use [and Abuse] of Multistakeholderism in the Internet' Radu, Chenou, Weber (n 60) 115–27.

[61] Meier and Trappel (n 48) 197.

[62] S Barnett, 'Media Ownership Policies: Pressures for Change and Implications' (2004) 10 *Pacific Journalism Review* 2, 10.

[63] C Eilders, 'Zivilgesellschaftliche Beteiligung im Medienbereich' in Kleinsteuber and Nehls (n 34) 159.

In this context the issue of multi-stakeholderism needs to be discussed, asking for the inclusion of all stakeholders in the governance and legislation processes. This quite new phenomenon has become a hotly debated topic in different areas[64] since the joint involvement of all stakeholders having the necessary know-how is desirable. The involvement of the general public in decision-making processes strengthens confidence[65] in decisions taken, as the public knows what reasons led to respective results. Furthermore, public participation increases transparency and accountability of the governing bodies.[66]

The inclusion of new issues, interests, and concerns communicated by civil society can also encourage the bodies responsible for producing media services to look at the specific societal aspects from different angles, therein finding a more adaptable solution for inclusion of civil society.[67] However, for the public to participate effectively in decision-making processes, it has to be able to (i) understand and criticize technical issues, (ii) possess sufficient knowledge of the given structures and potentials, and (iii) have the skills necessary to negotiate with more powerful actors.[68]

Hence, the responsible information providers should concentrate their efforts on getting their audience out of inactivity by offering them more possibilities to actively participate within the media environment.[69] Participation and involvement of civil society[70] can have a legitimizing side effect and allow for better credibility of actions taken by the competent institutions. Public scrutiny—as an indispensable instrument to civil society—based on adequate information mechanisms allows for public intervention in decision-making processes. The involvement of civil society in decision-making processes strengthens public confidence[71] in the decisions taken, as the public knows what reasons lead to the respective 'results'.

Legitimacy and accountability of a media governance framework

In addition, requirements such as legitimacy and accountability have to be considered when establishing a sustainable legal media framework. Namely aspects like competence,

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64 Among others in the context of Internet governance discussions, Weber (n 27) 88–103.

65 RH Weber, 'Transparency and the Governance of the Internet' (2008) *Computer Law and Security Report* 24, 346.

66 RH Weber, 'Accountability in Internet Governance' (2009) *International Journal of Communications Law & Policy* 13, 154; Malcolm (n 36) 272 ff, 504 ff.

67 J Steffek and P Nanz, 'Emergent Patterns of Civil Society Participation in Global and European Governance' in J Steffek, C Kissling, and P Nanz (eds), *Civil Society Participation in European and Global Governance: A Cure for the Democratic Deficit?* (Palgrave Macmillan 2008) 3; <http://www.peoi.org/Courses/Coursesen/mass/mass2.html>, accessed 23 June 2014.

68 Weber (n 66) 162.

69 Kleinsteuber and Nehls (n 34) 85.

70 Weber (n 27) 162–71.

71 Weber (n 65) 346.

power, strategy, transparency, and democratization can serve as basic guidelines as to what key elements must be included into the new media governance perspective.[72]

Media governance especially with regard to the Internet tackles central questions such as: Who rules the communication channels, in whose interest, by which mechanisms and for which purposes?[73] Particularly with the growing influence which some international bodies have achieved, questions on their legitimacy have arisen.[74] The envisaged realization of a concept of 'multi-stakeholder governance', perceived as the new way ahead in favor of the inclusion of the whole society, goes beyond the scope of traditional governance theories, which generally pursue an approach strictly distinguishing the state (public law) from the society (civil law).[75] With this in mind even a stronger involvement of 'media enterprises' needs to be sought.

Such a development challenges the traditional international legal and political understanding of legitimacy as a concept primarily relevant to sovereign states as subjects of international law according to traditional doctrine. Can the same criteria for assessing states' legitimacy be applied to international entities in the media field? The development of the World Wide Web has generally led to an increased influence of organizations and entities engaged with the Internet. However, with the gradual extension of their operational sphere beyond merely technical questions and towards addressing policy issues, the legitimacy of their actions has been questioned, with the debates on ICANN as a conspicuous example. Undisputedly suffering from an accountability gap, and a pronounced difference between its stakeholders' expectations and its performance[76] ICANN has responded to such confrontations by initiating different reforms, which particularly tackle the enhancement of democratic processes within the corporation, by supporting the individual Internet user's participation within ICANN's activities.

Additionally, the inclusion of accountability measures is central to the development of an effective media governance framework. Accountability, based on the Latin word *computare* (to calculate), is a pervasive concept, encompassing political, legal, philosophical, and other aspects; each context casts a different shade on the meaning of accountability.[77] Nevertheless, a general definition incorporating the main elements of accountability is directed to the obligation of a person (the accountable) to another person (the accountee), according to which the former must give account of, explain, and

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[72] H Walk, *Partizipative Governance: Beteiligungsformen und Beteiligungsrechte im Mehrebenensystem der Klimapolitik* (VS Verlag 2008) 18.

[73] See also RH Weber and M Grosz, 'Legitimate Governing of the Internet' (2009) *International Journal of Private Law* 2, 316–30.

[74] See Weber (n 27) 106; Weber and Grosz (n 73).

[75] RH Weber and M Grosz, 'Internet Governance: From Vague Ideas to Realistic Implementation' (2007) *Medialex* 3, 119–20.

[76] RH Weber and RS Gunnarson, 'A Constitutional Solution for Internet Governance' (2012) *Columbia Science and Technology Law Review* 14, 14–35.

[77] RH Weber, 'Accountability in the Internet of Things' (2011) *Computer Law and Security Review* 27, 134–36.

justify his actions or decisions in an appropriate way.[78] Together with checks and balances, accountability is a prerequisite for legitimacy and a key element of any governance discussion. While checks and balances take place by providing mechanisms to prevent the abuse of power, accountability steps do so by providing for or accessing actions with mechanisms such as non-judicial remedies, or judicial review.[79]

In particular, accountability implies that the stakeholders who form part of the governance mechanisms should be obliged to being called out to answer to anyone. As a fundamental principle, accountability concerns itself with power and power cannot be divorced from responsibility.[80] Therefore, responsibility should be commensurate with the extent of the power possessed.[81] Furthermore, accountability depends on reliable information which needs to be available, accessible (both logistically and intellectually), and based on known sources. Without such mechanisms, civil society will not be informed or able to participate, and decision making will not be democratic.

Accountability can be framed along the following three elements:[82] (i) standards need to be introduced that hold governing bodies accountable, at least on the organizational level; such standards help to improve accountability, (ii) information should be made more readily available to the concerned recipients, enabling them to apply the standards in question to the performance of those who are held to account; active rather than passive consultation procedures are to be established, and, finally, (iii) beneficiaries of accountability must be able to impose some sort of sanction, thus, attaching costs to the failure to meet the standards; such 'sanctioning' is only possible if adequate participation schemes are devised through direct voting channels and indirect representation schemes.

Synthesis and outlook

Summarizing, a sustainable media governance framework should focus on legitimacy and accountability aspects and encompass the participation of civil society for being most widely accepted. A respective legal framework must consequently address these issues in more detail; accordingly, cooperation with international bodies exerting influence on the new media needs to be realized.

In particular, the indispensable inclusion of private actors should be aimed at. As to that, regulations are needed to involve private actors by enabling them to raise their voice. With regard to recent political events (eg the Jasmine Revolution) showing that

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78 R Weber and RH Weber, *Internet of Things: Legal Perspectives* (Schulthess 2010) 80.

79 C Kaufmann and RH Weber, 'The Role of Transparency in Financial Regulation' (2010) *Journal of International Economic Law* 13, 779.

80 SB Young, 'Reconceptualizing Accountability in the Early Nineteenth Century: How the Tort of Negligence Appeared' (1989) *Connecticut Law Review*, 21, 201.

81 RM Lastra and H Shams, 'Public Accountability in the Financial Sector' in E Ferran and CA Goodhart (eds), *Regulating Financial Services and Markets in the 21th Century* (Hart Publishing 2001) 167.

82 Weber and Weber (n 78) 81.

governments tried to shut down the Internet and mobile communications, thereby trying to hinder the government opponents to make appointments and telling the world the truth about the current proceedings, a new media governance framework needs to determine internationally-binding regulations encompassing areas like Internet filtering and censorship.

Although the positive consequences of the individual's enlarged possibilities to participate in the information world by being both sender and receiver of information cannot be overstated, this development also entails a variety of risks, namely the deterioration of quality and the violation of privacy. Therefore, the legal framework needs to include provisions governing the substantive content of media services, the public service requirements, and the protection of individuals.

Since media governance must be classified as work in progress due to the fact that the existing large number of inconsistent domestic media regulations fails to cover the wide range of new problems arising from the constantly developing media environment, changes are reasonably required to establish a new media governance framework making uniform arrangements regarding many relevant regulatory areas. Taking into account the substantial changes of the forms of communication and the ongoing globalization the emerging problems require an international media governance framework.

Vincenzo Zeno-Zencovich

Anonymous speech on the Internet

Preliminary remarks[1]

The issue of anonymity on the Internet divides opinions. On the one side there are many who maintain that anonymity on the World Wide Web is an essential feature of its nature, and of its freedom.[2] On the opposite side are those who consider the Internet to be the same as any other public forum, where anonymity can only be the exception, not the rule.

This article aims to show that, from a legal point of view, the situation is extremely nuanced and it suggests a variety of answers which depend from many different, intrinsic and extrinsic, factors.[3] One has to underline the legal approach in a field which is fraught with policy issues. Although the law is inevitably influenced by social, economic and political factors, a lawyer must take into account the general framework, suggest answers that are coherent with it and present them in a normative fashion.[4] The starting point is that activity on the Internet can be, and widely is, anonymous.[5]

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[1] Some of the views here expressed were presented first in a workshop at the European University Institute ('Policing the Internet: Policy, Politics and Consequences of Regulating Internet Content' December 2012) and subsequently in a conference at Milan University ('Anonimato, diritti della persona e responsabilità in rete' November 2013). I have profited greatly from the contributions of all those who intervened. Owing to time constraints, I have been unable to include in the article comments on the ECtHR decision *Delfi AS v Estonia* and the ECJ Grande Chambre decision *Costeja v Google Spain*.

[2] See M Manetti, 'Art. 21 della Costituzione e tutela degli scritti anonimi' (2014) *Il diritto dell'informazione e dell'informatica* 2, 139.

[3] The most thorough examination of the various issues related to anonymity is contained in G Finocchiaro (ed), *Diritto all'anonimato. Anonimato, nome e identità personale* (Cedam 2008) where it is seen from the different perspectives of constitutional, private, criminal, and administrative law. More recently, see also RH Weber and UI Heinrich, *Anonymization* (Springer 2012).

[4] One should note that the legal debate over anonymity is mostly American, with dozens of articles (generally monotonic). This does not mean that in Europe the problem has not been considered. For the most illustrious voice in favour of anonymity on the Internet, see, when he was already Italian Data Protection Commissioner (1997/2005) and in countless subsequent public occasions, S. Rodotà. The European Commission examined the various issues as early as 1997. See Recommendation 3/97 'Anonymity on the Internet' by the Working Party on the Protection of the Individual with regard to the Processing of Personal Data. The topic was recently discussed in the 2012 Deutscher Juristentag in the session devoted to 'Persönlichkeits- und Datenschutz im Internet: Anforderungen und Grenzen einer Regulierung'. See G Spindler's *Gutachten* (Beck 2012) 33. G Resta in 'Anonimato e identificazione: un approccio comparato', a paper presented at the conference 'Anonimato, diritti della persona e responsabilità in rete' ((2014) *Il diritto dell'informazione e dell'informatica* 2, 171), points out that the American view of anonymity is highly ideological and coherent with views widely shared in that country.

[5] I shall analyse the 'common' Internet system, setting aside—for the sake of simplifying an already complex scenario—the so-called 'deep Internet' networks. See the Note, 'The TOR Network: A Global

Anonymity as a result of technology

This is due to technical and structural reasons: Whoever operates on the Internet does so through a machine which does not necessarily identify its user. The machine, which may range from a highly powered mainframe to a very small handset, may provide information as to its whereabouts, but excluding the not-so-common case of activities which can be performed only via biometric identification (fingerprints, iris), it is extremely difficult, from a practical point of view, to establish the author with any certainty. The structure of the Internet favours such situations, inasmuch as it is intrinsically cross-border and transnational and therefore defies typical systems of registration, identification and tracking. This feature has recently been enhanced by the growing phenomenon of cloud computing, which is characterized by the continuously changing location of computing facilities.

Anonymity as a social habit

This has generated a social habit of anonymous speech. While in the material world people tend to identify themselves when they enter into relations with other persons, on the Internet this is not widespread practice. As a matter of fact, one encounters the creation of multiple digital identities which parallel the 'official' and identifiable one.[6] This tendency towards anonymity is not restricted to natural persons. Entities are created on the Internet that group common interests and use the immense potential of the Web to promote, reach, and bond. Business entities may also take advantage of the increased opacity granted by the Internet. Piercing the corporate veil on the Web may be extremely complex, especially when the only link to the outside world is a bank account, often opened in some tax haven.

This social aspect—especially concerning individuals—cannot be ignored and without indulging in the libertarian rhetoric which will be examined further on, greatly influences the effectiveness of any legal intervention aimed at suppressing or curtailing anonymous speech. At the same time one must consider what are the aims of an intervention limiting anonymity on the Internet, what are the interests that require protection, where to strike the balance between competing values and what is the cost, financial and social, of enforcement.

Inquiry into the Legal Status of Anonymity Networks' (2012) 11 *Washington University Global Studies Law Review* 715.

[6] See V Smith Ekstrand, 'The Many Masks of Anon: Anonymity as Cultural Practice and Reflections in Case Law' (2013) 18 *Journal of Technology Law & Policy* 1.

The ambiguous meaning of anonymity

A further preliminary remark is necessary. Anonymity is an extremely variable notion, which in some cases has a strong legal and normative background, but in other cases requires a more detailed definition.[7] At any rate it appears obvious that there are significant differences between, say, the right of the mother who does not want to recognize her child to remain anonymous,[8] the duty to safeguard the anonymity of a whistle-blower,[9] or of a confidential source in a criminal investigation,[10] or anonymous litigation.[11]

The variety of cases in which the notion of anonymity arises (for all: the *société anonyme* in French company law) suggests the need for a careful examination of what exactly we mean when we are talking about 'anonymous speech on the Internet'. This appears to be more a social and factual situation, and therefore it is necessary to better define its legal ambit, also to avoid terminological misunderstandings. As will be argued in more detail further on, careful distinction must be made between the various situations.

Right to anonymity *versus* duty of disclosure

Again, and from a more legal perspective, it is clear that there are significant differences between the right to remain anonymous and the absence of a duty to disclose one's identity when communicating over the Internet. The former approach requires the establishment of procedures and remedies through which the right can be ensured and enforced. The latter is a much more factual approach, in which public and private authorities simply abstain from forms of normative and technological intervention that require the identification of who is operating on the Internet. To deepen this difference, on the one hand, the extent of a 'right to anonymity' must be established, and whether this right can be waived or superseded by over-riding interests. On the other hand, it must be established when it is both desirable and feasible to impose disclosure of a person's identity.

Anonymity *versus* secrecy

The uncertainty is increased by the existence of legal notions which are in various ways related to that of anonymity. Most contemporary constitutions and international conventions

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[7] See E Pelino, 'La nozione di anonimo' in Finocchiaro (n 3) 31 ff.

[8] See, for Italian law, A Avitabile, 'Il diritto all'anonimato in ambito familiare' in Finocchiaro (n 3) 143 ff.

[9] See the EU Commission (internal) 2012 'Guidelines on Whistleblowing' <http://www.coe.int/t/dghl/standardsetting/cdcj/Whistleblowers/EU%20guidelines%20%20Whistleblowing.pdf>. The issue of whistleblowing and of anonymity of sources is amply examined by M Cuniberti, 'Democrazie, dissenso politico e tutela dell'anonimato', (2014) *Il diritto dell'informazione e dell'informatica* 2, 111.

[10] See, in an Italian context, D Tassinari, 'Diritto all'anonimato e diritto penale' in Finocchiaro (n 3) 173 ff.

[11] See in a comparative perspective G Resta, 'Privacy e processo civile: il caso della litigation anonima' *Diritto dell'informazione e dell'informatica* 681–725 (2005).

on human rights include the right to secrecy of correspondence. It is commonly believed that this right—pertaining to physical mail—is extended to digital correspondence, such as e-mails. However, on the Internet the notion of correspondence—meaning an interpersonal communication between two specified persons—is blurred, considering the possibility of sending the same message to a very high number of persons (eg a mailing list), and the possibility that receivers may, with the greatest of ease, forward such a message to third parties. But is secrecy the same as anonymity? Generally speaking the right to secrecy means that others (typically public authorities) may not apprehend the content of the communication, but it does not mean that they are prevented from knowing who is writing to (or telephoning) whom.

This is because what is protected is the privacy—in the sense of seclusion—of the persons involved. Reflecting this approach are the provisions which require—even after the death of one of the parties of a correspondence—the consent of both to render public the content of the letters. On the Internet, instead, the situation is different: the content of the communication is public, and is meant to be so. Anonymity is used to hide not the content but its referability to a specified person. What is primarily protected is not privacy but discourse in the public arena, although what may also be relevant is the possibility of creating multiple, digital, identities.

The difference between the two notions—anonymity and secrecy—is made even clearer when one considers a vital institution of any democratic system, ie voting. Voting in elections is secret, in the sense that nobody may establish how one has cast the ballot. But surely voting is not anonymous. To the contrary, every precaution is taken in order to verify the identity of the voter and prevent attempts to vote in the place of someone else. As a matter of fact, the risk of fraudulent voting identities is one of the main obstacles to the introduction of electronic (ie digital, on-line) voting systems.

Anonymity and disguised identity

In fact one should consider that, commonly, anonymity is not meant—as it is in the material world—as an unsigned message (eg an anonymous letter), but instead is a message signed with a pseudonym (or nick-name).[12] This pseudonym (ie false name) may simply be the product of imagination, but often it can convey a deceitful impression, such as using someone else's identity or posing as a certain entity in order to attract disapproval (eg a right wing group which disseminates its views pretending it is a left wing group, or *vice versa*). Therefore, in a wider sense, anonymity does not only conceal one's identity; it may be used to disguise it with someone else's clothes.

[12] The right to use a pseudonym is enshrined in continental European copyright laws: see, for Italy, B Cunegatti, 'Anonimato e diritto d'autore' in Finocchiaro (n 3) 163 ff.

Is everything 'speech'?

Furthermore, not only the notion of anonymity but also that of 'speech' may be ambiguous. One should note from the outset that the European approach does not share the all-comprising notion of 'speech' as derived from the interpretation of the First Amendment to the US Constitution which includes a great number of practical activities, from burning a flag to strip-tease. On the Internet any activity is digitally conformed and expressed through words or images but does that necessarily mean that we are witnessing a 'speech'? For example, is selling memorabilia purportedly from Nazi concentration camps, giving instructions on the functioning of mechanical apparatus, or providing weather forecasts 'speech' in the sense we commonly apply to such a term from a legal point of view? As we shall see further on, qualifying activity over the Internet as 'speech' means that it is subject to the numerous limitations that generally apply to freedom of expression; first of all its definition and its boundaries.

The variables

Moving to a more detailed approach, this analysis will examine:
– who is communicating;
– with whom they are communicating;
– 'where' they are communicating;
– what is being communicated;
– what are the competing interests;
– gatekeepers and applicable law.

Who is communicating

Whether one frames anonymity as a right or disclosure as a duty, it is important to establish who is entitled to invoke anonymity and who is under an obligation to disclose their identity. One can easily detect a first logical difficulty: anonymity, *per se*, prevents us establishing who the speaker is, although the content of the communication may be useful to place them in a certain category. Here are some typical cases: an individual presents him / herself as a group or an entity; a business entity pretends to offer goods or services on an individual basis. It is therefore necessary to shift the analysis to what is being communicated (see below). At any rate one can, and should, distinguish between a) individuals, b) collective entities, and c) businesses.

a) Individuals, on a general basis, are entitled to the right to express their opinions freely; and at the same time they have a right to privacy. One could therefore posit that—provided they do not violate another person's rights—they can keep their identity concealed. Therefore anonymous speech, *per se*, cannot be prohibited.

Only in the case in which there is a breach of a different norm, anonymity should not be used as a shield—it would, therefore, appear that anonymity is more a right than a concession. The problem, however, is establishing the extent of this right and when it can be forfeited. And this depends very much on the other elements that will be analysed further on.

b) If individuals are granted—subject to certain conditions—a right to anonymity (or are not obliged to disclose their identity), is the same right valid for entities that group individuals together? Is public discourse by political or social groups regulated in the same way as that of individuals—and should it be? The answers to these questions are heavily influenced by political options. It is necessary to state clearly—in order to avoid any misunderstandings—that we are talking about democratic regimes of the western world. What may be appropriate for these can be seen in a totally different light when analysing non-democratic and/or non-western political systems.

If one looks at European constitutional tradition, anonymous political activity in the form of political parties, movements and groups appears to be contrary to its basic principles, which have been established and have evolved over the last 60 years. The excruciating experiences which brought the downfall of liberal governments in the first decades of the twentieth century have demonstrated the venomous effects of hidden and disguised political action, and how it paved the way to dictatorships in most of Europe. As a result of this lesson the most important post-war constitutions have expressly barred secret associations.[13] The reasons are self-evident. If one—quite rightly—requires that government be transparent, that same requirement applies to those who wish to influence or change government. An 'open society' cannot be limited to the upper spheres, but must involve all those who wish to play a role in it.[14]

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[13] See Article 21 of the German Constitution, and Article 22 of the Spanish Constitution on the publicity of political parties; and Article 18 of the Italian Constitution barring secret associations. This aspect is examined by GE Vigevani, in his paper 'Diritto all'anonimato e trasparenza nell'ordinamento costituzionale italiano', presented at the conference 'Anonimato, diritti della persona e responsabilità in rete'. (2014) *Il diritto dell'informazione e dell'informatica* 2, 207.

[14] The discussion on anonymous speech in the US generally takes as a starting point (quite correctly for that jurisdiction) the 1995 Supreme Court decision in *McIntyre v Ohio Elections Comm'n* striking an Ohio statute that made anonymous election leaflets illegal: 'Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority'. The position taken in this paper is the one that goes back to Savigny's timeless lesson in 'Of the Vocation of our Age for Legislation and Jurisprudence', ie that legal traditions may differ in the world and what is considered an 'honorable tradition' in the US, may not be so in Europe. One can only add that the notion of 'tyranny of the majority'—deeply rooted in US political thought (John Adams)—appears to be, from a legal point of view, a purely rhetorical argument. In a democratic system, government is by definition majoritarian, with all the checks and balances that have been created in order to ensure that the majority will govern in accordance with the constitution and rule of law. If there is a 'tyranny' there is no democracy, but this assertion requires something more than simple *ex autoritate* quotes. Otherwise one could legitimately argue that it is only a catch-phrase that is used to allow a minority to violate the laws set, democratically, by the majority.

An essential element of this 'open society' is the right of citizens to know who is speaking in the public arena, in order to evaluate fairly and correctly their credibility. Knowing the identity of a speaker allows us to know about their past and their relations with others, and to have an idea about their motive and purpose. Furthermore, knowing the identity of the speaker in a public arena is necessary to establish their financial sources and whether their message is authentic or simply comes from a paid piper. This concern is behind the widespread legislation that requires political parties and movements to publish their balance sheets and the sources—above a certain (generally small) sum—of their income.[15] If this is true of traditional political activity, it is even more so on the Internet, where the possibility of altering people's perception of reality is extremely high: the number of contacts, the relevance of a piece of news, the creation of mirror effects. With the Internet becoming the most important arena for opinions to be discussed and formed and decisions taken, it would be paradoxical for it to be shrouded in the mist of anonymity.

c) Business activity cannot be anonymous. It is against the basic tenets of a modern economic system, which means entering into business relations with others, persons or entities, mostly through contracts; paying and being paid; being responsible for what one does. All these principles would be meaningless if whoever ran the business could be anonymous, as a swindler or a receiver of stolen goods. In addition, not only can there be no anonymity in business activity; there can be no 'speech' either. So-called 'commercial speech' is a contradiction in terms, first of all because freedom of speech is given to individuals and to the body politic to participate in social and political debate, and not to corporations. It is an individual right, not an economic freedom. In the second place, in business activity 'speech' is simply part of the production, distribution and marketing process and is subject to the same limitations as the rest. There is no 'freedom of speech' that can be applied to labels, packages or advertisements.[16]

All this is—or should be—quite obvious. The problem arises, however, when non-profit entities engage in economic transactions: when they ask for a membership fee, when they receive donations, when they sell advertising space on their website. Is anonymity of the entity only a 'private' issue that concerns those who expressly enter into relations with the entity, or should the public have a right to know who stands behind the name of the entity or its acronym? One returns therefore to the issues examined before under b).

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[15] One can measure the distance between the European and the US approach even from this perspective, see JM Shepard and G Belmas, 'Anonymity, Disclosure and First Amendment Balancing in the Internet Era: Developments in Libel, Copyright, and Election Speech' (2012) 15 *Yale Journal of Law and Technology* 92 (arguing that campaign-finance disclosure laws should also be submitted to 'First Amendment scrutiny').

[16] I have tried to present this argument more extensively in *Freedom of Expression. A Critical and Comparative Analysis* (Routledge-Cavendish 2008) 58 ff.

With whom they are communicating

Before the digital age the distinction between correspondence and public communication was quite clear. The former was covered by the fundamental right of secrecy, which could be set aside only in cases established by the law and in some countries only by a court order. The latter, however, was subject to strict disclosure and liability rules—the name of the printer had to be indicated on every piece of printed matter; newspapers and periodicals were required to indicate a person responsible for their content; criminal and civil legislation was enacted to punish clandestine press and content that violated public interests and private rights. This legislation was extended to radio and television, first of all keeping these new media under a very strict State monopoly, and subsequently allowing only a limited amount of enterprises to enter the market. At any rate—even in present times—television content is extremely restricted and broadcasters are under a special obligation towards the public.

The Internet has subverted these rules, making it clear how restricted public discourse has been since the rise of full democratic systems. Not only can practically anybody communicate with the rest of the world at hardly any expense, but there are no restrictions on how much can be communicated. The new ways of communication via the Internet defy the traditional distinctions: it is up to the speaker to decide whether he wishes to restrict his speech to a single person or a wider audience, which again he has the ability to limit or to widen. What are the boundaries of correspondence on the Internet? Within them the issue of anonymity is irrelevant, because the speaker does not wish to render the content of his communication public. To establish if boundaries have been overstepped it is necessary to consider two elements, subjective and objective. First of all, the intent of the speaker, which is made clear not only by the external form of the communication but also by its content, typically if it is of a personal and confidential nature. In the second place the number of addressees of the message is relevant (eg a mailing list) and the way they are selected. If they are selected by the speaker on an individual basis one might consider the communication as a sort of expanded correspondence. But if selection is on a very perfunctory basis (eg simple registration with no other requirement or control) it can reasonably be seen as a public discourse, to which all the relevant guarantees and limitations apply.

'Where' they are communicating

If one applies the principle that individuals have a right to communicate, publicly, in an anonymous way, however that does not mean that the forum where they are communicating is irrelevant. In some cases there appears to be a legitimate expectation of anonymity—one just has to think of the many websites where people meet for sentimental or sexual reasons and can do so only if they are guaranteed anonymity. However, one should consider that the anonymity of the speaker does not imply that the

forum should also be anonymous.[17] As will be seen further on, this double shield is inconsistent with the basic rules of modern legal systems. But it also appears to be difficult to justify from a logical point of view. If what is being protected is the individual's freedom of expression, the forum, quite clearly, is not an 'individual', and is not entitled to, or does not exert, fundamental rights for the simple reason that the opinions expressed belong to someone else. And one should further consider that there is a difference between an occasional expression of anonymous views, and a systematic and professional hosting of other people's views. Clearly this fosters public debate, but one should consider whether it is significantly different from a radio station which allows listeners to phone and express, live, their views, or a television programme to which the audience may send texts that are broadcast at the bottom of the screen. Is the technology so different as to justify an entirely diverse legal regime? As will be seen further on, the fact that one chooses someone else's medium to express anonymously one's views may entail responsibilities for those who carry them.

What is being communicated

Contrary to common belief, regulation of public speech is not 'content neutral'—obscenity, hate speech, instigation to commit crimes, advertisements, financial information, emergency warnings are some of the many cases in which specific regulations are implemented in all democratic systems, even in those that are considered the most open, such as the US. Again a careful exercise of distinguishing is required. In all the cases listed above what are being protected through a restriction of speech are paramount public interests. Those interests would be (or risk being) severely imperilled if one could hide beneath the cloak of anonymity. But if one recognizes that there are wide areas of speech that do not warrant anonymity, one should ask oneself if this is also the case when private interests are jeopardized, typically personality rights such as reputation or privacy.

Again it should be stressed that not all cases should find the same solution; however what is important is that certain forms of speech require that the speaker be clearly identified. The problem is that, generally speaking, in the case of speech violating public interest, one can decide beforehand whether anonymity should be allowed, while if private interests are at stake, knowing who the speaker is becomes extremely relevant for establishing whether this is legitimate or not. Is it sufficient to claim that one has been damaged to obtain disclosure? Or is something more required, and who should decide?

[17] This should be the sense of several provisions (mostly German) which establish that use and payment of Internet services should be made, inasmuch as is possible, anonymous (for a detailed indication see Resta (n 4) para 2).

The competing interests

These last remarks bring us to the core of every legal question: the balancing of the competing interests in an effort to ensure what is considered the heart of the law, justice, avoiding the paradox well phrased by the Latin maxim *summum ius, summa iniuria*. From this standpoint the approach which favours, always and on any occasion, the right to anonymity appears to be absolutist, inasmuch as it disregards the need to protect equally valuable interests. Therefore, on one plate of the scales one has to put two concurring interests, one public, and the other private.

The Internet has opened up an unprecedented age of freedom of information and of expression. Never before have human beings been able to communicate, create, exchange, disseminate, and access thoughts, opinions and facts with such ease. This promotes some of the basic values of every democratic system, starting from knowledge and moving towards an open participation in the political, social, religious, philosophical and cultural life of the community. Clearly one cannot imagine returning to the past. Anonymity is one of the features that have allowed the system to develop, and therefore it should be kept in utmost consideration from a policy perspective.

On the same plate one should place the individual's right to privacy, or, to frame it in a continental European approach, the right to self-determine one's identity. In an age of increasing private profiling of everybody's habits and thoughts, and of public surveillance of millions of citizens[18] anonymity is one of the techniques that can help preserve a small area of imperscrutableness.[19] Here again one can note a significant difference between the US and European approaches. While the former—in this as in many other fields—generally bestows the (*ex post*) protection of individual rights on the courts, the latter has an (*ex ante*) regulatory approach well expressed by the lengthy EU Directives on data protection and, if passed, by the even bulkier General Data Protection Regulation.

On the other plate we have, again, public and private interests. First of all, that of the prevention and repression of crimes. If it is impossible or extremely difficult to identify the authors, this means that the Internet is actually a lawless environment.[20] What is a crime—even a hideous crime—in the material world becomes without sanction if committed on the Internet. All contemporary societies are based on a balance between individual freedom and social protection which is ensured by the law. The contract between citizens and institutions has as an implied term that certain interests will be

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[18] S Niger, 'Sorveglianza e nuovi diritti di libertà' in Finocchiaro (n 3) 3 ff.

[19] This is the argument behind the Note, 'Anonymity on the Internet: How does it Work, Who Needs it, and What are its Policy Implications?' (2006) 24 *Cardozo Arts & Entertainment Law Journal* 1395.

[20] An obvious remark is that a robber generally wears a mask in order not to be identified. The numerous US anti-mask laws are examined (critically) by M Kaminsky, 'Real Masks and Real Name Policies: Applying Anti-Mask Case Law to Anonymous Online Speech' (2013) 23 *Fordham Intellectual Property, Media & Entertainment Law Journal* 815.

protected and that the law will be enforced by the public authorities. The answer is clearly a question of degrees, and it is quite easy to list the areas in which everybody, in a civilized community, agrees that offences should not go unpunished. Generally speaking, therefore, there cannot be a right to anonymity when it comes to prosecuting and punishing crimes. There clearly is a grey zone which is open to debate, but this is not about anonymity, but rather whether certain behaviours should, or should not, be considered a criminal offence.

There are also important private interests which deserve protection—both patrimonial and non-patrimonial—and that are defenceless if whoever is considered responsible can hide behind anonymity. If one thinks of it, anonymity as a shield from private action is against the basic rules of natural law, which impose a duty not to harm others (*neminem laedere*) and to make good those who have been damaged by one's illicit behaviour. Again the debate is generally placed on the wrong perspective, which is not a case of being in favour of, or against, anonymity but of whether certain interests deserve protection, wherever and however they are violated. Insisting on a right to anonymity is simply an indirect way of asserting that those interests are legally worthless or that, on the Internet, they can receive only very limited and exceptional protection. Obviously this can be a matter open to debate, but one has to clarify the policy reasons behind a dual legal system based on the distinction between material activity and digital activity.[21]

Gatekeepers and applicable law

The highly complex and variable scenario that has been presented in these pages does not allow straightforward solutions. One can only try to resort to classical principles of the law, distinguishing between areas of non-liability, areas of personal liability, and areas of vicarious liability. In the first there is a right to anonymity (or no duty to disclose one's identity). In the second, instead, identification is a requisite of speech. In the last case a third party becomes liable for anonymous speech in the light of its role in disseminating content which is considered illegal (whether from a penal law or from a private law perspective). In some instances this liability would be automatic, typically when whoever hosts anonymous speech that violates public duties or private rights endorses the content. When, instead, there is no direct relationship between whoever hosts the digital space and the anonymous material which the latter contains, one could adapt the principles stated by the EU e-commerce directive: no liability if—duly warned—the host removes the illegal anonymous content and/or renders identifiable

[21] I am not considering other harmful social uses of anonymity as instruments for intimidation, bullying, discrimination (see V Smith Ekstrand, 'The Many Masks of Anon: Anonymity as Cultural Practice and Reflections in Case Law' (2013) 18 *Journal of Technology Law & Policy* 23).

the author.[22] Following this line one could imagine establishing *bona fide* proxies which allow identification in justifiable and predetermined cases.[23]

A similar pattern of solutions meets, however, a severe practical obstacle related to the applicable law. Most of the companies which host (websites that contain) anonymous speech are US-based and generally specify that when it comes to disclosure and liability they will apply US law.[24] And even if this were not stated, the possibility of obtaining compliance to EU court orders and administrative decisions in the US is highly problematic and objectively incompatible with Internet time, which is measured in seconds and minutes.[25] It is paradoxical that information on the Internet is generally retrievable at any moment and with no expense and effort, but if one attempts to discover who is operating on the Internet this becomes an impossible task.

Surely, the solution that has been adopted in many US states—disclosure of the identity of the speaker can be granted only after a lengthy judicial procedure[26]—is totally

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[22] The notion of 'best risk-avoider' is used by G Finocchiaro, 'La responsabilità civile di terzi per gli scritti anonimi in rete', paper presented at the conference 'Anonimato, diritti della persona e responsabilità in rete' (Milan University, November 2013).

[23] A similar solution is suggested by TZ Zarsky, 'Thinking Outside the Box: Considering Transparency, Anonymity, and Pseudonymity as Overall Solutions to the Problems of Information Privacy in the Internet Society' (2003) 58 *University of Miami Law Review* 991, 1041.

[24] See eg the terms of service of Blogspot Google: *'We do not remove allegedly defamatory content from www.google.com or any other Google US dot com domains.'* 'US domain sites such as Google.com, Blogger, Google Sites, etc are run in *compliance with US law*. Given this fact, and pursuant to Section 230(c) of the Communications Decency Act, we do not remove allegedly defamatory material from US domains. We will remove material if the material has been found to be defamatory by a court, as evidenced by a court order.' 'The language of Section 230(c) of the Communications Decency Act fundamentally states that Internet services like Google.com, Blogger and many of Google's other services are republishers and not the publisher of that content. Therefore, these sites are not held liable for any allegedly defamatory, offensive or harassing content published on the site.' 'Please note that a copy of each legal notice we receive may be sent to the Chilling Effects project (http://www.chillingeffects.org) for publication and annotation. *Chilling Effects will redact the submitter's personal contact information (i.e. phone number, e-mail and address)*.' 'We may also send the original notice to the alleged infringer or, if we have reason to suspect the validity of your complaint, to the rights holder.' (Italics added.)

[25] See CT Kotuby, 'International Anonymity: The Hague Conventions on Service and Evidence and Their Applicability to Internet-Related Litigation' (2003) 20 *Journal of Law & Commerce* 103.

[26] This appears to be one of the main topics of discussion in the US: see K. Ringland, 'Internet User Anonymity, First Amendment Protections and Mobilisa: Changing the *Cahill* Test' (2008) 5 *Shidler Journal of Law, Commerce & Technology* 16 (discussing Arizona case-law); Note, 'Protecting Copyright at the Expense of Internet Anonymity: The Constitutionality of Forced Identity Disclosure Under §512(h) of the Digital Millennium Copyright Act' (2004) 23 *Temple Journal of Science, Technology & Environmental Law* 243 (arguing in favour of the unconstitutionality); Comment, 'A Break in the Internet Privacy Chain: How Law Enforcement Connects Content to Non-Content to Discover an Internet User's Identity' (2010) 40 *Seton Hall Law Review* 1257 (arguing that the Fourth Amendment on unreasonable searches and seizures should be extended when trying to identify an anonymous speaker); Note, '*Dendrite v. Doe*: A New Standard for Protecting Anonymity on Internet Message Boards' (2001) 42 *Jurimetrics* 465 (discussing a New Jersey case); Note, 'Anonymity in Cyberspace: Judicial and Legislative Regulations' (2012) 81 *Fordham Law Review* 3651; Note, 'And the I(SP)s Have It … But How Does One Get It? Examining the Lack of Standards for Ruling on Subpoenas Seeking to Reveal the Identity of Anonymous Internet Users in Claims of Online Defamation' (2002) 81 *North Carolina Law* Review 1218 (suggesting to extend to ISPs the privilege journalists have

inconsistent with basic European constitutional principles, for which access to judicial remedies is a fundamental right that cannot be prevented or rendered too cumbersome.[27] A system such as that adopted in the US would introduce a generalized form of *certiorari* which is known only in exceptional cases (eg action against Heads of State and Members of Parliament; actions to establish or deny paternity). Here, instead, for the mere fact that an action has been committed on the Internet a special procedural regime would apply, that in most cases—considering also the costs of access to justice—would be tantamount to granting *de facto* immunity.

We come here to one of the most debated issues in contemporary international law and international relations, that of so-called digital sovereignty: to what extent should the law—and the law enforcement agencies and the judicial institutions—of one country be able to govern the actions that occur in a different country, or prevent them from being governed? And how can one avoid conflicts between States and jurisdictions? The matter is beyond the scope of this paper. Suffice it to note that if one does not agree with the libertarian view that the Internet is a zone without external regulation based only on technical rules and self-regulation, any solution must be widely shared in the international community, as already happens in many other areas of the law.[28]

Some conclusions

The discussion on the legal aspects of anonymous speech on the Internet is not the ultimate issue in this field. It is only one of the many problems that such a revolutionary invention brings to civilized communities.[29] Together with a bundle of blessings there

regarding their confidential sources: a similar argument is presented by M Manetti (n 2); Note, 'Unmasking 'Anon12345': Applying an Appropriate Standard When Private Citizens Seek the Identity of Anonymous Internet Defamation Defendants' (2009) *University of Illinois Law Review* 947 (suggesting a lighter, but always judicial, burden for private figures claims'). J McNealy, 'A Textual Analysis of the Influence of McIntyre v. Ohio Elections Commission in Cases Involving Anonymous Online Commenters' (2012) 11 *First Amendment Law Review* 149 suggests that the Supreme Court decision in favour of anonymous speech has not been so important. However the fact remains that in order to know the name of whoever one wants to bring to court a preliminary judicial procedure is required. A similar distinguishing interpretation of *McIntyre* is presented in the Note, 'Applying *McIntyre v Ohio Elections Commission* to Anonymous Speech on the Internet and the Discovery of John Doe's Identity' (2001) 58 *Washington and Lee Law Review* 1537. The only US article openly against mainstream positions I have found is by GR Lucas, 'Privacy, Anonymity, and Cyber Security' (2013) 5 *Amsterdam Law Forum* 107 (the author teaches at the US Naval Academy)

[27] This is the reason of the criticism of two—often quoted—recent German decisions (Landgericht München 3.7.2013 and OLG Hamm 3.8.2011) analyzed by Resta (n 4) para. 4.2. Some US commentators come to similar conclusions: see JB Eisenberg and JB Rosen, 'Unmasking "crack_smoking_jesus": Do Internet Service Providers Have a Tarasoff Duty to Divulge the Identity of a Subscriber Who is Making Death Threats*?*' (2002) 25 *Hastings Communications & Entertainment Law Journal* 683.

[28] See Weber and Heinrich (n 3) 23 ff.

[29] Appropriately BH Choi, 'The Anonymous Internet' (2013) 72 *Maryland Law Review* 501 points out that what deserves most protection on the Internet is its 'generativity' (stimulus to creativity and knowledge), rather than anonymity.

are—as in any step in the evolution of mankind—dangers and concerns that need to be examined and discussed. Once again what is required is a holistic approach which takes into account the complexity of modern societies and the not always converging instances for individual freedom and for social safety. One cannot expect that the balance that one may strike today will last forever, and one must imagine adaptable solutions that require a great deal of distinguishing, contrary to the quest for uniformity and the dislike for casuistry. This requires an open-minded (which is the contrary of one-sided) debate which can slowly, through a trial-and-error procedure, move us towards the most acceptable order.

Balázs Bartóki-Gönczy

Attempts at the regulation of network neutrality in the United States and in the European Union: The route towards the 'two-speed' Internet

Introduction

Critics have labelled James Joyce's Ulysses as the world's most criticised, but least read book. According to Reicher, network neutrality[1] is the subject most often discussed, but least understood in the world of infocommunications.[2] The debate around the subject of network neutrality has indeed been a favourite subject of lawyers,[3] economists,[4] and engineers[5] dealing with the ecosystem of the Internet on both sides of the Atlantic. But what do we mean by neutrality? The Internet, since its creation, it has been governed by the principle of neutrality which was defined by Tim Wu as an end aiming to maintain a system of belief about innovation, one that has gained significant popularity over last two decades.[6] In other words, all communication transmitted through the network of Internet access service providers (ISPs) must be treated independently of (i) content, (ii) application, (iii) service, (iv) device, (v) sender address, and (vi) receiver address. Sender and receiver address implies that the treatment is independent of the end user and content and application provider (CAP).[7]

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[1] On the basis of the principle of network neutrality, Internet access providers (IAPs) who provide the architecture of the Internet are required to grant equal treatment to all content, application service or other service providers using their networks, irrespective of the data transmitted and the identity of the sender of the recipient.

[2] A Reichert, 'Redefining Net Neutrality After *Comcast v FCC*' (2011) 26 *Berkeley Technology Law Journal* 733.

[3] V Schafer and H Le Crosnier: *La neutralité de l'Internet – Un enjeu de communication* (CNRS Éditions 2011), T Wu, 'Network Neutrality, Broadband Discrimination' (2003) 2 *Journal of Telecommunications and High Technology Law*.

[4] B van Schewick, 'Towards an Economic Framework of Network Neutrality Regulation' Paper presented at the 33rd Research Conference on Communication, Information and Internet Policy (2005); AT Wagner, 'The Economic Consequences of Network Neutrality Regulation' (2010) <http://krex.k-state.edu/dspace/bitstream/handle/2097/13598/AndrewWagner2012.pdf?sequence=1>, accessed 10 March 2014; and JE Nuechterlin, 'Antitrust Oversight of and Antitrust Dispute: An Institutional Perspective on the Net Neutrality Debate' (2007) 7 *Journal On Telecommunications & High-Tech Law Review* 19–66.

[5] P Faratin, D Clark, S Bauer, W Lehr, P Gilmore, and A Berger, 'The Growing Complexity of Internet Interconnection' (2008) 72 *Communications & Strategies*, 4th quarter, 51–71; A Dhamdhere and C Dovrolis, 'The Internet is Flat—Modeling the Transition from Transit Hierarchy to a Peering Mesh' <http://www.caida.org/publications/papers/2010/Internet_is_flat/Internet_is_flat.pdf>, accessed 10 March 2014.

[6] Wu (n 3) 145.

[7] Body of European Regulators of Electronic Communications (BEREC), 'Response to the European Commission's consultation on the open Internet and net neutrality in Europe' 30 September 2010, BoR (10) 42.

As such, the principle of net neutrality ensures the operation of the Internet as an open platform, which is fundamental from the aspect of the freedom of expression, too. While previously only the state presented a threat to the freedom of expression by its ability to censor opinions that were not favoured by the powers that be, on the Internet several private market actors have emerged that can, and often do, influence what content and, therein, which opinions reach its users. Nevertheless, it is important to note a fundamental difference at this point. While state authorities usually restricted opinions directly incompatible with the given system, with a few exceptions the motivation of CAPs is usually of a different, commercial nature. First of all, the majority of Internet access providers do not maintain such restrictions, and those that do usually restrict access to applications that endanger their revenues. That is, the motivation is basically different, but indirectly the result may nevertheless have an effect on the freedom of expression.

Many articles, studies, and books analyse the subject of net neutrality which may, *inter alia*, be approached from the direction of freedom of expression as well as the traffic management practices of Internet access providers (IAP). Accordingly, it cannot be the aspiration of the present paper to explore all aspects. My purpose is to show, via the history of the development of regulation in the USA and in the EU, how both regulatory approaches were frustrated, as well as to propose why I believe that, despite the current situation, we have no cause to mourn the 'open Internet'. In my opinion, it clearly follows from the intentions of the legislators that the present 'transitional state' will be replaced, in both Europe and the USA, with (hopefully) clear and direct regulatory intervention that will guarantee the protection of the open Internet.[8] Nevertheless, the protection of the principle of network neutrality is not an end in itself; it must serve the interests of Internet users in the future, too. The use of the Internet is constantly developing, thanks to such new innovative services as e-health, e-administration, online stock and commodity exchanges, and online media services, which are gaining fundamental importance in our everyday lives. These services, however, can only develop for the benefit of the entire human race if they are provided with guaranteed bandwidth for consumers to access them. On the basis of the current fundamental operating principle of the 'open Internet', ie the *best effort* principle,[9] this is not possible. It is for this reason that I argue that the Internet will and must become a two-speed system, with the emergence of a 'managed' Internet alongside the open Internet. It will be the task of regulation to ensure the peaceful coexistence of the two.

[8] It is worthwhile noting here that not only IAPs are able to influence what content we may access via the Internet, since, for example, copyright restrictions, search engine settings, etc, also have an effect on this. For more details, see R Patterson, 'Non-Network Barriers to Network Neutrality' (2010) 78 *Fordham Law Review* 2843–72.

[9] Very simply put, the best effort principle means that there is no guarantee that the data packets transmitted over the Internet actually reach the addressee, ie there is no guarantee of quality. It is, among other features, thanks to this 'simplicity' that the Internet owes its rapid development.

The main rationales for discrimination

Those who argue in favour of a regulatory intervention aiming to maintain the openness of the Internet want to forbid IAPs from discriminating between certain online services, applications or content. Before dealing with the regulatory initiatives, which is the core object of this article, it is worthwhile to examine the motivation of those IAPs (mainly mobile IAPs) who block, slow down or throttle certain data transmitted on their network.

The protection of revenue sources from voice and SMS services

Besides providing Internet access, mobile IAPs also provide their subscribers with voice and text services, the revenues from which, although shrinking, still account for a major part of their total revenues. With the emergence of over-the-top (OTT) providers such a Skype and Viber, which offer some voice services for free, mobile service providers feel that this important source of their revenues is threatened. Yet, in the future we may expect an exponential proliferation of such Voice over Internet (VoIP) services. In Hungary, for example, according to the most recent market research data, twenty-eight percent of smartphone and tablet users use Viber and thirty-one percent use Skype.[10]

In other words, such IAPs feel that these new OTT services threaten their retail voice and SMS revenues, and therefore some of the European IAPs restrict access to these services. In relation to this, the Commission—jointly with BEREC—published a report analysing the traffic management practices of IAPs.[11] The report pointed out that the content restrictions applied by European Internet access providers are most often directed against peer-to-peer (P2P) and VoIP applications. Of the 115 mobile Internet service providers participating in the survey, 41 IAPs (35.6 percent) replied that they restrict VoIP applications either continuously or periodically.

The conflict between service providers generating massive volumes of data traffic and Internet access providers

The other reason that some IAPs may restrict certain online content derives from a conflict of interest between IAPs and online content providers. To put it very simply, certain IAPs may restrict some online services in order to force the providers of the latter to pay for the use of their networks. This type of restriction is much less frequent than

[10] National Media and Infocommunications Authority, '2013 Online Market Research on Consumer Internet Usage'.

[11] BEREC, 'A View of Traffic Management and Other Practices Resulting in Restrictions to the Open Internet in Europe: Findings from BEREC's and the European Commission's Joint Investigation' 29 May 2012, Bor (12) 30.

blocking VoIP or P2P applications; however, its effect on subscribers' Internet access is similarly significant. The Internet is a typical two-sided market, where the Internet access provider is the 'platform' that enables interaction between the two groups, ie the two sides of the market.[12] In the case of the Internet, the Internet users constitute one side of the market and the online content, application, and service providers constitute the other.

In a two-sided market, service providers that take the role of platform may, in theory, realise their revenues from both sides of the market. The respective shares of the two sides in these revenues depend on many factors; however, it may be said that this is the result of the business decision of the service provider acting as a platform. However, in the case of the Internet, due to the principle of network neutrality, this is—at least theoretically—not so, as the principle forbids IAPs from charging 'data termination fees'. Theoretically, since these kinds of agreements have emerged in recent years without any regulatory supervision.

In this respect, IAPs have long since argued that this unilateral cross-financing (ie that they recover all their costs from the users' side) is not sustainable, especially since they are forced to invest heavily in the development of their networks due to the increasing volume of data traffic.[13] On the other hand, online service providers argue that it is because of their services that Internet users are willing to pay more for the Internet access service, and so making them pay to access users would be unjustified.[14] This difference of opinion has already led to several open conflicts, and the losing party was always the user.

One of the most notable such cases was the conflict between the French Iliad and Google. In Autumn 2012 many subscribers to the fixed-line IAP Free, a member of the Iliad Group, complained that YouTube, the video sharing portal belonging to Google, was inaccessible. On 22 November 2012 the French telecommunications authority (Autorité de régulation des communications électroniques et des postes – ARCEP)

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[12] For more on two-sided markets, see I Fiedler, 'Antitrust in Two-Sided Markets: Is Competition Always Desirable? The Case of a Satellite Broadcasting Network with Monopoly Power' (2010) Berkeley Program in Law and Economics, Working Paper Series 1, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1715982>; M Armstrong, 'Competition in two-sided markets' (2006) 37 *RAND Journal of Economics* 3, 668; for further details on economic analysis of charging on two-sided markets see J Tirole and J-C Rochet, 'Two-Sided Markets: An Overview' Institut d'Economie Industrielle working paper, 1–44; see also EG Weyl, 'The Price Theory of Two-Sided Markets' (2010) 100 *American Economic Review* 1642–72; N Economides, 'Net Neutrality, Non-Discrimination and Digital Distribution of Content Through the Internet' (2007) 4 *Journal of Law and Policy for the Information Society* 2, 209–33.

[13] AT Kearney, A Viable Future Model for the Internet: Investment, Innovation and more Efficient Use of the Internet for the Benefit of All Sectors of the Value Chain' <http://www.atkearney.com/documents/10192/4b98dac5-0c99-4439-9292-72bfcd7a6dd1>, accessed 10 March 2014, as well as a critique of the former: R Kenny, 'Are Traffic Charges Needed to Avert a Coming Capex Catastrophe?' (2011) <http://www.commcham.com/storage/publications/TrafficChargesATKReview.pdf>, accessed 10 March 2014.

[14] See eg B Williamson, D Black, and T Punton, 'The Open Internet: A Platform for Growth' (2011) <http://skypeblogs.files.wordpress.com/2011/10/plum_october2011_the_open_Internet_-_a_platform_for_growth.pdf>, accessed 10 March 2014.

launched an administrative procedure to investigate the case.[15] Prior to the closure of the investigation, Free further 'upped the *ante*'. On 5 January 2013 it remotely installed a piece of software on the subscribers' modems which automatically blocked all online advertisements. Obviously, this move primarily infringed upon the interests of Google, which obtains the majority of its revenues from online advertising, but Free had trodden on the toes of many other actors, too. The storm of indignation was such that the minister responsible for infocommunications immediately summoned the representatives of Google and Free. Under pressure, Free lifted the ban on online ads after three days, on 8 January. Following these developments the public eagerly awaited ARCEP's next move; however, ARCEP's decision of July 2013 only stated that the reason for YouTube's inaccessibility had been the shortage of available network capacity, and that Free had not discriminated between the various contents.[16] The authority overlooked the fact that Free had blocked online advertisements for five days. There are signs that suggest a scenario whereby Free wished to force Google to pay for the use of its network; however, Google had presumably refused to do so. This assumption is also supported by a remark made by Stéphane Richard, President and CEO of France Télécom, in a television interview according to which 'it may be nice to block online advertisements; however, this doesn't just hurt Google, but many others, too.'[17]

In Norway, NextGenTel, the largest ISP, decided to significantly reduce capacity to the national public broadcaster NRK. The broadcaster had reportedly declined to pay for the additional capacity NextGenTel said was required to carry the traffic requested by its customers. NRK reacted by putting a notice on its website stating that the decrease in performance was due to a decision by NextGenTel. In reply to customer complaints NextGenTel than reinstated the original capacity between the two networks.[18]

In Germany there was heated argument following Deutsche Telekom's announcement in spring 2013 that it intends to introduce a data traffic cap on its fixed IAP service as of 2016. Most of the criticism was directed at the fact that, once the data limits provided in the contract were applied, only Deutsche Telekom's own online TV service, Entertain, would have been accessible at the same quality as previously, while all other services, including Entertain's competitors, would have become virtually inaccessible due to the

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[15] Décision n° 2012-1545 de l'Autorité de régulation des communications électroniques et des postes en date du 22 novembre 2012 portant ouverture, en application de l'article L 32-4 du code des postes et des communications électroniques, d'une enquête administrative concernant diverses sociétés relative aux conditions techniques et financières de l'acheminement du trafic.

[16] Décision n° 2013-0987 de l'Autorité de régulation des communications électroniques et des postes en date du 16 juillet 2013 clôturant l'enquête administrative ouverte en application de l'article L 32-4 du code des postes et des communications électroniques, relative aux conditions techniques et financières de l'acheminement du trafic entre diverses sociétés.

[17] See <http://www.bfmtv.com/economie/stephane-richard-laffaire-free-est-un-coup-communication-425566.html>, accessed 6 March 2014.

[18] Connected Televisions, convergence and emerging business models, OECD Digital Economy Papers No 231, 41, <http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/ICCP/CISP(2013)2/FINAL&docLanguage=En>, accessed 10 March 2014.

decrease in the speed of data traffic. BnetzA, the German regulatory authority, ordered an investigation, in the course of which Deutsche Telekom clarified that, rather than its own service only, all services whose providers were willing to pay Deutsche Telekom for this would remain accessible after the introduction of the data limit. In respect of this, however, BnetzA remarked that, even so, the discrimination would remain since the competing online service providers would be required to pay a wholesale price for guaranteed quality access, while it would be granted to Entertain free of charge. The investigation did not answer all the questions; however, BnetzA indicated that it would be ready to ensure adherence to the requirement of equal treatment, even by imposing regulations, if necessary.[19]

The United States: Ensnared by an issue of powers

The dichotomy of telecommunication and information services

The common carrier duties

The development of the electronic communications markets of the US took a different route from that of the European markets.[20] While until the mid-eighties in Europe the paternalistic outlook, according to which the market should be replaced by the state, prevailed, in the United States it was the normative theory of regulation that was prevalent. According to this, state intervention into the operation of the markets is only necessary if the market is unable to deliver the welfare effects identified with it and does not provide efficiencies.[21] Accordingly, by contrast with Europe, in the United States a private monopoly service provider (AT&T) ruled the market rather than state monopolies. Since in this situation the federal state was not able to enforce the public interest on the telecommunications market directly, it had to achieve this goal via normative regulation.

This was one of the reasons that the Communications Act,[22] a milestone in the history of the regulation of telecommunications, had been promulgated as early as 1934, providing for the duties of the so-called 'common carrier' service providers. Common carrier is the collective name of services that were provided by a monopolistic service provider and were related to an important public interest (telephony, rail, air, and road

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[19] Report of the Bundesnetzagentur of 14 June 2013 concerning the rate changes with Deutsche Telekom AG implemented for Internet access as of 2 May 2013, <http://www.bundesnetzagentur.de/SharedDocs/Downloads/EN/BNetzA/Areas/Telecommunications/TelecomRegulation/NetNeutrality/Report_BNetzA_NN.pdf?__blob=publicationFile&v=1>, accessed 8 March 2014.

[20] A Lapsánszky, *A hírközlési közszolgáltatási-közigazgatási rendszerének fejlődése és szerkezeti reformja. A hírközlés fejlődését és liberalizációját meghatározó „fejlett távközléssel rendelkező" piacgazdaságokban* (HVG-ORAC 2009) 126–42.

[21] A Tóth, *Az elektronikus hírközlés és média gazdasági szabályozásának alapjai és versenyjogi vonatkozásai* (HVG-ORAC 2008) 22.

[22] Communications Act of 1934, 48 Stat 1064 (codified as amended at 47 USC 151 (2000)).

freight). On the basis of this public interest, extra obligations were imposed on *common carrier* service providers, of which the most important from the aspect of our topic was the duty to ensure discrimination-free access to the service.[23] By contrast, the so-called *private carriers* had no such obligations and were free to decide which users or, perhaps, competing enterprises they wished to provide with access to their networks.

The differentiation between basic and enhanced services

With the development of computing and the Internet, by the 1970s the conceptual discrimination between the various services had become increasingly necessary, as it would have been unreasonable to impose *common carrier* duties on all new services that did not simply consist of classic data transmission. The basic question was how to classify the new 'hybrid' services that consisted of both data processing and transmission, ie that featured an 'intelligent' component besides the automatism.[24] It was the Federal Communications Commission (FCC) that attempted to provide an answer to this question in the so-called II. Computer Inquiry issued in 1980.[25]

The new regulations distinguished 'basic services' that fell under the *common carriage* duties from 'enhanced services'. The FCC classified all services that provided 'pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information' as basic services.[26] Pure transmission capability referred to information (voice) transmission, where the information transmitted was only modified in that the human voice was converted to analogue signals on the speaker's side then back to the human voice on the recipient's side without performing any other computing operations on it. By contrast, enhanced services encompassed those services that actively modified the transmitted information via applications, codes, and protocols.[27] Accordingly, the storage of voice and data, the switch between different network protocols (in order to make information accessible from different networks), email, and VoIP services as well as[28] the various newsgroup services qualified as enhanced services.[29] To put it simply, all services that contained elements additional to the transmission of information were classified as enhanced services.

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[23] The regulation of telephone services was especially called for, since until 1984 telephony in the US had been controlled by a monopoly. See RB Chong, 'The 31 Flavors of Net Neutrality: A Policymaker's View' (2007) 12 *Intellectual Property Law Bulletin* 149.

[24] R Cannon, 'The Legacy of the Federal Communications Commission's Computer Inquiries' (2003) 55 *Federal Communications Law Journal* 2, 182.

[25] Amendment of s 67.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Doc No 20828, Final Decision, 77 FCC 2d 384 (1980), for more details on FCC's Computer Inquiry decisions, see D Sashkint, 'Failure of Imagination: Why Inaction on Net Neutrality Will Result in a *De Facto* Legal Regime Promoting Discrimination and Consumer Harm?' (2007) 15 *Commlaw Conspectus* 275–77.

[26] ibid 416.

[27] ibid 420.

[28] Stevens Report, Federal-State Joint Board on Universal Serv, Report to Congress, 13 FCCR 11501, para 78, 11 Comm. Reg (P&F) 1312 (1998).

[29] Cannon (n 24) 386.

As a result of this conceptual distinction, the common carriage duties listed under Title II of the Telecommunications Act were only applicable to basic services but not to enhanced services. The reason for the deregulation of enhanced services, as declared by FCC, was that it would be unreasonable to impose duties upon a computing market that was *in statu nascendi* and constantly changing,[30] and that the Commission intended to make it clear which services belong under the scope of the common carrier regulation.

The distinction between telecommunication and information services

The Telecommunications Act of 1996 that amended the Communications Act of 1934[31] adopted the conceptual dichotomy introduced by the Second Computer Inquiry, with the difference that it referred to basic services as 'telecommunication' services and to enhanced services as 'information' services.

The Act defines telecommunication services as such publicly offered services as consist of the transmission of the information chosen by the user between the end-points specified by the user without altering the information transmitted.[32] By contrast, all services that enable the processing of the information using a telecommunication service qualify as information services.[33] Similarly to basic services, telecommunication services belong under Title II of the Telecommunications Act, ie the common carrier duties are applicable to them, while information services—similarly to enhanced services—are exempt from such duties. As such, classification was an important issue with regard to new services. Since the Act had not provided an exact and comprehensive definition, the classification of the various individual services was left to the FCC and the courts.

Internet access service as a telecommunication service

It was in the Advanced Service Order issued in 1998 that the FCC[34] first dealt with the question of the service classification of xDSL Internet access service. With reference to the decision of the Second Computer Inquiry, the FCC established that the packet switched data transmission technology that is the basis of the operation of the Internet provides pure data transmission without modifying the content of the information transmitted. Accordingly, an xDSL technology-based Internet access service is a telecommunication service, to which common carrier duties apply.[35] Although it is true that Internet service providers offer consumers not only Internet access, but also several

30 Second Computer Inquiry (n 26) 434.

31 Telecommunications Act of 1996, Pub L No 104, 110 Stat 56 (8 February 1996).

32 ibid s 2, (47 USC 152) paras 43 and 46.

33 ibid para 20.

34 Deployment of Wireline Services Offering Advanced Telecommunications Capability, 13 FCCR 24012, 24014, 24029–30 (1998, Advanced Service Order).

35 ibid 35.

other services that qualify as information services,[36] in respect of this the FCC argued, however, that the two different types of services should be treated separately and belong to different categories.[37] This argument is highly significant because—as we shall see later on— only four years later the FCC deregulated Internet access services on the basis of a contradictory argument.

Two years after the adoption of the Advanced Service Order, the Ninth Circuit Court of Appeals had to decide the issue of whether an Internet service provided over a cable network qualified as a telecommunication or an information service.[38] According to the position of the court, Internet access service provided via a cable modem is, in general, an information service, given the online services offered by the provider, such as email. However, the position of the court coincided with that of the FCC formulated in the Advance Service Order, according to which the activity of the provider that consists of the transmission of the information specified by the user clearly qualifies as a telecommunication service.

As a result, after the publication of the Telecommunications Act, the transmission service (or, in today's language, the Internet access service) of Internet service providers was treated by both the FCC and the courts as distinct from their other online services, which clearly qualified as information services. Consequently, all Internet access providers were required to refrain from discrimination in respect of the online data traffic passing through their networks, thereby conforming to the principle of net neutrality. It is also important to emphasize, however, that at the time violations of this principle were rare, therefore this was not in the focus of the regulation.

The change of paradigm

FCC deregulates the cable network-based Internet access service

In 2002, the FCC in its Cable Broadband Order[39] had reached a conclusion contrary to its earlier positions and contended that an Internet service provided over a cable network qualifies as an information rather than a telecommunication service and so the *common carriage* obligations do not apply to it. Citing an earlier decision based on similar arguments,[40] the FCC specified the basis of the reclassification, which was somewhat surprising in the light of the Advanced Service Order. The FCC argued that, from the aspect of the consumer, the cable service provider provides a unified service that contains several different service elements, including *inter alia* data transmission, email service,

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[36] eg the email service, browser, etc offered by the service provider.

[37] Advanced Service Order (n 34) 36.

[38] *AT&T Corp. v City of Portland*, 216 F3d (9th Cir 2000).

[39] Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, FCC 02-77 (2002, Cable Broadband Order).

[40] See Federal-State Joint Board on Universal Service, 13 FCCR 11501, PP BM, CB (1998).

and web-browsing. According to the position of the FCC, these services should be assessed as a single unit, since consumers cannot use them separately. From this approach it followed that Internet service—including the 'access component' was an information service.[41] The objective of the FCC was to support the explosive development of the Internet on the basis of the assumption that a reduction in the regulatory burdens would increase investment and innovation in the market of competing online services.[42] In my opinion the decision—which was, and still is, much debated by the professional public—deserved criticism from several aspects.

During the public consultation about the draft order, several opinions were received that criticised the fact that the FCC does not distinguish the data transmission service on the network of the cable service provider as a telecommunication service from the other (information) services provided by the same IAP; for example, the provision of email accounts.[43] The FCC rejected these arguments, stating that just because the service provider performs data transmission, this cannot qualify as an independent telecommunication service on the basis of the Telecommunications Act, since the conjunctive element of the concept defined in the Act is that the service is provided to the public and—at least in those days—the FCC did not know of any cable service providers that sold their network access service separately.[44]

In my opinion, the interpretation, according to which the services of Internet service providers may only be treated as a single unit simply because they are not available to consumers separately, is incorrect and misleading. This approach misses the fundamental feature of the Internet that allows the distinction between the purely technical service, providing access to the open Internet, from the other online services that are at a higher level than the so-called 'network layer'.[45] Actually, there are two different markets here, and the technical Internet access service is a necessary input for the service providers operating in the online services market. The fact that the cable service provider is present in both markets (ie that besides the access service it provides other online services as well) does not preclude consumers—although they use the cable service provider's network to access the Internet—from using other services that compete with the online services of the cable service provider for, eg browsing or email. If we accept that the cable service provider simultaneously operates in two different markets with its comprehensive service consisting of several service elements, it may also seem reasonable that the activities performed in the different markets should be assessed separately in respect of whether they qualify as telecommunication or information services. In respect of this, the FCC argued that '[it] invites us, in essence, to find a

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41 Cable Broadband Order (n 39) 37.

42 Separate Statement of Commissioner Kathleen Q Abernathy, GN Doc No 00-185, ibid.

43 ASCENT, OpenNET, EarthLink, quoted by Cable Broadband Order (n 39) n 154.

44 ibid 40.

45 It is worthwhile to note here—if only because of the coincidence in time—that in the European Union it was then (in 2002) that the European Parliament and the European Council adopted the so-called Framework Directive for electronic communications (2002/21/EC), one of the fundamental principles of which was the distinction between content and transmission in regulation.

telecommunications service inside every information service, extract it, and make it a stand-alone offering to be regulated under Title II of the [Telecommunications] Act. Such radical surgery is not required.'[46]

At the time, the FCC had no remote notion of how justified this would have been. We may, of course, excuse the FCC by saying that in 2002 nobody could foresee that certain Internet access providers would abuse their role of gatekeeper and restrict access to certain online content, applications, and services; however, the other effects of the decision are and were evident, irrespective of the times, on the market.

As a result of the judgement, on the basis of the Advanced Service Order published four years previously and still in effect in 2002, xDSL-based Internet access qualified as a telecommunication service, while the service provided by cable Internet providers qualified as an information service. The FCC justified this by saying that, with regard to 'dial up' Internet services accessible via xDSL technology, the consumer is able to distinguish more easily between the service providing the telephone line and the information service provided through it. Unfortunately, this 'esoteric' reasoning fails to explain how the differentiated regulatory burden resulting from the decision is able to promote the development of infrastructure-based competition, which was also one of the FCC's declared objectives in the order.[47]

In fact several members of the FCC's own council disagreed with the decision. According to commissioner Abernathy, 'Cable modem and DSL providers appear to be competing in a converged broadband marketplace … I therefore believe that it would be inappropriate for the Commission not even to consider imposing access obligations on cable operators.'[48] Furthermore, it is also worthwhile to highlight the dissenting opinion of commissioner Michael J Copps who, in the light of the twelve years that have passed since, may clearly claim to have had foresight. Copps asked, with unconcealed irony, how the regulations that had, for many years, served the creation of competition, suddenly become an obstacle to that competition.[49] Correctly predicting the future, he drew the conclusion: 'Without [the access] requirement the Internet—which grew up on openness—may become the province of dominant carriers, able to limit access to their system to all but their own ISPs.'[50]

The test of the paradigm shift before the Supreme Court

In 2003 several service providers lodged appeals against the Cable Broadband Order. The cases were united and brought before the United States Court of Appeals for the Ninth Circuit of the District of Columbia.[51] The fundamental issue to decide was whether the court should accept the FCC's classification or follow the jury's case law, which was

[46] Cable Broadband Order (n 39) 43.
[47] ibid.
[48] Separate Statement of Commissioner Kathleen Q Abernathy (n 42) 71.
[49] Dissenting Statement of Commissioner Michael J Copps, GN Doc 00-185, 1.
[50] ibid 2.
[51] Columbia 9th Circuit, *Brand X Internet Services v FCC*, 345 F3d 1120, 1130–31 (9th Cir 2003).

contrary to the FCC's position. This is because, as we have detailed above, prior to the FCC's decision in the *City of Portland* case,[52] the court had qualified cable Internet access as a telecommunication service, too. The court of appeals was therefore in a difficult situation, as it had to decide on the validity of the FCC's interpretation on the basis of its substance.

In issues of legal interpretation, when the court has to decide upon the validity of a regulatory authority's interpretation of the law, the decision of the Supreme Court in the *Chevron* case[53] provides directions. In this, the supreme tribunal stated that, if the formulation of the law is not unambiguous and the interpretation of the regulatory authority may be regarded as 'reasonable', the court may not take a position different from that of the regulatory authority, even if it believes that there could be a better interpretation of the law.[54] In order to decide whether the interpretation of the regulatory authority was reasonable, the Supreme Court used a two-step test. First, it had to be decided whether Congress had clearly formulated the purpose of the regulation in question.[55] If so, nothing else had to be done, since both the court and the regulatory authority would have to adhere to this interpretation. If, however, Congress did not provide clear directions, the court would then have to examine whether the legal interpretation of the regulatory authority was permissible and conformant to the spirit of the law. If the answer was yes, the court would have to adhere to this interpretation.[56]

In the *Brand X* case, however, the application of the test formulated in the *Chevron* case[57] was complicated by the fact that there already existed a court decision contrary to the position of the regulatory authority. The court thus had to decide whether to apply the *Chevron* test or to assess the issue on the basis of precedent. Finally the court chose the latter option and maintained, on the basis of the *stare decisis* principle, its position in the *Portland* case, according to which Internet access providers qualified as telecommunication rather than information service providers.

In 2005, the case was brought before the Supreme Court, which disagreed with the decision of the court of appeals to decide the issue on the basis of precedent rather than the *Chevron* test.[58] The Supreme Court stated that the earlier legal interpretation of a lower level court may only prevail over the legal interpretation of the regulatory authority if judicial case-law clearly indicates that its interpretation is the only acceptable one, rather than just one of several acceptable interpretations.[59] Since, however, the situation

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[52] *AT&T* (n 38).

[53] *Chevron USA, Inc v Natural Res Def Council*, 467 US 837 (1984).

[54] ibid 837.

[55] ibid 865–66.

[56] ibid 843–44.

[57] For more details on the application and background of the *Chevron* test, see CR Kelly, 'The Brand X Liberation: Doing Away with Chevron's Second Step as Well as Other Doctrines of Deference' (2010) 44 *University of California Davis Law Review* 158–77.

[58] Supreme Court, *National Cable & Telecommunications Association v Brand X Internet Services*, 545 US 967, 980 (2005).

[59] AL Signaigo, '*National Cable & Telecommunications Association v Brand X Internet Services*: Resolving Irregularities in Regulation?' (2007) 5 *Northwestern Journal of Technology and Intellectual Property* 385, 389.

was not so clear-cut, the Supreme Court applied the *Chevron* test to decide whether the FCC's classification was valid or not.

During the application of the test described above, the supreme judicial body found that the law does not provide an unambiguous formulation for the decision of the issue, therefore—proceeding to the second question—it examined whether the FCC's argument was compatible with the spirit of the law.[60] In respect of this, the Supreme Court stated that the FCC's position was an acceptable interpretation of the law, although not the only one. As an example, the court highlighted the FCC's argument claiming that cable Internet access service cannot be understood as a telecommunication service, since a mandatory element of the latter is that it must also be made accessible separately, which is something that was not characteristic of the retail offerings of the time. The Supreme Court compared this to the sale of a motor-car, where no one would assume that the seller was offering the car body and the engine separately.[61] However, the court did not state that the FCC was right beyond all reasonable doubt, but only that its position was compatible with the text of the law. On the basis of the *Chevron* test, this was sufficient to decide the case and to strike down the decision of the court of appeals.

The deregulation of the other transmission technologies

The Cable Broadband Order, supported by the confirmatory decision of the Supreme Court, caused significant waves. The primary reason for this was not the fact of deregulation, as at the time few could have foreseen the extent to which certain Internet access providers would abuse their situation and restrict the data traffic passing through their networks. Rather, the main cause of the uproar was that the regulatory burdens imposed on cable Internet access providers competing in the same market[62] were significantly lower than those imposed on service providers using different technologies. The FCC also noted that this situation resulted in a severe distortion of competition; therefore, just one month after the decision of the Supreme Court in the *Brand X* case*,* it issued a decision on the classification of all fixed IAP services as an information service,[63] and, by 2007 it had similarly deregulated the provision of wireless[64] and other technology Internet access services.[65]

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[60] *Brand X* (n 58).

[61] ibid 989. Formulating a minority opinion, however, Scalia J offered a different analogy, one which, in my opinion, fits the Internet market better. Rather than the sale of a car, he compared Internet access service to a pizzeria, where, besides pizza, one can also order home delivery. Here the two services are much more distinct, highlighting the problem of treating them as a single unit.

[62] eg the obligation to contribute to the universal services.

[63] Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 FCCR 14853, 14862 (2005).

[64] Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks, 22 FCCR 5901 (2007).

[65] United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service, 21 FCCR 1321 (2006).

The position of the FCC: The open Internet is not endangered, as the Commission is able to regulate despite deregulation

Simultaneously with the decisions enabling deregulation, there was a growing number of those who perceived a serious risk that terminating the possibility of state intervention in the Internet access market would not strengthen innovation and competition, but, on the contrary, would surrender control over market actors who were not only interested in, but also capable of, restricting freedom of speech over the Internet. At the time, the FCC reacted to these qualms with confidence, saying that 'Should we see evidence that providers of telecommunications for Internet access or IP enabled services are violating these principles, we will not hesitate to take action to address that conduct.'[66]

To confirm this—on the same day it passed its decision on the deregulation of DSL-based Internet access providers—it issued a statement (Internet Policy Statement)[67] in which it stated that it would be able to take action against any conduct of Internet service providers violating net neutrality, despite the fact that they do not qualify as common carrier service providers. As proof of this it cited Title I Article 1 of the Telecommunications Act, which states that the FCC may impose additional obligations on interstate and foreign communications services on the basis of its ancillary jurisdiction. Besides establishing jurisdiction, the policy statement also laid down four fundamental principles, the defence of which the FCC was committed to. On the basis of this, Internet users are entitled to:

- access the lawful Internet content of their choice;
- run applications and use services of their choice, subject to the needs of law enforcement;
- connect their choice of legal devices that do not harm the network;
- competition among network providers, application and service providers, and content providers.[68]

The FCC thus appeared to be confident that it would be able to enforce these fundamental principles, despite the fact that Internet access providers now qualified as information service providers and were, consequently, exempt from such obligations as, for example, the principle of equal treatment. As it had already expounded in the Cable Broadband Order,[69] the FCC expected that it would be able to take action against information services on the basis of the general legal provisions from which its jurisdiction derived. This assumption, however, regularly failed before the various judicial fora, as we shall see later on. Through deregulation the FCC had thus unwittingly set itself a trap, from which it has so far not been able to escape.

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66 Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, 27.
67 Internet Policy Statement, 05-151. 23 September 2005.
68 ibid s II, 2–3.
69 Cable Broadband Order (n 39) 77–79.

Shut the stable door after the horse has bolted: Attempts at regulation

The Comcast *case*

It was not much later that the fears of those critical of the FCC's policy were realised. In 2005 the Internet access provider Madison River Communications started to restrict its customers' access to VoIP services, as a result of which the provider of VoIP services, Vonage, turned to the FCC. Within a month the authority concluded an agreement with Madison River Communications, which ended the block and 'voluntarily' paid a fine of USD 15,000.[70] AOL Time Warner blocked emails containing the URL www.dealaol.com. It is an interesting coincidence that www.dealaol.com openly attacked AOL Time Warner's pricing policy.[71]

In August 2007 a portal specialising in the BitTorrent Internet protocol[72] reported that several of the close to 13 million customers of Internet access provider Comcast experienced problems with BitTorrent-based file sharing or found it to be inaccessible.[73] Comcast consistently denied the charges; however, over 20,000 consumer complaints were received by the FCC[74] and the blocking was proven by independent measurements, too.[75] Under public pressure Comcast's vice-president admitted that in some cases they delayed traffic, although he did not admit the act of blocking. As a result, Free Press and Public Knowledge filed a complaint with the FCC, requesting the timely prohibition of Comcast's conduct.[76] The FCC established its jurisdiction in the case and ordered Comcast to publish its traffic management practices following the service provider's pledge to change its practice. Although the FCC—taking into account Comcast's

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[70] DG Barry, 'The Effect of Video Franchising Reform on Net Neutrality: Does the Beginning of IP Convergence Mean that it is Time for Net Neutrality Regulation?' (2007) 24 *Santa Clara Computer & High Technology Law Journal* 432.

[71] D Helling, 'Net Neutrality and Preserving Freedoms of the Internet' (2007) 7 *Law & Society Journal UCSB*, 58.

[72] BitTorrent is a p2p (peer-to-peer) based file-sharing protocol that is capable of down- and uploading data shared by others. The advantage of the protocol is that during downloads the user is able to exploit the upload bandwidth, too, thereby accelerating download speeds for other users. The solution is primarily used for the transmission of large data files and to decrease the load on low-bandwidth servers. In respect of the software it is important to note that we are not speaking about the banned, illegal file sharing portal, but a principle or method of data sharing that allows the sharing of any (legal) data over the Internet.

[73] M Reardon, 'Comcast Denies Monkeying with BitTorrent Traffic' (*CNET*, 2007) <http://news.cnet.com/8301-10784_3-9763901-7.html> accessed 12 February 2014; see also CE Smith, 'Net Neutrality, Full Throttle: Regulation of Broadband Internet Service Following the Comcast/Bittorent Dispute' (2010) 50 *Santa Clara Law Review* 574–75.

[74] B Field, 'Net Neutrality: An Architectural Problem in Search of a Political Solution' (2010) *Asper Review of International Business and Trade* 197.

[75] P Svensson, 'Comcast Blocks Some Internet Traffic' *Washington Post*, 19 October 2007 <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/19/AR2007101900842.html>, accessed 12 February 2014.

[76] Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, 1 November 2007, <http://www.publicknowledge.org/pdf/fp_pk_comcast_complaint.pdf>, accessed 10 March 2014.

willingness to cooperate—did not apply any severe sanctions,[77] Comcast contested the FCC's decision, claiming that the FCC had no jurisdiction over them as information service providers.

The FCC based its jurisdiction on Article 4i of Title I of the Telecommunications Act, which declares that the FCC may take all necessary measures in the interest of performing its tasks, provided that such measures are not contrary to the provisions of the Telecommunications Act. This rule provides the basis of the FCC's ancillary jurisdiction, on the basis of which the FCC found itself justified to prohibit Comcast's conduct, which had constituted discrimination against certain information services.

Central to the examination of the court was the question of whether, in the given case, the FCC was justified to rely on this special jurisdictional rule. The Supreme Court had dealt with the conditions of the application of ancillary jurisdiction several times earlier,[78] the conclusion of which decisions was drawn by a lower level court in the *American Library* case.[79] Accordingly, the FCC may exercise ancillary authority only if 1) the Commission's general jurisdiction granted under Title I of the Communications Act covers the regulated subject and 2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities.[80] Comcast itself did not dispute[81] that the first condition was satisfied since, on the basis of Article 2 of Title I of the Telecommunications Act, all landline and mobile interstate and foreign communication services belong under the scope of the Act, including information services as well. The central issue, therefore, was whether the FCC had any explicit legal authorisation that might be reasonably regarded as the basis of the regulation in question.

To demonstrate this, the FCC cited several legal provisions, two of which were general political declarations while one was a somewhat more specific legal authorisation. The court first reviewed the political declarations as the grounds of the establishment of jurisdiction. The FCC primarily referred to Article 230b, which declares that 'It is the policy of the United States 1) to promote the continued development of the Internet, 2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services.'[82] According to the position of the FCC, Comcast's conduct had endangered both objectives, therefore the action was justified. The other 'support' of the FCC was section 1 of the Telecommunications Act, in which Congress lists the reasons for the establishment of the FCC, one of which is the provision of 'fast

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[77] Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, 23 FCCR 13, 028 (2008).

[78] *United States v Southwestern Cable Co*, 392 US 157 (1968); *United States v Midwest Video Corp*, 406 US 649 (1972); and *FCC v Midwest Video Corp*, 440 US 689 (1979).

[79] *American Library Association v FCC*, 406 F3d 689, 692 (DC Cir 2005).

[80] ibid 691–92.

[81] *Comcast Corporation v Federal Communications Commission and United States of America*, No 08-1291, 6 April 2010, II.

[82] Telecommunications Act (n 30) s 230 (47 USC 230).

and effective' communication services.[83] In response to this, Comcast's position was that neither article provided grounds for the FCC's ancillary jurisdiction, since these were simply *political declarations* of Congress, which cannot be regarded to be substantive parts of the law and no specific jurisdiction may be derived from them for the regulatory authority; as such, the FCC's argument did not meet the second criterion of the *American Library* test. By contrast, the FCC held that the political declarations in the act are equally substantive parts of the law and may, therefore, serve as the grounds for the establishment of ancillary jurisdiction. To prove this, the FCC cited the *Southwestern Cable* and the *Midwest Video* cases.[84]

The court differed from the reasoning of the authority since, according to its position in the cases cited by the FCC the court had approved the establishment of ancillary jurisdiction on the basis of the political declaration, although there was no legal authorisation stated expressly and clearly in the law to complement the political declaration. In respect of information services, however, these did not exist, therefore the FCC could not rightfully base its jurisdiction on the general objectives expressed in the act. The court pointed out the weak point of the FCC's argument: 'if accepted, it [the argument of the Commission] would virtually free the Commission from its congressional tether,' and it could derive practically any jurisdiction from the general political objectives.[85]

After declaring that jurisdiction may not be based on general political objectives if they are not accompanied by a specific legal authorisation, the court proceeded to examine the much more interesting issue of whether the jurisdiction of the authority might be derived from Article 706, also cited by the FCC. On the basis of the article of the Telecommunications Act referred to, 'The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans … by … measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.'[86]

The FCC argued that, in contrast with Articles 1 and 230, Article 706 constitutes a clear legal authorisation from which its jurisdiction may be derived. This position was also supported by a previous decision of the court passed in the *Ad Hoc Telecommunications Users Committee* case, which stated that 'the general and generous phrasing of Article 706 means that the FCC possesses significant, albeit not unfettered, authority and discretion to settle on the best regulatory or deregulatory approach to broadband.'[87]

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[83] ibid s 1 (47 USC 230).
[84] See n 55.
[85] *Comcast* (n 81) 23.
[86] Telecommunications Act (n 31) s 706a (47 USC 1302a).
[87] *Ad Hoc Telecommunications Users Committee v FCC*, 572 F3d 903, 906–07 (DC Cir 2009).

The Court, however, rejected the FCC's argumentation in this case, too. What is especially interesting is the manner in which the court did this, since it did not clearly declare that ancillary jurisdiction may not be based on Article 706. As the first step of its argumentation *tour de force*, in respect of the *Ad Hoc Telecommunications Users Committee* case, the court declared that in that case Article 706 had been complemented by a clearer legal authorisation and so the reference was not decisive. In the second step, the court turned an earlier, 1988 decision of the FCC against the FCC, as in the aforementioned Advanced Service Order the authority's opinion had been that no independent jurisdiction may be based on Article 706.[88] The circle was thus closed, with the FCC ensnared by its self-contradictory decisions, and the court struck down the decision against Comcast without clearly stating that the FCC may not set up ancillary jurisdiction based on Article 706 of the Telecommunications Act. As such, all the conditions were in place for the survival of the legal uncertainty surrounding the FCC's jurisdiction.

The Open Internet Order

Following the *Comcast* decision there were many who urged the Senate to take a position on the issue,[89] and although the legislators reviewed two draft laws related to net neutrality in 2008, in the end neither was adopted.[90] Following the *Comcast* decision the FCC found itself on the horns of a dilemma regarding whether it should redefine the concept of information services, removing Internet access services from their scope, or should it keep trying to establish its jurisdiction within the effective definition environment. Although in the light of the preceding events the authority had made moves in the direction of the apparently more logical first option,[91] in the end the FCC decided to take the more difficult road. Eight months after the *Comcast* decision, on 21 December 2010, the FCC's Council adopted the Open Internet Order,[92] which followed the direction specified by the earlier Internet Policy Statement, but laid down the guarantee rules intended to maintain the openness of the Internet in much greater detail. It is worthwhile to examine the order from both the procedural law aspect and the aspect of substantive issues. Naturally, given the preceding events and their consequences, the establishment of jurisdiction is especially important; however, it is also worth briefly summarising the FCC's rules on the open Internet, with special consideration to the fact that European decision makers have also clearly relied on them.

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[88] Deployment of Wireline Services Offering Advanced Telecommunications Capability (n 34) 77.

[89] CS Scala, 'The FCC's Role in Regulating Network Neutrality: Protection of Online Innovation and Business' (2012) 15 *Chapman Law Review* 440.

[90] CM Hayes, 'Content Discrimination on the Internet: Calls for Regulation of Net Neutrality' (2009) *Journal of Law, Technology & Policy* 2, 502.

[91] Framework for Broadband Internet Service, 25 FCCR 7866, 7867 (2010), for more detail, see LL Selwyn and HE Golding, 'Revisiting the Regulatory Status of Broadband Internet Access: A Policy Framework for Net Neutrality and an Open Competitive Internet' (2010) 63 *Federal Communications Law Journal* 1, art 8.

[92] Report and Order in the Matter of Preserving the Open Internet Broadband Industry Practices, FCC 10-201 (2010, Open Internet Order).

The regulations related to content

First of all it is important to highlight the *material scope* of the order. These are broadband Internet access services, which are defined by the FCC as publicly offered retail commercial services that enable the transmission and reception of data between the endpoints of Internet-connected networks, as well as the provision of other communication services.[93] Obviously, the FCC had at last recognised that Internet access service should be treated differently from the other online services that are used via the Internet.[94] As we have shown above, among other things it was the lack of distinction between these two fundamentally different types of services that led the FCC in 2002 to qualify infrastructure-based access service as an information service.[95] The concept defined in the order now covers the concept of 'telecommunication service', as defined by the Telecommunications Act[96] similarly to the concept of information service. Nevertheless, unfortunately the FCC failed to declare that Internet access service qualifies as a telecommunication service rather than an information service and therefore it falls under the scope of Title II of the Telecommunications Act.

The Order specifies four principles in the interest of protecting the openness of the Internet: (i) transparency, (ii) no blocking, (iii) no unreasonable discrimination, and (iv) reasonable network management.[97]

Rendering the network management practices of the service provider *transparent* increases (or may increase) consumer consciousness, which is one of the most important incentives for effective market competition. For this reason, the Order provides that '[a] person engaged in the provision of broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings.'[98] Given the fact that the network management practices used by service providers are extremely complex, it is of key importance that the information is available in plain language. In my opinion, another very important requirement is that the user should be able to 'meet' the message, rather than it being hidden somewhere in the text of the General Terms and Conditions. The Order strives to fulfil both conditions when it provides that the information is to be formulated in plain language[99] and should be made

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93 ibid 44.

94 For example, the order expressly excludes from its scope a service such as eg email, while—although for different reasons—it also excludes dial-up Internet service from its scope (Open Internet Order (n 92), 47 and 51).

95 See Cable Broadband Order (n 39) and s titled 'FCC deregulates the cable network-based internet access service' of the present paper.

96 Telecommunications Act (n 31) s 2 (47 USC 152), paras 43 and 46

97 Open Internet Order (n 92) 43.

98 ibid 54.

99 ibid 56.

public on both the service provider's homepage and at the points of sale.[100] The FCC, however, rejected regulating the publication of the information in undue detail to allow service providers a degree of flexibility in the manner of implementation.[101]

The second basic principle is the *prohibition of blocking*, according to which '[a] person engaged in the provision of fixed broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.'[102]

The third principle is the prohibition of unreasonable discrimination, in respect of which the FCC provides that 'according to its obligations related to the provision of the services, the provider of broadband Internet access services may not unreasonably discriminate between the data transmitted over the network.'[103] Although any intervention into the data traffic transmitted over the network is *per definitionem* discrimination, the FCC recognises the fact that, in order to ensure the efficient operation of the Internet, a certain degree of intervention into data traffic by the service providers is necessary (eg in the event of network saturation). The fourth principle, however, declares that such traffic management is only permissible if it is suitable and sufficient for attaining the legitimate objective, taking into account the architecture of the network and the technology applied.[104] Such legitimate objectives may be (i) the protection of the integrity and security of the network, (ii) the filtering of content unwanted by the user (eg spam), and (iii) the management of the effects of congestion.

The order formulated separate—and somewhat less strict—rules towards the providers of mobile broadband Internet access. The FCC justified this with reference to the fact that the mobile Internet market is a fast changing market in development, where market competition is stronger with regard to the fixed line network markets.[105] On the basis of this, the duty of non-discrimination does not apply to mobile service providers; however (with some differences), they may not block legitimate websites and applications either and are required to adhere to the rules of transparency.

The FCC also separately investigated the issue of whether it is permissible for IAPs to demand money from online service providers for the transmission of their data traffic to the end-users. According to the authority, such a practice could result in several negative consequences. The barriers to market entry would increase; the extent of innovation and investments would shrink in the online content provision market; IAPs could easily demand unduly high prices from small content providers and it is possible that they would reduce the quality of the service of those content-only providers who refuse to pay for transmission. On the basis of all this, the FCC prohibited prioritisation

100 ibid 57.
101 ibid 59.
102 ibid 63.
103 ibid 68.
104 ibid 82.
105 ibid 94–95.

against consideration.[106] Despite all this, and to some extent in contradiction with itself, the authority found it permissible for IAPs to provide certain online service providers so-called *special services* with guaranteed bandwidth against consideration. Similarly to IPTV, this service would be a closed system where the data would not be transmitted via best-effort based Internet access.[107] In their minority opinions, several council members have criticised this somewhat self-contradictory provision which provides a possibility to circumvent the law.[108]

Jurisdictional issues

As has been discussed above, in the *Comcast* case the court had struck down the FCC decision eight months earlier without taking a clear-cut position on the issue of whether the FCC may base a jurisdiction on Article 706 of the Telecommunications Act. All it said was that an earlier, 1998 decision of the FCC had been negative, and that this was binding over the authority. Although the court had left the issue open, the FCC nevertheless assumed a major risk when it specified Article 706 as the basis of the Open Internet Order, too, arguing that its different position of 1998 was not applicable in the given case.[109] The risky legal move initiated great debate, even within the Council of the FCC. Although ninety percent of decisions of the five-member body are passed unanimously,[110] this order was adopted with only a 3:2 majority. The FCC was under heavy external pressure, too, since several members of Congress had warned the Commission that it was overstepping its jurisdiction by intending to regulate Internet access service.[111] Republican congressmen even went as far as to threaten a cut of the FCC's budget if it adopted the order.[112]

The most heated debate in the commission was related to the basis of the FCC's jurisdiction. It is telling that, with the exception of the then-president of the FCC, Julius Genachowski, all four members criticised in parallel or dissenting opinions the fact that the authority based its jurisdiction on Article 706. According to council member Michael J Copps, who had finally voted in favour of adopting the order, 'we do not anchor ourselves on what I believe to be the best legal framework … I pushed—pushed as hard as I could—to get broadband telecommunications back where they belonged, under

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106 ibid 76.

107 ibid 112.

108 Concurring Statement of Commissioner Michael J Copps, 'Preserving the Open Internet' GN Doc No 09-191, 'Broadband Industry Practices' WC Doc No 07-52, 142, and Approving in Part, Concurring in Part Statement of Commissioner L Clyburn, 'Preserving the Open Internet' GN Doc No 09-191, 'Broadband Industry Practices' WC Doc No 07-52.

109 Open Internet Order (n 92), 117–123.

110 Dissenting Statement of Commissioner Robert M McDowel, 'Preserving the Open Internet' (n 108) 145.

111 ibid.

112 K Leghart, 'The FCC's New Network Semi-Neutrality Order Maintains Inconsistency in the Broadband World' (2011)12 *North Carolina Journal of Law & Technology* 214.

Title II of our enabling statute.'[113] A similar doubt may be noted in the concurring opinion of council member Mignon L Clyburn, who expressed his 'sincere hope' that the court would confirm their position.[114] Council member Robert M McDowel formulated his position much more bluntly, calling the FCC Machiavellian, for whom the end justifies the means. According to his opinion, 'the FCC is not only defying a court, but it is circumventing the will of a large, bipartisan majority of Congress as well. … I'm afraid that this leaky ship of an Order is attempting to sail through a regulatory fog without the necessary ballast of factual or legal substance. The courts will easily sink it.'[115] Council member Baker spoke in a similarly critical tone, recalling that, for close to ten years, the FCC's position had consistently been that no specific jurisdiction may be derived from Article 706, unless it is coupled with legal authorisation expressly granted by the law.[116]

Verizon v FCC

Given the above, it is hardly surprising that the Open Internet Order was also put to test by the Court. The Internet access service provider Verizon filed suit on 30 September 2011,[117] requesting the court to strike down the order on the basis of the following reasons (among others):

– the FCC cannot legally establish jurisdiction on the basis of Article 706 of the Telecommunications Act;
– if the FCC may nevertheless proceed on the basis of Article 706, the rules introduced with the Open Internet Order cannot be derived from the objectives defined in Article 706;
– if the rules introduced by the Order are nevertheless compatible with the objectives defined in Article 706, the FCC still has no right to introduce rules that are in conflict with any of the provisions of the Telecommunications Act. However, on the basis of Article 3 of the Act, only telecommunication service providers may be treated as *common carrier* service providers.

The judgement of the court of appeals published on 14 January 2014[118] conducted the investigation of the Order according to the order of the above points. The court discussed other issues as well; however, given the outcome of the case, we shall not review those in detail.

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[113] Concurring Statement of Commissioner Michael J Copps, 'Preserving the Open Internet' (n 108) 141–42.

[114] Approving in Part, Concurring in Part Statement of Commissioner L Clyburn, ibid 179.

[115] Dissenting Statement of Commissioner Robert M McDowel (n 108) 145, 149.

[116] Dissenting Statement of Commissioner Meredith A Baker, Preserving the Open Internet (n 107), 'Broadband Industry Practices' (n 108) 189.

[117] <http://op.bna.com/der.nsf/id/rtar8m7s6n/$File/Verizon%20Notice%20of%20Appeal%20%28without%20order%29%20-%20AS%20FILED%201355.pdf>, accessed 13 April 2014.

[118] *Verizon v Federal Communications Commission*, No 11-1355, 14 January 2014.

In respect of the much disputed jurisdiction based on Article 706, the court examined two questions: (i) whether the authority may diverge from its previous opinion and (ii) whether the FCC had provided a reasonable interpretation of the obscurely formulated Article 706. As a surprise to many, the court answered both questions affirmatively. According to its position, the judicial argument put forward in the *Comcast* case, according to which the FCC was bound by its previous interpretation, was incorrect, since any authority cannot be 'forever' bound by its position on an issue and may diverge from it, provided it provides adequate grounds for such divergence. According to the court, the FCC had done so.[119]

The other question related to the jurisdiction based on Article 706 was whether the authority's interpretation of the law had been reasonable because, if it had, the court may not strike it down.[120] The court answered yes to this too, recalling that Congress had provided the FCC with special regulatory powers on several occasions; as such, the court 'saw no reason to assume that in this instance this was not the case.'[121] The court did not share the position that Article 706 granted unlimited powers to the FCC either, as the article in question sets two conditions the regulation must meet: firstly, it must respect the personal scope as defined in Title I of the Telecommunications Act, and secondly, it must be capable of encouraging the development of telecommunication networks.[122]

After establishing that the FCC had, indeed, legitimately based its jurisdiction on Article 706, the court proceeded to examine Verizon's proposition, according to which the regulation adopted did not conform to the objective of encouraging network development as stated in Article 706. In respect of this the court argued that maintaining the open Internet increases innovation in the market for online content and services, which, in turn, increases the demand for improving the quality of the Internet. This demand, in turn, encourages competition between Internet access providers and directly promotes infrastructure-based developments. The court found the Verizon's argument unfounded in this issue, too, and ruled that the authority was right in respect of this as well.

Nevertheless, the Open Internet Order failed. The court agreed with the final argument of Verizon, which said that the regulation is contrary to the prohibition of the Telecommunications Act, according to which the *common carrier* duties, such as the obligation of equal treatment, are only applicable to telecommunications service providers, but not to information service providers. The formulation of the court was clear: if the Internet access service qualifies as an information service, any regulation that prescribes the duty of equal treatment for these service providers is illegal.[123] Consequently, the court struck down its provisions on the prohibition of Open Internet Blocking and the duty of equal treatment, but maintained the effect of the rules on transparency.

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119 ibid A 19.
120 *Chevron* (n 53) 842–843.
121 *Verizon* (n 118) 23.
122 ibid 26.
123 ibid s III, 45–46.

Has the time come to re-think the classification of Internet access providers?

The FCC regarded the fact that the court had clearly confirmed its jurisdiction based on Article 706 of the Telecommunications Act as a success. Its victory, however, was a Pyrrhic one, since the court had also made it clear that the FCC has no right to take action against IAPs in the name of the defence of the open Internet. After the initial reactions[124] even President Obama spoke in the interest of the defence of the open Internet. Barely a month after the judgement, Tom Wheeler, president of the FCC, made two things clear: (i) the FCC would not give up its intention to ensure the neutrality of the Internet by way of regulation, and (ii) it would not file an appeal against the court judgement either.[125] Wheeler expressed his satisfaction over the fact that the court recognised the FCC's jurisdiction on the basis of Article 706, on the basis of which the FCC would proceed in the future, too. At this point readers may feel that either the FCC or they did not understand the judgement correctly, as even though it established that in principle the authority may take measures on the basis of Article 706, it also established that it cannot take *such* measures as are required for the protection of the open Internet (ie the stipulation of non-discriminatory treatment), regardless of the constitutional jurisdiction. This is a little bit like the situation when one is pleased to have been able to reserve a table in a restaurant, only to find that there is nothing to eat there. The person is entitled to enter the place, but once inside he cannot do what he went there for.

As a result of this—in my opinion—the most logical step would be for the authority to classify Internet access service once again as a telecommunication service, whereby the rules of discrimination-free treatment would be applicable without having to resort to such risky legal solutions as were used with regard to jurisdiction based on Article 706.[126] This, however, would require the regulator to revise its position expounded in the 2002 Cable Broadband Order, which treats the access service of the service provider (ie the connection of the network and the provision of the physical connection to the Internet)

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[124] Statement by FCC Chairman Tom Wheeler Regarding DC Circuit Opinion on the FCC's Open Internet Rules, on 14 January 2014, <http://www.fcc.gov/document/chairman-wheeler-statement-court-opinion-open-Internet-rules>, accessed 10 March 2014; Statement of Commissioner Ajit Pai on DC Circuit's Decision Striking Down Net Neutrality Rules, <http://www.fcc.gov/document/commissioner-pais-statement-dc-circuits-net-neutrality-decision>, accessed 10 March 2014; and the Statement of Commissioner Mike O'Reilly on DC.Circuit's Decision Striking Down Net Neutrality Rules, <http://www.fcc.gov/document/commissioner-oriellys-statement-net-neutrality-decision>, accessed 10 March 2014.

[125] Statement by FCC Chairman Tom Wheeler on the FCC's Open Internet Rules, 19 February 2014, <http://www.fcc.gov/document/statements-fccs-open-Internet-rules>, accessed 10 March 2014.

[126] It should also be noted, however, that, according to certain opinions, the classification of Internet access providers as telecommunication service providers would do more harm than maintaining the present situation. See eg DA Lyons, 'Virtual Takings: The Coming Fifth Amendment Challenge to Net Neutrality Regulation' (2011) 86 *Notre Dame Law Review* 66–118; R May, 'Net Neutrality Mandates: Neutering the First Amendment in the Digital Age' (2008) 3 *Journal of Law and Policy for the Information Society* 197–210; C Vitello, 'Network Neutrality Generates a Contentious Debate Among Experts: Should Consumers Be Worried?' (2010) 22 *Loyola Consumer Law Review* 513–39.

with other services, such as email, for example. While this latter is certainly an information service, the only reason that an access service could not qualify as a telecommunication service (even though in essence it is one), is because the service provider does not offer it independently. The terminology of the Open Internet Order had shifted in this direction; however, it did not clearly sever its ties to the Cable Broadband Order. Of course, another possibility would be for Congress to modify the Telecommunications Act; however, there is significant Republican resistance on this issue.[127]

New rules by the end of 2014?

On the 23 of April 2014, the FCC's chairman Tom Wheeler held a press conference where he talked about a new proposition prepared by his staff which would propose new rules that allow companies like Disney, Google or Netflix to pay ISPs like Comcast and Verizon for special, faster lanes to send video and other content to their customers. Consumer groups immediately attacked the proposal, saying that not only would costs rise, but also that big, rich companies with the money to pay large fees to Internet service providers would be favored over small start-ups with innovative business models—stifling the birth of the next Facebook or Twitter.[128]

Reacting to the critics, Tom Wheeler issued a statement on the 24 of April 2014 in which he aimed to clarify the 'misinformation that has recently surfaced regarding the draft Open Internet Notice of Proposed Rulemaking.'[129] According to his statement, the proposed Notice will not change the underlying goals of transparency, no blocking of lawful content and no unreasonable discrimination among users established by the 2010 Rule. According to Wheeler, it will propose:

– that all ISPs must transparently disclose to their subscribers and users all relevant information as to the policies that govern their network;
– that no legal content may be blocked; and
– that ISPs may not act in a commercially unreasonable manner to harm the Internet, including favoring the traffic from an affiliated entity.

The statement does not deal directly with the question of prioritization of content providers. However, Wheeler argues that 'The Court of Appeals made it clear that the FCC could stop harmful conduct if it were found to not be "*commercially reasonable*." Acting within the constraints of the Court's decision, the Notice will propose rules

127 ER Roxberg, 'FCC Authority Post-Comcast: Finding a Happy Medium in the Net Neutrality Debate' (2012) 37 *Journal of Corporation Law* 235.

128 E Wyatt, 'FCC, in a Shift, Backs Fast Lanes for Web Traffic', <http://www.nytimes.com/2014/04/24/technology/fcc-new-net-neutrality-rules.html?_r=0>, accessed 27 April 2014.

129 <http://www.fcc.gov/blog/setting-record-straight-fcc-s-open-internet-rules>, accessed 27 April 2014.

that establish a high bar for what is "commercially reasonable." The "commercially unreasonable" test created by the proposed Ruling will protect against harm to competition and consumers stemming from abusive market activity.'[130]

The information so far published doesn't allow me to make a detailed analysis. It is not clear what is meant by 'commercially unreasonable discrimination' or on what legal basis (Article 706?) the FCC bases its jurisdiction. Nevertheless, it seems to me that the FCC might move towards the approach of the European Commission which proposes to distinguish between (i) the open Internet where the 'best-effort' principle prevails and (ii) an Internet access with assured quality to content or application providers who are willing to pay consideration for the ISPs (see details below).

The European Union: The failure of the *ex post* approach?

Competition law abuses at the turn of the millennium

By the early 2000s, in certain cases European IAPs were already being ordered to treat online content providers without any discrimination. In 2000 Wappup.com turned to the Paris commercial court, because France Télécom only provided access to its own online services and websites via what was then fledgling mobile Internet access. The commercial court prohibited this conduct, calling it severely anti-competitive, similarly to the French regulatory authority which expounded in detail the potential negative effects of this practice on competition in online services.[131] In order to avoid similar problems, Vodafone had also been ordered to adhere to the requirement of equal treatment after it created the email program Vizzavi in cooperation with Vivendi, which was active in the media market.[132] Although the duty of the neutral treatment of data transmitted via the networks expressly appeared in French telecommunication regulations,[133] at the time the basis of intervention had exclusively been the prevention of any restriction to competition resulting from vertical integration.

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[130] ibid.

[131] Avis n° 00−948 de l'Autorité de régulation des télécommunications en date du 15 septembre 2000 donné au Conseil de la concurrence sur la demande de mesures conservatoires présentée par la société WAPPUP.COM à l'encontre des pratiques mises en oeuvre par les opérateurs de services mobiles sur le marché des services mobiles selon le protocole Wap, 17.

[132] N Curien and W Maxwell, *La neutralité d'Internet* (La Découverte 2011) 20.

[133] Code des postes et des télécommunications, L32-1 °5, D-98-1, alinéa 4–5, and title III of the official contract of mobile telecommunication service providers.

The review of the framework regulation of electronic telecommunications

The principle of net neutrality in the European framework regulation of electronic telecommunications

The issue of net neutrality first gained wide publicity in 2008 when, as a result of the American *Comcast* case, the European Parliament and the Council included the issue among the open questions of the electronic telecommunications package under review at the time. Despite strong lobby activity, the community legislature did not introduce strict regulations;[134] however, as a compromise, it was included in Article 8 of the Framework Directive under review[135] that, *inter alia*, the national regulatory authorities must promote the protection of the citizens of the European Union by 'promoting the ability of end-users to access and distribute information or run applications and services of their choice.' We might see here a similarity in wording to the American Internet Policy Statement. However, in my opinion, this formulation is ambiguous in terms of whether it is a clear obligation for the member states to ensure the unrestricted open Internet via *ex ante* regulation or whether it is just a regulatory objective, from which no direct obligation may be derived.

The *regulatory objective interpretation* is supported by preamble Paragraph 29 of the so-called Directive on the Rights of European Citizens,[136] which states that the Universal Service Directive under review may not contain 'orders or prohibitions related to the access of end-users to the services and applications implemented by the service providers and / or conditions restricting their use.' Although the rule which requires interpretation is laid down by the Framework Directive rather than the Universal Service Directive, one of the two directives is subordinated to the other, ie the provisions of the Universal Service Directive may not be contrary to those of the Framework Directive.

By contrast, we may highlight two preamble paragraphs in the Better Regulation Directive amending the telecommunications regulation,[137] as well as in the Directive on

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[134] S Wong, J Rojas-Mora, and E Altman, 'Public Consultations on Net Neutrality in Europe 2010: USA, EU, and France' *Institut National de Recherche en Informatique et en Automatique*, 4 October 2010 <http://hal.archives-ouvertes.fr/docs/00/52/30/75/PDF/RR-7404.pdf> accessed 2 March 2014.

[135] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a Common Regulatory Framework for Electronic Communications Networks and Services (Framework Directive) OJ L 108, 24 April 2002, 33–50, amended by Directive 2009/140/EC.

[136] Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on Universal Service and Users' Rights Relating to Electronic Communications Networks and Services, Directive 2002/58/EC Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector, and Regulation (EC) No 2006/2004 on Cooperation between National Authorities Responsible for the Enforcement of Consumer Protection Laws, OJ L 337, 18 December 2009, 11–36.

[137] Directive 2009/140/EC of The European Parliament and of The Council of 25 November 2009 amending Directives 2002/21/EC on a Common Regulatory Framework for Electronic Communications Networks and Services, 2002/19/EC on Access to and Interconnection of Electronic Communications Networks and Associated Facilities, and 2002/20/EC on the Authorisation of Electronic Communications Networks and Services, OJL L 3370, 18/12/2009, 37–69.

the rights of European citizens that *contradict the principle that the member states may tolerate discriminatory conduct* on the part of Internet access providers. First of all, preamble Paragraph 4 of the Better Regulation Directive—recognising the importance of the Internet in respect of education and the practical exercise of the freedom of speech as well as access to information—stipulates that 'any restriction imposed on the exercise of these fundamental rights should be in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms.' Practically identical with this was the statement made by the European Council in September 2010.[138] Accordingly, Internet access providers could only be entitled to decelerate or block access to certain content, since Article 10 Paragraph 2 of the European Convention on Human rights provides that the exercise of these freedoms, which carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The other explanatory note, which seems to support the interpretation that the provision of the Framework Directive places a clear obligation on the member states in respect of maintaining the open Internet, is found in preamble Article 34 of the Directive on the Rights of the Citizens of the Union. This declares that the member states must exercise control over the traffic management practices of Internet access providers with special respect to ensuring that such practices *do not restrict competition.* Given the fact that discrimination by Internet access providers between online content, services, and applications *per se* influences competition in the market for the latter, this provision also seems to support the interpretation that member states must prohibit all conduct endangering the prevalence of the principle of net neutrality.

Although, in my opinion, the directives are not unambiguous in respect of the interpretation of Article 8 of the Framework Directive, the official position was that the directives do not introduce any direct prohibition of discrimination by IAPs. The maintenance of the neutrality of the Internet only appears as a *regulatory objective,* from which no obligations or rights may be derived directly. This *ex post* approach is also suggested by the 2009 December communication of the Commission,[139] which declares that the emphasis is on the transparency of the conduct of the service provider and makes it clear that the Commission is ready to make use of all its powers of competition oversight to sanction any abuses. In a speech held at a 2010 April conference, Neelie Kroes, Commissioner of the Commission, justified this careful approach by saying that at the time there were not enough data available to assess the extent of the problem, and

[138] Declaration of the Committee of Ministers on Network Neutrality, adopted by the Committee of Ministers on 29 September 2010 at the 1094th meeting of the Ministers' Deputies, 6.

[139] Commission Declaration on Net Neutrality (2009/C 308/02), 18 December 2009.

the introduction of stricter regulatory measures could have thwarted the development of new, innovative business models. In the words of the commissioner: 'I will not be someone who comes up with a solution first and then looks for a problem to attach it to. I am not a police officer in search of a busy corner.'[140]

The Commission conducted a public consultation between June and September 2010 on the status of net neutrality in Europe to provide the basis for its report on the implementation of the directives. On the basis of the 318 replies received, the Commission established that there were no circumstances that would justify stricter regulation. Even the fact that BEREC[141] noted that in several member states IAPs impose restrictions on access to peer-to-peer applications and VoIP services did not shake this conviction of the Commission.[142] On the basis of the results of the public consultation, in April 2011 the Commission published a report prepared for the European Parliament and the Council, in which it did not propose the introduction of stricter rules until the provisions on the transparency of the reviewed framework regulation were implemented by the member states, casting light on whether current regulation provides adequate guarantees for the protection of the open Internet. Nevertheless, the Commission also made it clear that:

> If significant and persistent problems are substantiated, and the system as a whole—comprising multiple operators—is not ensuring that consumers are easily able to access and distribute content, services and applications of their choice via a single Internet subscription, the Commission will assess the need for more stringent measures to achieve competition and the choice consumers deserve. Transparency and ease of switching are key elements for consumers when choosing or changing Internet service provider but they may not be adequate tools to deal with generalised restrictions of lawful services or applications.[143]

It is, however, worth noting that the position of the Commission is not mandatory in respect of the member states, ie they may introduce stricter regulations. Although the idea was raised in several member states,[144] an act on net neutrality was adopted in two member states only, the Netherlands and Slovenia.[145]

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[140] N Kroes, 'Net Neutrality in Europe' Address at the ARCEP Conference, Paris, 13 April 2010, Speech/10/153, 4.

[141] Body of European Regulators for Electronic Communications.

[142] European Commission, 'Report on the Public Consultation on "The Open Internet and Net Neutrality in Europe" 9 November 2010. However it is important to note that BEREC has never advised the introduction of a stricter regulation.

[143] Communication from the Commission to the European Parliament, The Council, the Economic and Social Committee of the Regions: The Open Internet and Net Neutrality in Europe, COM (2011) final, 19 April 2011, 11.

[144] Austria, Belgium, France, Germany, United Kingdom, and Hungary.

[145] Chile was the first country in the world where a legal act directly dealt with the issue of net neutrality. In 2010 the Chilean Parliament adopted a new act on the neutrality of the network which fundamentally cuts back the rights of Internet access providers to filter content and raises the level of protection of content providers and Internet users (COM (2011) 222).

The logic of the ex post *approach*

The 2009 telecommunications regulatory reform thus adopted a careful approach which does not directly prohibit service providers' discriminatory conduct, but wishes to create conditions under which consumers themselves would punish such service providers by selecting different ones. The legislature of the Union hoped that this would be sufficient in the interest of maintaining the open Internet and no direct regulatory intervention would be required. The logic of the legislature of the Union was that in the first step the possibility should be created for users to select from competing Internet access services. However, the possibility of choice is useless if the users are not aware of how specific service providers restrict data traffic on the Internet. In the second step, therefore, the absolute transparency of the conduct of the service providers has to be ensured.[146] Yet, even this would not be sufficient because, if the possibility of choice is given and the user is aware that it would be worthwhile to switch between providers, all this is in vain if the user cannot make that switch. Therefore, in the third step it must be ensured that users are able to switch between providers as easily as possible. In the following I shall briefly describe the measures taken by European regulation in these three fields and then also show why, in my opinion, these measures did not and could not realise the hopes attached to them.

Invigoration of competition in the retail market for Internet access services

One of the central objectives of the 2002 telecommunications Framework Regulation was to strengthen market competition. The primary objective of the Framework Regulation was to decrease the prior sector-specific regulations in parallel with the market competition[147] by introducing a so-called asymmetric regulatory model which, by imposing additional obligations on service providers with significant market strength, creates a level playing field which is a precondition for effective market competition.[148] Until this is created, regulatory intervention is necessary, and should, insofar as possible, be directed at the highest level of the value chain, the wholesale markets, thereby ensuring the development of the competition in the 'downstream' retail markets. The European Commission identifies the markets where there is a chance of *ex ante* regulation via recommendations.[149]

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[146] On the market-shaping effect of transparency, see DA Haas, 'The Never-was-Neutral Net and Why Informed End Users Can End the Net Neutrality Debates' (2007) 22 *Berkeley Technology Law Journal* 1565–1635.

[147] European Commission Recommendation 2007/879/EC of 17 December 2007 on Relevant Product and Service Markets Within the Electronic Communications Sector Susceptible to *Ex Ante* Regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council OJ L 344/65.

[148] Framework Directive, preamble para 1.

[149] B Bartóki-Gönczy, F Bánhidi, M Mester, and Á Telegdi-Kovács, 'Az Európai Unió hírközlés-politikája, hírközlési "keretszabályozási" rendszere' in A Lapsánszky (ed), *Hírközlés-szabályozás, hírközlés-igazgatás hazánkban és az Európai Unióban* (CompLex 2014) 115.

On the basis of the experiences of the past 12 years, we may say that regulation has been successful in invigorating market competition, as is also obvious from the fact that, while in 2003 the Commission identified 6 retail markets,[150] by 2007 this number had dropped to one.[151] Moreover, according to a draft recommendation of the Commission published in February 2014, maintaining *ex ante* regulation would not be justified in the now single retail market, since the level of competition is sufficient.[152] Consequently, at least at the structural level, the first condition has been met, ie consumers may choose from the offerings of several service providers. This is one of the important differences between the American and the European markets; in the United States—due to the deregulation of Internet access services—a duopoly market structure has evolved where consumers typically may only choose between one Internet access provider using cable technology and another one using DSL technology, since these have no obligation to provide alternative service providers with access to their networks.[153]

Transparency

During the 2009 review of the Framework Regulation, one of the central issues was making the conduct of Internet access providers transparent. Article 20 of the Universal Service Directive provides that subscription contracts specify, in a clear, comprehensive, and easily accessible form, the conditions of any restrictions as well as the procedure used to measure and influence traffic. In the interest of achieving the same objective, Article 9 of the Access Directive and Annex A of the Authorisation Directive contain similar provisions.

BEREC, one of the most active organisations in the field of net neutrality, published its Guidelines on transparency in 2011;[154] these are intended to provide the member states with directions, since the Framework Regulation did not regulate issues in detail. Several countries (eg the United Kingdom,[155] Hungary) opted for self-regulation while

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[150] Commission Recommendation 2003/311/EC of 11 February 2003 on Relevant Product and Service Markets Within the Electronic Communications Sector Susceptible to *Ex Ante* Regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a Common Regulatory Framework for Electronic Communication Networks and Services.

[151] 2007/879/EC (n 144).

[152] Commission's Draft Recommendation on Relevant Product and Service Markets Within the Electronic Communications Sector Susceptible to *Ex Ante* Regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services.

[153] For more detail, see L Lessig, 'In Support of Network Neutrality' (2008) 3 *Journal of Law and Policy for the Information Society* 185–96.

[154] BEREC, 'Guidelines on Transparency in the Scope of Net Neutrality: Best Practices and Recommended Approaches' December 2011, BoR (11) 67.

[155] Voluntary Industry Code of Practice on Traffic Management Transparency for Broadband Services, March 2011 <http://www.broadbanduk.org/wp-content/uploads/2013/08/Voluntary-industry-code-of-practice-on-traffic-management-transparency-on-broadband-services-updated-version-May-2013.pdf>, accessed 2 March 2014; Open Internet Code of Practice: Voluntary Code of Practice Supporting Access to Legal Services and Safeguarding Against Negative Discrimination on the Open Internet <http://www.broadbanduk.org/wp-content/uploads/2012/08/bsg-open-Internet-code-of-practice-25-jul-2012.pdf, accessed 2 March 2014.

others (eg France,[156] Germany,[157] Sweden[158]) tried to achieve the improvement of the transparency of the traffic management practices of service providers through detailed guidelines issued by the regulatory authority. In Hungary the members of the Communications Council (HÉT) representing IAPs agreed in April 2013 to create a comparative table template to show in an easily understandable way whether the packages offered by them contain any restrictions.[159]

Reducing the cost of switching

Finally, it is also very important that consumers are able to switch services if they are dissatisfied with their Internet access service. In the interests of this ability, during the review of the Framework Regulation, provisions facilitating switching were inserted into Article 30 of the Universal Service Directive stipulating:

– that subscribers are able to keep their calling numbers when contracting with a different service provider without imposing direct charges on the subscribers that could keep them from switching between service providers;[160]
– subscriber contracts may not stipulate any initial obligation period of over 24 months. Furthermore, the companies must offer subscribers the possibility to conclude a contract for a maximum of 12 months;
– member states must ensure that the conditions and procedures related to the termination of the contract do not restrain consumers from switching between service providers.

For example, the British regulatory authority (Ofcom) encouraged British IAPs to create offers where subscribers may, during a certain initial period, terminate the contract or switch to a different package if they are dissatisfied with the Internet access service. Furthermore, Ofcom would also like to see that service providers offer the possibility of switching between packages free of charge if the service provider's network management practice undergoes a change of such magnitude that it affects the possibility of accessing

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156 ARCEP, 'Internet and Network Neutrality: Proposals and Recommendations' September 2010 <http://www.arcep.fr/uploads/tx_gspublication/net-neutralite-orientations-sept2010-eng.pdf>, accessed 2 March 2014.

157 Measures Aimed at Promoting Transparency for Consumers and on Measuring Procedures <http://www.bundesnetzagentur.de/SharedDocs/Downloads/EN/BNetzA/Areas/Telecommunications/TelecomRegulation/TransparencyForConsumers/DocTransparencyForConsumers.pdf?__blob=publicationFile&v=2>, accessed 2 March 2014.

158 PTS, 'Open Networks and Services' PTS-ER-2009:32, 30 November 2009 <http://www.pts.se/upload/Rapporter/Internet/2009/2009-32-open-networks-services.pdf>, accessed 2 March 2014.

159 The Code may be accessed at <http://www.hirkozlesitanacs.hu/wp-content/uploads/2013/10/HETetikaikodex_halozatsemlegesseg1.pdf>, accessed 2 March 2014.

160 The transfer and activation of numbers must be performed as quickly as possible. With regard to subscribers who concluded an agreement on porting their numbers to a different enterprise, the number must be activated within one working day (Universal Service Directive, art 30).

certain content and services.[161] BEREC itself published a report in 2010 containing proposals for the creation of a regulatory environment that would make the switch between providers easier.[162]

The failure of the *ex post* approach?

As has been mentioned, the *first* condition is to ensure vigorous competition in the retail market for Internet access. Although, as we have shown above, it is true that no service provider with significant market strength may be identified on the basis of the number and the respective market shares of the market actors, this is a static interpretation that does not take into account the question of whether the market actors are really competing with each other or not. Let us take Hungary as an example. On the basis of the number of actors, the three-actor mobile telephony market is a competitive market where no service provider possesses a share of the market that is large enough to enable it to act independently from the competitive constraint they exert on each other. On the basis of this, we could say that subscribers have the possibility to choose a service provider that does not restrict access to various online services. In practice, however, all three service providers restrict access to VoIP services in their low-priced packages. That is, regardless of the several market actors and the competition discernible in other segments, with regard to net neutrality there is no mobile service provider in Hungary that does not restrict access to VoIP services in some of its packages. One explanation of this could be that presently the service providers find it more important to protect their voice revenues than to generate competition between each other in respect of this issue.

The second condition is to ensure transparency. In my opinion, it is also extremely difficult to achieve a breakthrough in this field. The reason for this is that several conditions would have to be met in order to put the consumer in a position where real decisions are possible. First of all, the most important task is to inform consumers about the complex traffic management procedures and their consequences in an easily understandable manner. All this is worthless, however, if meanwhile the service providers 'hide' the information in several hundred pages of general terms and conditions which—let us have no illusions about this—are not read by a single subscriber before signing the subscription contract. The situation is not improved if the information is presented separately as well, but is published in a part of their website that is only found by those expressly looking for it.

And then comes the next, and perhaps most important, problem, which should deserve much more discussion. In order for the information to reach its target, interest on the part of the recipient is also necessary, as well as some already acquired knowledge of what

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[161] Ofcom, 'Strategic Review of Consumer Switching' 19 November 2010 <http://stakeholders.ofcom.org.uk/binaries/consultations/consumer-switching/summary/switching.pdf>, accessed 10 March 2014.

[162] BEREC, 'Report on Best Practices to Facilitate Consumer Switching' BoR (10) 34.

risk-free Internet access means. For as long as the population's level of information about the issue is low, one cannot expect that, during the comparison of the various Internet access offers, prospective subscribers will seriously consider which service provider grants discrimination-free access to online services and content. Unfortunately, the most recent public opinion poll also supports my assumption that the level of knowledge of the issue among the Hungarian population is low. According to the poll, of the numerous aspects considered by consumers before concluding the contract, the consideration of whether the service provider restricts access to certain online services took the last place. Only twenty-three percent of respondents said that they also take this into consideration to some extent.[163] By contrast, the most important consideration was the operating time of the battery.

The third condition is that subscribers should be able to switch between service providers easily and at a low cost. In Hungary fourty-five percent of subscribers conclude subscription contracts with mandatory loyalty periods. This proportion may be higher with regard to mobile Internet subscriptions, because many subscribers are only able to buy their desired smartphones by agreeing to the loyalty period.

In my opinion, the assumption of the legislature of the Union that invigorating competition, an increase in transparency and the facilitation of switching between providers are, in themselves, sufficient for maintaining the open, restriction-free Internet, was correct in theory. However, I believe that practice has shown that in fact this is not sufficient, due to the strong counter-incentives of the Internet access service providers, the oligopolistic market structure, the low level of consumer knowledge and the still high costs of switching between providers.

Draft proposal on the unified digital market: A 180 degree turn

The European Commission itself does not look upon the results of the last four years as a huge success, since several service providers still maintain their discriminative traffic management practices and the differences between the practices of the individual member states jeopardise the creation of the single market.[164] In September 2013 the Commission therefore submitted a draft proposal to the European Parliament and the Council advocating, *inter alia*, the clear prohibition of any discriminatory blocking or

[163] National Media and Infocommunications Authority, Participatory Consumer Perception Examination, 2013.

[164] Commission Staff Working Document, 'Impact Assessment: Accompanying Document for the Document Proposal for a Regulation of the European Parliament and of the Council Laying Down Measures Concerning the European Single Market for Electronic Communications and to Achieve a Connected Continent and amending Directives 2002/20/EC, 2002/21/EC, and 2002/22/EC and Regulations (EC) No 1211/2009 and (EU) No 531/2012, COM (2013) 627 final' 331, 29.

restriction, in the interest of protecting the open Internet.[165] Nevertheless, besides strengthening the mandatory rules on IAPs, the proposal also favours these providers by clearly permitting them to realise extra revenues by charging those content and application providers who require guaranteed quality access to users. Although the proposal has received much criticism and may change significantly before being adopted by the European Parliament and the Council, still, at the time of writing the present manuscript, it appears that the part of the proposal on net neutrality will make it into the final text, albeit with changes.

The provision of open Internet access

In contrast with the 'regulatory objective' formulated in the Framework Directive, Article 23 Paragraph 1 of the draft proposal provides users with the right to freely access and distribute the information and content of their choice, to run applications and to use services via their Internet access service. In respect of this, the draft proposal makes it clear that 'within the limits of any contractually agreed data volumes or speeds for Internet access services, providers of Internet access services shall not restrict the freedoms provided for in Paragraph 1 by blocking, slowing down, degrading or discriminating against specific content, applications or services, or specific classes thereof, except in cases where it is necessary to apply reasonable traffic management measures.'[166]

The key question will obviously be just what qualifies as 'contractually agreed limits', since it will be with reference to these that Internet access providers can diverge from the main rule.[167] According to the draft proposal, such measures must be transparent, discrimination-free, proportionate and necessary:

– for the implementation of a legal provision or a court order or the prevention of a serious crime;
– for the preservation of the security and integrity of the network, the services provided over the network and the terminals of the end users;
– the prevention of unsolicited messages from reaching end users who have agreed, in advance, with the application of such restrictions;

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[165] Proposal for a Regulation of the European Parliament and of the Council Laying Down Measures Concerning the European Single Market for Electronic Communications and to Achieve a Connected Continent and amending Directives 2002/20/EC, 2002/21/EC, and 2002/22/EC and Regulations (EC) No 1211/2009 and (EU) No 531/2012, COM (2013) 627 final.

[166] ibid art 23, para 5.

[167] It was in respect of this that the proposal of the Commission received the most criticism. See B Bartóki-Gönczy, 'Towards a Single Market for Telecoms: Critical Assessment of the Measures Proposed by the European Commission Related to Authorisation, Spectrum Assignment and Net Neutrality' (2014) *European Network Laws and Regulations Quarterly* 3–16, and BEREC views on the 'Proposal for a Regulation Laying Down Measures to Complete the European Single Market for Electronic Communications and to Achieve a Connected Continent', BoR (13) 142.

– the minimisation of the effects of temporary or extraordinary network bottlenecks, on condition that equal treatment is applied to equivalent types of traffic.
– Rational traffic management may only include data processing that is necessary for and proportionate with the achievement of the objectives specified in the present paragraph.

When a similar prohibition was introduced in the Netherlands, communications service providers increased the retail price of Internet access, claiming that this was required by service providers to compensate for the increased data traffic. The Commission, however, is of the opinion that this additional cost will be relatively low and will be compensated for by the revenue increase caused by the increased data traffic, since the service providers have every right to charge more for greater traffic.[168] On the basis of a 2012 report of the French regulatory authority, ARCEP, the cost increase of the service providers may be 6–12 percent if their data traffic were to increase threefold.[169]

The provision of guaranteed bandwidth for consideration

Besides the prohibition, however, the Commission also allows Internet access service providers to realise revenues from the other side of the two-sided market, ie the market for online content and application providers. In essence, this means that Internet access providers provide content or application providers with guaranteed bandwidth if they are willing to pay consideration. They, in turn, are then able to provide users with consistently high quality services (specialised service). It is very important that these services are not part of the Internet access service to which the above described freedom from discrimination applies.

Although several qualms may be raised in relation to the introduction of this service,[170] in my opinion enabling the provision of specialised services (although it is to some extent contrary to the principle of net neutrality) is a necessary step for two reasons. On the one hand, Internet access providers can use the revenues generated by these services to develop their networks, resulting in an improvement of the quality of their 'best effort' based Internet access service.[171] According to the Commission, such extra revenues could increase the overall revenues of IAPs by 1.5 percent.[172] On the other hand, the

[168] Commission Staff (n 164) 77.

[169] ARCEP's 'Report to Parliament and the Government on Net Neutrality' September 2012 <http://www.arcep.fr/uploads/tx_gspublication/rapport-parlement-net-neutrality-sept2012-ENG.pdf>, accessed 8 March 2014.

[170] For more detail, see B Bartóki-Gönczy and B Dömötörfy, 'Net Neutrality and Competition Law: New Business Models and Changing Regulatory Approach in the European Union' (2014) 4 *US-China Law Review*.

[171] For more details, see ARCEP, 'Internet and Network Neutrality: Proposals and Recommendations' September 2010 <http://www.arcep.fr/uploads/tx_gspublication/net-neutralite-orientations-sept2010-eng.pdf>., accessed 10 March 2014.

[172] Commission Staff (n 164) 77.

emergence of such services is essential for the Internet to be able to meet the new challenges of the times, for there are more and more online services, for which the guaranteed high quality of the Internet connection is indispensable. It is enough to think of e-health, banking or cloud-based services; these may become the basic services of the Internet of the future.

Conclusion

Although there are hardly any points in common in the development of the regulatory systems of the United States and European Union in respect of net neutrality, looking at the basic situation we may nevertheless find similarities in two aspects. The first is that the regulatory environment that would reassuringly settle the issue of the protection of the open Internet has not yet evolved on either continent. In the United States, from 2002 onwards the FCC fell into a legal trap it had created for itself and from which it has been unable to escape, despite several attempts. Most recently, in January 2014, the manner in which it intended to regulate the discriminatory conduct of IAPs was found to be contrary to the law. As a result of a 2009 compromise, no *ex ante* regulation has been introduced in the European Union in respect of the issue, because the legislature trusted that it will be possible to avoid abuses by using such indirect tools as the invigoration of competition, an increase in transparency and the facilitation of switching between service providers. However, the empirical data appear to refute this conviction of the legislator of the Union. As I have already expounded, in my opinion these tools in themselves cannot be sufficient, given the strong counter-incentives of the Internet access service providers, the low level of consumer awareness and the still high costs of switching between service providers.

The other trait common to the United States and the European Union is that, on both continents, the commitment of the legislature to maintaining the open Internet is clear. It may be prognosticated, therefore, that sooner or later the principle of net neutrality will be guaranteed by a legal act, putting an end to the present uncertainty. In the case of the United States, in my opinion, the most logical step for the FCC would be to reclassify Internet access service as a telecommunications service, whereby the rules on discrimination-free treatment would become applicable without having to engage in such a risky legal solution as jurisdiction based on Article 706. The question is whether the FCC will take this direction. Although the February 2014 statement of its president may be interpreted as an indication of this, the recent statement of Tom Wheeler might sign a change in the ambitions of the FCC. In the European Union, regulations are being drawn up that would make it clear that users have the right to freely access and distribute the information and content of their choice, to run applications, and to use services via their Internet access service. Although the Commission's draft regulations are far from perfect, it still appears that net neutrality is the issue that is surrounded by the largest consensus.

Nevertheless, while arguing in favour of the principle of net neutrality, I believe it is important to stress that this principle of the Internet also requires constant revision and development, since the Internet itself is continuously developing. Or, more precisely, it is not the Internet, but the expectations towards it, the fact that today almost the entire operation of our society is based on it. Online services are proliferating, for the best effort-based operation that is the major feature of today's Internet is insufficient. It is enough to think of the still fledgling services that will almost certainly define our future, such as e-health, online stock, and security exchanges or cloud-based services, which cannot tolerate spontaneous data losses and are only able to operate with a guaranteed quality of service. This is also true in the case of online media service providers such as Netflix, which will only be able to compete with classic broadcasters if its service, which demands enormous bandwidth,[173] becomes available in excellent quality.[174] This latter point, however, rests on the assumption that the Internet access service provider that provides the infrastructure and the bandwidth concludes separate agreements with the online service providers that require guaranteed bandwidth and are willing to pay a consideration for it. Moreover, such 'special' or 'managed' services will or may answer the problem that has long since been mentioned by IAPs, namely that to be able to cover their extra costs due to the exponential growth of data traffic they need new revenue sources, and, rather than burden their subscribers they would prefer to charge service providers that require large bandwidth. Consequently, in my opinion, sooner rather than later the Internet will become a two-speed system, within which the best effort-based and the 'managed' Internet will coexist. It will be the task of regulation and the regulators to ensure that the latter does not endanger the former and that they have a beneficial effect on each other's development.

[173] During the evening hours, in the United States Netflix occupies thirty percent of the total bandwidth of the Internet.

[174] It was not by chance, therefore, that in March 2014 Netflix concluded an agreement with the largest American Internet access provider, Comcast, about the allocation of guaranteed bandwidth to its service against consideration.

3.
Special issues in media regulation

Peter Leyland

Regulating press freedom in the United Kingdom and the constitutional response to the phone-hacking scandal

Introduction

This chapter provides an evaluation of the constitutional response to the phone-hacking scandal which rose to prominence in 2011 but the affair has its origins some years earlier. The criminal conduct of journalists working for the national press in pursuit of stories raised many questions which have tested the robustness of the central institutions of democracy in the UK. The full extent of the scandal was uncovered by a combination of the vigilance of investigative reporting of journalists working for the *Guardian* linked to the persistence of MPs in an investigative role seeking a full explanation from the main actors associated with phone-hacking. Indeed, at the point when the scandal hit the headlines the revelations were considered so serious that the Prime Minister felt it necessary to establish an independent judicial inquiry to conduct an in-depth investigation and to make recommendations over the regulation of the press specifically to prevent a recurrence of abuse on this scale. It will be argued that there needs to be a tension between politicians and government on the one hand, and the print and broadcasting media on the other. As one commentator points out: 'Both a fully functioning legislature, or parliament, and a free, open media are considered key components of a modern democratic political system. The former represents and communicates views and interests of citizens, and is the arena in which law is given assent. The latter serves as a public forum for debate and informs the electorate. It is the place where a mass democracy communicates with itself.'[1] A popular press, free from routine legal restraint, is expected to provide accountability by being able to undertake investigations that will uncover wrongdoing by politicians, the powerful, the rich, and the famous. But the problem is that newspapers are businesses which need to sustain their market position. In order to do so, and in the face of diminishing circulation and the prospect of increased competition from the internet and other forms of media, newspaper titles in competition with each other have frequently relied on sensational stories, and a morbid interest in celebrity, to promote their readership.

In order to understand the wider context the chapter begins with a brief account of the phone-hacking scandal and then proceeds to consider the way freedom of speech and freedom of the press have been protected under the uncodified UK constitution. Given

[1] M Kubala, 'Select Committees in the House of Commons and the Media' (2011) 64 *Parliamentary Affairs* 694–713, 695.

the nature of the scandal particular attention is given to the effectiveness of the regime of self-regulation which was intended to protect the wider public against the abuses of the press. The role of Parliament and the subsequent Leveson Inquiry in uncovering the wrongdoing is the main focus of this chapter. It will be argued that despite the initial difficulty in securing the cooperation of the *News of World* and News International, parliamentary select committees operating together played a crucial role in the exposure of the phone-hacking scandal and they are discussed as a classic demonstration of effective parliamentary oversight. In the last section, attention turns towards considering the role of the judicial inquiry under Lord Justice Leveson to further investigate the scandal and its wider implications.

What was the phone-hacking scandal?

A brief summary of the timeline and events in the Hacking Scandal is provided to assist the reader in following the analysis provided in this chapter.[2] A police inquiry initiated in 2005 revealed that private investigators had been used by Sunday newspaper the *News of the World* to hack mobile phones, including the phone of Prince William. In January 2007 the Royal Affairs editor of the *News of the World* Clive Goodman and Glenn Mulcaire, a private investigator employed by the paper, were convicted for conspiring to intercept communications. They were sentenced to short terms of imprisonment. The guilty pleas obviated the need to test the evidence by further examination before the court. The Culture, Media and Sport Select Committee (Culture Committee) investigated the matter.[3] Although there were no admissions or further evidence at this stage before the Culture Committee it appeared that there had been repeated use of illegal methods to obtain news stories. By July 2009, first, it became apparent that senior staff at the *News of the World* were aware of the use of illegally accessed messages from mobile phones between 2003 and 2007. Second, evidence of a cover up also began to emerge. Substantial cash payments had been used to clandestinely settle cases of alleged hacking by insisting on the insertion of gagging clauses. Although these payments were meant to cover the tracks of News International, the large sums involved raised further questions concerning how far up the organisation the authorisation for these payments extended. The Culture Committee placed on record in February 2010 that senior managers must have known about these practices.[4]

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[2] See Culture Media and Sport Committee, 'News International and Phone-hacking' Eleventh Report of Session 2010-12, HC 903-1, 1 May 2012, Annex 2: Timeline of Events; 'Phone hacking: Timeline of the scandal' *The Telegraph*, 23 July 2012.

[3] Culture, Media and Sport Committee, 'Self-regulation of the press' Seventh Report of Session 2006–2007, 11 July 2007, HC 375.

[4] Culture, Media and Sport Committee, 'Press standards, privacy and libel' Second Report of Session 2009–2010, vol 1, 24 February 2010, HC 362-I, 114 para 495. 'We strongly condemn this behaviour which reinforces the widely held impression that the press generally regard themselves as unaccountable and that News International in particular has sought to conceal the truth about what really occurred.'

After interviewing Andy Coulson, the editor of *News of the World* between 2003 and 2007 when the hacking had taken place, the Crown Prosecution Service indicated in December 2010 that no further charges would be brought. However, a national scandal of major proportions was about to erupt. In January 2011 a new investigation called Operation Weeting was initiated. This was after further allegations of phone-hacking were made by more public figures. In the following six months of 2011 an additional series of allegations of hacking were made, some concerning especially vulnerable victims.[5] Such revelations prompted widespread indignation and condemnation. The closure of the *News of the World* was announced by James Murdoch in July 2011. As these events unfolded the Culture Committee and the Home Affairs Committees of the House of Commons followed up the revelations by summoning the main actors, including News International Chief Executive Rebekah Brooks, Rupert Murdoch and James Murdoch, and the UK's most senior police officers.

As the discussion develops it will be apparent that the issue of phone-hacking assumed the proportions of a major scandal for a number of reasons. First, Parliament had been grossly misled in the evidence submitted to it regarding the extent of these illegal practices. The relevant committees were intent on exposing a blatant disregard by News International of their watchdog function. Second, the propriety of the Metropolitan Police was called into question because of its failure to pursue the investigations, while, at the same time, it was revealed that senior officers were being courted by *News of the World* journalists and News International executives. Third, the shortcomings of the Press Complaints Commission were demonstrated through its repeated failure to respond adequately to the scale of the wrong doing associated with phone-hacking. In turn, this failure of the PCC called into question its existence in its present form. Finally, as we shall see in the final section which discusses the Leveson Inquiry, the scandal had wider political implications relating to the Prime Minister's choice as director of communications and a bid by News International affecting media ownership in the United Kingdom. Both questions were potentially embarrassing to the government.

Freedom of expression and the regulation of the press in the UK

The United Kingdom has an uncodified constitution lacking a formal recognition of citizen rights. Traditionally, the position under the constitution is that everything is permitted except that which is expressly forbidden by law.[6] Citizens are free to speak or write what they like unless what is published contravenes a specific law.[7] The sole positive right to free speech found in UK constitutional law exists under Article 9 Bill of

[5] Including the Milly Dowler case referred to later.

[6] A Dicey, *An Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan 1959) 197.

[7] For example, the defamation laws and the Official Secrets Act 1989 prohibit particular types of expression.

Rights of 1689 which provides: 'That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.' This gives a right of free speech to MPs and Peers in respect to anything stated within Parliament.

The Human Rights Act 1998 (HRA) since it came into force in the year 2000 indirectly incorporates under UK domestic law the rights contained in the ECHR by making it unlawful for a public authority to act in a way which is incompatible with the convention. This of course includes Article 10 which recognises the right to free expression, subject to the limitations set out in 10(2). Further, under section 12 of the HRA a court must have particular regard to the importance of freedom of expression in civil actions against the media. Something equivalent to a First Amendment Right in the USA which purports to guarantee the liberty of the press is regarded by many as essential to the preservation of a free democratic state. Geoffrey Robertson and Andrew Nicol argue that: 'The fourth pillar of freedom of speech in Britain is the principle that the Government has no direct control over the press.'[8] It is often said that the media is free to publish and be damned.[9] In practice, this means that an injunction will be needed by government, or any other litigant, in order to prevent publication. While it has the unlimited resources of the state at its disposal to finance litigation before the courts, the government is otherwise treated in the same way as other litigants. To put it slightly differently: 'Journalists cannot claim to be above the law, but what they can claim, in every country that takes free speech seriously, is a right to publish first, and take the risk of conviction afterwards.'[10] This recognises a general rule against prior restraint which offers some protection against the government.

The concentration of media power in the hands of a few powerful proprietors and its consequences has been a continuous backdrop against which British politics has been played out since the prevalence of mass circulation newspapers in the early twentieth century.[11] As one commentator puts it: 'To own a newspaper has been regarded as the commercial manifestation of the liberty to speak. The Press has operated in the context of the market and, for the most part, the only economic constraints that it ensures are those that exist generally to constitute the market.'[12] Not only does commercial ownership lead to distortions in the way that knowledge is distributed but there has been a strong tendency of the press and the mass media in general to support political parties both with editorial comment and through deliberately biased reporting. The political allegiance of newspapers has always been a matter of controversy.[13] Moreover, the dangers of

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[8] G Robertson and A Nicol, *Media Law* (4th edn, Penguin 2002) 27.

[9] D notices may be issued by the government when there may be security implications for a story. They may apply pressure but they have no direct legal force.

[10] Robertson and Nicol (n 8) 19.

[11] On the concentration of media ownership see Royal Commission on the Press, 'Report' (1949, Cmnd. 7700); Royal Commission on the Press, 'Final Report' (1977, Cmnd. 6810).

[12] T Gibbons, *Regulating the Media* (Sweet and Maxwell 1991) 97.

[13] See J Curran and J Seaton, *Power without Responsibility: The Press, Broadcasting and New Media in Britain* (6th edn, Routledge 2003) 37–54.

monopoly power have been recognised by Royal Commissions on the Press.[14] As the *News of the World* phone-hacking scandal demonstrates there is obvious potential for the abuse of their position. For example, there is no imperative which requires that the press will act in the public interest, nor is there is anything to prevent the so-called free press from being motivated by self-interest. The manifest wrongdoing which was unearthed as part of the phone-hacking scandal provides a clear illustration of an abuse of power by editors and journalists, often at the expense of vulnerable victims. Newspapers have frequently published compromising stories of dubious authenticity for no other reason than to promote circulation. Politicians and other celebrity figures have been demonised without any clear justification. The Culture Committee identified a recklessness in approach in prioritising sensational stories irrespective of the harm that might be caused.[15] From a different standpoint, the lack of legal aid for defamation cases prevents all but the rich and the powerful from taking defamation actions in the courts to clear their names when faced with such abuse. It is worth stressing that the Leveson Report discussed below, which looked into the implications of abuse, has been criticised for not directly addressing the controversial question of the concentration of media ownership.[16]

On the other hand, many of the well-rehearsed arguments in favour of a so-called free press and lightly regulated media remain valid. 'The media provide readers, listeners, and viewers with information and that range of ideas and opinion which enables them to participate in a political democracy. Put shortly, the media perform a vital role as the "public watchdog" … they investigate and report upon the abuse of power.'[17] It might be argued that subject to certain restrictions all forms of the media are entitled to the protection of freedom of speech or a constitutional protection clause. Editors might also claim a constitutional right to determine the content of their newspapers. In sum, the importance of the press in an oversight role operating within the rule of law should not be underestimated.

The Press Complaints Commission

We turn next to consider the main body set up to constrain the power of the press. The Press Complaints Commission (PCC) was established in 1991 to replace the Press Council. The Calcutt Committee Report commissioned to look into the question had recommended a press complaints tribunal backed up by law but this recommendation was rejected in favour of self-regulation. The government of PM John Major remained

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[14] See Royal Commission on the Press, 'Report' (1949, Cmnd. 7700); Royal Commission on the Press, 'Final Report' (1977, Cmnd. 6810).

[15] Culture Media and Sport Committee, 'News International and Phone-hacking' Eleventh Report of Session 2010-12, HC 903-1, 1 May 2012, para 32.

[16] S Barnett, 'Plurality, Leveson, and the Threat to the BBC' *Political Insight*, December 2013, 27; Harold Evans, *The Guardian*, 29 November 2012.

[17] E Barendt, *Freedom of Speech*, (2nd edn, OUP 2005) 418.

cautious over the introduction of formal legal regulation of the press. It was recognised that newspapers might become subject to indirect political control by measures designed to inhibit a free press. In consequence, the PCC is a self-regulatory body which comprises an independent chairman, eight non-press members, and seven editors. Once established it is expected to enforce a code of practice drafted by the newspaper industry. The code provides that the newspapers must take care not to publish inaccurate information. An apology must be offered if they do so and it requires a fair opportunity to reply in order to correct inaccuracies. Respect for privacy and family life should be recognised. The use of long lens photography to take pictures in private places is unacceptable. Journalists and photographers must not obtain or seek to obtain information by harassment, nor must clandestine listening devices or the interception of communications be deployed to obtain information. The press should not intrude into the lives of children.[18] At first glance the contents of this code cover many of the relevant issues. It might be assumed then that general compliance with the spirit of its provisions would offer protection from the most obvious forms of abuse.

Members of the public are able to complain to the PCC for an invasion of their privacy without having to pay but the commission does not conduct oral hearings. It has no powers to prevent publication of material in advance and it has no formal conciliation procedure. A newspaper or journalist may be censured if found to have overstepped the mark but the PCC has no powers to fine or award compensation. Well in advance of the hacking episode it had been pointed out that: 'The PCC has not solved the intractable problem that tabloids are entertainment-based and will continue to publish circulation-boosting stories irrespective of adverse adjudications.'[19] A further problem was a failure to monitor compliance with this code and with rulings by the PCC. It is significant that the Leveson Inquiry recommends that 'proper data is kept that records the extent to which complaints have been made and their outcome.'[20] Although statutory regulation and a privacy law have been resisted the existing system of self-regulation based on the PCC was fatally undermined by the phone-hacking scandal.

Despite these limitations, until the revelations emerged from the *Guardian* in 2009 and before the Culture Committee the PCC was prepared to strongly defend its position. In the year prior to the scandal erupting it reported having 'issued over 1600 rulings, and negotiated over 600 settlements, which demonstrated an effective record of holding editors to account. Recent PCC rulings have set clear standards on, for example, the reporting of suicide, pregnancy, material taken from social networking sites, transgender issues, the prominence of apologies, and more.'[21] The PCC went on to make the ambitious claim that 'The success of self-regulation is not only based on the fact that the industry

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18 <http://www.pcc.org.uk/cop/practice.html>.

19 Robertson and Nicol (n 8) 707.

20 Leveson IV, part L, Summary of Recommendations, para 20, 1805.

21 'Press standards, privacy, and libel: Press Complaints Commission's Response to the Committee's Second Report of Session 2009–2010, HC 532, 6 April 2010, 2.

takes it seriously and responds to its requirements, but also that the public have access to it and confidence in it.'[22] Nevertheless, it later became only too apparent that these were extravagant and totally unconvincing claims. The Leveson Inquiry points out that, against a background of further phone-hacking revelations culminating in the Milly Dowler story, the investigations of the PCC had failed. Not only did the PCC lack independence, but it had been thoroughly discredited in the eyes of the public to such an extent that it had been compelled to withdraw its own report, and admit it had been misled by News International. Lord Black, chairman of the funding body for the PCC, had acknowledged in his submission before the Inquiry that some sort of reform was necessary.[23]

Parliament and the role of Departmental Select Committees

In this section of the article we assess the contribution of Parliamentary oversight as a method for uncovering and responding to the phone-hacking scandal, and related matters, including the probity of the police. Of course, it goes without saying that debates in the House of Commons will be held as a sounding board for public opinion on matters of great public controversy[24] but in a House which is adversarial and divided between government and opposition such debates tend to address matters of general principle and result in divisions along party lines. Since they were introduced in 1979 Departmental Select Committees have performed a crucial oversight function in a different fashion shadowing the main executive departments of government. These committees have been formed following a general election at the beginning of each parliamentary session.[25] Although comprised of between 11–14 MPs, with the membership ratio reflecting the support for the parties in the main chamber, the assumption was that they should seek to be non-partisan. As one commentator points out: 'The select committees went on to develop a strong reputation as scrutineers of government and were celebrated as being relatively non-partisan. But concerns grew about their powers, resources, and particularly how their members were chosen.'[26] Recent changes have been introduced to minimise the influence of Party Whips in the selection process. Reflecting their growing importance chairs of these committees receive a salary and they now represent and are accountable to the whole house, and members are answerable to party colleagues.[27] In their current

[22] ibid 4.

[23] Leveson IV, part J, ch 7, paras 1.5–1.10.

[24] Such a debate was held following the publication of the Leveson Report discussed below. See Hansard, 3 December 2012, col 599.

[25] P Leyland, *The Constitution of the United Kingdom: A Contextual Analysis* (2nd edn, Hart 2012), 142 ff.

[26] M Russell, '"Never Allow a Crisis Go to Waste": The Wright Committee Reforms to Strengthen the House of Commons' (2011) 64 *Parliamentary Affairs* 4, 612–33, 616.

[27] ibid 628.

form the departmental select committees have shown every sign of living up to their potential of being more independent of the official line taken by government and opposition. As in the case of phone-hacking the relevant Committee selects the subject matter of investigation precisely because it is both topical and highly sensitive. Once a subject has been chosen the style of investigation has invariably been to gather written evidence and call before the committee the key actors as witnesses. They face examination and cross-examination from the panel of MPs which comprises the committee. The Prime Minister, ministers, senior civil servants, regulators, captains of industry, academics, judges, police officers, and so on, will be routinely summoned to present their evidence to the committee (sometimes on oath).[28] As will be apparent from the discussion that follows refusal to attend or giving misleading or untrue evidence may be considered a contempt of Parliament and lead to criminal sanctions. Unless dealing with a matter of special confidentiality the proceedings of the select committees are routinely televised. This coverage gives the general public a window through which to view their routine work, as well as dramatic moments of revelation. In terms of what they actually achieved, the ability of both the Culture Committee and the Home Affairs Committee to explore the issues fully and demand full disclosure of relevant evidence was undoubtedly affected by the scale of the illegality and the fact that many of the senior figures at News International and from the Metropolitan Police might face criminal charges relating to their conduct. The Culture Committee draws attention to the fact that it had been careful to respect the requests of individuals facing or who might face criminal charges in the future.[29]

The Culture, Media and Sport Select Committee

Turning now to the role of the Culture Committee in relation to the press and phone-hacking. The activities of the press were subject to parliamentary investigation well before the phone-hacking scandal assumed full prominence. The Culture Committee is the departmental committee with a specialist interest in this field. It took extensive written and oral evidence before delivering its 2007 Report. It stated that: 'Certain recent events have again led the public and politicians to question the integrity of methods used by reporters and photographers to gather material for publication by the press.'[30]

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[28] The Culture, Media and Sport Committee believed it had been misled by former *News of the World* staff by evidence given on oath and referred the matter to the Committee on Standards and Privileges which indicated that it would exercise any penal jurisdiction as sparingly as possible. See R Kelly, 'Select Committees: Powers and Functions' in A Horne, G Drewry, and D Oliver (eds), *Parliament and the Law* (Hart 2013), 191–92.

[29] Culture Media and Sport Committee, 'News International and Phone-hacking' Eleventh Report of Session 2010–2012, HC 903-1, 1 May 2012, para 13.

[30] Culture, Media and Sport Committee, 'Self-regulation of the press' Seventh Report of Session 2006–2007, 11 July 2007, HC 375, 3.

Of course later revelations confirmed that the Culture Committee was misinformed by witnesses that reporters had been acting wholly without authorisation. The fact that editors were not questioning the source of sensitive information alleged to originate from hacking demonstrated a lack of vigilance on their part. The case had already drawn attention to the most serious breaches in the code enforced by the Press Complaints Commission (PCC) in recent times. Substantial payments to the reporter Glenn Mulcaire had been made when he ended his employment on condition that he plead guilty and remain silent but News International repeatedly refused to acknowledge this.[31] A slush fund to allow payment had been uncovered. Lumps sums had been used to settle civil claims prior to trial as a strategy for buying silence. Despite the resignation of the editor of the *News of the World* over the payments to the reporters Mulcaire and Goodman who were prosecuted and convicted for hacking offences, the manifest shortcomings in the effectiveness of self-regulation were already very apparent.[32] The inadequate and dilatory response of the PCC also attracted adverse comment. In particular, the PCC's failure to protect Kate Middleton before she was married to Prince William from clear and persistent harassment in the absence of a formal complaint attracted particular censure.[33] Notwithstanding the very serious matters which had come to light and the disgraceful intrusions caused by phone-hacking, the Culture Committee were not convinced that the answer lay in the introduction of a privacy law or in the statutory regulation of the press.[34]

As we have already noted the allegations of phone-hacking against the press predated the 2011 crisis but were marginalised by the *News of the World* and News International as having been undertaken by a rogue reporter (who was prosecuted and convicted). As part of the unfolding narrative relating to phone-hacking huge media exposure was given to the Culture Committee hearings in July 2011 following the announcement of the closure of the *News of the World* newspaper. The sessions which featured the most senior figures in News International, including Rupert Murdoch, James Murdoch, and Rebekah Brooks featured as headline news stories on TV and radio, and these hearings were given even more coverage when a member of the public assaulted Rupert Murdoch by showering him with shaving foam during the course of his presentation of evidence before the committee. However, we should not lose sight of the fact that the Culture Select Committee revisited the issue of phone-hacking because it was extremely concerned that it had been deliberately misled in its previous hearings. In the report resulting from the hearings the Culture Committee charts the response of the *News of*

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[31] Culture Media and Sport Committee, 'News International and Phone-hacking' Eleventh Report of Session 2010–2012, HC 903-1, 1 May 2012, paras 84–87.

[32] Culture, Media and Sport Committee, 'Self-regulation of the press' Seventh Report of Session 2006–2007, 11 July 2007, HC 375, paras 21 and 22.

[33] ibid para 46.

[34] ibid Conclusions and Recommendations 5–8. The reluctance by the Culture Committee to support a privacy law undermines the later claims by the News of the World of a concerted attempt by Parliament to silence the press.

the World and News International which had been to mount a targeted attack on the Committee in particular, and on MPs and the parliamentary select committee system in general. In its earlier investigations the Culture Committee had identified 'collective amnesia' by staff in regard to many claims relating to phone-hacking and that the earlier work of the committee may have been interfered with in 2009 as it transpired that News International had commissioned a private investigator to place a member of the Culture Committee under surveillance.

In effect, the report published in 2011 following the high profile hearings provides a justification of the earlier findings of the committee and it reveals that many statements made before it, asserting the limited extent of hacking, had been untrue. It concludes that the committee had been deliberately misled. Moreover, the report points out that in its counter-attack the newspaper had published editorial comment and articles with unsupported allegations of bias and external influence attributable to MPs.[35] It is somewhat ironic that the newspaper further claimed that changes to the PCC and serious reform of the law in this field would prevent the popular press from telling the truth (something the *News of the World* clearly had not done.) The paper even suggested that there were sinister forces at work which were trying to silence it and also keep its readers in ignorance. When challenged over this campaign to discredit Parliament James Murdoch offered an apology in front of the committee for what he acknowledged as being an 'aggressive defence'.[36] In addition, the Culture Committee was highly critical of the failure of the process of internal review at News International which was highly misleading. The company had relied on internal inquiries which were later exposed as being fundamentally flawed to give itself a clean bill of health.[37] Of course, these negative claims casting aspersions on Parliament coincided with the pre-2011 repeated denials of a culture of wrongdoing and of any undiscovered criminality at the paper.[38]

The Culture Committee reported that: 'Despite the professed willingness of witnesses from News International to assist the Committee, the company has continued to downplay the involvement of its employees in phone-hacking by failing to release to the Committee documents that would have helped to expose the truth.'[39] Quite apart from the individual cases of criminality associated with hacking this attempt to discredit the investigators by publishing inaccurate facts about the role of Parliament amounted to a systematic campaign directed at undermining the parliamentary oversight mechanisms designed to expose wrongdoing.

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[35] A substantial number of MPs had been discredited by revelations over exaggerated expenses claims exposed by journalists in 2008. See P Leyland, 'Freedom of Information and the 2009 Parliamentary Expenses Scandal' (2009) *Public Law* 675–81.

[36] Culture Media and Sport Committee, 'News International and Phone-hacking' Eleventh Report of Session 2010–2012, HC 903-1, 1 May 2012, para 27.

[37] ibid paras 22, 60, and 61.

[38] ibid para 2.

[39] ibid para 32.

The parliamentary mechanisms of accountability through departmental select committees were not confined to the respective investigations and reports into phone-hacking. The scandal drew attention to the powers available to these committees, both to ensure attendance of witnesses[40] and to insist on the truth of the testimony before them.[41] Even during the hearings in July 2011 conflicting evidence had been presented before the committee. The committee was in doubt that: 'The truthfulness of evidence given before a select committee, whether in written or oral form, is a cornerstone of the parliamentary select committee system.'[42] The report goes on to stress that obstructing or impeding Parliament is a contempt of Parliament. The courts have recognised that Parliament has an inherent power to punish for contempt. Any allegation that Parliament has been misled is very grave and it is also unusual.[43] Presenting false evidence to a committee, whether or not an oath had been administered, amounted to a contempt of the House of Commons in contravention of s.1 of the Perjury Act 1911. According to the Joint Committee on Parliamentary Privilege parliamentary privilege is not intended to stand in the way of evidence brought before the courts.[44] Further questions arose over what disciplinary action might be taken when it came to light that the committee had been misled yet again by News International employees.[45] In its final assessment the Culture Committee reached an adverse inference about the veracity of the evidence presented before it by pointing out that the effect of these actions and omissions was that the Committee's Report to the House of Commons in February 2010 on Press Standards, privacy and libel was not based on fully accurate evidence. In other words, false evidence had prevented the Committee from exposing the true extent of phone-hacking at an earlier stage.

Home Affairs Committee, the police and breaking the criminal law

In a different sense the phone-hacking scandal provides an illustration of departmental select committees hunting in packs to investigate and report on allegations of impropriety where there are matters of overlapping concern. The Home Affairs Select Committee which shadows the Home Office (responsible also for the Metropolitan Police) became involved over the mysterious failure of the police to investigate many serious breaches

[40] Rupert Murdoch and James Murdoch initially declined an invitation to appear before the Culture, Media and Sport Committee in July 2011 but they were subsequently summoned before it.

[41] Kelly (n 28) 165.

[42] Culture Media and Sport Committee, 'News International and Phone-hacking' Eleventh Report of Session 2010–2012, HC 903-1, 1 May 2012, para 8.

[43] ibid paras 9–11.

[44] Kelly (n 28) 180.

[45] ibid 191–94. See also Culture Media and Sport Committee, 'News International and Phone-hacking' Eleventh Report of Session 2010–2012, HC 903-1, 1 May 2012.

in the law related to hacking.[46] Phone-hacking involves a number of crimes which to some extent overlap. For example, it is an offence which may lead to imprisonment for up to two years under Section 1 of Regulation of Investigatory Powers Act 2000 for a person without lawful authority to intercept, at any place in the United Kingdom, any communication in the course of transmission by means of a public postal service; or a public telecommunications system. Also, under Section 55 of the Data Protection Act 1998 it is an offence knowingly or recklessly to obtain or disclose personal data without the consent of the data controller.[47]

After the initial convictions of Mulcaire and Goodman many other victims of phone-hacking sought an explanation for the lack of further prosecutions. It was unclear why so little evidence had been made available to investigators and the victims felt badly let down by the police and prosecuting authorities. As will be apparent from the discussion above further evidence (eg trawl of emails) was sought from the *News of the World* but although the organisation stated it was willing to assist with inquiries very little evidence was forthcoming. In its report the Home Affairs committee also deplored: 'the response of News International to the original investigation into hacking.' They stated that it was almost impossible to escape the conclusion 'that they were deliberately trying to thwart a criminal investigation. We are astounded at the length of time it has taken for News International to cooperate with police but we are appalled that this is advanced as a reason for failing to mount a robust investigation. The failure of lawbreakers to cooperate with the police is a common state of affairs.'[48] Indeed, the committee points out that a huge amount of material which would have been relevant in relation to other possible prosecutions was undoubtedly lost as a result of the failure of the police to press ahead at an earlier stage.

The hearings of the Home Affairs committee had an equally dramatic outcome to those held by its sister Culture Committee at approximately the same time (July 2011). Among the witnesses summoned before it were the most senior serving and former police officers including the Metropolitan Police Commissioner (Sir Paul Stephenson), Acting Deputy Commissioner (John Yates), former Assistant Commissioner (Andy Hayman). The resignations of the Metropolitan Police Commissioner and Acting Deputy Commissioner were announced as evidence given before the committee brought to public attention close social contacts between News International personnel and the police. The inference was that the existence of such contacts might have affected the judgment of the police in deciding whether to pursue these investigations. The Committee

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[46] Home Affairs Committee, 'Unauthorised tapping or hacking of mobile communications' Thirteenth Report of Session 2010–2012, July 2011, HC 907.

[47] A defence is available if a person can show that obtaining or disclosing the information was justified in the public interest (s 55(2)(d)). It is also an offence under the Computer Misuse Act 1990 where a person knowingly causes a computer to perform any function with intent to secure unauthorised access to any program or data held in any computer or to enable any such access to be secured.

[48] Home Affairs Committee, 'Unauthorised tapping or hacking of mobile communications' Thirteenth Report of Session 2010–2012, July 2011, HC 907, paras 50 and 51.

found that allegations of payments made to the police by the media and the level of social interaction which took place between senior Metropolitan Police Officers and News International executives were a matter of serious concern and had damaged the reputation of the Metropolitan Police.[49] But it is worth noting that the Leveson Inquiry despite being critical of the decisions taken by the Metropolitan Police found no direct evidence of corruption of the police by journalists or by executives of News International.[50]

The recommendations of the Home Affairs Committee also provide a good example of a dialogue between these committees and the government. This is because the government may make a formal response to the committee. The Home Affairs Committee was partly concerned to respond by proposing changes in the relevant law. The recommendations call for a greater variety of penalties for offences of unlawful interception of communications.[51] For example, it suggested that the government could introduce changes to the Privacy and Electronic Communications Regulations 2003 as part of the implementation of amendments to the European Framework on Electronic Communications, including the e-Privacy directive. Communication providers are required to notify all breaches of personal data to the Information Commissioner.[52] In its response the government stated that it was satisfied that the existing legislation provides a comprehensive set of criminal and civil sanctions for the unlawful hacking of mobile communications.[53]

Investigative journalism: House of Lords Committee

The Communication Committee of the House of Lords which was set up in 2007 to address a broad range of public policy issues associated with communications and broadcasting also looked into the phone-hacking scandal. The Committee points out that its recommendations are made against a background of newspapers suffering severe financial problems.[54] Particular concern is expressed because investigative journalism could be suffering as a result of a lack of clarity in the law. Indeed, a strong public interest underpinning investigative journalism is identified by the Committee as a vital constituent of the UK's system of democratic governance and accountability. The

[49] ibid Conclusions and Recommendations 20 and 21.

[50] Leveson II, ch 3, 'The Press and the Police: The Harm and the Response', para 7.34.

[51] Leveson, 'An Inquiry into the Culture, Practices and Ethics of the Press: Executive Summary', The press and the police: The relationship, para 91.

[52] 'Unauthorised tapping into or hacking of mobile communications' The Government Response to the Thirteenth Report from the Home Affairs Committee Session 2010–2012, HC 907, September 2011, Cm 8182, para 4.7.

[53] ibid para 2.10.

[54] See Select Committee on Communications' 3rd Report of Session 2010–2012, 'The future of investigative journalism', report, HL Paper 256, 16 February 2012, para 265.

exposure of phone-hacking by the *Guardian* in 2009[55] is referred to as one among many recent examples showing that media organisations themselves should take responsibility for the decisions they make regarding how to investigate, and whether to publish, a story. In coming to decisions on these matters, however, it is important that journalists and editors do so in a way that is rigorous, structured, and leaves an audit trail for future external scrutiny.[56] Another suggestion of this committee was that fines collected for breaches of a revised code of editors' practice under a new regime of self-regulation should be allocated to a special fund for the financing of investigative journalism.[57]

Phone-hacking and the Leveson Inquiry

The Leveson Inquiry was set up by the Prime Minister under the Inquiries Act 2005[58] on 13 July 2011 to examine the 'Culture, Practice and Ethics of the Press' and to look into the relationship between the press and the public.[59] It has frequently been argued that judicial inquiries are not a substitute for parliamentary forms of scrutiny, but they may have an important supplementary role providing reassurance where there has been great public concern.[60] Inquiries may also be employed to serve the political interests of the government. Why was such an inquiry set up at considerable public expense[61] when much of the main evidence had already been exposed before Parliament and its select committees? The phone-hacking scandal had implications which went uncomfortably close to the summit of political power. In principle, there is nothing unusual about a close nexus between senior politicians and journalists (and ex-journalists)[62] but, in this instance, given the extent of the allegations of illegal conduct and the conflicts of interest of media ownership which arose, the connection aroused suspicion at the highest political level. A trail of association with the criminality of phone-hacking led to 10 Downing Street and cast doubt over the judgment of PM David Cameron. This was because Andy Coulson, *News of the World* editor at the time of the hacking (Mulcaire and Goodman

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55 N Davies, 'Murdoch papers paid £1m to gag phone-hacking victims' *The Guardian*, 8 July 2009.

56 See Select Committee on Communications' 3rd Report of Session 2010–2012, 'The future of investigative journalism', report, HL Paper 256, 16 February 2012, para 268.

57 ibid para 299.

58 s 3(1)(a).

59 A number of critics argued that the remit should also have included electronic media. The full terms of reference: 'The culture, practices and ethics of the press; its relationship with the police; the failure of the current system of regulation; the contacts made, and discussions had, between national newspapers and politicians; why previous warnings about press conduct were not heeded; and the issue of cross-media ownership.'

60 C Harlow and R Rawlings, *Law and Administration* (3rd edn, CUP 2009) 572.

61 The total cost of the Leveson Inquiry available from the official website was £5,458,000. <http://www.levesoninquiry.org.uk>.

62 For example, Mrs Thatcher's press secretary from 1979–1990 Sir Bernard Ingham; Alistair Campbell, Tony Blair's Director of Communications 1997–2003.

had pleaded guilty to these offences) had been appointed to the key role of Communications Director of the Conservative Party in 2007. Despite the gathering clouds at the time of the May 2010 election and the objections raised by a number of opposition politicians Coulson was allowed to remain Director of Communications at 10 Downing Street until his resignation was precipitated by the prospect of his arrest as part the deepening phone-hacking crisis. At exactly the same time, July 2011, the success of Rupert Murdoch's News Corporation's bid to take over BskyB depended on whether the Secretary of State for Culture, Media, Olympics and Sport (a Conservative Party minister) referred the matter to the Competition Commission. Although there was no direct evidence of bias in relation to the bid by News International, there was evidence before the inquiry of an intimate relationship between News International lobbyist Frédéric Michel and the then culture secretary Jeremy Hunt.[63] Further, PM David Cameron acknowledged before the Leveson Inquiry a regular friendship between himself and former News International Chief Executive Rebekah Brooks and her husband. These relationships conveyed the impression that News International was linked very closely with the government. A judicial inquiry can be 'a device to deflect criticism and thereby defuse a potential crisis by conveying the impression that the issue is under impartial investigation.'[64] Thus, in the light of the above implications, the PM and the government might have hoped to be exonerated from any direct involvement by a judicial inquiry which would be perceived by the public as being fully independent. From the outset Leveson recognised the value of a free press and the importance of having the media onside: 'I know how vital the press is—all of it—as the guardian of the interests of the public, as a critical witness to events, as the standard bearer of those who have no one else to speak up for them. Nothing in the evidence that I have heard or read has changed that. The press, operating properly and in the public interest is one of the true safeguards of our democracy.'[65]

The Leveson Inquiry followed the pattern of other recent major inquiries by being fully open to public scrutiny. It had an official website which included relevant information, and the sessions involving the presentation of oral evidence were televised. From a procedural standpoint it is important to remember that judicial inquiries tend to be inquisitorial, assuming the role in Lord Denning's words of 'detective, inquisitor, advocate, and judge'. The Inquiries Act 2005 consolidates previous legislation by providing a statutory framework for these inquiries. It allows ministers or the Prime Minister to establish formal independent inquiries in response to events raising public concern and to set the terms of reference of any such inquiry. The minister is also granted powers to appoint the chair and panel members.[66] Once established, the Act confers powers on the chair of statutory inquiries to compel the appearance of witnesses or the

63 Leveson, 'An Inquiry into the Culture, Practices and Ethics of the Press: Executive Summary', para 128.
64 P Leyland and G Anthony, *Textbook on Administrative Law* (7th edn, OUP 2012) 175 ff.
65 Leveson, 'An Inquiry into the Culture, Practices and Ethics of the Press: Executive Summary', para 5.
66 Inquiries Act 2005 ss 1–6.

production of evidence. Crucially, it is the chair who determines procedure but in making any decisions relating to procedure he or she must act with fairness and with regard to the need to avoid any unnecessary cost.[67] Under Section 21(2) of the Inquiries Act 2005 Leveson was able to require persons to provide written evidence (including documents). Oral evidence at inquiries is also obtained by summoning witnesses before it.[68] However, their evidence is not presented as part of an adversarial process. Generally, under the rules of the inquiry where a witness is giving oral evidence only counsel to the inquiry and the inquiry panel may ask a witness questions. But there are circumstances where a witness may apply to the chair to allow his or her legal representative to question another witness, for example, if someone has given oral evidence relevant to the evidence they are expected to present. Finally, the chair is placed under a duty to report the finding to the minister who will lay the report before Parliament (or devolved Parliament/Assembly).[69] The Act provides that the inquiry must be held in public unless restrictions are justified according to specified grounds.[70]

The Leveson Report, stretching over four volumes and 1985 pages, testifies to a Herculean attempt by the inquiry to gather evidence widely, and then to provide in-depth analysis covering the full remit of issues, before presenting carefully measured conclusions and recommendations. Three aspects are particularly relevant to the arguments presented in this chapter.[71] First, the central recommendation of the Leveson Inquiry is that the current regime of self-regulation should be abolished. The PCC was found not fit for purpose as it fell between two stools. It was both inadequate as an investigatory body and it had no power as a regulator. The Leveson Report proposes a new voluntary independent self-organised regulatory system.[72] The controversial aspect is that the new body might be supported by backstop legislation to ensure that the regulatory element would be independent and effective.[73] The regulatory body would be governed by a fully independent board. This would be appointed in a genuinely open, transparent, and independent way, without any influence from the industry or the government, by a specially formed independent selection panel with experience of the press.[74] The funding of the body would be fixed and negotiated in advance.

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[67] ibid s 17(3).

[68] 175 witnesses gave evidence to the inquiry over 40 days.

[69] Inquiries Act 2005, ss 24 and 25.

[70] ibid s 18.

[71] Volume I covers general contextual issues: The Inquiry, the Press and the Public Interest, Standards, Crossing Legal Boundaries, The Criminal and Civil Law; Volume II covers the Culture, Practices and Ethics of the Press: the Press and the Public and the Press and the Police; Volume III covers the Press and Data Protection; Volume IV covers Aspects of Regulation: the Law and the Press Complaints Commission, Regulatory Models for the Future, Summary of Recommendations.

[72] Leveson vol 4, ch 7, 'Conclusions and recommendations for future regulation of the press', para 7.4.

[73] This would not be a typical statutory body of any sort but one recognised by statute. The form of statutory regulation might involve a backstop regulator to support enforcement after publication but with no legal powers of prior restraint. See Leveson vol 4, 1786, paras 4.2 and 4.14.

[74] Leveson, 'An Inquiry into the Culture, Practices and Ethics of the Press: Executive Summary', Establishing an independent self-regulatory regime, paras 1–5.

The new body would be both a 'firewatcher' able to take up systemic issues, as well as acting as a 'fire-fighter', able to respond effectively to matters of individual concern when they arose.[75] Once appointed it would have scope to examine issues on its own initiative and have sufficient powers to carry out investigations, including investigations into serious systemic breaches of the code. The body would establish an adequate and speedy complaints-handling mechanism as it would possess the investigatory powers equivalent to most ombudsmen. It would be free of charge for the complainant and complaints could be referred to it directly. While the proposed regulatory body would not have the power to prevent publication of any material it would operate in a climate of greater transparency by producing an annual report detailing performance, including a complete record of the number of complaints referred to it and investigated, together with a summary of investigations that had been conducted. At the same time, it would have the powers to take robust remedial action for a breach of the standards set out as part of the revised code. Of particular relevance given its remit, it would be able to insist on publication of corrections. In doing so it would have the power to specify the nature, extent, and placement of apologies. Further, it would be able to impose sanctions of up to one percent of turnover, with a maximum fine of £1m.[76] To assist with the newly acquired capacity to impose remedies the body would have a ring-fenced enforcement fund.

Second, in common with the Home Affairs Select Committee and the House of Lords Communication Committee referred to earlier, the Leveson Inquiry also recommended tightening up the relevant criminal law to make convictions easier for the kinds of abuses associated with phone-hacking and the misuse of data. For example, under the Data Protection Act 1998 personal data must be processed fairly and lawfully. Personal data can be obtained only for one or more specified and lawful purposes and it cannot be further processed in a manner incompatible with that purpose.[77] Lord Justice Leveson argued that changing exemptions for journalists would be significant and would go to the heart of the balance between the freedom of the press and the individual's right to a private life. In practical terms of the application of current law the Leveson Report proposed that the defence available to reporters under section 32 of the Data Protection Act for obtaining such personal data for investigations would be narrowed so that it would only apply to journalistic information 'necessary for publication' rather than material held 'with a view to publication'.[78] Furthermore, it recommended that the penalties for someone knowingly or recklessly obtaining or disclosing data in breach of section 55 of the Data Protection Act 1998 should be increased.[79] Under the Data

[75] See Harlow and Rawlings (n 60) ch 12, 'Parliamentary Ombudsman: Firefighter or fire watcher?'.

[76] Leveson vol 4, part L, 'Powers, Remedies and Sanctions', paras 15–20.

[77] Data Protection Act 1998, Schedule 1.

[78] Leveson vol 4, part H, ch 5, 'Leveson report proposals could lead to jail terms for journalists', para 2.59.

[79] ibid paras 2.93–2.94. These penalties are currently set out under ss 77–78 of the Criminal Justice and Immigration Act 2008.

Protection Act 1998 a right of compensation should be available, which would be not just for pecuniary loss but also for causing pure distress.[80]

Third, despite the fact that the Inquiry did not identify endemic corruption, serious misgivings were nonetheless expressed about the relationships that had existed between journalists, media executives, and senior ranking police officers. Leveson recommends that off-the-record briefings of the police should be discontinued and replaced by 'non-reportable briefings' to cover background briefing but, more crucially, it is further recommended in the interests of transparency, that it becomes mandatory for all senior police officers to record all of their contacts with the media.[81] Such a protocol would introduce an element of formality open to public scrutiny that in the future would make the occurrence of these former practices unlikely.

Conclusion

The phone-hacking scandal and its consequences have been of special constitutional importance not only because it raised, once again, the crucial question of the protection of press freedom in a nation lacking standard constitutional or legislative guarantees, but also because of the manner in which the full extent of the abuse was uncovered first by Parliament and then by the Leveson Inquiry. Despite the attempt by News International to cover its tracks with a carefully orchestrated damage limitation exercise going back to before 2007, the Culture and Home Affairs committees of the House of Commons were able to operate in tandem in 2011 to expose a culture of systemic abuse which spread beyond journalistic practice, and included the relationships between the press and the police and the press and politicians. Faced with repeated denials and obfuscation, the Culture Committee persisted with its investigations. The objective was not just to further expose individual cases of phone-hacking, serious though these were, but also to demonstrate publicly that false testimony had been knowingly given before it and that this constituted a deliberate contempt of Parliament. Indeed, the pressure on witnesses to answer with veracity, as they were examined and cross examined under the floodlight of publicity before these committees, amounted to a remarkable assertion of parliamentary authority.[82] In sum, we have seen in this discussion that the scandal demonstrated the importance of departmental select committees as parliamentary oversight mechanisms, notwithstanding the hostility of a powerful section of the print media.

Given the high profile of the phone-hacking scandal and related matters, the publication of the Leveson Inquiry Report was eagerly awaited by politicians, the media,

[80] ibid para 2.45.

[81] Leveson vol 4, part G, ch 4, paras 4.5 and 4.8.

[82] Admittedly, marginally reduced by allowance for the prospect of criminal action against some of the main actors.

and the public. The report was debated in Parliament.[83] The main question was whether these recommendations could form the basis for setting up a replacement for the PCC to look into complaints against the press. In his statement to the House of Commons the Prime Minister accepted in full the conclusion set out by Lord Justice Leveson that a new independent self-regulatory body should be set up, with teeth to investigate and hold the industry to account, but this position fell short of an endorsement of the final form of the body outlined in the report. Despite having indicated in advance of publication that the recommendations were likely to be implemented in full, the PM refused to support the idea of having any statutory underpinning for a replacement body. In addition, he expressed caution over changing legal exemptions for journalists charged with related offences. It was argued that such a change would go to the heart of the balance between the freedom of the press and the individual's right to a private life.[84] These are precisely the same issues that arose a generation earlier and the answer to them is equally politically charged in the current environment. It depends upon whether the view is taken that only self-regulation guarantees a free press, or, alternatively, whether, statutory enforcement of some kind is a necessary deterrent faced with the excesses of recent years. In other words, the challenge is to agree upon a system of regulation which is acceptable to the industry by appearing to protect press freedom, while at the same time having sufficient authority to protect victims by being able to enforce its findings. There was no agreement between the political parties. On the government side, the Conservatives mainly opposed statutory underpinning of the regime of regulation, while their coalition partners, the Liberal Democrats and the Labour opposition supported it. As these divisions have remained the newspaper industry announced that it would be setting up a new body (proposed before the Leveson Inquiry), to replace the PCC. It would be called the Independent Press Standards Organisation. The approach adopted in designing this replacement was rejected by Leveson in his report and it fails to include many of his main recommendations, including the key requirement that as a regulator it should be clearly independent from the industry.[85]

The outcome of such a thorough and costly investigation in terms of the incorporation of concrete recommendations appears to be disappointing. Should we be surprised then by the failure of such a comprehensive report to deliver a solution which was viable and could be largely implemented? Mark Elliott doubts whether Leveson as a judicial inquiry should have been set up in the first place, given that its 'remit took the inquiry deep into the policy arena, and it is far from clear why a judge—whatever his capacity to inquire into and establish the causes of the phone-hacking scandal that precipitated the inquiry—was an appropriate person to undertake such a task.'[86] In view of the very different

[83] Published on 29 November 2012.

[84] Hansard, 3 December 2012, col 599.

[85] See Media Standards Trust, 'The Independent Press Standards Organisation (IPSO): An Assessment' November 2013, This report points out that IPSO only applies 12 of the Leveson recommendations.

[86] M Elliott, 'Ombudsman, Tribunals, Inquiries: Re-fashioning Accountability Beyond the Courts' in N Bamforth and P Leyland (eds), *Accountability in the Contemporary Constitution* (OUP 2013) 255.

approaches politically and philosophically identified above there was only ever a remote chance that any set of recommendations could bridge the gap on regulation unless a consensus was reached by the main political parties. As we have just noted, following the publication of the Leveson Report the politicians and newspaper proprietors were split on what changes to press regulation should be implemented. There were several attempts by the combatants and the media covering the story to invite Lord Justice Leveson to act as a kind of facilitator to assist in reconciling the different positions. He flatly refused to respond beyond referring to the published recommendations of the inquiry. The reputation for independence he enjoyed as a respected judge would have been undermined if he had become directly involved in the debate that followed publication. This quality of independence should not be underestimated and was clearly very much on Lord Justice Leveson's mind. On the plus side, the inquiry, despite its shortcomings viewed from the perspective of the implementation of recommendations, had been able to gather the evidence and then apportion blame. The published findings emphasized the extent of the illegal practices associated with the *News of the World* and News International, but they also served an intended political purpose by refuting the suggestion that there was extensive direct evidence that the PM, the government or the police were corrupt.

Lorna Woods

Public service media in the era of austerity: European Union law and national public service media provision

Introduction

The European model of broadcasting adopts a mixed approach to the media, incorporating both commercial and public service aspects. The hallmark of the latter approach is the public service broadcaster, although most now have an online presence too (public service media, PSM). Although the existence of PSM might be a common theme among the EU member states, PSMs in each of those states are different from one another. They vary in structure, remit, method, and quantity of funding. Moreover, some (if not all) are under threat—whether for philosophical reasons (a preference for market provision); political reasons (some material challenges the dominant accepted viewpoint in a society); or financial (can the State justify the provision). With the ongoing financial crisis, this latter concern has intensified. The dramatic shutting down of ERT took place against the backdrop of the Greek state's need to make savings in public expenditure, but Greece is not alone in experiencing difficulties.

Austerity leaves PSM exposed to cuts in funding or to more draconian measures because the underlying assumption seems to be that states are completely free to choose whether to provide PSM or not. This chapter investigates the extent to which EU member states are obliged—if at all—to provide PSM. The chapter will discuss the extent to which substantive EU law governs Member States' choices. It will then consider whether general principles of EU law or fundamental rights guaranteed by the EU legal system affect the freedom of member states in this regard. For this argument, the links between freedom of expression and the need for pluralism, and the role of PSM in ensuring pluralism are key. The argument also raises novel questions about the scope of EU law. Given that most member states have provided PSM, there are two questions underpinning our assessment of the legal position. One is the question of whether any closure or privatization of existing PSM is legal under EU law; and the other is whether there are any obligations on the Member States in regard to establishment and scope of PSM. Such obligations could relate to the substantive decisions about existence, nature, remit, and funding of PSM, or could be more procedural, based in concerns about administrative justice and market fairness. First, however, we need a brief description of PSM and its characteristics.

Overview of public service media

PSM are media operators (traditionally broadcasters)[1] which operate in the public interest.[2] There is here a distinction between the institutional structure of a media organization and its functions. It is the public service functions that are important; and theoretically public service functions could be carried out by commercial entities.[3] The question of whether public service obligations can be satisfactorily spread among multiple operators is more difficult, because there might be aspects to public service—such as creating shared experiences and supporting social cohesion[4]—that are lost in that process. Conversely, just because an institution is state-owned or funded does not mean that it is a public service media organization. As the Council of Europe Committee of Ministers noted, '[t]he transition from State to public service and from broadcasting to public service media has yet to be successfully completed in many Council of Europe member states.'[5]

If the nature of the service is central, what are its characteristics? While there are some views which link the nature of the media to the formation of public opinion (and discussions about the role of the media as the 'fourth estate'), this could narrow the content of public service to matters relating to news and current affairs, an undesirable outcome.[6] Although the reporting of news and current affairs is significant, it should not be the only aspect of PSM. Indeed, in terms of attracting audiences, having a broader portfolio of content may be important. Further, matters of significance can be considered not only in factual programming but also in fiction, potentially expanding the audience exposed to such issues. In sum, PSM relates to the idea of audiovisual content as 'primarily a social rather than an economic process, as something with moral, cultural, intellectual, and creative purpose and not just a source of mild comment and moderate pleasure.'[7]

Crucially, insofar as public service media are freed—at least to some degree—from the constraints of the market, they should be better placed to produce a wide range of content, reflecting the views and interests of *all* viewers. Public service may support the

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[1] The fact that public service obligations were traditionally imposed on broadcasters, especially terrestrial broadcasters, can be explained by concerns relating to spectrum scarcity and the need to provide a content service that addressed the perceived needs of a wide range of groups in society.

[2] The nature of the public interest especially that in the media is contested, see eg F Sorauf, 'The Conceptual Muddle' in CJ Friedrich (ed), *The Public Interest* (Atherton 1962); V Held, *The Public Interest and Individual Interests* (Basic Books 1970). As regards public service media, see, GF Lowe and T Hajanen, *Broadcasting and Convergence: New Articulations of the Public Service Remit* (Nordicom 2003); G Born and T Prosser, 'Culture and Consumerism: Public Service Broadcasting and the BBC's Fair Trading Obligations' (2003) 64 *Modern Law Review* 657.

[3] See eg the position in the UK under the Communications Act 2003.

[4] D Green, 'The Public Realm in Broadcasting' in D Helm (ed), *Can The Market Deliver? Funding Public Service Television in the Digital Age* (Libbey 2005).

[5] Recommendation CM/Rec (2012)1 of the Committee of Ministers on public service media governance, adopted 15 February 2012, recitals; see also principles I-3.

[6] *Khurshid Mustafa and Tarzibachi v Sweden* (No 23883/06), judgment 16 December 2008.

[7] M Tracey, *The Decline and Fall of Public Service Broadcasting* (OUP 1998) 19.

views of minorities (of varying types) in the public sphere, potentially contributing to a more pluralistic debate in society. Some caution must be exercised, however, in equating PSM to pluralism. While the former may support the latter, and both are linked to freedom of expression, differences between them exist. In addition to supporting freedom of expression, public service media facilitate 'the provision of a varied and high-quality content, contributing to the reinforcement of democracy and social cohesion, and promoting intercultural dialogue and mutual understanding.'[8] In this sense, PSM is different from a fragmented multichannel environment in which a range of audiences exist with little interaction with each other—and with content dealing with different views or issues.

An additional characteristic of public service media is that they should be readily available to the majority of the population, which is often described as universality. Universality has two aspects. The first is technical and practical: that the technology to reach all parts of the relevant territory should be used. The second is affordability: all should be able to access public service content, irrespective of geographic location or socio-economic status. Universality, as it facilitates inclusiveness, also supports pluralism. Ultimately, however, there is no one set of institutional or even service-based standards which exclusively determine the nature and scope of PSM.

Substantive EU law

The first question is the extent to which substantive EU law requires PSM, if at all. The position of the EU's power to regulate in the field of the media has been contentious.[9] Despite differing and deeply held perspectives as to the role and level of media regulation across the various member states, the EU has legislated in the field of broadcasting through what is now the Audiovisual Media Services Directive (AVMSD).[10] The AVMSD harmonised standards for broadcast (and 'television like') services and, with the exception of the controversial European quota provisions,[11] focusses on negative regulation. For example, certain 'harmful' types of content are prohibited (hate speech)[12] or limited (pornography), and constraints apply to advertising. Nonetheless, one of the

[8] Council of Europe, Committee of Ministers, Recommendation CM/Rec(2012)1 on Public Service media Governance, 15 February 2012.

[9] See text associated with ns 42–47.

[10] Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (consolidated version) [2010] OJ L 95/1.

[11] R Collins, 'The Screening of Jacques Tati: Broadcasting and Cultural Identity in the European Community' (1993) 11 *Cardozo Arts and Entertainment Law Journal* 2, 361; I Katsirea, 'Why the European Broadcasting Quota should be Abolished' (2003) 28 *European Law Review* 190; J Harrison and L Woods, 'Television Quotas: Protecting European Culture?' (2001) 12 *Entertainment Law Review* 5.

[12] Cases C-244 and 245/10 *Mesopotamia Broadcast A/S METV and Roj TV A/S v Bundesrepublik Deutschland*, [2011] ECR I-8777.

purposes of the directive is the support of media pluralism.[13] The AVMSD, by supporting the possibility of the free flow of programming through the EU (eg via satellite television and cable re-transmission of terrestrial signals), potentially increases the range of content available and the diversity of supply.[14] The AVMSD is, however, completely silent as to the existence or otherwise of PSM.

The EU's competence to act with regard to electronic communications networks and services on which audiovisual content is disseminated is less contentious. While the regulatory regime for electronic communications in broad terms recognizes a distinction between content and transmission (with networks being service neutral),[15] the essential link between the two (in that transmission is necessary for content to reach viewers) is recognized, and especially allows measures taken to support media plurality.[16] States thus have the room to regulate for pluralism, but are not required so to do, and there is no specific requirement for PSM. The general objective of the Communications Package is to improve competition and efficiency, but elements of objectivity, transparency, and proportionality are required in relation to allocation of radio frequencies (central to the existence of terrestrial broadcasting),[17] a point re-affirmed in the Authorisation Directive.[18] This is the case whether the radio frequencies are assigned to broadcasters or to other providers of electronic services.[19] More specifically, the Access Directive recognized that there may be need of specific regulation to support the development of digital television, and the Universal Service Directive provided 'must carry' rules to favour public interest content. Again, the regime is permissive and focusses on transmission and universality rather than on types of content or provider. Thus, Article 31 specifies that must-carry rules may only be imposed on the network 'where a significant number of end-users of such networks use them as their principal means' to receive broadcasts. The plurality concerns arise implicitly: the imposition of 'must carry' is conditional on being 'necessary to meet clearly defined general interest objectives'.[20] The Court has linked

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[13] Note references to the role of audiovisual media content in cultural terms, and in respect of diversity: AVMSD, Recitals 4, 5, and 8.

[14] This seems to be the implication of AVMSD, Recital 8.

[15] The EU regulatory framework for electronic communications covers fixed and wireless telecoms, internet, broadcasting and transmission services, but not content, see eg Recital 5, Framework Directive (2002/21/EC) [2002] OJ L 108/33 (as amended). This distinction is reflected for example in the Greek regime where telecommunications are regulated by the Hellenic Telecommunications and Post Commission (EETT) and the applicable regime is found in Law 3431/2006, whereas the broadcasters are regulated separately, by the National Council for Radio and Television (NCRTV) under L3592/2007. Licences were however not initially granted by NCRTV, but by the relevant minister. Post Law 2863/2000 NCRTV was given the power to grant licences, though operationalizing the power has proved difficult. See I Katsirea, *Public Broadcasting and European Law* (Kluwer 2008) 62–63.

[16] Framework Directive, Recitals 5–6 and arts 1(3) and 8(1); note also provisions in Access Directive (Directive 2002/19/EC) [2002] OJ L 108/7 (as amended) regarding take up of DTT.

[17] Framework Directive, art 9(1).

[18] Authorisation of Electronic Communications Networks and Services (Directive 2002/20/EC) [2002] OJ L 108/21.

[19] Authorisation Directive, Recital 12.

[20] Universal Service Directive (Directive 2002/22/EC) [2002] OJ L 108/51, art 31.

pluralism with freedom of expression, and that cultural policies may seek to protect pluralism.[21] Certainly, plurality concerns constitute general interest objectives,[22] allowing room for PSM.

The Authorisation Directive allows special treatment of frequencies / systems used for broadcasting, but only those necessary to achieve a general interest objective.[23] While there is no jurisprudence on this specific provision, it is likely that the Court would here read across its acceptance of plurality (as served by PSM) in respect of other provisions. Conditions which may be attached to the authorisation include those to ensure compliance with must-carry obligations and AVMSD content requirements.[24]

The result is that the Communications Package cannot be used to require member states to have any particular broadcasting system, provided these procedural aspects are respected. Significantly, however, once a decision has been made with regard to the desirability of awarding a licence, the Communications Package—particularly the Authorisation Directive—will cover the process of award and grant to ensure principles of administrative justice are respected. While the Authorisation Directive focusses on conditions relating to the grant of authorisations, it deals also with duration, transfer, and renewal, and procedures in general should be transparent and proportionate. Furthermore, penalties should be proportionate. Recital 27 specifies:

> Save in exceptional circumstances, it would not be proportionate to suspend or withdraw the right to provide electronic communications services or the right to use radio frequencies or numbers where an undertaking did not comply with one or more of the conditions under the general authorisation.

While this recital relates to general authorisations rather than to the specific conditions which are permitted in relation to broadcasting,[25] removal of the right is reserved for extreme cases, usually where clear warning has been given. Thus Article 10(2) of the Authorisation Directive envisages the notification to a concerned undertaking of an alleged breach of condition, and specifies a time scale within which that undertaking has time to respond. While financial penalties may be levied,[26] national authorities may suspend rights of use only in 'cases of serious and repeated breaches of the conditions of the general authorization, the rights of use of specific obligations … where measures aimed at ensuring compliance … have failed.'[27] Clearly, then, the Communications

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[21] Case C-250/06 *United Pan-Europe Communications Belgium SA and Others v Belgium*, [2007] ECR I-11135 [41].

[22] Case C-134/10 *Commission v Belgium*, (Must-Carry), [2011] ECR I-1053 [43]–[44]; Case C-336/07 *Kabel Deutschland Vertrieb v Niedersächsische Landesmedienanstalt für privaten Rundfunk*, [2008] ECR I-10889 [33]–[34]. See also recital 6 Framework Directive.

[23] Authorisation Directive, art 5(2).

[24] ibid Annex.

[25] Note that the Italian Gasparri Law envisaged a notification system for commercial stations in the digital environment.

[26] Authorisation Directive, art 10(3).

[27] ibid art 10(5).

Package covers the end of a licence as well as the process of creation. Insofar as the Greek authorities removed or terminated ERT's right to use a frequency or electronic communications network (as opposed to its right to broadcast), it seems unlikely that these formalities have been met. Other challenges to PSM, such as lack of funding for PSM, or a decision to privatize a body, would not necessarily be problematic under this framework.

One final issue concerns the requirement for independent regulatory bodies, important for supporting independence of PSM.[28] The Communications Package contains a requirement for an independent regulator in each national electronic communications system, a regulator which has substantial responsibilities. Such independent bodies can support the independence of the media in that, where they are responsible for the awarding of licences and the assessment of broadcasters' behaviour without government intervention, they can constitute a barrier between the media bodies and direct state involvement. This support would be useful should a member state seek to curtail or override already existing processes, providing independent regulatory structures exist.[29] While the changes introduced by AVMSD to the previous Television Without Frontiers Directive (TWFD) emphasised the significance of independent regulators for broadcasting, both in terms of their existence and their role, a separate body with specified powers is not required by the AVMSD.[30] Indeed, Article 30 does not oblige member states to guarantee the independence of any such bodies which do exist.[31] Such limitation was visible in pre-accession negotiations in respect of some of the more recent member states, where the Commission could point to no binding instrument to require the independence of newly created audiovisual regulatory bodies in those member states. Following the HLG Report,[32] DG CONNECT consulted on the independence of regulatory bodies within the scope of the AVMSD and on options for strengthening their independence, including a possible revision of Article 30 of the AVMSD. While it does not consider the scope of any such body's competence, it does look to the issue of resourcing and independence.[33] Irrespective of how useful independent regulators might be in practice, currently no such obligations exist under Article 30 of the AVMSD.

Insofar as PSM has been considered by EU law, it has occurred in assessing the scope of Member State freedom to put PSM systems in place when they might conflict with

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[28] Council of Europe, Committee of Ministers, Recommendation CM/Rec (2012) 1, especially [25].

[29] The NCRTV in Greece is described as an independent authority, but the government of the day has a strong influence over its workings: see Katsirea (n 15) 61.

[30] Article 30 AVMSD, read in conjunction with recital 94 AVMSD.

[31] Final Report of the study on 'Indicators for independence and efficient functioning of audiovisual media services regulatory bodies for the purpose of enforcing the rules in the AVMS Directive' SMART 2009/0001 (INDIREG), <http://ec.europa.eu/avpolicy/info_centre/library/studies/index_en.htm#regulators>.

[32] The Report of the High Level Group on Freedom and Media Pluralism chaired by Professor Vaira Vīķe-Freiberga with Professor Herta Däubler-Gmelin, Professor Luís Miguel Poiares Pessoa Maduro and Ben Hammersley, A Free and Pluralistic Media to sustain European Democracy, January 2013. It also commented on the weaknesses of Article 30.

[33] Guidance on Independence can be found in the Council of Europe Recommendation on the subject.

free movement rights or competition law (including state aid). The status of ERT arose in a case before the Court of Justice[34] in which the monopoly of ERT was challenged, successfully, on the basis of free movement of services (under Article 59 of the Treaty on the Functioning of the European Union, TFEU) and the competition provisions. The underlying rationale of PSM was not under threat—what was at issue was the proportionality of the state measures. Free movement principles might bite also where national laws relating to structure and organization of media companies or their registration to provide content discriminated against those established in other Member States[35] (including indirect discrimination) or constituted a hindrance to cross-border service provision.[36] While the ECJ will review national rules triggering the free movement and competition provisions, it has accepted the value of regulation aimed at media pluralism and cultural diversity. Indeed, the *ERT* judgment can be seen also as supporting the importance of pluralism within the media sector.[37] In the *Mediawet* cases, the ECJ assessed the Dutch regulatory system as being:

> designed to establish a pluralistic and non-commercial broadcasting system and thus forms part of a cultural policy intended to safeguard, in the audio-visual sector, the freedom of expression of the various (in particular social, cultural, religious, and philosophical) components existing in the Netherlands. … Those cultural policy objectives are objectives relating to the public interest which a Member State may legitimately pursue by formulating the statutes of its own broadcasting organisations in an appropriate manner.[38]

The approach has consistently been of allowing space for media regulation in the public interest, but the nature of the free movement and competition provisions is such that they do not require action in this regard. They exist to ensure member states' activities do not create barriers to the single market. They are thus essentially negative in their obligations.

More commonly, we see the position of PSMs being challenged under the state aid rules, which prohibit the intervention of the state in the market. The argument about PSM

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[34] Case C-260/89 *Elliniki Radiophonia Tileorassi – Anonimi Etairia* (ERT) *v Dimotiki Etairia Plirofosissis* (DEP) *and Sotirios Kouvelas*, [1991] ECR I-2925.

[35] See eg the rules in issue in Case C-563/13 *UPC DTH S.à.r.l. v Nemzeti Média- és Hírközlési Hatóság Elnöke*, pending.

[36] TFEU, arts 49 and 56 and relevant case law: G Marenco, 'The Notion of Restriction on the Freedom of Establishment and the Provision of Services in the Case-Law of the Court' (1991) *Yearbook of European Law* 111; A Scheuer, C Bachmeier, L Rock, and B Schmeyer, 'The Citizens' Right to Information: Law and Policy in the EU and Its Member States: Report commissioned by the European Parliament' (2012) 24, <http://www.wobbing.eu/sites/default/files/EST75132.pdf>.

[37] The preference for avoiding state monopolies in the media can be seen also in the jurisprudence of the ECtHR: *Informationsverein Lentia v Austria* (Nos 6\1992\381\455-459, series A 276), judgment 24 November 1993, as well as the other EU institutions, eg European Parliament resolution of 20 Nov 2002 on media concentration, OJ C 025, 29.1.2004, 205; see also European Parliament resolution of 25 September 2008 on concentration and pluralism in the media in the European Union (2007/2253(INI)).

[38] Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda and Others v Commissariaat voor de Media*, [1991] ECR I-4007 [22]–[23]. There are others cases to a similar effect: see eg Case C-23/93, *TV10 SA v Commissariaat voor de Media*, [1994] ECR I-4795 [25].

is that the state in supporting PSM is ensuring that a socially important service is provided, universally.[39] While the European Commission accepted that in principle PSM might be compatible with state aid rules, it was concerned to ensure that aid granted to such undertakings is provided transparently and proportionately. Once again, this is a negative application of EU law, permitting such action but not requiring it. This position is reflected in the PSM protocol,[40] which expressly links PSM to media pluralism. In terms of seeing the PSM Protocol as a safeguard against Member State action, there is a problem. The protocol itself highlights the distinctive, national nature of PSM and states that the treaties 'shall be without prejudice to the competence of Member States' to organise and to fund PSM as they see fit. So, while the approach of the institutions requires member states to be clear about the grant and scope of any public service remit,[41] it does not require any particular level of service to be maintained.[42] This means that questions of sufficiency of support, as well as institutional questions of form of PSM, are not defined by EU law.

This partial coverage of the area in terms of existing regulation raises the question of whether the EU has competence to do more, specifically as regards PSM. Its competence to act in the media context has always been controversial, as it straddles the boundary between two types of policy areas in which the EU has different roles. The first is the internal market and industrial concerns, which clearly fall within the remit of the EU. The second relates to cultural policy, in which the EU has only supporting competence[43] and where subsidiarity might militate towards Member State rather than EU action. This tension can be seen in the area already: the original TWFD was not unanimously accepted[44] and Union action in the field of media pluralism was problematic during the 1990s.[45] The HLG Report considers this issue, arguing that the Union does now have competence, justified by the link between media freedom and pluralism and EU democracy. There is some academic support for this proposition.[46] It is unlikely that the HLG view, which is partly based on Article 11 of the EU Charter of Fundamental Rights (EUCFR), would be generally accepted because the Charter does not extend Union

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[39] Council, Resolution concerning PSB [1999] OJ C 30/1 [8].

[40] Protocol on the system of public broadcasting in the Member States, OJ [1997] C 340/109.

[41] The key test is found in the '*Altmark* criteria': Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*, judgment 24 July 2003; see also Commission, Communication on the Application of State Aid Rules to Public Service broadcasting [2009] OJ C 257/1.

[42] J Harrison and L Woods, *European Broadcasting Law and Policy* (CUP 2007), ch 13.

[43] TFEU, art 167; the power to harmonise in this field is specifically excluded.

[44] See discussion in Harrison and Woods (n 42) 77 ff.

[45] R Craufurd Smith, 'Rethinking European Union Competence in the Field of Media Ownership: The Internal Market, Fundamental Rights and European Citizenship' (2004) *European Law Review* 652; G Doyle, 'From "Pluralism" to "Ownership": Europe's Emergent Policy on Media Concentrations Navigates the Doldrums' (1997) 3 *Journal of Information Law and Technology*, <http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1997_3/doyle>.

[46] <http://cmpf.eui.eu/publications/policyreport.aspx>.

competence.[47] Nonetheless, the underlying assumption about the link of PSM to media pluralism and freedom of expression shows another avenue to explore, as the EU itself is supposed to respect the rule of law, democracy and human rights.[48]

EU law and human rights: PSM, media pluralism and freedom of expression

The EU is based on respect for human rights, rule of law, and democracy.[49] The questions we need to consider are twofold:

1. do our concerns about PSM fall within the scope of the values, specifically freedom of expression; and, if so,
2. is it possible to rely on freedom of expression to require an EU Member State to provide PSM, or to require the EU to act in this regard?

The starting point now is Article 6 of the Treaty on European Union (TEU) which recognizes and gives legal force to the rights, freedoms, and principles set out in the EUCFR. It then acknowledges a second group of rights, those forming the general principles of EU law. Article 6(3) of the TEU identifies two sources of general principles (though in a non-exhaustive manner): those guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR); and those resulting from the constitutional traditions common to the Member States. So, there are three possible sources of rights: general principles, ECHR, and the EUCFR, which are all interconnected.

General principles originated as a judicial development to temper the impact of market reasoning on human rights. In the *ERT* case the ECJ stated that, when deciding whether rules that obstruct the freedom to provide services can be justified according to EU law it has to be 'interpreted in the light of general principles of law and in particular of fundamental rights.'[50] The principles so recognised clearly included a right to freedom of expression, both within the national legal constitutions and the ECHR (Article 10), as can be seen from cases such as *ERT*. The question then is about the scope of protection awarded by freedom of expression.

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[47] <https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/HLG%20consultation%20publish.pdf>.

[48] TEU, arts 2 and 6.

[49] For an early review, see eg L Woods, 'The European Union and Human Rights' in R Hanski and M Suski (eds), *An Introduction to the International Protection of Human Rights: A Textbook* (2 edn, Akademi University Institute for Human Rights 2001).

[50] Case C-260/89 *ERT* (n 34).

Traditions common to the Member States

While the various constitutions all protect freedom of expression, they do it in various ways and the role of the media, let alone PSM, is not often expressly recognised.[51] Some Member States do see PSM as falling within the scope of constitutional protection, for example in Germany, and some recognize more limited aspects of the media, such as the press—as can be seen in Italy. Even where there is constitutional recognition of the media, however, difficulties can arise in practice. The Italian Gasparri law has been criticized for failing to deal with problems regarding the lack of independence of Italian PSM.[52] Further concerns relate to state interference in the broadcaster and its operations. Even the BBC, usually understood as an established and well-funded PSM organisation, is not immune from threats. The BBC is established by a Charter. The renewal of the Charter is not a matter for parliament but for the executive. If the Charter is not renewed, the BBC would seem to have no legal base. Its licence fee is likewise dependent on the goodwill of politicians. While Ofcom, the UK communications regulator, has had a role in reviewing public service, it acts only in an advisory capacity. A lack of formal guarantees is, however, a characteristic of the British constitutional order.

The Member State which has the strongest express constitutional protection of PSM is Germany, based on Article 5 of the Basic Law (German Constitution). Article 5(1) provides:

> (1) Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.

This provision's relationship with broadcasting started in 1961, when the Federal Constitutional Court (FCC) issued its first 'broadcasting judgment'. This case established the constitutional basis for public broadcasting and prohibited private broadcasting. While private broadcasting was eventually introduced, the German broadcasting system remains a dual system in which PSM plays an essential role, that of 'indispensable fundamental provision for all'. In its 1986 'broadcasting judgment', the FCC defined the public service broadcasting remit as requiring an unrestricted representation of the

[51] While the French constitution recognises free speech, it is silent on the media and the French arrangements—recently much amended—are found in the general law by virtue of Article 34 of the Constitution. The Greek Constitution, however, specifically recognises the media, although the broadcast media do not receive the same constitutional protection as the press, see Katsirea (n 15) 65.

[52] See eg OSCE Representative on Freedom of the Media 'Visit to Italy: Gasparri Law: Observations and Recommendations' 7 June 2005, <http://www.osce.org/fom/15827>.

diversity of opinions and broadly varied programme content. In its 'sixth broadcasting judgment',[53] the FCC reaffirmed the importance of PSMs. Nonetheless, the FCC has not required the German state to establish a PSM *per se*; what it sets down are the requirements for the broadcasting environment, as can be seen in its sixth broadcasting judgment. There the FCC held that:

> [t]he right also requires, however, a positive legal order which ensures that broadcasting is not abandoned to individual societal groups any more than it is to the state, and that it instead records and passes on the diversity of topics and opinions which play a role in society as a whole. This purpose demands material, organizational, and procedural rules that are oriented toward broadcasting's task and suited to effect that which the Basic Law's Art. 5(1) in its entirety seeks to guarantee. Cf. BVerfGE 57, 195 [320]. How in particular to structure this legal order is for the legislature to determine. The Basic Law does not prescribe any particular model. Nor does it require consistent realization of any model previously chosen. Instead, what matters constitutionally is simply the guaranteeing of free and comprehensive reporting.[54]

We might question how this requirement of diversity might be achieved without PSM, even if not public service broadcaster(s). Minority interests and other broadcasting in the public interest are areas where market failure is recognised, suggesting that some form of regulation and/or state support might be required if such programming is to be made available. These viewpoints have been reaffirmed in the context of state aid and the extension of PSM into digital media.[55]

Whether this is enough to argue that the EU recognises a general principle of freedom of expression that *requires* a dual system involving PSM is another question. Even if we argue from the German case law, we may find that there is not sufficient commonality among the Member States on this positive aspect of freedom of expression for it to constitute a general principle. Unfortunately, this question of how many Member States must recognize a principle before it may be considered a general principle of EU law has not been directly addressed by the ECJ and its jurisprudence in this area is not entirely consistent.[56] The question may be moot in this context, because the ECJ has relied on Article 10 of the ECHR in determining freedom of expression in its jurisprudence, to the exclusion of references to the Member States' various constitutional understandings of this right.

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[53] BVerfGE 83, 238.

[54] BVerfGE 83, 238 1 BvF 1/85, 1/88 6.

[55] BVerfG, 1 BvR 2270/05, judgment 11 September 2007, [120] ff.

[56] Eg Case C-36/02 *Omega Spielhallen-und Automatenaustellungs GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, [2004] ECR I-9609*;* Case 5/88 *Wachauf*, [1989] ECR 2633; Case C-2/92 *Bostock*, [1994] ECR I-955.

ECHR as source of general principles

Article 10 of the ECHR states:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

Article 10 is silent on the position of PSM. Case law has clarified that Article 10(1) of the ECHR has a broad ambit, and that it protects the means of expression (such as broadcasting frequencies) as well as the content.[57] The Court has repeatedly emphasized that the media has a duty to inform the public,[58] a responsibility often seen as central to the role of PSM, and which has in some instances justified special protection of the media.[59] The last sentence of Article 10(1) envisages the possibility of licensing systems for some mass media, including broadcasters, but the Strasbourg court has made clear that States do not enjoy unrestricted freedom in this regard. The Court has held that licensing systems must accord with the principles of Article 10(2) of the ECHR.[60] Not only must a public objective be served by the State measure, but that measure must be necessary in a democratic society and proportionate. Penalties such as fines or withdrawal of licences are not impossible to justify, but on the facts they must be lawful, appropriate, and proportionate,[61] and issued by authorities which do not have absolute discretion.[62] Furthermore, licensing systems must be implemented, so that a significant gap between the expectation of the law and the existing practice does not arise.[63] In this sense, states are under a positive obligation to ensure freedom of expression and are the guarantors of pluralism. There are thus parallels with the obligations under EU substantive law, though here they are arguably more far-reaching: the Article 10 argument would apply to formalities for broadcasting licences, as well as transmission licences (relating to electronic communications networks).

It would seem that the removal of the right to broadcast would constitute a *prima facie* violation of Article 10, though that breach could be justified under the final sentence of Article 10(1) and/or Article 10(2) of the ECHR. It would seem hard, however, to reconcile the abrupt closure of ERT, for example, with these latter requirements. While the removal of a right to broadcast, or the interference with a broadcast through physical means (eg locking workers out of their studio)[64] could trigger Article 10 of the ECHR,

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[57] *Autronic v Switzerland* (No 12729/87, series A/178), (1990) 12 EHRR 485.

[58] *Sunday Times v the United Kingdom* (No 1, series A/30), judgment of 26 April 1979, [65].

[59] EJ Dommering, 'Comments on Art. 10 ECHR' in O Castendyk, EJ Dommering and A Scheuer (eds), *European Media Law* (Kluwer 2008) 46.

[60] *Informationsverein Lentia v Austria* (series A/276), judgment of 24 November 1993, [32].

[61] *Sigma Radio Television Limited v Cyprus* (No 32181/04), judgment 21 July 2011.

[62] *Glas Nadezhda v Bulgaria* (No 14134/02), judgment 1 October 2007.

[63] *Centro Europa 7 v Italy* (No 38433/09), judgment 7 June 2012.

[64] *Frăsilă and Ciocîrlan v Romania* (No 25329/03), judgment 10 May 2012.

it is more difficult to argue that there is a right to a licence, or the right to use a specific type of technology,[65] save perhaps when that technology is the only means available.[66] Certainly a state has some freedom in balancing interests in the public interest.[67] Although the European Court of Human Rights (ECtHR) has tended to assume that cases involving the professional media involve political speech, or that the value in having an independent media justifies a narrow margin of appreciation,[68] in this context, its approach has focused more on systems and procedures to ensure the fair allocation of frequencies and licences.[69] In this there are again parallels in approach between the two EU and ECHR systems, despite their different overall objectives.

The ECtHR has noted the importance of pluralism and freedom of speech—linking it to tolerance and the proper functioning of democracy, an underpinning value for the ECHR itself.[70] Consequently it has imposed positive obligations on states to guarantee that numerous media operators are present in a given national market,[71] following a similar reasoning to the ECJ in *ERT*, and thus it seems that Article 10 requires states to take steps to avoid excessive media concentration.[72]

> [I]n such a sensitive sector as the audiovisual media, in addition to its negative duty of non-interference the State has a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism.[73]

While the Court accepts the advantages of multiple players in the media sector in supporting pluralism and diversity (external pluralism), it has also expressed concerns about increasingly powerful financial groups controlling the advertising sector.[74] More general concerns have been expressed about the sufficiency of competition to ensure real diversity of content. Haraszti notes that 'mere variety is not sufficient if the media is to play a robust role in helping to maintain democracy.'[75] As well as range of suppliers and

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[65] *Tele 1 Privatfernsehgesellschaft mbH v Austria*, (No 32240/96), judgment of 21 September 2000.

[66] *Frăsilă and Ciocîrlan v Romania* (n 64), *Khurshid Mustafa and Tarzibachi* (n 6); cf *Appleby v United Kingdom* (No 44306/98), CEDH 2003VI, *Mouvement Raelien Suisse* (No 16354/06), judgment 13 July 2012*;* and note difference in approach where public spaces are in issue: *Women on Waves v Portugal* (No 31276/05), judgment 3 February 2009.

[67] *Demuth v Switzerland* (No 38743/97), judgment of 5 November 2002, Reports 2002-IX.

[68] *Jersild v Denmark* (No 15890/89), judgment of 23 September 1994.

[69] *Centro Europa 7* (n 63).

[70] *Lentia* (n 37).

[71] ibid. Austria's prohibition on privately-owned licences was in breach of Article 10 ECHR.

[72] *De Geillustreerde Pers NV v Netherlands* (1976) and *Verein Alternatives Lokalradio Bern v Switzerland* (1986)—these are, however, early Commission decisions but the Court has cited them approvingly, for example in *Centro Europa 7* (n 63).

[73] *Centro Europa 7* (n 63) [134].

[74] *Vgt Verein gegen Tierfabriken v Switzerland* (No 24699/94), judgment 28 June 2001; see also concerns about the power of money in *Animal Defenders International v United Kingdom* (No 48876/08), judgment 22 April 2013.

[75] M Haraszti, 'Media Pluralism and Human Rights' Issues Discussion Paper, <https://wcd.coe.int/ViewDoc.jsp?id=1881589#P425_53443>.

range of content, we might envisage certain different types of content of good quality. So what more is required if the State is to fulfil its obligations to 'the principle of pluralism, of which the State is the ultimate guarantor'?[76] Here, PSM could be a (partial) solution.[77]

The ECtHR has recognised the importance of PSM in the light of its functions[78]—although it is seen as part of the expressive aspect of freedom of expression, rather than as a functional serving of the public's needs (by contrast with some of the reasoning in national legal orders).[79] In *Manole*,[80] concerning government interference with the stories carried by the state broadcaster, the Court held that as a corollary of its obligation to ensure pluralism, the State has a duty to ensure that the public has access through television and radio to impartial and accurate information and a range of opinions and comments, reflecting the diversity of political outlook within the country. Journalists and others working in the audiovisual media should not be prevented from imparting it.[81] Furthermore, the ECtHR argued that it is indispensable for the proper functioning of democracy that a (dominant) public broadcaster transmit impartial, independent, and balanced news, information, and comment and, in addition, that it provide a forum for public discussion in which as broad a spectrum as possible of views and opinions can be expressed. The Court recognized that PSM as an institution could fulfil these functions. *Manole* is an important judgment in that it recognises the role of PSM in a democratic society. In a similar vein, there is a significant body of declarations and recommendations within the Council of Europe outlining the nature, functions, and funding of PSM (or public service media) and which emphasise the need for these institutions to be autonomous and independent.[82]

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[76] *Lentia* (n 37) [38]; Committee of Ministers' Recommendation R (99) 1 on measures to promote media pluralism, the Parliamentary Assembly's Recommendation 1407 (1999) on media and democratic culture, Committee of Ministers' Recommendation Rec (2011) 7 on a new notion of media, Resolution of 25 November 2010 on public service broadcasting in the digital era: The future of the 'dual system' (2010/2028(INI)). This latter resolution recognises the 'dual system' and the role that both PSM and commercial operators play in a diverse media environment.

[77] Report prepared by the AP-MD (Advisory Panel to the CDMM on media concentrations, pluralism and diversity questions) 'Media Diversity in Europe' (H/APMD(2003)001), 3 and 15–16, <http://archiv2.medienhilfe.ch/topics/Diversity/CoE_MediaDiversity.pdf>. See also NB (EU) European Parliament Resolution 'Public service broadcasting in the digital era: the future of the dual system' (see Report by Ivo Belet (EPP, BE)).

[78] *Manole v Moldova* (No 13936/02), judgment 17 September 2009.

[79] Media Diversity in Europe (n 77) 5. It seems that the Court increasingly recognises the public sphere aspect as can be seen in cases such as *Manole* (n 78) and *Centro Europa 7* (n 63).

[80] *Manole* (n 78).

[81] See also *Kaleta v Poland* (No 20436/02), judgment of 16 July 2009.

[82] Committee of Ministers Recommendation R (96) 10 on the guarantee of the independence of public service broadcasting; Declaration of the Committee of Ministers on the guarantee of the independence of public service broadcasting in the member states, adopted on 27 September 2006; PACE Recommendation 1878 (2009) on funding of public service broadcasting; Committee of Ministers Recommendation CM/Rec(2007)3 on the remit of public service media in the information society; Action Plan on public service media at the Council of Europe Conference of Ministers responsible for Media and New communication Services at Reykjavik in 2009, European states made a commitment to maintain a strong and vibrant independent

While it might seem that the positive obligations under Article 10 require PSM, it is important not to overstate the position. In *Manole*, the Court clearly stated that:

> The choice of the means by which to achieve these aims must vary according to local conditions and, therefore, falls within the State's margin of appreciation. Thus, for example, while the Court, and previously the Commission, have recognised that a public service broadcasting system is capable of contributing to the quality and balance of programmes (*citations omitted*), there is no obligation under Article 10 to put in place such a service, provided that some other means are used to the same end.[83]

Nonetheless, while the case law does not require the establishment of PSM, it may be argued the State is required to protect pluralism. So, the situation is different where a member state has had PSM and then removes it, especially where that State makes no provision to compensate for the loss of the PSM and the consequent adverse impact on plurality. Further, we might ask whether, in the absence of existing PSM, or where a PSM is limited in its remit or by funding, and where there is an insufficiently plural media market—for example where there was only one media provider—the Court would require the establishment of PSM. Here the distinction between PSM as a range of functions and PSM as an institution is significant. As noted, it might be possible to achieve the former through appropriate regulation (though this would be difficult in any monopoly position). This alternative—PSM as institution—may provide internal diversity and support external diversity, but may be politically sensitive, not least because there are implications about funding for its operations. Note that many of the Council of Europe documents specify that part of the PSM independence requirement is financial and the ECtHR has stated that measures to ensure pluralism must be effective.[84] The case law suggests that a state is under an obligation to introduce a system to ensure plurality, even though the court might be cautious about specifying the form of that intervention. It is arguable that the implication of existing case law is that an action could be brought where PSM is poorly funded, though there are questions about who might be the victim.[85] This is, however, very sensitive territory.

public broadcasting service; Resolution No 1: Future of Public Service Broadcasting of the 4th Council of Europe Ministerial Conference on Mass Media Policy, Prague, 1994, notes the importance of public service broadcasting to human rights and democracy generally and the role of public service broadcasting in providing a forum for wide-ranging public debate, innovative programming not driven by market forces and promotion of local production. As a result of these vital roles, the Resolution recommends that member states guarantee at least one comprehensive public service broadcaster which is accessible to all.

[83] *Manole* (n 78) [100].

[84] *Centro Europa 7* (n 63).

[85] In principle, PSM can be victims: *Radio France v France* (No 53984/00), decision of 23 September 2003; Ö*sterreichischer Rundfunk v Austria* (No 35841/02), judgment of 7 December 2006. Cases such as *Khurshid Mustafa* (n 6) and *Faccio v Italy* (No 33/04), decision 31 March 2009 suggest that audiences can be victims too.

European Charter of Fundamental Rights

The final possible source of protection is Article 11 of the European Charter of Fundamental Rights (EUCFR). There are some claims that this is a stronger protection of media pluralism than Article 10 of the ECHR as Article 11(2) of the EUCFR expressly refers to media pluralism. It is debatable that this is so, given that according to the Explanations to the EUCFR, Article 11 is to be understood against Article 10,[86] which already has plentiful case law on media pluralism. Note that EUCFR may give higher protection than that specified in Article 10, though it is unclear when the Court will avail itself of this possibility.[87]

Applicability of guarantees: The scope of EU law

The scope of EU law

Assuming freedom of expression provides PSM with some protection, there is another difficulty with relying on freedom of expression in the EU system. These rights only apply within 'the scope of EU law', a concept the ambit of which is uncertain. General principles apply when the institutions act,[88] when Member States implement or apply Union law[89] or—as in *ERT*—when Member States seek to derogate from EU law. Similar principles apply in relation to EUCFR.[90] Article 6 of the TEU specifies: 'The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.' The scope of EU law should be the same as regards general principles under Article 6 of the TEU and as regards the application of the EUCFR.[91]

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[86] See also EUCFR, art 52(3).

[87] ibid 2nd sentence.

[88] Case 294/83 *Les Verts* [1986] ECR 1339 [23] and Joined Cases C-402/05 P and C-415/05P *Kadi and Al Barakaat* [2008] ECR I-6351 [316].

[89] Case 5/88 *Wachauf* (n 56). As can be seen from Cases C-465/00, C-138/01 and 139/01 *Rechnungshof v Österreichischer Rundfunk* [2003] ECR I-4989; [2003] 3 CMLR 10; Case C-101/01 *Lindqvist* [2003] ECR I-12971; [2004] 1 CMLR 20 the application of national law within the field of application of a directive will also be caught, irrespective of whether the national legislation was designed to implement the directive or not, and without there being any necessity for cross-border movement. See generally eg B de Witte, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights' in P Alston (ed), *The EU and Human Rights* (OUP 1999).

[90] EUCFR, art 51; see for comments eg M Dougan, 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts' 45 *Common Market Law Review* 617, 663.

[91] This seems to be the inference from the CJ's approach to the interpretation of Article 51 EUCFR, which might otherwise seem to be more limited. In Case C-617/10 *Fransson*, judgment 26 February 2013, the CJ approved the approach of the Explanations in this context, the Explanations tying the scope of the EUCFR's application back to jurisprudence on the scope of EU law with regard to general principles, notably the *ERT* case. More generally see J Dutheil de la Rochere, 'Challenges for the Protection of Fundamental Rights in the EU at the Time of the Entry into Force of the Lisbon Treaty' (2010) 33 *Fordham International Law Journal* 1776.

The determination of the scope of EU has given rise to much debate; EU law has been implicated in a range of circumstances, some more clear-cut than others.[92] The issue of scope can be problematic, especially in conjunction with European citizenship.[93] Even without that complicating element, disquiet has been expressed about competence creep and the federalizing effect of human rights especially where the implications of the scope of EU law are felt within the national legal order outside EU legislative competence.[94] Clearly, when the institutions act, they fall within the scope of EU law as they are creatures of the treaties and have competence only to act as specified therein. Legislation enacted under the treaties must comply with fundamental rights, and must be interpreted so to comply. Member States when acting as agent for the EU (eg border controls) likewise fall within the scope of EU law, as they do when implementing EU law (such as a directive),[95] whether Member States enact legislation to put the directive into force, or whether they rely on pre-existing law. A Member State which exercises a discretionary power under EU legislation must be considered as implementing European Union law.[96] When national regulatory authorities have been given tasks under an EU regulatory system, when carrying out those tasks they are implementing EU law.[97] Member States also act within the scope of EU law when they seek to derogate from the Treaties.[98] These various lines of cases could be collapsed into two broad groups: implementation and derogation.[99] A difference between them is that implementation has some connection with positive EU policy and law, but derogation may arise more broadly. It may be triggered by Member State laws in *any* area of policy, even where the EU has no competence to legislate. With regard to the issue of an obligation to establish and maintain PSM, both aspects might be implicated, so we must consider the scope of both categories in more detail.

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[92] M Derlén and J Lindholm, 'Three Ideas: The Scope of EU Law Protecting Against Discrimination' in M Derlén and J Lindholm (eds), *Volume in Honor of Pär Hallström* (Iustus 2012) especially 87 ff; T Tridimas, *General Principles of EU Law*, (2nd edn, OUP 2006) 39–42.

[93] See eg Sharpston AG in Case C-34/09 *Zambrano* [2011] ECR I-1177, AG, [83]–[84].

[94] Noted, for example, by Sharpston AG in *Zambrano*, ibid [141]; Cruz-Villalón AG in *Fransson* (n 91), though some see this 'federalising' opportunity as a good thing: M van den Brink, 'EU Citizenship and EU Fundamental Rights: Taking EU Citizenship Rights Seriously?' (2012) 39 *Legal Issues of Economic Integration* 273, 280–81.

[95] Joined Cases C-465/00, C-138/01 and 139/01 *Österreichischer Rundfunk* (n 89); Case C-101/01 *Lindqvist* (n 89).

[96] Case C411/10 and C-493/10 *NS v Secretary of State for the Home Department* and *ME and Others v Refugee Applications Commissioner*, judgment 3 February 2012, [68].

[97] Case C-380/05 *Centro Europa 7* [2008] ECR I-349. This would cover the NRAs in the Communications Package but more broadly also NRAs under the Energy Package.

[98] Case C260/89 *ERT* (n 34) [42] ff; Case C112/00 *Schmidberger* [2003] ECR I5659, [75]; and Case C36/02 *Omega* (n 56) [30]–[31].

[99] Eg Derlén and Lindholm (n 92) 88.

It has been suggested that,

> the concept of implementation can be understood in a narrow and a wide sense. The narrow interpretation would indicate that Member States are bound by fundamental rights only when their actions are directly and entirely prescribed by EU law. On the other hand, a wider definition would include all situations where Member State action is somehow founded on EU law.[100]

While this distinction begs the question of what 'somehow founded' means, the CJ's approach is closer to the latter position than to the former. The case law includes situations where the specific Member State action was not prescribed in detail by EU law but was nonetheless a consequence of it.[101] The key element is some level of applicability of EU provisions. As the CJ commented in the controversial case of *Fransson*,

> situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.[102]

Fransson also indicates that the level of connection between the provisions of EU law and the national action need not be that great. *Fransson* concerned Swedish penalties for tax evasion but while the VAT rules were in part a result of Directive 2006/112, the penalties were part of the domestic system and not required by the Directive. Nonetheless, the CJ held that—in contradiction to the views of the Advocate General—the Swedish rules did fall within the scope of EU law, based on more general obligations to ensure the effectiveness of EU law.[103] While this ruling means that many situations would fall within the scope of EU law that only have an indirect connection, there has been some suggestion that *Fransson* is specific to its facts and based on the need of the EU to protect its own resources derived from VAT.[104] Although the ruling on its wording is not so limited, subsequent jurisprudence suggests that not all indirect connections with EU law will trigger the application of the Charter.[105] The problem is that it is hard to find a consistent line linking these cases. The potential for a broad interpretation remains.

Derogation has likewise been broadly understood, extending to include circumstances in which the rule of reason applies.[106] Formally, the rule of reason operates so that a treaty freedom is not triggered in the first place, which contradicts the idea that such a situation lies within EU law. In practice, the rule of reason has been treated as derogating

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[100] ibid.

[101] Case 77/81 *Zuckerfabrik Franken GmbH v Germany* [1982] ECR 681.

[102] Case C-617/10 *Fransson* (n 91) [21].

[103] TEU, art 4(3).

[104] See eg strong response of German Federal Constitutional Court in the *Anti-terrorism Database Case* 1BvR 1215/07, judgment 24 April 2013.

[105] Cases C-489/09 and 1/10 *Gueye* and *Salmerón Sánchez* [2011] ERC I-225; Case C-128/12 *Sindicato dos Bancários do Norte* v *Banco Português de Negócios SA*, judgment 7 March 2013.

[106] Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag*, [1997] ECR I-3709; [1997] 3 CMLR 1329 [22]. K Lenaerts, 'Fundamental Rights in the European Union' (2000) 25 *European Law Review* 6, 575, 590–59; contrast L Besselink, 'The Member States the National Constitutions and the Scope of the Charter, (2001) 8 *Maastricht Journal* 68.

from primary EU law. One could argue that the power to derogate is given and defined by EU law which in itself must comply with human rights standards[107] or the resulting inconsistency would be unacceptable[108] and similar arguments could be used in any context determining the boundary of EU law—rule of reason, derogation, or cessation of derogation. Beyond this issue, there are questions about the duration of EU law once a connection has been established. The classic example arises in *Konstantinidis*, a case concerning a Greek national who exercised his right of free movement, thereby bringing himself within the scope of EU law.[109] Some years after his move, he objected to the way the host authorities transliterated his name. He argued that this situation fell within the scope of EU law. While the Advocate-General agreed, the Court did not. This case suggests that there are limits to the connection between exercise of free movement rights and general principles/EUCFR, though it should be noted *Konstantinidis* pre-dated EU citizenship and the Court relied heavily on the economic aspects, or lack thereof, in deciding the case. The introduction of European citizenship may have an impact in analogous cases.[110] Note also that a breach of human rights cannot itself create a 'hindrance' to free movement so as to trigger the application of the treaties,[111] however broadly hindrance is understood.[112] So far, there has been no appetite to endorse the suggestion of Advocate General Poiares Maduro advocating the creation of an additional category of general principles cases concerning a serious and persistent breach of fundamental rights, which he suggested would constitute a disincentive to free movement.[113]

Application of law on scope to PSM

The first question is whether the current Greek austerity measures (or those of other States similarly affected) which were arguably the justification for the closure of ERT can be attributed to the EU or be necessary for the effectiveness of its policies. This choice is not explicitly required by EU policy: the Commission stated that, in making their decision, the Greek authorities were acting within their competence and with autonomy.[114] The approach of the ECJ in *Sindicato dos Bancários do Norte*,[115] which concerned the implementation of wage cuts for employees of a nationalised bank to comply with the Stability and Growth

[107] TEU, arts 2 and 6.

[108] See eg P Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) 39 *Common Market Law Review* 5, 978.

[109] Case C-168/91 *Christos Konstantinidis v Stadt Altensteig*, [1993] ECR I-1191.

[110] The Court has described it as a fundamental status of Member State nationals: Case C184/99 *Grzelczyk* [2001] ECR I6193, [31].

[111] See eg Case C-313/12 *Romeo*, judgment 7 November 2013.

[112] See eg Case C72/03 *Carbonati* [2004] ECR I8027; Case C60/00 *Carpenter* [2002] ECR I6279.

[113] Case C-380/05 *Centro Europa 7* (n 97) [21]; contrast the views expressed by AG Sharpston in Case C-34/09 *Zambrano* (n 93) Opinion, [163], [172]–[73].

[114] See debate at European Parliament, 3 July 2013.

[115] Case C-128/12 *Sindicato dos Bancários do Norte* (n 105).

Pact, and in which the Court held that the Charter was not engaged, also militates against the closure decision being seen as falling within the scope of EU law.

Some of the directives (notably the Authorisation Directive or the AVMSD) could be used to argue that the matter falls within EU law. For example, the issue of the access to the transmission capacity (or rather its removal) as regulated by the Communications Package triggers the scope of EU law. As noted above, some conditions regarding penalties for non-compliance, including the revocation of a licence, are contained within the Authorisation Directive, as are conditions relating to renewal. Clearly, the end of a licence is considered as well as its beginning and the conditions in play during its lifetime. The effectiveness of the system is dependent on this interpretation, as otherwise it would be easy to undermine the competitive environment by the selective termination of licences. This would seem to fall within the scope of EU law following *Fransson*. Equally, content regulation—especially that to ensure pluralism—would fall within the scope of EU law—either by virtue of AVMSD (which permits member states to take higher measures within the field of the directive) or the Communications Package, which expressly recognises the space needed for pluralism regulation. These situations could be seen as analogous to the exercise of a discretionary power. For these reasons, decisions affecting the holding of frequency licences clearly lie within EU law. It seems much harder to argue that, where a member state has not acted to protect pluralism, there is an act within the scope of EU law; issues regarding sufficiency of resources allocated to PSM are likewise difficult.

A second option is to consider whether the derogation category applies. Member States when providing for PSM, and in relation to national media laws, operate within the scope of EU law by virtue of this line of cases. Wide though the *ERT* line of jurisprudence may be,[116] it is initially hard to see a removal of PSM as triggering the derogation element of EU law. Rather it concerns the decision to cease derogating. Of course, we could suggest that such decisions have a comparable relationship to EU law as cases under the rule of reason. Further, given the width of the derogation category and the fact of dependency, it is possible to imagine circumstances in which arguments might be put forward. For example, we could argue from the perspective of viewers who can no longer receive the PSM programming. The ECJ has accepted that the right to receive television broadcasts can fall within Article 59 of the TFEU, albeit in the context of satellite services, which the ECJ deemed to be inherently cross-border.[117] It is also possible that viewers in other Member States would want to watch ERT programming, especially the expatriate Greek community.[118] Consequently, it is arguable that there is a matter of EU law, so that any derogation (including application of the rule of reason) must be judged in the light of freedom of expression and the need for pluralism.

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[116] K Lenaerts and JA Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) 47 *Common Market Law Review* 1629; S Prechal, 'Competence Creep and General Principles of Law' (2010) 3 *Review of European Administrative Law* 1, 5.

[117] Case C-17/00 *De Coster v Collège des bourgmestre et échevins de Watermael-Boitsfort*, [2001] ECR I-9445.

[118] Note that the ECtHR has recognised the right of expats to receive programming from their home state: it is not clear whether this is a right to particular programming. See *Khurshid Mustafa* (n 6).

There are some difficulties with these arguments. The extent to which migrants can continue to claim the protection of EU law in their daily lives in the host Member States is, as we have seen from *Konstantinidis*, uncertain. Additionally, here the connection with EU law is diffferent, based ont the derogating decision rather than the exercise of a right. Arguments based on *De Coster* may founder on the fact that that case concerned access to existing services. While the termination of a system may constitute an interference with a person's right to receive (that someone being in another Member State), it is unlikely that the right to receive services requires the creation of such services. Thus, the non-existence of PSM would not be an issue within the scope of EU law. A different argument arises where a member state create a monopoly situation (as in *ERT*) or support or allow a market structure to arise which constitute a barrier to inter-state trade in media services. These situations—depending on the facts—could lead to concerns under the competition laws (such as abuse of a dominant position) or the freedom to provide services. Here Member States would be obliged to act to eradicate these barriers and in doing so would act within the scope of EU law.

Impact of freedom of expression

In sum, it seems that where there is an existing PSM, decisions affecting its existence, remit and arguably funding fall within the scope of EU law. So, the process of terminating a licence gives rise to rights, specifically administrative fairness considerations,[119] suggesting that—at the least—the process used to implement the decision to terminate ERT was deficient. Due notice and a chance to remedy problems would seem to have been required. How far, however, can this argument be pushed beyond procedural questions to the substance of the decision? Intuitively, it seems unlikely and in *Centro Europa 7*,[120] in which questions about pluralism were raised in the context of licensing decisions, there was a marked disinclination by the Court to address the point. Nonetheless, the Charter in particular is not severable and nor is the jurisprudence on any one right. In theory if the matter falls within the scope of EU law, and the right is engaged, there should be no distinction between substantive and procedural right. This would mean that, for example, should a member state take the decision to privatise its existing PSM, it must take steps to ensure that plurality is protected in the new order. As regards a general obligation to establish PSM, this seems unlikely to fall within the scope of EU law.

Treaty enforcement mechanisms for human rights obligations

While Article 6 of the TEU imposes an obligation on the Union and its member states, the enforcement provision for non-compliance is found in Article 7 of the TEU. Essentially,

[119] *Centro Europa 7* (n 97) AG [38]–[39].
[120] *Centro Europa 7* (n 97).

this provision allows for some of the rights of membership to be suspended if there has been or is 'a clear risk of a serious breach' of the values referred to in Article 2 of the TEU: including respect for human rights. While this sanction is theoretically available, the EU is unwilling to use it. The European Parliament has called on the Parliament's Conference of Presidents to 'assess the opportuneness of resorting to mechanisms foreseen by the Treaty, including Article 7.1' in the context of changes to the Hungarian constitution and media regulation.[121] Despite these calls, none of the institutions, not even the European Parliament, have formally started the procedure under Article 7 of the TEU. As an enforcement mechanism, it operates (if at all) in the realms of the political rather than the justiciable.[122]

Conclusion

This chapter has argued that case law indicates a link between freedom of expression, pluralism and PSM. As a consequence, at least some aspects of PSM provision are protected by freedom of expression. The concern, however, is always about the function of PSM rather than PSM as an institution. As regards the EU, the underlying question is the scope of EU law, as EU fundamental rights protection operates only within that field. In both the substantive scope of freedom of expression and the application of EU law, there are two fault lines. First, we have seen that there is a distinction between the maintenance of existing PSM and the requirement to establish PSM. The closure of PSM would fall within freedom of expression as protected by EU law. This brings us to the second fault line: the distinction between procedural and substantive obligations on the Member States. In the case of closure, the focal question would be whether such closure was capable of justification, implying at the least procedural guarantees for the PSM. Procedural rights under Article 10 of the ECHR in practice match the terms of EU secondary legislation. There are also questions regarding the nature and structure of the domestic media market and the impact of Article 10 of the ECHR/Article 11 of the EUCFR there. Some aspects might be unproblematic: the ECJ has acted previously to require member states to open up their markets to a range of providers, arguably supporting pluralism, in the original *ERT* decision. Requiring PSM, however, or even requiring a particular pluralistic structure, might well be a step too far, especially given the uncertainty of scope of Article 10 of the ECHR in this regard.

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[121] European Parliament Debate, 3 July 2013, REF: 20130701IPR14768; see also EP Resolution on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012), (2012/2130(INI)), (A7-0229/2013).

[122] On the political rather than legally enforceable nature of Article 7 see eg L Pech, '"A Union Founded on the Rule of Law": Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law' (2010) 6 *European Constitutional Law Review* 359, 384–85.

Petra Lea Láncos

Unearthing the values of European media law

Problem of the enforcement and determinability of the values of the European Union

The Hungarian Parliament adopted Act CLXXXV of 2010 on Media Services and Mass Media three years ago. Certain leading officials of the European Union have voiced concerns, claiming that Hungarian media rules do not conform to the EU's democratic requirements and fundamental legal standards such as proportionality, pluralism and the freedom of opinion.[1] The experts of the Council of Europe (CoE) have formulated further misgivings related to the freedom and independence of the media and the independence, neutrality and accountability of the regulatory authority.[2] As such, both the EU and the CoE have indicated several fundamental values and principles that may affect the freedom of media regulation enjoyed by the member states.

The above provides a starting point for a closer examination of the principles of democracy and pluralism and to assess the strengthening community of values forged between the EU and the European Council in the ambit of media regulation. The present study is divided into two parts with the first part concentrating on the question of the normativity and the determinability of European values, while the second part attempts to interpret the values of democracy and pluralism in the context of European media law in a broad sense.

This part centres on the fundamental values of the EU, focusing primarily on the general issue of the nature and scope of these principles, contributing thereby to a deeper understanding of the constraints of national media regulation. Accordingly, it is not the task of the present part to analyse in detail the various European sources of law referring to the media, but rather to examine the role, enforceability, and determinability of those EU values and principles that permeate the Union's expectations related to media freedom and pluralism.

Following the introduction, the first chapter of the present paper will provide a historical overview of the primary law foundations of the principles of the EU and the development of the EU's principles and values, as well as the broadening of the sphere

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[1] See eg N Kroes, 'Hungary's new media law' Speech/11/6 of 11 January 2011. <http://europa.eu/rapid/press-release_SPEECH-11-6_en.htm>.

[2] Expertise by Council of Europe Experts on Hungarian Media Legislation, Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules on Media Content and Act CLXXXV of 2010 on Media Services and Mass Media (11 May 2012) 5.

of these values. The purpose of the second chapter is to outline the functions and the normativity of Union principles, first in general, then focusing on the law of the EU. The third chapter will centre on Article 2 of the Treaty on European Union (TEU) as the set of minimum requirements formulated towards the member states and analyse the mechanism and chances of the enforceability of the values it stipulates *vis-à-vis* the member states. Finally, mention shall be made of the problem of the determinability of Union values as well as the standard provided for under Article 2 of the TEU which the member states are bound to enforce.

The historical development of the principles and values of the EU

The origins of the freedom of the press and the regulation of the media may be found in national law: '[The legal status of media service providers] and all forms of the freedom of speech … are laid down in the national constitutions. The European legal system cannot wholly disregard these historical and legal limitations in the field of the media; therefore, European media law necessarily encompasses the various national characteristics.'[3] Such national characteristics, however, have not evolved in isolation; in particular, starting with the second half of the twentieth century the states of the Continent established various forms of cooperation (CoE, OECD, European Communities) that contributed to the convergence of the legal systems of their member states. In parallel with the gradual fundamental law convergence of the member states participating in European integration, the Community regulation of cross-border radio and television services also picked up in the 1980s.[4] Since the primary law of the Community still lacked codified fundamental rights guarantees, the first milestone of Community media regulation, the Directive on cross-border television broadcasting,[5] referred to the European Convention on Human Rights as the primary law constraint of media content.[6]

The 1992 amendments provided for by the Maastricht Treaty only formulated expectations towards the member states by codifying fundamental principles,[7] yet the real turning point was brought about by the Treaty of Amsterdam. Namely, the principles laid down in Article 6 of the TEU not only served as the yardstick for evaluating the

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[3] E Dommering, 'European Convention on Human Rights and Fundamental Freedoms' in O Castendyk, E Dommering, and A Scheuer (eds), *European Media Law* (Wolters Kluwer 2008) 12.

[4] ibid.

[5] Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities.

[6] Dommering (n 3) 12.

[7] A von Bogdandy, 'A Disputed Idea Becomes Law: Remarks on European Democracy as a Legal Principle' in B Kohler-Koch and B Rittberger (eds), *Debating the Democratic Legitimacy of the European Union* (Rowman & Littlefield 2007) 34.

activities of the Union; the 1997 treaty amendment further designated these principles as the basis of the new constitutional order of the Union: 'Now not only a restrictive, but also a constitutive European constitutionalism found its recognition in positive law.'[8]

The Lisbon Treaty constituted another milestone in the history of European integration, since the political union initiated by the Maastricht Treaty was completed by awarding legal personality to the EU. After more than a decade of standby mode, the Charter of Fundamental Rights also became a mandatory source of law. In this way, the Charter rights and principles codifying the previous fundamental law practice of the European Court of Justice (ECJ) which may also be understood as the detailed elaboration of the values of the Union, became tangible.[9] Finally, the Lisbon amendment renamed the fundamental principles of the Union as 'values' and significantly broadened their scope. According to Article 2 of the TEU as amended by the Lisbon Treaty:

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men prevail.

Values and principles in the law of the EU[10]

By joining the EU[11] we became part of a system of multi-level governance where the legislative, executive, and judiciary powers are distributed between the nations and the Union. The result is a 'European constitutional space', where the constitution of the Union appears alongside the constitutions of the member states as a sort of 'partial constitution'. In the following we shall examine the role and effects of the values and principles laid down in this 'partial constitution' in the European constitutional space.[12]

In the course of the assessment of the Union's values and principles we must first determine the relationship between such values and principles under Union law. The Lisbon Treaty provides us with clues, since this amendment renamed the principles previously laid down in Article 6 of the TEU as values in Article 2 of the currently

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[8] A von Bogdandy, 'Founding Principles' in A von Bogdandy and J Bast (ed), *Principles of European Constitutional Law* (Hart 2009) 22.

[9] '[T]hey leave behind their shadow existence' (*haben diese Rechte ihr früheres Schattendasein im Unionsrecht hinter sich gelassen*). A von Bogdandy, M Kottmann, C Antpöhler, J Dickschen, S Hentrei and M Smrkolj, 'Ein Rettungsschirm für europäische Grundrechte: Grundlagen einer unionsrechtlichen Solange-Doktrin gegenüber Mitgliedstaaten' (2012) 72 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 46.

[10] In general see von Bogdandy (n 8) 14–18.

[11] G Marks, F Nielsen, L Ray, Jane Salk, 'Competencies, Cracks and Conflicts: Regional Mobilization in the European Union' in G Marks, FW Scharpf and PC Schmitter (eds), *Governance in the European Union* (Sage 1996) 41–42.

[12] A von Bogdandy, 'Grundprinzipien' in A von Bogdandy and J Bast (eds), *Europäisches Verfassungsrecht* (Springer 2009) 30.

effective Treaty version; furthermore, the amendment significantly broadened the scope of these values by adding further values that are in effect a detailed elaboration of the original principles. In this respect values are merely a 'rebranding' of the previous principles of the Union, while the nature and role of the new values of the Union have not changed in comparison with the previous principles. At the same time, this conceptual distinction was probably also motivated by the constitutional power's intention to set apart, at a conceptual level, the most prominent values of Union law from its other principles.[13]

As regards the conceptual distinction between values and principles, Bogdandy states: 'In this respect the Lisbon Treaty may be deemed problematic. Namely, it designates the fundamental principles of the EU as values and presents them as the ethical conviction of the citizens of the Union. … Value-based discourses often tend to assume a paternalistic dimension.'[14] Although, according to the author, the terminology is rather misleading, as values are 'expressions of fundamental ethical convictions', the values introduced by the Lisbon Treaty should in fact be recognised as legal norms and fundamental principles, given the manner of their codification and possible legal sanctions ensuing from their breach.[15]

The significance and the manner of the enforcement of values as compared with other principles are rather telling. Values represent fundamental principles that permeate the entire process of integration and are equally binding for the Union and the legislation and legal practice of the member states, furthermore, they even bind the candidate countries (Article 49 of the TEU)[16] and states wishing to establish relationships with the EU.[17] Two vehicles of enforcement are available *vis-à-vis* the member states, on the one hand a formalised political route on the basis of Article 7 of the TEU and, on the other hand, the infringement procedure initiated before the Court of Justice of the European Union (CJEU).[18] In the following we shall also discuss a proposal that would open up the possibility for the individual enforcement of fundamental rights with recourse to Article 2 of the TEU. By contrast, the principles 'left out' from Article 2 of the TEU such as the

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[13] Bodgandy refers to the conceptual status prior to the Lisbon Treaty when he writes: 'The concept of fundamental principle does not include all norms or norm elements that are defined by the Treaties of the European Court of Justice as principles; only a number of provisions belong here that are usually called fundamental or structural principles by the national constitutions, too.' von Bogdandy (n 8) 21.

[14] Von Bogdandy (n 12) 25, 58.

[15] Von Bogdandy (n 8) 22.

[16] COM(2003) 606 final, 3.

[17] Von Bogdandy et al (n 9) 67; the following report formulates concrete requirements in respect of media freedom and pluralism, Report of the High Level Group on Media Freedom and Pluralism, 'A free and pluralistic media to sustain European democracy' (January 2013), 4.

[18] C Ladenburger, FIDE 2012: Session on 'Protection of Fundamental Rights post-Lisbon – The interaction between the Charter of Fundamental Rights, the European Convention of Human Rights and National Constitutions' (Institutional Report, Brussels, 2011), <http://www.fide2012.eu/index.php?doc_id=88,%20at%2048%20ff>, 13.

principle of subsidiarity (Article 5 Paragraph 3 of the TEU)[19] or the principle of cooperation binding the member states (Article 4 Paragraph 3 of the TEU) can only be enforced via the annulment procedure or the infringement procedure, respectively, before the ECJ.

In order to assess the possible obligations the values and principles of the Union give rise to on the side of the member states' legislation and authorities, we must first examine the role and normativity of values and principles.

The role of values and principles in the law of the EU

In his most recent work on the principles of the Union, von Bogdandy differentiates between three functions of principles in the law of the EU.

The function of organizing the law: In a constitutional legal order, and Union law undoubtedly amounts to a constitutional legal order,[20] principles are cornerstones, designating the constitutional bases of the given legal system. At the same time they also provide the basis and framework for interpreting secondary sources of law, since 'the constitution must permeate all legal relationships',[21] while the principles are 'prominent norms that apply to the entire [legal system].' In this respect, secondary law may be regarded as the interpretation and application of the principles of primary law to specific issues. At the same time, von Bodgandy notes that principles cannot lead to cementing the legal system; instead, they have an organizing and legal development function, while they must remain conceptually open to be able to adapt to change and allow for case-by-case decisions on the relationship between the various principles.[22] Therefore, the relationship between the various principles and their effect on secondary law is dynamic, dependent on legal development fuelled by sociological challenges.

The function of providing the bases for legal arguments: While the organizing function of principles is one that defines the internal dynamics of Union law, from the aspect of the legislation and legal practice of the member states, the conceptual openness of the principles helps maintain the versatility of adapting to, and questioning any given

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[19] In the proceedings, according to Article 7 of the protocol on subsidiarity and the application of the principle of proportionality, the objections of national parliaments submitted in relation to the enforcement of the principle of subsidiarity do not automatically lead to the revocation of the legislative proposals; the decision on this remains with the legislator of the Union. Article 8 of the protocol, however, makes it possible for national parliaments, too, to initiate the annulment procedure indirectly, via the member state.

[20] Von Bogdandy (n 8) 27; '[C]onstitutionalization—which includes but goes beyond the phenomenon of European legal integration—relates to all those processes through which the above mentioned core principles are becoming embedded in the EU's legal order. In this vein, constitutionalization is being employed, inter alia, to refer to the inclusion of fundamental rights within the EU Constitution as the Charter of Fundamental Rights.' B Rittberger and F Schimmelfennig, 'Explaining the Constitutionalization of the European Union' (2006) 13 *Journal of European Public Policy* 8, 1149.

[21] Von Bogdandy (n 8) 16.

[22] ibid.

framework of interpretation related to the principles of the Union. According to von Bodgandy 'by enlarging the argumentative budget of the legal profession, principles strengthen its autonomy *vis-à-vis* the legislative political institutions,'[23] and do so precisely by the principled interpretation of legal provisions. This opens up the way for those enforcing the law to involve, in the interpretation of the legal provisions adopted by the legislator, a source of law that is beyond the authority of the legislator, ie to interpret secondary law with respect to the principles of primary law. The individual principles may primarily serve to provide the general bases for diverting legal arguments;[24] at the same time, the case-law of the CJEU also suggests that a principle in itself can serve as the yardstick for challenging the legality of an act.[25]

Corrective function: The currently effective text of the TEU devotes a mere sentence in a single Article (Article 2) to the enumeration of the values (principles) upon which the Union is based. The formulation of the principles is *concise, open and general*, and lacks any detailed definition. This is for good reason, as 'any interpretation of the principles would only cement them, and this would be contrary to the essence of the constitutional plan and would entail the risk of capturing present generations in the decisions of the past.'[26] Principles are established for the long run—it is not the principles themselves, but much rather their interpretation that follows the changes in society, politics, and the economy. The necessary openness of principles may be traced back to their corrective function. According to von Bogdandy, the principles function as a 'corridor' between the legal order and the broad public—by continuously reinterpreting the principles in the light of social reality the 'maintenance' of the legal order can be ensured. Principles, as corridors, allow the changing convictions and interests of society to seep in and cross-fertilise both the interpretation of the law and the legal arguments,[27] adjusting them to the ever-changing social reality.[28] On the other hand, it is worth mentioning that the general formulation of values also allows member states with different constitutional traditions to align themselves with Article 2 of the TEU. The openness of Article 2 of the TEU creates unity among the member states without jeopardising their 'constitutional diversity' and national identities (Article 4 Paragraph 2).[29]

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[23] ibid 17.

[24] MP Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism' (2007) 1 *European Journal of Legal Studies* 2, 12.

[25] Von Bogdandy (n 8) 17.

[26] ibid 12.

[27] ibid 17–18.

[28] C Voigt, 'The Role of General Principles in International Law and their Relationship to Treaty Law' (2008) 31 *RETFÆRD Jurist- og Økonomforbundets Forlag* 2, 9–10. '[P]roviding rational and legitimate legal grounds for the resolution of legal disputes in the ever increasing number of cases where the effective legal provisions are not able to appropriately react to the political, legal and social realities of the Union.' Maduro (n 24) 11.

[29] Von Bogdandy et al (n 9) 53.

The normativity of values and principles in the legal order of the Union[30]

According to Sebastian Unger, principles only have a 'weakened force'; as such, those applying the law are only required to enforce them as far as the legal and factual possibilities allow.[31] According to Robert Axley, the vehicle for this is discretion, with the proviso that principles should be enforced to the fullest possible extent (optimisation).[32] Ronald Dworkin claims that, unlike legal provisions that attach clear sanctions to offences,[33] principles provide 'arguments pointing in a certain direction, without prescribing any given decision.'[34]

In contrast with the above, András Jakab disputes that rules and principles should be distinguished on the basis of their normativity: 'We should assume that the so called "principles" have the same type of normativity (ie they are either applicable or not; and if they are, then they mean conclusively concrete legal consequences) as the rules—and it is merely their scope which is uncertain because of the vague and general expressions contained in their linguistic form.'[35] According to Jakab, principles also share the fate of legal rules, in that there are only two possibilities, they are either breached or not, *tertium non datur*. The fact that the breach of a principle may only be established by way of appreciation (balancing) is only a methodological question and has no bearing on the normativity of principles. In this system, principles are not enforced by way of optimisation, since that is much rather the result of the application of rules and principles to specific cases (judicial balancing).[36]

Regardless of whether we accept the theory of Alex and Dworkin or choose Jakab's approach to principles, in summary it may be stated that principles do possess normativity, and the fact that their normativity is disputed does not change the fact that in practice they are applied by way of judicial balancing.[37]

What are the obligations imposed by an EU principle on the national legislator? The legislator may only restrict the prevailing principles in the interest of achieving appropriate, 'legitimate' objectives. The jurisprudence related to facts that fall under the scope of EU law shows that the CJEU examines the legitimacy of the objectives set by the member states as well, for if an objective is unfounded (for example, it is an economic objective or one that could be achieved without intervention), the restriction imposed by the member state is unlawful. Nevertheless it is important to stress that the member states

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[30] Von Bogdandy (n 8) 22.

[31] S Unger, *Das Verfassungsprinzip der Demokratie* (Mohr Siebeck 2008) 133.

[32] R Alexy, 'Constitutional Rights, Balancing, and Rationality' (2013) 16 *Ratio Juris* 2, 136.

[33] See two-element norm structure, A Jakab, 'A norma szerkezetének vizsgálata' (2001) *Jogelméleti Szemle* 4.

[34] R Dworkin, *Taking Rights Seriously*; cited by Voigt (n 28) 10.

[35] A Jakab, 'Concept and Function of Principles. A Critique of Robert Alexy' <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1918421>, 5 (28 August 2009).

[36] ibid 6.

[37] The above abstract issue was examined at the 2011 FIDE conference with respect to the rights and principles laid down in the Charter, too, Ladenburger (n 18) 31–33, especially 33.

enjoy a broad margin in specifying the objectives of the policies they pursue[38]—and this is especially true of regulatory issues that have remained under the purview of the member states. In response to any risks or needs, the legislator automatically assesses the necessity and extent of intervention. The legislator is to observe the principle of proportionality in the realisation of its objectives, ie according to Alexy's approach, besides the restrictions created by the regulations, the governing principles must prevail to the fullest possible extent or, according to Jakab's views, the restriction must be legitimate.

While the regulatory activities of the legislator of the Union are bound by the values and principles of the Union, national legislators are bound by a double obligation. Besides the values of the Union, the national legislator is also bound by the principles enshrined in the national constitution. A good example for this twofold commitment is the verdict of the Bundesverfassungsgericht on the adoption of the European Arrest Warrant.[39] In its judgment the German Federal Constitutional Court expounds that, according to the constitutional principle of the rule of law and legitimate expectations, the legislator must exercise 'consideration', ie must act proportionately when adopting the framework decision on the European Arrest Warrant. This means that the legislator must make maximum use of the margin allowed by the framework decision, with due respect to the principles set forth in the national constitution.[40]

The nature, enforceability and determinability of the values of the EU

Article 2 of the Treaty on the European Union as a minimum of public policy

What is the role of the values of the Union in the ambit of media law? In keeping with what has been written about the function of values, the values of the Union constitute the basis and framework of interpretation of the entire legal system of the Union, including EU media law. This latter proposition, however, is incomplete. According to von Bogdandy and his co-authors, Article 2 of the TEU 'prescribes the common standards of, *inter alia*, human rights and democracy, and does so in respect of *all* supreme powers exercised in the European area, whether by the Union or the member states. In this sense Article 2 of the Treaty lays down an element of public policy for the member states.'[41]

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[38] See eg the *Schindler* case [61] of the judgement of 24 March 1994 in Case C-275/92. *Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler* mentions a 'sufficient degree of latitude', [1994] ECR I1039.

[39] BVerfG, 2 BvR 2236/04.

[40] 'The legislator, at any rate, was bound to make use of the margin allowed by the framework resolution for the member state in a manner considerate of the fundamental rights.' BVerfG, 2 BvR 2236/04 [80].

[41] A von Bogdandy, C Antpöhler, J Dickschen, S Hentrei, M Kottmann and M Smrkolj, *Opinion on the Compatibility of the Hungarian Media Acts with the Charter of Fundamental Rights of the European Union* (Max Planck Institute 2011) 19.

According to Ingolf Pernice, the common values lead to the creation of the 'minimum constitutional homogeneity' of the member states, designating, at the same time, 'the European limits of the constitutional autonomy' of the member states.[42]

Accordingly, the values laid down in Article 2 of the TEU also govern the exercise of the member states' media law powers. As such, the values of the Union shatter the traditional dualism of the implementation of the laws of the Union versus the powers of the member states—although, according to the authors, the fundamental legal standard guaranteed by Article 2 of the TEU in respect of the powers of the member states 'is much less strict than in the affairs related to the implementation of the law of the union.' Von Bogdandy and his co-authors point out that, although on the basis of Article 51 Paragraph 1 of the Charter of Fundamental Rights the provisions of the Charter are only applicable when implementing the law of the Union, the Charter is, at the same time, 'a manifestation of the human rights provided for in Article 2 of the TEU.'[43] Thus, we may distinguish two instances; on the one hand, instances of the implementation of the law of the Union in the form of the exercise of the powers of the Union and the implementation of the law of the Union by the member states, both of which are wholly governed by the Charter of Fundamental Rights, and, on the other hand, the exercise of the powers of the member states (including those instances that belong exclusively under the purview of the member states),[44] governed by the constitutional provisions of the member states and the ECHR. In respect of both of these broad sets of instances, however, the public policy minimum, as provided for under Article 2 of the TEU, is equally authoritative, and made tangible by the Charter of Fundamental Rights. Taking the arguments of the authors one step further, this also means that, in respect of the powers reserved for the member states (or, to put it differently, the powers remaining with the member states), Article 2 of the TEU reintroduces the benchmarks of the Charter of Fundamental Rights, albeit in a less strict form,[45] as a sort of vague public policy minimum.[46]

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[42] I Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?' (1999) 36 *Common Market Law Review* 726.

[43] Von Bogdandy et al (n 42) 20. The 2011 congress of FIDE pointed out another interesting facet of the relationship between the Charter and Article 2 of the TEU, with regard to disputed human rights that are not included in the Charter, such as the rights of minorities, it is Article 2 of the TEU that could provide a basis for the protection of rights. Ladenburger (n 19) 5. True though, Article 21 and 22 of the Charter could also be interpreted as fundamental law guarantees of the protection of minorities, see PL Láncos, 'Nyelvpolitika és nyelvi sokszínűség az Európai Unióban' Doctoral thesis, 2012. 211–16.

[44] Von Bogdandy et al (n 9) 48.

[45] G Halmai and O Salát, '"There are Universal Human Rights Standards that must be Upheld at all Costs" G Halmai and O Salát Speak with Armin von Bogdandy, German Professor of European Law' (2011) *Fundamentum* 2, 43: 'Article 2 of the Treaty on European Union provides the member states with substantial elbow room for the formation of the framework of a democratic rule of law.'

[46] Von Bogdandy, however, expressly states that 'in the event of a severe breach of human rights, different standards should be applied, not the Charter. At the same time the Charter of Fundamental Rights encompasses a large part of the provisions of Hungarian media law, as those may be interpreted as the adoption of EU law and, consequently, must conform to the requirements of the Charter. This, however, does not hold true for all aspects; there are sensitive gaps especially in the area of the printed press.' ibid 41.

The mixed nature of Article 2 of the Treaty on European Union

The rather mixed nature of the values of the EU presents an interesting problem. Certain values (principles) wholly correspond to those provided for by the Charter (eg the respect for human dignity), while others appear as horizontal values that may be associated with several fundamental rights (eg freedom) or even go beyond the sphere of fundamental rights (eg democracy). The position of values (formerly 'principles') within the ambit of fundamental rights reflects an interesting process which, incidentally, is not limited to the legal system of the Union. Analysing the Bundesverfassungsgericht's *Lüth* decision, Alexy identifies a similar tendency.[47] This, then, means that 'the values or principles found in the constitutional rights apply not only to the relation between the citizen and the state but, well beyond that, "to all areas of law". Thanks to this, a "radiating effect" of constitutional rights over the entire legal system is brought about. Constitutional rights become ubiquitous.'[48]

This, however, is not accompanied by a parallel tendency of constitutional principles 'turning into' fundamental rights; a breach of these principles does not create subjective rights on the part of the individuals. 'It would be hard, however, to justify subjective rights related to "democracy" or "the rule of law" … at least at the level of the Union, it seems that the time is not ready for such a move, given the fact that, to date, the CJEU has not rendered any such judgements either.'[49] This approach also coincides with the position of jurisprudence on the delimitation of the principles and rights laid down in the Charter of Fundamental Rights, as opposed to the subjective rights provided for by the Charter: 'principles (in themselves) cannot as such be invoked with direct effect before a national judge.'[50]

As a result of the mixed nature of Article 2 of the TEU (the fact that fundamental rights and constitutional principles appear alongside each other), the contents of the provisions may be enforced in different ways. Von Bogdandy and his co-authors primarily propose the application of the 'reverse *Solange*' doctrine for the enforcement of the fundamental rights provided for under Article 2 of the TEU, concentrating on the fundamental rights minimum as a narrower subset of the public policy minimum, while, with regard to the enforcement of the constitutional fundamental principles, the founding treaties alone prevail. Thus, the authors *split* Article 2 of the TEU between fundamental rights and other 'constitutional fundamental principles'. Breaches against these latter principles may result in infringements of the constitutional values concretising the constitutional fundamental principles, rather than violations against individual fundamental rights.

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[47] Alexy (n 32) 133.

[48] ibid. Maduro (n 24) 11. Habermas warns that by allocating the status of principles to fundamental rights, these rights are 'diluted' and lose some of their normativity. Habermas, cited by Alexy (n 32) 134. We do not, however, wholly agree with this—in keeping with Jakab's argument, there may only be differences in the application of the rules of resolution, which has no bearing on the normativity of the principle, see Jakab (n 36)

[49] Von Bogdandy et al (n 9) 60.

[50] Ladenburger (n 18) 33.

Possible routes for enforcing the public policy minimum

In keeping with the above, different possible sanctions are related to the enforcement of the fundamental rights minimum provided for in Article 2 of the TEU and the broader public policy minimum related to constitutional principles. Taking into account the reverse *Solange* proposal of von Bogdandy and his co-authors, we may make the following propositions. According to Article 2 of the TEU, the organs for the enforcement of the fundamental rights minimum are the courts of the member states with regard to the individual enforcement of rights and the CJEU with regard to infringement proceedings (court procedures). Besides these, the possibility of political sanctions (political procedure) based on Article 7 of the TEU is also given.[51] By contrast, respect for the constitutional principles embodying the public policy minimum cannot be enforced via the individual enforcement of rights; in such circumstances only the process of the CJEU and the proceedings according to Article 7 of the TEU are available. In the following we shall examine the possibilities of the enforcement of the values enshrined in Article 2 of the TEU *vis-à-vis* the member states.

The possibilities of judicial sanctions in the event of breaches of the public policy minimum

As regards the enforcement of the fundamental rights requirements provided for under Article 2 TEU *vis-à-vis* the member states, according to von Bogdandy and his co-authors, an analogy is available in the *Solange* judgment of the Bundesverfassungsgericht, however, this time in the form of the reverse *Solange* doctrine. The basis of the analogy is that, also in keeping with Article 7, the public policy minimum provided for under Article 2 of the TEU *only sanctions serious violations against the values of the Union*. According to the authors, therefore, 'so long as the member states ensure the substance of the fundamental rights guaranteed under Article 2 of the TEU, in issues that lie outside the scope of application of the Charter of Fundamental Rights,' they may exercise their powers independently.[52] This 'independence' means that, in 'purely internal situations', any member state breach of fundamental rights is governed by the national constitution and the ECHR.[53]

According to the reverse Solange doctrine proposed by the authors, in the event of major violations against the values of the Union, it is primarily the courts of the *member states* that are to take action.[54] For the application of the doctrine, however, we must first identify what serious violations against the values of the Union consist of and what pleas in law the union citizens can put forward in purely internal situations. The reverse *Solange* doctrine is based on the assumption that the member states guarantee the

[51] COM(2003) 606 final, 6.
[52] Von Bogdandy et al (n 9) 46.
[53] ibid 65.
[54] ibid 46.

minimum of the protection of fundamental rights according to Article 2 of the TEU. In order for the individual to be able to take action, with reference to EU law, against legal violations committed by the member states according to the reverse *Solange* doctrine, he or she must be able to refute the presumption stipulated by the doctrine and must demonstrate *a serious violation against the values of the Union* by the member state. What, then, constitutes a serious violation against the values of the Union?

According to Pernice, common values 'offer a reciprocal assurance to the European citizens for the respect of these basic values upon which they agree, at both European and national levels.'[55] These are the grounds for the presumption that member states respect the fundamental rights minimum provided for under Article 2 of the TEU. Hence, according to von Bogdandy and his co-authors, so long as the member states guarantee the *substance* of the rights to which the citizens of the Union are entitled, we may not speak of any serious breach against the values of the Union. If, however, a citizen of the Union is able to prove, before a member state court of law, that the member state has failed to ensure the substance of the fundamental rights, eg 'has failed to execute a final judgement of the European Court of Human Rights (ECtHR) related to a breach against the substance of fundamental rights,[56] circumvents, intimidates or disregards the member state courts in similar cases,'[57] the injured party may then assert the fundamental rights minimum guaranteed by Article 2 of the TEU before a member state court of law. According to the authors, if the presumption of the member state guaranteeing the fundamental rights minimum provided for by Article 2 of the TEU is refuted, then 'the member state courts may assert the substance of the fundamental rights of the Union against any member state measure in respect of which persons have subjective rights stemming from their status as citizens of the Union.'[58]

What, precisely, is the basis of the citizens' claims based on the law of the Union? In the *Grzelczyk* case, the ECJ stated that 'Union citizenship is destined to be the fundamental status of nationals of the Member States.'[59] Since the Lisbon amendment, the fundamental provision on the status of the citizens of the Union may be found in Article 20 of the Treaty on the Functioning of the European Union (TFEU). In respect of the status of the citizens of the Union as established in Article 20 of the TFEU, in the *Zambrano* case the ECJ stated that 'Article 20 of TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the

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[55] Pernice (n 43) 726. According to the Communication of the Commission issued in relation to Article 7 of the TEU 'the enumeration of … common values put the person at the very centre of the European integration project.' COM(2003) 606 final, 3.

[56] Cf the arguments of the communication of the Commission related to Article 7 of the TEU on the continuity of a major breach against mutual values, COM(2003) 606 final, 8.

[57] Von Bogdandy et al (n 9) 72.

[58] ibid 49.

[59] *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, No C-184/99, judgement of the Court of 20 September 2001, [2001] ECR I-6193 [31].

substance of the rights conferred by virtue of their status as citizens of the Union.'[60] Non-compliance with the fundamental rights minimum provided for under Article 2 of the TEU, ie a serious violation against the substance of fundamental rights, deprives citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union,[61] therefore the citizens of the Union suffering a breach of fundamental rights may assert their claims against the member state before a member state court of law invoking Article 20 of the TFEU and, in connection with that, Article 2 of the TEU. Within the framework of the proceedings before them, the member state courts may, via a preliminary ruling procedure, put questions to the CJEU on the uniform interpretation and application of the provisions of Article 2 of the TEU.[62]

In respect of the public policy minimum expected from the member states, the relevant practice of the CJEU provides certain guidance; however, to date no judgements have been passed on the basis of Article 2 of the TEU. It seems that the Commission is reluctant to question before the CJEU the 'fundamental rights credentials' of the member states in areas that lie outside the scope of application of the Charter of Fundamental Rights.[63] Yet the TEU *at no point excludes* Article 2 from the jurisdiction of the CJEU, therefore, it forms just as much a part of its jurisdiction as other provisions of the founding treaties.[64]

The possibilities of sanctions in the event of violations against the public policy minimum: The procedure according to Article 7 of the Treaty on the European Union

Although the founding treaty provides in detail for the Article 7 of the TEU procedure, the conditions of its 'activation' are rather vague. Accordingly, in respect of the enforcement of the public policy minimum according to the procedure provided for by Article 7 of the TEU, the most important issue is the establishment of a 'serious and persistent' breach against the values. According to the communication of the European Commission (EC) issued in relation to Article 7, good examples for the establishment of this are provided by Article 6 of the United Nations Charter and Article 8 of the Statutes of the Council of Europe.[65] The Commission, however, does not provide any guidance as to how the values formulated in similarly general terms in the Charter and the Statutes could assist in establishing a 'serious and persistent' breach against the values. The Commission nevertheless lays down that, in themselves, individual breaches against fundamental rights do not form sufficient grounds for the initiation of the procedure according to Article 7 of the TEU; this must be much rather based on 'systemic'

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[60] *Gerardo Ruiz Zambrano v Office national de l'emploi*, No C-34/09, judgement of the Court of 8 March 2011, [2011] ECR I-1177 [42]; cited by von Bogdandy et al (n 9) 65, Ladenburger (n 18) 16.

[61] Cf. COM(2003) 606 final, 5.

[62] Von Bogdandy et al (n 9) 73.

[63] ibid 47, 54.

[64] With the exception of foreign and security policy and the review of the maintenance of law and order and the measures of the member states' police forces (TEU art 24 para 1, TFEU art 276).

[65] COM(2003) 606 final, 6.

problems.[66] As regards the threshold for the preventive procedure of Article 7, the Commission stresses that the risk of the breach against values must be an actual risk: 'The risk must be embodied', for example in the form of a national regulation which calls the prevalence of a common value into doubt.[67] The establishment of the breach against common values must take into account the purpose and effect of the breach. While even a breach against a single value may be sufficient cause to evoke the procedure according to Article 7, breaches against several values are sufficient proof of the serious nature of the breach.[68] In respect of the establishment of the persistence of the breach, the Commission notes that persistence may mean the lasting nature of the breach as well as its regularity or recurrence. Similarly to the refutation of the presumption along the lines of the reverse *Solange* proposal, according to the Commission the persistence of the breach may be established on the basis that other international forums (the ECtHR, the Parliamentary Assembly of the Council of Europe or the United Nations Human Rights Commission) have condemned the member state for a violation for which the member state failed to provide remedy.[69]

The communication of the Commission referred to above has no mandatory force; however, it does contain important guidance as to the possible framework of the application of Article 7 of the TEU. Nevertheless, it is improbable that a procedure based on Article 7 would be launched in the near future. Member states are traditionally reluctant to engage in the procedure[70] based on Article 7—which has rightly been nicknamed a 'political nuclear bomb';[71] indeed, it has never been applied since the time of its codification. According to von Bogdandy and his co-authors, the problem is not

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[66] ibid 7.

[67] ibid.

[68] ibid 8.

[69] ibid.

[70] <http://www.presseurop.eu/de/content/news-brief/3692231-eu-druck-auf-regierung>; von Bogdandy et al (n 9) 47.

[71] On the basis of Article 7 of the TEU:—

(1) On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that *there is a clear risk of a serious breach by a Member State of the values referred to in Article 2*. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

(2) The European Council, acting *by unanimity* on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, *may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2*, after inviting the Member State in question to submit its observations.

(3) Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. . . .

that the procedure according to Article 7 of the TEU has never been applied in practice, since—with good reason—it was designed for exceptional and outstanding cases. '[The problem is much rather] that the procedure was designed in such a way as to give rise to the expectation among the member states that it will never be applied. [And this] in practice may entail the major risk that member states get used to "turning their back" on each other's violations against the public policy minimum.'[72]

The difficulties inherent in the definition of the public policy minimum

It is beyond dispute that Article 2 of the TEU provides for a public policy minimum that is mandatory for both the Union and the member states in the course of the exercise of their functions; however, the uncertainties of the contents of the Article as well as the possibility of political sanctions for its enforcement pose a major challenge to the interpretation and enforcement of the public policy minimum.[73] In respect of the fundamental rights minimum governing the member states it may also be said that, since the provisions of the Charter of Fundamental Rights are not directly applicable to the competences reserved for the member states, it is hard to say just what the duties of the member states are in this respect. As regards the public policy minimum in the broader sense, according to von Bogdandy the somewhat manifesto-like TEU may serve as guidance: 'Under the Treaty of Lisbon, the founding principles of Article 2 of the TEU-Lis will be concretised in light of the enunciations of the EU Treaty, and [the] diverging rules in the TFEU will be treated as exceptions'.[74] Nevertheless, the less strict implementation of the Charter and the general reference to the founding treaties provides no certain guidance for the member states in respect of the effective enforcement of the Union's public policy minimum.

As regards the attempt to define the public policy minimum of Article 2 of the TEU, the political process according to Article 7 holds little promise of success. For it is exactly the political nature of the process and the 'political exposure' of its application in the given case as well as the fact that it is dependent on the consensus of the member states that raise doubts as to whether the public policy minimum resulting from the process could indeed be suitable as the governing principle of the assessment of violations

The obligations of the Member State in question under this Treaty shall in any case continue to be binding on that State. The Council, acting by a qualified majority, may decide subsequently *to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed*. (Italics added.)

[72] Von Bogdandy (n 9) 54.

[73] It is still not clear, in many respects, how the law of the Union could be applied to the actions of a member state that fall outside of the scope of the law of the Union proper. What is certain is that Article 7 of the TEU does have a procedure in place for this; however, given its intricacies and consequences it is not suitable for managing the problem. Halmai and Salát (n 46) 41–42.

[74] A von Bogdandy, 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch' (2010) 16 *European Law Journal* 2, 110.

committed by the member states. Moreover, Article 7 once again provides only for a political type of review for the assessment of the termination of the breach, which is based on equally vague political conditions as the establishment of the serious breach of values. Finally, it is problematic that conducting the procedure according to Article 7 is not precluded by an ongoing or subsequent procedure before the CJEU, therefore, in principle, it is possible that a political decision and a legal judgment is passed simultaneously on whether a member state has breached the values provided for in Article 2 of the TEU.

The determinability of the public policy minimum as per Article 2 of the TEU would be greatly furthered by an infringement procedure before the CJEU on the basis of Article 2 of the TEU as well as a preliminary question on the public policy minimum posed within the framework of a national court proceedings for the enforcement of individual rights. This would tell us whether the values provided for in Article 2 of the TEU may be directly and independently invoked as grounds for claims against member states and, if so, what the exact outline of such an action would be in the given case. In the absence of such procedures, both the institutions of the Union and the member states are in a difficult situation—the institutions are only able to apply the values of the Union to exert political pressure on the member states, while the member states cannot be sure that they are not in violation of the values of the Union. However, there seems to be little chance of such proceedings before the CJEU.

As regards the enforcement of the values provided for in Article 2 of the TEU via infringement proceedings initiated by the Commission (or, possibly, a member state), we must not forget that, to date, the EC has displayed significant self-restraint in respect of claims based on values. In keeping with the conclusions of the 2011 FIDE assembly, it is still unclear just what the scope of the applicability of Union law is in respect of cases that lack cross-border elements and fall outside of the administration of European law.[75] On the basis of all this, it is not clear when—if ever—an infringement procedure will be initiated on the basis of Article 2 of the TEU.

Furthermore, the manifestation of the public policy minimum according to Article 2 of the TEU as a 'by-product' of the individual assertion of rights is also uncertain. It is questionable whether the member state courts and, subsequently in response to the preliminary question, the CJEU would accept the argument based on the reverse *Solange* doctrine. Thus, for example, a weak point of the proposal could be the refutation of the presumption of the observance of the fundamental rights minimum by the member state. The proposition also fails to specify which court would have jurisdiction to establish the refutation of the presumption, for, in respect of Article 20 of the TFEU, the fundamental rights minimum according to Article 2 of the TEU may only be invoked before the member state court after this presumption has been refuted. For this, however, the member state court would need to be in a position to determine the outlines of the fundamental rights minimum which had been breached. If the preliminary question already contains

[75] Ladenburger (n 18) 11–13.

a request for interpretation involving the refutation of the presumption, it is still uncertain whether the CJEU would decide that the reverse *Solange* doctrine was applicable and the ECJ had jurisdiction to answer such questions. This is because, on the basis of the communication of the Commission on Article 7 of the TEU, the Treaty 'does not empower the Court of Justice of the European Union to review whether a serious and persistent breach against the common values has been committed.'[76] On the other hand, we should also recall that the founding treaty does not preclude the jurisdiction of the CJEU for the interpretation of Article 2 of the TEU or the establishment of its 'direct effect' according to the reverse *Solange* doctrine. Thus, the possibility of such a decision cannot be precluded for the future.

Finally, decisions of interpretation resulting from any preliminary questions on Article 2 of the TEU posed by the member state courts would also yield ambiguous results. The reverse *Solange* proposal is exclusively limited to the individual assertion of the fundamental rights minimum and, as such, does not contribute to shedding light on the constitutional principles laid down in Article 2 of the TEU, ie the common public policy minimum in the broader sense.

The alternative possibility of the clarification of the values related to media freedom

In 2011 a European Citizens' Initiative was launched with the goal that the EC submit a legislative proposal in defence of the freedom of the press and media pluralism. The initiative makes express mention of Hungary: 'Certain countries, such as Hungary, for example, suffer significant political interventions directed at achieving state control and supervision of the media.'[77] The signatories of the initiative call upon the EC to adopt (correctly: propose) a directive in the field of the media for the prevention of the concentration of power, to create independent supervisory organs and the rules of conflicts of interest in respect of the interpenetration of media and politics, and finally, to establish a monitoring system to oversee the freedom of the media.[78]

Upon the recommendation of Neelie Kroes, European Commissioner for Digital Agenda, the High Level Group on Media Freedom and Pluralism was established,[79] *inter alia* to answer the question of 'whether the EU has sufficient scope in this field to meet the expectations of the public related to the protection of media pluralism.'[80] The recommendation made by the High Level Group on Media Freedom and Pluralism coincides in part with the European Citizens' Initiative. Accordingly, 'the EU should be

[76] COM(2003) 606 final, 6.
[77] <http://www.mediainitiative.eu/hu/2013/02/ez-egy-poszt/>.
[78] ibid.
[79] High Level Group (n 17) 9.
[80] <http://einclusion.hu/2012-01-08/neelie-kroes-a-magyarorszagi-mediapluralizmus/>.

considered competent to act to protect media freedom and pluralism at State level in order to guarantee the substance of the rights granted by the Treaties to EU citizens. … The link between media freedom and pluralism and EU democracy, in particular, justifies a more extensive competence of the EU with respect to these fundamental rights than to others enshrined in the Charter of Fundamental Rights.'[81] The High Level Group would organise the monitoring system proposed by the initiative, either beside the European Union Agency for Fundamental Rights or an independent institution. On the basis of any risks uncovered by the monitoring system, the European Parliament would issue resolutions and recommendations for remedy.[82]

Thus, on the basis of the recommendations of the High Level Group, the Union would examine the performance of member states in the field of media freedom and media pluralism, not only in the context of the implementation of European law, but also in respect of situations that belong under the exclusive purview of the member states. From this point onwards, the proceedings proposed for the narrow areas of media freedom and pluralism follow, in practice, the logic of the proceedings according to Article 7 of the TEU, since a preventive, forecasting system would be established, within the framework of which the monitoring organ would issue warning signals to the European Parliament. Similarly to the preventive proceedings of the Council according to Article 7, once again a political organ (in fact, the European Parliament) would formulate recommendations and adopt positions in respect of expectations towards the member states related to media freedom and pluralism. Although this procedure, which is 'softer' than Article 7 of the TEU, may seem to be a more attractive solution in the eyes of the member states (since it places the right to formulate the Union's positions related to breaches against media freedom and pluralism to an institution that is traditionally known as a 'loose cannon'), it may be said that it holds risks both as regards enforceability and the determinability of the expectations related to media freedom set forth under Article 2 of the TEU. For, tacitly, the European Parliament is also made up of members with ties to their own member states who run the risk of 'voting home' on issues of national significance to them and who shy away from the political boomerang of 'naming and shaming'. On the other hand, even if it is possible to acquire a majority to condemn the performance of a member state in the field of media freedom and pluralism, the coercive force of the recommendations and resolutions of the European Parliament lags far behind the consequences of the condemnatory verdicts of the member state courts or the judgements of the CJEU. Finally, similarly to the decisions adopted in Article 7 of the TEU procedure, the resolutions and recommendations of the European Parliament are politically highly exposed; the results are based on the political considerations of the Members of Parliament and not (necessarily) on the legal requirements under Article 2 of the TEU regarding media freedom and pluralism. Furthermore, this procedure may also run the risk that, in an infringement

[81] High Level Group (n 17) 3.
[82] ibid 5.

procedure or a preliminary ruling procedure, the CJEU may rule differently about the obligations of the member states according to Article 2 of the TEU.

It is beyond doubt that the values (principles) laid down in Article 2 of the TEU are normative provisions binding upon both the Union and the member states. The openness and general formulation of these values enables states with very different constitutional systems to align with the provisions of Article 2 of the TEU; however, these values are extremely difficult to apply precisely when a member state diverges from the common public policy minimum. Although there are several possible avenues for enforcing the public policy minimum—the text of the fundamental treaty, the jurisdiction of the CJEU or the reverse *Solange* doctrine which is merely a proposal as of yet—it is still doubtful whether these will ever actually be applied against the member states. In lack of such efforts we cannot know for certain just what the content of the public policy minimum provided for in Article 2 of the TEU actually is and where the final limits for the exercise of the powers of the member states lie.

The value of democracy and pluralism in European media law

Following the analysis of the determinability and legal normativity of European values detailed above, we shall now address two fundamental values underlying European media law in detail, ie the values of democracy and pluralism. As will be demonstrated below through an analysis of Union law, the case-law of the CJEU and the documents issued by the CoE, the enforcement of the values of democracy and pluralism is vital for creating and maintaining a diverse and balanced media landscape sustained by independent media service providers, and *vice versa*, media pluralism contributes to a well-functioning democracy in the states.

The gradual evolution of the common European set of values and the distribution of powers between the national and international / supra-national levels affects media regulation as well—democracy and pluralism are manifested in various international or EU documents, as well as the jurisprudence of the ECJ and the ECtHR. The ECJ aligned its jurisprudence with the document of the CoE ratified by the member states, the ECHR, and the jurisprudence of the ECtHR. Besides this, the EU also undertook to join the ECHR, while Article 52 Paragraph 2 and Article 53 of the Charter of Fundamental Rights synchronise the rights granted by the Charter with those granted by ECHR in respect of both content and the level of protection. European states that are members of both the EU and the CoE are subject to the fundamental rights system of both organisations; however, as will be demonstrated, these systems are continuously merging as a result of both voluntary alignment and mandatory adoption as provided for in the treaty.[83]

[83] Dommering (n 3) 69–70.

As a result of the ongoing convergence of the various European fundamental rights standards, in an assessment of the values and principles orienting media regulation, academic research cannot omit the analysis of the EU or CoE component. Accordingly, in the following we shall review the expectations towards media regulation and the principles of democracy and pluralism, with the intention not only to uncover the connections between the two principles and the restrictions placed on national media regulation, but also to trace the expectations of the EU and the CoE towards the member states.

The principle of democracy in the EU

For a long time, democracy did not feature among the principles (values) of European integration. According to von Bodgandy, this defect is primarily attributable to the consideration according to which the democratic legitimacy of European integration is to be supplied by the democracies of the member states, ie the operation of the Communities requires no separate source of legitimation.[84] At the same time, however, within the process of European integration (the transfer of member state powers to Brussels), criticism of the 'democratic deficit' of the Community[85] and the weak legitimation of its decisions has increased.[86] In response to the concerns about the democratic deficit, and in parallel with the extension of the powers of the Union, the powers of the only directly elected European institution, the European Parliament consisting of the representatives elected by the citizens of the Union, were also increased,[87] and, as a result of the Lisbon amendment of the Treaty, it has gained the status of co-legislator beside the Council. With the exception of the common foreign and security policy, the legitimacy of the actions of the Union now has two sources, the democratic systems of the member states via the Council and the CoE, and the community of the citizens of the Union via their participation in the decision-making of the European Parliament[88] (dual legitimacy).[89]

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[84] A von Bogdandy, 'Founding Principles' in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart/Beck 2009) 47.

[85] For a detailed treatment of the issues, see B Szolcsányi, '"Democrats" and "Relativists": Some Characteristics of the Dispute on the Democracy Deficit' (2006) *EU Working Papers* 3. 21–35, especially 22–23.

[86] JHH Weiler, 'The Legitimacy Credit Crunch of the European Union' Delivered at FIDE XXV, Tallinn Conference, <http://www.fide2012.eu/index.php?doc_id=145 2012> 4–8.

[87] FB Jacobs, 'Development of the European Parliament's Powers: An Incomplete Agenda?' <http://aei.pitt.edu/441/1/Development_of_the_EP_powers.pdf>, March 2003, 2–3; B Rittberger, 'The Development of the European Parliament's Powers' <http://aei.pitt.edu/2920/1/157.pdf>, 2003, 10–23.

[88] Treaty on European Union, art 10 [2]: 'Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.'

[89] A von Bogdandy (n 7) 36–37.

The Union's concept of democracy, as detailed in Articles 10 and 11 of the TEU introduced by the Lisbon amendments, is based on the democratic participation of the citizens of the Union. The provision states that the operation of the Union is based on representative democracy and sets out the sources of dual legitimacy, the participation rights of the citizens of the Union, the principle of subsidiarity, and the democratic role of the European party groups.[90] Finally, Article 11 of the TEU provides for the instruments and framework of social consultation and European citizens' initiatives.[91] The union's concept of democracy is further refined by the participatory and administrative rights of the citizens of the Union, as laid down in the Charter of Fundamental Rights, including the right to proper administration and access to documents (Articles 41–42), the right to vote and to stand as a candidate at elections to the European Parliament (Article 39), the right to refer cases of maladministration to the European Ombudsman, and finally, the right to petition the European Parliament (Articles 43–44). From this list, it is evident that the mechanisms of the democratic life of the Union were inspired by the tried and tested solutions that exist in the member states.

Nevertheless, at this point we should state that while, in the course of the process of integration, the Union took significant steps towards overcoming the often criticised European democracy deficit, the democracy of the Union and the democracies of the member states are radically different—there is no single 'people' at the level of the Union; the European party groups, the Council, and the Commission, playing the 'role of government', are mosaic-like, neither right-wing nor left-wing, and there is no effective system of political accountability.[92] Bearing all this in mind it is questionable whether and to what extent minimum democratic expectations may be formulated in respect of these two radically different levels.

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[90] Treaty on European Union, art 10:—

(1) The functioning of the Union shall be founded on representative democracy.

(2) Citizens are directly represented at Union level in the European Parliament.

Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.

(3) Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.

(4) Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union.

[91] Under Title II, art 12 of the TEU also discusses the powers of national parliaments in respect of the implementation of the principle of subsidiarity ('Provisions on Democratic Principles'); however, taxonomically this provision is more closely related to the rules on the distribution of powers.

[92] Weiler (n 86) 6–8. Although it does contribute to increasing the input legitimation of the democracy of the Union, even the newly introduced instrument of European citizens' initiative does not enable the citizens of the Union to effectively influence decision making—the procedure requiring cross-border organisation is only available to civil organisations with international contacts and the process itself is rather protracted, as it takes about one and a half years. R Hrbek, 'Die Europäische Bürgerinitiative: Möglichkeiten und Grenzen eines neuen Elements im EU Entscheidungssystem' (2012) *Integration* 1, 44.

Correlations between democracy and media freedom

It may be said that European democracy is, to a large extent, dependent on the democratic conditions of the member states—it is not by mere chance that von Bogdandy and his co-authors write that 'it would be a serious threat to [the] democracy [of the Union] if the citizens of the Union in the Member States were unable to express their opinions freely or to collect information from independent media sources.'[93] Due to the dual legitimacy of the Union, it is indispensable that 'in respect of legitimation, the Union be able to build on the political systems operating in its Member States.'[94] If media freedom is restricted in the member states, we cannot speak of functioning national political systems:[95] In the absence of effective political discourse supported by the media, the democracy of the nation-states becomes dysfunctional[96] 'because the democratic public means much more … than providing so-called input legitimation for political decision makers. Its task is to show the picture of the actual state of society, to enable the creation of a collective will, to ensure that political decisions are founded on active citizens' participation and to assess the decisions that have already been made. It thereby plays a key role in creating and maintaining a viable democracy.'[97]

Besides this, we should not forget that, at the level of the Union—*inter alia*, due to its multilingual nature—no true democratic public sphere has evolved yet. With a few exceptions (eg Euronews),[98] no European-level media service providers exist that could provide the direct foundations for the political life of the Union and a truly European political discourse. As such, the democracy of the Union and the political participation

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[93] Von Bogdandy et al (n 9) 53.

[94] ibid 48.

[95] '[Citizens] must have free access to information that will give them sufficient basis for making enlightened judgements and informed political choices. If not, control over the flows of information and manipulation of public opinion can lead to a concentration of power, the ultimate form of which is seen in authoritarian and totalitarian systems, which use both censorship and propaganda as tools for staying in power.' High Level Group (n 17).

[96] On the basis of the European Charter on Freedom of the Press, art 1: 'Freedom of the press is essential to a democratic society. To uphold and protect it, and to respect its diversity and its political, social and cultural missions, is the mandate of all governments.'

[97] D Rucht, 'Demokratische Öffentlichkeit als kritische Öffentlichkeit (Kommentar)' (2011) *WSI Mitteilungen* 3, 98.

[98] 98 'Theoretically, one of the main objectives of Euronews since its very beginnings has been to create a common European identity by complementing the new services of each country. This was to provide the audience with a European-wide view of news events from around the world and thus confer a single identity on everyone in the European Union. Several analysts believed that this goal was very important in order to achieve European integration, as a way to resolve two problems. On the one hand, there are problems in achieving the political union of the various states in the EU, and, on the other, there is a lack of information on and cross-relationships among the member states. There still is no formula to encourage closer ties among Europeans of different nationalities, which is the process that would lead to a strong common identity to offset nationalist feelings. Consequently, creating a common European identity becomes essential for Europe's political and economic integration.' A Casero, 'European-wide Television and the Construction of European Identity. The Case of Euronews' *Formats*, <http://www.iua.upf.edu/formats/formats3/cas_a.htm>.

of the citizens of the member states are primarily defined by the member states' media service providers, as these provide an accessible framework for the expression of opinions and political will formation. The effectiveness of the media systems and the public of the member states therefore have a direct effect on the state of the democracy of the Union, since the most important European political issues are presented by member state media. Prominent among the roles played by the media of the member states in European democracy is the presentation of the member state level election campaigns for European Parliamentary elections. The effectiveness of the national media is of key significance in the European elections, nevertheless European Parliamentary elections are often criticised for 'mapping' the politics of the member states thematically and at the level of the parties, as well as for serving as an instrument to 'punish' the national governments, at the same time they do lead to the formation of a democratic institution of the Union that possesses direct legitimation.

It is in this spirit that the European Parliament's resolution on media law in Hungary states that 'the European Union is founded on the values of democracy and the rule of law, as stipulated in Article 2 of the TEU, and consequently guarantees and promotes freedom of expression and of information.'[99] The European Parliament refers to the values of the Union; however, the report does not criticise the media regulatory activities of the Union, but the situation of media freedom and media pluralism in a single member state, namely Hungary. Accordingly, the European Parliament takes the position that the values provided for in Article 2 of the TEU are binding not only for the Union but also its member states.[100]

The CoE has discussed the correlations between democracy and media freedom on numerous occasions. According to Resolution 1636 (2008) of the Parliamentary Assembly of the Council of Europe ('Indicators for media in a democracy'), '[f]reedom of expression and information in the media is an essential requirement of democracy. Public participation in the democratic decision-making process requires that the public is well informed and has the possibility of freely discussing different opinions.'[101] Furthermore, the Resolution points out that all CoE member states have committed themselves to respecting democratic standards; upholding these is not merely an internal state affair, but rather the task of the community of all member states, which must oversee the state of democracy in all the member states. It was in keeping with this that the Committee of Ministers adopted its Recommendation on the role of the media in democracy in the context of media concentration[102] declaring that media freedom and pluralism are vital for democracy, given their essential role in guaranteeing free

[99] See European Parliament resolution of 10 March 2011 on media law in Hungary.

[100] In detail see von Bogdandy et al (n 9).

[101] Resolution No 1636 (2008) of the Parliamentary Assembly of the Council of Europe on the Indicators for media in a democracy, [1].

[102] Declaration of the Committee of Ministers on protecting the role of the media in democracy in the context of media concentration (adopted by the Committee of Ministers on 31 January 2007 at the 985th meeting of the Ministers' Deputies).

expression of opinions and ideas and in contributing to people's effective participation in democratic processes. The Recommendation of the Parliamentary Assembly of the Council of Europe on media and democratic culture stresses that the media are vital for the creation and the development of a democratic culture in all member countries and therefore the freedom of the media must be protected.[103]

As regards the role of the media in election campaigns, the Recommendation of the Committee of Ministers to Member States on measures concerning media coverage of election campaigns stresses that 'free and fair elections are one of the fundamental pillars of democratic nations.'[104] During the elections—ie at the time of the participation of the citizens in the formation of political institutions—the media and the guarantees of its freedom acquire special significance.[105]

Considerations for a European perspective on democracy and media freedom

In summary, it may be said that there are significant overlaps between the approaches of the EU and the CoE towards democracy and the role of the media within that context. According to these, the media plays a key role in creating and upholding democracy, while media freedom—as the cornerstone of the freedom of opinion and the free formation of political will—provides the necessary backdrop for the democratic participation of citizens in political life. Consequently, we may conclude that media freedom is one of the key guarantees of democracy. In the following we shall examine the principle of pluralism, one of the most important aspects of the freedom of the media.

Pluralism

The value of pluralism is closely related to that of democracy.[106] This is all the more true in the field of the media, since only the pluralism of media content and the independence of media providers are able to guarantee that the consumers of media services are in the position to formulate their informed opinion on public issues based on a multitude of

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[103] Recommendation of the Parliamentary Assembly 1407 (1999) on Media and democratic culture, [1] and pt (i).

[104] Recommendation R (99) 15 of the Committee of Ministers to Member States on Measures Concerning Media Coverage of Election Campaigns (adopted by the Committee of Ministers on 9 September 1999, at the 678th meeting of the Ministers' Deputies) Explanatory Memorandum, [2].

[105] Recommendation CM/Rec(2007)15 of the Committee of Ministers to member states on measures concerning media coverage of election campaigns (adopted by the Committee of Ministers on 7 November 2007 at the 1010th meeting of the Ministers' Deputies).

[106] P Keller, *European and International Media Law* (OUP 2011) 412; A Nieuwenhuis, 'The Concept of Pluralism in the Case-Law of the European Court of Human Rights' (2007) *European Constitutional Law Review* 3, 380; High Level Group (n 17) 10; K Karppinen, *Rethinking Media Pluralism* (Fordham University Press 2013) 4.

sources comprising several different positions.[107] There are two main threats to media pluralism, political influence and market concentration, as well as the added threat of the combination of the two,[108] which reduces the pluralism of the media due to the intertwining of political and economic powers.

Several national constitutional courts, as well as the ECtHR, regard media pluralism as a constitutional value and afford it protection as such;[109] the High Level Group on Media Freedom and Pluralism has explicitly called it a 'key public good'.[110] Although the legal concept of media pluralism is not codified anywhere by European law, several provisions of primary and secondary law refer to it.[111] Thus, for example, after providing for the freedom of expression in Article 11 Paragraph 1 of the Charter of Fundamental Rights, Paragraph 2 states that '[t]he freedom and pluralism of the media shall be respected.' At the same time, Keller points out that Western European states have entered the CoE with major state-owned or state-supported media service providers 'which were subject to content mandates reflecting national political, social, and cultural policy priorities [therefore the international organisations presumed from the outset] that this intervention in media markets and the accompanying restrictive effects on the liberty to publish were essentially legitimate.'[112]

In keeping with the above, EU law has adopted an interventionist media policy from the very beginning[113] which is restricted by the rules of the internal market. According to the expert commentary on the Charter of Fundamental Rights, while 'states have the right to organise media service within their territories' they are obliged to ensure the prevalence of media pluralism.[114] According to the 1992 Green Paper of the EC, 'Pluralism and Media Concentration', pluralism is a legal institution that may even justify restricting the freedom of expression in the interest of ensuring the diversity of the information provided to the public.[115] The EC recognises that, in itself, the market is not

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[107] 'The part often played by the media as editors of the public sphere … is vital to the promotion and protection of an open and inclusive society in which different ideas of the common good are presented and discussed.' *Centro Europa 7 Srl v Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni and Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni*, No C-380/05, AG Maduro, opinion, [39].

[108] High Level Group (n 17) 9, 16.

[109] P Valcke, 'Looking for the User in Media Pluralism Regulation: Unravelling the Traditional Diversity Chain and Recent Trends of User Empowerment in European Media Regulation' (2011) *Journal of Information Policy* 1, 288.

[110] High Level Group (n 17) 6.

[111] Valcke (n 109) 289.

[112] Keller (n 106) 414.

[113] It is the High Level Group on Media Freedom and Pluralism that intends to find the right balance in this issue, see High Level Group (n 17) 6.

[114] EU Network of Independent Experts on Fundamental Rights, 'Commentary of the Charter of Fundamental Rights of the European Union' (2006) 117.

[115] Pluralism and Media Concentration, COM (92) 480 final, Brussels 23 December 1992, 61. With respect to this the Green Paper cites the resolution on Media takeovers and mergers (OJ C 68 19 1990): 'restrictions are of fundamental importance in the media sector not only due to economic considerations, but primarily in the interest of ensuring the plurality of the sources of information and the freedom of the press' (Article B).

necessarily able to warrant the prevalence of media pluralism, therefore intervention may be called for in the interest of ensuring it.[116] 'Ensuring media pluralism … implies all measures that ensure citizens' access to a variety of information sources, opinion, voices etc in order to form their opinion without the undue influence of one dominant opinion forming power.'[117] Accordingly, media pluralism simultaneously provides the forum for the expression of widely diverging opinions (*status negativus*) and may even serve as the legal basis for the restriction of the freedom of expression in the interest of the plurality of opinions (*status positivus*).

The elements of media pluralism

According to Dommering and Valcke, in the field of the media the term pluralism may refer to the diversity of press products and the diversity of programmes available in the media market, the geographical market where several independent service providers operate and, finally, the situation where all political and social strata are able to access media services (qualitative, quantitative, and structural pluralism).[118] At present the research into media pluralism and the relevant policies of the member states predominantly focuses on the supply side of the media market, although new research is also being carried out into the demand side of the market, and the habits of the consumers of media services (exposure).[119] In the following we shall examine the elements of media pluralism. The judgements of the ECJ that detail the various aspects of media pluralism were passed in cases containing cross-border elements; however, the general statements of these on pluralism may serve as an appropriate basis for examining cases limited to a single member state. Besides the judgements of the ECJ we shall also review the recommendations of the CoE related to media pluralism.

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[116] European Commission, 'The Digital Age: European Audiovisual Policy. Report from the High Level Group on Audiovisual Policy' ch I, 1. Naturally, there are opposing views as to what constitutes the appropriate instrument for ensuring media pluralism—the liberalisation of the media market and the increasing influence of economic actors may contribute to the increase of the pluralism of information sources and media contents, however, the absence of state intervention may lead to interpenetration and content deficits that threaten, in the long run, not only the prevalence of pluralism, but also the freedom of information and expression. See Perry Keller (n 106) 406–409.

[117] Commission Staff Working Document, 'Media Pluralism in the Member States of the European Union' Brussels, 16 January 2007, 5.

[118] Dommering (n 3) 22; Valcke (n 109) 289. Valcke points out that European decision makers primarily concentrate on the supply side, ie in the context of ensuring media pluralism they focus especially on the ownership, content and access aspects of press products.

[119] Karppinen (n 106) 192–93.

Structural requirements

The approach focusing on the structural aspect of media pluralism assumes that the diversity of the sources in the media market guarantees the diversity of media content as well.[120] Although this approach is now vigorously contested, it may be said that, as there are objective data available about the market presence and ownership background of media service providers, the structural approach regarding the examination of the media market may be regarded as better founded than a comparative assessment of media content based on uncertain factors.[121]

Concentration

The structural precondition of media pluralism is the avoidance of undue concentration in the media market, as this alone is able to ensure the availability of diverse media content from a multitude of sources to the consumers. It is a special characteristic of the media market that the excessive capital requirement of media services forms a significant barrier to market entry, whereby capital-strong enterprises are easily able to secure dominant positions.[122] Keller points out that, from the aspect of the media market, this is problematic as 'commercial dominance tends to reduce the number of independent media firms capable of funding and producing news and current affairs information.'[123]

In relation to the transformation of the media market due to new technologies, there are some who believe that the market dominance of the printed press and the linear media service providers has become less problematic from the aspect of media pluralism, since the emergence of online media services that require less capital has opened up the market for the entry of new actors and, consequently, the diversification of content. Although this proposition is partly true, Keller points out that, in a significant proportion of households, citizens still only use the traditional sources of information;[124] furthermore, in our view media pluralism can only prevail if not only the media market as a whole, but each and every sector of it is diverse.

Competition policy is the Union's primary instrument to ensure the fulfilment of the structural requirement of media pluralism and the avoidance of the undue concentration of the media market.[125] Since, however, the competition authority is only able to prevent the undue concentration of the market and abuses of dominant position, it cannot ensure media pluralism on its own.[126] Member state provisions recognised by the Union can—under

120 ibid 193.
121 ibid 192–93.
122 Keller (n 106) 417–18.
123 ibid 418.
124 Keller (n 106) 421.
125 Commission Staff (n 117) 7.
126 ibid 8.

certain conditions—make up for this defect.[127] The relatively broad leeway granted to the member states in this respect is also justified by the fact that they have widely different media market structures;[128] moreover their expectations towards media pluralism may also be different and so measures related to media pluralism must be tailored to the specifics of the various national media markets. This recognition is reflected in the Commission's 2003 White Paper on services of general interest, according to which the member states themselves are those who are primarily responsible for media pluralism.[129]

In line with this, in Resolution 1636 (2008) of the Parliamentary Assembly of the Council of Europe (Indicators for media in a democracy), the Parliamentary Assembly recommends to the member states that '[l]egislation must be enforced against media monopolies and dominant market positions among the media.'[130] Furthermore, the Committee of Ministers of the Council of Europe has stated that media concentration may provide certain groups with significant influence which could simultaneously lead to the abuse or demolition of 'political pluralism and democratic processes'.[131]

The ECJ has also dealt with the member states' regulations related to the structural requirements of media pluralism, and it was along the lines of this argumentation that the Dutch government tried to justify the restrictive provisions of the Dutch media act, the Mediawet, albeit without success. In the *Gouda* case, the claimants challenged the provision of the Mediawet that prescribed the unified regulation of television programmes broadcasted in or towards the Netherlands, prohibited the creation of both programmes and advertisements by the same producers and prescribed that advertising revenues be mandatorily used for programme production.[132] The Dutch government attempted to justify these restrictions by claiming that they serve to promote cultural objectives, or, more precisely, to ensure the freedom of opinion of Dutch social, cultural, religious, and ideological groups, which freedom would be curbed if advertising producers had

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[127] Keller (n 106) 419. Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, art 21 [4]: 'Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law. Public security, *plurality of the media* and prudential rules shall be regarded as legitimate interests within the meaning of the first sub-paragraph.'

[128] Keller (n 106) 420.

[129] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – White Paper on services of general interest, 4.6: 'Concerning media pluralism, the public consultation highlighted that, in the light of the differences that exist across the Member States, the issue should be left to the Member States at this point in time. The Commission concurs and concludes that at present it would not be appropriate to submit a Community initiative on pluralism. At the same time, the Commission will continue to closely monitor the situation.'

[130] Resolution (n 101) 8.18.

[131] Declaration of the Committee of Ministers on protecting the role of the media in democracy in the context of media concentration; <https://wcd.coe.int/ViewDoc.jsp?Ref=Decl-31.01.2007&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>.

[132] *Stichting Collectieve Antennevoorziening Gouda and Others v Commissariaat voor de Media*, C-288/89, [1991] ECR I-4007, judgement of 25 July 1991, [21].

undue influence on the content of programmes.[133] The ECJ, however, found that the attainment of the cultural objectives claimed by the Dutch government did not provide adequate justification for restrictions affecting the organisational conditions of foreign broadcasters:[134] 'in order to secure the pluralism which it wishes to maintain the Netherlands Government may very well confine itself to formulating the statutes of its own bodies.'[135] At the same time, the Court also stated that the maintenance of media pluralism is related to the freedom of expression 'which is one of the fundamental rights guaranteed by the Community legal order.'[136]

Transparency

As the extent of the concentration of the media market is only measurable on the basis of the ownership status of the media service providers, in Stolte and Craufurd Smith's view, 'exact and up-to-date data about media ownership are of central significance to any regulation related to media pluralism.'[137] The authors also point out, however, that the transparency of the ownership relations between the owners of media service providers is not only significant from the perspective of the formation of the media market policies of the member states—as a significant proportion of the citizens of the Union gather their information about public affairs from the media, if they are not aware of who the owner of a given media service provider is, they have difficulties with assessing the content it provides. On the basis of this it may be said that the transparency of the media is of fundamental importance in ensuring the informed participation of citizens in political processes.[138] Article 5 of the Audiovisual Media Services Directive provides for the minimum information that audiovisual media service providers are required to make available to consumers.[139] At the same time, Stolte and Craufurd Smith point out that this information is not sufficient to ensure the real transparency of the ownership background of media service providers, since the obligation to provide information does not extend to parent companies, financing and shareholder issues.[140] The directive on electronic

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133 ibid [22].

134 EU Network of Independent Experts (n 114) 120.

135 *Stichting* [24].

136 ibid [23].

137 Y Stolte and R Craufurd Smith, 'The European Union and Media Ownership Transparency: The Scope for Regulatory Intervention' Open Society Media Program, 2010/6, 3.

138 ibid 16.

139 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 Article 5:

'Member States shall ensure that audiovisual media service providers under their jurisdiction shall make easily, directly and permanently accessible to the recipients of a service at least the following information:

(a) the name of the media service provider;

(b) the geographical address at which the media service provider is established;

(c) the details of the media service provider, including its electronic mail address or website, which allow it to be contacted rapidly in a direct and effective manner;

(d) where applicable, the competent regulatory or supervisory bodies.'

140 Stolte and Craufurd Smith (n 137) 10.

commerce provides for the provision of a similarly limited scope of information in respect of on-demand media service providers and online press products.[141] Accordingly, although the Union is clearly striving to make the ownership background of media service providers transparent, at present this objective is served by company law and competition law instruments that are only able to provide a limited overview of the actual ownership relations between media service providers, since they were not designed for that purpose, nor is it probable that the consumers of media services are able to find and understand such data.[142]

The Parliamentary Assembly of the Council of Europe also calls attention to the requirement that the ownership relations within the media and any exercise of influence via the media must be rendered transparent,[143] and calls upon the Committee of Ministers to support the member states in their efforts to this end.[144] In the context of media concentration, the recommendation of the Committee of Ministers expressly refers to the national measures 'with a view to guaranteeing full transparency of media ownership'.[145] The recommendation also states that, in cases when the media owner is a political party or a politician, the member states should ensure that the ownership relations are made public.[146]

In the absence of cogent European regulations ensuring the complete transparency of the ownership relations of the media, it is the task of the member states (signatory states) to create the necessary media transparency regulations in the interest of both the effective supervision of the media and informing their citizens.

Quantitative requirements

In respect of the prevalence of the value of media pluralism, the number of sources of objective information available to citizens is an important factor. In the *Familiapress* case[147] the Austrian government used the requirement upholding media pluralism to justify the provision of the act on unfair competition prohibiting distributors from offering prizes for the purchase of goods or services.[148] Although the Austrian provision was capable of hindering the trade of magazines between the member states, the ECJ

141 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, art 6.b: '(b) the natural or legal person on whose behalf the commercial communication is made shall be clearly identifiable.'

142 Stolte and Craufurd Smith (n 137) 11–13.

143 Resolution (n 101) 8.18.

144 Recommendation of the Parliamentary Assembly 1407 (1999) on Media and democratic culture, vii.a.

145 Declaration (n 102) II.

146 Recommendation (n 105) [6].

147 *Vereinigte Familiapress Zeitungsverlags- und vertreibs GmbH v Heinrich Bauer Verlag*, Case C-368/95, [1997] ECR I-3689, judgement of the Court of 26 June 1997, [13]

148 Gesetz über unlauteren Wettbewerb, 9a.1.1.

acknowledged that the preservation of media pluralism may constitute a mandatory requirement. '[D]iversity helps to safeguard freedom of expression … which is one of the fundamental rights guaranteed by the Community legal order.'[149] Whilst the provision in question promotes the legitimate objective of the preservation of media pluralism, and thereby the prevalence of the right to the freedom of expression, the prohibition may simultaneously result in a restriction of the freedom of expression—precisely by excluding the sale of specific periodicals.[150] Taking all this into consideration, the ECJ left it to the national court to assess whether, in the light of the concentration of the Austrian media market and the market positions of the individual press products, permission to participate in prize games would entail a threat to media pluralism in Austria.[151]

On the basis of all this, in the law of the internal market the value of pluralism is a legitimate avenue for justifying member states' restrictions on market freedoms; however, the measures that the member states may take are not boundless and must pass the test of proportionality as well.[152] The decision of the ECJ also provides sufficient flexibility by leaving the assessment of the state of the national press market, and the performance of the test of proportionality on the basis of such assessment, to the member states' courts.

Qualitative requirements

The aspect of media pluralism related to the diversity of media content has traditionally been a much disputed area, since it necessarily entails the dangers of methodological uncertainty arising from the comparison and evaluation of media content.[153]

In the main proceedings of the *United Pan-Europe Communications Belgium SA* case,[154] the claimant cable service providers contested the provisions of the Act of 30 March 1995 on broadcasting networks and broadcasting activities, which granted a preferential status to the broadcasting organisations selected in the so-called must carry system. According to the Belgian act, 'the aim of the must-carry regime is to safeguard the pluralistic and cultural range of programmes available on television distribution networks and to ensure that all television viewers have access to that pluralism.'[155] During the proceedings, in justification of the national regulations, the Belgian government claimed that it guarantees 'to Belgian citizens of the bilingual region of Brussels-Capital that they will not be deprived of access to local and national news and

149 *Familiapress* [18].
150 (n 106) [26].
151 ibid [18].
152 ibid [27].
153 Karppinen (n 106) 193.
154 *United Pan-Europe Communications Belgium SA and Others v Belgium*, [2007] ECR I-11135, Case C-250/06, judgement of the Court of Justice of 13 December 2007.
155 ibid [4].

to their culture.'[156] The ECJ recalled in this respect that 'cultural policy may constitute an overriding requirement relating to the general interest which justifies a restriction on the freedom to provide services,' also with respect to the freedom of speech.[157] The Court did not stop at acknowledging the cultural policy consideration as a legitimate justification, but went further and analysed the first step of the test of proportionality, concluding, in general, that a policy 'such as that at issue in the main proceedings constitutes an appropriate means of achieving the cultural objective pursued, since it … guarantees to television viewers in that region that they will not be deprived of access, in their own language, to local and national news as well as to programmes which are representative of their culture.'[158] Although the national authorities have a wide margin of discretion in the formulation of the regulation, they may not exercise their powers arbitrarily and must bear in mind the requirement of effet utile.[159] Consequently, provisions[160] amounting to indirect discrimination, stipulating that the beneficiary broadcasters have their headquarters within the nation's territory, are contrary to community law.[161] Enforcing media pluralism may only be achieved by measures based on criteria known by broadcasters in advance (test of adequacy).[162] With regard to the second step of the test of proportionality, the Court only stated that the 'number of channels reserved to private broadcasters having that status must not manifestly exceed what is necessary in order to attain that objective.'[163] In all other respects the ECJ left it to the national courts to perform the test of proportionality in relation to the national legislation.

The relevant obligation of the member states is, of course, based on the Union's prohibition of discrimination; however, at this point it is worth mentioning the recommendation of the Parliamentary Assembly of the Council of Europe as well, which declares that the 'media must have fair and equal access to distribution channels, be they technical infrastructure (for example, radio frequencies, transmission cables, satellites) or commercial in nature (newspaper distributors, postal or other delivery services).'[164]

Media pluralism as a European value

In summary, it may be said that the EC and the ECJ regard media pluralism and the cultural diversity served by such pluralism as values worthy of protection; in the interest of securing and maintaining these values the member states may take various measures,

156 ibid [40].
157 ibid [41].
158 ibid [43].
159 ibid [43]–[44].
160 ibid [49].
161 ibid [48.
162 ibid [46]–[47].
163 ibid [47].
164 Resolution (n 101) 8.18.

including measures that may possibly restrict market freedoms. The introduction of measures restricting market freedoms—even when serving such legitimate objectives as the creation and maintenance of media pluralism—may only take place if they are proven to be necessary on the basis of the situation in the market concerned. Even in such situations, member states are required to ensure that the restrictive measures are proportionate to the objective pursued, ie that they are capable of establishing media pluralism and do not go beyond what is necessary for achieving that objective. Finally, the CoE and its institutions are committed to maintaining media pluralism and have formulated several related recommendations to their participant states.

Summary

The media play a key role in the maintenance of modern democracies. Political views are disseminated primarily through the media and citizens receive information on public affairs mostly from the media. Enforcing the fundamental rights of the freedom of expression and the freedom of information may be guaranteed, in part, via the media, whereby the media are simultaneously the medium for the exercise of fundamental rights and the token of a functioning democracy. At the same time, however, the principle of democracy can only prevail if the media are able to present a wide range of different opinions as the source of diverse information. The EU and the CoE have emphasised on several occasions that ensuring the freedom of the media is, at the end of the day, the guarantee of a functioning democracy.

Media pluralism is an important aspect of media freedom, since only diverse media are able to ensure effectively that the freedom of expression of all citizens prevails. The relevant literature on the subject lists structural, quantitative, and qualitative requirements towards media pluralism. Market concentration and the limited availability of frequencies and broadcasting possibilities, as well as the narrowing down of media content pose a threat to media pluralism. Both the EU and the CoE have recognised this threat and pointed out several times that the transparency of the ownership relations of the media, the appropriate number of media service providers and the presentation of the broadest range of political content and cultural identities must be ensured by the member states. The requirements are primarily directed at the member states; however, at the level of the Union, opinions have appeared according to which within the framework of the extension of the powers of the Union, the Union should pursue monitoring and advisory activities as well, in respect of media pluralism.

It is questionable, however, whether the member states would approve the extension of the powers of the Union in this direction, and, if so, just how effective the 'Union's supervision' of the member states' media freedom would be. The diversity of the media systems of the member states and the emergence of new media services present a special challenge which may undermine the objectivity and effectiveness of the Union's control.

4.
Defamation issues

John Campbell

The law of defamation in flux: Fault and the contemporary Commonwealth accommodation of the right to reputation with the right of free expression

Introduction

2010 was the centennial year of *Hulton v Jones*,[1] a case that, in establishing strict liability for libel in the United Kingdom, cast a long shadow over the right to free speech in the remainder of the twentieth century. A humorous article had, as the butt of its wit, a fictional barrister named Artemus Jones. Unfortunately for the publishers, a living person carried that unlikely name and he was also a barrister. He sued for libel. Both parties accepted that the publishers did not know of the existence of the real Mr Jones and that they could not, therefore, have intended to libel him.[2] But this was held irrelevant, introducing strict liability into the tort, and banishing the small remnant of fault that still existed at the time, in the requirement that the publisher must have intended to visit the libel on the plaintiff. This decision has never been free of controversy.[3]

Hulton v Jones is almost certainly no longer good law,[4] but in its time it was a key decision on the path to making libel such an atypical tort. Strict liability is only one of libel's unusual features. Others are the presumptions of good reputation of a claimant,[5]

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[1] *E Hulton & Co v Jones* [1910] AC 20 (HL).

[2] A curious contemporary note in the *Law Quarterly Review* suggests that the jury did not believe the defendant's version that it knew of no real person carrying the name of Artemus Jones. If this is so, then the principle of law articulated in the House of Lords was quite unnecessary because the real reason for the decision was a finding of fact: (1910) 26 *Law Quarterly Review* 103, 104.

[3] See, for example, Sir William Holdsworth, 'A Chapter of Accidents in the Law of Libel' (1941) 57 *Law Quarterly Review* 74, where the *Hulton v Jones* rule is subjected to searching criticism on this ground. Another criticism came from Melius de Villiers who pointed out, only about eight years after *Hulton v Jones* was decided, that the English rule now had the potential to render liable individuals not normally capable of intention, such as children and the mentally disabled. The fact that this has never occurred (so far as the writer is aware) does not detract from the logical force of the criticism: Melius de Villiers, 'The Roman Law of Defamation' (1918) 34 *Law Quarterly Review* 412, 413.

[4] Thus in *Kerry O'Shea v Mirror Group Newspapers* [2001] EMLR 40 (QBD), a newspaper had published a pornographic advertisement showing a photograph of a glamour model who bore a striking resemblance to the claimant. Morland J held that strict liability should not be extended to unintentional defamation brought about by 'lookalike' photographs. Although he characterised the case as an 'extension' of strict liability, this was no doubt to avoid the doctrine of precedent; and, however characterised, this is a check on the principle of strict liability.

[5] *Dingle v Associated Newspapers* [1961] 2 QB 162, 181; *Carson v John Fairfax & Sons* [1993] 178 CLR 44, 101.

of the falsity of the allegations published[6] and of damages.[7] Taken together, before recent developments, all of this meant that libel defendants had the odds very heavily stacked against them when the summons arrived.[8] Strictly speaking, even today, all a claimant need do is to plead and prove publication (not a difficult issue in media cases, or indeed most cases of written defamation) and the defamatory meanings of the publication complained of (also not much of an issue provided the claimant does not exaggerate his or her case). And then, in the absence of a special defence, the case is won.

Thus a publisher is liable in damages where all the elements (bar publication and the defamatory meaning of the publication) are presumed. In other words, a claimant is relieved from the burden of proving any of the usual elements of a tort—fault, falsity, causation, and loss. These features are controversial because, by giving a claimant such advantages, they are said to inhibit freedom of speech and the free flow of information.[9]

For a very long time these were the features of defamation and libel law in most English-speaking and Commonwealth countries—for example parts of the United States, India, the UK, Australia, New Zealand, and Canada—until the second half of the twentieth century. The exceptions were South Africa where Roman Dutch Law required the existence of fault[10] until, in 1977, the Appellate Division decided that there would be strict liability for the media,[11] and certain American states.

Then, on 9 March 1964, Justice William Brennan commenced his opinion in *New York Times Co v Sullivan*[12] with this auspicious sentence: 'We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a state's power to award damages in a libel action brought by a public official against critics of his official conduct.'[13] The limit that he found was to require a public official to plead and prove fault in its most extreme form, but one instantly recognisable to Commonwealth lawyers as the standard required to hold a publisher liable in respect of a publication made on an occasion of qualified privilege—actual knowledge of the falsity of the allegations, or recklessness (commonly known as 'malice').

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[6] *Jameel v Wall Street Journal Europe SPRL (No 2)* [2005] QB 904 (CA) 915 B; *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (HL)192 F; *Khumalo v Holomisa* 2002 (8) BCLR 771 (CC) 778 G; *The Age Co Ltd v Elliott* [2006] VSCA 168 [28]; *Pressler v Lethbridge* [1997] 153 DLR (4th) 537, 541.

[7] *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946 (CA) [37].

[8] *Jameel v Wall Street Journal* [2006] 4 All ER 1279 (HL) [38], [152].

[9] E Barendt, L Lustgarten, K Norrie, and H Stephenson, *Libel and The Media: The Chilling Effect* (Clarendon Press 1997) 191–92; *Derbyshire County Council v Times Newspapers* [1993] 1 All ER 1011 (HL)1018 F–H.

[10] *Maisel v Van Naeren* [1960] (4) SA 836 (C), 840 C – 842 B. In 1918 Melius de Villiers identified the requirement of fault in Roman law (from which South African law originally derives) as the key point of distinction from English law. See de Villiers (n 3) 412–13.

[11] *Pakendorf v De Flamingh* [1982] (3) SA 146 (AD) 157 E–F.

[12] 376 US 254 (1964).

[13] ibid 256.

What was not recognisable to Commonwealth lawyers, however, was that the required standard of fault was built on constitutional foundations. So, for many years, Commonwealth courts assumed that the *Sullivan* principle was alien to the common law and it was never followed because its foundation was the US Constitution.[14] From the 1990s attitudes changed and some countries adopted their own Bills of Rights, while others discovered not dissimilar constitutional protections in their existent Constitutions. The result is, as will be more fully argued in what follows, that Justice Brennan's opening words can no longer be understood to forbode a strange or alien doctrine; they heralded a new appreciation of the value of freedom of speech that, by the end of the century, had changed the legal landscape in many other countries.

Modern developments in the Commonwealth

In most jurisdictions, the courts see the law of defamation as the mechanism that strikes a 'balance' between the right to reputation (sometimes characterised as an incident of human dignity) and the right to freedom of speech.[15] That requires, as Lord Hope of Craighead said in *Jameel*, that 'any incursion into press freedom that the law lays down should go no further than is necessary to hold the balance between the right to freedom of expression and the need to protect the reputation of the individual.'[16] But it was not always so. As the High Court of Australia observed in *Theophanous*, the balance in the common law used to be 'tilted too far against free communication and the need to protect the efficacious working of representative democracy and government in favour of the protection of individual reputation.'[17]

One of the earliest intimations of judicial appreciation of disequilibrium in the law of defamation came in *Spring v Guardian Assurance Plc*.[18] *Guardian*, which had once employed Spring, gave a reference to a prospective employer that wrongly impugned Spring's integrity. Spring therefore lost this employment opportunity. Spring had no case in defamation, as the occasion was obviously one of qualified privilege and no malice

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[14] *Theophanous v Herald & Weekly Times Ltd* [1994] 182 CLR 104 (HCA) 125; *Reynolds v Times Newspapers Inc* [2001] 2 AC 135 (CA) 176 E–F; *Grant v Torstar Corporation* [2010] 314 DLR (4th) 1, 26 [68]; *Lange v Australian Broadcasting Corporation* [1997] 189 CLR 520 (HCA) 563.

[15] *R Rajagopal v State of TN* [1994] SCC (6) 632, 648; *National Media Ltd & Others v Bogoshi* [1998] (4) SA 1196 (SCA) 1207 C; H Melkonian, *Defamation, Libel Tourism and the Speech Act 2010* (Cambria Press 2011) 100. It is difficult to improve on Lord Denning's description of the exercise in *Goldsmith v Sperrings* [1977] 1 WLR 478 (CA): 'At the outset Mr Comyn told us that this was a very important case. It concerned the freedom of the press. That is a matter which is very dear to us. But when Mr Hawser came to reply he retorted that it concerned the good name of an ordinary citizen. That, too, is a matter which is equally dear to us. These two interests come into conflict here. We have to choose between them. We have to hold the balance and to see which way the scales come down' (483 E).

[16] *Jameel v Wall Street Journal* [2007] 1 AC 359 (HL) [109].

[17] *Theophanous* (n 14) 133.

[18] [1995] 2 AC 296 (HL).

could be proved. This also meant that there could be no case in malicious falsehood. The majority in the House of Lords, however, found that Spring had a claim in negligence for economic loss. What was interesting, though, was that the majority rejected the argument that Spring's remedies could only found in defamation and malicious falsehood.[19] It did so because, amongst other reasons:

> There would be no purpose in extending the tort of negligence to protect the subject of an inaccurate reference if he was already adequately protected by the law of defamation … [T]he result of [the requirement of malice] is that an action for defamation provides a wholly inadequate remedy for an employee who is caused damage by a reference which due to negligence is inaccurate. This is because it places a wholly disproportionate burden on the employee. Malice is extremely difficult to establish … if the law provides a remedy for references which are inaccurate due to carelessness this would be beneficial. It would encourage the adoption of appropriate standards when preparing references.[20]

Superficially, this case looks as if it reinforces the advantages enjoyed by a plaintiff because it attenuates the fault requirement where the plaintiff bears the onus of proving it. But it represents an early recognition, by the House of Lords, of the problem posed by the fault standard in libel. The House of Lords decided that a claimant in Mr Spring's position ought not to face so high a hurdle as knowledge of falsity (or recklessness) and the pity is that the majority extended the ambit of the tort of negligence instead of redressing the imbalance within the tort of libel itself. Had it made negligence the fault standard required to overcome a defence of qualified privilege, the foundation would have been in place for *Reynolds* privilege to have been later seen for what it actually was—a requirement of negligence before publication of a defamatory statement attracted liability.

Spring did not, itself, precipitate the intellectual breakthrough in re-calibrating the law of defamation to better reflect a modern understanding of the importance of free speech. That came, first, in India and Australia in the form of a new defence of reasonable or responsible publication, initially cast in the form of an enhanced qualified privilege. These cases start with *Rajagopal*[21] in India and move through *Theophanous*,[22] *Stephens*,[23] and *Lange*[24] in Australia, continue through *Bogoshi*[25] in South Africa, and *Reynolds* and *Jameel* in the United Kingdom, *Lange*[26] in New Zealand, *Bonnick*[27] in the Privy Council

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[19] This argument is controversial in other jurisdictions, but the controversy is not relevant to any issue in this article.

[20] 346 C–F (Lord Woolf).

[21] *Rajagopal* (n 15).

[22] *Theophanous* (n 14).

[23] *Stephens v West Australian Newspapers Ltd* [1994] 182 CLR 211.

[24] *Lange v Australian Broadcasting Corporation* (n 14).

[25] *Bogoshi* (n 15).

[26] *Lange v Atkinson* [2000] NZCA 95.

[27] *Bonnick v Morris* [2003] 1 AC 300 (PC).

(originally in Jamaica), and they finish with *Toronto Star* in Canada[28] and *Flood*[29] in the UK. These cases all excuse a media defendant from liability for false defamatory statements in certain circumstances. All of these cases were a consequence either of new constitutional guarantees (New Zealand and Canada), a searching re-invigoration of long-standing constitutional provisions (India and Australia) or a recent legislative guarantee of free speech (the United Kingdom). Only in South Africa was it held that the development was a simple revision of the common law[30] (although the coincidence of this development within four years of the adoption of a Bill of Rights must throw some doubt on this protest). They all did slightly different things: in Australia and New Zealand, it was only political speech that was protected, in India it was only speech concerning 'officials', while in the United Kingdom, South Africa, and Canada it was all speech in the public interest; in Australia, New Zealand, and the United Kingdom the new defence was characterised as a new form of qualified privilege, at least initially, while in South Africa, India, and Canada it was characterised simply as a new defence. In all countries surveyed, the new defence was based on reasonableness (or responsibility in the case of Canada, New Zealand, and, later, the UK). None of the decisions is free from conceptual or doctrinal illogicality and difficulty. However, taken together, they represent a break from the past although their full potential has not yet been realised in the courts of the various countries that will be reviewed.

It will be argued below that this momentous judge-made reform over the last 20 years or so[31] has had the effect of introducing fault as the primary element of the tort; but that because it has often been introduced through the prism of constitutional or other legislative guarantees of free speech, and mostly been characterised as an extension of the old qualified privilege defence, its real effect has been masked and this has hampered a more general overhaul of the tort. It will also be argued that the balance is not best struck by juxtaposing a strict liability tort against a set of formulaic defences (including, now, reasonable or responsible publication), and that it would be better struck within the elements of the tort itself, by the recognition of fault as a requirement for liability.

Before dealing with the cases in detail, it is necessary to make some introductory remarks on three issues. The first is the significance of the different statutory instruments that precipitated these decisions. The second is the position of fault in defamation prior to these cases. And then, also before dealing with the Commonwealth cases, developments in United States law will be surveyed. The reason for this is that the Supreme Court in the United States grasped, many years before Commonwealth courts did, that a different balance was required between the right to free speech and the right to reputation, and their reasoning, as well as their conclusions, have much to teach us. It was once an

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[28] *Grant v Torstar Corporation* [2009] SCC 61.

[29] *Flood v Times Newspapers Ltd* [2012] UKSC 11.

[30] *Bogoshi* (n 15) 1210 F.

[31] What Lord Bingham called 'The liberalising intention of the *Reynolds* decision': *Jameel v Wall Street Journal* (n 16) [35].

orthodoxy, in the Commonwealth, that US law in this area derives from a quite different constitutional structure but, as will be argued more fully below, this is not correct and there is much in the methodology employed by the US Supreme Court that is perfectly consonant with the balance between freedom of speech and reputation that has always informed Commonwealth law.

The statutory instruments

In the first place, all the decisions, as set out above, were held to be authorised by very different constitutional and legislative provisions. In India, it was the Constitution of India; in Australia, it was the constitutional structure of representative government; in New Zealand it was guarantees similar in substance, but structurally different, in the New Zealand Bill of Rights and in New Zealand's political context. In the UK, it was the European Convention on Human Rights, introduced into UK domestic law by the Human Rights Act, 1998. In South Africa it was the Bill of Rights contained in the Constitution that, in spite of the protestations of the Supreme Court of Appeal, at the very least forced a revision of the common law; and in Canada it was the Canadian Charter of Rights and Freedoms ('the Charter'). These provisions, though, all have in common that they demand a more expansive public discourse than could ever pertain under a regime of strict liability. This is far more significant than their differences in origin, status and reach. Potentially more fundamentally, UK, South African, and Indian statutory instruments required a balance to be struck between reputation and free speech, whereas the Australian, Canadian, and New Zealand statutory and constitutional context did not do so explicitly. But even this is a distinction without a difference, because the Australian and Canadian judges, at least, were acutely aware of the common law protection of reputation in their countries[32] and, in essence, struck the same balance. Lord Cooke of Thornden made precisely this point in *Reynolds*:

> For the purposes of defamation law, the background or context does not seem materially different. The constitutional structures vary, but the pervading ideals are the same. Freedom of speech on the one hand and personal reputation on the other have the same importance in all democracies.[33]

Fault in defamation

Paul Mitchell has sketched the history of fault in the English law of libel through most of the nineteenth century.[34] Mitchell shows how fault (in those days called 'malice') was settled as a requirement for the tort at the beginning of the nineteenth century[35] and that,

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[32] *Lange* (n 14) 562; *Lange v Atkinson* [1998] 3 NZLR 424, 431, ls 5–10; *Toronto Star Newspapers Ltd v Canada* 2010 SCC 21, [2010] 1 SCR 721 [1]–[3], [58].

[33] *Reynolds* (n 6) 221 A.

[34] P Mitchell, *The Making of the Modern Law of Defamation* (Hart 2004) ch 5.

[35] *Bromage v Prosser* [1824] 1 CAR & P 475, 476.

as late as the early 1880s, the Court of Appeal in *Capital & Counties Bank v Henty & Sons*[36] set the fault test as whether the defendant 'knew or ought to have known (that the meaning) was calculated to injure the plaintiff.' It was only in 1910—*Hulton v Jones*—that the English tort of libel was settled as one of strict liability in that there was no fault requirement. The Australian Courts followed the same path.[37] In South Africa, Roman-Dutch law always required fault and it was only in the 1970s that the Appellate Division established a strict liability, following the English rule, and even then only for publication in the mass media.[38] Yet fault was never completely extirpated from the law of defamation. It maintained a presence in the defences of qualified privilege (although this was seldom available to a media defendant) and fair comment,[39] both of which could always be trumped if the claimant pleaded and proved malice. In qualified privilege, malice was present if the defendant did not believe the allegations to be true (or was reckless) or if he or she was actuated by an improper motive.[40] For the purpose of fair comment, malice was present if a defendant did not honestly hold the view that he or she had expressed.[41] In South Africa, it has always been necessary to plead and prove the fault of a non-media defendant[42] (and, as set out above, before 1977 and after 1998, also of a media defendant); and in all jurisdictions, distributors who are not authors have never been held liable in the absence of fault.[43] So fault is not alien to defamation: it has a long history in most jurisdictions, and vestiges survived *Hulton v Jones*.

The United States

United States defamation law was not at all clear before 1960, but Mitchell[44] argues that prior to *Hulton v Jones* at least some states,[45] and the US Supreme Court in some circumstances,[46] founded liability for a defamatory statement on negligence; but that after *Hulton v Jones* at least some states followed the new English rule of strict liability;[47] and Ian Loveland has shown[48] that other states extended the concept of qualified privilege to public (as opposed to private) statements if political speech was involved. And, consistent with the usual rule, they held that qualified privilege for public statements

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36 [1882] 7 App cas 741, 772.
37 *Lee v Wilson* [1934] 51 CLR 276, 295 and 298.
38 *South African Broadcasting Corporation v O'Malley* [1977] (3) SA 394 (AD) 403 E – 404 H.
39 Only in South Africa.
40 *Horrocks v Lowe* [1975] AC 135 (HL)149–151.
41 *Tse Wei Chun v Cheng* [2001] EMLR 31 (HKCFA) [57].
42 *Bogoshi* (n 15) 1202 C–D and 1214 A–B.
43 *Goldsmith* (n 15) 487 F – 488 A.
44 Mitchell (n 34) 114–15.
45 *Hansen v Globe Newspaper Co* 159 Mass [1893] 293, 301–4.
46 *Peck v Tribune Co* 214 US 185, 189.
47 *Washington Post Co v Kennedy* 55 App DC 162 (1925) 163; *Larocque v New York Herald Co* [1917] 220 NY Rep 632.
48 I Loveland, *Political Libels: A Comparative Study* (Hart 2000) ch 3.

could be defeated by malice. Thus in Kansas, from the earliest years of the twentieth century, liability could not attach to political speech, in the broadest sense, if publication was made 'in good faith';[49] in Pennsylvania, political speech was protected, from the late nineteenth century, unless the defendant knew that the information disseminated was false;[50] and in Iowa, also from the late nineteenth century, the test for liability in respect of speech on public affairs was knowledge of falsity.[51]

Loveland characterises these cases as focussing on the speaker's 'culpability in publishing an untruth'[52] but, in fact, like all occasions held privileged, the primary focus was on the occasion and on the reciprocal interests of the parties to the communication. As Mitchell explains: 'today it would be utterly inaccurate to describe the defence [of qualified privilege] as based on fault; malice does have a role, but only a subordinate one … Malice is only relevant in that the defence is lost if the claimant proves that the defendant spoke the words maliciously. In short, the emphasis is on the existence of the relevant duties and interests, not the defendant's state of mind.'[53] Yet Loveland was surely not wrong to observe some focus on the speaker's 'culpability', and while Mitchell is right to point out that Loveland overstated his argument because of the defence's basis in the existence of rights and duties on the part of both speaker and audience, Mitchell himself perhaps understates the role of malice, or at least its potential.

New York Times Co v Sullivan[54] was not, therefore, an unpredictable rupture with precedent, but was built on a considerable body of state jurisprudence that sought to protect political speech. It is a reasonably easy case to deal with: while it was a decision of apogean importance in the US law of defamation, it was a unanimous decision and the reasoning is clear and decisive. The facts are too well-known to justify detailed repetition. Sullivan was a leading official in the city of Montgomery, Alabama, and his duties included supervision of the police. The *New York Times* published an advertisement, subscribed to by prominent people, that criticised the Montgomery police for certain actions taken against students demonstrating in favour of civil rights, and against the civil rights leader, Martin Luther King. Some statements were false and this was then, under Alabama law, a 'libel *per se*' in that the words used tended, *inter alia*, to injure Sullivan 'in his public office'. Once this was so, the defendants could only escape liability by proving the truth of their allegations.[55] Brennan J criticised this rule in the following terms:

> A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable 'self-censorship'. Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate

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49 *Coleman v McClennan* [1908] 98 P 281, 292.
50 *Press Co Ltd v Stewart* [1888] Pa 119 584, 603.
51 *Bays v Hunt* [1882] 14 N.W. 785, 787.
52 Loveland (n 48) 49.
53 Mitchell (n 34) 145.
54 376 US 254 (1964).
55 ibid 267.

> safeguard have recognised the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. … Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone'. … The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.[56]

The result was 'a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made … with "actual malice"—that is with knowledge that it was false or with reckless disregard as to whether it was false or not.'[57] The reason for the federal rule, it seems clear, was the court's recognition that strict liability discouraged true criticism on account of the uncertainty of the process of litigation. Commonwealth countries would wait over 30 years before their judges grasped this rather obvious—as it seems to us now—insight.

Sullivan did not, of course, deal with the position of a private claimant. That was the focus of the later case of *Gertz v Robert Welch Inc*.[58] Powell J delivered the opinion of the majority. He introduced the arguments by referring to the 'general problem of reconciling the law of defamation with the first amendment',[59] and concluded them by repeating this exercise, albeit differently worded, as an 'accommodation of the competing values at stake'.[60] Making clear that the court's decision was the product of this exercise, he dismissed the idea of absolute protection for the media because this would require 'a total sacrifice of the competing value served by the law of defamation.'[61] Reverting to the tensions between absolute protection for the media and 'the competing value served by the law of defamation', Powell J held that a person's right to the protection of his or her reputation reflects the basic concept of the dignity and worth of every human being which was recognised by every decent system of ordered liberty.[62] Powell J then went on to hold that:

> We held that, so long as they do not impose liability without fault, the states may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. This approach provides a more equitable boundary between the competing concerns involved here. It recognises the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation. At least this conclusion obtains where, as here, the substance of the defamatory statement 'makes substantial danger to reputation apparent'.[63]

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56 ibid 279.
57 ibid 279–80.
58 *Gertz v Robert Welch Inc* 418 US 323.
59 ibid 333.
60 ibid 348.
61 ibid 341.
62 ibid 341, and following *Rosenblatt v Baer* 383 US 75 (1966) 92.
63 ibid 347–48.

Then the United States Supreme Court confirmed, in *Times Inc v Firestone*,[64] that while fault was always required before the media could be held liable in damages for defamation, in respect of private individuals this did not need to be set as high as in the *Sullivan* case. The effect was to authorise a test of negligence for private individuals because that is the only practical alternative to the *Sullivan* test.

Finally, in *Harte-Hanks Communications v Connaughton*[65] the Supreme Court found reckless disregard for the truth to be established where a newspaper deliberately avoided acquiring knowledge that might confirm the falseness of the facts reported by it.[66] This was a signal departure from *New York Times v Sullivan*, which found irrelevant the fact that the newspaper, in its own files, had material that illustrated the falsity of its publication.[67] This departure has been developed in a series of lower court decisions that have driven the United States protection towards a standard of reasonable publication. The clearest of these (although a controversial decision) is *Suzuki Motor Corporation v Consumers Union of US Inc*[68] where the issue was held to be 'whether CU, armed with the knowledge that its tests were potentially flawed in this way, failed reasonably to investigate in such a manner as to lead a jury to conclude by clear and convincing evidence that CU was aware of the falsity of its samurai report.'[69]

The first important aspect of these cases is the methodology, and the reasoning is in no way foreign to modern Commonwealth law. It is true that *Sullivan* is relatively sparely reasoned, but Powell J in *Gertz* makes it abundantly clear that the exercise in these cases is one of balancing human dignity and the right to reputation against the right to free speech. In his references to the 'value served by the law of defamation',[70] Powell J meant to the right to reputation. This was made even more abundantly clear by Rehnquist CJ in the *Milkovich* case. He said 'but there is another side to the equation; we have regularly acknowledged the "important social values which underlie the law of defamation", and recognise that "society has a pervasive and strong interest in preventing and redressing a tax upon reputation" … the right of man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.'[71] The court's conclusions in these cases therefore amounted to the United States' accommodation between these competing values and this is no different an exercise, as will be shown below, to the Commonwealth courts' methodology when, over 30 years after *Sullivan*, they were also called upon to re-balance the same two competing rights.

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64 424 US 448 (1976).

65 491 US 657 (1989).

66 ibid 682–85.

67 *New York Times Co v Sullivan,* 376 US 254 (1964) 287.

68 (2002) 330 F3d 1110 (9th circuit).

69 *Suzuki Motor Corporation v Consumers Union of US Inc,* 330 F3d 1110 (9th Cir 2003) 1138–39.

70 *Gertz* (n 58) 341.

71 *Milkovich v Lorain Journal Concessionaire,* 497 US 1 (1990) 12. See also *Dun & Bradstreet v Greenmoss Builders Inc,* 86 LEd 2d 593, 609.

The really salient lesson to take from these decisions, however, is that the United States courts secured an improved balance between the right to reputation and the right to freedom of expression by requiring some degree of fault. Quite apart from any discussion of the appropriate level of fault, the real intellectual breakthrough was the United States' recognition that it was strict liability that had tilted the law of defamation too far in favour of the right to reputation; and that the antidote for this imbalance was the re-introduction of some form of fault as an element in the tort of defamation. Indeed, the later cases—particularly *Harte-Hanks Communications* and *Suzuki Motor Corporation*—seem to move US law away from the uncompromising protection offered to the media in *New York Times v Sullivan*, and towards the more variegated and fluctuant Commonwealth position of responsible or reasonable publication.

Developments in the common law world

This section surveys the leading Commonwealth cases that break with the past and adopt some or other variant of *Reynolds* privilege. They are cases decided all over the Commonwealth over the last 20 years or so.

India

In *R. Rajagopal v State of TN*[72] the petitioner was the editor of a weekly magazine. He sought to restrain the prison authorities in Tamil Nadu from interfering with the publication, in instalments, of the autobiography of a condemned prisoner that detailed the prisoner's close association with the authorities. A number of issues arose for decision but, on the issue of defamation, Reddy J (for the court) held that there would be no liability for defamation of a public figure unless the defendant had showed 'reckless disregard for truth', but that it would be enough for the media to prove that it 'acted after a reasonable verification of the facts'.

The early cases in Australia: *Theophanous* and *Stephens*

On 12 October 1994, the High Court of Australia delivered two judgments, the result of which was to move beyond the traditional defences available to newspapers reporting on political matters. But neither case provided a *ratio decidendi* in the sense that while there were majorities for the result, those majorities were divided on the reasons.

[72] *R Rajagopal v State of TN,* [1994] SCC (6) 632.

Theophanous

Dr Theophanous was a member of the Australian House of Representatives. A newspaper published a letter, in November 1992, critical of Dr Theophanous' views on immigration. Dr Theophanous sued the publisher, complaining of various defamatory imputations. The defendant newspaper pleaded, in essence, that the allegations complained of were a discussion of political and governmental matters, concerning the performance of members of Parliament in relation to their suitability for office, made without malice, reasonably, with an honest belief in their truth or, at least, without reckless disregard for their truth and, therefore, were 'not actionable' or at least 'by reason of the freedom guaranteed by the Commonwealth Constitution … published on an occasion of qualified privilege.'[73] The majority upheld this defence in two judgments—one, jointly, by Mason CJ, Toohey and Gaudron JJ ('the main judgment'), and the other by Deane J.[74]

The High Court of Australia had, earlier, recognised an implied freedom of communication derived from the concept of representative government enshrined in the Constitution.[75] The main judgment now held that this extended to the free flow of information, ideas and other debate between all who participate in political discussion, in other words to all members of society, generally.[76] The expression 'political discussion' was given the broadest reach and follows Barendt in finding that it is 'all speech relevant to the development of political opinion on the whole range of issues which an intelligent citizen should think about.'[77] The main judgment, therefore, found that the common law was 'tilted' in favour of the protection of individual reputation at the expense of free communication.[78]

It redressed this imbalance by finding that political discussion was required to be protected 'from exposure to onerous criminal and civil liability' if the implied freedom of communication, designed to ensure the efficacy of representative democracy, was to be effective;[79] and this was because of the 'chilling effect' of civil actions for libel,[80] because qualified privilege's requirement of reciprocity of interest meant that it was not normally available in respect of general publication[81] which, in turn, meant that many defendants were turned back to the truth defence, even in respect of a defence of fair comment; and here the 'rule compelling the critic of official conduct to prove truth as a

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[73] *Theophanous* (n 14) 119.

[74] The dissenting judgments are not dealt with because they have been overtaken by later developments in the High Court of Australia.

[75] *Nationwide News (Pty) Ltd v Wills* [1992] 177 CLR 1 and *Australian Capital Television (Pty) Ltd v The Commonwealth* [1992] 177 CLR 106, cited in *Theophanous* (n 14) 120–21.

[76] *Theophanous* (n 14) 122.

[77] ibid 124.

[78] ibid 133.

[79] ibid 130.

[80] ibid 130–31.

[81] ibid 133.

defence to actions … does not deter false speech only.'[82] The main judgment held that it is often difficult to prove the truth of the alleged libel in all its particulars. And the necessity of proving truth as a defence may well deter a critic from voicing criticism, even if it be true, because of doubt whether it can be proved or fear of the expense of having to prove it.[83]

The result was that a defendant would be excused liability if it acted reasonably in all the circumstances. Reasonableness meant that the defendant did not know that the allegations were false, was not reckless in publishing them (as Deane J recognised in the same case, a description of actual, subjective intention;[84] and the New Zealand Court of Appeal also understood recklessness as 'knowledge of falsity')[85] and, that the defendant had either taken some steps to verify the material or was justified in publishing without taking such steps.[86] Furthermore, the main judgment found that the defendant had the onus of proving that publication is protected because this 'accords with the approach that the courts have taken in the past to proof of matters of justification and excuse and we are not persuaded that the constitutional character of the justification should make any difference to the onus of proof.'[87]

Stephens

A group of West Australian politicians, Stephens amongst them, sued the publisher of the *West Australian* for defamation. Two defences were pleaded on behalf of the newspaper that were objected to by the plaintiffs: reasonable publication and qualified privilege. Mason CJ, Toohey and Gaudron JJ cleaved to their previous positions and Deane J now joined them, although not apparently abandoning his previous, more extreme, position. The case, although marked by an interesting discussion on qualified privilege by Brennan J, therefore added little to the breakthrough in *Theophanous*, and also did little to shed light on the true conceptual rationale for the breakthrough. Australia would have to wait another three years for binding precedent on this issue.

New Zealand: *Lange v Atkinson*

David Lange, the former Prime Minister of New Zealand, sued a journalist and his publisher for defamatory statements in a newspaper article. Defences of 'political expression' and qualified privilege were pleaded. The New Zealand High Court refused to strike them out, ordering that they be combined into one defence of qualified privilege.

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82 ibid 132 (following *Sullivan*).
83 ibid 132–33.
84 Deane J termed it 'subjective motivation', ibid 195.
85 *Lange v Atkinson* [2000] NZLR 385 (NZCA) 400 [45].
86 *Theophanous* (n 14) 134–35, 135–37, and 140.
87 ibid 137.

The New Zealand Court of Appeal agreed. The matter was appealed, further, to the Privy Council which remitted the matter to the New Zealand Court of Appeal in order for it to reconsider its decision in the light of new UK and Australian authority. The New Zealand Court of Appeal did so, and it is this second decision that now authoritatively settles the New Zealand position.

There is only one, unanimous, judgment. It draws on New Zealand's democratic structure where representation is proportional, the fact that there was better access to government papers than in the UK, and a Bill of Rights that guarantees 'public processes, notably political processes by its affirmation of the right to vote in genuine periodic elections … and the rights of freedom of expression.'[88] The New Zealand Court of Appeal opted for a qualified privilege, but not in the form in which it had been adopted in either the UK or in Australia. The purpose of the new privilege 'was to facilitate responsible public discussion' and that was also its limit. If not responsible, the privilege was forfeit. That, the court held, involved a 'responsible basis for asserting a genuine belief in truth'[89] and someone reckless or indifferent to truth 'cannot assert a genuine belief that it was true.'[90] The court also emphasised the flexibility of its concept of recklessness:

> What amounts to a reckless statement must depend significantly on what is said and to whom, and by whom. It must be accepted that to require the defendant to give such responsible consideration to the truth or falsity of the publication as is required by the nature of the allegation and the width of the intended dissemination, may in some circumstances come close to a need for the taking of reasonable care. In others a genuine belief in truth after relatively hasty and incomplete consideration may be sufficient to satisfy the dictates of the occasion and to avoid any inference of taking improper advantage of the occasion.
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> A case at one end of the scale might be a grossly defamatory statement about a Cabinet Minister, broadcast to the world. At the other end might be an uncomplimentary observation about a politician at a private meeting held under Chatham House rules. It is not that the law values reputation more in the one case than the other. It is that in the first case the gravity of the allegation and the width of the publication are apt to cause much more harm if the allegation is false than in the second case. A greater degree of responsibility is therefore required in the first case than in the second, if recklessness is not to be inferred. Responsible journalists in whatever medium ought not to have any concerns about such an approach. It is only those who act irresponsibly in the jury's eyes by being cavalier about the truth who will lose the privilege. Such an approach reflects the approach that qualified privilege is not a licence to be irresponsible.[91]

This judgment, even after recognising that recklessness in this context is 'equivalent to knowledge of falsity'[92] then seems to suggest that negligence is the real basis of the new defence: 'indifference to truth is, of course, not the same thing conceptually as

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88 *Lange v Atkinson* (n 85) [26]–[29].
89 ibid [43].
90 ibid.
91 ibid [48], [49].
92 ibid [45].

failing to take reasonable care with the truth but in practical terms they tend to shade into each other.' It will be argued, below, that the New Zealand Court of Appeal in fact really conflated two different elements—duty of care and negligence—in asking 'whether the defendant has exercised the degree of responsibility which the occasion required.'[93]

The United Kingdom

Reynolds

This matter involved a defamatory and false statement about a former Irish Taoiseach that the newspaper defendant honestly believed to have been true. Alone of the courts that reviewed the law of defamation at this time, the House of Lords started from the premise 'that the established common law approach to misstatements of fact remains essentially sound.'[94] All the law lords sitting in this case agreed on the principles, although the court divided on the result.[95] Lord Nicholls, who gave the main speech, declined an invitation to create a new privilege for 'political information' where no liability could attach in any circumstances because it 'would not provide adequate protection for reputation' and it 'would be unsound in principle to distinguish political discussion from discussion of other matters of serious public concern.'[96] In this regard, Lord Nicholls saw no difference between the ordinary requirements of qualified privilege, and the defendant's suggestion that a qualified privilege defence be extended to media reports unless the media's conduct in publishing was 'unreasonable'.[97] Earlier, in a survey of the principles governing qualified privilege, Lord Nicholls had observed that all that was required (absent malice) was that both the maker of the statement and the recipient must have the familiar, reciprocal, rights and duties to disseminate and receive the information concerned, and this involved consideration of all the circumstances 'viewed with today's eyes'.[98] These considerations derived from the 'elasticity of the common law'[99] and, in a now well-known passage,[100] were articulated in a non-exhaustive list as:

> 1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. 2. The nature of the information, and the extent to which the subject matter is a matter of public concern. 3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. 4. The steps taken to verify the information. 5. The status of the information. The allegations may have already been the subject of an investigation which commands

93 ibid [46].
94 *Reynolds* (n 6) 204 C.
95 *Flood* (n 29) [28].
96 *Reynolds* (n 6) 204 C.
97 ibid 203 B–C.
98 ibid 194 F – 195 D.
99 ibid 204 H.
100 Termed, puzzlingly, 'celebrated' by Lord Dyson in *Flood* (n 29) [188].

> respect. 6. The urgency of the matter. News is often a perishable commodity. 7. Whether comment was sought by the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary. 8. Whether the article contained the gist of the plaintiff's side of the story. 9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. 10. The circumstances of the publication, including the timing.[101]

Lord Steyn agreed, opting for qualified privilege with public interest as its governing principle.[102]

Lord Cooke of Thornden also recognised that the concept of qualified privilege was now extended to publication to the world at large, and this was a development 'to meet the reasonable needs of freedom of speech in a modern democracy, by recognising that there may be a wider privilege dependent on the particular circumstances.' Therefore, he held, all circumstances needed to be considered, but he emphasised 'the precautions taken by the defendant to ensure accuracy of facts'. He saw Lord Nicholls' non-exhaustive list of matters to be considered, as bringing English and Australian law into much the same position.[103] Lords Hope and Hobhouse, too, did not consider that the common law test for qualified privilege was required to be altered except in the sense suggested by Lord Nicholls.

Jameel v Wall Street Journal[104]

This case was precipitated by an article reporting that the Saudi Arabian Central Bank, at the request of US law enforcement agencies, had monitored the bank accounts of some of Saudi Arabia's most prominent businessmen in order to prevent them from being used, wittingly or unwittingly, to channel funds to terrorist organisations. The information was attributed to US and Saudi officials involved in the exercise. The claimants were one Saudi businessman and the company that he owned.

Lord Bingham (with whom Lord Hope and Lord Scott agreed) saw *Reynolds* as having been 'built on the traditional foundations of qualified privilege' but also having 'carried the law forward in a way which gave much greater weight than the earlier law had done to the value of informed public debate of significant public issues.'[105]

He understood *Reynolds* to have retained the 'duty/interest' test and that Lord Nicholls' consideration of matters relating to the nature and source of the information was relevant in the determination as to whether or not that test was satisfied or, as Lord Nicholls more directly put it, whether the public was entitled to know the particular information.[106] The necessary precondition for the reliance on qualified privilege was

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101 *Reynolds* (n 6) 205 A–C.
102 ibid 213 D – 214 E.
103 ibid 225 E–G.
104 *Jameel* (n 8).
105 ibid [28].
106 ibid [30].

therefore that the published matter should be in the public interest, as it was in this case.[107] He summarised Lord Nicholls' test as one of responsible journalism, the rationale of which is that 'there is no duty to publish and the public have no interest to read material which the publisher has not taken reasonable steps to verify.'[108] Lord Bingham then upheld the newspaper's appeal and disagreed with the findings of the Court of Appeal and the Judge in the court *a quo* that the failure to delay publication in order to obtain the businessman's comment vitiated the basis for the application of *Reynolds* privilege.[109]

Lord Hoffman, on the other hand, found the use of the term 'privilege' misleading and that, although Lord Nicholls had used the term in *Reynolds*, he had not done so in 'the old sense'. In *Reynolds*, it was the material that was privileged, not the occasion, and it could not be defeated by malice 'because the propriety of the conduct of the defendant is built into the conditions under which the material is privileged.' It is therefore 'a different jurisprudential creature from the traditional form of privilege from which it sprang'.[110] He therefore went on to hold that in *Reynolds* privilege, the duty/interest test was satisfied by the public interest in that journalists had a professional duty to publish such material and the public had an interest in receiving it, meaning that the test could be reduced to the questions, first, as to whether or not publication was in the public interest and, second, whether or not inclusion of the defamatory material was justifiable in the sense that it made 'a real contribution to the public interest element in the article' and here allowance would be made for editorial judgment.[111] If these two questions were answered in favour of the publisher, the last question was whether or not 'the steps taken to gather and publish the information were responsible and fair'.[112]

The standard was objective, analogous to 'reasonable care' and may be informed by industry practice such as the code adopted by the Press Complaints Commission.[113] Finally, Lord Hoffman held that Lord Nicholls' list was not a series of hurdles that were required to be surmounted and that the failure to obtain the plaintiff's comment on the allegations was, in the circumstances of this case, insufficient to trump the responsible publication defence because the claimant would not, in all likelihood, have had the information required.[114]

Lord Scott of Foscote disagreed that *Reynolds* privilege was 'a different jurisprudential creature' than conventional privilege[115] and went on to hold that *Reynolds* privilege provided protection for statements published to the world at large in appropriate

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[107] ibid [31].
[108] ibid [32].
[109] ibid [35].
[110] ibid [43]–[46].
[111] ibid [50], [51] (and Lord Hope at [107]–[109]).
[112] ibid [53].
[113] ibid [55]. This has been the position in the United States since *Harte-Hanks Communications v Connaughton*, 667–68. See also *Suzuki* (n 69) 1137, and *Murphy v Boston Herald Inc* [2007] 865 NE 2d 746 (Mass) 765–66.
[114] *Jameel v Wall Street Journal* (n 16) [56], [84].
[115] ibid [132]–[135].

circumstances,[116] and he saw newspapers as having a duty to publish information where the public interest is 'real and unmistakable'. This duty encompassed a responsibility on the media 'to take such steps as are practicable to verify the truth of what is reported' and further, where practicable, to give the subject of the publication an opportunity to comment.[117]

Baroness Hale, on the other hand, agreed with Lord Hoffman that *Reynolds* privilege was a 'different jurisprudential creature.'[118] For her, there were two requirements for this defence: first, some real public interest in having this information in the public domain (an easier test than the public's need to know) and, second, responsible verification of the facts.[119]

The importance of this case lies chiefly in the recognition by Lord Hoffman and Baroness Hale that *Reynolds* privilege was not cast in the image of the traditional or qualified privilege. McBride and Bagshaw agree, pointing out that the court does not ask, with regard to a *Reynolds* defence as it would with regard to a conventional qualified privilege defence, whether, had the statement been true, the publisher would have had a duty to convey it to the recipient, and whether the recipient had an interest in hearing it. The important question, as all the opinions in *Jameel* recognised, related to the defendant's conduct in verifying the allegations published.[120]

Flood

Here the respondent, Times Newspapers Limited, had published an article stating of Detective Sergeant Flood that allegations had been made that had led Scotland Yard to investigate whether or not he was guilty of corruption. The investigators had found no evidence of corruption. The court, further, accepted DS Flood's evidence that he had not been corrupt. The issue on appeal was whether the newspaper was safe from liability under *Reynolds* privilege which operated if the allegations had been published in the public interest and if they had been published responsibly. The Court of Appeal, reversing the decision of the High Court, held that the defendants had not acted responsibly in that they had failed to adequately verify certain allegations of fact.[121]

In summarising Lord Nicholls' test, Lord Phillips found that it encapsulated two tests: responsible journalism and issues of public concern. The second test was best formulated as asking 'whether the public was entitled to know the information'.[122]

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116 ibid [137].
117 ibid [138].
118 ibid [146].
119 ibid [147]–[149].
120 N McBride and R Bagshaw, *Tort Law* (4th edn, Pearson Education 2012) 568.
121 *Flood* (n 29) [2], [3].
122 ibid [29]–[32].

It was common cause that the subject matter of the article was in the public interest to publish. But Lord Phillips found that there were two other issues in this regard—whether it was in the public interest to publish the supporting facts and whether it was in the public interest to publish DS Flood's name. Lord Phillips found that, subject to verification, it was in the public interest to publish the supporting facts[123] and that publication of the claimant's name was justified for two reasons: many of his colleagues would have known who he was and, if not named, others might have come under suspicion.[124] Lord Phillips then turned to the issue of verification and emphasised that the publisher was required to have taken reasonable steps to satisfy itself that the allegations were true—an objective test—and, further, believed that they were true—the subjective element.[125] Lord Phillips then turned to the issue of verification. He found a distinction between *Chase 2* level meaning (reasonable grounds to suspect) and verification for the purpose of reasonable publication which does not require 'such hard and fast principles', and where a reasonable journalist should 'satisfy himself that such grounds exist but this does not necessarily require that he should know what those grounds are.' Indeed, the journalists could either base their articles on 'reliable sources' or infer it from 'the fact of a police investigation in circumstances where such inference is reasonable.'[126]

On verification, Lord Phillips held that the journalist 'should be reasonably satisfied that there was a serious possibility that DS Flood had been guilty of corruption'[127] and he found that the journalists 'were justified in concluding that it was a strong circumstantial case.'[128]

For Lord Brown, *Reynolds* privilege raised one question only: 'could whoever published the defamation, given whatever they knew (and did not know) and whatever they had done (and had not done) to guard so far as possible against the publication of untrue defamatory material, properly have considered the publication in question to be in the public interest?'[129] In the context of this case, that question became 'whether it can ever properly be said to be in the public interest to publish, as here, the detailed allegations underlying a criminal investigation—to publish, in effect, a summary of the case against the suspect, reliant in part on anonymous sources, before even the police have investigated the allegations, let alone charged the suspect.'[130] In other words, the defendant would need to show that it was 'in the public interest that the public should know, in advance of the outcome of the investigation, that such an allegation has been made and is being duly investigated.'[131] Upholding the defence on the facts of the case, Lord Brown answered

123 ibid [68].
124 ibid [74].
125 ibid [78], [79].
126 ibid [80].
127 ibid [88].
128 ibid [98], [99].
129 ibid [113], Lord Clarke agreed at [184], [185].
130 ibid [114].
131 ibid [116].

the question by finding that the 'denunciation' of DS Flood related 'to a matter of obvious public importance and interest' and the journalists 'justifiably' thought that there was 'a strong circumstantial case'.[132]

Lord Mance expressly injected the conduct of the journalists into the test for public interest on the basis that a publication would not be in the public interest unless it had been 'the subject of responsible journalistic enquiry and consideration'.[133] In deciding this question, weight ought to be given 'to the judgment of journalists and editors' as to the nature and degree of steps taken before publication and also as to whether or not the content was in the public interest.[134] Lord Mance, in finding for the newspaper, identified three areas of disagreement with the Court of Appeal. First, he found that in a case which involved not mere reportage, but 'where a greater or lesser degree of suspicion is reported', the media 'cannot disclaim all responsibility for checking their sources so far as practicable, but, provided the report is of real and unmistakable public interest and is fairly presented, need not be in a position to produce primary evidence of the information given by sources.'[135] Second, he found that the media are entitled not to disclose the identity of the source.[136] Third, he found that the journalists had taken sufficient steps to verify their publication.[137] Indeed, he later noted that the journalists had investigated the 'allegations exhaustively over a substantial period as far as they could'.[138]

Lord Dyson emphasised that the requirement of verification 'provides real protection for the individual concerned',[139] and added that 'the court should be slow to interfere with an exercise of editorial judgment.'[140]

After three House of Lords decisions, the position in the UK can hardly be said to be clear. Reynolds simply treated the new defence as the extension of qualified privilege to general publication in newspapers. In the later two cases most judges conflated the issue of public interest and verification and, in addition, Lord Phillips required both objective and subjective intention.

These cases are now overtaken by section 4 of the Defamation Act, 2013 that abolishes *Reynolds* privilege, and that reads:

> 4. Publication on matter of public interest
> (1) It is a defence to an action for defamation for the defendant to show that—
> (a) the statement complained of was, or formed part of, a statement on a matter of public interest; and

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132 ibid [119].
133 ibid [123].
134 ibid [137].
135 ibid [158].
136 ibid [159].
137 ibid [160], [170].
138 ibid [179].
139 ibid [196].
140 ibid [199].

(b) the defendant reasonably believed that publishing the statement complained of was in the public interest.

(2) Subject to subsections (3) and (4), in determining whether the defendant has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case.

(3) If the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the claimant was a party, the court must in determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed by it.

(4) In determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate.

(5) For the avoidance of doubt, the defence under this section may be relied upon irrespective of whether the statement complained of is a statement of fact or a statement of opinion.

(6) The common law defence known as the *Reynolds* defence is abolished.

This section concretises the move away from qualified privilege in *Jameel* and *Flood*, and also follows those cases in fixing public interest as the conceptual foundation of the defence. This has attracted searching and compelling criticism from Paul Mitchell and Eric Barendt, dealt with more fully below in the section on public interest. Apart from that, the authors of the currently most authoritative guide to the Act believe that 'an element requiring that there has been objectively responsible journalism will remain.' They conclude that 'one thing that is clear from Hansard and the explanatory notes, is that although by s 4(6) the *Reynolds* defence was abolished, Parliament did not intend to change the general principles for the availability of a public interest defence along *Reynolds* lines, such as that most recently articulated in *Flood*.'[141]

The Defamation Act has ossified UK defamation law in, essentially, the image of *Flood*. Defamation law in the UK is no longer a common law tort, but is now a creature of statute. Accordingly, the further conceptual development argued for in this article—that defamation ought to be cast as a negligence-based tort—is not now possible in the UK; but it is possible in all other jurisdictions examined and the great breakthroughs in *Reynolds* and *Jameel*, at least, will undoubtedly continue to feed developments in the rest of the Commonwealth.

[141] J Price QC and F McMahon (eds), *Blackstone's Guide to the Defamation Act 2013* (OUP 2013) 74, para 5.56, and 79, para 5.71.

South Africa: *Bogoshi*

Bogoshi came to the Supreme Court of Appeal as an appeal against the upholding of an exception (summary judgment on an issue of law in English procedure) taken against a plea to the effect that the defendants had not known of the falsity of the defamatory statements complained of, and had not been negligent in publishing them. The Supreme Court of Appeal approved this defence, thereby overturning previous authority to the effect that liability in defamation for the media was strict.[142] If the SCA had left it there, then South Africa would have had the clearest solution to the chilling effect of the pre-existent law of defamation of any country. But it did not. Hefer JA went on to cast the new defence as one excluding unlawfulness (what in English law would be termed a qualified privilege). This meant that fault was required to be pleaded by the plaintiff in its old form of actual, subjective intention (*animus iniurandi*), but it could be defeated by way of a defendant showing merely an absence of negligence (culpa). In other words, as welcome as the new defence is, the issue of fault in defamation was thoroughly confused[143] in that the formal requirement is actual, subjective intention, but this can be negatived by showing an absence of negligence. It would have been far more logically coherent to cast defamation as a delict (tort) based on fault in the form of negligence. Hopefully the South African courts will soon find an opportunity to do so because they have the advantage of a long history of a fault requirement in defamation, and it is therefore a far easier doctrinal step in South Africa than anywhere else.

Australia settles its position: *Lange v Australian Broadcasting Corporation*

The *Lange* case in Australia revisited crucial questions that, because of the split courts in *Theophanous* and *Stephens*, had not yet been authoritatively answered. The defendant pleaded that the allegations complained of had been published pursuant to a freedom guaranteed by the Commonwealth Constitution that protected discussion of government and political matters even if the allegations were false, so long as the defendant was unaware of this and had not been reckless (ie did not care whether the allegations were true or false). If these conditions were satisfied, the argument went, publication was 'reasonable' and therefore 'not actionable'. The defendant also pleaded common law privilege in that it had a duty to publish the allegations complained of to its viewers who had a reciprocal interest in receiving the information which was, also, in the public interest. The plaintiff contended that *Theophanous* and *Stephens* had been wrongly decided.[144]

142 *Bogoshi* (n 15) 1210 G–H.
143 ibid 1214 F–G.
144 *Lange* (n 14) 551–52.

All seven judges of the High Court of Australia participated in the judgment. They implied a freedom of communication between people concerning political or governmental matters that enabled the free and informed choice of voters, from those provisions of the Commonwealth Constitution providing for representative government.[145] But this freedom was not absolute and entailed 'the need to strike a balance in those circumstances between absolute freedom of discussion of government and politics and the reasonable protection of the persons who may be involved, directly or incidentally, in the activities of government or politics'[146] because the law's 'protection of personal reputation (a purpose compatible with the Constitution) must admit as an exception that qualified freedom to discuss government and politics.'[147]

The court found that the common law defence of qualified privilege was not 'reasonably appropriate' because it provided 'no appropriate defence for a person who mistakenly, but honestly, publishes government or political matters to a large audience'.[148] The High Court of Australia, therefore, remedied this deficit by declaring that 'each member of the Australian community has an interest in disseminating and receiving information, opinion and arguments concerning government and political matters that affect the people of Australia' and the 'duty to disseminate such information is simply the correlative of receiving it.'[149] The categories of qualified privilege were thus extended to this effect;[150] and this development was said to be necessary because 'apart from a few exceptional cases, the common law categories of qualified privilege protect only occasions where defamatory matter is published to a limited number of recipients.'[151]

But this extension was accompanied by a requirement that such publication was reasonable for two reasons, only the first of which is relevant here. It is that the general publication ('thousands of recipients') was so much greater than the limited publication of the usual qualified privilege occasion, and that the potential for damage to reputation was therefore so much higher. The court also held that, generally, reasonableness required that the defendant had good grounds for believing the published allegations to have been true, had taken appropriate steps to verify those allegations, did not believe them to be untrue and, where practicable and necessary, had sought and published the plaintiff's response.[152]

The judges of the High Court had now therefore buried their differences[153] and, in doing so, had opted for much the same solution as the UK and New Zealand courts.

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145 ibid 559–61, 561–62, 562, 565–66, and 566.
146 ibid 565–66.
147 ibid 566.
148 ibid 569–70.
149 ibid 571.
150 ibid.
151 ibid 572.
152 ibid 572–74.
153 It has been suggested that this was because three of them were shortly to retire, with more conservative replacements likely, and so sought 'to consolidate what has gone before and achieve some certainty for what is an unpredictable future.' A Lynch, 'Unanimity in a Time of Uncertainty: The High Court Settles its Differences in *Lange v Australian Broadcasting Corporation*' (1997) 6 *Griffith Law Review* 211, 220.

The new defence was little other than an extension of qualified privilege to a mass publication with the additional requirements of both an objectively assessed verification exercise and a subjective belief that the allegations were not untrue (or an absence of recklessness in this respect).

Canada

Lower Canadian courts had, for about a quarter of a century, extended the category of qualified privilege to general publication, but it was only in 2009 that the Supreme Court of Canada built on these decisions, and synthesised them into a properly conceptualised, new, defence to a defamation action in *Toronto Star*.[154]

The facts of the case, as with most of these cases, are not very important. It suffices to note that a wealthy businessman, seeking to extend a golf course on his property, attracted critical reports in the *Toronto Star*. McLachlin CJ noted that the guarantee of freedom of expression in section 2(b) of the Charter was not absolute and that, although reputation was not protected in the Charter, the Canadian Courts had always recognised it by limiting freedom of expression through the law of defamation.[155]

McLachlin CJ, writing for the whole court, held that the Charter guarantee of free expression was essential for the proper functioning of democracy, the search for truth and an aspect of self-realisation for both speaker and listener.[156] A proper balance between the Charter guarantee of free expression and an individual's reputation might, she wrote, be struck by scrutinising the conduct of the publisher, and a defence based on reasonable conduct would ensure that the media were held accountable through the law of defamation.[157]

McLachlin CJ held that the previous legal regime was one of strict liability and not justifiable. After a survey of contemporary jurisprudence (all dealt with above), she confirmed the adoption of a defence of responsible communication on matters of public interest.[158]

McLachlin CJ decided that the new defence was not an extension of qualified privilege, but something quite different from it, essentially on the basis that qualified privilege was ill-suited to general publication and that any idea of a reciprocal duty and interest between journalists and the world at large was purely notional.[159]

The elements of the new defence were to be, in the first place, public interest (in other words, broader than the governmental and political subject-matter of Australian and

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154 *Toronto Star* (n 32) [35], [36].
155 ibid [1]–[3], [58].
156 ibid [47]–[57].
157 ibid [62].
158 ibid [85]–[86], [97].
159 ibid [88]–[94].

New Zealand law)[160] and, in the second place, that it was responsible. The second element required consideration and assessment of all relevant factors that would normally include: the seriousness of the allegations, the public importance of the matter, the urgency of the matter, the status and reliability of the source, whether or not the claimant's side of the story was accurately reported, whether the inclusion of the defamatory statement was justifiable, what the defendant's intended meaning was and other relevant factors.[161] The focus of the inquiry, she made clear, was 'on the conduct of the defendant'.[162]

Fault

These cases all have in common an insight that Commonwealth defamation law, before they were decided, tilted too far in favour of the protection of reputation and therefore had a 'chilling' effect on the flow of important information into and through the various societies in which they were decided.[163] It is then not surprising that the courts initially looked to expand conventional and familiar defences, resulting in most opting for a kind of modified, qualified privilege. But the courts were generally reluctant to extend to the media the uncompromising immunity from liability that inheres in the conventional qualified privilege. So the duty to impart information, and the right to receive it, were made dependent on whether credible attempts had been made to verify the defamatory allegations, when no such limitation is present in conventional qualified privilege. Indeed, the defining feature of qualified privilege—that false statements attract absolute protection, in part because of their very limited circulation[164]—was absent.

All jurisdictions covered above opted for a requirement that a publisher of defamatory material take steps to verify it before publication. This is the elemental component common to all jurisdictions and it is the very foundation of the new defence. Whether called '*Reynolds* privilege', 'responsible journalism' or 'reasonable publication', the new defence shields from liability any publisher who has embarked on a satisfactory verification exercise. They all describe it slightly differently—for example 'appropriate steps' in Australia, or 'responsible basis' in New Zealand, 'reasonable steps', 'such steps as are practicable' and 'responsible journalistic enquiry' in the UK—but it is not easy to see any difference in substance: all require the publisher to have taken reasonable steps to verify the material intended to be published and require it to meet the standard of reasonable care. That, apart from public interest, is really all there is to the defence.

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160 ibid [99]–[109].

161 ibid [110]–[126].

162 ibid [124].

163 *Flood* (n 29) [46].

164 As noted by the unanimous judgment of the High Court of Australia 'only in exceptional cases has the common law recognised an interest or duty to publish defamatory matter to the general public' —*Lange* (n 14) 570. See also McHugh J in *Stephens* (n 23) 264, and *Toronto Star* (n 32) [88]–[94].

This verification exercise exists, of course, to protect people against the careless publication of falsities. All of these formulations are different ways of saying that the new defence would not protect a careless publication, and it is difficult to see what else can possibly have been intended by the courts that, variously, used such phrases or words. And, as noted by Lord McMillan in *Donoghue v Stevenson*, where there exists a duty of care (dealt with below), 'carelessness assumes the legal quality of negligence and entails the consequences of negligence.'[165]

All the formulations thrown up in the cases surveyed in this article are entirely consonant with this definition of negligence, taken from a very old English decision: 'the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.'[166]

Negligence, thus, is the test of what, in the particular circumstances pertaining, it is reasonable to do or not to do. It is very difficult to see how this differs from the tests, variously articulated and laid down in the cases that, collectively, we can now refer to as providing a defence of reasonable or responsible journalism.

Descheemaeker, in analysing the relationship between defamation and negligence in English law, has subjected the structure of the English law of defamation to an analysis that illuminates many of the anomalies in the tort, described more fully above. In brief, his argument is this: the difficulty in combining negligence into a libel or slander tort is that negligence requires fault in the form of *culpa* while libel and slander torts put fault either on the lesser basis of strict liability or, in respect of the defences, the higher standard of malice. Also, the English courts have never recognised a duty of care not to injure the reputation of others. On the other hand, he argues, negligence does not protect any one, particular, interest. And, in time, it has exercised a gravitational pull on defamation: thus distributors are excused liability if they did not know, and could not have been expected to know, of the defamatory material distributed; and in *Spring*, although the reference was privileged as far as defamation law was concerned, it had been negligently given and the defendant was therefore found liable. Then followed *Reynolds*, and Descheemaeker concludes that:

> Structurally, the interest of the *Reynolds* defence is that it is entirely fault-shaped: the defendant is prima facie liable, but will be absolved from liability if he proves that he has been responsible. This 'responsibleness' is, similarly to cases of qualified privilege, ousted by malice; but here it is extremely difficult to see how a defendant who could avail himself of a defence defined in terms of reasonableness (or lack of carelessness) could then be shown to have been malicious. The standard of liability is strict but defeated by a *culpa*-shaped defence. As a result, apart from the onus of proof (and subject to the above fine-tuning), publications coming within the scope of the *Reynolds* defence

[165] [1932] AC 562 (HL) 618–19.

[166] *Blyth v Birmingham Waterworks Co* [1856] 11 Exch 781, 784 (Alderson B).

> are now subject to an almost pure negligence claim: 'you owed me a duty not to carelessly (and falsely) defame me, and you have breached your duty by irresponsibly publishing defamatory (and false) material, thereby injuring my reputation!'[167]

It is clear, therefore, that in all countries surveyed, the new defence is not now correctly to be regarded as a type of qualified privilege, no matter what the judges may have said in this regard. It is equally clear that it is the defendant's conduct that determines the availability of the defence[168] and, in this regard, the defendant is required to have taken steps to avoid inaccuracy. Terms such as 'reasonable steps' or 'a responsible basis for asserting truth' manifestly contemplate a test for negligence; but equally, where the test is characterised as 'such steps as are practicable' or 'appropriate efforts of verification', it is difficult to see what test other than negligence is contemplated. It is certainly not actual intention, and also certainly not recklessness. The very focus on the defendant's conduct also strongly suggests that the new defence is better seen as moving the tort from its unique and special place, predicated on publication of the allegations or comments complained of, into the general tort of negligence. Lord Woolf, in *Spring v Guardian Assurance Plc & Others*, described the difference: 'an action for defamation is founded upon the inaccurate terms of the reference itself. An action for negligence is based on the lack of care of the author of the reference.'[169]

Thus it is clear that all the decisions surveyed, in their respective jurisdictions, have re-introduced fault in the form of negligence as an element of defamation. There remain four issues to deal with: (1) whether or not negligence is the appropriate standard, and the allied question as to whether or not the combined fault standard in Australia, New Zealand, and perhaps the UK, of both subjective, actual intention and negligence is logically sustainable and necessary; (2) whether a duty of care can be found in the new defence; (3) what part public interest ought to play in the defence; and (4) whether there are any other difficulties that militate against a negligence-based tort of defamation.

Is negligence the right standard?

From there, the next issue is to assess whether negligence is indeed the most appropriate standard of fault to reinstate a proper balance between the competing rights of reputation and free speech. For public figures, the United States Supreme Court held that it was knowledge of falsity or recklessness as to the truth or otherwise of a factual allegation; in other words, a fraudulently or recklessly inaccurate statement of fact. The reason for so high a standard is, the United States Supreme Court held, the inevitability of false

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[167] E Descheemaeker, 'Protecting Reputation: Defamation & Negligence' (2009) 29 *Oxford Journal of Legal Studies* 603, 639.

[168] *Toronto Star* (n 32) [124]; *Jameel* (n 16) [43]–[46]. For Barendt, this 'is surely now clear', see E Barendt, 'Reynolds Privilege and Reports of Police Investigation' (2012) 4 *Journal of Media Law* 1, 1.

[169] *Spring v Guardian Assurance Plc & Others* [1994] IRLR 460 (HL) 347 A.

statements of fact in robust public discourse and the need not to 'chill' that discourse by a standard of fault that is too easy for a claimant to meet. But the United States Supreme Court also acknowledged that there is no constitutional value in false speech,[170] and this suggests that the chosen standard of fault ought to discourage false speech. The most efficient way of discouraging false speech is to require the media to research the facts and, if this is done honestly and diligently, then, and for that reason, to excuse them liability.[171] However the test of knowledge of falsity, or recklessness, does the opposite: it positively discourages the media from investigating the veracity of an allegation, 'tip-off' or leak.[172] It does this in at least two ways: first, if the media are required to investigate a 'tip-off' or lead, they may discover information that casts the truth of that 'tip-off' into doubt. This may bring the media into the danger area of recklessness if they go ahead with publication. Therefore, it is safer not to investigate, independently, the truth of a 'tip-off' but rather to argue that they did not know that the allegation was false and rely on the fact that recklessness is also very difficult to prove[173] (in *Sullivan* it was held that a newspaper is not even required to check its own records);[174] second, the cost of good investigative reporting is high: the salaries of a team of dedicated investigative reporters that may produce only a few revelations in any given calendar year, substantial disbursements for travel, communications, database searches, legal advice, hospitality etc. All of this cost could be saved if the media are not required to conduct an independent and honest investigation.

The promotion of the free flow of true facts is, on the other hand, obviously facilitated by the United States Supreme Court's lesser fault requirement for private figures. Here the test, in almost all conceivable situations, is negligence. This is a test that compels the media to embark on an honest, diligent, and sufficiently comprehensive investigation of any 'tip-offs' or leads conveyed to them. If, after such an investigation, it is reasonable to publish any allegations of fact, that can only be because the media have discovered sufficient evidence supporting the allegations. Even if those allegations subsequently transpire to be false, the media are excused liability if they have investigated them to a sufficient degree. And of course, the more evidence turned up by the media in the course of their investigation, the less likely it is that the defamatory allegations published in consequence of that investigation will be false.

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170 *Dun* (n 71) 608.

171 White J appeared to recognise this in *Dun* (71) 609, when he bemoaned the destruction of reputations by 'falsehoods that might have been avoided with a reasonable effort to investigate the facts.'

172 As in the US case of *Harte-Hanks Communications v Connaughton* discussed above. See also L Leigh, 'Of Free Speech and Individual Reputation: *New York Times v Sullivan* in Canada and Australia' in I Loveland (ed), *Importing the First Amendment* (Hart 1998) 57.

173 In *Miskonsky v Tulsa Tribune Co* [1983, Okla] 678 P-d 246, it was held that in order to prove reckless disregard, a claimant was required to show that the defendant had *serious* doubts as to the truth of the defamatory allegations.

174 *Sullivan* (n 67) 287.

There is another reason why the United States Supreme Court standard for public figures is quite inappropriate. In general (by which is meant the overwhelming majority of cases) the media do not lie about those who are the targets of its stories. This is not to say that they are objective in controversial issues, merely that they are for the most part recipients of all manner of information which they publish, or do not publish, as the case may be. Accordingly, any standard which requires that a claimant prove that the media have actually lied (and this is the result of a standard of malice that requires actual knowledge of falsity) in publishing allegations is, in almost all cases, and as noted in many of the judgments discussed above, destined to fail. In *Spring*, for example, the House of Lords identified common law malice (which is the *Sullivan* test) as effectively denying a claimant a cause of action in cases of qualified privilege;[175] and it follows that if malice is made the fault element of the action, then all claimants (not merely those in a situation of qualified privilege) will have been deprived of a cause of action.[176] This means that, practically speaking, the *Sullivan* rule non-suits public plaintiffs against the media.[177] This obviously promotes the free flow of false information (which is of no constitutional value), but it is impossible to see how it promotes the free flow of true facts.[178]

So while the Commonwealth courts were, for many years, too myopic to discern the great breakthroughs in *Sullivan*—the recognition that there was a balance to be struck between the rights to reputation and of free speech; and that the re-discovery of fault as a requirement for an action for libel or defamation was a fairer striking of that balance than strict liability—they were right to reject the *Sullivan* formula. The reason for this is that the standard of fault in *Sullivan* is the one conventionally deployed to defeat qualified privilege. It was set so high in qualified privilege because of the importance attached to allowing certain people to speak their minds without restraint on certain, limited, occasions. But these occasions almost never included public, general speech.[179] It was virtually always private occasions that were protected.[180] Speech to a limited number of other people, on a private occasion, carries with it far less potential for harm than a newspaper article or a prime-time broadcast, especially in the internet age where all such information is now stored and can be forever accessed by new readers.

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[175] *Spring* (n 169) 346 C–F.

[176] Significantly, White J, who had joined the judgment and opinion in *Sullivan*, later recanted saying that: 'I have also become convinced that the Court struck an improvident balance in the *New York Times* case between the public interest in being fully informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputations'—*Dun* (n 71) 608.

[177] For these reasons arguments, such as that advanced by Ian Loveland, that the *Sullivan* rule does not grant the media an 'absolute freedom to defame politicians' are correct in form but not in substance or reality. See I Loveland, '*City of Chicago v Tribune Co*—in context' in Loveland (n 172) 71.

[178] As White J observed in *Dun* (n 71) 609, the *Sullivan* rule 'countenances' dissemination of information that 'is polluted and often remains polluted by false information'.

[179] Until *Reynolds* privilege, but this is dealt with more fully below.

[180] *Bryanston Finance Ltd & Others v De Vries and Ano* [1975] 1 QB 703 (CA) 729 B–C.

There is a further important reason for not following the US formula. The US formula depends on the distinction between a public figure and a private one. This is not so easy. The claimant in *Gertz* was held to be a private figure despite his position at the heart of a great controversy. Of course, there are people whom it will always be easy to fit into the one category or the other. The Head of State is always a public figure; and a cashier in the supermarket is always, without exception, a private figure. On the other hand, the circumstances that can propel a hitherto private figure into the public realm are so many and various as to be incapable of any sensible categorisation. In *Gertz*, the United States Supreme Court suggested voluntary participation in public matters as the test,[181] but this carries the potential to hit activity impelled by conscience and morality, not merely ambition. Furthermore, a stand on principle may arguably not be voluntary if a person's conscience, religious or otherwise, means that he or she can do no other without a sense of great moral turpitude or cowardice. Such a distinction is also objectionable because it introduces one rule for one class of people, and another rule for a different class of people. No one has ever suggested that rich people ought to be held to a different test for the recovery of loss than poor people. In all jurisdictions surveyed in this article, such a principle would be held to offend the rule of law which requires that all people be governed by the same laws.[182] The public/private divide is vulnerable to the same criticism.

The Indian, New Zealand, and Australian approach that protects only public discussion, or discussion of government or political matters is, perhaps, less vulnerable to the argument that it offends against the rule of law because the restriction is not on different classes of people, but on different classes of subject matter. Yet these approaches, too, are vulnerable to the broader criticism that they can give rise to difficult, and perhaps expensive, interlocutory battles over the nature of the defamatory material. They are also vulnerable to the criticism that it makes little sense to protect political material, as opposed to all material published in the public interest. This may, in practice, be a distinction without a difference but once fault in the form of negligence acts as the filter for what can acceptably be published, then a further filter based on the subject-matter of the publication would seem to serve no rational purpose.

And, ultimately, the question has to be what the value is of introducing a rule that will inevitably render litigation more complex, longer, and more expensive. In this article, it is argued that a requirement of fault in the form of negligence restores the appropriate balance between the right to reputation and the right to free speech, and so there is no need for the public/private divide (or any other divide) merely in order to insert a more demanding standard of fault for a limited class of people (or information); conversely, insertion of the public/private divide is too high a price to pay for the limited (in fact, questionable) benefits of the *Sullivan* standard of fault.

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181 *Gertz* (n 58) 345.

182 T Bingham, *The Rule of Law* (Allen Lane 2010) 55–59.

On a different note, and as more fully set out above, certain courts opted for a formulation of the new defence that required both the absence of actual, subjective intention (including recklessness)—sometimes called malice—and the absence of negligence. This was the position of the High Court of Australia in *Theophanous* and maintained in its more authoritative decision in *Lange*; it was, in part, the position of the New Zealand Court of Appeal in *Lange v Atkinson*; it was not the position of the House of Lords in either *Reynolds* or *Jameel* but, in one of the areas of great conceptual confusion in Lord Phillips' judgment in *Flood*, it seems to have seeped into UK law. It is obviously unnecessary because in no jurisdiction surveyed in this article is it a defence to a claim in negligence that the defendant acted deliberately.[183] In this particular context, András Koltay observes that '[I]t is very difficult to imagine that someone can prove reasonableness or responsible behaviour if he behaved maliciously.'[184] Echoing this, at least one academic authority in South Africa argues that the intentional causing of harm to another is contrary to the standard of care that a reasonable person would exercise, making negligence simultaneously present.[185]

Duty of care

It would, of course, be pointless to cast defamation as a tort of negligence unless a viable duty of care could be formulated as its springboard. As Lord McMillan said in *Donoghue v Stevenson*, 'the law takes no cognizance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage.'[186] This is not the place to rehearse the different formulations of a duty of care that have been variously advanced, accepted, refined or discarded by the courts over the years[187] because all the courts surveyed above impliedly, at least, accept that the occasion of the publication of defamatory material gives rise to a duty of care. That is the reason why, as Descheemaeker notes, publishers are liable under the new responsible/reasonable publication test for the careless dissemination of defamatory allegations.

Yet some of the cases surveyed above suggest that not all occasions of careless publication of defamatory matter beget the breach of a duty of care and this complicates the position somewhat. Thus, the New Zealand Court of Appeal takes the view that

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183 McBride and Bagshaw (n 120) 93–94, para 4.2.

184 A Koltay, 'Around the World with *Sullivan*. The *New York Times v Sullivan* Rule and its Universal Applicability' in A Koltay (ed), *Freedom of Speech. The Unreachable Mirage* (CompLex 2013) 111.

185 J Neethling, JM Potgieter, and JC Knobel, *Law of Delict* (6th edn, LexisNexis 2010) 133–34, para 4.2.

186 [1932] AC 562 (HL) 618–19.

187 For example, the 'neighbour' test, the 'incremental' test or the 'proximity' test, see McBride and Bagshaw (n 120) 104, para 5.2.

'the gravity of the allegation and the width of publication' may generate different requirements of care. So too did Lord Nicholls in at least the first two of his well-known considerations—the seriousness of the allegation and the nature of the information.

Even this ought not to occasion much difficulty because some courts have already embarked on non-suiting claimants in traditional defamation law either because the allegations were trivial[188] or because publication was too limited to effect any real change in the claimant's reputation.[189] It should therefore not be too arduous to accommodate these limitations on the right to sue for defamation within the concept of duty of care on the basis that no such duty arises in circumstances where no substantial damage to reputation is likely; indeed, such considerations are more naturally dealt with as part of the substantive law of duty of care than in an entirely discrete enquiry as to whether or not there has been an abuse of process.

Public interest

Before the UK Court of Appeal and the Supreme Court decisions in *Flood*, public interest did not appear to play any role in the new defence other than the traditional requirement that the material complained of was required to relate to some or other matter of public interest. For instance, the basic principle in South Africa was set in a nineteenth century decision in the Cape, frequently followed since then. De Villiers CJ said: '[a]s a general principle, I take it to be for the public benefit that the truth as to the character or conduct of individuals should be known.'[190]

In those Australian jurisdictions that require publication also to be in the public interest, the approach is similar to that articulated by De Villiers CJ. It simply requires the matter under discussion to be 'properly of public concern'.[191] In the UK, Lord Denning held that when 'a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others; then it is a matter of public interest.'[192] Thus, traditionally, public interest has tested only the subject-matter of the information published and complained of; it has not tested the conduct of those publishing information or the individual allegations contained in that information.

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[188] *Berkoff v Burchill* [1996] 4 All ER 1008 (CA) 1020 B; *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985 (QBD) [100].

[189] *Kroch v Rossell* [1937] 1 All ER 725 (CA) 732 B and 729 A; *Jameel* (n 7) [70], [74]–[76]; *Bezant v Rausing* [2007] EWHC 1118 (QBD) [73]; *McBride v Body Shop International Plc* [2007] EWHC 1658 (QBD) [35]–[38].

[190] *Graham v Kerr* [1892] 9 SC 185, 187.

[191] *Allworth v John Fairfax Group* [1993] 113 FLR 254, 263; *Cohen v Mirror Newspapers* [1971] 1 NSWLR 623, 628; *Bellino v ABC* [1996] 185 CLR 183, 229.

[192] *London Artists v Littler* [1969] 2 QB 375 (CA) 391.

Mitchell points out, in his note on the decision of the Court of Appeal in *Flood*,[193] that it extended public interest beyond the broad subject of the story to its component facts. Thus, in *Flood*, the defendant was required to show the public interest not merely in police corruption as the general theme of the story, but also in the publication of the claimant's identity. This elevates public interest into a higher hurdle for a defendant to surmount.[194]

Barendt sees another danger: he notes that Lord Brown and Lord Clark in the Supreme Court decision may have gone further by subsuming the issues of verification and public interest into a single question: 'whether the publisher could properly have believed that publication was in the public interest.' Barendt argues that both the Court of Appeal (followed closely by Lord Phillips in the Supreme Court) and the approach of Lord Brown and Lord Clark in the Supreme Court, inject uncertainty into the defence which reintroduces the 'chilling' effect of libel laws.[195] Barendt is right to sound this warning.

First, the *Flood* approach greatly complicates the task of the publisher in establishing whether a publication is, or is not, in the public interest. No longer is it simply a question as to whether or not the general subject matter of the publication is in the public interest, but each published fact, including the identity of the perpetrator, must be assessed in order to ascertain that it is in the public interest to publish such fact. This is an invasion of editorial discretion.[196]

Second, the approach of Lord Brown and Lord Clark collapses verification into public interest so that the question becomes (in part, at least) whether the level of verification creates sufficient public interest in the publication of the allegations. But this is artificial and conflates two quite different concepts. Public interest, in this area of law, has always been, in those jurisdictions that used it, simply whether or not the subject matter of the story is of public interest; it has never involved the question as to whether or not it was adequately researched. The question of adequate research falls naturally within the element of fault. Thus the question of verification is transmogrified from whether the publishers had sufficiently researched the publication (and therefore were not negligent) to whether the level of their research meant that there was a public interest in the publication of their research. It is difficult to see any value in this involuted formulation: if the research is considered sufficient, then publication is permitted because sufficient care has been taken. It adds nothing to say that publication is then in the public interest and for that reason not unlawful, save to add a tenebrous and arcane overlay to the argument.

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193 P Mitchell, 'The Nature of Responsible Journalism' (2011) 3 *Journal of Media Law* 1, 19–28, 20.

194 See also Barendt (n 168) 10.

195 ibid.

196 Lord Mance and Lord Dyson were alive to the danger, providing for a certain deference to editorial discretion but giving no clues as to how this was to be achieved.

At any rate, the UK is now locked into this position by the terms of the Defamation Act, 2013, although it does not look likely, from the cases decided elsewhere, that many other jurisdictions will follow suit.

Potential objections to a fault-based tort

A fault requirement deprives a claimant of a trial on the truth of the publication

A standard of negligence is not above controversy, precisely because it may undermine the purpose of the tort by striking a false balance. Lord Cooke of Thornden was fully sensitive to this even as he approved an extended privilege for the UK in *Reynolds:* 'The whole purpose of defamation law is to enable a plaintiff to clear his or her name. The privilege required for reasonable freedom of speech does run counter to that purpose in some cases.'[197] And in the later Supreme Court decision in *Flood*, Lord Brown emphasised this when he noted that *Reynolds*' privilege may 'leave the defamed individual with no opportunity to vindicate his reputation and no compensation for its destruction.'[198] The main judgment of the High Court of Australia in *Theophanous*, too, was alive to the fact that the new test 'deprives a plaintiff of a trial on the issue of truth or falsity.' But, it held, 'a test which focuses on the truth or falsity of the defendant's reputation rather than the defendant's belief in truth or falsity would, in our view, run counter to the freedom of communication implied by the Constitution and the purpose it seeks to serve.'[199]

So at least three Commonwealth courts have seen the difficulty, and have dismissed it without much discussion. To them can be added the repentant views expressed by White J in *Dun & Bradstreet v Greenmoss Builders*. After describing the impossibility of a public official restoring his or her reputation absent malice after *Sullivan*, White J (who was on the Supreme Court that decided *Sullivan*) concluded that this result seemed 'grossly perverse' and 'overkill'.[200]

However reputation, unlike a disabling injury for example, can be restored. So the question is whether the law ought to prohibit the restoration of reputation merely because a publisher had not been negligent in publishing defamatory falsehoods. Put differently, should a claimant who is not entitled to damages by virtue of the absence of negligence on the part of the publisher, nevertheless be entitled to some other kind of relief such as an injunction (interdict in South Africa).[201] The difficulty here is that normally a

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197 *Reynolds*, 221 C.

198 *Flood* (n 29) [112].

199 *Theophanous* (n 14) 138.

200 *Dun* (n 71) 608–10.

201 For an illuminating discussion of various forms of alternative relief in defamation actions, see D Milo, '"It's Hard for Me to Say I'm Sorry": Apology as a remedy in the South African Law of Defamation' (2012) 4 *Journal of Media Law* 1, 11–16.

claimant would have to prove precisely the same elements of the tort in order to obtain an injunction, and if fault is now to be recognised as an element of defamation, then an injunction could also not be granted unless the courts are prepared to do so in the absence of fault, and therefore on the basis of strict liability.

This is probably possible in South Africa[202] but not in other Commonwealth countries.[203] Is it nevertheless a desirable solution to the problem posed in *Reynolds*, *Flood* and *Theophanous*? On the one hand, an injunction does provide a mechanism for a claimant to redeem his or her reputation, while not imposing the risk of damages on a defendant publisher. But, on the other hand, such a remedy will re-introduce all the 'chilling' effects of strict liability that the courts have been at such pains to ameliorate. This is because media defendants, for example, will, in deciding whether or not to defend an action for an injunction only, be faced with an invidious choice: At one extreme, a newspaper may simply decide not to defend an action for an injunction as a purely business decision taken in order to relieve strain on its budget, and this could have the effect of a quite unjustified vindication of character; and, at the other extreme, if a newspaper does defend its publication merely to avoid an injunction, it will be faced with the hurdle of strict liability now universally recognised as inimical to the right of free expression. Other potential remedies such as a declaration of untruth or an order that the publisher apologise for factually incorrect statements all suffer from the same—and further[204]—disadvantages.

In a thoughtful passage in *Dun & Bradstreet v Greenmoss Builders*, White J wondered whether the US Supreme Court could not have adequately provided the press with First Amendment protection by limiting damages, or by directing that malice was not an element where no damages were sought but only a vindication of reputation.[205] However his context was a legal system where damages could be cripplingly high and where costs were not recoverable by the successful party from the unsuccessful party. In most Commonwealth jurisdictions, it is not so much the risk of damages that produces the 'chilling' effect, because they are now not as high as they once were, but the cost of what is often complex litigation with the potential for much expensive interlocutory foreplay,[206] as well as the prospect of paying the other side's costs. A limitation on damages would not really change much in the jurisdictions surveyed in this article and a vindication of reputation apart from damages will attract all the objections set out above.

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[202] *Elida Gibbs (Pty) Ltd v Colgate Palmolive (Pty) Ltd (No 1)* 1988 (2) SA 350 (W), 358 J – 359 A.

[203] *Miller v Jackson* [1977] QB 966 (CA) 980. Some commentators, however, think there is no bar to an injunction restraining any tort: WVH Rogers, *Winfield & Jolowicz on Tort* (18th edn, Sweet & Maxwell 2010) 1071.

[204] For example, in the case of an apology, this may run counter to any guarantee of freedom of conscience in those countries where this enjoys protection, whether by way of a statutorily conferred right or by the common law.

[205] *Dun* (n 71) 610.

[206] In all jurisdictions surveyed, the cost of litigation is recognised as a 'chilling' factor.

Imperfect as it may be, it does seem that it is an ineluctable consequence of the new defence—at least if it is to achieve its purpose of broadening the area of permissible discourse—that a defamed person has no remedy at all in the absence of negligence. This might appear at variance with the right to reputation (sometimes, as in South Africa, a constitutional or statutory right) but tortious or delictual injury to other constitutional rights such as life and property also do not attract damages unless fault can be showed on the part of the wrongdoer. It is, in any case, difficult to see what other balance could be struck that would give a defamed person an opportunity to redeem his or her reputation, but that would also not re-introduce the 'chilling' effect on public debate that has been ameliorated in recent years. Also, it should always be remembered that the defamed person is better off in some ways: Where, for example, a defence of qualified privilege bars his or her claim then a fault standard of negligence will provide a far better chance of success than the old requirement that malice be proved (provided that the courts clearly see that malice cannot survive in what has become a negligence-based tort).

The defences that are currently overcome only by malice

One further potential drawback requires some consideration: if fault in the form of negligence is to be an element of the tort, where does that leave those defences, such as fair (or, now, honest) comment[207] and qualified privilege, that are defeated by malice only? The short answer is that these defences were developed to mitigate the otherwise uncompromising effect of strict liability and become substantively redundant once strict liability is replaced by a less uncompromising standard of fault. Thus a publisher who can successfully defeat an allegation of negligence is not liable because an element of the tort or delict has not been proved; and therefore has no need of any other special defence. Equally, if it chooses to plead fair (or honest) comment or qualified privilege, then the claimant ought not to be burdened with the obstacle of malice for all the reasons given, for example, by Lord Woolf in *Spring* and White J in *Dun & Bradstreet v Greenmoss Builders*: it should be sufficient that the claimant showed that, notwithstanding the privilege of the occasion, or the comment, that the defendant was nevertheless negligent in publishing the information complained of. This is the inexorable consequence of the recognition by some courts that the new defence is not confined to the media, but is available to all individuals.[208] It also has the great advantage of completing the simplification of the tort.

This does not mean that such defences will necessarily become procedurally redundant. Although most courts now hold that the defendant bears the onus to displace what must now be seen as a presumption of negligence,[209] it may be that an occasion of

[207] In South Africa only.
[208] *Seaga v Harper* [2009] 1 AC 1 (PC) [11].
[209] For example, *Theophanous* (n 14) 137.

qualified privilege, for example, has the effect of returning the onus of proof in respect of negligence to the claimant. But these are speculative reflections and really fall outside the compass of this article.

Conclusion

No reform of any law takes root unless its inherent advantages overwhelm the disadvantages of change, including the period of uncertainty that inevitably ensues as the courts settle it down and adapt it to its environment. The reform introducing a defence of reasonable or responsible publication, effected in slightly different ways by courts all around the Commonwealth as described above, certainly carries the great advantage of redressing the law's previous bias in favour of reputation at the expense of the free flow of information and opinion. But nowhere does it have that other great advantage—of simplicity; on the contrary, an already recondite tort or delict becomes more byzantine with, for example, new limitations on what kind of speech can be protected, the element of public interest now amplified to an undefined extent and different standards of fault contending for primacy. The reform is therefore incomplete.

Yet the one common and cardinal feature of every single manifestation of this reform is that it is contingent on the publisher taking sufficient care to verify what is proposed to be published. There is not much else of substance. If that feature is re-located in a new requirement, for defamation, of fault in the form of negligence, then everything becomes simple—old defences built on abstruse foundations such as qualified privilege and comment will wither and die and most cases will then involve the relatively straightforward issue of whether or not the publisher was negligent in verifying the material that it (or he or she) published. The traditional presumptions assisting claimants—of good reputation, falsity and damages—take on, in this context, a far less inauspicious aspect, even if some imperative for their reform remains.

This article, therefore, does not propose any great conceptual breakthrough in order to give better effect to the right of free speech—that has already been achieved; it argues simply for a reconfiguration of the tort (or delict) in order to give full and proper effect to what has already been done.

Ursula Cheer

The burgeoning of freedom of expression in New Zealand defamation law

Introduction

The New Zealand Bill of Rights Act 1990 (the Bill) contains a right to freedom of expression.[1] Of course, freedom of expression existed as a right prior to the enactment of the Bill,[2] but this 'über-right' and indeed, all of the rights in the Bill, were both confirmed and preserved by it.[3] The Bill is not supreme law, and contains no judicial strike-down power, thus operating as an interpretative direction for the judiciary and other state servants.[4] However, the Bill is and should be transformative, both of statute and the common law. And in media law it has been, if somewhat erratically.

Without doubt, the enactment of the Bill has elevated the rights consciousness of the general New Zealand public, the media and the legal fraternity. This has flowed through into the case law, although not consistently.[5] In some cases, there is brief but general reference to freedom of expression; in others, this is tied to the Bill but still dealt with in rather a shallow way; and in yet others, detailed arguments based on the Bill are addressed, sometimes well, sometimes not.

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[1] Section 14 provides: Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

[2] See *Lange v Atkinson*, [1998] 3 NZLR 424, 460–61. See also s 28 of the Bill.

[3] See the long title to the Bill: a) To affirm, protect, and promote human rights and fundamental freedoms in New Zealand; also s 2 and Paul Rishworth in P Rishworth, G Huscroft, S Optican, and R Mahoney, *The New Zealand Bill of Rights* (OUP 2003) 31.

[4] The key provisions are:

'4. Other enactments not affected—

No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—

(a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or

(b) Decline to apply any provision of the enactment—

by reason only that the provision is inconsistent with any provision of this Bill of Rights.

5. Justified limitations—

Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

6. Interpretation consistent with Bill of Rights to be preferred—

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.'

[5] See A Geddis, 'The State of Freedom of Expression in New Zealand: An Admittedly Eclectic Overview' (2008) 11 *Otago Law Review* 657.

New Zealand judges are pragmatic and have set about transforming our laws in ways which display a balancing and weighing approach to rights, including freedom of expression. Some judges dislike talking about the Bill in the abstract. For example, Justice Thomas in the Supreme Court has suggested that Bills of Rights are dedicated charters with the capacity to be cohesive and harmonising agents within the community.[6] For this judge, (and others who are inclined to be thoughtful about the Bill) rights come with responsibilities and are to be exercised lawfully with concern and consideration for others.[7] In New Zealand, we balance rights in the European style and have not adopted the hierarchical approach to protecting speech which dominates the approach in American law.[8]

Although our Bill of Rights jurisprudence is still nascent, it is clear that whenever any rights in the Bill are impacted by the operation of other legislation, the Bill must be taken into account in some fashion. The leading case *Hansen v R*[9] mandates that the rights in the Bill are given effect through statutory construction. Thus, the question of whether limits to rights can be demonstrably justified in a free and democratic society has been thrust to the centre of our Bill of Rights analysis.[10] It is answered by using the Canadian approach of asking whether the limiting measure serves a purpose sufficiently important to justify curtailing the right or freedom, and then querying whether it is rationally connected to its purpose, impairs the right no more than is reasonably necessary to achieve that purpose and is in due proportion to the importance of the objective.[11]

Media law, which inevitably triggers limitations on the right to freedom of expression, has a diverse mixture of sources, including primary legislation, secondary legislation such as regulations, codes, and guidelines, and most importantly, the decisions of the courts, mainly in private disputes.[12] As I have observed elsewhere,[13] there is no statutory requirement in New Zealand to carry out a Bill of Rights analysis in relation to actions between private citizens. New Zealand's Bill was intended to have only vertical effects: it applies to the three branches of Government and bodies exercising public functions,[14] and thus in general only protects private citizens from the state.[15] In spite of this, it is clear that the New Zealand judiciary is giving the Bill horizontal effect when resolving disputes between private citizens and when developing the common law, including

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6 *Brooker v Police*, [2007] NZSC 30 [171].

7 ibid [173]. See also Tipping J in *Lange v Atkinson*, [1998] 3 NZLR 424, 473, and in *Hosking v Runting*, [2005] 1 NZLR 5, [231]–[237].

8 A Koltay, *Freedom of Speech. The Unreachable Mirage* (CompLex 2013) 109.

9 [2007] 3 NZLR 1.

10 See C Geiringer, 'The Principle of Legality and the Bill of Rights Act: A Critical Examination of *R v Hansen*' (2008) 6 *NZ Journal of Public and International Law* 59.

11 *R v Oakes*, [1986] 1 SCR 103. See Tipping J in *Hansen* (n 9) [104] and Anderson J [272].

12 See J Burrows and U Cheer, *Media Law in New Zealand* (10th edn, LexisNexis 2010).

13 See 'The Future of Privacy: Recent Legal Developments in New Zealand' (2007) 13 *Canterbury Law Review* 169.

14 The New Zealand Bill of Rights Act 1990, s 3.

15 See P Rishworth, 'Human Rights' (2005) 1 *New Zealand Law Review* 87.

media law.[16] Because this process does not produce directly enforceable rights, the horizontal effect is usually regarded as weakly or strongly indirect.[17] It is given content in two ways, though sometimes in combination: the judges argue they are simply bound by the Bill as the judicial arm of the state, or that they are implicitly required to take account of the values expressed in the Bill.

The question of the horizontal effect of New Zealand's Bill of Rights cannot be fully explored in this paper. However, I consider that indirect horizontality in relation to the right of freedom of expression in media law is not only inevitable, but desirable and compelling. Media law claims are suffused with a very high level of public interest, much of this flowing from engagement with freedom of expression. Therefore in New Zealand media law, the Bill is relevant to interpretation of any relevant legislation, to development of the common law, and in some cases, to both.

Against this brief sketch of the constitutional background, this paper will examine the most significant recent development in defamation law as an example of the burgeoning effects of freedom of expression as enshrined in the New Zealand Bill of Rights. The focus of the discussion is the generic qualified privilege defence which currently protects limited forms of political discussion against defamation claims. The analysis will show that appropriately, (and as predicted), the defence appears to be developing into a broader public interest defence.

Qualified privilege and political discussion in defamation

The most profound development in recent years in New Zealand in relation to defences in defamation has been the appearance of an extended form of qualified privilege applying to a particular form of political statements which are published widely. In the now famous *Lange* cases,[18] the courts rebalanced the defamation equation somewhat in favour of defendants, including the media, using freedom of expression discourse and to some extent, our Canadian-influenced Bill of Rights. Lepofsky correctly suggests that there are public interest values on both sides in defamation disputes. The value of a

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[16] Philip A Joseph, *Constitutional and Administrative Law in New Zealand*, (3rd edn, Thomson/Brookers 2007) 1176. See also *Simunovich Fisheries Ltd v Television New Zealand Ltd,* [2008] NZCA 350 [89]. Various approaches seem to have been accepted in the United Kingdom also, see eg J Morgan, 'Privacy, Confidence and Horizontal Effect: "Hello" Trouble' (2003) *Cambridge Law Journal* 444; G Phillipson, 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy Under the Human Rights Act' (2003) *Modern Law Review* 726; *McKennitt v Ash*, [2005] EMLR 10 [49], *Murray v Express Newspapers plc and Big Pictures (UK) Ltd*, [2007] EWHC 1908 (Ch) [18], and see Phillipson's view of *Von Hannover* in 'The "Right" of Privacy in England and Strasbourg Compared' in A Kenyon and M Richardson (eds), *New Dimensions in Privacy Law* (CUP 2006) 184, 185.

[17] J Norton, '*Hosking v Runting* and the Role of Freedom of Expression' (2004) 10 *Auckland University Law Review* 245, 249.

[18] *Lange v Atkinson*, [1997] 2 NZLR 22; *Lange v Atkinson (No 1)*, [1998] 3 NZLR 424; *Lange v Atkinson*, [2000] 1 NZLR 257 (PC); *Lange v Atkinson (No 2)*, [2000] 3 NZLR 385.

person's good name and reputation goes to personal dignity and worth as a human being,[19] but also allows us to interact socially, to survive economically, and to maintain self-image and worth.[20] Democratic values are also served by defamation law because there is a public interest in not deterring good candidates for public office from seeking office by leaving them vulnerable to defamation.[21] As to freedom of expression, the values underlying it have been identified as its role in facilitating the emergence of truth in the marketplace of ideas, in maintaining and supporting open democracy, and in promoting the ultimate good of a liberal society where citizens are able to say and publish to others what they want as an expression of their liberty.[22] It is these public interests which engage Bill of Rights discourse horizontally in New Zealand defamation law.

The *Lange* litigation arose when David Lange, former New Zealand Prime Minister and former leader of the New Zealand Labour Party, sued Mr Joe Atkinson, a lecturer in political studies at the University of Auckland, and the publishers of the magazine, *North and South*, over an article and cartoon in which Mr Atkinson criticised Mr Lange's record as prime minister and compared his performance as party leader unfavourably with that of current leaders. The defendant pleaded both ordinary qualified privilege and a new defence called political discussion, relying on Australian developments.[23] Justice Elias in the High Court reconsidered the existing defence of common law qualified privilege, and held that, contrary to the previous position, factually inaccurate political discussion might be protected by it.[24] The only precondition of availability tentatively suggested by the judge was a requirement of honest belief in what was published.[25]

The decision was appealed to the Court of Appeal, and in *Lange No 1*[26] that Court decided that qualified privilege may protect a statement which is published generally, and covers statements which directly concern the functioning of representative and responsible government. Like the High Court, the Court of Appeal decided not to require a standard of reasonable behaviour when publishing political statements. The defence failed only if the plaintiff proved that the defendant was predominantly motivated by ill will towards the plaintiff or otherwise took improper advantage of the occasion of publication.[27] Ill will is established if it is shown the defendant did not believe what

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[19] MD Lepofsky, 'Making Sense of the Libel Chill Debate: Do Libel Laws Chill the Exercise of Freedom of Expression?' (1994) 4 *National Journal of Constitutional Law* 168, 197.

[20] ibid 198.

[21] Tipping J in *Lange No 1*, 474.

[22] Tipping J in *Hosking v Runting* (n 7) [233], Rishworth et al (n 3) 309.

[23] In *Lange v Australian Broadcasting Corporation*, the High Court of Australia had extended the categories of qualified privilege to protect a communication made to the public on a government or political matter: [1997] 71 ALJR 818. See also A Kenyon, '*Lange* and *Reynolds* Qualified Privilege: Australian and English Defamation Law and Practice,' (2004) *Melbourne University Law Review* 13.

[24] *Lange v Atkinson*, [1997] 2 NZLR 22, 45–46.

[25] ibid 49.

[26] *Lange v Atkinson*, [1998] 3 NZLR 424.

[27] Previously malice, now set out in the Defamation Act 1992, s 19. Section 19(1) provides: In any proceedings for defamation, a defence of qualified privilege shall fail if the plaintiff proves that, in publishing the matter that is the subject of the proceedings, the defendant was predominantly motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication.

was published, while taking improper advantage of the opportunity to publish can arise where a defendant published the matter recklessly, not caring whether or not the words were true.

The decision was appealed to the Privy Council,[28] and was heard at the same time that a similar English decision, *Reynolds v Times Newspapers*[29] was heard by the House of Lords, by the same judges: Lords Nicholls, Steyn, Hope, Hobhouse, and Cooke, the latter from New Zealand. The Board recorded its anxiety that the New Zealand Courts had reached their decisions without being able to consider the House of Lords' decision in *Reynolds*. It therefore strongly suggested the New Zealand Court of Appeal would wish to take *Reynolds* into account and took the unusual course of allowing the appeal and remitting the matter back to New Zealand for further hearing.

However, in *Lange No 2,* the Court of Appeal affirmed its previous decision, but went on to elucidate and delimit it.[30] The Court summarised its conclusions about the defence of qualified privilege as it applies to political statements which are published generally as follows:[31]

> (1) The defence of qualified privilege may be available in respect of a statement which is published generally.
> (2) The nature of New Zealand's democracy means that the wider public may have a proper interest in respect of generally-published statements which directly concern the functioning of representative and responsible government, including statements about the performance or possible future performance of specific individuals in elected public office.
> (3) In particular, a proper interest does exist in respect of statements made about the actions and qualities of those currently or formerly elected to Parliament and those with immediate aspirations to such office, so far as those actions and qualities directly affect or affected their capacity (including their personal ability and willingness) to meet their public responsibilities.
> (4) The determination of the matters which bear on that capacity will depend on a consideration of what is properly a matter of public concern rather than of private concern.
> (5) The width of the identified public concern justifies the extent of the publication.
> (6) To attract privilege the statement must be published on a qualifying occasion.

Therefore, in New Zealand, the privilege is a generic one attaching to subject-matter coming within the category of discussion about MPs past, present or future. It does not require an examination of the circumstances of publication (in particular, of media behaviour) in each case before determining whether the occasion is to be treated as one of qualified privilege (as was decided in *Reynolds* in the United Kingdom).[32] In New

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[28] *Lange v Atkinson*, [2000] 1 NZLR 257 (PC).

[29] [1999] 4 All ER 609 (*Reynolds*).

[30] *Lange v Atkinson*, [2000] 3 NZLR 385.

[31] ibid 390–91, 400.

[32] ibid 400. See Koltay (n 8) 109. The *Reynolds* defence has since been abolished and replaced by a statutory provision: Defamation Act 2013, s 4. On the Act generally, see A Mullis and A Scott, 'Tilting at Windmills: The Defamation Act 2013' (2014) 77 *Modern Law Review* 1, 87–109.

Zealand, once a factual matrix passes through the subject matter gateway, section 19 of the Defamation Act provides protection against press irresponsibility by mandating loss of the defence if ill will or misuse of the opportunity to publish exists.[33]

Freedom of expression discourse in *Lange*

In *Lange* the judgments make reference to the New Zealand Bill of Rights and all the judges use general freedom of expression discourse in the form of discussion of potential chilling effects flowing from defamation law. Elias J in the first instance decision demonstrated the New Zealand preference for balancing when she said: 'The modern law of defamation represents compromises which seek to achieve balance between protection of reputation and freedom of speech. Both values are important. Both are public interests based on fundamental human rights.'[34] Unsurprisingly, then, Elias J accepted horizontal application of the Bill in *Lange*:[35]

> In my view, the New Zealand Bill of Rights Act protections are to be given effect by the Court in applying the common law. The application of the Act to the common law seems to me to follow from the language of s 3 which refers to acts of the judicial branch of the Government of New Zealand, a provision not to be found in the Canadian charter … The New Zealand Bill of Rights Act 1990 is important contemporary legislation which is directly relevant to the policies served by the common law of defamation. It is idle to suggest that the common law need not conform to the judgments in such legislation. They are authoritative as to where the convenience and welfare of society lies.

Elias J did not set out a detailed approach to the Bill. However, she saw it as requiring a balancing of rights in defamation cases and as allowing the common law to prescribe limits to freedom of expression when it is balanced with rights of reputation.[36] In carrying out this balancing, Elias J considered such broad issues as the value of speech and protection of individual dignity,[37] whether the Bill can apply horizontally,[38] the requirements of the law of defamation in New Zealand,[39] the different approaches in other jurisdictions, the chilling effects doctrine,[40] the position and power of the news media,[41] the political background,[42] matters relevant to remedies,[43] and the state of the

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[33] See n 26.
[34] *Lange v Atkinson*, [1997] 2 NZLR 22, 30.
[35] ibid.
[36] ibid 45, discussing s 5 of the Bill. See n 4.
[37] ibid 31.
[38] ibid 32.
[39] ibid 32–36.
[40] ibid 36–37.
[41] ibid 43.
[42] ibid 45–46.
[43] ibid.

privilege defence in New Zealand.[44] Similarly, in the Court of Appeal, the Court endorsed the approach of Elias J to horizontality,[45] and a balancing of values within the whole of the law of defamation was carried out. However, in discussing the Bill of Rights, it was emphasised that 'principles, freedoms, international texts and comparative experience must in the end be assessed in a local context.'[46]

Accordingly, all of the judgments have a strong comparative element, in which the leading Canadian case at the time, *Hill v Church of Scientology of Toronto*[47] received attention. The *Hill* Court declined to change Canadian law to adopt the malice test applied by the Supreme Court of the United States in *New York Times v Sullivan*[48] which gives priority to freedom of expression. The Court of Appeal in *Lange* distinguished *Hill* and explained that the elements relevant to public interest which might have prompted a change in that case were missing. *Hill* did not involve the media or political commentary about government policies or figures, the change asked for was a radical change to the common law, and the *Hill* court was seen as rightly cautious in the circumstances. However, the New Zealand Court observed a hint of a sea-change in Canadian defamation law, from a narrow approach taken by the Supreme Court in the 1950s and 1960s in cases involving political leaders, contrasted to more recent decisions of provincial Courts of Appeal where it had been given a wider role.[49] It is now apparent from the landmark decision of the Canadian Supreme Court in *Grant v Torstar*[50] that this hinted change detected by the New Zealand court was more than accurately identified.

Justice Tipping, who wrote a separate but concurring judgment in *Lange No 1*, indicated he would like to impose a reasonableness requirement on the extended defence in New Zealand and was worried the balance might be wrong without it. However he did not do so in the end because he hoped that the provision in s 19 of the Defamation Act that the defence is lost where there is ill will or taking advantage of the ability to publish would allow some examination of the issue of reasonable care.[51] The language of responsibility was used repeatedly by this judge: 'Responsible journalists in whatever medium ought not to have any concerns about such an approach … qualified privilege is not a licence to be irresponsible.'[52] This approach has been adopted and means that in New Zealand a publisher who has not checked sources, or perhaps not obtained the other side of the story, may find it hard to assert a genuine belief in the material, in which case the issue of ill will or taking improper advantage can be raised. Therefore, media methods

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[44] ibid 43–44.

[45] *Lange No 1,* 451.

[46] ibid 467. In *Lange No 2,* a similar, though more specific approach is taken, as the Court was revisiting issues referred to it by the Privy Council.

[47] [1995] 126 DLR (4th) 129.

[48] *New York Times v Sullivan*, 376 US 254 (1964).

[49] *Lange No 1*, 448, 450–52.

[50] *Grant v Torstar Corporation*, 2009 SCC 61, [2009] 3 SCR 640.

[51] ibid 475, 476–77.

[52] ibid 402.

may be investigated in New Zealand, but at the stage *after* the occasion of publication is said to be privileged, where the plaintiff wants to suggest s 19 of the Defamation Act should apply to deprive the media defendant of the defence because of ill will. As already stated, this is in contrast to the approach taken in the United Kingdom.

Lange did not produce a new defence to defamation claims. While the decision has come to be seen as momentous, the *Lange* courts did not want to be seen to be actually changing the common law. At first instance, Justice Elias was inclined to take a position which was sympathetic to the media, however, in the end, she tempered her approach with caution. Although prepared to adjust the balance between freedom of speech and protection of reputation as a value judgment, informed by local circumstances and guided by principle,[53] Elias J acknowledged that whether there is a need to provide additional protection for the media turned in part on a sociological assessment of the vulnerability or power of the news media and that a court may not be sufficiently informed about that.[54] She therefore ultimately directed that the two defences pleaded in the interlocutory application, extended qualified privilege and political discussion, be pleaded as one—qualified privilege. A new defence of political discussion was not pursued in the Court of Appeal. However, in that court, Tipping J directly addressed the issue of change to the common law in this manner: 'But if this Court is to develop the law of qualified privilege, it must be a bona fide development, and not the creation of a new defence. While the line can be fine, development is the prerogative of the common law, while creating a new defence is the prerogative of the legislature.'[55] Thus, the *Lange* defence remains part of the existing law of qualified privilege.

Developments since *Lange*

It will be obvious that the *Lange* litigation is the strongest recent example of development of the common law of defamation in New Zealand, and was motivated by concerns about freedom of expression. Although the privilege has been slow to consolidate and grow since its inception, nonetheless, the defence is undoubtedly an embryonic public interest defence. This is because the confinement of subject matter as outlined in *Lange* cannot be maintained on a principled basis, and in any event, is beginning to break down in practice.[56] Furthermore, the principled reasons for privileging statements about national or local politicians, for wishing to protect against potential chilling effects of defamation law in relation to that sort of discussion, must be the basic arguments about

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[53] *Lange v Atkinson*, [1997] 2 NZLR 22, 43.

[54] ibid 44.

[55] *Lange No 1*, 473.

[56] My own regular discussions with media and media lawyers disclose that the defence is being argued as a public interest defence in response to claims throughout New Zealand. *Karam v Fairfax New Zealand Ltd*, [2012] NZHC 887 is an example of a claim (now settled) in which the defence was pleaded although the plaintiff was a public figure but not an MP, past, present or future.

freedom of expression from democracy and the marketplace of truth ideal. However, those arguments, if pushed to their fullest extent, support a wider public interest defence. Therefore, right from its inception, the *Lange* defence has been subject to pressure to expand.

In the first Court of Appeal decision on the defence, *Vickery v McLean*[57] the Court was immediately asked to extend the defence beyond the limited subject matter of discussion about past, present or future Members of Parliament. It refused to apply the defence to statements about local council employees, but the judgment contains obiter dicta that it might apply to local as well as national politicians.[58] However, the Court also stated a limitation, that allegations of serious criminality did not attract the defence, because they should not be disseminated too widely. Overall, the judgment is cautious. Since then, however, a body of case law has begun to build, at least at High Court level, in which the courts have indicated a preparedness to consider the defence applies to matters of general public interest. I turn now to outline these developments.

First, *Osmose New Zealand v Wakeling*[59] surprised many commentators, because the High Court, in the context of a striking out action, appeared to extend the defence by treating it as one of public interest but with very little reasoning to explain this apparently radical departure from precedent. Osmose made and supplied timber preservative products, and it alleged two individuals, Dr Wakeling and Dr Smith, made false and damaging statements about those products. Although some of the statements were published in the media, unusually, Osmose did not pursue any media interests, alleging instead that the first and second plaintiffs were responsible for the chain of publication. However, Wakeling and Smith joined Television New Zealand, Radio New Zealand, APN New Zealand, and Fairfax New Zealand as third parties, in a procedure rarely used for defamation. This decision of Harrison J dealt with applications by the media to have the third party notices set aside.

The judge made a strike out order, because he was in no doubt that the articles published by the newspapers were published on an occasion of qualified privilege, and that the broadcasters which published would be protected by the defence of qualified privilege if the plaintiff had sued them directly. Harrison J found the articles were published on occasions of qualified privilege because the material published was of public concern. This was based on the fact that New Zealand has significant home ownership, and in recent years has had to confront a high national incidence of leaky homes suggesting some systemic failure in the building industry which has justified government intervention. Furthermore, the government had endorsed Osmose's product following an inquiry into leaky homes. The finding of public interest ignored the limitation imposed in *Lange*, that the subject matter to which the defence of constitutional qualified privilege can apply is discussion about politicians, past, present or future.

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57 Unreported, Court of Appeal, CA 125-00, 20 November 2000.
58 ibid [17], per Tipping J.
59 [2007] 1 NZLR 841.

Harrison J did not justify his decision on the basis of extending *Lange*, but spoke instead in generalised terms about public interest, as if that were already sufficient to trigger the defence.

The case against the media was settled in *Osmose*, but in spite of the lack of detailed reasoning in the High Court judgment about the question of public interest, I do support this aspect of it. This is because if more than lip service is to be paid to freedom of expression, the political discussion defence should be expanded. There was genuine public interest in the *Osmose* publications, and the topic of leaky buildings is exactly the sort of subject matter to which the defence should be extended in New Zealand, thus drawing our law closer to that in the United Kingdom and Canada. In fact, it was accepted in *Lange* that our media is quite responsible compared with that in the United Kingdom,[60] and so it is incongruous for our law to be more restrictive of freedom of expression than that jurisdiction.

Dooley v Smith[61] is a less clear example of the courts' willingness to expand the *Lange* defence. Nonetheless, it still indicates the possibility remains open. Mr Dooley sought only a declaration from the court that Messrs Smith and Shahadat had defamed him. All three men were elected trustees of a registered charitable trust called Development West Coast (DWC). The trust was established to manage the $92 million payment from government after it had stopped logging of indigenous forests on the West Coast. Members came from various councils and districts, with some, such as the parties in this litigation, being voted on. In the claim, Mr Dooley said that the defendants had each made defamatory statements about him to the media. The judge noted he had not heard full argument on the issue whether *Lange* could apply to this, a case that did not involve discussion of MPs, but stated, obiter, that he thought it could potentially apply. Justice Lang made a strong statement to the effect that the circumstances in which qualified privilege can apply may never be closed and he correctly saw no logical reason why *Lange* should be restricted to statements about the performance of those elected to parliament because the public have a legitimate interest in being informed about the performance of those elected to positions of responsibility in other public institutions as well. This would be so especially where the institution manages public assets and carries out public activities, as with the DWC.[62] The judge then went on to apply the defence to see if it would be successful on the facts. He found it would not be, because both defendants were motivated by ill will and took improper advantage of the opportunity to publish in making the statements to the media. Ill will has to be the predominant motive, not just a partial one. In this case, the evidence used by the judge to find ill will and improper advantage arose from things such as letters to the editor previously sent, lack of care taken in checking facts, and going public with the damaging statements in a press

[60] *Lange v Atkinson*, [2000] 3 NZLR 385 [34].
[61] [2012] NZHC 529; *Smith v Dooley*, [2013] NZCA 42; *Dooley v Smith*, [2013] NZSC 155.
[62] *Dooley v Smith*, [2012] NZHC 529, [157]–[171].

release when the facts could have been checked privately. Therefore, although the judge assumed the defence could have covered the subject matter, in the end, neither defendant was successful in using it. Mr Dooley obtained his declaration.

The decision was appealed to the Court of Appeal and it was hoped a higher court might endorse the expansion of the defence. The issue was completely side-stepped, however, because the Court found all the statements involved were not actually defamatory to begin with, so no defence was needed. This meant the matter of whether the defence could be expanded was left for another day, although the Court of Appeal certainly did not close this issue down.[63] An attempted appeal to New Zealand's highest court, the Supreme Court, failed on the grounds that the differences between the High Court and the Court of Appeal judgments amounted to matters of fact, which would not be revisited on appeal.[64]

Frustratingly, then, *Dooley* did not clarify matters a great deal. However, it did show that a further High Court judge is prepared to expand the defence, and that the Court of Appeal is open to argument about the issue.

In October 2013, a further decision emerged from the High Court which supports expansion. *Cabral v Beacon Printing & Publishing*[65] involved a claim against the *Whakatane Beacon* newspaper and an individual journalist. The *Beacon* published an article about a local development project which the plaintiff was involved in funding, in the course of which it disclosed details of old overseas convictions of the plaintiff and mentioned investigations into alleged misuse of funds by trustees of a connected trust. The plaintiff argued the inclusion of this information in the article gave an inaccurate defamatory impression of her. In an application to strike out the defence the court felt it had sufficient information before it to decide that qualified privilege was unavailable. This was not because the article was not about an MP, but because it was not of sufficient public interest. In other words, the Court treated the defence as one on public interest, but found it could not apply to the facts because the published story was not in fact a public interest story.

In expanding the subject matter of the defence, the Court said 'there may be other matters of public interest, for which the media may properly invoke the privilege. The Court of Appeal recognised this in *Lange v Atkinson*.'[66] However, it then went on to point out that matters of *general interest* alone will not be of sufficient public interest.[67] The Court found the article here was of local interest, it touched on matters in which some local people were involved including payment of monies, and as such, it was *newsworthy.*

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63 *Smith v Dooley* (n 61) [74].
64 *Dooley v Smith*, [2013] NZSC 155 [4].
65 [2013] NZHC 2684.
66 ibid [28]; *Lange No 1*, 445.
67 ibid [29].

But this was not the same as public interest. That required something more – something so important that it entitled the defendants to tell the readers about it even though it defamed the plaintiff and was not true.[68]

Cabral suggests two important things about the defence – first, it *can* extend to matters of public interest, but second, the threshold for a story to cross into public interest is quite high. It is surprising that the story in *Cabral* did not cross the threshold. The story appears more than newsworthy and is also comparable to overseas cases where public interest stories have been found to exist. For example, in the English case, *GKR Karate (UK) Ltd v Yorkshire Post Newspapers Ltd*[69] a public interest defence was successful in relation to a story in a weekly, free community newspaper that was distributed to 158,000 houses and businesses in the Leeds area discussing the issue of the local selling of karate lessons door to door.

Although *Cabral* usefully adds to the body of New Zealand law suggesting we at least have a public interest defence, the defence will be of limited use if the question of what is in the public interest is defined narrowly, as has happened in Australia where the defence is confined to government or political matters and has to be linked to the constitutional system of representative government. This requires strained interpretation at times. Thus a story about a bankrupt barrister was held to relate to income tax laws;[70] and an article about an attack on a barrister was within the ambit of the defence because the attack had first been made in Parliament.[71] However, an article criticising a judicial officer (a magistrate) was held not to be within the privileged category.[72] And in *Aktas v Westpac Banking Corporation*[73] the Australian High Court complicated matters further by requiring that public interest must attach to all aspects of the occasion of publication, in that the duty / interest requirement must be met. In that case, the Court held by a bare majority that the mistaken dishonouring of cheques and communication of this to the payees by a bank could not be covered by the defence because public interest did not attach to the occasion. There was public interest in communicating a refusal to honour, but not the mistaken suggestion that the plaintiff could not pay. The minority in the case pointed out that this limits the privilege to occasions where the defendant has not made any error. The challenge for the New Zealand courts in further developing the *Lange* defence lies in avoiding the convoluted and restrictive approach to public interest taken by the Australian courts.

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[68] ibid.

[69] [2000] 1 WLR 2571 (CA); *GKR Karate (UK) Ltd v Yorkshire Post Newspapers Ltd (No 2)*, [2000] EMLR 410. The new public interest defence in the Defamation Act 2013 (UK) requires that the statement be a matter of public interest (undefined) and that the defendant reasonably believed that publication of the statement was also in the public interest: <http://www.legislation.gov.uk/ukpga/2013/26/enacted>.

[70] *Archer v Channel Seven Perth (Pty) Ltd*, [2002] WASC 160.

[71] *Amalgamated Television Services (Pty) Ltd v Marsden*, [2002] NSWCA 419.

[72] *Popovic v Herald and Weekly Times*, [2003] VSCA 161 (although there was a difference of opinion on the point in the Court of Appeal). See also the cases noted in U Cheer and J Burrows, 'Defamation' in S Todd (ed), *The Law of Torts in New Zealand* (6th edn, Thomson Reuters 2013) 897, n 593.

[73] [2010] 241 CLR 79.

The future of the *Lange* defence

If the *Lange* defence is to expand, where should it expand to? Developments in Canadian law offer useful insights here. The Supreme Court of Canada recently moved beyond defamation law and modified the common law by creating a general public interest defence which it called 'responsible communication on matters of public interest.'[74] The case arose from statements contained in an article published by a newspaper about a private golf course development which a Mr Grant proposed to carry out on a large lakefront property on the Twin Lakes, Ontario. The article reported the views of local residents criticising the development and expressing suspicion that political influence had been exercised behind the scenes by Grant. One resident was quoted saying 'Everyone thinks it's a done deal.' The reporter had attempted to verify the facts and had sought comment from Grant, who did not respond.[75] Grant sued the reporter, the newspaper and its affiliates, and the resident quoted in the piece.

The Court accepted the existence of a defence of responsible communication. The nature of the defence is as follows: First, the defence is new and separate from the traditional qualified privilege defence, in part because it is not the occasion which is protected, but the published material, and because qualified privilege was seen as based on social utility, rather than free speech values.[76] Second, to ensure adaptability to new media, the defence applies to responsible communication on matters of public interest and is not tied to any concept of publication.[77] The question of public interest is not to be determined in isolation, but in the context of the publication as a whole. No single definition of public interest was offered. However, compellingly, it is not confined to discussion of government or political matters. Rather, the subject matter must invite public attention or substantially concern the public because it affects the welfare of citizens or attracts considerable public notoriety or controversy. Some segment of the public must have a genuine stake in knowing about the matter. This element is not to be characterised narrowly.[78]

There are a number of factors which are relevant to whether a public interest defamatory communication is made responsibly. These are: the seriousness of the allegation, the public importance of the matter, the urgency of the matter, the status and reliability of the source, whether the plaintiff's side of the story was sought and accurately reported, whether including the defamatory statement was justifiable, whether the statement's public interest lay in the fact that it was made rather than its truth (reportage)

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74 *Grant v Torstar Corporation* (n 50) 640 [7], [65].
75 ibid [8]–[17].
76 ibid [88]–[95].
77 ibid [96]–[97].
78 ibid.

and a catch-all category of other considerations where relevant. The Supreme Court did not think the issue of tone will always be relevant and therefore, it is an occasional factor only.

The *Torstar* decision has taken the defence in Canada outside the realm of tort law and into that of human rights generally. Lack of space prevents a full analysis being carried out in this paper of whether it would be desirable for New Zealand to follow suit. In concluding, I simply note here that if the subject matter continues to be extended and the defence becomes one of public interest, then, as suggested in *Torstar,* it begins to look less and less a specialised part of defamation law and more like a rights-based defence. Given that there is increasing scope for parallel development of such a defence in the law of privacy, a stand-alone defence could be more logical.

Whether this comes about depends how defamation law develops in the future in this jurisdiction. Claims both here and in the United Kingdom appear to be declining.[79] In New Zealand, there is also ample empirical and anecdotal evidence that defamation is becoming less of a concern to the media than the developing tort of privacy.[80] Furthermore, Palmer goes so far as to suggest that the tort of defamation might even fall into disuse in the next 30 years, as a relic of a previous media age.[81]

However, I think it most likely that significant distinctions between defamation and privacy may begin to disappear,[82] while the use of the defamation tort continues to decline. The orthodox understanding has been that defamation provides a remedy for published untrue information while privacy provides a remedy for published true intimate information (and now also sometimes for intrusion in order to obtain that information). In my view, common law judges have the power to take the emphasis off the truth or untruth element in each tort and put it instead on the public interest defence based on responsible journalism.

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[79] Professor Dame H Genn, 'Civil Justice Reform and the Role of ADR', Paper delivered as New Zealand Law Foundation Distinguished Visiting Fellow, Christchurch, 17 September 2009. Reform of procedural rules has led to a decline in civil claims generally. One media lawyer has commented that the decrease in defamation claims may have occurred because the UK media is much more used to interacting with its audience and dealing with complaints as they arise: See 'Fewer Libel Cases Reaching a Verdict' (*Guardian*, 9 October 2008) <http://www.guardian.co.uk/media/2008/oct/09/medialaw.pressandpublishing>. See also 'Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding observations of the Human Rights Committee' Human Rights Committee, Ninety-third session, Geneva, 7–25 July 2008, GE.08-43342, and the Table of Media Law cases maintained by Inforrm (*The International Forum for Responsible Media Blog*), <http://inforrm.wordpress.com/table-of-cases-2/>.

[80] See U Cheer, *Reality and Myth: The New Zealand Media and the Chilling Effect of Defamation Law* (PhD, University of Canterbury 2009), <http://hdl.handle.net/10092/3050>.

[81] Rt Hon Sir G Palmer, 'The Law of Defamation in New Zealand: Its Recent Evolution and Problems' *Law, Liberty, Legislation: In Honour of John Burrows QC* (LexisNexis 2008) 339, 357.

[82] Judge P Moloney QC has commented that in future it is likely an increasing number of claims will be brought jointly in both causes of action: 'Privacy: The New Libel?' *Protecting the Media 2008*, IBC Conference (UK), 1 September 2008.

If these torts implode in this fashion, what do we have then? One possibility is the ascension of rights-based jurisprudence, in the form of a claim for loss of autonomy, dignity, and integrity, based on either publication of true or untrue facts, which may be defended on the basis of public interest. The latter could be satisfied if the material invites public attention or substantially concerns the public because it affects the welfare of citizens or attracts considerable public notoriety or controversy, and the communication involved is responsible. Such an outcome is entirely possible in both New Zealand and Canada, and in both jurisdictions, distantly-related Bills of Rights will have played a fundamental role in the process, as well as comparative jurisprudence.

Anne SY Cheung

Liability of Internet host providers in defamation actions: From gatekeepers to identifiers

Internet intermediary liabilities in defamation actions have posed vexing legal problems in the new Internet social era of Web 2.0, especially when users can generate and spread their own content anonymously without being easily identified. In such an event, Internet intermediaries or Internet service providers (ISPs) can become defendants in defamation actions, the legal outcome of which is highly dependent on the roles they play in most jurisdictions, that is, whether the ISPs are categorised as content, access, or host providers.[1]

Amongst the three different types of intermediaries, host providers are in a legally nebulous position. Unlike content providers who are actively involved in contributing to the content of the disputed defamatory statement and should be liable in defamation actions, and unlike access providers, who only connect users to the Internet through a telecommunications network and thus should not be liable, host providers are caught in the middle. They have 'hosted' a website or provided a platform for their customers, hence allowing their presence and facilitating their publications. Common forms of host providers are social networking sites such as Facebook and Myspace, and Internet forums or bulletin boards such as Ubuntu Forums (the largest help and support forum for Linux users) and Tianya (the most popular forum in China, with more than 85 million registered users).[2] The operators of these platforms enable users to post their own content and upload their own profiles, pictures and films. However, in most cases, the host providers do not exercise any prior control or active monitoring before users upload materials,[3] notwithstanding the fact that there may be basic ground rules stating that

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[1] B Kleinschmidt, 'An International Comparison of ISP's Liabilities for Unlawful Third Party Content' (2010) 18 *International Journal of Law and Information Technology* 4, 332.

[2] See 'Introduction to Tianya [Tianya jianjie]' (Tianya) <http://help.tianya.cn/about/history/2011/06/02/166666.shtml>, accessed 6 January 2014 (in Chinese).

[3] For example, based on interviews with online editors and community managers at 104 news organisations from 63 countries, a report found that 'there was a relatively even split between those that moderate pre- and post-publication: 38 and 42, respectively, with 16 adopting a mixed approach'. See E Goodman, 'Online Comment Moderation: Emerging Best Practices' (*The World Association of Newspapers*, 2013) <http://www.wan-ifra.org/reports/2013/10/04/online-comment-moderation-emerging-best-practices>, accessed 6 January 2014.

defamatory or other unlawful content should not be posted.[4] Still, host providers have access to and dominion over their own servers, and can remove users' content after publication. Overall, host providers are not as active as content providers, but neither are they as passive as access providers—they are not authors, yet not mere conduits. Clearly, they provide platforms and invite and encourage postings, thereby earning revenue from advertisements on the sites. Should we then hold host providers accountable in defamation actions?

Interestingly, different answers were given in three jurisdictions in 2013, representing diverse judicial and legislative positions. First, the European Court of Human Rights held in *Delfi AS v Estonia* that an Internet news provider was liable for the comments posted by its readers despite the fact that it had removed the objectionable content upon receiving notice from the claimant.[5] Although the damages awarded against the host provider were modest (€320), the judgment remains controversial and the repercussions have been wide. Second, the Court of Final Appeal (CFA) of the Hong Kong Special Administration Region (Hong Kong) decided on the liability of online service providers in the case of *Oriental Press Group Ltd. v Fevaworks Solutions Ltd*. (*Feva*).[6] The highest court in Hong Kong confirmed the decisions of the lower courts and ruled that the provider of an online discussion forum is liable for defamatory remarks posted by third parties, and that therefore when it has received notification from a complainant it has a duty to remove the defamatory remarks within a reasonable time.[7] This approach to liability appears to be in line with the legal positions in other jurisdictions, which have largely been based on a notice-and-take-down regime. However, a careful analysis of the *Feva* judgment revealed that the Hong Kong court reached this conclusion through an extension of common law principles in holding online intermediaries of discussion forums as 'secondary publishers' with liabilities imposed from the outset.[8] In both the *Delfi* and *Feva* judgments, what has been decided but far from settled is an online host provider's duty to monitor. The disputed aspects cover when such duty arises, and what

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[4] For example, according to the *Guardian*'s Community Standards and Participation Guidelines, 'personal attacks (on authors, other users, or any individual), persistent trolling and mindless abuse will not be tolerated'. The *Guardian*'s moderation team usually 'post-moderate[s] nearly all comment threads', but for 'certain special series or articles which may contain extremely sensitive content, such as Blogging the *Qur'an*, [all] comments are pre-moderated before appearing on the site', see 'Community Standards and Participation Guidelines' (*The Guardian*, 7 May 2009). <http://www.theguardian.com/community-standards>, accessed 6 January 2014, and 'Frequently Asked Questions about Community on the Guardian Website' (*The Guardian*, 7 May 2009). <http://www.theguardian.com/community-faqs#310>, accessed 6 January 2014.

[5] App No 64569/09 (ECtHR, 10 October 2013) <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-126635>, accessed 6 January 2014.

[6] [2013] HKCFA 47.

[7] [2009] HKCFI 964; [2009] 5 HKLRD 641; HCA597/2009, affirmed by Court of Appeal [2012] HKCA 5; [2012] 1 HKLRD 848; [2012] 6 HKC 313; CACV53/2011, affirmed by Court of Final Appeal, [2013] HKCFA 47. For comments on decisions from the lower courts, see G Kennedy, 'Asia Pacific News' (2013) 29 *Computer Law and Security Review* 94; R Ong, 'Internet Intermediaries: The Liability for Defamatory Postings in China and Hong Kong' (2013) 29 *Computer Law and Security Review* 274.

[8] *Feva* (n 6) [12], [103].

its nature and scope are. In contrast to these two positions, which treated host providers as gatekeepers, the third possibility was provided by the newly amended Defamation Act of the United Kingdom, which came into full force on the first day of 2014.[9] To a great extent, as subsequent discussion shows, the duties and liabilities of host providers under the new regime depend on whether the originator of the defamatory statement can be identified. The new Act has consolidated the common law position and the European Union Directive 2000/31/EC (better known as the Electronic Commerce (EC) Directive),[10] enforced through the Electronic Commerce (EC Directive) Regulations 2002,[11] with specific provisions governing the liabilities of online website operators (Section 5), into new regulations outlining the rules on notice requirements given by the complainant and corresponding procedures on what an ISP should do upon receiving notice.[12]

In comparing and studying the approaches applied by the three abovementioned legal regimes, this chapter argues that it is necessary to have a special regulatory regime for Internet host providers. To be fair to host providers, users and victims of defamatory statements, clear guidelines on host providers' monitoring duties and ground rules for users should be stated at the outset. At the time of writing, it is unknown how the appeal to the *Delfi* case will be decided by the Grand Chamber of the European Court,[13] how the judgment of the *Feva* case will be interpreted in Hong Kong and how the newly amended Defamation Act will be implemented in the UK. What is certain is that the legal battle will continue and is likely to remain intense.

Delfi AS v Estonia: Internet news portal's duty to prevent harm

The legal battle over 'Add your comment'

The legal dispute in *Delfi* originated with an online news article in 2006, reported on the applicant Internet news portal, concerning a change in ferry routes that led to a delay in the opening of an ice road. It was implied that a cheaper means of transport between the mainland in Estonia and certain islands nearby had also been inevitably delayed. The report attracted 185 comments in the portal's 'Add Your Comment' section within two

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9 Defamation Act 2013.

10 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, particularly electronic commerce, in the Internal Market (2000) OJ L178/1 (Directive on electronic commerce).

11 Electronic Commerce (EC Directive) Regulations 2002 (UK), SI 2002/2013.

12 Defamation (Operators of Websites) Regulations 2013, SI 2013/3028.

13 'Case of *Delfi AS v Estonia*: Request for Referral to the Grand Chamber on Behalf of the Applicant' (8 January 2014) <http://www.psw.ugent.be/cms_global/uploads/publicaties/dv/REQUEST%20FOR%20REFERRAL%20TO%20THE%20GRAND%20CHAMBER_DELFI_2014%2001%2008%20FINALDV.pdf>, accessed 16 January 2014.

days, about twenty of which were abusive and contained personal threats and offensive language against L, who was a member of the ferry company's supervisory board.[14] Six weeks later, the applicant received a request from L's lawyers to remove the offensive comments, and a claim of damages.[15] Although the messages were promptly removed on the same date the request letter was received, Delfi refused to pay damages. Thus, a civil lawsuit was brought by L. The influence of the applicant company should not be underestimated, as it is one of the largest Internet news portals in Estonia, with a presence in Latvia and Lithuania.[16] On average, each day it publishes up to 330 articles and attracts the comments of approximately 10,000 readers.[17]

Although the local court ruled in favour of Delfi in the first round, this was overturned by the Court of Appeal and the Supreme Court of Estonia. The latter ruled that Delfi could not rely on the Information Society Services Act of Estonia, which was based on the European Union Electronic Commerce Directive. Under the Electronic Commerce Directive, the circumstances in which Internet intermediaries should be held accountable for materials that are hosted, cached or carried by them but which they did not create are defined.[18] Article 15 of the Directive clearly stipulates that ISPs have no general duty to monitor information that passes through or is hosted on their systems. In effect, it provides a 'safe haven' for the exemption of ISPs' liability when they are host providers, unless they have actual knowledge of unlawful activity or information[19] and have failed to act expeditiously to remove the materials or disable access to the information upon obtaining such knowledge or awareness.[20] In effect, the Directive has set up a notice-and-take-down regime for online intermediaries. However, the appellant courts in Estonia ruled that Delfi was not immune from liability as it was not merely a technical, automatic and passive intermediary.[21] Rather than applying the Information Society Services Act, the Court of Appeal and the Supreme Court applied the Obligations Act.[22] According to their judicial opinion, Delfi was a publisher and a provider of content services because it had integrated the comment environment into its news portal and had invited users to post comments.[23] It had also derived economic benefits from the comments due to the advertisements on its portals.[24] Above all, only Delfi could remove the objectionable

[14] ibid [13].
[15] ibid [14].
[16] *Delfi* (n 5) [7].
[17] ibid [7], [8].
[18] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, particularly electronic commerce, in the Internal Market (2000) OJ L178/1 (Directive on electronic commerce), arts 13, 14.
[19] ibid art 13.
[20] ibid art 14. For discussion, see DM Síthigh, 'The Fragmentation of Intermediary Liability in the UK' (2013) 8 *Journal of Intellectual Property Law and Practice* 7, 521, 524.
[21] *Delfi* (n 5) [25].
[22] ibid [22], [38].
[23] ibid [25], [27].
[24] ibid [27].

comments, whereas the original users who posted them could not. Thus, the Court of Appeal and the Supreme Court concluded that Delfi should bear the burden of publisher to prevent harmful publication.[25]

Undeterred, Delfi appealed to the European Court of Human Rights. The issue has become whether the national courts of Estonia had infringed on Delfi's freedom of expression as protected under Article 10 of the European Convention of Human Rights. The European Court confirmed the domestic court's decision and held that the finding of liability by the former was a justified and proportionate restriction on Delfi's right to freedom of expression. This was mainly because the comments posted were highly offensive, insulting and threatening in nature; the postings were in reaction to an article published by the appellant; the appellant had failed to prevent the offensive postings from becoming public but had profited from the postings; the authors of the posts were anonymous; and the fine imposed by the national courts was not excessive.[26]

Walking the tightrope of host providers

The European Court's choice to defer to the domestic court's decision in not applying the Electronic Commerce Directive was understandably disappointing.[27] Many felt that Delfi had already acted in a responsible way as a news portal. Specifically, the news portal had an online report button for users to comment or complain, a filter system that automatically deletes comments that include vulgar words, and a policy of notice and takedown upon request. In light of this, critics consider the judgment a 'serious blow to freedom of expression online' that 'send[s] a shiver of fear down any website operator's spine',[28] displaying 'a profound failure to understand the EU legal framework regulating intermediary liability' that 'conveniently ignores relevant international standards in the area of freedom of expression on the Internet.'[29] They also raised concerns that the judgment would impose a strict and onerous pre-publication monitoring standard on news portals in the future, possibly leading to comment sections being closed or a pre-

[25] ibid [24], [29].

[26] ibid [94].

[27] ibid [74].

[28] D Voorhoof, 'Qualification of News Portal as Publisher of Users' Comment May Have Far-Reaching Consequences for Online Freedom of Expression: *Delfi AS v Estonia*' (*Strasbourg Observers Blog*, 25 October 2013). <http://strasbourgobservers.com/2013/10/25/qualification-of-news-portal-as-publisher-of-users-comment-may-have-far-reaching-consequences-for-online-freedom-of-expression-delfi-as-v-estonia/>, accessed 10 January 2014.

[29] G Guillemin, 'Case Law, Strasbourg: *Delfi AS v Estonia*. Court Strikes Serious Blow to Free Speech Online' (*Inforrm's Blog*, 15 October 2013) <http://inforrm.wordpress.com/2013/10/15/case-law-strasbourg-delfi-as-v-estonia-court-strikes-serious-blow-to-free-speech-online-gabrielle-guillemin/>, accessed 10 January 2014.

registration system for users.[30] Furthermore, some were puzzled as to why Delfi had to bear the brunt of the blame when it acted swiftly to take down the objectionable postings despite the fact that the claimant took six weeks to complain through traditional mail.[31] Others found it alarming that the Court would rule that a news organisation should have anticipated that a report of public interest would attract negative and hostile comments and should have exercised a degree of caution and diligence to avoid infringing on others' reputations.[32]

The standard set by the Estonian Court and endorsed by the European Court is stringent and demanding for any ISP, especially compared with the situation in the US. The latter, arguably, is the most favourable to any intermediary, including host providers. Under s 230 of the Communications Decency Act, '[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.'[33] This can be most unfair to victims of anonymous and vexatious online defamatory postings, as seen in the case of *Zeran v America Online, Inc*.[34] However, if both the strict standard of the European Court and the lenient US approach are equally unsatisfactory, how should the balance be struck that is fair to both ISPs and claimants in defamatory actions?

Some may claim that the notice-and-take-down regime under the EU Electronic Commerce Directive has provided a fair solution. They may further argue that had the Directive applied in the case of *Delfi,* the news portal would not have been found liable, and that it was wrong for the Estonian courts to rule that Delfi was a content provider and a publisher.[35] Yet the line between the latter two categories and a host provider is delicate. The protection of the EC Directive defences may be easily lost when an intermediary is perceived as being too active. ISPs must often 'walk the tightrope of liability' to maintain their status as mere hosts.[36]

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[30] ibid. M Ulvik and D Pavli, 'Case Watch: A Strasbourg Setback for Freedom of Expression in Europe' (*Open Society Foundations,* 22 October 2013) <http://www.opensocietyfoundations.org/voices/case-watch-strasbourg-setback-freedom-expression-europe>, accessed 10 January 2014.

[31] Guillemin (n 29); Voorhoof (n 28); E Weinert, 'Oracle at "Delfi": European Court of Human Rights Holds Website Liable for Angry Reader Comments' (2014) 25 *Entertainment Law Review* 1, 28, 31.

[32] *Delfi* (n 5) [29]; Guillemin (n 29); Dirk Voorhoof (n 28).

[33] 47 USC §230(c)(1). For discussion see BC McManus, 'Rethinking Defamation Liability for Internet Service Providers' (2001) *Suffolk University Law Review* 647.

[34] 958 FSupp1124 (ED Va 1997), aff'd, 129 F3d327 (4th Cir 1997). In *Zeran*, an unknown person posing as the plaintiff posted an advertisement for T-shirts containing offensive remarks concerning the Oklahoma City bombing on an Internet billboard hosted by the defendant. The advertisement directed buyers to contact the plaintiff's home phone number. This led to a series of abusive phone calls and escalated into death threats against the plaintiff, which lasted for nearly a month. The plaintiff brought actions against AOL for delay in removing defamatory messages posted by an unidentified third party, refusal to post retractions of those messages, and failure to screen for similar postings thereafter but the Court ruled in favour of the defendant. For discussion, see E Barendt, *Freedom of Speech* (OUP 2007) 464–66.

[35] Guillemin (n 29); Voorhoof (n 28).

[36] S James, 'Tightening the Net: Defamation Reform and ISPs' (2012) *Entertainment Law Review* 197.

To summarise briefly, in the *Delfi* case, the Estonian courts justified their decision in ruling the Internet news portal to be a content provider and a publisher largely due to the fact that Delfi had integrated the commenting environment for readers into its news portal and invited users to post comments.[37] Delfi had also determined which comments were published and which were not, and only it could remove or change them.[38] Foremost, the original authors could not delete or modify their own comments once posted. The European Court was convinced by the domestic courts. In a similar vein, it also highlighted the substantial degree of control over comments exercised by Delfi.[39]

Regardless of whether one agrees with the reasoning, *Delfi* is not the only case in which a seemingly neutral intermediary host was being categorised as a content provider or a publisher by the courts. In the UK, where the Electronic Commerce Directive is implemented through the Electronic Commerce (EC Directive) Regulations 2002,[40] similar disputes have arisen. The English High Court held in *Kaschke v Gray* that an ISP of a web blog had lost the protection of the EC Directive Regulations because it had corrected the spelling and grammar of blogs posted by its users.[41] In the appeal against a summary judgment hearing, Justice Stadlen considered the ISP to have been actively engaged with the content, such that the extent of its control had gone beyond the mere storage function—an essential criterion of a host under Regulation 19.[42] In another case, *McGrath v Dawkins*, the English High Court was asked to consider whether Amazon, the world's biggest online book seller, should be held liable for defamatory remarks posted by readers in its 'Review' section.[43] The case shared various factual similarities with *Delfi*: it had a moderation policy of limited pre-publication control by automatic filter for forbidden words, a blacklist system against users who had used profane language,

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[37] *Delfi* (n 5) [25], [27].

[38] ibid [27].

[39] ibid [89].

[40] Electronic Commerce (EC Directive) Regulations 2002, SI 2002/2013, reg 19.

[41] [2010] EWHC 690 (QB). For comments, see R Lundie-Smith, '*Kaschke v Gray*: The Application of Article 14 of the E-Commerce Directive to Blogs' (2010) *Entertainment Law Review* 272.

[42] *Kaschke* (n 41) [86]. Reg 19 of the EC Directive Regulations states that '[w]here an information society service is provided which consists of the storage of information provided by a recipient of the service, the service provider (if he otherwise would) shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that storage where—

(a) the service provider—

(i) does not have actual knowledge of unlawful activity or information and, where a claim for damages is made, is not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful; or

(ii) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information, and

(b) the recipient of the service was not acting under the authority or the control of the service provider.'

[43] [2012] EWHC B3 (QB). Application for leave rejected [2013] EWCA Civ 206. For comments, see Inforrm, 'Case Law: *McGrath v Dawkins*: Creationism, Atheism and Internet forums, where Libel Law Should Fear to Tread' (*Inforrm's Blog*, 18 April 2012). <http://inforrm.wordpress.com/2012/04/18/case-law-mcgrath-v-dawkins-creationism-atheism-and-internet-forums-where-libel-law-should-fear-to-tread/>, accessed 11 January 2014.

a 'Report Abuse' button and a notice-and-take-down procedure. Most notably, it had invited readers to write reviews on books selected by the website, and reviews that contained forbidden words were submitted for manual check before the final decision to exclude was made.[44] It was only because the complainant in *McGrath* had failed to give effective notice to Amazon of what the defamatory statement constituted and why it was 'unlawful' (the strength and weakness of any available defence under defamation law)[45] that Amazon was 'bound to succeed' under Regulation 19 and the English court was saved from resolving the difficult question in deciding whether Amazon was a mere host. Nevertheless, the court noted *obiter* that had the disputed postings in the case at bar triggered any manual review, Amazon's position might have been very different under Section 1 of the Defamation Act 1996 (the scope of which is explained further under part III), as it might have been considered an editor.[46]

The gatekeeper's duty to prevent harm

The *Delfi* judgment, as noted earlier, was also affected by various other considerations such as the economic interests of the ISP. It is, therefore, hard to tell whether the ruling would have been different if Delfi had played a more passive or reactive role in letting its readers retain the power to delete or amend comments after submission. All we know is that since the ruling by the domestic court, Delfi has implemented a new set of policies and measures. These include not allowing persons who have posted offensive comments to post any new comments without reading and accepting the rules of commenting; setting up a team of moderators who conduct follow-up moderation of comments posted on the portal; reviewing all user notices of inappropriate comments; and ensuring that comments comply with the rules of commenting.[47] On average, Delfi removed about eight percent of the comments, mainly spam and irrelevant remarks, whereas defamatory comments constituted less than 0.5 percent of the total number.[48] Nevertheless, *Delfi* should not be dismissed as having little application to the general online Internet environment.[49] It is not and will not be a single case.

In fact, many online intermediaries are in a factual position analogous to that of Delfi. Many online discussion forums have been moderating their own portals. Based on interviews with online editors and community managers at 104 news organisations from 63 countries in 2013, it was found that 38 organisations exercised pre-publication moderation while 42 exercised post-publication moderation, with 16 adopting a mixed

44 *McGrath* (n 43) [33].
45 ibid [43].
46 ibid [41].
47 *Delfi* (n 5) [30].
48 ibid.
49 *J19 and J20 v Facebook Ireland* [2013] NIQB 113 [29]–[32].

approach.[50] Of the 97 organisations that allowed online comments, they admitted occasionally blocking comments from being published and deleting comments after publication.[51] The average deletion rate was eleven percent and the most common reason for such was the inclusion of offensive language.[52] Other than filtering keywords, seventy-one percent said that they blocked blacklisted individuals either by their accounts or by their IP addresses.[53] In addition, one of the publications stated that they had a moderating team to read comments.[54] Indisputably, a significant number of news portals and discussion forums have endeavoured to act responsibly, but in doing so, they may have lost their immunity as host providers.

Unless future judicial rulings or statutory provisions can clarify the exact factual basis for Delfi's liability or that of other online discussion forum providers, the problems concerning their status and their scope of monitoring duty are likely to recur.

Oriental Press Group v Fevaworks: Online discussion forum as publisher[55]

If a statutory regime designed specifically to govern the responsibilities of ISPs in defamation cannot adequately resolve the problems faced by host providers, one can imagine the confusion and frustration that ISPs face in a pure common law jurisdiction, as illustrated in the Hong Kong case of *Oriental Press Group v Fevaworks*.

The respondents (defendants) in the case were the providers, administrators and managers of a website that hosted one of the most popular Internet discussion forums in Hong Kong, known as the Hong Kong Golden Forum.[56] It boasted of having 30,000 users online at any given time and over 5,000 postings each hour during peak hours. Use of the forum was free to registered members and its revenue came from advertisement sponsorship. The administrators did not edit or filter messages. In fact, the Forum had only two administrators monitoring its discussion for six to eight hours per day, with the duty of removing objectionable content.[57] On the other side of the legal battle, the appellants (the plaintiffs) were the publishers of the Oriental Press Groups running the Oriental Daily, which is one of the most popular local newspapers.

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[50] Goodman (n 3) 7.
[51] ibid 36.
[52] ibid.
[53] ibid 38.
[54] ibid 33.
[55] Discussion of the *Fevaworks* case can be found also in ASY Cheung, 'A Study of Online Forum Liabilities for Defamation: Hong Kong Court in Internet Fever' (2013) 18 *Media and Arts Law Review* 382.
[56] *Feva* (n 6) [12].
[57] ibid [15].

The legal action was concerned with three statements posted on the Golden Forum in 2007, 2008, and 2009 by third parties alleging that the appellants were involved in drug trafficking, money laundering and other illegal, immoral and corrupt activities.[58] The respondents were alerted to the existence of the first two statements and the 2008 statement was removed from the website within three and a half hours of the respondents being informed. The 2007 statement, however, was not removed from the website until more than eight months after the respondents had been informed.[59] The 2009 statement was removed immediately by the respondents themselves on their own discovery.[60] The lower courts dismissed the claims regarding the 2008 and 2009 statements, but held the respondents liable for the 2007 statement due to their unreasonable delay in taking down the offending post upon notice. For this, the appellants were awarded of HK $100,000 (approximately US $13,000) as damages.[61] The appellants were not satisfied with the outcome and the amount of damages. Hence, they applied for leave to appeal.

In the final round of the legal battle, the Court of Final Appeal was asked to consider the extent to which providers of Internet forums may be held liable for the posting of defamatory statements by their users. To answer this, the Court had to decide whether Internet forum providers should be considered publishers of defamatory postings by third parties and whether the common law defence of innocent dissemination was available to them.[62]

Feva before court

As the Defamation Ordinance of Hong Kong does not cover issues and liabilities specifically concerning ISPs, the Court had to rely on existing common law principles. In sum, the Court first established that an online discussion forum was a 'secondary publisher' from the outset, to which the defence of innocent dissemination was applicable. The Court then differentiated between an online discussion forum and a notice board provider, such that the latter's liability in defamation only arose upon notification of the defamatory statement. Throughout the entire legal discussion, what proved most critical was deciding when and to what extent liability arises for an online discussion forum. Yet in the attempt to fix the liability of an Internet discussion forum as secondary publisher from the outset under common law principles established in previous centuries, many more questions were being raised in the judicial reasoning than were answered.

[58] ibid [6].
[59] ibid [7].
[60] ibid [8].
[61] ibid [7].
[62] ibid [11].

Publication and innocent dissemination

Under common law, publication takes place when a defendant communicates a defamatory statement to a third party, and liability in defamation arises from participation in the publication of the defamatory matter. *Prima facie*, the author, editor, publisher, printer, or vendor of a newspaper is liable.[63] Having said that, the common law allows the defence of innocent dissemination to one who is not the first or main publisher of the libellous works but who has only taken a 'subordinate part in disseminating it'. Well known examples of the latter category are proprietors of libraries (*Vizetelly v Mudie's Select Library Ltd*)[64] and news vendors (*Emmens v Pottle*).[65] To rely on this defence, one must show that (1) he did not know or was innocent of any knowledge of the libel contained in the work disseminated by him, (2) that there was nothing in the work or the circumstances under which it came to him or was disseminated by him that should have led him to suppose that it contained a libel and (3) that such want of knowledge was not due to any negligence on his part.[66] The onus of proof is on the defendant.[67]

Although consensus has been reached on the result not to hold this person to be liable, judicial opinions differ as to when legal liability arises, and when not to place legal liability. In *Tamiz v Google Inc*, the English Court of Appeal considered that the successful invocation of the innocent dissemination defence leads to the defendant being deemed not to have published the libel at all.[68] In that case, the English Court left it open whether Blogger, as provided by Google, might be regarded as a secondary publisher in hosting a blogging platform, although that could only be for the period after it had received notice by the complainant.[69] Lord Justice Richards reasoned that there has been a long established line of authority that a person involved only in dissemination is not to be treated as a publisher unless he knew or ought by the exercise of reasonable care to have known that the publication was likely to be defamatory, and that Google could not be said to have known or ought reasonably to have known of the defamatory comments prior to notification of the complaint.[70]

The above reasoning, however, was rejected explicitly by the Hong Kong Court of Final Appeal in the *Feva* judgment.[71] Instead, Ribeiro PJ, in delivering the leading judgment, opted to follow the Australian position in *Thompson v Australian Capital TV,* which holds that 'it would be more accurate to say that any disseminator of a libel publishes the libel but, if he can establish the defence of innocent dissemination, he will not be responsible for that publication.'[72]

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63 P Milmo (ed), *Gatley on Libel and Slander* (11th edn, Sweet and Maxwell 2008), para 6.16.
64 [1900] 2 QB 170.
65 (1886) 16 QBD 354.
66 The ratio was established in the *Vizetelly* judgment, referred to in *Feva* (n 6) [27].
67 *Feva* (n 6).
68 *Tamiz v Google* [2013] EWCA Civ 68, 1 WLR 2151 [18], [26]; discussed in *Feva* (n 6) [53].
69 *Tamiz* (n 68) [26], [34], and [35].
70 ibid.
71 *Feva* (n 6) [31], [53].
72 (1996) 186 CLR 574, referred to [30], [31].

This option is indeed a curious one. First, the facts of *Tamiz v Google* were of direct relevance to the *Feva* case. Given that *Tamiz v Google* was a dispute over the liabilities of a particular Blogger platform provided by Google, its nature shared many similarities with the Golden Forum. In contrast, *Thompson v Australian Capital TV* was about the live broadcast of a current affairs programme produced by another television station. The Australian High Court held that while the defendant did not have any real control over the defamatory material, innocent dissemination was not applicable as it was the defendant's choice of the specific technical setup that caused the lack of control.[73] Following the logic of the Australian case, the Hong Kong court should have ruled that Feva could not rely on an innocent dissemination defence, as it had chosen to run an online discussion forum knowing the setup's limitations. Such a result would have been a drastic blow to the running of most ISPs and a severe measure against freedom of expression.

Primary and secondary publishers

At this point, one cannot help but ask the fundamental question: what, exactly, is a publisher? Under common law as summarised by the Hong Kong Court, a primary publisher is one that knows or can easily acquire knowledge of the content of the article published and has a realistic ability to control its publication. The Hong Kong Court called these the 'knowledge criterion' and the 'control criterion'.[74] As the respondent's online discussion forum did not have prior knowledge of the postings, was not aware of their content,[75] and did not have the ability or opportunity to prevent their dissemination before notification,[76] the Court ruled that the forum could not be seen as a primary publisher, but rather as a 'secondary publisher'.

As previously mentioned, those who have played a subordinate part in dissemination are entitled to the innocent dissemination defence because they have merely played a 'passive instrumental role in the process' and do not have the sufficient degree of awareness or intention for the law to impose legal responsibility for defamatory publications.[77] They are most often referred to as 'innocent disseminators' or 'subordinate distributors', whereas Ribeiro PJ of the Hong Kong CFA prefers to call them 'secondary publishers'.[78]

This test of innocent dissemination also requires one to exercise reasonable care and not be negligent, especially when one has been warned of libellous matter in a former

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[73] For a discussion, see DJB Svantesson, 'A Bulletin Board is a Bulletin Board (Even if it is Electronic): Certain Intermediaries are Protected from Liability After All' (2004) 16 *Bond Law Review* 2, 169, 170.

[74] *Feva* (n 6) [76].

[75] ibid [84].

[76] ibid [89].

[77] *Tamiz* (n 68) [18], referring to *Emmens v Pottle* (1885) 16 QBD 354.

[78] *Feva* (n 6) [32].

publication issue.[79] The test is readily applicable for print media, and is only fair to newsvendors and distributors. However, in the context of electronic media, are online discussion forums and other ISPs analogous to distributors or innocent disseminators in the traditional sense?

The Hong Kong Court answered in the affirmative because the respondent's forum could not have realistically monitored each user post before its publication and likewise did not have the ability to edit or prevent the defamatory comments from being published.[80] Earlier in the reasoning, the Court noted that the nature of publication on the Internet was a qualitatively different process—an open, interactive procedure involving 'many-to-many' communications, such that the new intermediaries were not originators of content, but rather mere facilitators.[81]

When does liability arise?

If that is the case, then how can online discussion forums as secondary publishers satisfy the requirements under the defence of innocent dissemination both before and after they have become aware of the defamatory content of the offending posts? The position, once the discussion forum has received notice, is straightforward. In the opinion of the Hong Kong Court, the defendant should promptly take all reasonable steps to remove the offending content from circulation as soon as reasonably practicable.[82] However, the position before receiving notice has remained confusing and unsatisfactory.

Ribeiro PJ made it clear that 'the focus of the innocent dissemination defence has been on past, completed publications in which the defendant was not aware of the defamatory content and could not, with reasonable care, have discovered it.'[83] In *Feva*, the respondent had only two administrators to monitor the very high volume of Internet traffic in its online forum, thus the Court concluded that they had no realistic means of acquiring such knowledge or of exercising editorial control over the content. In addition, in the Court's opinion, there was nothing to alert the respondent before the 2007 complaint.[84]

Given this position, the Court does not seem to have required prior monitoring by online discussion forums. In fact, one would arguably be in a better position not to have any administrators to monitor the forum. Otherwise, the online discussion forum may be held liable as a primary publisher exercising control, with required knowledge of the content of the postings. Compared with Ribeiro PJ's judgment, spotted correctly and addressed directly, but unfortunately not answered fully, were the issues raised by Justice

79 Milmo (n 63), para 6.19.
80 *Feva* (n 6) [102], [111].
81 ibid [55]–[58], and [61].
82 ibid [97].
83 ibid [90].
84 ibid [102].

Litton in the *Feva* case. In the concurring opinion of Justice Litton, the defendants as a forum host have 'in theory' 'some control' over the content of the statements published on the website, otherwise they would not have discovered, on their own initiative, the 2009 defamatory statement.[85] Also raised but not answered by Justice Litton was that it 'may not be enough' to 'merely employ two administrators to monitor forum discussion for six to eight hours a day, five days a week.'[86] Finally, he also noted that while keyword filtering and monitoring might not be feasible, there was nothing to suggest that having the administrators to highlight the identities of key persons could not be an alternative to preventing the posting of defamatory statements against the appellants.[87]

What the Hong Kong Court has failed to clarify is the standard of care required by online discussion forums before acquiring knowledge or notification of alleged defamatory postings. Adrian Fong pointed out that Ribeiro PJ set the 'reasonable care' standard so low that it discourages good faith monitoring by large online social platform operators.[88] Regrettably, online discussion forums were left in limbo at this stage. Was the Court saying that it was unrealistic to monitor the Internet traffic and content of each individual posting in a popular discussion forum, and thus no monitoring duty should be imposed? Or was the Court saying that had the Feva discussion forum employed more administrators, then the basis of liability would have been different? If, in the future, more advanced and powerful software is available for content screening and filtering, will online discussion forums and other ISPs be required to install it?

The unnecessary logical complexities involved in regarding the respondents as secondary publishers from the outset, with actual liability imposed only at the point of notification, are even more noticeable when Ribeiro PJ stated that providers of discussion forums should not be treated on a par with the occupiers of premises because they 'played an active role in encouraging and facilitating the multitude of Internet postings by members of their forum … they designed the forum … they laid down conditions for becoming a member and being permitted to make postings … they employed administrators whose job was to monitor discussions and to delete postings which broke the rules; they derived income from advertisements placed on their website.'[89] In his opinion, the online forums were clearly participants and publishers from the outset. While Ribeiro PJ has argued convincingly that defamatory postings by third parties on online discussion forums should not be compared with unauthorised postings on notice boards run by a golf club, as in *Byrne v Deane* (a case dating back to 1937),[90] it is difficult to conceptualise a situation in which one might apply the test results in a finding that a

[85] ibid [124].
[86] ibid [131].
[87] ibid.
[88] A Fong, 'Dissemination of Libel by Online Social Platforms: Reinterpreting Laws to Meet the Information Age' (*SSRN*, 15 July 2013) <http://dx.doi.org/10.2139/ssrn.2293889>, accessed 10 January 2014.
[89] *Feva* (n 6) [51].
[90] [1937] 1 KB 818.

defendant has published due to active participation in publication, but that same degree of participation and involvement do not prevent a defence of innocent dissemination from arising.

These difficulties could be avoided if the Hong Kong Court recognised the unique nature of online discussion forums and concluded that liability arises only upon notification. An online discussion forum is simply not a primary publisher due to the lack of required knowledge and control in the interactive and user-generated content environment of the Internet world. Yet it is not as passive as a secondary publisher in the traditional sense of being a library or a news vendor, due to its active role in hosting and running the online platform and in inviting participation. Rather than distorting the nature of online discussion forums so that they can be mapped into a common law equivalent of primary or secondary publisher, future disputes would be better resolved through statutory guidelines designed for a new category of Internet intermediaries.

While the result of *Feva* in imposing liabilities on the defendant only for the 2007 statement, which it took eight months to remove, was justified, a more viable legal solution would have been to adopt a statutory provision that clearly stipulates the basis and nature of liability for Internet intermediaries based on their roles (as facilitator, as host, as moderator). As we have seen in the *Feva* case, it is both artificial and unsatisfactory to fit an invention of the Internet era into the straitjacket of nineteenth-century defamation common law.

The legislative attempt in the United Kingdom: Identified or unidentified poster

Parallel to the legal developments of the judiciary in the European Court and in Hong Kong, the UK witnessed significant legislative changes in defamation law in 2013.[91] The Defamation Act 2013, with specific provisions governing Internet intermediaries, complements the Defamation Act of 1996 and the Electronic Commerce Regulations 2002 without replacing them.

The legal liabilities of ISPs in the pre-2013 era hinged much on their roles. For instance, Section 1(3)(e) of the Defamation Act of 1996 stipulates that a 'person shall not be considered the author, editor, or publisher of a statement if he is only involved as the operator of or provider of access to a communication system by means of which the statement is transmitted, or made available, by a person over whom he has no effective control.' However, the defence is only available to the ISP if it can show that (1) it was not the author, editor or publisher of the statement; (2) it has taken reasonable care in respect of its publication; and (3) it did not know, and had no reason to believe, that what

[91] For an overview discussion, see A Mullis and A Scott, 'Tilting at Windmills: the Defamation Act 2013' (2014) 77 *Modern Law Review* 1, 87.

it did caused or contributed to the publication of a defamatory statement.[92] The first two criteria have forced host providers to face the notorious 'catch-22' dilemma: in seeking to attract the statutory defence by taking reasonable care, they have instead forfeited it by being considered too proactive and hence have become editors.[93] The last criterion may mean that an ISP who is initially being considered as a host provider may end up being a publisher once it has received notice of a defamatory statement, as in *Tamiz v Google*.

Unlike the Defamation Act of 1996, which is dominated by the lexicon of authors, editors and publishers used in common law defamation actions, the immunity granted under the EC Regulations 2002 is based on whether the ISP is considered a mere conduit, a cache or a host. In addition, the knowledge requirement on the part of an ISP also differs between the two statutes. As discussed earlier in Part II of this chapter, the Defamation Act requires that the ISP has knowledge of the defamatory statement concerned, while the EC Regulation refers to the unlawfulness of the statement. While the former only notes the injury to another's reputation, the latter requires that enough evidence be adduced to show the strengths or weaknesses of the case's available defences.[94]

Without changing these standards, the Defamation Act of 2013 has added a new defence to Internet intermediaries (referred to as website operators under the Act).[95] Under s 5(2), the defence allows the operator to show that 'it was not the operator who posted the statement on the website'. Furthermore, s 5(12) states that the defence is not defeated by reason, only by the fact that the website operator is a moderator of the statements posted by others. The defence will, however, be defeated if the claimant shows that (1) it was not possible for him to identify the person who posted the statement; (2) he gave the operator a notice of complaint in relation to the statement;[96] and (3) the operator failed to respond to the notice within the required provision, which is 48 hours as stated in the Defamation Regulations.[97] The other ground on which the defence is defeated is when the website operator has acted with malice in relation to the posting of

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[92] Defamation Act 1996 (UK), s 1(1).

[93] *McGrath* (n 43) [41]. For discussion, see V McEvedy, 'Defamation and Intermediaries: ISP Defences' (2013) *Computer and Telecommunications Law Review* 108, 111.

[94] *McGrath* (n 43) [43].

[95] Defamation Act 2013, s 5; Defamation (Operators of Websites) Regulation 2013, reg 1(2). Under reg 1(2), an operator is defined simply as the 'operator of the website on which the statement complained of in the notice of complaint is posted'. This definition is broad enough to accommodate the possible range of platforms with future and fast advances in technology.

[96] Under reg 2 of the Defamation (Operators of Websites) Regulation 2013, a notice of complaint must specify (a) the electronic mail address at which the complainant can be contacted; (b) the meaning that the complainant attributes to the statement; (c) the aspects of the statement that are factually inaccurate; or opinions not supported by fact. In addition, the complainant needs to confirm if he does not have sufficient information about the poster to bring proceedings against the poster; and whether he consents to the operator providing the poster with his name and electronic mail address.

[97] Defamation Act 2013, s 5(3); Defamation (Operators of Websites) Regulation 2013, reg 5(2)(a).

the statement concerned (s 5(11)).[98] In addition to s 5, s 10 provides that a court does not have jurisdiction to hear and determine an action for defamation brought against one who was not the author, editor or publisher of the statement complained of, unless the court is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher.[99] As scholars have commented, this makes it 'significantly more difficult to proceed against online intermediaries'.[100] From now on, much will be dependent on whether the original poster, defined as 'the person who posted the statement complained of on the website referred to in the notice of complaint',[101] can be identified.

If the poster can be identified and subject to his consent, the ISP can pass the poster's full name and postal address of residence or business to the complainant, and leave the post on the site,[102] unless and until the court orders its removal under s 13 of the Act. If it is not possible to identify the poster,[103] or if the poster fails to respond within 48 hours,[104] then the ISP can then take down the post within 48 hours of receiving a notice of complaint.

The new approach is not without problems. First, victims of defamatory statements will face a very unpleasant situation if the poster is willing to have a legal confrontation in court, when the statement could be left online without any notice of complaint attached.[105] Second, the new statute has not resolved the conflicting assessment standards of claims by the ISP upon receiving notice of complaint between the UK Defamation Act since 1996 ('defamatory') and the EU Regulations ('unlawful').[106] Third, the scope of s 10 of the new Act remains uncertain regarding what being 'reasonably practicable for an action to be brought against the author, editor or publisher' would constitute.[107] Namely, would a claimant be required to pursue a Norwich Pharmacal order from the court for the disclosure of anonymous user details before going to court? What should one do when

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[98] An example is that the website operator had incited the poster to make the defamatory statement or had otherwise colluded with the poster. Explanatory Notes to the Defamation Act 2013, para 42. <http://www.legislation.gov.uk/ukpga/2013/26/notes>, accessed 17 January 17, 2014.

[99] Section 10(2) confirms that the terms 'author,' 'editor', and 'publisher' have the same meaning as in section 1 of the Defamation Act 1996. Under s 1(2) of the 1996 Act, 'author' means the originator of the statement but does not include a person who did not intend that his statement be published at all; 'editor' means a person having editorial or equivalent responsibility for the content of the statement or the decision to publish it; and 'publisher' means a commercial publisher; that is, a person whose business is issuing material to the public, or a section of the public, who issues material containing the statement in the course of that business.

[100] Mullis and Scott (n 91) 101.

[101] Defamation (Operators of Websites) Regulation 2013, reg 1(2).

[102] ibid reg 2(2)(b).

[103] ibid reg 3(1).

[104] ibid reg 5.

[105] Mullis and Scott (n 91) 102.

[106] Defamation Act 2013, s 5(6); EU E Commerce Regulations, reg 19. M Harris, 'Defamation Act 2013: A Step in the Right Direction' (*Inforrm's Blog*, 9 January 2014) <http://inforrm.wordpress.com/2014/01/09/defamation-act-2013-a-step-in-the-right-direction-mike-harris/>, accessed 14 January 2014.

[107] J Agate, 'The Defamation Act 2013: Key Changes for Online' (2013) 19 *Computer and Telecommunications Law Review* 6, 170, 171.

the post is uploaded by an overseas author to a local website? Above all, as many posters do not use real names to register, it is uncertain whether the new law would lead to a system of real name registration and verification before posting, or whether this would simply imply a swift notice-and-take-down system for ISPs. Its effect on anonymous posting is difficult to predict.[108] Nevertheless, it is no longer necessary to identify with precision the degree of an ISP's involvement (whether it has exceeded its capacity and has become a publisher), or the nature of the knowledge it has about the contested statement and its role (whether it is a mere host or not), as long as it is not responsible for the offending statement.

Conclusion

The social and participatory nature of Web 2.0 has presented unprecedented problems for defamation disputes. It challenges our traditional understanding of what publishers are, begs us to redress the grievances faced by victims of defamation actions in the face of anonymous writers and confronts us with wrongs for which host providers are asked to share responsibility.

In reviewing the three legal attempts to define the responsibilities of intermediaries in defamation, we have seen the uphill legal battles that host providers must wage. Despite the fact that the three jurisdictions studied are premised largely on a seemingly sensible notice-and-take-down regime for intermediaries' liabilities, the actual implementation of this standard has revealed many intricate legal problems yet to be solved. The statutory classification of intermediaries into mere conduit, cache or host may not be helpful, especially when such categorisation is highly fact sensitive. The courts have struggled to understand the technological roles and monitoring functions of Internet providers. Equally, our common law understanding of author, publisher and editor is hardly adequate. As one author observed, 'defamation cases challenge the analogical abilities of the courts to apply traditional defamation analysis to a new technological medium.'[109] In seeing host providers as publishers, courts are often preoccupied with enabling the victims to bypass the threshold for facing anonymous authors. In contrast to the approach of treating host providers as gatekeepers, the UK's new Defamation Act has swept aside the necessity to classify the role and status of ISPs. In re-adjusting the focus to the identification of the original poster, it has opted for a practical and functional solution that gives victims of defamation an adequate remedy and at the same time provides

[108] Regarding the conflict between the public interest value of anonymous speech and reputation protection, and its relation to the Defamation Act 2013, see E Barendt, 'Defamation and the Net: Anonymity, Meaning and ISPs' in C Walker and RL Weaver (eds), *Free Speech in an Internet Era* (Carolina Academic Press 2013) 107.

[109] McManus (n 33) 653.

clearer guidelines to ISPs. Although the new solution offered by the UK Parliament is yet to be tested, it has re-drawn the parameters between host providers, users and victims of defamatory statements.

What can be safely concluded for now is that a statutory regime that can specifically address the liability of intermediaries without being shackled by their forms and functions is essential in defamation regulation. Regardless of which approach is chosen, one should not lose sight of the notion that the ultimate concern of defamation is the protection of freedom of reputation without undue sacrifice of freedom of expression, even in the ever-changing online social ecology of commenting and blogging.

András Koltay

The regulation of the defamation of public figures in Europe, with special emphasis on the Hungarian legal system*

Introduction

Personality rights enjoy strong protection under various legal systems as a result of twentieth century legal developments. For a long time, it did not even occur to anyone that the level of this protection should be differentiated according to the type of statements that are harmful to an individual's reputation, or that this level should be reduced for certain types of persons. False statements and statements that are harmful to an individual's reputation were naturally regarded as constitutionally unprotected statements, until the emergence of the idea that certain statements relating to public debates and which may be harmful to the reputation of public figures should be afforded special protection. Such special protection is necessitated by the paramount importance of the freedom to engage in public debates. The development of the protection of reputation in modern times is difficult to reconcile with the recognition of privileged statuses, and the fact that an individual is active in public life is regarded as one that automatically reduces the scope of such protection. This approach is essential to a fundamental feature of democratic societies: open debates on public matters are more important—up to a certain limit—than the protection of the personality rights of the persons being criticised. Persons participating in public life voluntarily waive their opportunity to enforce their personality rights in general. The limited protection of the reputation and honour of public figures thus became acknowledged in all legal systems which recognise the above distinction.

It is an almost uniform feature of European legal systems that this reduction of the scope of the protection of the reputation of public figures is not provided for in codified law; the manner of the application of the law in this special case is left to the case law of the courts. Only a couple of states form an exception to this but, even in their case, it is usually only in the field of criminal justice that the legal code of the branch of the law offers any guidance. Common European law, respecting the specific, organically evolved solutions applied by the member states, has not attempted a uniform resolution of this issue; however, the European Court of Human Rights (ECtHR), which is traditionally very active in these areas, has successfully drawn up the foundations that the various states are required to take into account when applying the law.

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In this study, we present the international background of the question under review. Then we provide a brief overview of the solutions applied in specific European countries, broken down by the most important problems. Later sections take a closer look at the Hungarian regulations and the jurisprudence of the Constitutional Court (CC) and ordinary courts, and examine the Strasbourg cases relating to Hungary, but with lessons for those outside the country too.

International legal sources

The *acquis communautaire* of the European Union does not consider the issues of the protection of honour and reputation, with the exception of the rule of the AVMS Directive[1] that provides that the right of reply—against audio-visual media services—has to be established by the member states (presently, Article 28). The right of reply provided for by the Directive takes the form of a legal consequence for defamation, but includes no specific content regarding the affairs of public figures.

According to the ECtHR, 'No doubt art 10-2 enables the reputation of others—that is to say, of all individuals—to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.'[2]

The protection of the freedom of public debate carries especial weight in the jurisprudence of the ECtHR. As a result of this, Strasbourg case law is perhaps richest and most stable with regard to defamatory statements and opinions voiced about public figures. It is not primarily a lower level of the protection of the reputation of public figures that Strasbourg prescribes; it is concerned, rather, to ensure the broadest protection of debates about public issues, ie the decisive factor is not the status of the person who is the subject of an allegation, but the extent to which the debate serves the public interest. The court distinguishes between statements of fact and statements of opinion, and offers broader protection to the latter, whereby it also recognises the civil and criminal sanctioning of false statements of fact and, with certain restrictions, places the burden of proof on the respondent / defendant. It also examines the published statements in their entirety, ie in the context of the entire publication, as a result of which certain expressions that would in themselves be considered to be defamatory do not necessarily constitute a

[1] Directive 89/552/EC of the European Commission on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (Television Without Frontiers Directive) and, since 2010, Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audio-visual media services (AVMS Directive).

[2] *Lingens v Austria*, App No 9815/82 (judgment of 8 July 1986), [42].

legal violation in the eyes of the Court.[3] At the same time, the status of the attacked party is also a significant issue for consideration: the extent of the protection offered to the freedom of speech may be different according to whether the subject of the criticism is a member of the government, a politician, a public official, an employee of the judiciary or a private individual. Obviously, the extent of the protection offered to personality rights is in inverse proportion to the attacked person's position in the order listed above.

The European Convention on Transfrontier Television provides for the right of reply in a manner similar to that of the AVMS Directive.[4] Although the Council of Europe did not contribute to the creation of a mandatory norm that could be relevant with regard to the protection of the honour and reputation of public figures, in a 2004 statement the Committee of Ministers did attempt to lay down certain basic principles.

> *Council Of Europe Committee Of Ministers: Declaration on freedom of political debate in the media*
> (Adopted by the Committee of Ministers on 12 February 2004 at the 872nd meeting of the Ministers' Deputies)
>
> *I. Freedom of expression and information through the media*
> Pluralist democracy and freedom of political debate require that the public is informed about matters of public concern, which includes the right of the media to disseminate negative information and critical opinions concerning political figures and public officials, as well as the right of the public to receive them.
>
> *II. Freedom to criticise the state or public institutions*
> The state, the government or any other institution of the executive, legislative or judicial branch may be subject to criticism in the media. Because of their dominant position, these institutions as such should not be protected by criminal law against defamatory or insulting statements. Where, however, these institutions enjoy such a protection, this protection should be applied in a restrictive manner, avoiding in any circumstances its use to restrict freedom to criticise. Individuals representing these institutions remain furthermore protected as individuals.
>
> *III. Public debate and scrutiny over political figures*
> Political figures have decided to appeal to the confidence of the public and accepted to subject themselves to public political debate and are therefore subject to close public scrutiny and potentially robust and strong public criticism through the media over the way in which they have carried out or carry out their functions.
>
> *IV. Public scrutiny over public officials*
> Public officials must accept that they will be subject to public scrutiny and criticism, particularly through the media, over the way in which they have carried out or carry out their functions, insofar as this is necessary for ensuring transparency and the responsible exercise of their functions.

[3] E Barendt, *Freedom of Speech* (2nd edn, OUP 2005) 222–25. For a brief summary of the case law of the Court, see C Ovey and RCA White, *Jacobs & White: The European Convention on Human Rights* (4th edn, OUP 2006) 323–29.

[4] European Convention on Transfrontier Television, Strasbourg, 5.V.1989. art 8.

VI. Reputation of political figures and public officials
Political figures should not enjoy greater protection of their reputation and other rights than other individuals, and thus more severe sanctions should not be pronounced under domestic law against the media where the latter criticise political figures. This principle also applies to public officials; derogations should only be permissible where they are strictly necessary to enable public officials to exercise their functions in a proper manner.

A comparative overview of certain issues related to the protection of the reputation and honour of public figures[5]

Issues of terminology, clarification of concepts

The protection of the honour and reputation of public figures constitutes a complex set of legal problems, because it requires the identification of the rules and the limits of the application of several branches and areas of the law (criminal law, civil law, media regulation), as well as several distinct personality rights that can be interpreted independently of each other: reputation, honour and human dignity. As a result, even the internal coherence of some of the individual legal systems may be wanting; the overall European picture is certainly diverse and not free from contradictions.

Reputation, honour and human dignity are personality rights closely related to each other. Different legal systems protect these rights in different ways. Certain systems differentiate between several different rights (thereby giving them different meanings), and view them as independent rights, whereas others do not define them independently but protect them collectively, under their anti-defamation rules, without any differentiation.

Reputation protects the individual from (society's) external value judgment, and can primarily be harmed by the statement of falsehoods, within either the system of civil law or criminal law. The exact meaning of the term 'honour' is hard to grasp in terms of the law. While it is not appropriate to generalise, honour refers to the individual, innate values of the personality; harming these does not demean the external perception of the given person, but causes 'internal' harm to him/her. Hence, reputation fundamentally means the value judgment of other persons about one's personality, while honour means the *immanent* core of one's personality, which is rather hard for the law to grasp.

The notion of human dignity can only be defined in law with great difficulty. Breaches of human dignity, however, can be identified quite easily. The right to human dignity, where it is protected as a personality right, can be violated (similarly to honour) by seriously offensive, unjustifiably harmful, or humiliating opinions. The protection of reputation, honour and dignity are therefore strongly connected as far as freedom of speech is concerned, and in most instances they cannot actually be separated from each other.

[5] In our review of the regulations of the various individual states we have relied heavily on the international study conducted for the Hungarian National Media and Communications Authority by DLA Piper Hungary in 2011–2012.

The manner of the discussion of the subject here does not allow a separate examination of the right to reputation and the right to honour; the reason for this is that several legal systems regulate these two together and identically and so differentiating them is an issue that belongs more to jurisprudence than to the legal provisions themselves. (The purpose of this study is primarily to explore the solutions provided by codified law.) The law of defamation or law of libel is thus viewed in its totality.

Another important preliminary remark to be made is that we have tried to dwell as little as possible on the general aspects of the protection of honour and reputation, not because these topics are not worthy of consideration in themselves, but simply because this would have broadened the scope of the problem under examination to an unmanageable extent. As such, we shall only deal with general issues not related to the protection of the personality of public figures inasmuch as these are required for an understanding of our subject, or if such general provisions have a significant effect with regard to public figures.

The nature of the branch, area, and source of law regulating the protection of personality

Characteristically, several different branches and areas of the law play a role in the defence of honour and reputation. It is clearly common to all European legal systems that natural and, in parallel, legal personality enjoys the protection of both civil and criminal law. That is, in the member states of the European Union, it is characteristically the large general codes, the civil and the criminal codes, that contain the general rules on the protection of personality. In England and Ireland special laws on defamation (the Defamation Acts) deal with this issue, intentionally leaving the resolution of certain important problems to judicial legislation. In European states, therefore, the violation of reputation and/or honour exists generally as both a civil law and a criminal law delict, although the intensity of the application of these rules in practice may vary significantly.

The previous provisions on criminal libel have only been abolished or repealed in a few of the legal systems of the Member States. The English,[6] Irish,[7] Romanian, Estonian and Latvian regulations and the regulations of Cyprus are among these.[8] In Estonia the new Criminal Code of 2001 contained no general provisions on libel; however,

[6] From the second half of the twentieth century, criminal libel which may be traced back to 1275 (the '*scandalum magnatum*') and had often been used as an instrument to suppress freedom of speech existed in the legal system in name only and Article 79 of the Coroners and Justice Act of 2009 abolished even the theoretical possibility of its application (the law provides for the felonies of seditious libel, defamatory libel and obscene libel).

[7] Defamation Act of 2009 art 35 abolished the common law offences of defamatory libel, seditious libel and obscene libel.

[8] A White, 'Ethical Journalism and Human Rights' in *Human Rights and a Changing Media Landscape* (Council of Europe Publishing 2011) 57.

it did provide for special instances: the criminal offence of libel may still be committed against representatives of the state, protectors of law and order and courts and judges.[9] The amendment of the Latvian criminal code of 9 December 2009 abolished the offence of criminal libel; however, it should be noted that the act still provides for the criminal offence of 'bringing into disrepute', which consists of making injurious statements that are known by the imparter to be false.

At the same time, the provisions on the protection of reputation and honour may also appear within the regulations that are specific to the media. This may be realised in one of two ways: either the provision over and above the general protection of personality is present in a press law or similar that is applicable to all media, or it is only present with regard to certain media (eg audio-visual services) in a sectoral act of law regulating that given type of media. At the same time, it can be misleading that certain countries (France, for example) include criminal law regulations in their press laws; thus, in actual fact, the press law not only consists of independent 'sectoral' regulations, but also overlaps with the field of criminal law. Beyond this, there exist provisions directed at the protection of honour and reputation in the various self- and co-regulatory codes too.

Furthermore, it is also important to stress the actual or quasi-legislative role of the courts. Under the system of common law, due to the conscious retreat of legislative regulation (whereby the law only settles certain issues related to the protection of reputation), the courts may take on the role of *de facto* legislator (in England, and in Ireland, though to a lesser extent). At the same time, as we shall see, in most countries of the continental legal system there is no special legislation on the protection of the personality of public figures either, and so its outlines are also shaped by judicial practice. It should also be stressed that in Europe, in general, the application of the provisions on the protection of personality does not fall under the powers and responsibilities of the media authorities, as the individual legal systems usually leave this to the courts.

The following section reviews the regulations of those states where the issues of the protection of reputation and honour are (*inter alia*) provided for within the regulation of the media. The Austrian media act[10] provides for the sectoral rules for the protection of reputation and honour in general, with regard to all media. According to the act, in ongoing criminal proceedings the injured party may demand indemnification if the defendant is a media enterprise. If criminal proceedings have not been launched, the injured party may initiate this independently.[11] In addition to civil and criminal law, the act provides for a set of regulations governing the protection of certain inherent personal rights and remedies. Section 6 states that 'if an offence is committed in the media, such as defamation, libel, slander, insult or ridicule, the person affected is entitled to claim from the media owner indemnity for the injury suffered'.

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[9] Criminal Code of Estonia (6 June 2001) arts 275, 305.

[10] Mediengesetz (Media Act), Federal Act on the Press and other Publication Media 12 June 1981, (1981) 314 Federal Law Gazette.

[11] ibid art 8(a). See C Doley and A Mullis (eds), *Carter-Ruck on Libel and Privacy* (6th edn, LexisNexis 2010) 1090.

Similarly, the French press act[12] establishes general (criminal law type) rules for all media. According to Article 29 of the Press Act, defamation is defined as 'any allegation or imputation of a fact affecting the honour or reputation of a person'. It is considered to be a criminal offence committed by means of the press.

Luxembourg's free expression act[13] also prohibits defamation in all media. The prohibition of defamation and infringement of good reputation (*Chacun a droit au respect de son honneur et de sa réputation*) must at all times be complied with. When this obligation is not complied with, a judge can take all necessary measures to end such non-compliance, at the cost of the party responsible.

In Malta, the Press Act[14] makes it an offence, punishable by a fine, for anyone to libel any person by means of the publication or distribution in Malta of printed matter, from whatsoever place such matter may originate, or by means of any broadcast.

In Italy, under the Press Law, libel is punishable.[15] The criminal responsibility rests on the author of the article, and also on the editor if the latter failed to carry out the necessary checks to prevent the libel.[16]

Certain provisions of the Greek media regulations apply exclusively to audio-visual services; others to all media services (television and radio), while some of them are only applicable to public service media. Article 7 of Presidential Decree 109/2010 provides for the obligation of all programmes transmitted by the audio-visual media to respect personality, honour and reputation. The same provisions are included in Article 3 of law No 2328/1995 regarding the Greek National Council for Radio and Television, which expands these obligations, in relation to personal rights, to commercial communications broadcast by the radio and television stations. In addition, according to Article 3 of law 1730/1987, the programmes transmitted by the public broadcaster should respect, inter alia, the personality and privacy of people.

In Chapter 7 Article 4 Paragraph 14 of the Swedish Freedom of the Press Act,[17] there is a special provision which states that defamation is an offence against the freedom of the press, and as such is punishable.

Spanish media regulations only prescribe the respect of honour with regard to audio-visual services. Article 4.4 of the General Audiovisual Law[18] requires audio-visual communications to respect the honour of individuals.

The Slovakian media regulations also only provide for obligations additional to the general civil and public law rules with regard to the audio-visual media, and do not expressly cite the protection of reputation and honour. The protection of personal rights

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12 Press Act of 1881.
13 Act of 8 June 2004 on the Freedom of Expression in the Media, ch V art 16.
14 Act XL of 1974, art 11.
15 Law 8 February 1948, No 47 (Printed Press Law), art 13.
16 R Mastroianni and A Arena, *Media Law in Italy* (Kluwer 2011) 51–52.
17 Tryckfrihetsfördningen (Freedom of the Press Act), 2002:908.
18 General Audiovisual Law 7/2010.

is stipulated in Article 19 of the Act on Broadcasting and Retransmission: according to the provisions of this article, media services must not, through their processing and content, impact on human dignity and the basic rights and freedoms of others.

The Danish and the Irish legal systems are examples of the relegation of the protection of reputation and honour to the area of self- and co-regulation. The Danish Ethical Guidelines[19] contain the following clause:

> Safeguarding freedom of speech in Denmark is closely connected to the freedom of the mass media to collect information and news and to publish it as correctly as possible. Free comment is part of the exercise of the freedom of speech. In attending to these tasks, the mass media should recognise that the individual citizen is entitled to respect for his personal integrity … and the need for protection against unjustified violation thereof.

As these guidelines have a serious impact on the interpretation of Section 34 of the Media Liability Act, this provision might be deemed to have been violated if particular organs of the mass media do not respect the inherent rights. The Press Council[20] has the right to commence a case involving the violation of the ethics of journalism on its own volition if the Ethical Guidelines have obviously been violated.

In Ireland, the Code of Practice for the print press (supervised by the Press Council) also contains protection for individual rights in the Press Media. Principle 4 obliges member publications to respect certain personal rights, and notes that 'everyone has constitutional protection for his or her good name'. It then goes on to state that 'newspapers and periodicals shall not knowingly publish matter based on malicious misrepresentation or unfounded accusations, and must take reasonable care in checking facts before publication.'[21]

In summary, the regulation of the protection of reputation and honour may appear in the following branches and sources of law:

- civil law (civil code);
- criminal law (criminal code);
- media regulation (press or media acts);
- self-regulation or co-regulation (codes of conduct);
- judicial practice (in countries with common law systems by intentionally passing the role of lawmaker to the courts, elsewhere by providing the appropriate interpretation of the legal provisions).

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[19] A detailed set of ethical guidelines can be found in an annex to Reglerne for god presseskik (Media Liability Act) (No 85 of 9 February 1998).

[20] The Danish Press Council handles complaints from all media under the Media Liability Act. The Council can start a case of its own volition if the Ethical Guidelines have been violated.

[21] E Carolan and A O'Neill, *Media Law in Ireland* (Bloomsbury Professional 2010) 502–4.

The definition of public figures

I have found no example of the legal definition of the category of public figures in Europe. The absence of such a definition is not surprising, since the sphere of public figures is constantly changing in parallel with the changing world of the media and the public; accordingly, it is up to judicial practice to define this group of people, since judicial practice is able to adapt to this state of constant flux. Where the codified norm does apply taxonomy to define a given sphere of persons, the purpose of this is usually to provide additional protection. An example of this, albeit one independent of freedom of speech issues, is the definition of public officers, against whom violent conduct applied during the performance of their public functions is punishable more severely. As we shall see later on, somewhat surprisingly, we have even encountered in Europe a legal system that provides a stricter than general protection of the personality rights, including honour and reputation, of a certain circle of individuals.

German jurisprudence and legal literature differentiate between absolute public figures (*absolute Personen der Zeitgeschichte*) and relative public figures (*relative Personen der Zeitgeschichte*).[22] To allocate a person under these classifications it is necessary to conduct an individual assessment of the information interest of the public and the personal rights of the person depicted.

Absolute public figures are those who stand out from the masses due to their exceptional behaviour or particular roles. Irrespective of a particular event, those persons receive public attention. This category includes, inter alia, important politicians, high ranking representatives of the economy, members of reigning royalty, well-known actors, TV presenters, musicians, athletes and scientists. However, photographs of absolute public figures may only be published without their consent if such publication aids in the formation of opinions in regard to questions of general interest.

Relative public figures only become visible to the wider public for a certain period of time in connection with an event in contemporary history. The information of interest in this category is limited to the event which makes the person a public figure. This category includes, inter alia, criminals, if their offence is out of the ordinary and causes a general sensation, other participants in spectacular criminal proceedings, such as judges and lay judges, prosecutors and counsels for the defence, as well as witnesses and the victims of crimes. Furthermore, family members and partners of absolute public figures are relative public figures but may only be depicted in connection with the absolute public figure.

The Spanish CC has, on a subjective basis, made a triple classification of public figures: (i) in a strict sense, public figures are those people with a public job (eg public authorities or other people indirectly related to them); (ii) public figures are those individuals who are not connected to public institutions but who are well-known because

[22] H-P Götting, C Schertz, and W Seitz (eds), *Handbuch des Persönlichkeitsrechts* (CH Beck 2008) 225–34.

of their occupation; and (iii) celebrities, 'famous' people without any other feature or profession, at least known, than the fame or notoriety with which they are attributed, which usually arises from the public exhibition of their private lives.[23]

Lacking any statutory definition, the Hungarian CC had clearly defined the concept of 'public figure' in a restrictive manner in decision No 36/1994. (VI. 24.) AB, and only restricted the application of general defamation law with regard to the 'authorities' or 'official persons' and 'public figure politicians'.

While the extension of the group of public figures is a worldwide trend, the theoretical foundations of this—sometimes apparently boundless—expansion are yet to be clarified. As discussed above, the limited personality protection afforded to public figures is justified by the effectiveness of democratic order and by the need to conduct public debates. However, this argument is hardly applicable to certain new waves of expanding the group of public figures (eg to include 'celebrities'). It is not possible to determine, with absolute certainty, who has an impact on the development of public matters and to what extent. While persons who are unknown to the public but, in the background, make important decisions for society enjoy unlimited personality protection, other people who become known for a short period of time as celebrities and have no influence on public matters whatsoever qualify as public figures.

This imbalance may be eliminated if the legal focus—and the scope of limited protection—shifted from people to matters of public interest. The practice of the ECtHR clearly emphasises the definition of those situations where less than customary protection of personality is called for, rather than the public figure status of individuals. In other words, the fact of appearing publicly (in a public matter) is more important than the public figure (the person) him- or herself.[24] The scope of activities and information about public figures, persons exercising state powers, and persons carrying out public functions that may be disclosed to the public is of fundamental importance. The protection of the personality rights of such persons may be limited occasionally, even beyond the scope of carrying out their public functions and public appearances. For example, the family life of a Member of Parliament may be regarded as information of public interest if it may influence the decisions of voters.

The measure of the protection of public figures

There are hardly any European states where a codified rule (a legal act) provides for a decreased level of the protection of honour and reputation granted to public figures and the differentiated application of certain procedural rules in their case. In Hungary,

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[23] Constitutional Court judgments Nos 165/87, 107/88, 20/92, and 320/94.

[24] See *Bladet Tromsö and Stensaas v Norway* (App No 21980/93 judgment of 20 May 1999); *Nilsen and Johnsen v Norway* (App No 23118/93, judgment of 27 February 2001); *Thorgeirson v Iceland* (Case No 47/1991/299/370, judgment of 28 May 1992); see also Barendt (n 3) 222–25.

however, the CC (decision No 36/1994. (VI. 24.) AB) established the constitutional framework of the application of the criminal law provisions on the protection of personality almost as if the intention were to lay down a general norm.

According to the Finnish Criminal Code,[25] criticism that is 'directed at a person's activities in politics, business, public office, public position, science, art or in comparable public activity and that does not obviously overstep the limits of propriety' does not constitute criminal defamation.

There is no clear-cut rule as to what is considered to obviously overstep the limits of propriety. Instead, this is assessed by the court on a case by case basis. The criticism can be sharp and pejorative but, in order to be acceptable, it must limit itself to the public activities of the person and not relate to their personality.

In Poland, pursuant to Article 213 Section 2 of the Criminal Code,[26] whoever raises or publicises a true allegation regarding the actions of an individual holding a public function or in defence of a justifiable public interest shall be deemed not to have committed an offence. Therefore, if the allegation is true but none of the other conditions apply, the statement may constitute an offence. (This rule applies as truth on its own is not a defence against criminal libel; the defendant also has to prove that the publication served the public interest.)

In Luxembourg, similar rules apply to criminal libel cases. With regard to libel, defamation and infringement of good reputation against persons of public life, Article 447 of the Criminal Code[27] provides for specific rules. The suspect accused of such an offence 'for allegations based on facts relating to their functions, either against persons in authority or any public person, or against a legal person' has, at all times, the right to prove the alleged facts. These rules apply, for example, to members of parliament.[28]

In Denmark, the Criminal Code contains a special defence which can be applied in cases concerning public or political debates. Section 269 of the Criminal Code provides for the 'lawful protection of obvious public interests', and therefore open public debate, when a publication breaches one's right to reputation or honour.[29]

Despite the fact that the principle of the reduced protection of the honour and reputation of public figures is generally prevalent in European legal systems, some states define certain special legal cases whereby—contrary to the general European approach—the personality rights of certain public figures of prominent importance are granted additional protection. In practice these rules are not applied or are applied only very rarely, and their compatibility with the judicial practice of the ECtHR is, at best, doubtful.

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25 Finnish Criminal Code (39/1889) ch 24 s 9.
26 Criminal Code of 6 June 1997, (1997) Journal of Laws No 88, item 553.
27 Luxembourg Criminal Code (Loi du 16 juin 1879).
28 Cour 30 janvier 1904, Cass 25 mars 1904, P 8, 395.
29 S Sandfeld Jakobsen and S Schaumburg-Müller, *Media Law in Denmark* (Kluwer 2011) 64.

Despite the fact that the position of the Bulgarian CC favoured the broad protection of opinions voiced about politicians, government officials and the government,[30] the amendment of the Criminal Code in 2000 provides for stricter penalties in the event of slander against official persons or the members of popular representative bodies.[31]

The Estonian Criminal Code does not prohibit libel in general; however, it does constitute an offence if it is against representatives of the state, defenders of law and order and the judges; ie in their case, the law provides for a higher level of protection than it does for private individuals.[32]

In Malta, under the Press Act[33] it is an offence for anyone, by means of the publication or distribution in Malta of printed matter, to 'impute ulterior motives to the acts of the President of Malta', or to 'insult, revile or bring into hatred or contempt or excite disaffection against, the person of the President of Malta', and any such person shall be liable on conviction to imprisonment for a maximum term of 3 months and to a fine.

The German Criminal Code[34] contains a very widely applicable differentiation between public figures and private persons. According to Section 188 StGB, if the defamation or intentional defamation is directed against a person standing in political life, stricter sanctions may apply.

> If an offence of defamation (section 186) is committed publicly, in a meeting or through the dissemination of written materials … against a person involved in popular political life based on the position of that person in public life, and if the offence may make his public activities substantially more difficult, the penalty shall be imprisonment from three months to five years. … An intentional defamation (section 187) under the same conditions shall entail imprisonment from six months to five years.

The defamation of other persons in public life is not covered by this increase in the penalty.

Section 115 of the Danish Criminal Code prescribes that the maximum penalty be doubled if the defamed person is the king, or the head of the Danish government. According to the literature, this section has never been applied in practice.[35]

In summary, it may be said that the various legal systems typically leave the task of deciding the most important issues concerning the protection of the reputation and honour of public figures to the courts to a much larger extent than is customary for the tasks and responsibilities assigned to the judiciary. The handful of relevant legal provisions—coupled with the (also rare) provisions for the protection of personality that deviate from, and are stricter than, the main rule—are exceptions. Also typical is that, even within the given legal system, these are not meant to provide general solutions and are only relevant to the limited application of criminal law.

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30 Judgment No 7 of 1996 of the Constitutional Court.
31 Criminal Code, s 148 para 1(3), see Doley and Mullis (n 11) 1118.
32 Criminal Code (6 June 2001), arts 275, 305.
33 ch 248 of the Laws of Malta, II s 5(1).
34 Strafgesetzbuch (StGB) (Criminal Code) 15 May 1871.
35 Sandfeld Jakobsen and Schaumburg-Müller (n 29) 66.

The distinction between statements of fact and statements of opinion

The distinction between statements of fact (or allegations) and statements of opinion is one of the most important issues related to the protection of reputation and honour. Usually, however, the provisions of codified law do not deal with this issue but leave it to the courts to consider the content of statements found to be injurious. It makes a major difference to the judgment of the infringement whether the court qualifies a piece of content as fact or opinion. Statements of fact may be subjected to demonstration, ie both the communicator and the injured party are granted the opportunity to prove or refute their veracity. As such, exemption from legal liability in cases involving the publication of assertions that cannot be proven to be true is only possible in exceptional cases. At the same time, opinions cannot be subjected to demonstration; the most that can be examined is whether they have any factual basis or not. Moreover, with regard to certain opinions, even this factual basis cannot be subjected to examination (eg if a politician is called a Nazi then it is possible to examine whether any parallels exist between the politician's activities and Nazi politics, but if the opening performance of a play is deemed to be terrible then—due to the very nature of this opinion—no such factual basis may be sought). In such cases, as well as when the opinion is based on factual grounds, criticism is granted broader protection than false statements of fact, since its publication is accompanied by a significant interest of society. At the same time, extremist and abusive opinions may not meet this condition. These general principles, however, rarely appear in codified legal provisions. The libel laws of the various European countries typically forbid libel and defamation in general but it is usually clear which of the possible grounds for exemption are applicable to statements of fact and which apply to statements of opinion.[36]

With regard to libel and defamation, the above-mentioned decision No 36/1994. (VI. 24.) of the Hungarian CC makes a clear distinction between facts and opinions. Applying a solution that is somewhat uncommon in Europe, it grants full immunity to opinions in cases concerning public figures and provides for the punishment of false statements of fact in certain cases only. However, this clear distinction is not present in the text of the Criminal Code itself.

In the English law of libel, opinions enjoy statutory protection (on the basis of 'honest opinion' defence) if they have a factual basis and are not expressed in bad faith.[37] According to the new law, protected opinions cannot only be expressed on matters of public interest; the defence is available in respect of any opinion on any matter—which is a step away from the previous common law approach. Nevertheless, protected opinions should have sufficient factual basis, ie the defendant should prove that these facts were true at the time of publication, and the publication itself should refer to these facts.[38]

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[36] eg the English protection of 'honest opinion' obviously extends over opinions, while the protection of the 'truth' concerns statements of fact.

[37] Defamation Act 2013, s 3.

[38] J Price and F McMahon (eds), *Blackstone's Guide to the Defamation Act 2013* (OUP 2013) 56–57.

The facts can be 'any fact which existed at the time of the statement complained of', or 'anything asserted to be a fact in a privileged statement published before the statement complained of' and it is further necessary that 'an honest person could have held the opinion'.[39] Abusive opinions that do not have any factual basis and transgress the limits of admissible criticism do not enjoy protection as they do not have a factual basis. Defining the limits of admissible criticism is not easy. For example, an actor prevailed in a libel action against a critic who wrote that he was 'hideously ugly'.[40] The English law of libel does not, then, separate the protection of honour and the protection of reputation.[41] Libel is possible even if the statement cannot be proven (eg saying that someone is ugly, which is a subjective value judgment).

Causes of exemption from liability

The various legal systems in Europe provide for the grounds for exemption from liability in cases of communications injurious to honour or reputation; legal liability for injurious communications is therefore not objective and not unlimited. The causes of exemption are not codified in all states; where no legal provisions define these causes they are shaped and defined by judicial practice. In the following review we shall not discuss these, and will limit ourselves to causes of exemption as defined by statutory law with the exception of the English common law system (where the law—in fact, several legal acts—also provides for defamation, but this does not cover the entirety of the field of libel law).

A general cause for exemption is if the content of the communication is proven to be true, ie if the communicator is able to demonstrate, before a court of law, the truth of the statements made (see eg England,[42] Austria,[43] Cyprus,[44] Luxembourg,[45] Sweden,[46] France[47]). At the same time, under some of the legal systems, proof is only admitted in criminal procedures if the publication served a valid public interest (eg an expression related to a public issue), or, perhaps, an appreciable private interest. In the absence of such an interest, even statements of fact that are demonstrably true may qualify as libellous (and according the procedural rules, the demonstration of their truth is not admitted).[48]

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[39] Defamation Act 2013, s 3.4.

[40] *Berkoff v Burchill* [1997] EMLR 139, CA.

[41] Barendt (n 3) 228.

[42] Defamation Act 2013, s 2.

[43] Media Act, s 6.2.2(a).

[44] Civil Wrongs Act, ch 148 s 19.

[45] Luxembourg Criminal Code (Loi du 16 juin 1879), art 443; Act of 8 June 2004 on the Freedom of Expression in the Media, ch V art 17.

[46] Freedom of the Press Act, ch 7 art 14 para 14.

[47] Press Act of 1881, arts 35, 55–56.

[48] See eg Hungary 1998. évi XIX. törvény a büntetőeljárásról (Act XIX of 1998 on Criminal Procedure); Danish Criminal Code, s 270; in Sweden, Freedom of the Press Act, ch 7 art 14 para 14.

An extenuating circumstance may be if the libelled party had previously consented to publication[49] or if the party against whom the lawsuit was initiated had only indirectly contributed to the injury (ie was an 'innocent' party to it), thus releasing newsagents, postmen and printers from liability for any libellous statements published in a press product.[50]

It is important to note that—presumably not independently from the ever-growing case law of the ECtHR—some of the legal systems that had previously applied extremely strict rules and only provided exemption from legal liability in very few cases when the published statements were not proven (ie were false) now exempt the party making the defamatory statements, even if such statements are factually false, but were made in good faith and concern public affairs. That is, in certain clearly defined cases, even false statements may be granted protection; in the majority of cases the considerations to be taken into account are shaped by case law, although under certain legal systems they have already become part of codified law.

The generally prevalent rule is that fair criticism (ie criticism based on facts, or value judgments that require no proof as they have no factual basis), however injurious or damaging it may be, cannot be considered to be defamatory if its publication was necessitated by the public interest.[51] In such cases setting the limitations is also left to judicial practice in most legal systems. A basis for exemption, recognised by several legal systems, is if the given medium does not itself make the slanderous statement, but merely reports on the slanderous opinion of someone else, ie it only passes (reports) on that opinion. We shall examine this exception in more detail later on.

Special circumstances

Some legal systems provide for certain special circumstances, under which exemption from liability is even granted in the event of the publication of slanderous statements. Under English law, absolute privilege protects certain statements made under special circumstances and provides the publisher with full immunity from legal liability (such statements include those made in Parliament, during court proceedings or government work, as well as the re-publication of such).[52]

Danish judicial practice accepts the right of lawyers to make defamatory remarks when defending their clients in the courtroom or during a legal procedure.[53] The Danish Criminal Code contains a unique exemption from liability: Section 272 provides that if the offensive (defamatory or abusive) remarks are retaliatory (ie the person who made the remarks was reacting to a previously made, similarly offensive remark made against him or her) they may not be sanctioned.[54]

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[49] English common law and Irish Defamation Act 2009, s 25.

[50] England's Defamation Act 1996, s 1; Irish Defamation Act 2009, s 27.

[51] English Defamation Act 2013, s 4 'publication on matter of public interest', 'honest opinion'; in Ireland's Defamation Act 2009, s 20; Civil Wrongs Act of Cyprus, s 19.

[52] Bill of Rights 1688, art 9, Defamation Act 1996, s 14. See similarly Ireland's Defamation Act 2009, s 17.

[53] Sandfeld Jakobsen and Schaumburg-Müller (n 29) 64.

[54] ibid 65–66.

In Austria, there is a defence for the broadcaster if the defamatory remarks were made during a live broadcast and employees or agents of the broadcaster were not guilty of neglecting the journalistic diligence required.[55]

Public interest and good faith

As has been noted, under certain legal systems statements concerning public affairs may enjoy protection, even if they are proven to be false, if they were made in good faith. Under English law, if certain conditions are met, qualified privilege provides exemption from liability (the basis of such exemption is always the interest of the community and the good of society).[56] The scope of statutory qualified privilege was substantially expanded by the application of the *Reynolds* defence.[57] According to this judgment, the protection of freedom of speech must be expanded, subject to certain conditions, to those events where the disclosing party publishes false allegations in matters of public interest. However, this cannot mean full protection independent from the circumstances of the given disclosure.

The first major milestone of the 'liberation' of public debate was the *Derbyshire County Council v Times Newspapers* case.[58] In this decision, the House of Lords ruled that government and local government bodies may not sue for defamation. Since the *Goldsmith v Bhoyrul* decision[59] extended the principle, political parties may not pursue defamation claims either. However significant these decisions may have been, they did not resolve the issue of whether the protection of the reputation of individual officials may also be limited with regard to public debates.[60]

The answer to this question was given in the *Reynolds v Times Newspapers* case[61] closed in 2001, a case that was definitely a milestone in the development of common law. The suit for libel was launched in regard to an article published in the *Sunday Times*. This article stated that the recently resigned Irish PM, Albert Reynolds, had withheld certain information related to the appointment of the president of the High Court (Ireland's supreme judicial forum), thereby misleading the Irish Parliament as well as his own coalition partners. An important circumstance in the case was that while the Irish papers had published the ex-PM's refutation of the allegations, the *Sunday Times* had not.

Since the paper was not able to prove the veracity of the statements and could not rely on any (at any rate extremely narrow) privileges exculpating it from liability (qualified or absolute privilege), it was clear that it was going to lose the lawsuit. Indeed, it did; however, the decision passed by the House of Lords significantly amended the rules that had previously been in effect.

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55 Media Act s 6 para (2) item 3.
56 Defamation Act 1996, s 15 and Schedule 1.
57 *Reynolds v Times Newspapers* [2001] 2 AC 127.
58 [1993] AC 534.
59 [1997] 4 All ER 268.
60 E Barendt, 'Libel and Freedom of Speech in English law' [1993] *Public Law* 453−56.
61 [2001] 2 AC 127.

The decision signed by Lord Nicholls emphasised the importance of open and free public debate. The *Reynolds* decision extended this protection in general over all cases when the imparter (usually the press) publishes statements that are of interest to the public. This does not entail full protection, irrespective of the circumstances under which the statement is made (the decision thus rejects the introduction of a *New York Times v Sullivan*-type solution granting full immunity), as that would render the protection of reputation impossible. The amendment maintains the previous requirement for balance, but fine-tunes the balance of power and grants greater room for free speech.

The judgment extended the sphere of application of the qualified privilege to include press reporting on events of public life, since such reporting is the (moral) duty of the press, and society has a vested interest in access to such information. To facilitate the performance of this duty, the press has to be granted immunity under certain conditions, even if the information published is incorrect or inaccurate.

In order to avoid leaving it to the discretion of the individual judges when such extended immunity is applicable, Lord Nicholls compiled a list of ten 'guiding principles', with the intention of ensuring the homogeneity of judicial work.

> Depending on the circumstances, the matters to be taken into account [when deciding about the application of the qualified privilege] include the following. The comments are illustrative only. 1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. 2. The nature of the information, and the extent to which the subject matter is a matter of public concern. 3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. 4. The steps taken to verify the information. 5. The status of the information. The allegation may have already been the subject of an investigation which commands respect. 6. The urgency of the matter. News is often a perishable commodity. 7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary. 8. Whether the article contained the gist of the plaintiff's side of the story. 9. The tone of the article. A newspaper can raise queries or call for an investigation. It ought not to adopt allegations as statements of fact. 10. The circumstances of the publication, including the timing.
> This list is not exhaustive. The weight to be given to these and any other relevant factors will vary from case to case.[62]

At any rate, these criteria jointly defined the standard of 'responsible journalism'. Since the *Sunday Times* did not meet this standard, *Reynolds* prevailed in the suit.[63]

The House of Lords confirmed in its later decisions that the qualified privilege is only applicable when the published statement does, indeed, serve the public interest. In the *Jameel* case[64] the House of Lords took the position that the publication of the disputed statement as a whole should serve the public interest and the publication should be 'responsible and fair'.[65]

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[62] *Reynolds v Times Newspapers* [2001] 2 AC 127, 205.
[63] Barendt (n 3) 219.
[64] *Jameel v The Wall Street Journal Europe* (No 2) [2006] UKHL 44, [2007] 1 AC 359.
[65] ibid [53].

The third in the line of defamation cases decided by the then highest judicial forum (since superseded by the Supreme Court) with the application of the extended qualified privilege was *Flood v Times Newspapers*.[66] In that decision the Lords reinforced the test of the *Jameel* decision, based on the *Reynolds* defence: the publication of a protected statement should be in the public interest and the press should act responsibly, considering the relevant circumstances set out in the *Reynolds* decision.[67]

The Defamation Act 2013 brought about some important changes in this field. The Act—similarly to *Flood*—guarantees a statutory defence for allegations published on a matter of public interest.[68] The precondition of this exemption is that their publication must be made on a matter of public interest, and also that the disclosing party must reasonably believe that publication is in the public interest. Originally, the bill (draft law) was intended to enact certain points of the *Reynolds* judgment almost word-for-word but, in the end, the final text only stipulated that in examining the defence to an action for defamation 'the court must have regard to all the circumstances of the case.'

Though 'responsible journalism' is not mentioned in the text of the Act, the courts will probably continue to investigate these kinds of cases by applying the circumstantial criteria of the *Reynolds* judgment, since that ruling applied great effort and circumspection to enumerate the scope of circumstances that are relevant and hence can be examined.[69] This is expected to happen, even though the Defamation Act 2013 (Section 4 Paragraph 6) abolished the *Reynolds* defence (being a common law excuse from liability) with due consideration of the new statutory defence. At the same time, the criteria specified therein can also be taken into account when a judge is making a reasoned judgment while applying the statutory provisions.

The defence of honest opinion is also considered to serve the public interest, though without explicitly referring to matters of public interest.[70] This protects the freedom of opinion, but only if the opinion has a factual basis and the party making the statement is acting in good faith.

Ireland's Defamation Act[71] is rather similar to the laws of England; it is the codification of the previous common law judicial practice. Accordingly, the instances of exemption are also very similar (truth, absolute privilege, qualified privilege, honest opinion, consent, innocent publication). Exemption on the basis of 'fair and reasonable publication' is most often applicable in cases of defamation against public figures; this rule has incorporated most elements of the English *Reynolds* decision and has elevated them to the status of an act of law. The *Reynolds* rule, then, is in a certain sense also present in the Irish legal system.[72]

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66 [2012] UKSC.

67 The tests in the three decisions differ in many details, so 'the position in the UK can hardly be said to be clear.' See J Campbell, 'The Law of Defamation in Flux: Fault and the Contemporary Commonwealth Accommodation of the Right to Reputation with the Right of Free Expression' in this volume.

68 Defamation Act 2013, s 4.

69 Price and McMahon (n 38) 74−76, 79.

70 Defamation Act 2013, s 3.

71 Defamation Act 2009.

72 Carolan and O'Neill (n 21) 165–81.

Irish Defamation Act 2009, Section 26.

(1) It shall be a defence (to be known, and in this section referred to, as the 'defence of fair and reasonable publication') to a defamation action for the defendant to prove that—
  (*a*) the statement in respect of which the action was brought was published—
    (i) in good faith, and
    (ii) in the course of, or for the purpose of, the discussion of a subject of public interest, the discussion of which was for the public benefit,
  (*b*) in all of the circumstances of the case, the manner and extent of publication of the statement did not exceed that which was reasonably sufficient, and
  (*c*) in all of the circumstances of the case, it was fair and reasonable to publish the statement.

(2) For the purposes of this section, the court shall, in determining whether it was fair and reasonable to publish the statement concerned, take into account such matters as the court considers relevant including any or all of the following:
  (*a*) the extent to which the statement concerned refers to the performance by the person of his or her public functions;
  (*b*) the seriousness of any allegations made in the statement;
  (*c*) the context and content (including the language used) of the statement;
  (*d*) the extent to which the statement drew a distinction between suspicions, allegations and facts;
  (*e*) the extent to which there were exceptional circumstances that necessitated the publication of the statement on the date of publication;
  (*f*) in the case of a statement published in a periodical by a person who, at the time of publication, was a member of the Press Council, the extent to which the person adhered to the code of standards of the Press Council and abided by determinations of the Press Ombudsman and determinations of the Press Council;
  (*g*) in the case of a statement published in a periodical by a person who, at the time of publication, was not a member of the Press Council, the extent to which the publisher of the periodical adhered to standards equivalent to the standards specified in *paragraph (f)*;
  (*h*) the extent to which the plaintiff's version of events was represented in the publication concerned and given the same or similar prominence as was given to the statement concerned;
  (*i*) if the plaintiff's version of events was not so represented, the extent to which a reasonable attempt was made by the publisher to obtain and publish a response from that person; and
  (*j*) the attempts made, and the means used, by the defendant to verify the assertions and allegations concerning the plaintiff in the statement.

Examples of the protection of false (unproven) statements made in good faith regarding public affairs may be found in other states, too.

In Denmark, Section 269 of the Criminal Code provides that there is no liability 'if the issuer of the allegation in good faith has been under an obligation to speak or has acted in lawful protection of obvious public interest or of the personal interest of himself or others;' this exemption only applies to false and defamatory statements, and not to abusive remarks.[73] As such, good faith and public or private interest are both needed for this exemption from legal liability to be applied. Apart from the exemption set out in Section 269(1), the Criminal Code, in Section 269(2), provides an opportunity for the courts to reprieve the defendant from punishment 'where evidence is produced which justifies the grounds for regarding the allegations as true.' It means that, even when the

[73] Sandfeld Jakobsen and Schaumburg-Müller (n 29) 61.

allegations are not true and there was no public/private interest in publishing them, the person who made the allegations may have the sentence remitted if he or she had serious reasons to believe that the allegations were true (and thus acted in good faith).[74]

In Austria, under the media legislation, no claims may be raised by the injured party if the public had a predominant interest in the publication or when in the application of the journalistic diligence required there was sufficient reason to accept the statement as true.[75]

In Poland, under Article 12 of the Press Act,[76] journalists are excused from liability, even in the event of untrue publications, provided they acted fairly and with due care.

In Luxembourg, when a publication to the public entails the defamation of a person, the person responsible for that publication cannot be held liable if the responsible party proves that it has sufficient reasons for concluding that the facts were accurate and when it is justified by the right of the public to have knowledge of such facts.[77] The demonstration of the truth in criminal procedures is only possible in certain instances permitted by the law, such as the publication of injurious statements about the representatives of the authorities or other persons in public service.[78]

The Portuguese Criminal Code also exempts from liability imparters of false statements who acted in good faith and had compelling reason to believe the statements to be true.[79] In Italy, too, the media are exempted from criminal liability if they exercised their right to provide information or formulate dissenting opinions.[80] Italian judicial practice has extended this rule to procedures related to the protection of personality rights, providing that anyone (ie not only journalists proper) publishing statements in the media may plead this.[81] In Estonia the public interest served by the publication may be grounds for exemption from civil law liability.[82]

Finally, in Sweden, media outlets are exempt from legal liability in cases in which—in the circumstances—it is justifiable to communicate information in the press, and 'if proof is presented that the information was correct or there were reasonable grounds for the assertion.'[83]

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[74] ibid 61–62.

[75] Mediengesetz (Media Act, Federal Act on the Press and other Publication Media 12 June 1981, (1981) 314 Federal Law Gazette) s 6 para (2) item 2(b).

[76] Press Act of 26 January 1984.

[77] Loi du 8 juin 2004 sur la liberté d'expression dans les medias (Act of 8 June 2004 on the Freedom of Expression in Media), s 17 para (1) item (b); Criminal Code, art 443.

[78] Criminal Code, art 445, s 2. See Doley and Mullis (n 11) 1266.

[79] Criminal Code, art 180, No 2. See Doley and Mullis (n 11) 1299.

[80] Criminal Code, art 51. See Doley and Mullis (n 11) 1239.

[81] ibid 1241.

[82] Law of Obligations Act, ss 1046(1), (2); see Doley and Mullis (n 11) 1187.

[83] Freedom of the Press Act, ch 7 art 4 para 14.

Dissemination (reportage)

In cases where information received from others is passed on or slanderous statements made by others are reported on (dissemination), certain legal systems grant exemption to the imparter (usually the media) of such statements. At the same time, a large proportion of such rules belong to the domain of case law and are rarely part of the statutory sources of law.[84]

The English and Irish rule of *absolute privilege* described in the previous section may be regarded as similar; according to this, the media's reporting on defamatory statements made under certain special circumstances (during court proceedings, in Parliament, etc) is granted exemption from legal liability. Section 4 Paragraph 3 of the new English Defamation Act 2013 protects the reportage of the press. In some cases the press can omit the duty to take steps to verify the truth of the published statement. This can happen 'if the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the claimant was a party', and 'publishing the statement was in the public interest.'

In Austria a similar absolute privilege exists: in the event of a true report on a hearing in a public session of the National Council, the Federal Council, the Federal Assembly, a State Parliament or any committee of the above general bodies of representation, no claims can be raised.[85] Apart from this rule, a much wider—general—defence exists in the media law for defamatory allegations originally made by third parties: if it is a case of an accurate quotation of the statement of a third party and the public had a predominant interest in obtaining knowledge of the statement quoted, then no claims may be raised by the defamed person.[86] The wide protection that Austrian statutory criminal law provides for defamatory statements is unique in Europe.

In Luxembourg, the defendant cannot be held liable if the defamatory publication concerns a communication previously made to the public, on the condition that all measures are taken to avoid such defamation and provided that the identity of the person responsible for the communication concerned is mentioned. There is also no legal liability when the publication concerns the correct reproduction of a quote by a third party, on the condition that it is clearly indicated as such, the identity of the author of the publication is mentioned, and the publication of the quote is justified by the right of the public to have knowledge of it.[87]

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[84] For example, in Denmark (see Sandfeld Jakobsen and Schaumburg-Müller (n 29) 65) and in Hungary in certain cases judicial practice grants exemption to slanderous statements without relying on codified law. On the basis of Hungarian case law the media's presentation of information published by the Parliament, local governments, national and local public administration bodies, the courts and the public prosecutor's office cannot serve as the basis for defamation cases (see Supreme Court Decisions Nos EBH2001. 407., BH2002. 51., BH2003. 357., and EBH2005. 1289.). In the present section, however, we shall mainly deal with the provisions of codified law.

[85] Media Act s 6, para (2) item 1.

[86] ibid item 4.

[87] Act of 8 June 2004, s 17 para 2; Loi du 16 juin 1879 (Luxembourg Criminal Code), art 443.

Conclusions

This comparative review yields certain general conclusions on the nature and application of the provisions on the protection of the reputation and honour of public figures in Europe (or, more specifically, in the Member States of the European Union that form the primary subject of our investigations).

A) In the legal systems of the various states, the provisions on the protection of reputation and honour are dispersed and appear in several different places; as such, the parties suffering the infringement may initiate several different proceedings in parallel with each other. Criminal law prohibits the violation of reputation and honour in almost all European states, usually threatening the offenders with fines and imprisonment.

B) The role of judicial practice is definitive with regard to the issues of the protection of the reputation and honour of public figures, irrespective of the branch of law applied. This is equally true with regard to the definition of the scope of persons concerned and the standards applicable to them.

C) The scope of public figures is not precisely defined; rather, it is constantly changing and growing; furthermore, the protection extended to such people may also be differentiated depending on their personal status.

D) Very few states provide for stricter standards applicable to the protection of the reputation and honour of public figures in legal acts; such provisions only appear in the criminal codes (one exception is the new Hungarian Civil Code). The provisions also leave much to the interpretation and application of the law by the courts.

E) A slightly surprising finding of the research is that, in certain states, there still exist rules that provide for stronger than standard protection of the personality rights (and, consequently, the honour and reputation) of public figures. According to the legal literature, these provisions are not applied in practice; however, their very existence is hardly compatible with the practice of the ECtHR.

F) The distinction between and the differentiated legal treatment of facts and opinions is one of the fundamental issues regarding the protection of reputation and honour. In the various states this differentiation is also left to judicial practice.

G) In instances of conduct that constitute a violation of reputation and honour, the possibility of exemption from legal liability is always given. That is, liability is not objective; sometimes the grounds for exemption are provided for by law, but much more often they are shaped by judicial practice.

H) The examination of the public interest involved (and, in several countries, the issue of good faith) is of paramount importance in the proceedings related to public figures. If a publication is deemed to be of public interest because it serves the interests of democratic publicity then even the publishers of false statements of fact may be exempted from liability.

The protection of the reputation and honour of public figures in the Hungarian legal system

The foundations of the legal protection of honour and reputation

On the basis of Article VI of the Fundamental Law of Hungary, '(1) [e]very person shall have the right to the protection of his or her … good reputation.' Good reputation and honour are personality rights that are separable from each other but are closely interconnected.

In civil law, the violation of reputation means the making or dissemination of an injurious, untrue statement of fact pertaining to another person, or a true fact with an untrue implication pertaining to another person. Violation of honour means the expression of an opinion that is capable of negatively affecting society's judgment of that person and that is formulated in an unduly offensive manner (Act V of 2013 On the Civil Code, Article 2:45).

In criminal law, Article 226 of Act C of 2012 (the Criminal Code) provides that publication (statement, dissemination) of any fact capable of causing harm to honour may result in liability for the crime of libel, while Article 227 prohibits the use of expressions capable of harming the honour of others. Libel may only be committed by stating facts, while honour may only be harmed by expressing opinions. (It should be noted, that – naturally – the previous Civil Code, in force between 1959 and 2014, and the Criminal Code, in effect between 1978 and 2013, also provided protection for reputation and honour.)

The 2013 amendment of the Criminal Code extended the definition of defamation with two new delicts, prohibiting the 'creation of sound or video recordings capable of causing injury to honour' or the 'publication' of such. The reason for the amendment was the 'Baja video scandal,' when a faked video recording had been created in the run up to the local government by-elections in an attempt to discredit the majority ruling party: this recording was published by a major news portal, which accepted the presentation of bribery in the video as true. The new provisions only sanction deliberate acts (both in respect of the creation and the publication of the recording), ie causing injury to the honour of others with malice aforethought. The criticisms directed at the amendment do have a valid point, in that the previous general definition of defamation and protection of honour had also provided for sanctioning such actions;[88] however, the ethical and diligent conduct of the media will not be sanctionable even under the new rules (the

[88] P Nádori, 'Hogyan védheti meg az újságírókat a Lex Gavra?' (*Sajtó Törvény,* 29 October 2013) <http://sajtotorveny.wordpress.com/2013/10/29/hogyan-vedheti-meg-az-ujsagirokat-a-lex-gavra/>; G Polyák, 'Három csapás a videobűnözőkre' (*HVG,* 29 October 2013) <http://mertek.hvg.hu/2013/10/29/harom-csapas-a-videobunozokre/>; T Sepsi, 'A Fidesz a bizonyítékhamisítók mellett a tényfeltárókra is lesújt' (*Átlátszó*, 29 October 2013) <http://atlatszo.hu/2013/10/29/a-fidesz-a-bizonyitekhamisitok-mellett-a-tenyfeltarokra-is-lesujt/>.

sanctionability of negligence, as provided for in the original draft, does not appear in the final text of the act as accepted by Parliament; ie the criminal offence is contingent upon the media's deliberate malice).

The rules briefly reviewed above do not contain any specific provisions on public figures or the discussion of public issues. Similarly to the freedom of speech, the right to honour and good reputation also enjoys constitutional protection, and for a long time the level of protection was not differentiated and reduced in respect of certain subjects depending on the type of statements offensive to reputation. After 1989 – the political regime change – the notion gradually gained ground that certain statements relating to public debates that violate the reputation or honour of public figures should rightfully be afforded special protection.

The measures applied by the Constitutional Court in respect of the protection of the reputation and honour of public figures (1991−2004)

The CC decision No 48/1991. (IX. 26.) was the first CC treatment of the protection of the reputation and honour of public figures. This decision was passed within the framework of the CC's competence for constitutional interpretation, rather than as part of a norm control process, and it examined, specifically, the constitutional issues related to the legal status of the President of the Republic. Article 31/A (1) of the previous Constitution provided that 'The person of the President of the Republic is inviolable; a separate legal act provides him with criminal law protection.' The CC also examined the implications of this text in respect of the protection of reputation and honour. According to the decision:

> Para (1) of Article 31 of the Constitution offers no guidance as to the scope of the criminal law protection provided for in the text. It belongs under the discretion of the legislator to decide whether to extend the scope of this special criminal law protection over the life, the physical integrity, the honour or the reputation of the president. It also belongs under the discretion of the legislator to decide upon the nature of this protection; eg the severity or lightness of the punishment or ex officio prosecution of cases that would otherwise belong under private prosecution, etc. . .
> When providing for the specific rules of the protection of honour, the legislator may equally decide to apply stricter sanctions or to give greater priority to the freedom of criticism of the official activities of persons holding public office or public functions. If the legislator were to provide increased protection for the honour and dignity of the President, the Constitutional Court points out that this may not result in a limitation of the substance of the right of freedom of expression (para (1), Article 61). The exercise of the right of freedom of expression, which is indispensable in a democratic society, may only be limited within the boundaries of the constitution.[89]

[89] Constitutional Court decision 48/1991. (IX. 26.) Statement of Reasons, s C.II.4.

On the basis of this decision the extent of the protection of the honour and reputation of the President of the Republic may even be broader than that provided for by the general rules for the protection of these rights that apply to private persons. Such protection, however, may not limit the 'substance' of the freedom of opinion.

A major shift from the previous decision was CC decision 36/1994. (VI. 24.), which provided for the theoretical foundations of the issue much more specifically. The decision was based on a motion challenging the constitutionality of the crime of 'defamation of authorities or official persons', a crime specified in the proposed Article 232 of the Criminal Code. The new delict defined by Parliament—which did not enter into force, as the President of the Republic refused to sign the proposed law, which was then struck down by the CC—threatened those persons who use expressions capable of harming the honour of authorities with more severe punishment than that dispensed for the crime of defamation committed against other private persons. The provision offered an excellent opportunity for the CC to clarify its theoretical position on the essence of the freedom of speech, while ruling on the subject matter at hand.

The provision was found unconstitutional and was struck down because—relying on a previous decision, No 30/1992. (V. 26.), of fundamental importance in respect of the freedom of speech—the CC again established that the freedom of expression and the freedom of the press are prerequisites for the existence and development of a democratic society, and therefore constitute fundamental rights of utmost importance (decision No 36/1994. (VI. 24.) Statement of Reasons, s II/1). In upholding this right, further protection is extended, as:

> the possibility of publicly criticising the activity of bodies and persons fulfilling state and local government tasks, furthermore, the fact that citizens may participate in political and social processes without uncertainty, compromise and fear, is an outstanding constitutional interest.[90]

As such, while the constitutionality of protecting the honour and reputation of the above-mentioned persons by means of criminal law may not be excluded, freedom of speech may be limited to a lesser extent—in comparison to private persons—in order to protect persons exercising state powers.

According to the position of the CC, the rule providing extended protection to the rights of authorities or official persons was unconstitutional, because:

– it aimed to punish libel (defamation) if the victim is acting in a public authority capacity with the same scope as with regard to other victimised persons, which is clearly contrary to the principles represented in the established practice of the ECtHR;
– in public affairs, it would order the punishment of expressing opinions that represent value judgments, which is an unnecessary and disproportionate restriction of the constitutional fundamental right;

[90] Constitutional Court decision 36/1994. (VI. 24.) Statement of Reasons, s III.1.

– regarding the communication of facts, it did not differentiate between true and false statements and, with regard to the latter, between intentionally false ones and those that are false due to negligence in the form of not complying with the rules of a profession or occupation, although only with regard to the latter may the freedom of expression be constitutionally restricted by means of criminal law instruments.[91]

Going further, the CC defined certain 'constitutional requirements' in respect of the applicability of the criminal law delicts of defamation and harming honour. As László Sólyom, the then president of the Court, put it: 'Whichever way we look at it, what happened was that the CC *wrote something into* the Criminal Code.'[92] According to such constitutional requirements:

> An expression of a value judgment capable of offending the honour of an authority, an official, or a politician acting in public, and expressed with regard to his or her public capacity is not punishable under the Constitution; and a statement of fact or an allegation capable of violating honour or an expression directly referring to such a fact is only punishable if the person who states a fact, or spreads a rumour capable of offending one's honour, or uses an expression directly referring to such a fact, was aware that the essence of his or her statement was false, or was not aware of its falsehood because of his or her failure to pay attention or exercise the caution reasonably expected of him / her pursuant to the rules applicable to his or her profession or occupation, taking into account the subject matter, the medium and the addressee of the expression in question.[93]

Accordingly, the expression of an opinion containing a value judgment is unlimited within the defined scope of subjects and cases, while the statement of a fact may not be punished, unless the perpetrator was aware of the falsehood thereof, or was not aware of such a falsehood due to their failure to exercise the level of due diligence that may be expected from them. This test establishing the liability of the perpetrator for deliberate lies or in the event of negligence is rather similar to—but is not identical to—the *New York Times* rule formulated by the US Supreme Court.[94] Its influence on the decision of

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[91] ibid s III.

[92] GA Tóth, 'A "nehéz eseteknél" a bíró erkölcsi felfogása jut szerephez – beszélgetés Sólyom Lászlóval' (1997) 1 *Fundamentum* 40.

[93] Constitutional Court decision 36/1994. (VI. 24.), operative part.

[94] The *New York Times v Sullivan decision*, 376 US 254 (1964) is one of the most frequently cited decisions in the history of the United States Supreme Court. Besides radically changing the law of defamation as applied previously, it went well beyond deciding the specific issue at hand and in part created a new interpretation and theoretical grounding of the freedom of speech as well as influencing several other legal systems. The majority opinion of the Federal Supreme Court, written by William Brennan J, pointed out that the freedom to criticise those holding public office is indispensable for the healthy development of society. The participation in democratic decision-making requires a free flow and exchange of information and opinions in respect of any events of public importance. The interest vested in the openness of debates dictates that—shifting the balance in favour of the freedom of speech—even certain false statements shall be granted protection. However, on the basis of the law of libel, no true statements may constitute legal violations. In the interest of the broadest possible freedom of communication, the decision created a new, federal-level rule: as of that point, elected public officials may not sue successfully for publishing statements made in relation

the CC was also noted by the president of the Court, László Sólyom.[95] The differences are significant: neither the *Sullivan* rule nor its subsequent amendments contained any sharp distinction between facts and opinions. The *New York Times* ruling was passed in a civil law suit for damages, while the decision of the Hungarian CC was adopted with regard to criminal law. The similar Hungarian standard lays down a significantly lower threshold of limitations: instead of recklessness, failure to meet the expected level of (professional) care is also sufficient.[96] This may make it hard for journalists to be acquitted from liability, as the rules of their profession require the increased verification of the given statement. It is the duty of the person making the statement to prove that their conduct was appropriate and thus provides grounds for acquittal, as is general in European legal systems. The personal scope, however, is similar to that of the *New York Times* ruling: it is limited to the authorities, public officers and public political figures. At the same time, this personal scope has gradually become broader, paralleling the legal development in the US.[97] (It is also worth noting that, while the decision contains a detailed description of the ECtHR case law, it does not make express mention of the *New York Times* ruling, despite its obvious influence.)

There is a contradiction between the 1991 and the 1994 CC decisions: while the former would have regarded the increased legal protection of the reputation and honour of the President of the Republic (albeit with restrictions) as constitutional,[98] the latter provided for a lesser degree of protection (albeit only in the field of criminal law) of these rights of authorities, official persons (such as the president) and politicians in the public eye. The later decision does not expressly mention this contradiction, but it does allude to the fact that 'the Constitutional Court maintains its statements contained in the Constitutional Court decision No 48/1991. (IX. 26.) … in accord with the statements made in the present decision.'[99] The contradiction could only be resolved if the stricter protection of the rights of the President of the Republic were only permitted in the field of civil law; however, both the 1991 decision and the text of the Constitution clearly

to their position and harmful to their reputation, unless they can prove that the publisher (typically the press) acted with actual malice, ie it had knowledge that the information was false, or the information was published with reckless disregard of whether it was false or not. According to the most often cited words of Brennan J, there is 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'

95 L Sólyom, *Az alkotmánybíráskodás kezdetei Magyarországon* (Osiris 2001) 481–82.

96 The measure of 'professional care' is fundamentally different from the measure applied in the *New York Times v Sullivan* case and is much more akin to the measure of *'responsible journalism'* evolving in common law systems. This, in turn, is closely related to the *tort of negligence*, see E Descheemaeker, 'Protecting Reputation: Defamation and Negligence' (2009) 29 *Oxford Journal of Legal Studies* 4, 603; J Campbell, (n 67).

97 See *Curtis Publishing Co v Butts, Associated Press v Walker,* 388 US 130 (1967), *Rosenbloom v Metromedia,* 403 US 29 (1971).

98 Criminal Code art 459 para 1.11.a.

99 Constitutional Court decision, 36/1994. (VI. 24.), Statement of Reasons, s III.1.

include criminal law protection as well. The issue, however, is purely of theoretical interest as no such legal act providing for heightened protection has been passed, despite such a mandate being granted by the Constitution.[100]

It is important to stress that the decision did not consider opinions to be beyond restriction in general; constitutional protection is only extended to opinion expressed about public figures as such. At the same time, the constitutional requirements set forth in the decision of the CC provides no guidance as to whether such opinions must have a factual basis or they can be defamatory, offensive to dignity or disproportionately exaggerated without any verifiable factual grounding. On the basis of the statement of reasons, we may conclude that the CC intended to establish that no opinion expressed about public figures as such is punishable:

> Value judgment, ie somebody's personal opinion, is always covered by the freedom of expression, regardless of its value, truth and emotional or rational basis. However, human dignity, honour and reputation, likewise constitutionally protected, may constitute the outer limit of the freedom of expression realised in value judgments, and the enforcement of criminal liability in the protection of human dignity, honour and reputation may not be generally considered disproportionate, and thus unconstitutional.
> According to the position of the Constitutional Court, however, value judgments expressed in the conflict of opinions on public matters enjoy increased constitutional protection even if they are exaggerated and intensified. … Even in the period of the establishment and consolidation of the institutional structure of democracy—when civilised debating of public matters has not yet taken root—there is no constitutional interest which would justify the restriction of communicating value judgments in the protection of authorities and official persons. The protection of the peace and democratic development of society does not require criminal law interference against the criticism and negative judgments of the activity and operation of authorities and officials, even if they are in the form of libellous and slanderous expressions and behaviour.[101]

That is, according to the decision, with regard to public affairs and in criminal proceedings, all value judgments enjoy protection, irrespective of 'value, truth and emotional or rational basis' (ie irrespective of whether they have factual basis or not) and, although such protection is not unlimited, in public debates the measure defined by the CC should be applied to them. Nevertheless, the differentiation between opinions has become an important factor of distinction in subsequent judicial practice. In another case, the CC passed decision 34/2004. (IX. 28.) on the constitutionality of defamation and harming honour committed by Members of Parliament along similar principles to those applied to the 1994 decision. According to Article 4 of Act LV of 1990 on the Legal Status of Members of Parliament, the immunity of MPs did not apply in cases of defamation and harming honour, or to the liability of MPs under civil law (similarly to

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[100] In the section about the President of the Republic Parliamentary Decision No 9/2011. (III. 9.) provides that 'with respect to the immunity … of the President's person, the Parliament shall enact a separate, organic act.' Act CX of 2011 on the Legal Status and Remuneration of the President of the Republic of Hungary, however, contains no provisions related to this issue.

[101] Constitutional Court decision No 36/1994. (VI. 24.) Statement of Reasons, s III.2.

the Act currently in force, Act XXXVI of 2012, Articles 73–79). According to the motion, this situation violated the right of MPs to free speech. The CC ruled that the challenged provision was not unconstitutional *per se* but established the constitutionality requirement that the immunity of MPs may not be suspended in the event of expressing opinions reflecting value judgments on fellow MPs, other persons exercising state powers, other politicians acting in public, or on public affairs. Furthermore, immunity may not be suspended for false statements of fact, unless the MP was aware of the falsehood of his or her statement.

This decision was also adopted in the context of criminal law, and did not affect liability under civil law. The measure of the restriction is less severe than that defined by the previous decision: MPs may be acquitted of liability even if they acted with (gross) negligence. Nevertheless, it is important to take into account that the decision applies to a rather specific and narrow group: it is certainly justified to protect the freedom of speech of Members of Parliament. The operative part of the decision does not limit 'privileged' speech to the Chamber of Parliament or to the work of the committees: it covers all statements made at any time and any place. However, an opposite suggestion may be found in the reasoning of the decision, according to which this benefit applies 'only in plenary sessions of the Parliament and in sessions of the committees'.[102] It might be beneficial to ignore this suggestion and follow the instructions of the operative part. The personal scope is similar to that of the previous decision: the higher threshold of tolerance is prescribed for MPs, persons exercising state power and political figures in the public eye. The statement of reasons contains a curious reference that is in contradiction with the foregoing: 'in connection with statements not related to their public capacity, official persons are entitled to the same protection as private persons.'[103] This indicates the intention to extend the protection over all statements concerning public affairs rather than only over those concerning the original personal scope. Since, however, the content of the operative part contradicts this, it is most probably also an unintended mistake.

Retaining the liability of MPs under civil law is in line with the spirit of the 1994 decision, as well as the earlier Supreme Court decision reaffirming the statutory provision that the immunity of MPs does not cover their liability under civil law, including their liability for violating the honour or reputation of others (decision No BH2004. 55).

The 1994 decision of the CC went well beyond simply settling the specific issue at hand. The body undertook to lay down the new foundations of the freedom of speech and to interpret the concise passages of the Constitution on fundamental rights; its basic decisions regularly transcended the specific issues to be settled. It was especially CC decisions Nos 30/1992. (V. 26.) and 36/1994. (VI. 24.) (the former on the constitutionality of the criminal law restriction of hate speech) which assumed the task of defining the concept of freedom of speech and the identification of its philosophical foundations.

[102] Constitutional Court decision No 34/2004. (IX. 28.) Statement of Reasons, s V.3.1.
[103] ibid s V.3.3.

These, while stressing the individual's right to self-expression and accepting the individualistic justification of the freedom of speech, lay greater emphasis on its instrumental nature, ie its role in the formation of democratic will and the furthering of community decisions. In this, too, they are akin to the *New York Times* ruling. The significance of the Court's contributions to the interpretation of the freedom of speech is beyond dispute.

Some observers were sharply critical of the decision of the CC, reproaching the body for several reasons. They protested against the maintenance of the criminal law protection of reputation and honour and the imperfect adoption of the *New York Times* decision, whereby the burden of proof remained with the speaker and the measure of indictability was 'merely' *expectable* diligence rather than gross negligence.[104] True, the CC could have opted simply to prohibit the application of the two delicts of defamation and harming honour in respect of public figures, along with the constitutional requirements defined by it. However, had the court opted for this approach it would have clearly verged on exceeding its jurisdiction while nothing would have compelled the courts to subject themselves to this provision. Third, the dual (civil law and criminal law) protection of personality is not contrary to the norms of the rule of law of the legal solutions customary in Europe (most legal systems provide parallel civil and criminal law protection to personality rights with regard to public figures, too).

The case law of the courts

According to CC decision 36/1994. (VI. 24.), the assessment of statements capable of violating reputation and honour must distinguish between statements of fact and statements of opinion. Within these categories, further differentiation is possible based on various considerations.

With regard to statements of fact, distinction must be made between true statements of fact (proven before the court) and untrue statements of fact (unproven allegations). With regard to untrue statements of fact, further distinction may be made between, on the one hand, allegations made deliberately or lacking the due diligence required by the professional rules applicable to the party communicating them and, on the other hand allegations made in keeping with the relevant professional rules.

With regard to statements of opinion, there also exists a difference between opinions that have a factual basis and opinions of a nature that precludes such grounding (opinions arising from anger, reflecting emotions or simply embodying individual, subjective value judgments). If, with regard to the former, the truth of the factual grounding is proven before the court, the party making the communication is acquitted from liability,

[104] G Halmai, 'Túl kevés és túl sok szólásszabadság – egy utilitarista megközelítés' (2005) *Fundamentum* 187–88; P Molnár, *Gondolatbátorság* (Új Mandátum 2002) 99–101; A Sajó, *A szólásszabadság kézikönyve* (KJK–Kerszöv 2005) 155.

irrespective of how extreme or injurious the opinion communicated was. Opinions lacking factual grounds, however, may remain open to restriction if they are unreasonably injurious, offensive or denigrating—to use the established terms of judicial practice.

Given the varying doctrinal orders of the different branches of the law, certain differences arise from the application of the relevant provisions of criminal and civil law; for example, criminal law does not automatically permit the proof of statements of facts in cases of libel, but only if the publication thereof was in the public interest or a cogent private interest. That is, according to the initial position of the law, even true but libellous statements of fact constitute legal violations. (At the same time, however, in lawsuits concerning public figures, the existence of a public interest in favour of the communication goes without saying.) In the following we shall review the published high court decisions to illustrate these distinctions.

The measure applied by civil courts

Practice shows that the influence of decision No 36/1994. (VI. 24.) of the CC is present to some extent in civil law cases, too; however, this does not mean that that standard is applied exclusively or consistently: in their judgments the courts rarely refer to the said CC decision.

Statements of fact: The distinction between statements of fact and opinions with or without factual grounding is not evident in certain cases (eg according to *ad hoc* decision No BDT2004. 1038 the phrase 'at last we have a mayor with clean hands' should not be construed as an implicit statement of fact about the previous mayor, the plaintiff in the case, but only a 'strong piece of criticism, a condemnatory value judgment' and so no proof of its factual grounding is required, although the implicit allegation of dishonesty is typically an opinion that may have factual grounds and, consequently, may require proof).

In respect of statements of fact, the measure applied by the courts is not differentiated according to the requirement of the 1994 decision of the CC. In practice, false statements of fact usually qualify as legal violations and the courts do not examine whether the requirement of professional due diligence has been upheld or violated, in which case it is possible that a false statement of fact could be considered legal. That is, the constitutional measure requiring due diligence is not applied. From the few relevant high court decisions, decision No BDT2005. 1278 states outright that 'in respect of false statements of fact capable of triggering negative opinions, public figures are entitled to the protection of their personality rights under the same conditions as any other person.'

Decision No BDT2011. 2592 refers to, but misinterprets, the 1994 decision of the CC when it states that 'freedom of expression does not protect the communication of false facts that are capable of libel or damage to good reputation, if the person making the communication is aware of their falsehood or the rules of his or her trade or profession would require of him or her the examination of the truth of the facts.' As we have seen, according to the 1994 decision of the CC, it is not the mere requirement of the due diligence expected from the trade or profession that leads to the establishment of the

legal violation, but a violation against such expected conduct (professional due diligence). This is also reinforced by decision No BDT2012. 2765, which states that 'it can be expected of the press that the authenticity and truthfulness of those statements of facts included in the writings published by them that offend others have been checked and verified.' However, this decision does not specify the scope of this obligation of verification, and whether the press has any liability in all events when it later turns out that the assertions were false, or whether the press can be exempted from liability if it applied the appropriate diligence.

Decision No ÍH 2013. 59 stipulates that the interest of academic freedom in itself does not exempt the researcher from legal liability, if the researcher publishes such statements of facts about a certain, identifiable person that later turn out to be false.

Opinions with factual grounding available for examination: Freedom of criticism is broadly interpreted by the courts proceeding in civil law cases. According to decisions Nos BH1993. 89 and BH2001. 468, the content of an expression of opinion is not in breach if it does not contain falsehoods; ie in respect of content, opinion may not be restricted. 'Expressions of opinion, value judgments or criticism' in themselves do not constitute adequate grounds for the protection of reputation (see also position statement PK12 of the Supreme Court). As stressed in both cases, however, the manner of the expression of opinion may be in breach if it is 'disproportionately exaggerated, unreasonably offensive, denigrating, derogatory, or humiliating'. This often used definition originates from Károly Törő decades ago,[105] and has been adopted by judicial practice (see also eg decisions Nos BH2001. 522, BH2002. 221, and BH2002. 352). It is difficult to understand (and leads to complicated distinction issues in these decisions) the indirect suggestion in this definition that, according to the position of the courts, even opinions with factual (proven) grounds may be in breach if the 'manner of their expression' conforms to the above requirements; the application of this principle would deprive the freedom of expression, as understood by the 1994 decision of the CC, of its substance. Similar conclusions may be drawn from the recent High Court decisions, according to which even opinions that have a factual basis may not be expressed in an unduly injurious or derogatory manner (see eg decision No BH2012. 240).

Judgment No BDT2006. 1376 conforms to the decision of the CC and provides protection to opinions with factual basis:

> Value judgments—statements of opinion, criticism, characterisation—may only result in damage to reputation if they are grounded on false statements of fact or provide the grounds for false inferences: if, however, they are arbitrary and do not conform to rational thinking, practical experience and the rules of logic then, in certain cases, they may be regarded as depicting reality in a false light and may, consequently, serve as the basis for the establishment of an infringement of personality rights.

[105] K Törő, *Személyiségvédelem a polgári jogban* (Közgazdasági és Jogi Könyvkiadó 1979) 421.

> If a statement of opinion qualifies as a rational inference from real facts and is not unreasonably injurious, offensive or denigrating in the manner of its expression, it may not constitute damage to good reputation even if otherwise it is a negative or false value judgment.

A similar distinction between inferences based on true facts and other opinions is made by judgment Nos BDT2007. 1599, BH2008. 329, BDT2010. 2215, BDT2011. 2403, and decision No EBH2011. 2396, published as a Supreme Court decision of doctrinal importance. Some of these expressly refer to the 1994 decision of the CC, others do not, but in essence even the latter conform to the intentions of that decision in respect of the issue examined.

Principled decision No EBH2007. 1599 introduced a significant consideration into the legal practice of the enforcer of the law: if the opinion expressed is related to or reflects upon a previous dispute, then it cannot be considered to infringe the law even if it is 'formulated in an exaggerated manner' (thus, the existence of the previous dispute is to be regarded as the factual grounding of the opinion expressed). Similarly, although the opinion expressed in the issue that formed the grounds for decision No BDT2007. 1701 was also, in the opinion of the court, severely injurious and denigrating as, according to the court, the plaintiff had filed criminal charges against the defendant in bad faith and without grounds, the published opinion of the latter should be regarded as a stage of a dispute and, as such, may not be interpreted out of context (according to the court: 'if someone baselessly accuses another person of a criminal offence before the authority, he or she is required to tolerate more severe offences, unless their weight is disproportionately larger than that of the original offence').

In a case where proceedings were initiated in relation to an opinion expressed at a historical conference, the issue of the freedom of academic research was also raised. As a matter of theoretical importance, the court declared that 'irrespective of its value and veracity, the opinion of an expert historian formulated about a historical event cannot form the grounds for the protection of personality' (decision No BH2006. 210). Similarly, 'it is without doubt a quite radical opinion to see an analogy between the method used by public figure plaintiffs to reach press publicity and the means of the German public information system during World War II; nevertheless, this opinion does not infringe the laws, since it compares two sociological sets of tools and hence does not express an opinion about the way the plaintiffs relate to the underlying values.' (decision No ÍH 2013. 140.)

Although, in respect of public figures, the threshold of defamation—with regard to the expression of opinions rather than statements of fact—is higher, opinions on the activities of such figures are nevertheless not beyond sanction: the measure is 'disproportionate exaggeration' and 'unjustified injury'. Also relevant is the consideration of whether the opinion published had real factual grounds or not: in the previous case the courts had a significantly lower possibility of restriction.

Opinions lacking a factual basis to enable verification: Decisions Nos BH2001. 522 and BH2004. 104 expressly highlight the category of public figures who are required to tolerate exaggerated or heated opinions and so the law provides a narrower protection of

their personality rights. According to the decisions, if the manner of expression is not unduly injurious, denigrating or humiliating, even the most forceful criticism cannot be regarded as grounds for the protection of personality (similarly, see also decisions Nos BH1993. 89 and BDT1999. 3). By contrast, exaggerated and disproportionate opinions that, by virtue of their nature, possess no factual basis do not qualify as legal (see eg decision No BDT2011. 2403). According to decision No BH2004. 104, public figures are required to tolerate even 'exaggerated' expressions of opinion 'reflecting heated emotions' and 'no personality right protection may be extended with regard to exaggerated and unfounded value statements' (decision No BDT2003. 839). In accordance with this, decision No BDT2012. 2740 states that 'insults and defamatory statements lacking factual content' constitute injury to the honour of the attacked party; however, unlike these previous decisions, it stresses the requirements of good faith and honesty, the infringement of which constitutes a restriction of the freedom of expression. Obscene words as expressions of opinion are not automatically unjustified and arbitrary if they are used for literary expression and are called for by the subject matter of the text (EBH2011. 2408).

The measure applied by criminal courts

Statements of fact: In practice, false statements of fact usually constitute the offence of libel and the measure of professional due diligence required by the CC is rarely applied by criminal courts either (see eg decision No BH2011. 186). In certain cases, however, the communicator may be exculpated even if a false statement of fact is published. Court decision No EBH2005. 1289 acquitted the defendants because, in the absence of any infringement of the law, the publication of the official expert opinion prepared during the course of the investigation that subsequently proved to be false (in which the injured party was declared to be insane in a news article) provided insufficient grounds for sentencing.

The decision of the Budapest Court of Appeal with regard to journalist Endre Babus that resulted in his acquittal was closer to the 1994 measure of the CC in respect of the assessment of statements of fact, but did not conform to it (3.Bhar.32/2010/5.). Instead of the 'due care and diligence' 'to be expected on the basis of the relevant rules of the profession or occupation', in this case the measure applied was that of 'good faith' and, since the journalist used data from a scientific publication (which later on proved to be false), good faith exculpated him from criminal law liability. (In this case, the decisive factor was not the scientific nature of the publication in itself (since the law provides no protection to the publication of clearly false data in scientific publications either, and the restriction of such publication does not qualify as a violation of the freedom of scientific research), but that the journalist had no reason to doubt the authenticity of the data used.) The statement of reasons offers no guidance as to the relationship or difference between the two measures. In our view, in this decision the measure of good faith is such a general category that summarises all considerations, on the basis of which the legality of the conduct of the publisher may be established. The decision requiring

the consideration of all relevant factors and circumstances may thus be assumed to regard more elements as worthy of assessment than did the 1994 decision of the CC, which would restrict the scope of the examination to the mandatory rules deriving from the profession of the speaker.[106]

Opinions: In criminal law practice, criticism *per se* cannot serve as the basis for the establishment of defamation, as its veracity cannot be assessed objectively. However, the limits of criticism may be drawn: the use of offensive or denigrating speech, offence to human dignity and defamation are not lawful, even under the guise of criticism (decision No BH1994. 300). Opinions, therefore, are not wholly beyond restriction; 'with regard to overstepping the limits of criticism, even public figures are entitled to criminal law protection' (decision No EBH2005. 1289).

The notion of the dichotomy of facts and opinions and the distinction between the various types of opinion is also reinforced by decision No BH1995. 77. The background to this decision was that the accused party (the mayor of a town) called the suitor, the editor-in-chief of the town's daily, a liar. In itself, a 'condemnatory value judgment' is not defamatory. For example, according to decision No BH2001. 99 the expression 'the real criminal' used against a mayor acting as plaintiff, as well as the reference to his 'training as a fabricator of balance sheets', were objectively capable of defamation and went beyond the extent that is expected to be tolerated by politicians and public figures. An earlier decision did not qualify a remark of the court about the 'lack of culture' of a town's former council chairman (who has since remained a participant in the local public affairs) as criticism. The statement of fact should have been proven; lacking that, the remark made during the course of a public debate amounts to an offence of libel (decision No BH1994. 356). At times the margin between permissible and infringing expressions is extremely narrow indeed, and the decision is, to a large extent, dependent upon the perception of the proceeding judicial division and the interpretation of the expressions under dispute.

Activities conducted within the private sphere and those conducted before the public should be distinguished, however, and the intentions of the 1994 decision of the CC may have no bearing on the avenues of legal remedy available in cases of injurious statements made about the private lives of public figures. A principled court decision states that the less broad personality protection options of public figures 'cannot be construed as to entail that those playing a role in public affairs (public figures) cannot be awarded criminal law protection against defamatory statements made in respect of issues not related to their public roles (ie relating to their private or professional lives)' (decision No EBH2005. 1192).

In the *Babus* case, the Budapest Court of Appeal extended the 'good faith test', applied in connection with false statements of facts, to injurious opinions as well, and

[106] A Koltay, 'A Fővárosi Ítélőtábla határozata Babus Endre újságíró rágalmazási ügyében' (2010) 3 *Jogesetek Magyarázata* 33−38.

declared that 'with respect to the act of defamation, the factual grounds of the critical opinion and the good faith of the person expressing the given opinion (ie whether they applied the expected diligence), and also whether the opinion is justified by public interest must be examined.' (decision No ÍH 2013. 87.)

The characteristics of dissemination in disputes on public affairs

The case law of Hungarian courts has recently shifted, correctly, to a more lenient approach toward dissemination, ie the passing on of information received from others or the reportage of different positions in a given issue; exemption from liability is granted to the persons disseminating information. In certain cases, and if using certain journalists' sources, it may be acceptable if the press merely publishes a given statement without authenticating its factual basis. According to authoritative ruling No EBH2001. 407, such sources include Parliament, local governments, and various national and local public administration bodies. 'Press members … reporting on proceedings falling within the competence or about motions or proposals filed during such proceedings are not required to have evidence for the truthfulness of their statements.' In other words, reports reflecting what has actually been said are accepted as lawful under all circumstances. Similarly, the media cannot be required 'to verify the statements made in a press conference by a police officer' (Decision No BH2002. 51.). The act of relaying information received from a press officer of the court may not serve as grounds for any claim for the infringement of personality rights either (decision No BH2003. 357). Similarly, 'press correction may not be sought if the press publishes correct information about a fact established in a criminal, civil, or public administrative action before the completion of the proceedings' (decision No BH2004. 273), even if the information subsequently turns out to be false in the course of the proceedings. Furthermore, journalists who practically called the victim a psychopath on the basis of a defective expert opinion prepared during the police investigation were found not guilty of criminal libel on the basis of authoritative decision No EBH2005. 1289. In the previously mentioned *Babus* case (3.Bhar.32/2010/5.), the Budapest Court of Appeal accepted a scientific publication as a source that journalists have no reason to call into doubt and as such they are not required to verify the statements of fact it contains.[107]

The relationship between civil law and criminal law

The 1994 decision of the CC considered the issue of the protection of the reputation and honour of public figures in its criminal law aspects only. Although the basic judgment of 1994 affected the case law of civil courts in some degree, the courts are still uncertain about the extent to which the provisions of the decision should be applied. The relationship between civil and criminal law cannot be entirely harmonious; it is questionable whether it would be necessary to introduce identical or harmonising

[107] ibid.

measures in the two different fields of the law. Due to the different nature of civil and criminal law, this would be neither straightforward nor absolutely necessary. Firstly, the statements of facts involved are not identical (defamation as provided for by the Civil Code and the Criminal Code, violation of good reputation according to the civil code and slander as provided for by the Criminal Code all differ from each other to some extent); secondly, the conditions of establishing legal liability are not the same either (criminal law 'culpability' is entirely different from civil law 'liability'). From the point of view of freedom of opinion this may lead to cases based upon the same statement of facts differing in their outcomes (eg although the speaker is acquitted in the criminal proceedings, he or she is, however, held liable in a parallel civil lawsuit). The adjusted and amended version of the 1994 measure of the CC that differentiates between statements of opinion on the basis of the existence or absence of factual grounds, however, may be applied in both branches of the law. A conceivable and desirable solution leading to more or less predictable decisions would be to stipulate that, with regard to opinions expressed in relation to public affairs, those opinions that have a genuine (proven) factual basis may not be subject to restriction, while defamatory opinions offensive to human dignity that are not based on facts should remain sanctionable (in both branches of the law). It would significantly further the adjudication of ongoing proceedings with the participation of the media if the dispensation of justice were to clarify how the publishers of false statements may be relieved from liability (either by the application, precise definition and upholding of the measure of professional due diligence proposed by the CC or the measure of good faith that appears, from time to time, in the practice of the courts and which awaits detailed elaboration).

The birth and the rules of the new Civil Code

Antecedents of the new Code

The birth of the new Civil Code dates back to the year 1998 when Government Order No 1050/1998. (VI. 24.) was issued on the preparation of the new code and the creation of the expert bodies responsible for the codification work under the direction of Professor Lajos Vékás.[108] The draft, which had been prepared in several versions by 2008, contained no new rules expressly related to the protection of the personality rights of public figures. The framers of the act offered the following explanation for this:

> The problems related to the specific position and the protection of public figures were discussed during the process of preparation. The necessity of harmonising two requirements was formulated: on the one hand, the protection of public figures' right to reputation, and the assertion of the right of the community to formulate opinions and to implement the control of society, on the other hand.

[108] T Lábady, *A magánjog általános tana* (Szent István Társulat 2013) 101.

Table 1: The legal assessment of statements of fact and opinions expressed about public figures under Hungarian law

		Civil law	**Criminal law**
Statement of fact	**True (proven)**	Legitimate (in all cases)	Legitimate, if proof is admissible (the communication is in the public interest or a cogent private interest)
	False	Infringing	Infringing
		Legitimate, if the publication was unintentional or did not constitute a breach against professional due diligence (CC Decision of 1994)	Legitimate, if the publication was unintentional or did not constitute a breach against professional due diligence (CC Decision of 1994)
		Legitimate, if the publication was based on an official communication made by a court of law, the police, the public prosecutor's office, etc.	Legitimate, if the publication was based on an official communication made by a court of law, the police, the public prosecutor's office, etc.
			Legitimate, if the publication was made in good faith
Opinion	**It has a factual basis**	Legitimate if the factual basis is proven	Legitimate, if the factual basis is proven
			Legitimate in all cases (CC Decision of 1994)
		Infringing, if the factual basis is proven, but the statement is extreme, unreasonably injurious, disproportionately exaggerated	Infringing, if the factual basis is proven, but the statement is extreme, unreasonably injurious, disproportionately exaggerated
		Infringing, if the factual basis is false (unproven)	Infringing, if the factual basis is false (unproven)
	Factual basis is conceptually precluded (subjective value judgment)	Legitimate, if the statement is not extreme, unreasonably injurious or disproportionately exaggerated	Legitimate, if the statement is not extreme, unreasonably injurious or disproportionately exaggerated
			Legitimate in all cases (CC Decision of 1994)
		Infringing, if the statement is extreme, unreasonably injurious or disproportionately exaggerated	Infringing, if the statement is extreme, unreasonably injurious or disproportionately exaggerated

> These requirements, however, must be asserted within judicial practice. The diversity of the cases does not make it possible for the act to provide for either a limitation of the right (the restriction of the protection provided to public figures) or the exculpation of the offender from the legal violation.[109]

Nevertheless, the draft finally submitted by the government in June 2008 did contain a provision specifically applicable to public figures.

> *Article 2:93 (The protection of the rights of public figures)*
> If the press has violated the reputation of a public figure in connection with the public figure's public appearance or other public expressions, the legal sanctions provided for under Articles 2:88─91 shall only be applicable if the infringement of rights occurred due to deliberate malice or gross negligence on the part of the press; the press shall be relieved from such legal sanctions if it is able to furnish proof that its actions were not due to deliberate malice or gross negligence.

It is important to note that, in contrast with the 1994 decision of the CC, the draft act mentioned the 'gross negligence' of the media as the basis for liability rather than 'due care and consideration' (professional due diligence). This provision would have granted even greater freedom to the media than the decision of the CC. In contrast to the decision of the CC, the official statement of reasons attached to the draft act expressly cited the *New York Times* case as one of the sources of inspiration for the draft provisions.

> [The proposal,] however, would also guarantee that the press uncovering abuses and malpractices related to public life need not expect severe retaliation when certain inaccuracies and factual errors that are insignificant in comparison with the affair brought to light are found in the analyses and reports published as a result of its efforts obviously made in good faith and beneficial to society. In this respect, the ruling of the Supreme Court of the United States of America passed in 1964 in the *New York Times v Sullivan* case carries some important lessons for Hungarian legislation, too. … With regard to violations against reputation, the Proposal would allow the application of objective sanctions (that are independent of imputability) and subjective sanctions (that are a function of imputability) under different conditions when the press commits the legal violation in respect of a public figure. The protection of the reputation of public figures, however, does not call for a different legal assessment in general, but only when the reputation of a public figure is violated in 'in relation to his or her activities as such or other expression related to public affairs'. The legal consequences of the violation of the private lives of public figures are the general sanctions provided for in Article 2:80. The Proposal attaches a legal consequence to the statement of the facts according to Article 9:23, which is different from the provision with general scope. Accordingly, with regard to the press, the legal sanctions of violations against personality rights that are independent from imputability could only be applied if the press is found to be imputable, and only if the legal violation is a result of a premeditated act or, as a minimum, gross negligence. With regard to entitlement to damages for the infringement of personal rights and the enforcement of claims for damages, evidence of non-severe negligence on the part of the press is not sufficient. On the basis of Article 2:93, the injured party shall carry the burden of proof in respect of the injury to his or her reputation; however, exculpation shall be available to the press by proving that their conduct was neither intentional nor grossly negligent. The legal offence qualifies as intentional if the press had been aware that the statement resulting in injury to reputation was untrue, irrespective of whether

[109] L Vékás (ed), *Szakértői javaslat az új Polgári Törvénykönyv tervezetéhez* (CompLex 2008) 163–64.

> the conscious deception of the reader (viewer) was related to a major or a less important part of the communication. Disregard of the basic professional rules and requirements towards the press may lead to the establishment of gross negligence. If the press is able to prove that, on the basis of the examination of the circumstances of the case, their responsibility or negligence in respect of the offence cannot be regarded as severe, they shall be relieved of the legal consequences provided for by Article 2:88–91. As a consequence of this, if, for example, due to casual negligence a piece of investigative journalism contains certain inaccuracies that have no bearing on the merits of the message, these shortcomings of the article (programme) may not form the legal basis for successful action against the communicator acting in the public interest.

The new Civil Code, adopted after lengthy debate (Act CXX of 2009), contained a provision amending the original proposal.

> *Article 2:94 (Specific provisions on the protection of reputation)*
> (1) If the reputation and honour of a person exercising public authority or entrusted with a public function is violated in relation to the exercise of such public authority or the fulfilment of such public function, the legal sanctions provided for in Articles 9:89–92 [the sanctions for the violation of personality rights—A.K.] are only applicable if the legal offence was accomplished by making false statements, allegations or misrepresenting true facts, on condition that this was the result of the perpetrator's premeditated conduct or gross negligence; the perpetrator shall be relieved of such sanctions if he or she is able to prove that the conduct in question had not been premeditated or grossly negligent.
> (2) If the reputation and honour of a public figure not exercising public authority and not entrusted with a public function is violated, the provisions of Paragraph (1) are to be applied if the rights to personality are violated in relation to that person's public appearance or public figure capacity.

The Act intended to introduce a test similar to that used in CC decision No 36/1994. (VI. 24.) for criminal libel and harm to honour (usually committed by the media) against public figures. Irrespective of whether they are 'value judgments' and whether they have any factual basis, opinions would have been entirely beyond restriction, ie defamatory and abusive opinions would also have enjoyed complete freedom if they were related to the exercise of public authority or the holding of a public function. In this respect the provision would have been compatible with the 1994 decision of the CC.

With regard to statements of fact, too, the communicator would have been exculpated if he or she was able to prove that their 'conduct had not been premeditated or grossly negligent'. In the 1994 decision of the CC the test of premeditation and negligence pertains to the process of the examination of the truth-value of the published statement; the text of the new act does not make it clear what it refers to, as there is no direct reference to the discovery of the truth. In fact, the text could have lent itself to a rather grotesque interpretation: if the decisive element of the test is whether the false statements of fact are published as a result of 'the offender's intentional conduct', then with regard to a journalist or editor such an intention is hardly disputable, as it is highly improbable that they write or publish unwittingly or by accident. That is, it would have been more exact if the legal assessment of the conduct of the communicator were focussed on the process of discovery of the truth of the statement. Another divergence from the test of the

CC is that the text used the general civil law term of 'gross negligence', which is not identical to the violation of the rules of professional due diligence referred to in the decision of the CC, although it is somewhat nearer to the test of *reckless disregard* required by the US Supreme Court in the *New York Times v Sullivan* case.

From the aspect of legal dogmatism, a further disturbing element of the provision was that the text spoke about the exculpation of the 'offender' and provided relief from legal liability in cases when the reputation and honour of public figures was 'violated' in relation to their exercise of authority or performing a public function. This pointed to the inference that the code regarded the publication of false statements of facts and the expression of opinions violating honour and reputation to be legal offences irrespective of the application of the test and only precluded the application of civil law sanctions in certain cases. This, however, would have been nonsensical, *inter alia* because first among the sanctions is the 'establishment of the fact of the legal violation by the court', Article 2:89.a); the consistent interpretation of the text would have yielded the result that, with regard to a 'legal violation', after the application of the test (ie successful proof by the communicator), the 'establishment of the fact of the legal violation' would have become a contradiction in terms.

Irrespective of the rule on public figures, the new act would also have transformed the rules pertaining to dissemination (reportage) (Article 2:93). It would have granted immunity for the media from the legal consequences of violations against personality rights if such violations resulted from accurate reporting of events in public life (with the precise specification of the person making the statement), or as a result of the publication of official documents or decisions.

In the end, Act CXX of 2009 did not enter into force. On the basis of the violation of legal certainty, due to the brevity of the time for its preparation, decision No 51/2010. (VI. 28.) of the CC struck down the separate act providing for the entry into force of the Code, and the new Parliament formed after the April 2010 elections repealed the Act by Act LXXIII of 2010. Following this the codification process started anew.

Provisions of the new Code on the protection of the personality rights of public figures

According to the proposal of the new Civil Code published in early 2012—which was drawn up by expert bodies with similar members to the earlier ones, once again under the leadership of Professor Vékás—the principle of the lesser protection of personality extended to public figures would also have been included in the act in the form of a general clause: the courts would thus once again have had to confront a deliberation issue in lawsuits initiated by public figures for the protection of reputation or honour. The original proposal read as follows:

> *Article 2:44 (Protection of the personality rights of public figures)*
> The protection of the personality rights of public figures shall not pose unnecessary restrictions on the fundamental rights guaranteeing the free discussion of public affairs.

According to the statement of reasons attached to the proposal submitted to Parliament by the Government:

> The Proposal makes up for a delay of several decades by enacting the rule, already applied by the courts, on the lower level of protection of the personality rights of public figures in the interest of the prevalence of the fundamental rights ensuring the freedom of debate on public affairs.

It is important to note that this text aimed to protect the 'free discussion of public affairs'; therefore, in addition to a stronger statutory protection of freedom of speech, and with a judicial practice supporting this kind of interpretation, the scope of 'public affairs' and 'public figures' which evolved during previous judicial practice would be restricted and 'tabloid events' and 'celebrities' would be excluded from it. At the same time, the provision contains no directly applicable test that would be binding upon the courts in cases initiated by public figures; instead, its nature is that of a basic principle, the application of which is not restricted to the protection of honour and reputation, but which may, in theory, serve as a point of reference in respect of the enforcement of any personality right.

By contrast, the adopted and promulgated text (Act V of 2013), amended by a motion submitted by a Member of Parliament, runs as follows:

> *Article 2:44 (Protection of the personality rights of public figures)*
> The exercise of fundamental rights guaranteeing the free discussion of public affairs may limit the protection of the personality rights of public figures on the grounds of legitimate public interest, to a necessary and proportionate extent, without violating human dignity.

In keeping with the original proposal, the amended text incorporated into the Act provides the possibility of narrowing the scope of 'public figures' and 'public affairs' and leaves significant elbow-room for the courts in the application of the law although it raises several issues. The question arises of precisely which personality rights are affected by the principle: in practice, apart from the protection of reputation and honour, these may be the protection of private life, images or sound recordings, private secrets and private data; ie under certain circumstances these rights of public figures are to be restricted.

The head of the codification committee, Lajos Vékás, voiced his concerns before the final vote of the Act, which were confirmed by the first commentary on the new Civil Code, edited by him.[110] These concerns were:

– the necessity/proportionality test is inapplicable in private law disputes (with the content established by the CC); it does not have any specific private law content;
– the 'legitimate public interest' represents an unnecessary and problematic restriction;

[110] L Vékás, 'Bírálat és jobbító észrevételek az új Ptk. törvényjavaslatához (a zárószavazás előtt)' (2013) *Magyar Jog* 1, 1−7; L Székely and L Vékás, 'Személyiségi jogok' in L Vékás (ed), *A Polgári Törvénykönyv magyarázatokkal* (CompLex 2013) 58−59.

– any violation of personality rights necessarily harms human dignity; hence, if the addition of the words '[may limit] without violating human dignity' is interpreted literally, freedom of speech should be subordinated to personality rights in all disputes, although this could not have been the aim of the legislator.

The codification of the test of necessity / proportionality, according to which fundamental rights such as freedom of expression may only be restricted if the prevalence of other fundamental rights or constitutional values so demands and only in proportion with the desired objective,[111] indeed does seem to be a redundant provision, for in the practice of the CC, if these fundamental rights are involved, the courts must perform these tests anyway prior to passing a decision. It is, of course, a different issue that, if the test is codified, the courts would be unable to circumvent it. Another criticism directed at the text of the Act that is worthy of consideration is that the fundamental rights test provided for by the text is to be applied in respect of the relationship between the state (the courts) and those legal subjects wishing to enforce or protect their rights; such a provision would therefore be 'alien' to a private law code.[112]

The exclusion of the violation of human dignity can be considered as somewhat more problematic, as it does not take into account that, according to other provisions of the Code (Paragraph (2) of Article 2:42) human dignity is not simply a specific human right, but it is, on the one hand, the source of all personality rights and, on the other hand, a general clause that may be cited if a violation of personality rights occurs, but the right violated is not among the personality rights actually specified in the Code (ie the right to human dignity is the 'general personality right'),[113] and is such a general rule that it allows the necessarily incomplete and fragmented system of personality rights regulations to be flexible and adaptable to changing circumstances during the course of the application of the law. That is, 'human dignity is actually the underlying source, the "mother right" of all explicit and implicit civil law personality rights and, as such, its separate declaration alongside the general clause would have resulted in unnecessary redundancy.'[114] A strict,

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[111] On the uncertainty of the measure widely applied by the Hungarian Constitutional Court see L Blutman, 'Az alapjogi teszt a nyelv fogságában' (2012) 2 *Jogtudományi Közlöny* 145−56.

[112] Z Navratyil, 'Az ember mint jogalany a Polgári Törvénykönyvben' in Z Csehi and Z Navratyil, *Személyek joga a 2013. évi V. törvény alapján* (Menedzser Praxis 2013) 40.

[113] On the general personality right grounded in a judicial practice that is fundamentally linked to the German civil code (BGB) see eg K Zakariás, 'Az általános személyiségi jog a német Szövetségi Alkotmánybíróság gyakorlatában' (2013) 2 *Jogtudományi Közlöny* 73–87; F Szilágyi, 'A személyiség magánjogi védelmének dogmatikája a német jogban' (2013) 2 *In Medias Res* 347–80.

[114] Vékás (n 109) 160. According to Balázs Landi 'the Civil Code of 2013 expresses the academic position that the sphere of the civil law protection of personality is not identical to the catalogue of fundamental rights, although in respect of certain fundamental rights the principle of parallel protection still prevails, ie constitutional law, criminal law and civil law provide parallel protection to human beings and their various legal expressions.' See B Landi, 'A személyiségsértés mint elkövetői magatartásában erkölcstelen (jogellenes) és elszenvedett sérelmében erkölcsös tényállás szankciórendszerének sajátosságai a polgári jog rendszerében – történeti visszatekintéssel' (2014) 2 *Jogtudományi Közlöny* 93, 94. In practice difficulties of interpretation may arise since while the Civil Code of 1959 provided for the right to human dignity as an

verbatim interpretation of the text may also come up against an inherent irresolvable contradiction: it is natural that all statements violating reputation or honour also violate human dignity (as the source of these rights). The main issue raised previously had been the extent of this injury, ie to what extent the debate on public affairs should be protected and how to find the right balance between the freedom of speech and the protection of personality rights with regard to statements about public figures. Accepting that participants in debates on public affairs must proceed 'without any violation against human dignity' would place significant restrictions on these debates and it is precisely this new rule, intended to provide the legal basis for the protection of such debates, that would become inapplicable.

Constitutional Court decision on the rules of the new Civil Code on the freedom to criticise public figures

The Commissioner for Fundamental Rights contested the wording 'legitimate public interest' in the statute, which was stipulated as one of the preconditions for the reduced protection of personality rights, prior to entry into force of the given provision, via a motion to the CC. According to the motion:

> On the basis of the practice and tenets of the Constitutional Court presented, in my view the violation of human dignity is a constitutional limit even in respect of the criticism of public figures, notwithstanding the special protection of the freedom of expression and the freedom of the press (Article II and Paragraph (4) of Article IX of the Fundamental Law), as well as the measure of necessity and proportionality, since these conditions follow from the Fundamental Law itself and the practice of the Constitutional Court which applies them to specific instances. *Beyond that, however, it is unreasonable and disproportionate to demand the existence of a public interest, especially a public interest qualified with the adjective 'legitimate'.*
> I wish to remark that, from the aspect of legal certainty and the clarity of norms, even the adjective itself is hard to understand, as we cannot assume the existence of any 'illegitimate public interest' in the legal sense. My position is that, as long as it remains within the constitutional limits set by the Constitutional Court, vigorous criticism of the actions of public figures, especially figures of public authority, is in every instance in the public interest. To put it differently, the freedom to shape public opinion is a legitimate interest that is indispensable for democracy. Given the already inconsistent judicial practice (eg PK 12), the legal uncertainty and disproportionate restriction brought about by the introduction of this condition would result in a step backwards, whereas a step forward, the harmonisation of judicial practice and the practice of the Constitutional Court, is what is called for in this field.

explicit personality right (albeit one that did not appear significantly in case law) and the Civil Code of 2013 has elevated its status to that of a general personality right, the provisions restricting the rights of public figures once again appear to be specific personality rights. To further complicate matters, the Civil Code of 2013 may even be construed by the courts as providing that human dignity in general (ie according to art 2:42 para 2 and not only according to the interpretation of art 2:44) is a specific, explicit personality right.

> Summarising the above, in my view, the inclusion of the term '*legitimate public interest*' in Article 2:44 of the Civil Code violates the requirement on the clarity of norms provided for by para (1) of Article B) of the Fundamental Law and is contrary to the provisions of paras (1) and (2) of Article IX of the Fundamental Law (freedom of expression, freedom of the press), as it enables a disproportionate restriction of rights.[115]

The motion contains criticism that is worthy of consideration, although the disputed rule might have had another interpretation, stating that if the discussion of public affairs is also an interest of special importance according to the text of the law then, given the lesser protection of the personality right of public figures, 'legitimate public interest' is present in every instance when such affairs are discussed in public.[116] Under this interpretation—which is more lenient towards the text of the law—the passage under debate at worst would have been considered redundant and would not have yielded undesirable results during the course of the application of the law in terms of freedom of opinion.

However, the CC annulled the 'legitimate public interest' wording from Article 2:44 of the new Civil Code by its decision No 7/2014. (III. 7.) and so the provision concerned entered into force on 15 March 2014 without this text.

The majority opinion of the decision tries to summarise, as a starting point, the foundations of the constitutional protection of freedom of opinion, making a detour to issues of justifying the given right, the case law of the CC, and also the case law of the ECtHR and the US Supreme Court related to freedom of speech. Out of the justifications of freedom of opinion, the decision highlighted the search for truth, serving democratic public opinion, and individual autonomy as well, stating that these justifications supplement, support and reinforce each other in terms of the issue under review (the freedom to criticise public figures and open debate on public affairs).[117] The decision also mentioned earlier CC case law (in particular decision No 36/1994. (VI. 24.)) and many ECtHR decisions and, as a new element in CC decisions, several US judgments as well.[118] It should be highlighted that, unlike in the 1994 decision, the court this time summarised

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[115] The text of the motion submitted by the ombudsman is available from the website of the Constitutional Court: <http://public.mkab.hu/dev/dontesek.nsf/0/dcae82809f3037d2c1257bbf001baba1/$FILE/ATTB2AKV.pdf/2013_1193-0_ind%C3%ADtv%C3%A1ny.pdf>.

[116] It should be noted that, similarly to its common law antecedents in court decisions, the new British Defamation Act of 2013 also cites the public interest nature of publications as an exonerating circumstance in the event of the publication of false statements of fact injurious to personality rights (s 4 para 1). In our view, in the Hungarian text of the law it is also only the 'legitimate' nature of the public interest that is a confusing and superfluous extra condition.

[117] Constitutional Court decision No 7/2014. (III. 7.), [13], [39]–[41]. For the correlations and relation between the justifications of freedom of speech, see A Koltay, *A szólásszabadság alapvonalai – magyar, angol, amerikai és európai összehasonlításban* (Századvég 2009) 43−47.

[118] In addition to the *New York Times v Sullivan* decision there is the *Gertz v Robert Welch Inc* (418 US 323 (1974)) and the *Dun & Bradstreet v Greenmoss Builders* (472 US 749 (1985)), see Constitutional Court decision No 7/2014. (III. 7.), [34]−[37].

the test used by the US Supreme Court in the *New York Times v Sullivan* case, though in the end its decision was not based on this test (whereas in 1994 the court applied a reverse process, when it used certain elements of that test, but failed to mention it explicitly).

The CC decision No 7/2014. (III. 7.) examined the constitutionality of the entire Article 2:44 of the Civil Code, although the motion addressed to the CC only objected to the wording 'legitimate public interest'. The reason for this was that, according to the CC, 'the constitutionality of a specific element of the rule cannot be assessed separately from all the other elements.'[119] Hence, the decision examined all three conditions required for a limited protection of the personality rights of public figures (ie the lack of violation of human dignity, the necessity for the limited protection and its proportionality, and the existence of the legitimate public interest).

The decision stated that although the protection of human dignity can constitute a limitation to freedom of opinion, any violation of human dignity 'cannot justify the restriction of freedom of speech. If it could, the very content of the freedom of speech would then become void … The right to the protection of human dignity is unrestrictable, but only as a legal determinant of human status.'[120]

The constitutional problem and the quite narrow latitude available to the CC can easily be identified here. Both the Fundamental Law and the Civil Code expressly protect human dignity, the former also declaring its inviolability (using the customary constitutional law terminology, its unrestrictability) (Article II of the Fundamental Law). The freedom of opinion, similarly to human dignity, is a constitutional right (Article IX of the Fundamental Law): however, it is not unrestrictable, but its restriction is possible only within a limited scope, similarly to all other fundamental rights (Paragraph (3) of Article I of the Fundamental Law). The constitutional collision between human dignity and freedom of opinion is, in itself, not an unresolvable issue in law. This possible collision is not a recent problem. However, Article 2:44 of the Civil Code wants to provide extra protection for the freedom of opinion (by ensuring a wider freedom to discuss public affairs), but on the other hand it prohibits the publication of opinions violating human dignity, as one of the objective limitations to a wider protection. Accordingly, there are two scenarios: either the latter provision is unconstitutional (as it frustrates the exercise of freedom of opinion, since any injurious opinion necessarily violates human dignity at the same time) or such a constitutional interpretation must be assigned to the protection of human dignity, in terms of the application of the examined provision, that can provide guidance for those applying the law. The CC chose the latter solution and expressly called the attention of the courts to their responsibility with regard to an interpretation that was constitutionally compliant.[121] The decision makes it clear that 'the unrestrictable aspect of human dignity comprises the absolute limit to freedom of speech, only with respect to that extremely narrow range of expressions of opinion

[119] ibid [54].
[120] ibid [43].
[121] ibid [60].

which denies the very foundations of the human status.'[122] As a general rule,[123] opinions and value judgments cannot be the grounds for either criminal or civil law prosecution. In this respect the decision of 2014 referred to one of the most important elements of the decision of 1994, namely the total impunity of opinions. However, contrary to the 1994 decision, in 2014 the CC did not consider value judgments as totally protected under the constitution, at least in civil law, since, according to them, the strong protection provided for value judgments:

> does not result in the protection of human dignity, privacy and good reputation of the parties concerned [ie public figures] … becoming void. Those exercising state powers and the politicians in the public eye are entitled to the protection of their personality rights if the given value judgement relating to their person does not concern their public affairs-related activity, within the scope of any discussion of public affairs, but their private or family life. Hence, civil law prosecution might be justified in that narrow scope when the expressed opinion, being a total, obvious and seriously disparaging negation of the human status of the concerned person, does not violate the personality rights named under Article 2:43 of the new Civil Code, but the unrestrictable aspect of human dignity specified under Article 2:42. Taking into account the arguments expressed above, even public figures can demand legal protection against false statements of fact.[124]

The decision highlights certain individuals exercising state powers, such as judges, who, due to their special position, in line with the case law of the ECtHR, can be granted extra protection in terms of their personality rights (but still below the level of general personality right protection) as compared to other public figures.[125]

One of the merits of the decision is that it tried to provide an independent interpretation to the personality right of human dignity, which so far has only been used in the application of the law in a very fragmentary manner.[126] In this respect, the following conclusions can be drawn, based on the decision of the CC:

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[122] ibid [60].

[123] ibid [61].

[124] ibid [62].

[125] See eg *Barfod v Denmark* (No 13/1987/136/10, judgment of 28 January 1989); *De Haes and Gijsels v Belgium* (No 7/1996/626/809, judgment of 27 January 1997); *Skalka v Poland* (App No 43425/98, judgment of 27 May 2003); *Perna v Italy* (App No 48898/99, judgment of 6 May 2003); *Lesnik v Slovakia* (App No 35640/97, judgment of 1 March 2003).

[126] In the 'company' of the protection of reputation and honour, the protection of human dignity is seldom applied directly as a personality right. Criminal case law developed a rather specific meaning of human dignity: it is regarded as part of honour, and libellous or denigrating expressions are regarded as the violations of both the right to honour and human dignity (see decisions Nos BH1993. 139., BH1998. 412., EBH2000. 181., BH2001. 99., EBH2005. 1194.). For example, the court held in case No BH2000. 285 that human dignity means 'the value judgement of society about the character, behaviour, and personal values of the individual', and that 'human dignity … expresses the need for treating each and every person in line with the minimum civilised standards of society.' This fossilised case law mixes the terms of reputation, honour, and human dignity, and developed a rather narrow meaning for the latter, which cannot be separated from honour. However, as the violation of human dignity, in itself, is not a specific crime punishable under the Criminal Code, the above mixing of the various terms does not result in material practical consequences. The interpretation of human dignity is more complicated in civil lawsuits. Most relevant court decisions regard

(1) opinions and value judgments concerning public affairs and public figures enjoy special protection,
(2) this protection, however, does not include value judgments made regarding the private or family life of public figures (as long as these are not related to public affairs),
(3) furthermore, the protection does not include those opinions which represent an obvious and seriously disparaging negation of the human status of the person concerned (ie the opinion questions or doubts that the person concerned is a human being, or disparages or reviles the person concerned in their human quality, and not in relation to public affairs).

In the latter case it is already not the right to honour, as per Article 2:45 of the Civil Code, that is violated (the protection granted to opinions relating to public affairs under Article 2:44 could totally exclude the possibility of violation of this right to honour in terms of the least protected public figures, ie politicians, those exercising state powers, for future judicial practice; the text mentioned above—the exclusion of liability under civil law as a 'general rule'—unequivocally refers to this), but the right to human dignity (Article 2:42 (2) of the Civil Code). Hence, based on the decision of the CC, contrary to the former general approach of civil law courts, human dignity has a unique and independently applicable content above and beyond the right to honour and good reputation. At the same time, this means the rejection of the stipulations of the decision of 1994, at least as far as the comprehensive and total protection and unrestrictability of opinions are concerned. Even so, since the 1994 decision was adopted in a criminal law context whereas the 2014 decision was adopted in connection with the Civil Code, the CC did not have to take sides regarding the necessity of maintaining the former test. Therefore, the 2014 decision makes no contribution to clarifying the correlation between the criminal case law and the similar rules of the two fields of law.

As far as the statements of facts are concerned, the decision stipulated that 'demonstrably false facts in themselves are not protected by the Constitution,'[127] thereby making a vague hint that, under certain circumstances, even false statements of facts can receive protection under freedom of speech. To disperse uncertainty, but without the intention of specifying a test for concrete statements of fact, the decision later declared that:

the right to honour and the right to human dignity as synonymous terms. As such, 'unjustifiably harmful', 'humiliating', 'offensive', 'derogatory' expressions—similarly to the violation of honour—in some cases can be regarded as violations of human dignity (cases Nos BH1997. 578., BH2000. 293., BH2002. 352., BDT2006. 1466.). No proper, independent interpretation has yet been given in practice to human dignity, specified as a separate personality right under the previous Civil Code, and also named in the new Civil Code of 2013 (as a refreshing exception, we can find two decisions of the Pécs Court of Appeal: BDT2010. 2191. and BDT2011. 2549.).

[127] Constitutional Court decision No 7/2014. (III. 7.), [49].

> even for those facts having no constitutional value which later turn out to be false, it is justified to take into account the interest of ensuring conditions for a discussion of public affairs that are as free as possible when determining the extent of imputability (attribution of liability) and the possible penalties in the course of the legal proceedings.[128]

In connection with the 'necessary and proportionate extent', the decision established that the 'restricted nature of the protection of the personality rights of persons exercising state powers and the politicians in the public eye is deemed "necessary and proportionate" in a much wider scope than for anyone else.'[129] However, this condition specified in the Civil Code is not unconstitutional since 'although it is linked to general terms used not in private law but in constitutional law, it nevertheless ensures the necessary and sufficient latitude for the application of the law to specify the tests used for the limits of expression of political opinion.'[130] The decision sets different categories regarding the group of people concerned and the level of protection of the criticism related to the given group: there are (1) public figures involved in public affairs, consciously undertaking public life, among whom people exercising state powers and politicians in the public eye are to be highlighted; and (2) *'non ex officio'* public figures involved in public affairs and (3) those people exercising state powers who are not able to protect themselves publicly due to the nature of their service, such as judges. As we go down this list, the necessary level of protection of their personality rights is increasing whereas the protection of freedom of speech is decreasing.[131]

However, the wording 'legitimate public interest' qualifies as an unnecessary restriction of freedom of speech and freedom of the press:[132]

> As far as the discussion of public affairs is concerned, the restriction of the protection of the personality rights of public figures for purpose of guaranteeing freedom of opinion is a constitutional interest and requirement in all cases. Therefore, there is no need to justify an unidentifiable 'public

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[128] ibid [50]. Actually, the civil law 'imputability test' could easily become the Gordian knot for the protection of reputation of public figures. Based on the fundamental rules of civil law proceedings, a person is considered liable for tort damages (disadvantages caused by the publication) if their conduct was wrongful (imputable), ie they failed to act in the manner that could generally be expected under the given circumstances (art 6:519 of the Civil Code). What 'could be expected' from a journalist in terms of revealing the truthfulness of the facts in a publication could actually be determined by judicial practice, with a theoretically general scope. Such a test, not yet applied in the Hungarian legal system, could include similar elements regarding the search for truth as, for example, the English *Reynolds* judgment (*Reynolds v Times Newspapers* [2001] 2 AC 127). Therefore, up to a certain point the issue could be settled (ie the notion of 'responsible journalism' defined) even under civil law judicial practice, indeed the English House of Lords made an attempt to that effect. The only difficulty is that based on the Civil Code (arts 2:51−53), the above mentioned 'imputability test' could be applied only in terms of the financial compensation of the damage (penalty for the disadvantage and indemnification for the damages caused). The 'imputability test' cannot be applied for objective sanctions (which could be applied based on the fact of the infringement, independently from the imputability), therefore, based on these legal obstacles, it cannot be used to assist the definition of a general rule.

[129] Constitutional Court decision No 7/2014. (III. 7.), [57].

[130] ibid [56].

[131] ibid [57]−[58].

[132] ibid [64].

> interest', and even less the 'legitimate' nature of such public interest. … This condition of the new Civil Code would narrow the scope of free expression of opinion to an unjustified extent, since, in addition to the ever present social interest for the discussion of public affairs, it would only allow a wider criticism of public figures if further public interest could be verified.[133]

It is remarkable that the decision was passed only with an extremely small majority (8 against 7 votes). Accordingly, seven judges attached their dissenting opinion to the decision. More precisely, there were six dissenting opinions, since Szívós J joined the opinion put forward by Balsai J. It needs to be underlined that not all of the dissenting opinions can be considered to be really and fully dissenting views in terms of content, since not all of their arguments deal with the eventually narrowly applied annulment (ie the annulment of the wording 'legitimate public interest'). In many instances the judges criticise and add comments to the reasoning of the other textual parts, which were found constitutional by the majority as well. The arguments put forward under the dissenting opinions can be grouped as follows:

(1) Criticism regarding the inclusion of the former Constitutional Court practice for consideration purposes (Balsai J, Dienes-Oehm J, Juhász J): The CC decisions quoted by the majority reasoning do not pertain to the questions under review and were passed under different circumstances and within a different context and therefore these decisions cannot be used as authoritative justifications to decide the present case.

(2) The rule of the new Civil Code under review can be seen as the codification of the former Constitutional Court practice and hence is not unconstitutional (Lenkovics J): According to this argument, the necessity/proportionality test and the inviolability of human dignity follow from the CC case law, 'the text of the new Civil Code actually translates these constitutional requirements into private law.' Although agreeing with the argument that the CC underlined the importance of 'public interest' in all of its major decisions on the freedom of speech (the majority reasoning of the present decision does the same when it refers to the importance of the search for truth and the aspects of democratic public opinion), this is not the same as the constitutionality of 'legitimate public interest' as a restricting criterion. The right 'to the free discussion of public affairs' (remaining in the text of the law) unequivocally refers to the public interest (even without the annulled text), which represents the theoretical grounds for the reduced protection of the personality rights of public figures.

(3) The annulment was not justified since no respective case law was so far available (Balsai J, Dienes-Oehm J, Lenkovics J, Juhász J, Pokol J, and Salamon J): Sufficient time should have been left to see how case law relates to this issue, ie how the civil courts interpret the annulled textual part, and intervention would have been required only if it had turned out that the courts applied the rule in an unconstitutional manner.

(4) The interest for the protection of human dignity is stronger than the interest for freedom of speech (Juhász J, Salamon J): although it is true that stronger criticism can be expressed regarding public figures based on their public role, freedom of opinion must

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[133] ibid [65].

nevertheless yield and be subordinate to the protection of human dignity: 'this value judgement was expressed by the wording "legitimate public interest", annulled by the majority decision.'[134]

(5) The requirement of 'legitimate' public interest is not an unconstitutional restriction (Salamon J): The principle ensuring the possibility of increased criticism regarding public figures does not allow or justify that these public figures be deprived of the generally guaranteed legal protection of personality rights in instances when no public interest is involved. A possible counter-argument to this is that it is always the public interest that is used as a reason for the reduced protection of personality rights. The text of the law, aiming to ensure the 'free discussion of public affairs' has clear reference to public interest, even after the annulment.

(6) Public figures and the scope of public life are not defined. It is not clear who or which situations require a narrower protection of personality rights. The annulled wording was intended to assist the identification of these issues (Juhász J): the argument somewhat reminds us of the starting point of the Civil Code provision under review, which was intended to reserve the reduced protection of personality rights exclusively to the discussion of 'public affairs' (thereby excluding tabloids, for example). The unequivocal reference to 'the free discussion of public affairs' remained in the text of the law even after the CC's decision, and hence the aspect missed by the dissenting opinion can find its support in the text of the law. Similarly, Pokol J argued that the CC could have given a constitutionally acceptable interpretation to the term 'legitimate public interest' if this was defined as 'the intensity of the relation of the public speech to public affairs.'[135] The stronger the relation of the given opinion to a certain public affair, the stronger its protection, and the more 'legitimate' the public interest, the publication of which is protected by it.

Summary: Current status and possible future of Hungarian jurisprudence

It is clear from the above that Hungarian case law in terms of public figures has not yet reached a refined and sophisticated state. Twenty years after the 1994 decision, it is without doubt that the US-influenced approach of the CC decision was not fully expedient. Whereas the clearly defined (or at least intended to be defined) 'categories', based on which any freedom of speech-related legal issue can be decided even without much balancing of the judge's uncertain assessment, are doing a great service in the freedom of speech case law of the United States and the establishment of the doctrines attached to the First Amendment,[136] and the *New York Times v Sullivan* case determined

[134] ibid, Juhász J, dissenting opinion [94].

[135] ibid, Pokol J, dissenting opinion [112].

[136] See eg Frederick Schauer, "Categories and the First Amendment: A Play in Three Acts," 34 *Vanderbilt Law Review*, (1981), 265–307

such clearly defined categories in issues of the defamation of public figures and guaranteed extremely strong protection to freedom of speech; however, Hungarian courts resisted the similar 1994 attempt and refused to apply as a test the full protection of opinions (value judgments) or to leave false statements of facts unpunished under certain conditions. As a result, judges are now left to decide individual cases themselves, according to their own discretion, within constitutional frameworks, but without predefined and exact categories. The CC decision No 7/2014. (III. 7.) can greatly contribute to the clarification of civil law jurisprudence, as it tries to clarify and address the issue of the restrictability of opinions expressed in relation to public affairs and public figures, rejecting the 1994 approach applied in criminal law which declares that opinions are generally unrestrictable. In this way, the decision makes a valuable attempt to separate the right to human dignity and the right to honour as well, and provides a partial clue to the constitutional assessment of false statements of facts related to public affairs, by referring to the 'imputability' test applied in civil law. These intentions, plus the 'good faith' test often applied in criminal law cases, may be capable of providing a stable framework for the judges' discretion without facing the judges with rigid categories and without depriving them of the task of balancing between the opposing interests.

Defamation cases of Hungarian interest before the European Court of Human Rights

Keller v Hungary

The applicant was a Member of Parliament who posed a question to the Prime Minister at a parliamentary session, asking whether there was any connection between the minister of agriculture and certain foreign extreme right groups. The Prime Minister was not aware of any such connection. In his response, the applicant said that the reason for this may be that the father of the minister without portfolio responsible for overseeing the secret services was a member of the Hungarian extreme right 'Hungarist' movement. He subsequently repeated these statements in several press organs. Subsequently, the minister without portfolio initiated a civil lawsuit for injury to reputation, as the applicant had alleged that he had abused his official power in the interests of his father. The Hungarian courts (with the Pest County Court acting as court of second instance) established that the minister's personality rights had been violated. According to the courts, the allegations made by the applicant constituted statements of fact whose truth he was unable to prove. Although in such cases the threshold of tolerance concerning a public figure (the minister in the present case), must be higher than that demanded from private individuals, the applicant (the defendant before the Hungarian courts) had also exceeded this higher threshold and had tarnished the minister's reputation with the false and injurious statement of fact.

Following this, the applicant sought remedy from Strasbourg; however, the ECtHR regarded the complaint as unfounded and therefore unacceptable, and passed no decision

on the merits of the case.[137] The ECtHR shared the position taken by the Hungarian courts, according to which the communication under dispute had been a statement of fact, had been injurious to the reputation of the minister and had had no factual basis. As such, the intervention into the exercise of the right of the freedom of speech was regarded as necessary and proportionate, including the damages imposed upon the applicant (HUF 700,000, c EUR 2,300, plus legal costs).

Csánics v Hungary

The applicant was the chairman of the Trade Union of Transporters of Valuables and Security Workers (Értékszállítási és Őrzésvédelmi Dolgozók Szakszervezete), who represented its members at several companies and who was also an employee of security firm G. As a trade union chairman, he was constantly involved in disputes with the company. His employment had been terminated in 1998; however, in 2000 the competent court ruled that the termination had been infringing. Following this, the applicant stated that since then the company G. had not permitted him to enter the company premises, even when acting in official trade union matters. Subsequently the applicant filed criminal charges for libel against the CEO of company G., S. K., as the latter had stated at a company meeting that 'the applicant had protected the criminals working at the company.' Acting as court of second instance, the Budapest Metropolitan Court found S. K. guilty and imposed a fine of HUF 150,000 (c EUR 500) on him. Following this, in his capacity as trade union chairman, the applicant gave several interviews to newspapers about the planned sale of another company which would have been acquired by company G. One of the dailies published an article about the planned sale of company D. and interviewed the applicant, who made the following statement:

> the other reason [for which we are holding a demonstration] is that 2,500 employees should not lose their livelihood and that a company [ie company G.] which tramples on constitutional and labour rights should not be the successor of company D. … Because of the inhuman conduct of the management [of company G.], [the employees] should not have to stay in a place where they were called 'criminals'. We have initiated court proceedings in some fifty cases because of this.

In early 2003 S. K. initiated a civil lawsuit, requesting that the court establish that the applicant's statements had damaged his reputation. In its proceedings, which were repeated for formal reasons, the court of first instance established that the contested statements of the applicant had caused injury to the reputation of the plaintiff as they had been false and injurious statements of fact rather than value judgments. Acting as court of second instance, the Pest County Court maintained the first instance decision. The court established that the statements made by the applicant had been value judgments based on statements of fact and had been expressed by the applicant in an infringing

[137] *Keller v Hungary* (App No 33352/02, admissibility decision of 4 April 2006).

manner as he had voiced his views 'in an unreasonably injurious, libellous and crude manner'. The applicant submitted a petition for review of the decision to the Supreme Court. According to his position the binding judgment had incorrectly qualified his statements as statements of fact, as they had expressed an opinion based on true facts. Furthermore, he emphasised that his intention had been to inform the public about an important issue. The Supreme Court deemed the applicant's petition to be unacceptable and declared that the binding decision had been correct and in conformity with the relevant legal provisions.

Following this, the applicant sought remedy from the ECtHR, which consequently passed a decision establishing a violation of Article 10 of the Convention (*Csánics v Hungary*).[138] According to the ECtHR, one of the elements of the disputed communication (ie that the inhumane conduct of the management of company G. had severely abused employees' rights) qualified as an opinion or value judgment, while the other element (according to which company G. had called the applicant and his colleagues criminals) had been a statement of fact and, consequently, open to proof. The ECtHR—also in view of the previous acts of defamation committed by S. K. against the applicant—therefore disputed the position of the courts, according to which the entire communication had been a statement of opinion and therefore no possibility had been granted to prove the statement of fact. According to the ECtHR, on the basis of the earlier tempestuous relationship between the parties the objectionable statement had a partially factual basis or had, at least, clearly been made in good faith during the course of a debate on public issues. As regards the manner of the communication, the ECtHR declared that it had not gone beyond the limits of tolerable criticism. That is, the Hungarian courts had violated the applicant's right to freedom of speech.

Karsai v Hungary

In 2004 a heated dispute commenced on whether a statue of Pál Teleki, the ill-fated prime minister of the Horthy era, should be erected in Budapest. As a result of the dispute, which had immediately evolved into a matter of prestige, the Municipal Assembly of Budapest reversed its previous decision, and thus no statue was erected. The statue, which had been completed in the meantime, was erected in the township of Balatonboglár.

On 12 March 2004, historian László Karsai published an article entitled 'Arguments in Favour of the Teleki Statue' in the weekly *Élet és Irodalom*, mentioning that in recent years several articles and studies 'praising' Pál Teleki had appeared in organs he referred to as 'right-wing' and 'extreme right-wing'. As he wrote,

[138] App No 12188/06, judgment of 20 January 2009.

> In the Parliamentary Library's PRESSDOC database, there are hundreds of articles and studies praising Pál Teleki, written in a sometimes uninhibited, sometimes more moderate style. In 1994–95, the extremely anti-Semitic and irredentist *Hunnia Brochures* devoted a 15-episode series to the ex-PM. The amateur historian [B.T.] wrote several articles singing the praises of Pál Teleki—of the devout Catholic, the enthusiastic Scouts officer—who in his view was an anti-Nazi '*Realpolitiker'*.
> These articles and studies remained largely without reaction. Only a few of us lay our hands, at least from time to time, on the products of the right-wing or extreme right-wing press, which, perhaps encouraged by this [indifference], keep lying, keep slandering, keep inciting against and bashing the Jews, in a more and more uninhibited way.

The author named in the cited article, Bálint Török, filed a lawsuit for the infringement of personality rights, claiming that his honour and reputation had been damaged. Judgment No 21.P.632674/2004/3. passed on 1 June 2005 by the Budapest Metropolitan Court, acting as court of first instance, rejected the claim, saying that 'although the term "Jew-bashing" found to be offensive by the plaintiff, is indeed injurious, the context makes it clear that it had been directed towards the extreme right-wing press organs mentioned in the previous sentence rather than the plaintiff.' The connection between the expression 'Jew-bashing' and the person of the plaintiff was so remote, according to the position of the court, 'that it could only create the impression forming the basis of the lawsuit in extremely inattentive readers.'[139]

By contrast, judgment No 2.Pf.21.065/2005/5. of 17 January 2006 of the second instance forum, the Budapest Court of Appeal, reversed the first instance decision and established that defendant László Karsai 'had violated the plaintiff's personality rights to honour and reputation by creating the false impression that Bálint Török had engaged in Jew-bashing in his articles about former prime minister Pál Teleki.' Besides ordering him to pay costs, the court ordered the defendant to publish in *Élet és Irodalom,* at his own cost within 15 days, the operative part of the judgment, establishing the infringement, 'accompanied by an expression of his regret'. According to the Court of Appeal, the statements made in the article formed a coherent train of thought, and the article had not only dealt with right-wing and extreme right-wing press products in general, but had specifically named one such product and one such author, the plaintiff. On the basis of this, the term 'Jew-bashing' could have been interpreted as referring to the plaintiff.

Judgment No Pfv.IV.21.071/2006/5 of 28 June 2006 maintained the final decision and accepted the argument of the court of second instance. (It should be noted that neither court decision makes mention of CC decision No 36/1994. (VI. 24.) and the measure applied by it that is also relevant in respect of the present case.) The losing plaintiff then brought the case before the ECtHR, claiming a violation of his freedom of speech protected by Article 10 of the Convention (*Karsai v Hungary*).[140]

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[139] The Hungarian courts and the ECtHR confined themselves to the examination of the legality of the term 'Jew-bashing'. It is not entirely clear to us why Bálint Török did not claim, at the time, violation of his personality rights in respect of the trio of expressions 'keep lying, keep slandering, keep inciting'. These are clearly statements of fact and, as such, are infringing if not proven. Since, however, the plaintiff made no such claim, the courts were not in a position to examine this issue.

[140] App No 5380/07, judgment of 1 December 2009.

The reasoning of the judgment of the ECtHR declares that exaggerations or even provocative statements are admissible in public debates.[141] This is especially so in respect of political opinions published in relation to affairs of prominent public interest (Article 35.). By contrast with the Hungarian courts, the position of the forum was that the use of the term 'Jew-bashing' is an *opinion* rather than a *statement of fact;* therefore its publisher is not required to furnish proof of its truth, but only that is has certain 'factual basis'.[142] If the opinion is based on actual fact then it cannot be regarded as infringing, irrespective of how injurious a piece of criticism it conveys. With this we have reached the core of the reasoning of the decision: it is true and not disputed by anyone that Bálint Török had actively participated in the efforts directed at presenting a favourable impression of the historical role of Pál Teleki to the public. According to the ECtHR, in his article Karsai had argued that the 'apology' for a politician widely known to have had anti-Semitic convictions constitutes the trivialisation of his 'racist' policies; it was this phenomenon that the applicant had condemned as 'Jew-bashing'. Taking into account Teleki's role in the enactment of the anti-Semitic laws, labelling Török's 'apologetic' writings as 'Jew-baiting' cannot be regarded as the expression of a pure statement of fact; rather, it is a statement of opinion that is neither excessive nor devoid of factual basis.[143]

With regard to decisions placing restrictions on the freedom of speech, the nature and severity of the sanction imposed must also be taken into account. The sanction imposed upon the applicant (public retraction) is capable of casting doubt upon his professional authenticity and thereby to have a *chilling effect* on the exercise of the freedom of speech.[144]

On the basis of all this, the ECtHR took the position that the Hungarian courts had not been able to prove the existence of a *pressing social need* in respect of the sanctioning of the communication concerned, and thus the sanctioning cannot be regarded as necessary in a democratic society. That is, the Hungarian state had violated the applicant's right to the freedom of speech.[145]

The decision of the ECtHR invites certain criticisms. The application of the law is not entirely capable of distinguishing between statements of fact and opinions; the dichotomy of fact and opinion—which is the basis of establishing whether an infringement has been committed under several legal systems, as well as in the practice of the ECtHR—is one of the most important issues related to the protection of reputation and honour, albeit one that cannot be resolved with perfect precision in many cases. The distinction is primarily a linguistic issue, which is nevertheless required of the courts. In the opinion of the present author, the term 'Jew-bashing', published in the article and which forms the basis of the proceedings, should be regarded as a statement of fact rather than an expression of

141 ibid [28].
142 ibid [31]–[33].
143 ibid [34].
144 ibid [36].
145 ibid [38].

opinion. According to the vernacular usage of the word, someone who is 'Jew-bashing' expresses hostility, hate, insult or derogation towards members of the Jewish community or incites or tries to incite hatred against them. This is therefore a positive action, which is either performed by someone or not. It may be argued, of course, that Jew-bashing is possible covertly or indirectly via various innuendos, but these articles contain no such elements. The other expressions in the text besides 'Jew-bashing' (lying, slandering, inciting) are also in favour of qualifying the communication as a statement of fact, since these undoubtedly are such, thereby reinforcing the weight and nature of the single statement Bálint Török had sued over.

In the writings of Bálint Török referred to by László Karsai we do not find any anti-Semitic or anti-Jewish statements whatsoever. What had actually been expressed in Török's mentioned articles instead of 'Jew-bashing' is stated in Karsai's public retraction published in *Élet és Irodalom* on 10 March 2006 (the publication of which had been ordered by the decision of the Hungarian court). Although probably intended as a piece of irony, the sentence accompanying the 'expression of his apology' actually provides proof of the infringement committed by him. The text runs as follows: 'Török was not Jew-bashing; he was merely protecting an anti-Semitic politician, trying to mitigate his role in the enactment of the Jewish Laws.' There is a major difference between the two statements. The former is a clearly condemnable act, while the latter is an expression made during the course of a debate on history and public issues.

The Strasbourg Court provides greater protection to injurious, offensive and, sometimes, baseless opinions than to false statements of fact. Already in the *Lingens* and *Oberschlick* cases it was established that proof of the truth of opinions may not be demanded by the national courts. This, however, does not entail full immunity for opinions. The courts expect value judgments to have some *factual grounding*, lacking which purely abusive opinions are not granted protection, even in relation to public affairs.[146] Although the expressions 'Nazi-friendly' (in the *Lingens v Austria* case),[147] 'Nazi politics' (in the *Oberschlick v Austria No 1* case),[148] and 'closet Nazi' (in the *Scharsach and News Verlagsgesellschaft GmbH v Austria* case)[149] were regarded by the ECtHR as opinions protected by the freedom of speech, these utterances had voiced opinions rather than statements of fact, nevertheless opinions of a rather extreme and injurious nature.

That is, saying that somebody is a 'Nazi' (a 'racist' or a 'xenophobe') is entirely different from saying that the person engages in 'Jew-bashing' ('racist acts', 'incitement to hatred') and may entail entirely different consequences. It should be noted that, in the

[146] *Jerusalem v Austria* (App No 26958/95, judgment of 27 February 2001); *De Haes and Gijsels v Belgium* (No 7/1996/626/809, judgment of 27 January 1997); *Dichand and Others v Austria* (App No 29271/95, judgment of 26 February 2002).

[147] No 12/1984/84/131, judgment of 24 June 1986.

[148] App No 11662/85, judgment of 23 May 1991.

[149] App No 39394/98, judgment of 13 November 2003.

absence of adequate factual grounds, calling someone a 'Nazi' may also constitute an infringement as a disproportionate, extreme, denigrating and defamatory opinion.

The ECtHR had not been familiar with the articles of László Karsai that were disputed by Bálint Török, or at least this is the impression created by the reasoning of the judgment. The Court argued that any support of Pál Teleki—whom the Court clearly regards as an anti-Semitic, racist historical figure[150]—may in itself constitute 'Jew bashing'. As an opinion, this has sufficient factual grounding and may not, therefore, be restricted. As such, the reasoning of the ECtHR had indirectly subscribed to the logical reasoning that whoever 'glorifies' Teleki (ie speaks positively about his historical role) automatically engages in 'Jew-bashing'. Or, at least, the Court decided that this opinion has sufficient factual grounds.

Naturally, the ECtHR has no intention of acting as a referee in disputes about historical issues, as no other court could do either. However, in its decision making it should have taken into account the complexity of these disputes and the different interpretations possible. The assessment of erstwhile Prime Minister Pál Teleki is, indeed, far from clear-cut and the intellectual debate over his role should be left to the historians. The ECtHR, however, did not take differences in opinions into account, but indirectly took a stand in the dispute by summarising, in a rather unfortunate footnote, the information on Teleki's historical role found to be decisive by the Court. The Court mentioned three elements: that the anti-Jewish acts had been adopted under his administration; that it was also during that period that Hungary joined the Tripartite Pact and that his government had collaborated with Nazi Germany at the beginning of World War II. Obviously, the decision of the ECtHR cannot be expected to have taken every small detail of the complexity of Teleki's historical role into account; however, the wording of the decision[151] and the aforementioned footnote (which, in the opinion of the author, was not sufficient for a well-founded assessment of the facts by the Court) suggest an over-simplified image of Teleki.

In the light of its previous practice, the decision of the ECtHR cannot be regarded as wholly consistent. The facts of another case, in which judgment was passed in 2000, are rather similar to the circumstances of the *Karsai* case. In the *Wabl v Austria* case[152] the complainant, a former member of parliament, accused an Austrian newspaper of 'Nazi journalism' after the paper published an interview with a policeman who Wabl had scratched with his nails at a demonstration and who had since been terrified of having contracted AIDS as a result of the injury. During the course of the dispute that ensued in the wake of the article, the complainant called the conduct of *Kronen Zeitung* 'Nazi journalism', which constituted a transgression of the limits of the protection of the freedom of speech according to the Austrian courts. In this case, the ECtHR passed a decision in favour of the state called to suit: the applicant's outrage at the attitude of the

[150] *Karsai v Hungary* (App No 5380/07, judgment of 1 December 2009), [33]−[34].
[151] ibid [33]−[34].
[152] App No 24773/94, judgment of 13 March 2000.

newspaper does not justify the analogy with Nazi journalism, which verges on a criminal allegation, given the fact that the Austrian legal system strictly prohibits the dissemination of national socialist ideas. The ECtHR attached special importance to the fact that the allegation of conduct inspired by Nazi ideas may stigmatise the party following such conduct, ie the allegation of Nazism may put a stigma on the attacked party. Although the article published in the newspaper did form sufficient grounds for the outrage of the applicant, the expression 'Nazi journalism' was not used by Wabl in the heat of the moment, but only several days after the publication of the article at a press conference in response to a journalist's question. The facts of the *Karsai* case are somewhat different in that the complainant had published his opinion about Teleki and those who depict him as a positive figure of history not simply out of outrage, but as a result of his understanding of history which, although not generally accepted or 'conventional', was based on his activities as a student of history.

The reasoning applied in the *Wabl* case is relevant in the *Karsai* case, too, because the communication concerned qualified as a statement of opinion in both cases. In cases of actual 'Jew-bashing', the suspicion of a criminal offence—hate speech and incitement against a community—may arise under Hungarian law, too; the person accused of such conduct is stigmatised in Hungary, too, and Karsai's article cannot be regarded as a sudden reaction that is harder to control, either. Nevertheless, the council proceeding in the *Karsai* case did not attempt to distinguish between the two cases and did not even make mention of the *Wabl* decision.

Uj v Hungary

On 2 January 2008 the journalist Péter Uj published an article entitled 'Kincskereső' (Treasure Hunter) in the 'Opinion' column of the national daily *Népszabadság*. The subject of the article was the quality of a well-known Hungarian wine, the product of Tokaj Kereskedőház Zrt. In the opinion of the author, the quality of the product was poor and its popularity among Hungarian consumers was unjustified. The disputed passages of the article were the following:

> On nine out of ten occasions, it is a product of T. Zrt, available below 1,000 [Hungarian forints] per bottle, that represents the world's best wine region, the Hungarian National Pride and Treasure . . . and that could make me cry. Not only because of the taste—although that alone would easily be enough for an abundant cry: sour, blunt and over-oxidised stuff, bad-quality ingredients collected from all kinds of leftovers, grey mould plus a bit of sugar from Szerencs, musty barrel—but because we are still there … hundreds of thousands of Hungarians drink this shit with pride, even devotion … our long-suffering people are made to eat (drink) it and pay for it at least twice ([because we are talking about a] State-owned company); it is being explained diligently, using the most jerk-like demagogy from both left and right, that this is national treasure, this is how it is supposed to be made, out of the money of all of us, and this is very, very good, and we even need to be happy about it with a solemn face. This is how the inhabitants (subjects) of the country are being humiliated by the skunk regime through half a litre of alcoholised drink. . . .

> And once again, I would remind everybody of how people were whining back then, saying that foreigners were coming to destroy Tokaj, buy up the market and make everything multinational and alien-hearted; and then it turned out that those foreigners made gorgeous wine, just like some lucky, resolute and very talented Hungarian family wineries, that they tried to make Tokaj world-famous again, because this was their business interest (profit, ugh!); while we as a community are trying to destroy their achievements using State money, lest something finally could be a success.

Criminal proceedings were instituted against the journalist on the basis of a private prosecution. The first instance judgment was passed by the Budapest II. and III. District Court (4.B.964/2008/2.). The court found the journalist guilty of the offence of slander and sentenced the journalist to one year's probation without imposing a fine. That is, the court regarded the statements made as statements of fact which 'go well beyond the boundaries of journalistic freedom of expression and legitimate criticism'. The court offered no further reasoning for its decision and did not analyse the relationship between the article and the case law of the CC.

Following the appeal against the judgment the Budapest Metropolitan Court, acting as court of second instance, changed the original judgment from defamation to harming honour, and issued the lightest available sentence against the journalist, a court warning (20.Bf.7368/2009/6.). That is, the court correctly regarded the content of the article as a statement of opinion. The court referred to CC decision No 36/1994. (VI. 24.) as well, but did not apply its measure applicable to public figures and disputes on public issues. All the court established was that 'human dignity, honour and reputation, likewise constitutionally protected, may constitute the outer limit of the freedom of expression realised in value judgments.' This is obviously true and is present in the CC decision, too; however, the court of second instance failed to take into account the different rules applicable in public disputes, rules which are restrictive in respect of the protection of personality rights, while a state-owned company producing one of Hungary's most prestigious products is obviously a 'public figure' in this respect. The court had even attributed a tenet to the CC that distorts the very essence of the decision of the latter. Quoting the decision: 'Thus, the position taken by the Constitutional Court is that, in the event of a conflict between these two fundamental rights—the freedom of expression and the right to dignity, honour and reputation—the right to honour takes precedence.' An oddity of the second instance decision is that it clearly speaks of a violation of the 'human dignity' of the private prosecutor, whilst 'human dignity' is conceptually limited to the sphere of human beings (ie 'natural persons'). It is also true, however, that in criminal law practice the right to honour is granted to legal persons as well (see eg decision No BH1992. 154), and several decisions mention human dignity as part of the right to honour and libellous or denigrating expressions are regarded as the violations of both the right to honour and human dignity (decisions Nos BH1993. 139, BH1998. 412, BH2000. 285, EBH2000. 181, BH2001. 99, and EBH2005. 1194). It is clear, however, that the protection of human dignity with regard to a legal person is a fundamentally erroneous concept.

This error was also reinforced by the decision of the Supreme Court, which upheld the two previous decisions (No Bfv.I.282/2010/3.). The supreme justice forum only found it noteworthy in the 1994 decision of the CC that 'despite its prominent importance the right of the freedom of expression is not beyond all restriction.' The decision also mentions the violation of human dignity (and the right to honour) due to the use of abusive, denigrating or degrading expressions.

The ECtHR, however, established the violation of the applicant's right to freedom of speech in its decision of July 2011 (*Uj v Hungary*).[153] The decision formulated certain reservations of the ECtHR with regard to the establishment of violations against human dignity by the courts:

> there is a difference between the commercial reputation-related interests of a company and the reputation of an individual concerning his or her social status. Whereas the latter might have repercussions on one's dignity, for the Court interests of commercial reputation are devoid of that moral dimension. In the instant application, the reputation-related interest at stake is that of a State-owned corporation; it is thus a commercial one without relevance to moral character.[154]

The ECtHR established that the disputed article pertained to a public issue and was part of a public debate. The interest vested in the freedom of such disputes allows the publication of even exaggerated, injurious and offensive opinions. Since the courts of Hungary failed to take this into account, a violation was committed against Article 10 of the Convention.[155]

> The Court notes that the expression used by the applicant is offensive. Nevertheless, the subject matter of the case is not a defamatory statement of fact but a value judgment or opinion, as was admitted by the domestic courts. The publication in question constituted a satirical denouncement of the company within the context of governmental economic policies and consumer attitudes … The opinion was expressed with reference to government policies concerning the protection of national values and the role of private enterprise and foreign investment. It dealt therefore with a matter of public interest.
>
> The Court considers that the domestic courts failed to have regard to the fact that the press had a duty to impart information and ideas on matters of public interest and in so doing to have possible recourse to a degree of exaggeration or even provocation, or in other words to make somewhat immoderate statements. … For the Court, the wording employed by the applicant was exaggerated but made in a public context; the expression used is, regrettably, a commonly used one in regard of low-quality wine and its vulgarity thus constituted a forceful part of the form of expression.[156]

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153 App No 23594/10, judgment of 19 July 2011.

154 ibid [22].

155 For a more detailed presentation of the ECtHR decision see A Becánics, 'Az Emberi Jogok Európai Bíróságának ítélete az újságírói véleménynyilvánítás szabadságáról az Uj Péter-ügyben' (2011) *Jogesetek Magyarázata*, hallgatói különszám 4−7.

156 *Uj v Hungary* (App No 23594/10 judgment of 19 July 2011), [23]−[24].

Ungváry and Irodalom Kft v Hungary

The facts of the case

The historian Krisztián Ungváry, who later became one of the defendants in the subsequent civil lawsuits and defendant of the criminal lawsuit, published a lengthy article on 18th May 2006 in the weekly *Élet és Irodalom* entitled 'The Genesis of a Process: The Dialogue Group at Pécs'. The article was concerned with the actions of the state security service against a student peace activist movement called Dialogue, which was active at the university of the city of Pécs in the 1980s, the last decade of the communist state era.

In the article, Ungváry primarily relied on the materials held in the Historical Archives of the State Security Services as a 'strictly confidential action plan', and wrote about the role of the leadership of Pécs University, including L. K., the deputy secretary of the local party committee between 1983 and 1988 and a justice of the Constitutional Court at the time of the publication of the article, in supporting the activities of the state security service. With the cooperation of the organs of the party and the state security, the Dialogue movement had been thwarted as not being in conformity with the official 'line'. Ungváry characterised the conduct of L. K. in the Dialogue case as 'hard line', recalling that it was L. K. who had ordered the removal of Dialogue's poster, saying 'the country needs no such … initiatives' and had reproached one of the election candidates of the communist youth organisation for enjoying Dialogue's support. L. K. applied for a press correction against the weekly. The courts accepted his application.

On 27 May 2007 a television channel aired an interview with Ungváry about the article published in *Élet és Irodalom,* where the latter reiterated his opinion about L. K. Moreover, in the programme Ungváry called L. K. 'trash' and 'mega-trash'. In April 2008 a book co-authored by Ungváry was published on the history of the communist state security service,[157] one of the chapters of which contained a slightly amended version of the article published in *Élet és Irodalom*.

On the basis of all this L. K. filed a criminal complaint against Ungváry and launched two civil lawsuits for the protection of personality (a press correction lawsuit and a lawsuit for the protection of reputation and honour) against Ungváry and the publisher of *Élet és Irodalom*.

Review of the decisions of the Hungarian courts

In the lawsuit for press correction, the Budapest Metropolitan Court ordered the editorial board of the newspaper to publish a corrective statement (No 19.P.23.260/2007/8.). The court cited the 1994 decision of the CC, regarded the majority of the disputed part of the article as statements of fact and established that, lacking proof, their publication

[157] G Tabajdi and K Ungváry, *Elhallgatott múlt – A pártállam és a belügy. A politikai rendőrség működése Magyarországon 1956–1990* (Corvina 2008).

constituted a legal violation. (Although, as we have mentioned, the court cited the measure of 'professional diligence', established in the decision of the CC, which would release the editorial board and the author from legal liability in a civil law context even in the event of publishing false facts, this measure was not applied by the court after all.)

On 19 February 2009 the Budapest Metropolitan Court, proceeding in the lawsuit for the protection of reputation and honour, established that the statements made in Ungváry's study published in *Élet és Irodalom*, the television interview and the book had violated the personality rights of L.K. as had the publisher by publishing the study (19.P.25.000/2007/16.). The first instance judgment established that Ungváry and the publisher had published untrue (unproven) statements injurious to L. K.'s reputation. Following the appeal against the judgment, on 13 October 2009 the Budapest Court of Appeal amended the first instance judgment and rejected L. K.'s claim on the grounds that the statements referred to had been value judgments supported by facts rather than statements of fact (2.Pf.21.082/2009/5.). At the same time, the Court of Appeal also established that Ungváry had violated L. K.'s honour and human dignity by calling him 'trash' in the television programme. On the basis of L. K.'s petition for judicial review, on 2nd June 2010 the Supreme Court amended the second instance decision (apart from the defamation also established by the Court of Appeal) and established that the article had violated the personality rights of L. K. by creating the false impression that, in the communist era, he had been a 'quasi-agent' and informer, collaborating with and writing reports to the state security services as an 'official liaison', had opposed the election of the officials of the youth organisation at the behest of the secret service and had called for a hard-line policy (Pfv.IV.20.328/2010/5.). According to the position of the Supreme Court, the article had contained unfounded statements of fact abusive to L. K. The Court ordered the plaintiffs to pay joint and several damages of HUF 2 million (c EUR 6,700) and ordered Ungváry to pay a further HUF 1 million (c EUR 3,350), plus interest.

The Pest Central District Court, acting as court of first instance in the criminal lawsuit, found Ungváry guilty of defamation and issued a court admonition against him. According to the court, the materials published in the article and the book were 'objectively clearly capable of injury to the honour of the private prosecutor'. At the same time, however, the court also established that the writings of the defendant resulted from academic research, and only the representatives of science are entitled to decide on academic issues. That is, the court regarded the majority of the disputed elements of the article as academic opinions, the assessment of the validity of which was beyond the competence of the court and which did not transgress the limits which L. K. as a public figure was required to tolerate. The court only established that the defendant had committed a criminal offence in respect of the use of the terms 'trash' and 'mega-trash'. By contrast, besides maintaining the establishment of the offence of defamation, the Budapest Metropolitan Court proceeding as court of second instance in the criminal lawsuit also established that the defendant had committed the offence of libel by publishing the statements in the article (20.Bf.V.7908/2009/5.). According to the position of the court, the parts of the text pertaining to L. K. were statements of fact rather than statements of opinion and Ungváry had been unable to prove the veracity of the

statements that were injurious to L. K. The third instance forum, the Budapest Court of Appeal, reversed both previous judgments and acquitted the defendant of all charges (3.Bhar.341/2009/6.). The court shared the position of the court of first instance in that Ungváry's statements made about L. K. 'should be regarded in their entirety as opinions, conclusions made in an academic study on the basis of research that are [negative to L. K.].' These opinions had 'certain factual grounds' and the author had published them in good faith. As regards the expression 'trash', the court did not deem this to be defamatory either, but only as an opinion that public figures are required to tolerate. The ruling of the Supreme Court, proceeding on the basis of the motion for judicial review, maintained the third instance decision of the Court of Appeal (Bfv.III.927/2010/4.). In keeping with the rules of criminal proceedings, the supreme judicial forum could not assess whether the previously proceeding court had considered the evidence available in an appropriate manner and had made valid inferences on the basis of it.

In summary, the final outcome of the proceedings was quite different in the civil law and the criminal law cases: in the former Ungváry had been convicted while he had been acquitted in the latter, on the basis of the very same facts.

The measure applied by the Hungarian courts

The various civil and criminal law courts have not applied a single, uniform measure with regard to the protection of the reputation and honour of public figures and neither have they applied the measure set by CC decision No 36/1994. (VI. 24.) in a uniform manner.

The first civil law court decision directed at the protection of honour and reputation (Budapest Metropolitan Court, No 19.P.25.000/2007/16.) referred to the CC decision, laid down the broad freedom of opinions and made mention of the measure applicable to statements of fact:

> According to the position of the Constitutional Court, freedom of expression does not protect the communication of false facts that are capable of defamation, if the person from whom the communication originates is aware of its falsehood or the rules of his or her trade or profession would require the examination of the truth of the facts from him or her, but he or she has failed to proceed with the due diligence required by the responsible exercise of the fundamental right of the freedom of expression.

According to the court, therefore, historians, journalists and press organs are expected to conduct a thorough examination of the veracity of the facts. Following the identification of the constitutional measures, the court regarded the majority of the statements of the article found to be injurious by the plaintiff as (false, ie unproven) statements of fact and imputed to the defendant the latter's non-compliance with the duty of special diligence.

Although the second civil court decision passed in the wake of the appeal (Budapest Court of Appeal, No 2.Pf.21.082/2009/5.) did mention the CC decision, its own ruling was not based on that. In this case this neglect may be understood as a positive development from the aspect of the interpretation of the law because, in contrast with

the CC decision, the judgment differentiated between expressions of opinion that have a factual basis and those that do not and, since the majority of Ungváry's statements were regarded as opinions grounded in actual fact, the court only established a legal violation on the basis of the publication of the opinion containing the terms 'trash, mega-trash'.

The third civil law court decision passed in the course of the review process (Supreme Court, No Pfv.IV.20.328/2010/5.) made no mention at all of the 1994 CC decision and did not establish a separate measure to be applied. Since the court regarded the disputed statements to be statements of fact, the truth of which had not been proven by the defendant, it established the violation of the good reputation of the plaintiff.

Although the first criminal court decision (Pest Central District Court, No 20.B.25.036/2009/14.) made a minor reference to the 1994 CC decision, the acquittal of the defendant was not based on the principle of the full freedom of opinions and value judgments about public figures provided for therein, but rather on the protection of the freedom of academic debates and the non-restrictability of academic opinions by courts of law. The latter is an important constitutional guarantee; however, we believe that in this case the court had misunderstood the substance of the freedom of academic research. The decision provides that:

> the question of whether cooperation between the party and the organs of state security had been a necessity is an academic issue. Accordingly, it is also an academic issue whether, on the basis of the necessity of such cooperation, the cooperation of [L. K.] with the organs of state security may be proven on the basis of the sources available.

At this point the court had mixed the 'general' results of academic research with the results of the research related to L. K. In my view the above issue does involve a—general—question of academic research, namely whether 'cooperation between the party and the organs of state security had been a necessity.' As regards the specific role played by L. K., the veracity of statements of fact or opinions that have a factual basis about his person is something that is open to investigation during the course of a legal procedure. That is, if the courts do not find evidence of the veracity of statements of fact or factual grounds for statements of opinion, only the CC's measure of due professional care could provide relief from legal responsibility (in the event of false statements of fact). The assessment of the academic presentation of historical events and processes (eg the operation of the communist secret services) and the statements published about the specific actions of specific persons may be different. If this were not so, if the freedom of academic research were to provide protection to any analyses of the events of recent history, down to the level of the presentation of the actions of individuals, participants in the events of history could easily be deprived of the protection of their personality rights, ie any false statement or groundless opinion could be published about them, and this would serve neither the ethics of academia nor of history nor the stability of the system of the protection of personality rights (in agreement with this see decision No ÍH 2013. 59). The Supreme Court's statement was in agreement with this; the ruling on the closure of the criminal proceedings (Bfv.III.927/2010/4.) declared that:

> In the given case—obviously—it may be a question of academic truth whether the former position of the substitute private prosecutor, the related tasks and their performance correspond to or constitute the actions referred to in the statements found by him to be injurious. The establishment of … whether he had specifically and actually engaged in such activities—ie his actual, specific conduct—may form the subject of an evidential process in a lawsuit. If the specific conduct of a specific person were regarded as an academic truth, this could result in the removal of such conduct from the realm of the law; the establishment of its veracity (actual fact) would become the privilege of the academician(s), independently even from the person concerned.

Strict insistence on the veracity of the facts could perhaps be loosened if the courts were to apply the CC's measure of due care in their actual practice; in this case, errors committed in good faith would be exonerated from legal liability.

The second criminal court decision (Budapest Metropolitan Court, No 20.Bf.V. 7908/2009/5.) made no mention of the 1994 CC measure either, it regarded most of the injurious communications as statements of fact and—on the basis of the 'traditional' interpretation of the law—established the commission of the offences of libel and defamation due to the absence of evidence.

The basis for the third criminal court decision (Budapest Court of Appeal, No 3. Bhar.341/2009/6.) appears to be CC decision No 36/1994. (VI. 24.), referred to in the decision several times; however, in actual fact the court applied a measure different from the one provided for therein. The Court of Appeal correctly quotes the CC's decision, according to which the 'expression of a value judgement capable of offending the honour of an authority, an official or a politician in the public eye, and expressed with regard to his or her public capacity is not punishable under the Constitution.' Following this, however, the court declared that 'the freedom of expression means that the majority is required to tolerate even extremely offensive expressions that are not devoid of factual bases and thus do not qualify as abusive, if they take the form of value judgements.' That is, in contrast with the CC, the Court of Appeal differentiated between opinions with factual grounds and opinions devoid of such grounds; something that is not objectionable, as shown by our previous argument. Unfortunately, however, following this the Court declared that 'in the case of public figures, proof does not serve the discovery of the facts, but only to prove that the perpetrator had proceeded in good faith, ie to prove whether the value judgment had factual grounds or not.' This renders almost nonsensical the previous differentiation between opinions, as it does not require, in the case of opinions with factual basis, that the communicator of the opinion be able to prove the veracity of such factual grounds; rather, it is content with the mere existence of such (true of false) factual grounds. As a result of this, the communicator of an opinion based on false factual grounds would be exculpated from legal liability, even if he or she had neglected to take professional care, and in most cases this would be contrary to the requirement of good faith also mentioned as part of the court's measure. Naturally, opinions with false factual grounds may not necessarily be restricted in every case and value judgments may be provided protection on the basis of other considerations if they are on important public issues and the context and manner of the communication (its proportionate and non-denigrating nature), or perhaps an unprejudiced account of a dispute, call for such protection.

The distinction between facts and opinions

As may be seen, to a large extent the decisions of the courts were based on whether they regarded the elements of Krisztián Ungváry's publication found grievous by L. K. as statements of fact or statements of opinion. Of the seven different court decisions passed on the merits of the case, the numbers of those qualifying the most important statements as statements of fact and those qualifying them as statements of opinion were nearly equal (4–3). This circumstance in itself indicates that the contents involved are very difficult to assess. In such borderline cases no clear directions exist for the courts to follow; the decision about the nature of the communication (which is a prerequisite for identifying the measure to be applied, given the differences between legal assessment of statements of fact and statements of opinion) falls under the scope of their discretion in interpreting the texts involved. In general it may be said that the decisions of the courts do not dwell upon lengthy linguistic or other analyses when examining the parts found to be injurious. The following table presents an overview of the decisions of the courts with regard to five prominent sections of the text.

Table 2: Distinction between statements of fact and opinion in the Hungarian court decisions passed in the Ungváry *case (not including the decision in the press correction case)*

1. Civil court decision (Budapest Metropolitan Court)	**2. Civil court decision (Budapest Court of Appeal)**	**3. Civil court decision (Supreme Court)**	**1. Criminal court decision (Pest Central District Court)**	**2. Criminal court decision (Budapest Metropolitan Court)**	**3. Criminal court decision (Budapest Court of Appeal)**
'[L. K.]'s conduct wholly qualifies as the work of an agent.'					
statement of fact	opinion	statement of fact	opinion	statement of fact	opinion
'[L. K.] maintained a regular and obviously collegial relationship with the organs of state security, often pro-actively meeting their expectations.'					
statement of fact	opinion	statement of fact	opinion	statement of fact	opinion
'As an official contact [L. K.] had been a diligent informant and proponent of hard-line policies.'					
statement of fact	opinion	statement of fact	opinion	statement of fact	opinion
'[L. K.] reported to state security in the line of his professional duties.'					
statement of fact	opinion	statement of fact	opinion	statement of fact	opinion
'The action of [L. K.] against S. Zs., an alleged sympathiser with the Dialogue group, resulted in the political demise of the latter.'					
statement of fact	opinion	statement of fact	opinion	statement of fact	opinion

With so many different judicial opinions, it is hard to take a clear stand in respect of the texts. For example, the statement according to which 'the conduct of [L. K.] wholly qualifies as the work of an agent]' could rightfully be regarded as a piece of opinion, since Ungváry did not state that L. K. had been an agent, but only that he performed work similar to that of an agent. It is more or less known what an agent did under communism and its assessment is an issue of academic research worthy of higher protection; if a historian states that someone's conduct had been similar to that of an agent (that the person qualified as an 'official contact'),[158] this may be regarded as an opinion with factual basis, the factual grounds of which (ie the similarity of the work of an agent to the conduct of the 'non-agent') may be subjected to proof. Irrespective of this, however, the results of the courts' assessments of this section, too, yielded widely different results.

The regular, collegial relationship with state security is probably a statement of fact that requires proof; however, the second part of the sentence ('often proactively meeting their expectations') could be regarded as an opinion with sufficient factual basis, since academic methods are available to determine what these expectations consisted of, therefore an opinion grounded in fact is possible about whether L. K. had been proactive in meeting such expectations or not. It is questionable whether the use of the term 'informant' is a statement of fact or, rather, an emotional qualification of the 'information reports' indisputably co-authored by L. K., in which case it would be more of an opinion. In our view the expression 'had been a proponent of hard-line policies' is more of a statement of fact than a statement of opinion and may be subjected to proof.

Even more problematic is the assessment of the sentence according to which '[L. K.] reported to state security in the course of his professional duties'. In the lawsuit with respect to this sentence, Ungváry referred to the fact that the official 'textbook'[159] published by the Ministry of Internal Affairs itself stated that senior party members were required to cooperate with the state security organs, and it had been clearly demonstrated in other cases, too, that there had been constant rapport between the party organs and the organs of state security; these were not distinct from each other. The question is whether, given this general information, the assumption that L. K. specifically had personally cooperated with the organs of state security is a statement with factual basis, especially since the cooperation assumed by the historian had no written evidence available as proof in a subsequent legal process. At this point, a question belonging to the realm of

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[158] Ungváry based his statements—eg that L. K. had been an 'official contact' who performed similar work to that of the agents of the secret police and that he 'reported to state security in the course of his duties'—on the definitions of the so-called 'State Security Textbook' published by the Ministry of Internal Affairs int the Communist era (*The operative forces, assets and applicable methods available to state security work, the organisation of the network.* Publishing House of the Ministry of Internal Affairs, undated), according to which 'the term official contact denotes persons who, due to their senior position in the given field, line or object, are mandatorily required to assist the work of the state security organs. … Thus, official contacts are persons who hold certain offices or functions … [eg] the leaders of party and mass organisations' (ibid 9), the confidential so-called 'Information reports' co-authored by L. K. with monthly regularity and the minutes of the Executive Committee of the University's party organisation.

[159] See the previous note.

the theory of learning also arises, namely whether there is a difference between 'historical' and 'legal' truth, ie is it possible that historians widely accept a statement, the truth of which cannot proven during the course of a legal procedure. In a later article commenting on the condemnatory judgment of the civil court against him, Ungváry himself criticised this different nature of 'legal' truth and the fact that the court only assessed L. K.'s conduct in the light of Ungváry's statements, but not from a moral perspective:

> According to the logic of the court, no statements may be formulated about issues in respect of which no direct and clear evidence is available. If this tenet is applied to the science of history, an absurd situation arises which destroys the possibility of academic research as well as the freedom of opinion. It is useless that evidence clearly sufficient to pass an academic (ie not legal) decision on an issue is available to the student of history if such evidence is insufficient for direct proof.[160]

The logic of the courts and lawsuits does indeed work this way: In the present case, the historian had not been able to prove distinctly the connection of L. K. with the organs of state security. Irrespective of whether the last piece of text in the table, according to which L. K. had caused the 'political demise' of a university student, qualifies as a statement of fact or an opinion with factual basis, it is, in our opinion, open to proof, or is grounded in facts open to proof, since it is clear that, prior to 1989, the student in question could hold no political office, and it is also clear that the state and party organs very carefully filtered the persons admitted among their rank and file. L. K.'s conduct—his public address against the student at the 28th March 1983 meeting of the Executive Committee of the university's party organisation—had played an instrumental role in this (the role itself is a true fact, while its weight and significance in causing the student's 'political demise' is a protected opinion).

It should be noted at this point that, besides the uncertainties in the legal application of the rules of the protection of personality, the cases under examination also highlight how fraught with difficulties enquiring into Hungary's troubled past can be. Since public figures have failed to confront their own activities during the communist era honestly, and since the public could only access fragments of this information, the results are protracted legal procedures that are never closed to the full satisfaction of either litigant, along with the clouding of historical facts. If, after 1989, everyone had owned up to their previous actions or would have been required to do so by law, much less effort would be needed from historical research to uncover the past and there would be a much narrower margin for errors or exaggerations on the side of historians.

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[160] K Ungváry, 'Egy ítélet margójára' *Élet és Irodalom*, vol 54 No 26. (2 July 2010); K Ungváry, 'Mennyiben hasonló Kiss és Biszku védekezése?' (*HVG,* 21 June 2010) <http://hvg.hu/velemeny/20100621_ungvary_kiss_biszku>.

The case before the European Court of Human Rights

Krisztián Ungváry and the publisher of *Élet és Irodalom* sought remedy from Strasbourg against the condemnatory judgment passed in the civil law suit.[161] Although the ECtHR established a violation of the applicants' freedom of speech, its judgment unfortunately does little to clarify the issues. Neither did the peculiarities of Strasbourg's decision-making mechanism contribute to a clear settlement of the case, as the ECtHR may only pass a single decision, either establishing a violation against the freedom of speech or rejecting the claim, but it may not assess the disputed parts of the text separately, ie it cannot rule that 'the qualification of part A) of the text as infringing violates the right of the applicant' while 'the decision of the Hungarian court in respect of part B) of the text is acceptable.' In actual fact, the decision of the Hungarian courts consisted of several smaller decisions about the various individual parts of Ungváry's publication under examination; however, Strasbourg is only able to pass a single, unified decision about the whole of the Hungarian judgment. Consequently, the ECtHR did not even attempt to analyse the various parts of the text individually, but attempted to assess the article and the decision of the Hungarian courts in general.

The decision—as is customary for the decisions of the ECtHR—recalls the dogmas on the protection of the reputation and honour of public figures (higher threshold of tolerance, the importance of the openness of public debates, the watchdog role of the press in a democracy). In themselves, however, these are not sufficient to decide the case. An important element of the judgment is that, using a general formulation, the ECtHR 'does not dispute' the decision of the Hungarian courts (or, more exactly, of the Supreme Court's final decision in the case), according to which the disputed statements were statements of fact.[162] Although true, at a later point the judgment creates a sense of uncertainty in the reader by nevertheless disputing the position of the Hungarian courts, where it expounds that the restrictive interpretation of certain expressions used in the article had presented the Hungarian court as regarding them as opinions.[163] Elsewhere, the decision declares that 'official contacts' did enjoy a certain degree of leeway in the course of their cooperation with the organs of state security; therefore L. K.'s over-

[161] *Ungváry and Irodalom Kft. v Hungary* (App No 64520/10, judgment of 3 December 2013).

[162] ibid [52]. The formulation used by the ECtHR at this point is ambiguous. The term 'does not dispute' does not necessarily mean that the body was in agreement with the Hungarian court regarding the assessment of this issue. The Danish case referred to by the ECtHR (*Pedersen and Baadsgaard v Denmark*, App No 49017/99. decision of 17 December 2004 [major Chamber], [76]) and the Austrian case cited in the Danish case (*Präger and Oberschlick v Austria*, App No 15974/90, judgment of 26 April 1995) leave the decision of whether a disputed communication constitutes a statement of fact or a statement of opinion to the discretion of the courts of the Member States, applying the principle of the *margin of appreciation* (applied in the case law of the ECtHR for the first time in the judgment of 7 December 1976 in case 5493/72. *Handyside v United Kingdom*: for further details see A Legg, *The Margin of Appreciation in International Human Rights Law. Deference and Proportionality* (OUP 2012). At the same time, the Second Section passing the decision in the *Ungváry* case was not always consistent in the application of this principle, as is shown by the above discussed *Karsai v Hungary* case, where the ECtHR overrode the consideration of the state court.

[163] ibid [59].

performance of their expectations constitutes a 'fact-related value judgment'.[164] At yet another point, the judgment writes that the article had been, 'to some extent', based on statements of fact.[165] Instead of such contradictory statements, the ECtHR should have clarified its qualification of the various parts of the article, and this is what the outcome of the case should have been based on.

The decision of the ECtHR states that certain statements of the applicant (the 'regular and obviously collegial relationship with the organs of state security, often pro-actively meeting their expectations') had 'exceeded the limits of journalism, scholarship, and public debate.'[166] These assumptions had been libellous and had no sufficient factual basis.

On the basis of this (ie if the ECtHR regarded the publication as consisting of statements of fact without proof, ie statements that do not enjoy the protection of journalistic or scholarly freedom), the application should have been rejected. However, the ECtHR attempted to present arguments proving the violation of the freedom of speech. Even in cumulative form, these arguments are hardly convincing. (Given the complexity of the assessment of the case, the arguments may be sufficient to assist the Second Section of the ECtHR to reach an acceptable decision in the specific case, they are certainly not sufficient to set up a general norm for the assessment of cases of defamation against public figures.)

This first such argument is that the court should have interpreted the disputed passages of the text in conjunction with the entire article.[167] The ECtHR records that the author's intention with the article was to prove that 'official contacts' had collaborated with the organs of state security without being expressly ordered to do so. The Hungarian court attached no significance to the argument that L. K.'s reports had been available to the authorities of the communist system, too, and that the applicant's 'undeniably offensive and exaggerated' statements were made within the broader context of presenting the operation of the oppressive mechanism of the totalitarian system.[168] At the same time, if the purpose, content and general grounds of a text and the relationship of the offensive passages with the whole were, in themselves, regarded as grounds for exculpation from legal liability, this would result in significant uncertainty regarding the assessment of the relationship between the protection of reputation and the freedom of speech. Within the context of the protection of personality rights, it is necessary to focus on the offensive parts of a longer piece of text, while the other parts are most often only relevant if they have a bearing on the interpretation of the offensive parts; in the present case, the ECtHR accepted the falsehood and offensive nature of the parts highlighted by L. K. even in the light of the full article and so this reasoning does not appear to be convincing.

164 ibid [58].
165 ibid [73].
166 ibid [53].
167 ibid [54].
168 ibid [55].

The 'contextual analysis' of the offensive parts of the text can only act as an auxiliary principle in the examination of a violation against the freedom of speech. In the given case a decision was required about an extremely complicated and hard to assess text; the involvement of this principle in the decision was acceptable, although not fully convincing and devoid of any general effect that is applicable in other cases.

Following this the ECtHR stated that the accuracy expected of a journalist or a historian is not measurable in the same way as the accuracy expected from a criminal court, ie a lower (less strict) measure of proof is sufficient in the event of the participation of the former in public debates than that with regard to the courts.[169] This may recall the measure of professional diligence provided for in CC decision No 36/1994. (VI. 24.), but only as a rather remote memory, since the ECtHR made no mention as to just what the measure of proof consists of with regard to journalists and historians. Lacking this, however, the ECtHR nevertheless established that the Supreme Court had failed to take the importance of the role of the press in society into consideration in respect of the given case and did not apply 'most careful scrutiny' in its decision on the limitation of the freedom of press.[170]

By contrast, another statement of the ECtHR was apposite, according to which the Hungarian court did not examine the issue of the extent to which holding party positions and reporting to the organs of the party may be regarded as activities performed (in part) for the organs of state security, given the close interrelationship between the various organs.[171] (We have also reflected on this deficiency when analysing the Hungarian decisions. If a specific answer had been provided to this question then that would have affected the legal assessment of several statements in the article.)

The remaining arguments of the ECtHR contain no new elements; the decision records that the issue under dispute is an important topic of public life and that the applicant had accessed the documents forming the basis of the article in the course of academic research.[172] The ECtHR does not regard making decisions on historical issues to be its task either, but stresses that such publications are worthy of the heightened protection extended to political debates.[173] The disputed content had bearings on L. K.'s public activities and not his private life.[174] The article represented an academic position, albeit using exaggerated language, but without sensationalism.[175] The ECtHR also argued that, at L. K.'s request, the paper published by the second applicant had published a rectification (which could, ironically, serve as an argument in proof of an actual violation of personality rights). It is surprising that, according to the position of the ECtHR, L. K. suffered no negative consequences in respect of his professional activities as a result of

169 ibid [56].
170 ibid [57].
171 ibid [60].
172 ibid [61].
173 ibid [63].
174 ibid [64].
175 ibid [67].

the publication of the article (surprising because the ECtHR thereby overrode the opposite finding of the Hungarian court without offering any substantial proof; the extent of the negative consequences suffered by L. K. due to the publication is, of course, debatable, but the fact that it is primarily the national court that is competent in assessing this is beyond dispute).

In summary, it should be stressed that the ECtHR took a questionable direction when it established a violation against the freedom of speech on the basis of uncertain arguments. On the basis of these arguments, in cases that are much less complex and difficult, parties communicating statements of facts that are clearly false could also cite a violation of Article 10; however, the special features of the *Ungváry* case and the complexity of the text under examination will hardly make it capable of becoming an often cited decision of precedent value. The ECtHR could have achieved the same result via different means, whether by regarding the disputed sections of the text as opinions that have a factual basis, or by an application similar to that of the Hungarian CC in respect of statements of fact or by establishing that the sanction applied had been excessive. After considering the various elements of the text individually, the ECtHR could have declared that, since it had only agreed with a part of the Hungarian court's consideration of the case (eg it only regarded 4 of the 10 disputed sections to be false statements of fact), the decision of the Supreme Court had thus violated the freedom of speech since, besides the rightfully restricted communications, it had also extended over protected statements.

In respect of the publisher of the newspaper as secondary applicant, the ECtHR had also established a violation against Article 10, but on the basis of much more plausible arguments. (The Hungarian courts established the uniform legal liability of the author and the publisher, although the measure of due professional care may be entirely different with regard to each: the task of the historian is to uncover the truth via the methods of academic research, while the publisher of a newspaper can hardly be expected to call into doubt the content of an article based on the findings of a recognised historian.) According to the decision, the extent to which the publisher had been compelled to regard the article as written by a reputable historian had been a substantial factor, as had been the issue of whether the examination of the truth of such an article could legitimately be omitted by the newspaper.[176] In order to be able to fulfil the role of 'watchdog', it is important that the level of the legal liability of the publisher should not be so high as to encourage self-censorship.[177] Also significant is the circumstance that the state security documents on which the article were based are not public and their analysis requires special knowledge, ie the publisher would have had no possibility to verify the article and had no reason to doubt its accuracy as it had been written by a well-known expert in the subject. The publisher had adhered to the rules of journalistic ethics and the publication had not been in bad faith.[178]

[176] ibid [73].
[177] ibid [74].
[178] ibid [75].

An important and noteworthy circumstance is the fact that two justices had attached dissenting opinions to the decision (or, more precisely, a detailed opinion was written by Egidijus Küris J, while two others subscribed to and expressed their agreement with that opinion), ie in the seven-member section the decision was passed by a minimal majority. The dissenting opinion adopted the position of the Supreme Court in all significant issues, with the exception that Küris J and the other two judges also agreed that, in respect of the article published, Article 10 had been violated, as the publisher had proceeded with a 'proper standard of care' (Opinion of Küris J, Paragraph 1). Küris J declared that the case was a 'borderline case' where no clear precedent was available.[179] According to the three judges formulating the minority opinion the published statements had been statements of fact; however—by contrast with the majority opinion—their truth should have been proven by the applicant in the article. The publications had clearly violated L. K.'s personality rights.[180] Another interesting point raised by Küris J was that, at the time of the publication of the article, L. K. had been a CC judge (and still is at the time of the present study) and had been awaiting re-election (and not in vain, as we have seen). In the case-law of the ECtHR related to personality rights it is an important consideration that society has placed trust in the courts, attorney's offices, judges and attorneys, ie in their case the protection of their reputation and honour is restricted to a lesser degree than with regard to other public figures (politicians, government officials).[181] To the regret of Küris J and the other two judges, the majority of the judges of the ECtHR did not consider the question of loss of public trust in L. K.[182]

[179] *Ungváry and Irodalom Kft v Hungary* (App No 64520/10, judgment of 3 December 2013), Küris J, dissenting opinion [4].

[180] ibid [17].

[181] See eg *Barfod v Denmark* (No 13/1987/136/190, judgment of 28 January 1989); *De Haes and Gijsels v Belgium* (No 7/1996/626/809, judgment of 27 January 1997); *Skalka v Poland* (App No 43425/98, judgment of 27 May 2003); *Perna v Italy* (App No 48898/99, judgment of 6 May 2003); *Lesnik v Slovakia* (App No 35640/97, judgment of 1 March 2003).

[182] *Ungváry* (n 179) Küris J, dissenting opinion para [18].

5.
The protection of privacy

Val Corbett

The right of publicity and the search for principle

The world is a vampire, sent to drain.[1]

Introduction

In 2013 Forbes published its list of the world's most powerful celebrities.[2] The magazine reported that professional tennis player Roger Federer earned in the region of $71m during the previous year. A breakdown of those figures shows that $6.5m was earned as a result of salary / winnings from playing in professional tennis tournaments. A staggering $65m of his total earnings was as a result of endorsements or sponsorship arrangements. On the same list, the professional golfer Tiger Woods was reported as earning in the region of $78m during that year. For a golfer who had not won a major professional golf championship since the US Open in 2008, these are impressive figures. Of Tiger Woods's total earnings, $13.1m was earned directly as a result of playing in professional golf tournaments. The remaining $65m was earned from endorsement and sponsorship arrangements.

Apart from establishing that a lot of money can be earned if you are very good at hitting a small ball with accuracy, these statistics prove that celebrity endorsements are big business. Indeed, as can be seen from above, as a celebrity's career progresses income from endorsements can represent the majority part of their earning ability. Advances in technology and social media have only served to heighten the star power of celebrities as it allows them direct access to their fans. The ordinary fan is now directly exposed to the glow of such fame through every medium possible. It is not surprising then that advertisers have recognised the influence that such celebrities have over the spending habits of consumers. Endorsements or advertising campaigns featuring a well-known celebrity are now an essential part of the marking strategy of many companies. Whether we find it agreeable or not, the celebrity's image has become a valuable commodity.

In the light of these developments, some jurisdictions have responded by granting legal recognition to the celebrity's right to her own image. The purpose of any such right is essentially to protect the 'the persona' of the individual from unauthorised use.[3] Thus, the unauthorised commercial use of the characteristics which are indelibly linked to the individual could be actionable.[4] For example, the unlawful use of the individual's

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[1] B Corgan (1995) 'Bullet with Butterfly Wings' (The Smashing Pumpkins, Virgin Records).

[2] 'The World's Most Powerful Celebrities' <http://www.forbes.com/celebrities/list/s> (accessed 26 January 2014).

[3] JT McCarthy, *Rights of Publicity & Privacy* vol 1, 1:3 (2nd edn, Thomson Reuters 2001).

[4] ibid 4:45.

photograph,[5] voice,[6] catch-phrase,[7] and even a drawing[8] have been held to be capable of amounting to an infringement of the right. This is so because these things encapsulate the uniqueness of our personality. Like the right to privacy, the image right seeks to protect an essential but intangible part of our very essence. However, while the right to privacy may *prohibit* the publication of unwanted information and hence is defensive in nature, the right to one's image must be positive because the individual may want to take advantage of the publicity their image garners. In the light of this, the preferred term used in this work to describe such a right is the 'right of publicity'.[9]

Given the value that these images have one might expect that the law protecting such assets would be robust and philosophically sound. The reality, however, is very different. Many jurisdictions have failed to regulate this area and those that have appear to have developed the law in an ill-conceived and haphazard fashion based on a misunderstanding of the underlying nature of such rights. Ireland, like the United Kingdom,[10] has yet to grasp this particular nettle. The publication of the Privacy Bill 2012, however, represents a first attempt by the Irish legislature to tackle this issue. Unfortunately, in choosing to implement such protection as a violation of privacy Ireland is destined to repeat the mistakes of other jurisdictions regarding this issue. More recently, the Channel Islands have introduced pioneering legislation in this area in the form of the The Image Rights (Bailiwick of Guernsey) Ordinance 2012. This comprehensive legislation is, unlike the Irish Privacy Bill, exclusively dedicated to the protection of publicity rights. It provides for the world's first image rights register that entitles a *personnage* to register certain features or characteristics associated with their personality including their name, voice, signature etc.[11] Under the legislation a personnage includes any natural (living or dead

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[5] *Pavesich v New England Life Insurance Co,* 122 Ga 190, 50 SE 68 (Ga 1905).

[6] *Midler v Ford Motor Co,* 849 F2d 460 (9th Cir 1988).

[7] *Carson v Here's Johnny Portable Toilets, Inc*, 698 F2d (6th Cir 1983) 831.

[8] *Ali v Playgirl,* 447 FSupp 723 (SDNY 1978), where the plaintiff, Muhammad Ali, sought an injunction against the defendant company regarding the publication of a drawing of a nude, African American boxer sitting in the corner of a boxing ring. The drawing was simply captioned 'Mystery Man'. The drawing was accompanied by a verse which referred to the boxer in the drawing as 'The Greatest'. Notwithstanding the fact that the drawing did not specifically identify the plaintiff, the court held that there was sufficient information in the drawing and accompanying captions to identify the figure as referring to Muhammad Ali, the famous professional boxer. The plaintiff had consistently referred to himself in public as 'The Greatest', so much so that his image had become synonymous with the moniker.

[9] *Haelan Laboratories v Topps Chewing Gum,* 202 F2d (2nd Cir 1953) 866, 868.

[10] *Douglas & Others v Hello! Ltd & Others,* [2007] UKHL 21; *per* Lord Hoffmannn [293]: 'Although the position is different in other jurisdictions, under English law it is not possible for a celebrity to claim a monopoly in his or her image, as if it were a trademark or brand. Nor can anyone (whether celebrity or nonentity) complain simply of being photographed.' See also *Weller v Associated Newspapers Ltd,* [2014] EWHC 1163 (DB); per Dingemans [19]: 'There is no law of "image rights"', referring to the position in England and Wales.

[11] s 3 of The Image Rights (Bailiwick of Guernsey) Ordinance 2012.

in the preceding one hundred years), legal or fictional person[12] and upon registration, such a personnage is entitled to a property right in the registered image.[13]

Given the increasing commercialisation of human personality it is the aim of this essay to consider how the law should respond to the inevitable encroachment on the liberty of the individual from such activity. This work is divided into three parts. Part I examines the underlying justifications traditionally put forward for the recognition of a right of publicity. This part concludes that the underlying rationale of such rights should be the protection of the dignity and autonomy of the individual. In the light of such analysis, Part II proposes that the right of publicity can only be effectively and fully vindicated if it is recognised as a property right in personality and asserts that such vindication can be achieved through Hegel's conception of a property right. Finally, Part III examines the potential for Ireland's Privacy Bill to achieve the necessary protection for the individual in such circumstances.

Justifications for the right of publicity

Granting what is effectively a monopoly to individuals over their personality might deprive society of important cultural symbols and as a result have a deleterious effect on freedom of expression ie by taking away from the common stock. Thus, the introduction of a right of publicity must be justified. Detailed analysis of the justifications for the recognition of such a right is essential in order to ensure that attempts to regulate this area are built on sound theoretical foundations so as to ensure that some of the complications experienced by other jurisdictions are minimised. On this point Terrell and Smith observe:

> the present chaos of inconsistent academic and judicial conclusions is a rare object lesson in the importance to the law of fundamental conceptual analysis—that is, the investigation of the basic legal categories, and accompanying methods of reasoning, that may be at stake in a legal dispute.[14]

It is therefore necessary to critically examine the justifications traditionally put forward in favour of such a right. If the existence of a right of publicity can be justified it is then necessary to consider the conceptual basis of such a right as failure to do so will only lead to confusion and inconsistency regarding the exact nature of the right and the extent of the protection it should afford. Each of these justifications will now be examined in turn.

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[12] s 1(1).

[13] s 2.

[14] TP Terrell & JS Smith, 'Publicity, Liberty, and Intellectual Property: A Conceptual and Economic Analysis of the Inheritability Issue' (1985) 34 *Emory Law Journal* 1, 1–2.

Labour theory

The labour theory is premised on the philosopher John Locke's theory of property.[15] In Locke's view the right to one's personality was a property right based on the idea that the labour of one's body and the work of one's hands was one's own property. Essentially, it provides that the individual has a moral right in the thing of value transformed because of one's efforts. In the context of publicity rights, the right presupposes that the individual most responsible for the creation of the image is entitled to ownership of it because it is the result of her efforts, time, and money.[16] Every person is therefore 'entitled to the fruit of his labours unless there are important countervailing public policy considerations.'[17] No other person should be allowed to take advantage of, or profit from, such efforts without the consent of the individual as it is her 'property'. In the words of Terry, 'any expenditure of mental or physical effort, as a result of which there is created an entity … vests in the person who brought that entity into being a property right to commercial exploitation of that right.'[18] Allowing another to 'reap where he has not sown' would be a form of unjust enrichment and should be deemed unlawful.[19]

The Lockean 'personality as property' approach towards such rights has formed the basis of an assignable and descendible right of publicity under US law. Initially, the right to publicity developed as a privacy right in the US.[20] The decision of the United States Court of Appeals for the Second Circuit in *Haelan Laboratories v Topps Chewing Gum*, is often interpreted as the first case in which the US courts departed from its 'publicity as privacy' approach to the issue and towards a property right approach. In that case, both the plaintiff and defendant were competitors in the manufacture of chewing gum. The plaintiff contracted with famous baseball players for the exclusive right to use their photographs and names on baseball cards in the promotion of its products. Afterwards, a third party entered into a similar, but separate, agreement with the baseball players. This third party in turn assigned its rights in the players' images to the defendant who then used the photographs in the promotion of his competing products. The plaintiff challenged the defendant's use of the photographs in this manner as such use was contrary to the exclusive right he had obtained through his contract with the players. The defendant responded by arguing *inter alia* that the plaintiff could not enforce an exclusive right to the photographs of the players against it as any such right was personal to the players and non-assignable to other parties such as the plaintiff. Consequently, any contract entered into by the plaintiff and the players created no more than a release from liability by the players in favour of the plaintiff.

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15 J Locke, *Second Treatise of Government* (The Liberal Arts Press 1952).

16 MB Nimmer, 'The Right of Publicity' (1954) 19 *Law and Contemporary Problems* 203, 216.

17 ibid.

18 A Terry, 'Unfair Competition and the Misappropriation of a Competitors Trade Values' (1988) 51 *Modern Law Review* 296.

19 *Zacchini v Scripps-Howard Broadcasting Co*, 433 US (1977) 562, 576; *Carson v Here's Johnny Portable Toilets, Inc* (n 7) 837.

20 *Pavesich* (n 5).

Notwithstanding these arguments, the court acknowledged that the plaintiff did indeed enjoy what was termed a 'right of publicity' in the photograph of the players.[21] This right was independent of the right to privacy. The focus of this right of publicity was on the commercial value of the individual's identity. It was the monetary value that was the subject of ownership and should 'as such be capable of assignment and subsequent enforcement by the assignee.'[22] Otherwise the right 'would usually yield no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.'[23] Because the plaintiff had been assigned a property right under his contract the subsequent use of the players' images by the defendant represented an unlawful interference with his rights. The decision of Judge Frank in *Haelan* is one of earliest decisions in the United States which conceived of the right of publicity as one of property and therefore assignable. The individual's personality was viewed in a similar manner to the goodwill one would develop in a business. It was something of commercial value, carefully built up through skill and hard work.

The labour theory of the right of publicity is not without its critics. In particular, it is often pointed out that it is difficult to determine the extent to which fame is the result of one's labour and therefore deserving of one's ownership. Does one develop a commercially desirable personality through 'sweat and tears' alone or how much does luck or the work of others play a role? Madow, in a compelling article which rejects the notion of such rights, carefully deconstructs the labour theory argument in favour of the protection of publicity rights.[24] Citing the work of historian Missner,[25] and using the example of Dr. Albert Einstein, Madow argues that the fame one generates is as much to do with the vagaries of luck and the input of others rather than the individual work of the celebrity. Specifically, he argues that fame is something that is '*conferred by others*' and is not necessarily dependent on the efforts of the individual.[26] For example, while accepting that Einstein's groundbreaking work as a physicist played a part in his fame, Madow pinpoints simple luck and circumstance as being the dominant factors that distinguished Einstein from others within his field at the time, asserting that '[f]ame does not play fair; it plays favorites.'[27] The labour theory, according to Madow, also ignores the vital role that the media play in the creation of celebrity. He observes that the media chose Einstein because he did interviews and was quotable—he had the right 'look'.[28] Finally, the image of Einstein that we are familiar with today, what he means to us—the mad but friendly scientist with the shock of bushy white hair and moustache—was a meaning created by the media. Madow therefore concludes:

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21 ibid 868.

22 Nimmer (n 16).

23 *Haelan* (n 9) 868.

24 M Madow, 'Popular Ownership of Public Image: Popular Culture and Publicity Rights' (1993) 81 *California Law Review* 125.

25 M Missner, 'Why Einstein Became Famous in America' (1985) 15 *Social Studies of Science* 267, 288.

26 Madow (n 24) 188.

27 ibid 189.

28 ibid 190.

> A celebrity, in short, does not make her public image, her *meaning for others*, in anything like the way a carpenter makes a chair from a block of wood. She is not the sole and sovereign 'author' of what she means for others. Contingency cannot be entirely erased. The creative (and autonomous) role of the media and the audience in the meaning-making process cannot be excised . . . a celebrity's public image is *always* the product of a complex social, if not fully democratic, process in which the 'labor' (time, money, effort) of the celebrity herself (and of the celebrity industry, too) is but one ingredient, and not always the main one.[29]

Madow correctly points out that the creation of a 'celebrity image' is not solely the work of the individual in the same way that a chair carved from a block of wood is the sole creation of a carpenter. Doubtless, the creation of the celebrity image is dependent on a number of factors other than the celebrity herself. However, celebrity and the media—the entertainment media in particular—are in a symbiotic relationship. One feeds off the other. Notwithstanding the legitimacy of Madow's thesis, it is flawed in that he underplays the critical role that the individual plays in the creation of celebrity. Madow's arguments tend to dismiss the efforts put into the creation of celebrity by the individual herself and appears to deliberately sideline the individual's own efforts in creating the persona. The fact remains that all such creations emanate from the person of a particular individual without whom it cannot exist. While Lady Gaga may have been inspired by Madonna, *there is no* Lady Gaga without Stefani Germanotta. Moreover, all creative processes are inspired by the work of others and this attribute does not exclusively apply to fame. As Kwall acknowledges '[n]o creator begins the creation process on a blank slate—all creators stand upon the shoulders of prior creators.'[30]

In today's media-saturated world where many celebrities are simply 'well-known for their well-knowness',[31] it may be difficult for some to understand the nature of such fame. However, to credit the popularity of the Kardashian family (from the *Keeping up with the Kardashians* reality television show) to luck or to the work of others is to underestimate the role played by the Kardashians themselves. Whatever one might think about it, the creation of the 'Kardashian image' is the result of a carefully crafted and choreographed campaign of media manipulation by the family and has been hugely successful. Even Madow acknowledges that Einstein's popularity is not solely based on chance, admitting that his popularity can be explained by the fact that he made himself available for interviews and provided great 'copy' with his quotes.[32] Noting that, without Einstein's time and effort there is 'no doubt the media would have looked elsewhere for a symbol of "scientific genius".'[33] In other words, Einstein became famous because of his persona—*who* he was and not just *what* he was.

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[29] ibid 195.
[30] RR Kwall, 'Fame' (1997) 73 *Indiana Law Journal* 1, 45.
[31] DJ Boorstein, *The Image: A Guide to Pseudo-Events in America* (Vintage Books 1992).
[32] Madow (n 24) 190.
[33] ibid.

Economic theory

The right of publicity is sometimes justified on economic grounds. The economic theory of publicity rights is closely aligned to the justifications for the protection of copyright.[34] According to these arguments, persons should be economically incentivised into 'undertaking socially enriching activities' such as creating an identity which is to the cultural benefit of society.[35] Such creativity can only be encouraged, so the argument goes, if the individual is granted the exclusive right to control such creations as it 'provides incentive for performers to make economic investments required to produce performances appealing to the public.'[36] This rationale was used to justify the protection of the performance of a celebrity by the US Supreme Court in *Zacchini v Scripps-Howard Broadcasting Co*. In that case, the plaintiff had a fifteen-second entertainment act which involved him being fired from a cannon into a net some 200 feet away. A reporter from a local radio station used a camera to record the plaintiff's performance without his consent. This footage was later shown on a news broadcast together with a favourable review of the plaintiff's act which people were encouraged to see for themselves. In upholding the plaintiff's right of publicity claim, notwithstanding the countervailing freedom of expression arguments put forward by the defendant, the court acknowledged the importance of protecting the plaintiff's economic interests noting that much of its economic value lay in his 'exclusive control over the publicity given to his performance'. Consequently, protecting those interests encouraged him to 'produce a performance of interest to the public'.[37]

Madow pours cold water over the idea that publicity rights must be protected in order to incentivise the creation of socially beneficial 'cultural symbols'.[38] He challenges the received wisdom that a failure to protect such rights will inevitably result in a decrease in effort by such individuals.[39] Arguing that the copyright analogy is flawed in this regard, Madow notes that the purpose of copyright is to protect the primary source of the creator's income eg the author's book. On the other hand, their image is generally a 'collateral source of income for athletes, actors, and entertainers'.[40] Consequently, failing to protect such an individual's image rights would not necessarily deprive her of the ability to earn from her primary activity and should therefore not act as any kind of disincentive. Moreover, because such individuals are already handsomely rewarded for their primary activity, a failure to additionally protect their personality rights is unlikely to discourage such activity as such income is 'more like the proverbial icing on the cake

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[34] Kwall (n 30).

[35] JT McCarthy, 'Melville B. Nimmer and the Right of Publicity: A Tribute' (1987) 34 *UCLA Law Review* 1703, 1710.

[36] DE Shipley, 'Publicity Never Dies: It Just Fades Away' (1981) 66 *Cornell Law Review* 673, 681.

[37] ibid 576.

[38] C Walsh, 'The Justifications Underlying Personality Rights' (2013) *Entertainment Law Review* 1, 17, 19.

[39] Madow (n 24) 208.

[40] ibid 209.

than a necessary inducement'.[41] This thinking however fails to appreciate just how integral such income has now become to the earning capacity of a celebrity. In fact, in the cases of Roger Federer and Tiger Woods, their earning capacity from endorsements for 2013 actually dwarfed their earnings from their primary activity. It can hardly be said therefore that such earnings are no more than just the 'icing on the cake' for these celebrities. In many cases they *are* the cake.

It might be argued that it is somewhat distasteful for the law to provide greater protection for the income of those who are already vastly wealthy. However, celebrities are entitled to the same protection as all persons notwithstanding the fact that the market may put a higher premium on their rights. Each of us, rich or poor, famous or not, is entitled to the same protection and someone's wealth is not a good reason to deny recognition of such a right. One must also remember that the careers of celebrities can be very short. A career as a professional sportsperson is by its very nature fleeting and provides a very narrow window of opportunity during which significant earnings can be made. Similarly, in the entertainment industry careers are not conducive to longevity as it can be a case of, 'when you're hot, you're hot. When you're not, you're not.' In such circumstances, why should such celebrities not be entitled to maximise their earnings while they can? Moreover, it is not only the wealthy that possess economically valuable personalities. Take a famous amateur athlete whose image is used to promote a product/service without her consent. Is she not entitled to protect her dignity regardless of whether she is in a position to monetize it?

Madow also argues that the failure to protect such rights would not necessarily deprive the individual of all income from such activities because they could still profit from the income derived from merchandise 'officially approved' by them.[42] While Madow strongly asserts that such rights are not economically significant to the celebrity, he argues that even if the losses from such income were meaningful, they would only result in the celebrity becoming even more productive to account for the shortfall in income.[43] While highlighting the fact that nothing significant would be lost in failing to protect such rights, Madow also points to some possible costs of providing such protection. For example, such protection has, in his words, 'distributional consequences',[44] leading to the concentration of wealth in the hands of those who are already well-compensated for their efforts. In his opinion, the protection of celebrity leads to an overinvestment in what he terms 'celebrity-production' which only encourages others to pursue similar careers based on the riches it might bring them instead of pursuing careers as engineers or doctors which might better benefit society.[45]

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41 SJ Hoffman, 'Limitations on the Right of Publicity' (1980) 28 *Bulletin of the Copyright Society* 111, 118.

42 Madow (n 24) 211.

43 ibid.

44 ibid 218.

45 ibid 216, where Madow observes, 'Is it not at least *possible* that society would be better off if some of the kids who are now devoting themselves to perfecting their jumpshots (or guitar riffs) in the usually vain hope of making it to the NBA (or the top of the charts) said "to hell with it", and started thinking of other ways

The second variant of the economic justification for the protection of personality rights is one of allocative efficiency. The protection of scarce resources (such as an individual's right of publicity) through private property rights ensures that such resources are not over-exploited.[46] Such protection will further ensure that the property will be allocated to the party who most values it and will pay the owner accordingly for such use.[47] Moreover, the communal use of the image will only diminish its value. The more ubiquitous the individual's image becomes through advertising and endorsements the less impact it has on the consumer. It becomes a case of familiarity breeding contempt. Moreover, the more products and services the individual associates with, the less that competing businesses want to be associated with her.[48]

In the English case of *Edmund Irvine Tidswell Ltd v Talksport Ltd*,[49] a similar rationale was used in a passing off action to justify the protection of the goodwill that the famous Formula One racing car driver Eddie Irvine had built up in his persona. In this case, the defendant had purchased a photograph of the claimant from a sporting photograph agency. The original photograph showed the claimant holding a mobile phone to his ear. The defendant doctored the photograph so that the claimant appeared instead to be holding a portable radio which displayed the name of the defendant's radio station. It was the claimant's contention that the defendant's doctored image of him falsely implied that he had endorsed their product. At first instance, the High Court upheld Irvine's claim stating that the law 'will not allow others to so use goodwill as to reduce, blur or diminish its exclusivity.'[50] On appeal, the claimant's action was upheld and the award of damages to the claimant originally made was increased from £2,000 to £25,000.[51] Parker LJ of the Court of Appeal justified the increase in the amount of damages on the basis that the higher figure represented what it would have cost the defendant 'to do lawfully that which it did unlawfully' when it used the claimant's photograph.[52] In so doing, the Court of Appeal had applied a theory of economic allocative efficiency to the question before it.

The allocative efficiency argument does not impress Madow. He disagrees with the notion that the value of the persona necessarily diminishes the more widespread its use.[53] In fact, he argues (with little empirical supporting evidence) that the celebrity's persona will increase in value rather than decrease the more it is used and notes that 'the way to maximise economic value is to make the merchandise available to any and every

of making a living? Maybe we would lose a Michael Jordan or two that way, but we might get a great many engineers or computer programmers in exchange.'

46 H Demsetz, 'Toward a Theory of Property Rights' (1967) 57 *American Economic Review* 347, 356.

47 RA Posner, 'The Right of Privacy' (1978) 12 *Georgia Law Review* 393, 411.

48 Madow (n 24) 221.

49 [2002] 367 EWHC (Ch).

50 *per* Laddie J, [38].

51 *Irvine & Others v Talksport Ltd,* [2003] EWCA Civ 423.

52 ibid [114].

53 Madow (n 24) 221.

one who is willing to pay the marginal cost of its production.'[54] Nor does Madow believe that the value of the celebrity's persona would be diminished to nil through overuse. He argues that it is irrelevant whether the persona is subject to over-use, because it is not 'a nonrenewable natural resource like land', there will always be a steady supply of celebrities to replace that which has been used up.[55] Consequently, 'there would be no "tragedy" in the classic parable if the herdsmen, after depleting their common pasture, could simply move on to another one.'[56] However, as other commentators point out, Madow's view fails to consider the fact that while the user might be able to move on to other targets once a certain celebrity's persona has outlived its usefulness, the same cannot be said for that celebrity.[57] Thus, as Kwall observes, 'if the celebrity is so overused that she no longer is viewed by the public as embodying the essence of a unique spirit that once made her successful' then her ability to earn has been greatly diminished.[58] This was the very point that Laddie J was making in *Irvine* when he acknowledged the harm done to the claimant's goodwill was the dilution of its exclusivity.

Consumer protection theory

Yet another justification for protection of the right of publicity is the idea that such protection is necessary in order to safeguard the interests of the consumer. Absent such protection, it is argued, the consuming public could be misled into believing the celebrity had agreed to the association with the defendant's product. This justification is commonly associated with passing off actions such as that in *Irvine* where 'misrepresentation' lies at the core of an action that is primarily concerned with protecting traders and the consuming public from unfair competition through false association.[59]

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[54] ibid 222.

[55] ibid 224.

[56] ibid.

[57] See generally, T Frazier, 'Appropriation of Personality: A New Tort?' (1983) 99 *Law Quarterly Review* 281, and G Black, *Publicity Rights and Image: Exploitation and Legal Control* (Hart 2011), 122.

[58] RR Kwall, 'The Right of Publicity vs the First Amendment: A Property and Liability Rule Analysis' (1994) 70 *Indiana Law Journal* 47, 109.

[59] This form of indirect protection of consumers has led to a rather strained analysis of the notion of misrepresentation in passing off. For example, in *Fenty & Others v Arcadia Group Brands Ltd & Others,* [2013] EWHC 2310 (Ch), the first named claimant (the popstar Rihanna) brought an action in passing off against Topshop the fashion retailer when, without her consent, they sold t-shirts with her photograph emblazoned on the front. The photograph used was one from the shoot of the claimant's latest music video which was recorded as part of a promotional campaign for her latest album. The claimant brought an action in passing off alleging that the defendant had misrepresented to the consuming public that she had endorsed the garments in question. The High Court of England & Wales held that there was nothing on the garment which would indicate that the claimant had endorsed it. There was nothing attached to the labelling nor was the claimant's name or logo used on any of the labelling. Moreover, the court acknowledged that consumers simply buy such clothing because they like the picture and not necessarily because they believe it is an endorsed product. Notwithstanding these arguments the court held that false endorsement did exist. Topshop was a retailer associated with famous stars in general (indeed, it had a previous commercial relationship with the claimant)

Falsely attributing an association between a product/service and a celebrity negatively affects the flow of information to the consumer and prevents her from making a rational choice about which product/service to purchase as it misleads the consumer into believing that the product/service is sound because the celebrity has approved it.[60] Madow does admit that such an association between product/service and celebrity creates an associative value as it develops in the consumer 'a good feeling about it, an emotional attachment to it'.[61] However, he concludes that the consuming public are not likely to make purchasing decisions simply on the basis that the product/service is endorsed by a celebrity and reasons that in fact, '[m]ost consumers probably think little and care less about licensing arrangements between celebrities and advertisers.'[62] This conclusion of course begs the question, if the consuming public think so little about the arrangements between celebrities and products/services why do advertisers go to such lengths and pay so much money to create such associations? Madow also ignores the fact that if this emotional attachment is falsely created, it does influence the consumer in a way that is misleading.

As a form of consumer protection in cases of false endorsement, the right of publicity is excessive. Madow cites the United States Court of Appeals decision in *Carson v Here's Johnny Portable Toilets, Inc*[63] as an example of the overreach of the right of publicity as a form of consumer protection. In that case, the plaintiff was a famous American entertainer/comedian and the host of *The Tonight Show.* He was famous for the catchphrase 'He-e-e-re's Johnny' which was used to introduce him each night as the host of his show. The plaintiff was synonymous with the phrase and had a business interest in a clothing label and had licensed the use of this phrase to it. The defendant company began renting and selling portable toilets under the name, 'Here's Johnny' and supported by the phrase, 'The World's Foremost Commodian.' The court dismissed the plaintiff's claim for unfair competition on the basis that there was no possibility that the consuming public would be misled into thinking Carson was personally connected with the defendant's business. Thus, notwithstanding the fact that the court found that there was no likelihood of confusion amongst the public, the plaintiff's claim for infringement of his right of publicity succeeded as the use of elements of his personality implied a false association between him and the defendant's product.

and the particular image of Rihanna used could imply to the consuming public that it was an endorsed product linked to a marketing campaign to promote her album. See also *Tidswell* (n 49).

60 DG Baird, 'Human Cannonballs and the First Amendment: *Zacchini v Scripps-Howard Broadcasting Co*' (1978) 30 *Stanford Law Review*1185, 1187 (n 7).

61 ibid. Citing the Australian decision of *Pacific Dunlop Ltd v Hogan,* (1989) 83 ALR 187, 195.

62 Madow (n 24) 230.

63 698 F2d (6th Cir 1983) 831.

Personality theory

Moralists would justify the recognition of publicity rights on the basis that such rights are necessary in order to protect an aspect of human dignity.[64] Dignity represents the norm as to how we expect to be treated as persons. Thus, the justification for the protection of a right of publicity is to protect personality ie that which is part of our essence and what makes us human. One of the key elements to the dignity of the person is the ability to exercise free will. According to the German philosopher Immanuel Kant, all human persons are the same in the sense that they all share this attribute.[65] While all human persons share the concept of 'personhood' they do so in different forms. Even though we might all share the characteristics of personhood, our personal identity is what makes each of us unique. Thus, as Kahn notes, 'personhood is not the same as identity.'[66] When aspects of a person's identity, such as their name or likeness, are appropriated for commercial purposes without their consent, that individual's dignity is not respected. It represents an attack on that individual's ability to develop their personhood freely in their own way.

Kant envisaged that the uniqueness of being human lies in our ability to exercise our rational will freely in our own way.[67] A truly autonomous individual is self-legislating, in the sense that the moral authority of laws which bind the individual are of their own making as a result of the choices they make, and in this sense, 'the autonomous person is (part) author of his own life.'[68] Kant believed that each individual is entitled to exercise their free will to act in accordance with a universal law as long as such actions do not violate another's freedom to act. The autonomous individual, therefore, should be the 'master of all those facts about his own identity, such as his name, health, sexuality, ethnicity, his own image'.[69] Moreover, and particularly relevant in the context of so-called publicity rights, autonomy has a social value because '[d]eveloping a social identity shapes the individual's self-identity.'[70] In this way, Kant's philosophy on the autonomous human being can provide the basis for the recognition of publicity rights. As Haemmerli observes:

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[64] EJ Bloustein, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39 *New York University Law Review* 962.

[65] I Kant, *Fundamental Principles of the Metaphysics of Morals* (TK Abbott transl, BiblioBazaar 2007).

[66] J Kahn, 'Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity' (1999) 17 *Cardozo Arts & Entertainment Law Journal* 213, 219.

[67] I Kant, *Grounding for the Metaphysics of Morals: With on a Supposed Right to Lie Because of Philanthropic Concerns* (JW Ellington transl, 3rd edn, Hackett 1993).

[68] J Raz, *The Morality of Freedom* (Clarendon, 1986) 369.

[69] *Per* Law LJ of the Court of Appeal in England and Wales, in *Wood v Commissioner of Police for the Metropolis,* [2009] EWCA Civ 414 [21].

[70] H Delany and E Carolan, *The Right to Privacy* (Thomson Round Hall 2008) 14.

> The central concept of autonomy in Kantian philosophy could lend itself to a philosophical justification of a right of publicity. Autonomy implies the individual's right to control the use of her own person, since interference with one's person is a direct infringement of the innate right of freedom (which takes concrete form in social life as liberty or freedom from compulsion by others).[71]

Thus, according to moral theorists, one of the key elements to human dignity is respect for the autonomy of the individual. Privacy is a key aspect of personality as it provides the space for the person to grow and develop as an individual.[72] Subjecting an individual's name or likeness, the manifestations of her identity, to unauthorised control by another can undermine the individual's autonomy to exercise her free will. As one's identity is central to individuality, an assault on identity is an assault on one's dignity.[73] Thus, the Kantian person should be free to develop her own identity in a moral way. In Biblical terms, the Kantian notion of respect for the individual can be summarised as imposing a duty on individuals to do to others as you would like them to do to you.[74] An individual commits a wrong when she acts in a self-preferential way without consideration of the rights of others.

The protection of the dignitary interests of the individual appeared to be at the heart of one the earliest US decisions on the right of publicity in *Pavesich v New England Life Insurance Co*. In that case, a photograph of the plaintiff was used without his consent to advertise the defendant insurance company. The plaintiff was not famous but initiated legal proceedings on the basis that his right to privacy had been unlawfully invaded. In upholding his claim, the Georgia Supreme Court recognised that the actions of the defendant had deprived the plaintiff of his liberty, and consequently his dignity, as a free person. The court noted that the knowledge that he was being used in this way brings the individual:

> to a realization that his liberty has been taken away from him, and as long as the advertiser uses him for these purposes, he cannot be otherwise than conscious of the fact that he is, for the time being, under the control of another, and that he is no longer free, and that he is in reality a slave without hope of freedom, held to service by a merciless master.[75]

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[71] A Haemmerli, 'Whose Who? The Case for a Kantian Right of Publicity' (1999) 49 *Duke Law Journal* 383, 416.

[72] SM Jourard, 'Some Psychological Aspects of Privacy' (1996) 31 *Law & Contemporary Problems* 307.

[73] Kahn (n 66) 219.

[74] *King James Bible* (Cambridge edn) Luke 6:31, 'And as ye would that men should do to you, do ye also to them likewise.'

[75] ibid. 220, 50 SE 80. See also *Onassis v Christian Dior-New York, Inc* 472 NYS2d 254, 260 (1984), where the New York Supreme Court upheld a claim by Jacqueline Onassis in circumstances where Christian Dior used a model that bore a startling resemblance to Onassis in an advertising campaign. Onassis did not seek compensatory damages but rather an injunction prohibiting the commercialization of her personality. In granting the injunction, the court noted that the law 'intended to protect the essence of the person, his or her identity or persona from being unwillingly or unknowingly misappropriated for the profit of another.'

The moral justification of publicity rights based on personality has certain distinct advantages over other justifications. The justification of publicity rights grounded in the persona of the individual is not vulnerable to the criticism of Lockean labour theory. Personality theories justify the right of publicity not because the individual has expended effort in creating the persona but rather on the basis that it is necessary to protect persona if one is to be truly free. Locke's theory on the other hand, seeks to prevent others from using the individual's persona in order to prevent them from reaping where they have not sown. Consequently, personality theories provide that because one's persona is part of us, we are morally entitled to claim ownership over it. Hence, the wrong is not just the economic impact of the appropriation but is instead, the 'wrongful exercise of dominion over another'.[76] As Haemmerli opines:

> there is no 'Lockean' notion here of property rights acquired through labor. The right to control the use of one's image or other objectification of identity is a property right based directly on freedom, autonomy, or personality. In fact, Kant explicitly rejects a labor theory, stating that cultivation of land, for example, is not essential to the acquisition of property rights in it. Kant says that the modification of a thing by labor 'forms nothing more than an external sign of the fact that it has been taken into possession.'[77]

The focus of Kantian philosophy is on the persona and not simply on economic considerations. As such, the impact of appropriation of another's personality is measured not solely in financial terms but is considerate of much broader concerns relating to individuality. The harm suffered is not limited to economic issues but also to the harm caused to the individual when their autonomy is unfairly interfered with. This personality-driven approach has tended to find favour in European legal systems more so than in the United States where economic interests have tended to be prioritised.[78] In a number of decisions the European Court of Human Rights has consistently held that the right to dignity is a basic human right of every citizen which includes the right to control one's image. In one such case, *Von Hannover v Germany*,[79] the applicant, Princess Caroline of Monaco, had brought an action for infringement of her Article 8 right to a private and family life under the European Convention of Human Rights following the publication of a number of photographs of her and her family in public and quasi-public places. In upholding her claim, the European Court of Human Rights held that, 'the concept of private life extends to aspects relating to personal identity, such as a person's name … or a person's picture.'[80]

The jurisprudence of the court was further developed in the later decision of *Reklos & Davourlis v Greece*.[81] In that case, a child was born to Greek nationals in a private clinic.

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[76] Bloustein (n 64) 990.
[77] Haemmerli (n 71) 421.
[78] *Zacchini* (n 19).
[79] [2005] 40 EHRR 1.
[80] ibid [50].
[81] [2009] ECHR 200.

The baby was immediately placed into a sterile unit to which only medical personnel had access. As part of a photography service provided to parents, a photographer entered the sterile unit and took a photograph of the baby, face on. The parents were very upset at this intrusion, particularly as the photographer had, without their consent, entered the sterile unit in order to take the photograph and thereby endangered the health of their child. The parents complained to the clinic's management, about the intrusion, who appeared to be indifferent to their complaint and who also refused to hand over to them the negatives of the photographs. The parents' claim before the domestic courts failed on the basis that the baby's personality rights had not been affected because given his age, his psychological and emotional state had not yet developed to the extent that his rights could be considered as having been infringed. The child's parents appealed to the European Court of Human Rights on the basis that the right to a private and family life under Article 8 of the European Convention on Human Rights had been violated. The applicants' claim was successful. In broadly defining a right to privacy based on the personality of the individual, the court held that Article 8 had been infringed:

> A person's image constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his or her peers. The right to protection of one's image is thus one of the essential components of personal development and presupposes the right to control the use of that image. Whilst in most cases the right to control such use involves the possibility for an individual to refuse publication of his or her own image, it also covers the individual's right to object to the recording, conservation and reproduction of the image by another person. As a person's image is one of the characteristics attached to his or her personality, its effective protection presupposes, in principle and in circumstances such as those of the present case … obtaining the consent of the person concerned at the time the picture is taken and not simply if and when it is published. Otherwise an essential attribute of personality would be retained in the hands of a third party and the person concerned would have no control over any subsequent use of the image.[82]

The Kantian notion of the person implies a *negative* freedom rather than a *positive* liberty ie a 'freedom from', rather than a positive freedom ie a 'freedom to'.[83] According to Kant, freedom exists in a 'state of nature' free from anything in particular, 'the autonomous individual must have no distinguishing empirical or natural characteristics whatsoever … Any concrete characteristic is necessarily a limitation.'[84] Without something more, the Kantian right provides incomplete protection of publicity rights. While interferences without the individual's consent could be considered to breach the individual's right on the basis that it undermines her autonomy, this is a defensive right only. To give full effect to the individual's rights and to be truly free, a justification of publicity rights must allow that individual to fully benefit. Thus, any purported protection of the individual's personality on the basis of a right to privacy is inadequate. For

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[82] ibid [40]. See also *Von Hannover v Germany* (No 2) (2012) 55 EHRR 15.

[83] I Berlin, 'Two Concepts of Liberty' (1958) in *Four Essays on Liberty* (OUP 1969).

[84] JL Schroeder, 'Unnatural Rights: Hegel and Intellectual Property' (2006) 60 *University of Miami Law Review* 453, 462.

example, in the case of *Haelan* (discussed earlier) had Judge Frank decided that the right of the baseball players was one of privacy the plaintiff could not have been guaranteed exclusive control of their images. A privacy interpretation of the players' right of publicity would have left the plaintiff without recourse as such a right would be personal to the players and could not be acted upon by the plaintiff notwithstanding the agreement he had with them. Moreover, such an interpretation of the right would also negatively impact on the players as the value in assigning their image rights would have been greatly diminished. If the buyer of those rights could not be guaranteed exclusivity in connection with their use, they would be of little commercial value. Consequently, if the individual is to be truly free in relation to her personality, she must not only have freedom 'from' but also a freedom 'to' ie the right to *control* the use of one's image. The individual must be able to exercise such freedom in a positive way and such freedom cannot be achieved through a personal right to privacy. It is submitted that such freedom can be found in Hegel's theory of abstract right.[85]

Hegel's theory of property

According to the German philosopher Georg Hegel, in order to exist as more than abstract beings, persons must have the ability to impose themselves on the external world. Developing Kant's theory of personality, Hegel believed that in order to make the Kantian freedom practical it was necessary for it to manifest itself externally. In Hegel's words, '[a] person must translate his freedom into an external sphere in order to exist as an Idea.'[86] Hegel believed that it was through ownership of property that the autonomous individual could express her freedom beyond her person and into the material world. Only when an individual has the freedom to enforce rights against others who are required to respect them can an individual's freedom be 'self-actualised'. It was through the recognition of property rights that Hegel believed that Kant's freedom could be made practical.[87] In Hegel's view, individual will exists both internally and *externally* and it is through private property rights that the individual's freedom can be expanded into the material world.[88] Hegel viewed the moral justification for private property as an extension of one's personality.[89] Through private property ownership one's will is manifested in the external world. Private ownership of property allows for positive freedom and it is only through property rights that the individual can abstract themselves from the particular and gain specificity. Benson described this freedom as 'a *moral capacity to use things*'.[90]

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85 GWF Hegel, *The Philosophy of Right* (AW Wood ed, CUP 1991).

86 ibid 41.

87 Schroeder (n 84) 455.

88 Hegel (n 85) 43.

89 K Priya, 'Intellectual Property and Hegelian Justification' (2008) 1 *NUJS Law Review* 359, 360.

90 P Benson, 'The Basis of Corrective Justice and its Relation to Distributive Justice' (1992) 77 *Iowa Law Review* 515, 562.

This right to use things is vindicated by the recognition of property rights which are alienable through contract in what Hegel described as 'abstract right'.

Private property rights support the development of one's personality by providing an expanded sphere of freedom where one can have 'some control over resources in the external environment'.[91] In Hegel's conception, it is through the notion of private property and the institution of contract law that full effect can be provided to the recognition of individual personality. The existence of a Hegelian property right in one's personality is not new. Radin, for example, argues that such an approach is necessary 'to achieve proper self-development—to be a person—an individual needs some control over resources in the external environment. The necessary assurances of control take the form of property rights.'[92] Not all aspects of one's personality are capable of being the subject of a property right and are therefore innate (eg the right to bodily integrity).[93] However, there are other aspects of one's personality, the indicia of one's identity, which are external to us and are capable of being the subject of property rights.

In Hegel's conception, property rights could exist in things external to the person and these rights share certain characteristics. The recognition of a property right, according to Hegel, is dependent on three things. In the first place one must establish possession or occupancy of the object. The individual must establish that her will is manifested in the object.[94] When a person has taken possession of an object, she differentiates herself from others not associated with it and thereby gains specificity from the particular.[95] There must be some outward sign of possession. Hegel indicated that a person could embody their will in an object either through physical custody of it, marking it or imposing a form upon it, in essence, establishing to others that it is yours.[96] Because an individual cannot claim things external to her as of right, objects are *res nullis* and first occupation of the thing may give rise to ownership of it:

> Relative to someone else, I can acquire an exclusive right over a thing through an external manifestation of will that signifies that I have effectively brought the thing under my power, so long as my act is prior in time to a similar act by the other. Once established, my right to the thing continues as long as I am able to manifest my power over it.[97]

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91 MJ Radin, 'Property and Personhood' (1982) 34 *Stanford Law Review* 956, 956.

92 ibid.

93 Benson (n 90) 584.

94 J Hughes, 'The Philosophy of Intellectual Property' (1988) 77 *Georgetown Law Journal* 287.

95 Schroeder (n 84) 469.

96 Hegel (n 85) 76. For example, in legislation enacted in the Channel Islands (The Image Rights (Bailiwick of Guernsey) Ordinance 2012) the act of registering one's image in the register created under the legislation confers on the holder a property right in the image (s 51).

97 Benson (n 90) 584–85.

Secondly, in order to establish ownership Hegel believed that the individual must exploit the object.[98] While possession might establish a connection between the individual and the object, the use of the object by the individual establishes 'that she is the subject who has the end of enjoyment, and the enjoyed thing is a mere means to this end.'[99] In other words, the individual must establish her dominance over the object. However, the individual's use of the object could become unhealthy or needy. Consequently, the third characteristic of property rights is alienation.[100] The autonomous individual can forsake her rights in the thing by exercising her right to remove her will from it. Thus, property is alienable and with the consent of the original owner can be transferred to another. Unlawfully removing a thing from the control of another without their consent amounts to an interference with their will as manifested in their control of the thing and represents an attack on their personhood. In fact, Hegel viewed the right of alienation as the true indicator of ownership. In his view, it was only when the power of the individual to acquire the object is recognised is autonomy fully vindicated. The institutions of contract and property provide the individual with the means by which the right to ownership is recognised. As Schroeder observes:

> The mutual intersubjectivity of contract is necessary because, according to Hegel, one becomes a subject (*eine Person*) only when one is recognized as such by another *subject*. Subjectivity (the capacity to bear legal rights and duties) exists only insofar as rights are enforceable. Since all persons logically being as abstract individuals (not subjects), in order to achieve subjectivity, each individual must first make other individuals into subjects by recognizing them as such. This means that it is impossible to create rights by unilaterally claiming them for oneself. Since rights are intersubjective they can only be created intersubjectively.[101]

Hegel's theory of property as applied to personality

The right of publicity can be justified on the basis that wrongful interferences with the persona of the individual through the misappropriation of signifiers of the individual's identity are an attack on the dignity of that individual. Such interferences restrict the autonomy of the individual and are wrong because they negatively impact on 'individual dignity'.[102] The right to protection from such interferences is not simply defensive in nature. Thus, if the right of publicity is conceived of as a Hegelian personality property right, then true effect can be granted to the freedom of the individual in a positive way.

The external signifiers of the individual's persona such as their image, voice, and name, for example, can most effectively be protected as a personality property right in

98 Hegel (n 85) 62.
99 Schroeder (n 84) 473.
100 Hegel (n 85) 105.
101 Schroeder (n 84) 478.
102 Bloustein (n 64) 986.

accordance with Hegel's theory of abstract right. These signifiers are external to the individual and where she can establish that they embody her will they represent an opportunity for the individual's self-actualisation as an autonomous human person. Thus, as Reiter observes, Hegel's theory is appealing to the celebrity industry because a celebrity's persona is often regarded as a 'shell'.[103] The external signs of that personality are embodiment of the will of the individual and can be claimed via a Hegelian notion of property.

Determining what personality rights are personal, and consequently inalienable, from those which are considered a form of property, and consequently alienable, depends on the extent to which such rights can be considered external to the individual. It is a question of degree, measured along a spectrum. As Radin explains:

> A general justification of property entitlements in terms of their relationship to personhood could hold that the rights that come within the general justification form a continuum from fungible to personal. It then might hold that those rights near one end of the continuum—fungible property rights—can be overridden in some cases in which those near the other—personal property rights—cannot be. This is to argue not that fungible property rights are unrelated to personhood, but simply that distinctions are sometimes warranted depending upon the character or strength of the connection. Thus, the personhood perspective generates a hierarchy of entitlements: The more closely connected with personhood, the stronger the entitlement.[104]

In other words, there are certain aspects of one's persona that cannot be assigned to another. At one extreme, it is clear that one cannot assign one's physical liberty to another. However, one can assign the right to use a photograph of one's self to another. It is the inbetween that creates difficulties. Blood can be donated,[105] but can an index finger be sold? The scale, as Radin observes, 'ranges from a thing indispensable to someone's being to a thing wholly interchangeable with money.'[106] Consequently, it might be stated that depriving an individual of certain aspects of her persona which are essential to her self-development may be considered to be actionable. It is, in essence, the difference between 'the domains of *être* (being) and *avoir* (having)'.[107] The closer the thing is associated with the individual's being then the less likely it is to be considered to be transferable.

Subjecting the individual's signifiers of personality to commodification without her consent is an unlawful interference with her will and is actionable. Because these signifiers are part of the person of the individual, the subject will be able to establish that

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[103] C Walsh, 'The Justifications Underlying Personality Rights' (2013) *Entertainment Law Review* 17, 19.

[104] Radin (n 91) 986.

[105] In *A v National Blood Authority,* [2001] 3 All ER 289, the High Court of England & Wales held that contaminated blood products donated to patients could be classified as a 'product' for the purposes of the Consumer Protection Act 1987.

[106] Radin (n 91) 987.

[107] EH Reiter, 'Personality and Patrimony: Comparative Perspectives on the Right to One's Image' (2002) 76 *Tulane Law Review* 673, 717.

her will is occupied within them. Because '[t]he right of publicity … relates to uses of objectifications, not to manipulation of the person himself,'[108] then Hegel's theory of property can justify a property right in those external signifiers which are an embodiment of the individual's will. This is a right to *control* such uses. Hegel's theory of property is one where the individual imposes her will on an object and 'occupies' it.[109] While there is considerable debate as to whether Hegel's notion of occupancy is first occupancy (ie the owner must establish ownership prior to others) there can be little doubt that the individual can claim first ownership in the external signifiers of her identity.[110] As one's name, likeness, voice etc are manifestations of one's will and are synonymous with the individual then establishing ownership by way of Hegelian occupancy is clear.

Moreover, a theory which supports the existence of personality property rights based on protecting the dignity, autonomy and will of the individual does not need to rely on Locke's labour theory as a justification for their existence. Regardless of how much or how little effort the celebrity put into the development of her image nothing can alter the fact that it is she and no one else who has the closest connection with that persona.[111] Ownership of the signifiers of identity is established on the basis of the individual's right to freedom of will. Ownership, as defined by occupancy, is established on the basis that our personality is part of us. External signifiers of that personality can therefore be viewed as an extension of our personality and such 'rights give individuals the power to control the use of various attributes of self.'[112] As Haemmerli notes, '[m]ost people . . . experience a special, even unique attachment to their own images or other objectified attributes, and feel that those things are inextricably associated with their identities.'[113] Consequently, whether the individual, or somebody else, expended labour in the creation of the external persona is not relevant to ownership. As Kwall comments, '[r]egardless of the input from others, celebrities still remain the vehicles through which their images are conveyed to the public.'[114]

Conceiving of the right of publicity as a personality property right avoids the theoretical confusion between privacy and property which has hampered the development of the law in this area in other jurisdictions. The recognition of such rights as derived from privacy offers inadequate protection. Such rights are innate, inalienable and offer protection to the intangible 'spiritual interest' of the person only, with little regard for the economic consequences to the individual.[115] On the other hand, viewing such rights

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108 Haemmerli (n 71) 417.

109 Hegel (n 85) 76.

110 Schroeder (n 84) 491–92.

111 Kwall (n 30) 41.

112 JM Hauch, 'Protecting Private Facts in France: The Warren & Brandeis Tort is Alive and Well and Flourishing in Paris' (1994) 68 *Tulane Law Review* 1219, 1223.

113 Haemmerli (n 71) 424.

114 Kwall (n 30) 42.

115 Kahn (n 66).

simply as private property based on labour is subject to the criticism that those publicity rights are not the sole creation of the individual and should not be the subject of ownership by that individual. The personality as property approach:

> shifts the focus of the debate away from a monocular obsession with economic rights to a more balanced focus on the moral, as well as economic, dimensions of personhood and property. It views the individual as an autonomous being preceding the creation of property, a notion that resonates with our cultural mores.[116]

Commodification of the individual's personality without her consent devalues the individual as a person and restricts her freedom to develop her own personality in her own way. The unjustified encroachment on the autonomous will of another is a self-preferential act without regard for the rights of the other and is a wrong. As Bloustein comments, 'this is so because the wrong involved is the objective diminution of personal freedom rather than the infliction of personal suffering or the misappropriation of property.'[117] Recognising such rights as a form of personality property allows the courts to consider both aspects of the harm ie the personal and the economic. Justifying the right of publicity as a right of privacy or property right leads to confusion as regards compensating the harm caused. Normally, breach of property rights cannot give rise to a claim in damages for injury to feelings. Equally a claim of invasion of privacy cannot give rise to a claim for economic losses. As Goodenough notes, the theoretical distinction between privacy and property has led to a situation where those justifying such rights based on privacy focused on the mental distress as the damage suffered, whereas those who adopted the simple property approach focused on the economic or market impact of the infringement. In his view, by using the persona as the basis of the claim, '*both* kinds of harm can exist, and both kinds of interests, personal and pecuniary, can be damaged.'[118]

In the United States where the right of publicity has long been viewed as a property right in most states, the tension between dignitary and property interests is most evident. For example, in *Waits v Frito Lay, Inc*[119] the plaintiff was a respected singer known for his raspy singing voice which was once described by a fan as 'like how you'd sound if you drank a quart of bourbon, smoked a pack of cigarettes and swallowed a pack of razor blades. … Late at night. After not sleeping for three days.'[120] Tom Waits was famous for rejecting lucrative offers to endorse products or commercialise his image in any way. He was of the view that to agree to such endorsements would detract from the musician's artistic integrity. The defendant produced a radio commercial promoting corn chips featuring a vocal performance from a Tom Waits's impersonator. Waits objected to the

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116 Haemmerli (n 71) 413.

117 Bloustein (n 64) 990.

118 OR Goodenough, 'Go Fish: Evaluating the Restatement's Formulation of the Law of Publicity' (1996) 47 *South Carolina Law Review* 709, 736.

119 978 F2d 1093 (9th Cir 1992).

120 ibid.

imitation of his persona in this way because of his public stance regarding commercial endorsements and because it undermined his musical integrity. Waits's claim was upheld by the court. The breakdown of the jury's award for compensatory damages in that case, however, betrays the confusion which surrounds the theoretical foundation of such rights in the US. In that case, the jury awarded Waits compensatory damages of $100,000 for the fair market value of his services, $200,000 for injury to his peace, happiness, and feelings, and $75,000 for injury to his goodwill, professional standing, and future publicity value.[121] The defendants appealed the entirety of the award and, in particular, argued that the award of $200,000 for injury to feelings was inappropriate compensation for infringement of a property right which should focus on economic or material losses. In upholding the jury award the court acknowledged that the plaintiff's profile as a musical artist and his public stance against such commercialisation meant that there was much more, other than financial considerations, at stake for him as a result of the misuse of his personality. The award of $200,000 for injury to feelings was therefore essentially compensating the plaintiff for violation of a dignitary and not a property interest. However, when justifying the $200,000 award, the court focused on the embarrassing impact caused by the infringement rather than the impact on his dignity. In particular, it noted that Waits' public pronouncements on endorsements meant that the defendant's actions were embarrassing for him and made him appear hypocritical. However, as Kahn observes, this justification is misguided:

> Waits was not simply embarrassed, he was outraged. His distress was not mental but spiritual or philosophical. He felt that the commercialization of his voice undermined the integrity of his persona. Such a harm has nothing to do with embarrassment; it has to do with an individual's ability to sustain a coherent and integrated sense of self.[122]

The recognition of publicity rights as being grounded in the persona of the individual avoids the conceptual difficulties presented to the courts in claims such as that in *Waits*. The plaintiff was not necessarily upset that others were reaping where he had sown. Rather, in a principled claim, he was primarily concerned that his integrity as a musical artist was being impugned. His will manifested itself externally through his distinctive voice and was one of the key signifiers of his identity. The defendants interfered with that autonomy by using his persona in this way without his permission. The harm was not the humiliation, embarrassment or angry feelings but rather the degrading of his individuality by subjecting his persona to such commercialisation.

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[121] Waits was additionally awarded $2m in punitive damages.

[122] J Kahn, 'Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity' (1999) 17 *Cardozo Arts & Entertainment Law Journal* 213, 240.

Characteristics of the right of publicity

As a form of personal property, publicity rights may be alienable. Respect for the autonomy of individuals requires that the external manifestation of their will embodied in things such as the signifiers of their identity be recognised and respected by others. The right that is protected is the right to *control* one's identity.[123] It is this right of control that is transferable and any unauthorised use of same is an attack on the integrity of the individual. For example, such an approach could justify the plaintiff's claim in *Haelan* on the basis that the baseball players had assigned to the plaintiff the exclusive use of their images in conjunction with the sale of the plaintiff's products.

Classifying the right of publicity as a personal or property right raises questions surrounding the inheritability of the right. If deemed a form of privacy, then as a personal right it cannot be descendible. On the other hand, if classified as a form of property then, like all property it should logically pass to the individual's heirs upon their death. If the right is deemed to be descendible then it may have a significant impact on freedom of expression. Does the protection of a celebrity's personality from 'beyond the grave' tip the balance too much in favour of personality at the expense of the public interest? This very issue has been the source of some controversy in the US where the approach to the question appears to vary from state to state. For example, in *Lugosi v Universal Pictures*,[124] the Supreme Court of California held that the widow and son of the actor, Bela Lugosi, who had famously starred as Dracula in a film made by the defendant, were not entitled to exploit his image as Dracula after his death. As Bela Lugosi himself had not exploited his association with the Dracula character outside of playing the role, those rights could not be inherited by his descendants. To decide otherwise, the court held, would be to provide his descendants with a windfall which they did not deserve at the expense of freedom of expression. The reasoning of this decision is somewhat muddled. On the one hand, the court refused to recognise the descendability of the right of publicity thereby treating it akin to a personal right of privacy. Yet, at the same time justified the refusal to do so on the basis of economic considerations (the deceased did not commercially exploit the right during his lifetime) which are normally only relevant to rights which are considered a form of property.

By contrast, in *Martin Luther King, Jr. Center for Social Change, Inc v American Heritage Products, Inc*,[125] the United States Court of Appeals for the Eleventh Circuit, held that the heirs of the late Dr King were entitled to prohibit the sale of commemorative busts of him on the basis that his right of publicity descended to them. In recognising a right of publicity on the basis of economic incentives, the court held that such a right was also descendible, irrespective of whether the right was exploited during the individual's lifetime. As the court observed, the value of the individual's image is devalued if

123 *Reklos* (n 81) [40].
124 603 P2d 425 (Cal 1979).
125 250 Ga 135; 296 SE2d 697 (1982).

exclusive control over the right can be arbitrarily and suddenly ended with the death of the individual concerned. A right of descendability with a specified durational limit would eliminate those concerns.[126]

Freedom of Expression v Right of Publicity

The recognition of a right of publicity as a form of personality property right does raise concerns for freedom of expression.[127] An over-extensive right of publicity has the power to create a monopoly over cultural symbols in favour of individuals, as Madow explains, '[t]here is no doubt that the right of publicity makes private censorship of popular meaning-making *possible*.'[128] Essentially, there is a real fear that a right of publicity 'eliminates important semiotic material from the public domain' and allows the controller of the image to dictate to society what the image means to us.[129] Consequently, the use and meaning of iconic symbols is funnelled into the hands of the few who monopolise it to the detriment of the rest of society.

Like all property rights, the right of publicity is not absolute and must be limited by the rights of others, including the right to freedom of expression. However, this balance can be struck with the application of certain restrictions to the right of publicity. First, the right of publicity should not prohibit all uses of the individual's persona and should only become actionable where the individual's identity is exploited for advertising or commercial purposes. The right protects one from becoming a commercial slave to another, as Weisman explains, '[u]nauthorised publicity … affects the individual's identity by associating him with a concept … An individual should not be denied the right to shape his personality and decide matters affecting this crucial right.'[130] Consequently, uses which benefit society and do not undermine the individual's dignity are not unlawful. Therefore, akin to the application of the 'fair use' doctrine in copyright law, uses of the individual's image which are incidental will not give rise to liability.[131]

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126 ibid 705.

127 SR Barnett, 'The Right of Publicity *versus* Free Speech in Advertising: Some Counter-Points to Professor McCarthy' (1996) 18 *Hastings Communications and Entertainment Law Journal* 593; R Kwall, 'The Right of Publicity vs the First Amendment: A Property and Liability Rule Analysis' (1994) 70 *Indiana Law Journal* 47.

128 Madow (n 24) 239.

129 Kwall (n 30) 3. See also Madow's discussion of the attempts by John Wayne's children to prohibit the use of the actor's image being sold in gay bookstores on greeting cards with the caption, 'It's such a bitch being butch.' His children argued *inter alia* that such a portrayal of their father was demeaning to him because of his hard-earned macho, heterosexual image. According to Madow, this latter view was the preferred meaning of 'John Wayne' in American culture and the recognition of a property right in his image vesting in his children post-mortem allowed them the opportunity of maintaining that meaning. See Madow (n 24) 145–46.

130 A Weisman, 'Publicity as an Aspect of Privacy and Personal Autonomy' (1982) 55 *Southern California Law Review* 727, 729.

131 For example, in *Krouse v Chrysler Canada Ltd* (1974) 1 OR (2d) 225, the Court of Appeal of Ontario in Canada refused to uphold the respondent's claim for passing off and appropriation of personality in circumstances where his image as a professional footballer was incidentally used as part of a promotion by

As Zapparoni explains:

> where an individual's identity is used in the reporting of news, in commentary or entertainment, or in works of fiction or non-fiction (creative works), this will not result in a breach of the right. There will generally be no infringement where a celebrity's name or photograph is used in connection with a fan magazine or feature story; nor will infringement occur where an unauthorised biography is disseminated or incidental use takes place.[132]

Second, the right of publicity should only apply to uses which are inextricably linked with the identity of the individual. Freedom of expression is threatened by overly-broad rights of publicity where vague connections are made with the individual's identity. The much-criticised US case of *White v Samsung Electronics America, Inc*,[133] is one such example.[134] In that case, the plaintiff was a famous hostess on the popular American television show, 'Wheel of Fortune'. The defendant produced a humorous television commercial featuring a robot wearing a blonde wig and presenting a television show similar to 'Wheel of Fortune' in the year 2012. The advertising was intended to depict the durability of the defendant's products. The court upheld the plaintiff's claim that the use of the robot in this manner represented an infringement of her publicity rights. In applying an expansive test to the question of 'identity' the court held that there had been an infringement of the plaintiff's right of publicity on the basis that the use of the robot was suggestive of the plaintiff. Essentially, as Zapparoni notes, the court held that 'infringement will be established whenever the combination of features used in the advertisement merely *reminds* the audience of the plaintiff in question.'[135]

Under a Hegelian notion of property, vague references to one's identity would not be sufficient to ground a claim for infringement of the right of publicity. As a result the individual's right of publicity would not be overprotected at the expense of freedom of expression. Hegel's notion of first occupancy being a characteristic of property would

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the defendant. Specifically, the court held that it was the institution of professional football that was being deliberately advertised and not the plaintiff who was an individual participant. In *Gould Estate v Stoddart Publishing Co,* 39 OR (3d) 545 [1998] OJ No 1894, the Court of Appeal of Ontario held that photographs and interviews conducted with a famous musician (who had since died) were in the public interest. While decided under the law of copyright, the court did acknowledge that the material in question was the journalist's literary and artistic creation and did not involve the exploitation of the deceased's musician's artistic genius.

132 R Zapparoni, 'Propertising Identity: Understanding the United States Right of Publicity and Its Implications: Some Lessons for Australia' (2004) *Melbourne University Law Review* 690, 703.

133 971 F2d 1395 (9th Cir 1992).

134 D Dawson, 'The Final Frontier: Right of Publicity in Fictional Characters' (2001) 2 *University of Illinois Law Review* 63.

135 Zapparoni (n 132) 713. See also *Carson v Here's Johnny Portable Toilets, Inc* (n 7), where the plaintiff's action succeeded where the use of the catchphrase 'Here's Johnny' with which he had become synonymous was sufficient to ground a claim for infringement of the right of publicity. Also, *Wendt v Host International, Inc,* 125 F3d 806 (9th Cir 1997), where the actors George Wendt and John Ratzenberger ('Norm' and 'Cliff' from the TV show *Cheers*) successfully brought an action against the proprietors of a chain of *Cheers* themed bars which had placed robots in these bars which were said to be modelled on the characters Norm and Cliff, which they had played in the show.

require an immediacy be established with the individual's identity.[136] In other words, the 'use of identifying indicia must *unequivocally, uniquely, and directly* identify the plaintiff' if they are to succeed in an action.[137] Had such a test been applied in *White* it could be argued that the mere evocation of the plaintiff's identity would not be sufficient to be considered an infringement of her right of publicity. As Haemmerli explains, 'the use of the robot was suggestive; all agree that Vanna White herself was not perceived to be there. Indeed, the point of the advertisement was that she no longer was.'[138]

Third, concerns about freedom of expression are heightened where the right of publicity is recognised as being descendible. The fact that the control of an individual's image could be passed on to her heirs upon death raises the spectre of depriving society of that image for an indefinite period long after the individual in question has passed away. As the right of publicity is a personality property right, any restriction on its alienability has to be specially justified. All other forms of property are descendible, why not the right of publicity? However, the right is not absolute and a durational limit, similar in nature to copyright protection, should be placed on the right for a set period of time after the individual's death. Such an approach would achieve the appropriate balance between respecting the individual's property in her personality while at the same time balancing that right with the right of society to have access to such images after the individual has died. The durational limit of such a right should be a matter for the legislature.

The right of publicity in Ireland

While the dignitary rights of the individual have long been the subject of constitutional protection in Irish law, there has been little analysis of the right of publicity and a paucity of case law on the issue.[139] However, Irish law has long recognised the importance of

136 Haemmerli (n 71) 459–64.

137 ibid 460.

138 idid 462.

139 However, regardless of the current domestic position, Ireland can no longer afford to ignore the issue of publicity rights. The recent decision of the European Court of Justice in *Martinez v MGN Ltd*. C-161/10; means that advertisers in Ireland might find themselves subject to a personality right infringement claim in another jurisdiction. In that case, the actor Olivier Martinez and his father complained before a French court that their private lives had been interfered with contrary to Article 9 of the French Civil Code as a result of a story which appeared on a website accessible at the internet address 'www.sundaymirror.co.uk' entitled 'Kylie Minogue is back with Olivier Martinez.' The company which published the story claimed that the French court lacked the jurisdiction to deal with the matter as there was an insufficient connecting link between the act of publishing the story in the UK and the damage which it was alleged was suffered by Martinez in France. The matter was referred to the court for a preliminary ruling. The court held that such a claim could be brought either in the jurisdiction where the information was published or the jurisdiction where the centre of business of the person who has had his rights infringed is based. Conceivably, therefore, an Irish advertiser running a marketing campaign from Ireland and which is made available in another Member State where publicity rights are recognised could find itself subject to an infringement claim brought against it in that jurisdiction.

protecting human dignity. The preamble to the 1937 Irish Constitution (Bunreacht na hÉireann) expressly states that the people, through the Constitution, intend to seek to 'promote the common good … so that the dignity and freedom of the individual may be assured.'[140] In this regard, the right to privacy of the citizen has been recognised as an unenumerated personal right guaranteed under the Constitution that is deemed 'necessary for the expression of an individual personality'.[141] Underlying this constitutional jurisprudence has been a concern for the protection of the dignity and autonomy of the citizen. For example, in *Re a Ward of Court* (*Withholding Medical Treatment No 2*),[142] it was held by the Irish Supreme Court that the right to refuse medical treatment flowed *inter alia* from the right to privacy and that such a right was necessary to 'ensure the dignity and freedom of an individual'.[143]

Ireland has recently attempted to legislate in this area with the publication of the Privacy Bill 2012. The Bill, inspired by the decision of the European Court of Human Rights in *Von Hannover,* is primarily concerned with providing for a tort of violation of privacy. As regards the right of publicity, section 3(2) of the Bill provides that it shall be a violation of the privacy of an individual for a person:

> (c) to use the name, likeness or voice of the individual, without the consent of that individual, for the purpose of—
> (i) advertising or promoting the sale of, or trade in, any property or service, or
> (ii) financial gain to the said person,
> if, in the course of such use, the individual concerned is identified or, as a result of such use, is capable of being identified, and the said person knew that the individual had not given such consent.

By categorising the right of publicity contained in section 3(2) as a violation of privacy, the Bill effectively creates a personal right of publicity based on privacy. This has a number of implications regarding the nature of the protection afforded to the individual under section 3(2). First, as the right to privacy is a personal right guaranteed under the Constitution, the right is inalienable.[144] The draft legislation is silent on the transferability of the individual's right of publicity. Consequently, section 3(2) fails to adequately vindicate the will of the individual in achieving self-actualisation as an autonomous person and severely curtails the ability of the individual to fully exercise her autonomy. An individual cannot grant the exclusive licence in her image and consequently its value and her ability to exercise her will in the world are diminished. Advertisers will be less willing to pay for the use of the individual's persona, and particularly pay the

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140 *McGee v Attorney-General,* [1974] IR 284, 319 *per* Walsh J.
141 *Norris v Attorney-General,* [1984] IR 36, 72.
142 [1995] IESC 1, [1996] 2 IR 79.
143 ibid [346].
144 Article 40.3.1 of Bunreacht na hÉireann.

market rate, if they cannot be assured of exclusivity.[145] At most, section 3(2)(c) provides a negative right ie where there is unauthorised commercial use of the individual's image then that individual shall have a cause of action. Moreover, the requirement within section 3(2) that the defendant '*knew* that the individual had not given such consent' (emphasis added) implies that it is for the plaintiff to prove that the defendant had *actual* knowledge of the absence of the plaintiff's consent before an action will succeed. To properly vindicate the rights of the plaintiff in such circumstances it is submitted the draft legislation should include a requirement of constructive knowledge ie it would be sufficient if the plaintiff could establish that the defendant knew *or should have known* that the plaintiff did not provide consent.

The personal nature of the right contained within section 3(2)(c) is confirmed under section 15 of the Bill which provides that the cause of action is extinguished on death.[146] Thus, the right of publicity is not descendible and cannot be passed on to heirs on the individual's death. The limited right of publicity recognised within the Bill is restricted 'having regard to the rights of others, public morality, and the common good.'[147] Specifically, it will be a defence if the violation of the individual's rights was as a result of an act of newsgathering necessary or incidental to the 'acquisition or preparation of material for publication in a periodical or … the acquisition or preparation of material for broadcasting.'[148]

Section 8 of the Bill provides for the remedies that are available for the violation of the plaintiff's privacy. These remedies include the issuing of an injunction and the payment of damages. However, in a classic example of the conceptual confusion which surrounds the Bill, section 8(c) provides that 'the defendant may have to pay to the plaintiff damages equal to any, or any likely, financial gain accruing to the defendant as a result of the violation of the plaintiff's privacy.' If the right to publicity contained within the Bill is a personal right, and presumably concerned with dignitary harms, it is difficult to fathom how a violation of that right gives rise to damages for economic harm. A claim for such damages is more typical in cases involving infringements of property rights. The inclusion of such damage highlights the apparent conceptual confusion between privacy and property which exists within the draft legislation and will produce unnecessary complications in this area.

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[145] Note s 52(1) of The Image Rights (Bailiwick of Guernsey) Ordinance, 2012 which provides: 'A registered personality is, and a registered personality's image rights are, transmissible by assignment, testamentary disposition or operation of law in the same way as other personal or movable property.'

[146] Amending s 6 of the Civil Liability Act 1961.

[147] s 3(1) of the Privacy Bill 2012.

[148] s 5(1)(e) of the Privacy Bill 2012.

Conclusion

Recent disclosures regarding the extent to which US intelligence agencies have been intruding into the private lives of individuals have quite rightly led to worldwide condemnation.[149] That individuals are entitled to protection from unreasonable intrusions into the sphere of their private lives is not controversial. Such protection is accepted as necessary to preserve every individual's dignity and autonomy of will. However, when attention turns towards protecting other aspects of the individual's personality such as one's image, the condemnation is less pronounced. The apparent lack of concern for these rights most likely arises because they are associated with the rich and famous. True, the case law invariably involves celebrities who, given their fame and vast wealth, may not necessarily be sympathetic plaintiffs. However, that is simply a matter of economics. The rights involved apply to us all. Protection of those aspects of one's personality, the signifiers of one's identity, is essential to individuality. Without the ability to express ourselves in the external world through our personality, none of us is free.

Developing a right of publicity as a personal right cannot effectively vindicate the interests involved. A personal right will be defensive in nature. Because personal rights are inalienable, the holder will not be able to exclusively assign their interest to others. Consequently, the interest protected will be devalued. While the increasing commodification of personality might appear distasteful to some, it is a reality of modern day commerce and the law must reflect this reality. Ireland has an opportunity to learn from the experience of others in this sphere and it is essential that the development of a publicity rights regime is based on a sound philosophical footing. Irish constitutional jurisprudence has long since recognised the sanctity of the dignity of every individual and together with the jurisprudence of the European Court of Human Rights provides a solid basis for developing the law as regards this aspect of personality rights. Given the complex policy issues at play, what is necessary is the introduction of a comprehensive statutory regime dealing exclusively with the right of publicity modelled on the legislation introduced in the Channel Islands. Conceiving of the right of publicity as violation of privacy in the Privacy Bill will not effectively guarantee these rights. The recognition of the right as a form of property based on personality which guarantees control to the individual is the most effective method by which the dignitary interests involved will be properly secured.

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[149] B Gellman, 'NSA broke privacy rules thousands of times per year, audit finds' *Washington Post,* 16 August 2013 <http://www.washingtonpost.com/world/national-security/nsa-broke-privacy-rules-thousands-of-times-per-year-audit-finds/2013/08/15/3310e554-05ca-11e3-a07f-49ddc7417125_story.html>, accessed 1 February 2014.

Ashley Packard

The European Union and the United States at a privacy crossroads… again

The European Union and United States have reacted very differently to information society privacy challenges. While the EU has pushed for uniform data regulation to protect its citizens' privacy, the United States has promoted industry self-regulation to enhance economic flexibility.[1]

The United States has asserted the efficiency-based argument that businesses and government need access to personal data to guarantee economic growth and national security.[2] Privacy is appreciated for its intrinsic values, but additional regulations to ensure it are seen as costly and potentially disruptive to innovation. In contrast, EU officials have argued that privacy is both a fundamental right and critical to a robust information society because citizens will only participate online if they feel their privacy is guaranteed against ubiquitous business and government surveillance.[3]

The European Union has established baseline data privacy protection for all EU citizens through a Data Protection Directive.[4] Although there is some flexibility in how EU nation states interpret the directive, all states are expected to place controls on data processing. These regulations limit the information data collectors may gather from EU residents without their permission and the ways in which the data may be used.

In contrast, the United States has enacted no baseline privacy protection. Data collectors are encouraged to develop terms of agreement that offer consumers notice of their practices and an opportunity to consent. These terms of service function like contracts and the Federal Trade Commission is empowered to punish companies that violate them. Where privacy legislation has been deemed necessary, the government has passed separate regulations applicable to the financial, educational, medical and government sectors.[5] Such regulations are meant to avoid harm, rather than to control data processing.

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[1] LA Bygrave, 'Transatlantic Tensions on Data Privacy' (*Transworld,* 19 April 2013) 5 <http://www.transworld-fp7.eu/?p=1149>, accessed 1 September 2013.

[2] A Newman, *Protectors of Privacy: Regulating Personal Data in the Global Economy* (Cornell University Press 2008) 2.

[3] ibid 12.

[4] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data OJ L 281, 23/11/1995 P. 0031—0050 (Data Protection Directive).

[5] C Hoofnagle, 'Comparative Study on Different Approaches to New Privacy Challenges: United States' (May 2010) 1 <http://ec.europa.eu/justice/policies/privacy/docs/studies/new_privacy_challenges/final_report_country_report_B1_usa.pdf>, accessed 20 August 2013.

When the European Union first passed its Data Protection Directive, it stipulated that EU nations would only be able to transfer data to other countries that offered adequate levels of data protection.[6] The United States was not among them. This led to a power struggle between the two blocs, with the US threatening at one point to bring the EU before the World Trade Organization for breaching the 1994 General Agreement on Trade and Services.[7] However, the US Department of Commerce and the European Commission were able to negotiate a compromise. American companies that promised to meet EU privacy standards could join a Safe Harbor framework whose members were entitled to conduct business with EU nations, although there is doubt among EU citizens regarding its effectiveness.[8]

In spite of their different privacy approaches, the economic interests of the European Union and the United States have become increasingly intertwined. According to the Office of the US Trade Representative, 'The US economic relationship with the EU is the largest and most complex in the world, generating goods and services trade flows of about $2.7 billion a day.'[9]

The EU and the US are now attempting to expand their trade relationship even further through the pursuit of a free trade agreement known as the Transatlantic Trade and Investment Partnership (TTIP).[10] The goal of the negotiations is to reduce regulatory barriers between the two blocs that interfere with trade, including differences in privacy protection.

However, that negotiation—as well as the Safe Harbor framework—is precariously situated. The European Commission has proposed an update to the current Data Protection Directive that would give EU citizens a bundle of data protections that Americans don't have, moving the two privacy regimes farther apart. If the regulation passes, US companies will likely have to agree to new codes of conduct to retain the Safe Harbor. Success of the trade agreement may require the US to pass baseline data privacy protections guaranteed by law. EU representatives are also more sensitized to the need for data privacy, following the exposure of the US National Security Agency's surveillance of European citizens' communications by former NSA contractor Edward Snowden.[11]

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[6] Data Protection Directive, art 25.

[7] Bygrave (n 1) 19.

[8] J Baetz, 'EU Spying Backlash Threatens Billions in US Trade' (*NBCNews.com*, 30 October 2013) <http://www.nbcnews.com/id/53415556#.UnK2pySjX4k> (quoting Viviane Reding: 'The existing scheme has been criticized by European industry and questioned by European citizens: They say it is little more than a patch providing a veil of legitimacy for the US firms using it'). European Commission, 'Restoring Trust in EU–US Data Flows: Frequently Asked Questions (MEMO/13/1059, 27 November 2013) <http://europa.eu/rapid/press release_MEMO-13-1059_en.htm> (making 13 recommendations to improve the functioning of the Safe Harbor.)

[9] Office of the US Trade Representative, 'European Union' <http://www.ustr.gov/countries-regions/europe-middle-east/europe/european-union> accessed 19 March 2013.

[10] European Commission, 'Trade: Transatlantic Trade and Investment Partnership', <http://ec.europa.eu/trade/policy/in-focus/ttip/>, last updated 24 July 2013.

[11] Baetz (n 8).

Now that such an important trade relationship hangs in the balance, we need to take a closer look at the differences between EU and US approaches to informational privacy protection and the economic assumptions inherent in them. This paper 1) describes the European Union's approach to data protection and proposed changes likely to impact its trade relationship with the United States; 2) discusses US protections for data privacy and administrative proposals for reform; and 3) analyzes conflicting arguments the EU and the US have presented regarding the economic efficiencies of data protection.

Privacy and the European Union

EU member states have actively promoted data privacy by passing broadly protective legislation that applies uniformly to all data collectors. There are two reasons for this:

First, EU member states assume their citizens need data security to feel comfortable engaging in e-commerce.[12] Removing impediments to commerce is a priority. The EU evolved from the European Economic Community, which was assembled to ensure that 'goods, persons, services, capital, and, concomitantly, personal data are able to flow freely throughout Europe.'[13] Creating consistent data regulations is one method of advancing that economic goal.

Second, Europeans consider privacy to be a fundamental human right.[14] Member nations of the Council of Europe—composed of forty-seven European states committed to following a set of minimum legal standards—have ratified the European Convention on Human Rights and integrated its basic principles into their domestic law. The treaty guarantees that 'Everyone has the right to respect for his private and family life, his home and his correspondence.'[15] The European Union's constitutional framework, the Charter of Fundamental Rights, also recognizes data protection as a fundamental right.[16]

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[12] Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data, COM(2012) 11 final (Data Protection Regulation).

[13] Bygrave (n 1) 5.

[14] Universal Declaration of Human Rights, 10 December 1948, 217 A (III); European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols nos 11 and 14, 4 November 1950, ETS 5; International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol 999, 171.

[15] Convention for the Protection of Human Rights and Fundamental Freedoms, art 8.

[16] Charter of Fundamental Rights of the European Union, 7 December 2000, *Official Journal of the European Communities*, 18 December 2000 (OJ C 364/01).

EU methods of data protection

The European Union protects data security through a Data Protection Directive passed in 1995.[17] The European Commission introduced the legislation as 'an internal market instrument designed to improve cross-border trade by harmonising data protection legislation.'[18]

For its time, the Data Protection Directive was a model for the rest of the world. The policy was comprehensive—applying to all data collection, both off- and online, regardless of subject area—and technologically neutral. It established a definition for personal data, clarified data protection rules, defined data subjects' rights, and established supervisory authorities and transnational oversight arrangements.[19]

The Data Protection Directive specifies that personal data can only be processed if '*the data subject has unambiguously given his consent*.'[20] Consent is considered 'any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed.'[21]

The directive's consent requirement does not come without exceptions. One 'legitimate interests' exception has been interpreted very broadly and become a much-abused loophole. It says data processing can be done without the subject's consent if it is 'necessary for the purposes of the *legitimate interests* pursued by the controller or by the third party or parties to whom the data are disclosed,' except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject.[22]

The inherent flexibility of a directive as a legislative instrument also creates wiggle room for interpretation. EU directives are not automatically binding on EU nations. Individual member states must adopt them into domestic law and in doing so often tweak the wording to meet their needs. Because their laws are not the same, data protection remains inconsistent across Europe.

The e-Privacy Directive

Other directives were passed to 'flesh out' data security in the years following the Data Protection Directive's passage in 1995. One of these was the e-Privacy Directive of 2002, meant to protect personal data and privacy in the electronic communications sector.[23]

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[17] Data Protection Directive, 31–50; N Robinson, Hans Graux, M Botterman, and L Valeri, 'Review of the European Data Protection Directive, Rand Corporation for the Information Commissioner's Office' (2009) 6 <http://www.rand.org/pubs/technical_reports/TR710.html>, accessed 1 September 2013.

[18] ibid 7.

[19] ibid.

[20] Data Protection Directive**,** art 7(a).

[21] ibid art 2(h).

[22] ibid art 7(f) (emphasis added).

[23] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, (2002) OJ L 201, 37–47 (e-Privacy Directive).

The e-Privacy Directive requires member states to ensure that electronic communications networks can only store information or gain access to information stored on a user's computer after providing clear and comprehensive information explaining the purpose of the data processing.[24] Data collectors must have users' consent before installing cookies or other technologies for data capture on their computers.[25] The directive was amended in 2009 to change the consent mandate from an opt-out to an opt-in requirement. The new 'cookie law', as it has come to be known, went into effect 26 May 2012.

The updated e-Privacy Directive also addresses the issue of websites transferring data to third parties. In cases in which this is a possibility, the subscriber has the right to be informed and to know the recipient or categories of possible recipients. A third party may not use the data for any purpose other than that for which it was originally collected without having to go back to the data subject to ask for consent.[26]

The directive also requires that public electronic communications services report breaches of data that were not encrypted to a competent national authority and notify subscribers or individuals whose privacy is adversely affected.[27]

The EU's proposed data protection regulation

In January of 2012, the European Commission introduced a draft of a Data Protection Regulation intended to supersede the EU's Data Protection Directive passed in 1995.[28] Unlike the current directive that leaves room for interpretation, the regulation would create uniform data protection rules across the EU. Although the legislation will likely undergo amendments as it moves between Parliament and the European Council, it includes proposals for:

– *Explicit consent from data subjects*: A requirement that data collectors get explicit consent from individuals before processing their personal data.[29] Parental consent would be required for children under 13. 'Profiling based solely on the processing of pseudonymous data' will be allowed as long as it 'cannot be attributed to a specific data subject without the use of additional information.'[30]

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[24] ibid art 5(3).

[25] Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation, (2009) OJ L 337/20, 0011-0036 (Citizens' Rights Directive).

[26] ibid 16.

[27] ibid 19.

[28] Data Protection Regulation.

[29] Data Protection Regulation Annex, 10227/13 ADD 1, 2012/0011 (COD), 31 May 2013, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0011:FIN:EN:PDF>.

[30] JP Albrecht et al, 'Rapporteur Round-Up: Data Protection Regulation Passed with "Overwhelming majority"' (*TheParliament.com*, 22 October 2013), <http://www.theparliament.com/latest-news/article/newsarticle/rapporteur-round-up-data-protection-regulation-passed-with-overwhelming-majority/#.Uma0DSSjX4k>.

- *Transparency and fairness*: A requirement that the purpose for which data are processed be explicit and legitimate.[31] Data used should be limited to the minimum amount required to accomplish that purpose and stored for no longer than necessary.[32]
- *Accuracy*: A requirement that 'personal data that are inaccurate … are erased or rectified without delay.'[33]
- *Data portability*: A requirement that data subjects have the right to transmit personal data they have supplied from one electronic processing system to another system without hindrance from the data controller.[34]
- *Right to object to use of data for marketing*: A requirement that data subjects have the right to object, free of charge, to the use of their data for direct marketing purposes.[35]
- *Right of erasure*: A requirement that data subjects be given the option to have personal data erased when the data are no longer needed for the purpose for which they were collected, when data subjects have withdrawn their consent for processing, or when they object that processing doesn't comply with the regulation. This controversial part of the proposed regulation would also obligate data controllers to inform third parties with whom they have shared data that the data subject wants them to erase their copies as well.[36] The proposal excepts situations in which the data are necessary for historical, statistical or scientific research, for reasons related to public health or security, or to protect the right of free expression.
- *Right not to be subject to automated processing decisions*: The requirement that data subjects not be subjected to automated decisions based on profiling, for such benefits as a job or a loan, or when that is the case, have the right to human intervention.[37]
- *Notification of data breaches*: The requirement that data collectors notify data protection authorities and individuals affected when their security has been breached.
- *Extra-territorial application*: The requirement that any company—including those outside of the European Union—that collects data from people living inside the European Union abide by the regulation in the course of offering Europeans goods or services or monitoring their behavior.[38]
- *Enforcement and sanctions*: The requirement that each member state have a data protection authority to enforce the regulation, empowered to impose fines. The Commission proposed fines of up to €1 million or two percent of a company's worldwide revenue in cases in which the company has violated the regulation.

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31 Data Protection Regulation, art 5(a), 43.
32 ibid 22.
33 ibid art 5(d), 43.
34 ibid art 18(2), 53.
35 ibid art 19(2), 53.
36 ibid 19.
37 ibid arts 20, 54.
38 ibid art 3, 41.

Parliament's Committee for Civil Liberties, Justice and Home Affairs recommended increasing the fines to a maximum of €100 million or five percent of a company's worldwide revenue.[39]

Revised directive proposed for criminal justice sector

The European Commission opted to give EU member states more flexibility in developing rules for the criminal justice sector. It has proposed a separate data directive for police and judicial authorities that would apply to the processing of personal data for crime prevention, investigation, detection, prosecution or the execution of criminal penalties.[40]

This Data Directive for Competent Authorities, as it is called, would be less protective than the regulation proposed for the private sector. For example, it would not require limited retention periods for data, transparency regarding what is collected and for what reason, mechanisms to assure accuracy of personal data or that data collected is not excessive for its purpose.[41]

Privacy law in the United States

Privacy in the United States is secured through implied protections in the US Constitution, federal and state statutes, administrative regulations and common law. However, the right to privacy is not absolute.

Constitutional protection

Privacy is not mentioned in the US Constitution, but it is implied in the Fourth Amendment, which states: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause.'[42]

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[39] Albrecht et al (n 30).

[40] European Commission, 'Proposal for a Directive of the European Parliament and the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data' COM (2012) 10 Final, 2012/0010 (COD) (Data Directive for Competent Authorities).

[41] See Article 29 Data Protection Working Party Opinion on the Data Protection Reform Proposal, 01/2012, adopted 23 March 2012, 00530/12/EN WP 191.

[42] US Constitution, Amendment IV.

Privacy interests may be waived when pitted against other rights that are more explicitly protected in the Constitution, such as freedom of expression,[43] or national security, which gained significant traction in the public psyche after terrorists attacked in 2001.[44]

The right to privacy—originally instituted as a protection against government intrusion and only later expanded to include protections against private actors—is also an evolving concept. Consequently, some types of privacy protections are more developed than others. While Constitutional protection for bodily, territorial and communicative privacy is well established, protection for informational privacy is not. The Supreme Court had the opportunity to affirm Constitutional privacy protection for information in *NASA v Nelson* (2011) but left the question open.[45] In a concurring opinion, two justices argued that no Constitutional right to 'informational privacy' exists.[46]

Even if there were a confirmed Constitutional right to informational privacy in the United States, it would only protect citizens against government intrusion, not from data collection by private companies. Nor would it prevent private companies from sharing what they have collected with the government. In what has come to be known as the 'third party doctrine', the Supreme Court held that people who volunteer information to third parties no longer have a reasonable expectation of privacy in it—even if they revealed the information on the assumption that it would be used for limited purposes and shared no further.[47] Consequently, the Fourth Amendment does not prohibit the government from accessing data such as phone or bank records that consumers have voluntarily shared with the phone company or the bank.

Sectoral privacy protection

In the United States, protection of data—from government and private actors—comes primarily through statutory law at both the state and federal level. No one statute applies uniformly to data collectors. Separate protections have been created for data gathered by financial institutions, schools, medical providers, video stores, Internet service providers, telecommunications companies, credit reporting agencies and government agencies. Privacy statutes specify what these entities *may do with the data they collect* (who they can share it with and under what circumstances). But there is almost nothing to limit *the type or amount of data that may be collected* about adults, particularly in an online environment.

The US law that comes closest to comprehensive data protection is the Privacy Act of 1974. However, its restrictions apply exclusively to federal agencies.[48] The law gives citizens access to records that the federal government maintains about them and a right

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[43] See eg *Sorrell v IMS Health, Inc*, 131 SCt 2653 (2011) (overturning a Vermont statute restricting marketers' use of pharmacy records because the restriction violated their First Amendment rights).

[44] See eg C Savage, E Wyatt, and P Baker, 'US Confirms Gathering of Web Data Overseas' *New York Times*, 7 June 2013, A1 (describing the National Security Agency's surveillance program).

[45] *NASA v Nelson*, 131 S Ct 746 (2011).

[46] ibid [765] (Scalia, concurring).

[47] *United States v Miller*, 425 US 435, 443 (1976).

[48] 5 USC § 552a.

to request corrections if the records are inaccurate or incomplete. It also prohibits the disclosure of personal records without the subject's consent.[49] The law places one limit on the type of data that may be stored. It bars federal agencies from maintaining records of citizens' First Amendment activities.[50]

Protection for privacy on the Internet comes from the Electronic Communications Privacy Act, which applies to government and private entities. It includes three components meant to secure electronic information: The Pen Register Statute,[51] the Federal Wiretap Act,[52] and the Stored Communications Act.[53]

The Pen Register Statute protects dialing and routing information ancillary to phone and email messages. Because this information is assumed to be less private than the message itself, authorities may access it with a subpoena, which requires them to show that the information sought may be useful to an investigation.

This protection is certain to seem hollow to anyone familiar with news coverage of the National Security Agency's surveillance program. The NSA has taken advantage of a section of the Patriot Act, passed after the 2001 terrorist attacks, that enables government officials to gain access to business records that may have an impact on terrorist investigations.[54] The intent of the law was to allow security officials to obtain records of those under suspicion of terrorist activities. However, it has been broadly interpreted to allow the government to capture metadata of all telecommunications, so officials have a complete data set when a search is required.[55] Several organizations have filed suit to challenge this interpretation.[56]

The Wiretap Act protects the actual content of phone calls, emails or files in transit by making it illegal to intercept electronic communications or disclose them. Law enforcement may access this information only with a warrant after showing probable cause that the communications contain evidence of criminal activity. A separate law—the Foreign Intelligence Surveillance Act—applies to the interception of foreign communications.[57] Under its looser standard, the government need only show that the target of surveillance is a foreign power or an agent of a foreign power and a significant purpose of the surveillance is to gather foreign intelligence information.

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[49] But see 5 USC § 552a (a)(7),(d)(5), (j)(1)–(j)(2), (k)(1)–(k)(7) (outlining exceptions to the law, including allowances for data sharing among law enforcement agencies and for 'routine use' that allows federal agencies to disclose individually identifiable information by stating their plans to disclose that type of information when they create or alter the database).

[50] 5 USC § 552(e)(7).

[51] 18 USC §§ 3132(a)(1).

[52] 18 USC §§ 2510–22.

[53] 18 USC §§ 2701–11.

[54] *Public Law* 107–56, Sec 215, 26 October 2001.

[55] *In re* application of the Federal Bureau of Investigation for an order requiring the production of tangible things from (the rest is redacted), No BR 13-109, US FISA Court, <http://www.uscourts.gov/uscourts/courts/fisc/br13-09-primary-order.pdf>.

[56] *First Unitarian Church of Los Angeles v NSA*, No CV 13 3287 (ND Cal 16 July 2013); *ACLU v James Clapper*, No 13 CIV 3994 (SDNY 11 June 2013).

[57] 50 USC § 1801 et seq (2012).

The Stored Communications Act protects the content of emails and files stored by an Internet service or telecommunications provider. Government authorities require a warrant to gain access to stored data within the first six months of its receipt. After that, a subpoena will do. The Stored Communications Act was passed in 1986, before the Web existed. At the time, legislators assumed that files stored after six months were abandoned. No one anticipated that people would store email with their ISPs for years or entrust remote services with their data through cloud computing. Consequently, under current law, files stored remotely receive less protection than files stored at home.[58]

Two exceptions written into the Electronic Communication Act also weaken electronic privacy protection. First, both the Wiretap Act and Stored Communications Act allow users and the entity providing service to the user to access the user's data.[59] Consequently, an ISP has access to all of the data it transmits and stores and can mine it for marketing purposes.[60] Google, for example, scans its users' emails for key words it then uses to target advertising to them. Because Gmail subscribers exchange emails with users of other email services, their messages may incorporate content from individuals who have not agreed to Google's terms of service. In a court filing intended to ward off a class action lawsuit from nonsubscribers whose emails are scanned, the company stated that people sending to any of Google's 425 million Gmail users have no 'reasonable expectation' of privacy.[61] Employers who supply Internet access or phone mail to their employees may also examine employees' stored files without permission.

Second, both the Wiretap Act and Stored Communications Act allow users of a service to authorize a third party's access to data that runs through it.[62] This exception has been interpreted in a strange way that allows websites that users visit to give third party data collectors consent to place cookies on users' computers and to scrape their data while the user is on the site. A federal district court in New York held in *In re DoubleClick Inc Privacy Litigation* (2001) that Google's Internet marketing company did not violate the Wiretap or Stored Communications Acts by placing cookies on people's computers without their permission.[63] It reasoned that the websites users visited were equal partners in an online exchange and that, as a party to the communication, the websites had the authority under the exemption to authorize a third party—DoubleClick—to intercept data on the website owner's behalf.[64]

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[58] But see *United States v Warshak*, 631 F3d 266, 288 (6th Cir 2010) (holding that in the 6th Circuit a warrant is required for access to stored data, no matter how old).

[59] 18 USC § 2701 (2)(c); 18 USC § 2702 (b)(5); 18 USC § 2511 (3)(iii).

[60] D Bogatin, 'Free Google Gmail: The High Price You Pay' (*ZDNet*, 10 September 2006) <http://www.zdnet.com/blog/micro-markets/free-google-gmail-the-high-price-you-pay/428>, accessed 20 March 2013); 'How Google Spies on Your Gmail Account (And How to Stop it)' (*Gawker,* 11 May 2011) <http://gawker.com/5800868>, accessed 30 July 2013.

[61] D Rushe, 'Google: Don't Expect Privacy when Sending to Gmail' (*The Guardian,* 14 August 2013), <http://www.theguardian.com/technology/2013/aug/14/google-gmail-users-privacy-email-lawsuit>.

[62] 18 USC § 2701 (2)(d); 18 USC § 2702 (b)(1); 18 USC § 2511 (3)(ii).

[63] 154 F Supp 2d 497 (SDNY 2001). See also *Del Vecchio v Amazon*, C11-366-RsL (WD Wash 1 December 2011) and *La Court v Specific Media, Inc* 8:10-cv-01256-GW-JCG (CD Cal 28 April 2011, dismissing suits based on the use of 'super' or 'flash' cookies).

[64] ibid.

Although online data aggregators can collect and sell any data they wish from adult Internet users in the United States, the same liberties to do not apply to children who venture online. The Children's Online Privacy Protection Act authorizes the Federal Trade Commission to regulate sites that collect personal information from children under 13.[65] Companies that operate such sites must get viable consent from a parent or a legal guardian to collect information such as the child's name, home address, email address, telephone number, Social Security number, or any other personal identifiers, including geolocation information or data collected through cookies. COPPA also prevents third-party marketers from collecting personal information for behavioral advertising purposes without parental consent.

States are generally more protective of Internet users' privacy than the federal government. For example, although federal law does not require websites or online services that collect personally identifiable data to post their privacy policies, California does through its Online Privacy Protection Act.[66] Because it is impractical for online services to limit their policies to Californians, nationwide consumers have benefitted. California has also implemented a 'do-not-track' law, which Congress considered but failed to do.[67] Websites that collect personally identifiable information from California users must disclose (1) how they respond to a web browser's 'do not track' signal and (2) whether third parties collect personal information from the website's users as they continue to other sites.[68] There is no federal law requiring that Internet service providers keep personally identifying information concerning their customers private unless the customer gives permission to disclose the information. But Nevada and Minnesota require this.[69] Minnesota also requires that ISPs get permission from subscribers before disclosing data about subscribers' online surfing habits.[70] Most states have also passed laws requiring notification of security breaches involving personal information.[71]

Administrative protection

Privacy protection in the United States also comes from independent administrative agencies. For example, the Federal Communications Commission has adopted rules that prohibit telecommunications carriers from sharing customers' personal information with joint partners or outside companies who want to use it for marketing purposes unless their customers opt in to data sharing.[72]

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[65] 15 USC §§ 6501–6.

[66] Calif Bus & Prof Code §§ 22575–78.

[67] Calif AB 370, ch 390 (27 September 2013, amending Calif Bus & Prof Code § 22575).

[68] Calif Bus & Prof Code §§ 22575 (b)(5–6).

[69] Minn Stat §§ 325M.01–.09; Nev Rev Stat § 205.498.

[70] Minn Stat § 325M.04.

[71] Alabama and New Mexico are exceptions.

[72] Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, 13 FCCR 8061, 25 (1998).

The Federal Trade Commission takes action against companies that violate their own privacy policies through its power to prohibit unfair and deceptive trade practices.[73] In past years, it has issued consent orders against Google, Facebook, MySpace and Twitter for violating their promises to protect subscribers' privacy. The FTC fined Google $22.5 million after it discovered that the company was bypassing the 'do-not-track' privacy setting on the Safari browser.[74] Facebook was penalized for changing its privacy settings without first informing its users.[75] MySpace was fined for sharing identifiable information about its users with its advertisers.[76] Twitter paid for lax security of passwords.[77]

A proposal for expanded data protection

In 2012, the White House released its vision for a 'Consumer Privacy Bill of Rights', which includes recognized fair information practices that, with exceptions, would operate similarly to those included in the EU's proposed Data Protection Regulation.[78] The proposal, which the Obama Administration has encouraged Congress to enact into law,[79] included the following assertions:

– *Individual control*: Consumers have a right to exercise control over what personal data companies collect from them and how they use it.
– *Transparency*: Consumers have a right to easily understandable and accessible information about privacy and security practices.
– *Respect for context*: Consumers have a right to expect that companies will collect, use and disclose personal data in ways that are consistent with the context in which consumers provide the data.
– *Security*: Consumers have a right to secure and responsible handling of personal data.
– *Access and accuracy*: Consumers have a right to access and correct personal data in usable formats, in a manner that is appropriate to the sensitivity of the data and the risk of adverse consequences to consumers if the data are inaccurate.

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[73] 15 USC §§ 41–58.

[74] *In the Matter of Google, Inc*, FTC Docket No C-4336, Consent Order (13 October 2011) (requiring the company to implement a privacy program subject to independent third-party audit); J Angwin, 'Google, FTC Near Settlement on Privacy,' *Wall Street Journal,* 10 July 2012, A1 (describing a $22.5 million settlement with the FTC over allegations that it used computer code to trick Apple's Safari Web browser into allowing it to track users' activity).

[75] *In the Matter of Facebook, Inc*, FTC File No 092 3184, Consent Order (10 August 2012, requiring the company to implement a privacy program subject to independent third-party audit).

[76] D Kravets, 'FTC Slaps MySpace for Privacy Breaches' (*Wired.com,* 8 May 2012) <http://www.wired.com/threatlevel/2012/05/ftc-myspace-slap/> accessed 8 August 2012.

[77] *In the Matter of Twitter, Inc*, FTC File No 092 3093 Consent Order (11 March 2011).

[78] White House, 'Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy' (February 2012), <http://www.whitehouse.gov/sites/default/files/privacy-final.pdf > accessed 30 August 2013.

[79] ibid 10.

– *Focused collection*: Consumers have a right to reasonable limits on the personal data that companies collect and retain.
– *Accountability*: Consumers have a right to have personal data handled by companies with appropriate measures in place to assure they adhere to the Consumer Privacy Bill of Rights.

In contrast to the EU's proposed Data Protection Regulation, the Administration's proposal does not specify a need for explicit consent for data collection, suggesting instead that consumers need a way to opt out of it. The document also observes that it may be 'impractical to provide individual control' in the case of third party information collectors and includes no suggestion of a right to data erasure.[80]

Most significantly, the Privacy Bill of Rights would not apply to *all* data collectors—only those who are not covered by other federal statutes. Acknowledging the US's sectoral approach to privacy, the Administration stated that it prefers to support 'legislation that would supplement the existing framework and extend baseline protections to the sectors that existing federal statutes do not cover.'[81] This is a practical consideration. The White House knows that, in its current state of partisan rancor, Congress is unlikely to consider a complete overhaul of federal privacy protections.

In the meantime, the Commerce Department is encouraging industry stakeholders to voluntarily incorporate elements from the Privacy Bill of Rights into their own codes of conduct. Companies that voluntarily adopt the Privacy Bill of Rights into their terms of service would be legally bound by contract to honor it. Violations would be enforceable by the Federal Trade Commission. However, because adoption of the Administration's privacy proposal is voluntary, companies could also choose to ignore it or amend it as they see fit.

Privacy and economic efficiency

Although differences in privacy regulation between the European Union and United States are substantial, they have enjoyed the world's largest bilateral trade relationship, comprising nearly half of the world's Gross Domestic Product and thirty percent of world trade.[82] The two economic giants mitigated their differences through their negotiation of the Safe Harbor Framework in 2001.[83] The program allows US companies

[80] ibid 13.
[81] ibid.
[82] Office of the United States Trade Representative, *Final Report of the US-EU High Level Working Group on Jobs and Growth* (11 February 2013) <http://www.ustr.gov/about-us/press-office/reports-and-publications/2013/final-report-us-eu-hlwg> accessed 30 August 2013; L Movius and N Krup, 'US and EU Privacy Policy, 'Comparison of Regulatory Approaches' (2009) 3 *International Journal of Communication* 171.
[83] Department of Commerce, 'Safe Harbor Overview' <http://ita.doc.gov/td/ecom/menu.html>, accessed 30 August 2013.

to self-certify to the Department of Commerce that their privacy principles mirror core requirements in the EU Data Protection Directive and 4,000 have done so.[84]

Passage of the Data Protection Regulation would likely require those companies to offer substantial new privacy protections in order to maintain their trade relationship. If the Framework were to collapse, the potential disruption in trade could cost the average household of four people €1,041 or $1,353, according to a report prepared by the European Centre for International Political Economy for the US Chamber of Commerce.[85]

On the other hand, should the European Union and United States find a way to meet in the middle, the economic benefit could be quite substantial. In February of 2013, the EU and the US began negotiations on a trans-Atlantic free trade agreement that would liberalize trade and investment between the two blocs. Tariffs between them are already low—under three percent. So the principle focus of the agreement is on reducing regulatory barriers to trade, particularly in the areas of security and consumer protection.[86] The negotiations will emphasize areas in which the EU and the US may develop 'partial regulatory convergence or cross-recognition of standards.'[87]

The European Commission estimates that a twenty-five percent reduction in regulatory divergence would translate into economic gains of as much as €68.2 billion a year for the European Union and $65 billion for the United States.[88] A fifty percent reduction in regulatory divergence could mean €119 billion annually for the EU and $125 billion for the US.[89] At the higher end, this would translate into an extra €545 in annual disposable income for European families and $865 for US families on average.[90]

Conflicting economic theories

Clearly the European Union and United States both want economic growth stemming from e-commerce, but they appear to be approaching that goal from opposing economic theories. The EU assumes more privacy regulation is necessary to ensure consumer

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[84] CF Kerry, 'General Counsel, US Commerce Department, Keynote Address at the German Marshall Fund of the United States' (28 August 2013) <http://www.commerce.gov/news/speech/2013/08/28/us-commerce-department-general-counsel-cameron-f-kerry-keynote-address-german>, accessed 29 August 2013.

[85] European Centre for International Political Economy, 'The Economic Importance of Getting Data Protection right: Protecting Privacy, Transmitting Data, Moving Commerce' (March 2013), <http://www.uschamber.com/sites/default/files/grc/020508_EconomicImportance_Final_Revised_lr.pdf>, accessed 25 August 2013.

[86] Invest in EU, 'European Commission Fires Starting Gun for EU-US Trade Talks' (13 March 2013) <http://www.investineu.com/content/european-commission-fires-starting-gun-eu-us-trade-talks-12c3>, accessed 7 July 2013.

[87] European Commission, 'Trade: Countries and Regions: United States' <http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/united-states/>, last updated 18 June 2013.

[88] J Francois, M Manchin, H Norberg, O Pindyuk, and P Tomberger, 'Reducing Transatlantic Barriers to Trade and Investment: An Economic Assessment' *Final Project Report Prepared for European Commission under implementing Framework Contract Trade*, 10/A2/A16, (March 2013) 2.

[89] ibid.

[90] ibid.

confidence in online markets. The US has traditionally assumed that more government regulation for privacy would be a barrier to economic markets.[91] Which argument is correct? There are numerous ways to consider the economic impact of privacy protection and none is clear-cut. But the ideological conflict appears to focus on the impact of privacy regulation on consumer confidence and businesses' efficiency. Let's look at each in turn.

Privacy and consumer confidence

One way of looking at the economic impact of privacy regulation is to consider how it affects consumer behavior. The European Commission's argument that people need privacy assurances to trust e-commerce is based on the assumption that without it potential consumers will decide that risks to their privacy outweigh the benefits of online exchanges.

The reaction to the NSA's surveillance program within the cloud computing industry supports this argument. Following the revelation that the NSA was collecting communications from American Internet companies, the Information Technology and Innovation Foundation released a report indicating that US cloud providers will likely lose $21.5 to $35 billion over the next three years.[92] The data was based on a Cloud Security Alliance survey showing that ten percent of officials at non-US companies had cancelled contracts with US providers of cloud services, and fifty-six percent of non-US respondents claimed to be hesitant to work with US providers.[93] Before the NSA program was leaked, Europeans were already concerned about the security of data on US cloud-based servers.[94] The Foreign Intelligence Surveillance Amendment Act of 2008 broadened the authority of the US government to collect foreign data moving through US telecommunication services, including 'remote (cloud-based) services'.[95]

Consumer reaction to corporate surveillance has been significantly less pronounced. The obvious success of American technology firms in the absence of online privacy protection suggests that Internet users are not avoiding these services based on their

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[91] White House, 'Framework for Global Electronic Commerce' (1997) <http://clinton4.nara.gov/WH/New/Commerce/>, accessed 30 August 2013. ('To ensure that differing privacy policies around the world do not impede the flow of data on the Internet, the United States will engage its key trading partners in discussions to build support for industry-developed solutions to privacy problems and for market driven mechanisms to assure customer satisfaction about how private data is handled.')

[92] J Vijayan, 'US cloud firms face backlash from NSA spy programs' (*ComputerWorld UK*, 23 July 2013) <http://www.computerworlduk.com/news/security/3460473/us-cloud-firms-face-backlash-from-nsa-spy-programs/>, accessed 25 August 2013.

[93] ibid.

[94] European Parliament, Directorate General for Internal Policies, 'Fighting Cyber Crime and Protecting Privacy in the Cloud' (2012) <http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=79050>, accessed 25 August 2013.

[95] 50 USC §1881a.

privacy concerns. In spite of a multitude of surveys showing that participants fear the loss of their privacy, they continue to click 'OK' on terms of agreement that indicate their data will be collected and shared with others.[96]

The argument has been made that consumers have already engaged in a cost-benefit analysis, deciding the value of online services is worth the attendant risk to their privacy.[97] But this argument is flawed, at least with respect to American companies. While users may appreciate the benefits of personalization achieved through data collection, they have no way of adequately weighing the costs of those benefits. Internet privacy choices are characterized by incomplete and asymmetrical information. Consumers are frequently unaware that data is being gathered about them, how much data is gathered, how it will be used, whom it will be shared with, and what the consequences will be.

In the mid-1990s, the Federal Trade Commission responded to Internet privacy concerns by encouraging companies to share their data collection practices in privacy policies. However, Annenberg surveys done in 2003 and 2005 showed that consumers weren't reading them. Moreover, almost sixty percent of respondents assumed that when a website had a privacy policy, it meant that the company was promising not to share users' information.[98] Ten years later, it is probably safe to assume more users understand that privacy policies don't protect their privacy, but that doesn't mean users are making sense of them.

Alessandro Acquisti and Jens Grossklags, who study the economic relationship between online use and privacy choices, observed in 2007 that the complexity of privacy decision-making leads individuals to arrive at 'highly imprecise estimates of the likelihood and consequences of adverse events, and altogether ignore privacy threats and

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[96] Pew Internet, 'Trust and Privacy Online: Why American Want to Rewrite the Rules' (*Pew Internet & American Life Project,* 2000) <http://www.pewinternet.org/Reports/2000/Trust-and-Privacy-Online.aspx>, accessed 8 August 2013 (finding that eighty-six percent of Internet users were in favor of 'opt-in' privacy policies that require Internet companies to ask for permission to use personal information); Network Solutions 'Survey Reveals Increased Privacy Concerns Cause Consumers to Provide False Identity Data' 19 February 2004 <http://about.networksolutions.com/site/survey-reveals-increased-privacy-concerns-cause-consumers-to-provide-false-identity-data/>, accessed 4 June 2013 (reporting that seventy percent of respondents said they had provided false data because of concerns about their personal information becoming public); Ponemon Institute, '2010 Privacy Trust Study of the United States Government' (30 June 2010) <http://fcw.com/articles/2010/07/26/comment-mike-spinney-dhs-trusted-identities.aspx> (citing a study of 9,000 adults showing that the majority did not trust the privacy commitments of the federal government and that privacy trust had dropped from a high of fifty-two percent in 2005 to a low of thirty-eight percent in 2010); D Sarno, 'Consumer Reports, Times Polls Find Broad Data Privacy Concerns' (*Los Angeles Times*, 3 April 2012) <http://articles.latimes.com/2012/apr/03/business/la-fi-tn-consumer-reports-privacy-20120403>, accessed 1 August 2013 (finding seventy-one percent of consumers were very concerned about online data collection).

[97] AF Westin, 'Social and Political Dimensions of Privacy' (2003) 59 *Journal of Social Issues* 2, 431–53.

[98] J Turow, C Hoofnagle, DK Mulligan, N Good, and J Grossklags, 'The FTC and Consumer Privacy in the Coming Decade, Technical Report' University of Pennsylvania and University of California, Berkeley (November 2006), <http://www.truststc.org/pubs/142.html>, accessed 25 August 2013.

modes of protection.'[99] They argued that the carelessness consumers show regarding their privacy has more to do with 'the effort needed to evaluate everyday privacy choices' than their level of comfort in what is done with their data.[100]

This conclusion was supported by Aleecia McDonald and Lorrie Cranor (2008), who found that the average length of a privacy policy is 2464 words and that a person would need 244 hours a year to read the privacy policies of each site he or she visited just once.[101] That is equivalent to more than eight hours of reading a day for a month.[102] McDonald and Cranor estimated the national opportunity cost for time to read those policies would be $781 billion.[103] In comparison, online retail sales in the United States in 2011 totaled $145 billion.[104] The data led them to conclude that 'under the current self-regulation framework, targeted online advertising may have negative social utility.'[105]

Other analysts have observed that even if consumers took the time to read the privacy policy on each website they visit, the practice of framing unwanted privacy provisions in vague language makes the policies appear less intrusive than they actually are.[106] A report by TrustE found that privacy policies are characterized by inadequate information about what data is gathered and how it will be used. Only seven percent of privacy policies explain what data is stored and for how long, and only thirty-two percent explain how users could delete their data for good.[107]

Because people don't know how their data is used or the potential risks that may be incurred by sharing it, they also have no idea how to assign a value to it.[108] That may lead them to assign an arbitrary value for personal data in relation to the thing they want to

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[99] A Acquisti and J Grossklags, *What Can Behavioral Economics Teach Us About Privacy, Digital Privacy: Theory, Technologies, and Practices* (Taylor and Francis 2007) 365.

[100] ibid.

[101] AM McDonald and LF Cranor, 'The Cost of Reading Privacy Policies' (2008) 4 *I/S Journal of law & Policy for the Information Society* 543, 544.

[102] To reach this conclusion, the researchers measured the length of the privacy policies on the seventy-five most popular websites and assumed an average reading time of 250 words a minute to estimate an average reading time needed of ten minutes per policy. Using Nielson/Net ratings, they estimated that, on average, Internet users visit 1354 unique websites annually.

[103] McDonald and Cranor (n 101) 554 (Calculating the cost at twenty-five percent of wages in leisure time and twice wages during business hours.)

[104] US Census Bureau, 'E-Stats' 1 (26 May 2011) <http://www.census.gov/econ/estats/2009/2009 reportfinal.pdf>, accessed 3 August 2013.

[105] ibid.

[106] N Good, J Grossklags, D Thaw, A Perzanowski, D Mulligan, and J Konstan, 'User Choices and Regret: Understanding Users' Decision Process about Consensually Acquired Spyware' (2006) 2 *I/S Journal of Law and Policy for the Information Society* 323.

[107] D Coldewey, 'Examination of Privacy Policies Shows a Few Troubling Trends' (*TechCrunch*, 30 November 2011), <http://techcrunch.com/2011/11/30/examination-of-privacy-policies-shows-a-few-troubling-trends/>, accessed 8 July 2013.

[108] I-H Hann, K-L Hui, T Lee, and IPL Png, 'Online Information Privacy: Measuring the Cost-Benefit Trade-Off' *Proceedings of 23rd International Conference on Information Systems* (ICIS 2002) <http://aisel.aisnet.org/icis2002/1/>, accessed 10 July 2013.

buy—such as a book, for example. Acquisti and Grossklags (2007) argue that when this occurs, it is likely that the consumer's valuation of his or her data will stay close to that number.[109]

Even if they don't know what to do about it, surveys show that consumers worry about their privacy.[110] Some companies have profited by tapping into that concern, like DuckDuckGo, which promises not to collect personal information, and Microsoft, Apple and Mozilla, which offer browsers with do-not-track tools.[111]

Privacy and businesses efficiency

Another way to look at the economic impact of privacy regulation is to consider its impact on business efficiency. This includes the administrative costs businesses and government offices incur when they comply with privacy regulations, and lost opportunities for innovation based on data collection.

EU compliance costs

The European Commission assumes that the administrative cost of operating within the current Data Protection Directive's fragmented system of privacy rules is almost €3 billion a year. It argues that the expected savings of reducing that fragmentation for economic operators under the proposed Data Protection Regulation would be €2.3 billion (or $3 billion) annually.[112] Instead of operating within the privacy regimes of 28 member states, companies will be able to operate within one privacy framework and trust that the rules will apply uniformly across borders.

The problem of legal fragmentation affects data controllers who are established in more than one member state and transfer data across borders. The European Commission assumes there are 8,821,638 data processors in the EU and that twenty-one percent of them (or 1,852,544) engage in cross-border trade. Of those, roughly fifty percent or 926,272 have established operations in more than one country, requiring them to operate under more than one privacy regulation, and would save under the new data protection measure.[113]

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[109] Acquisti and Grossklags (n 99) 370–71.

[110] Pew et al. (n 96).

[111] H Collis, 'Little Known Search Engine that Refuses to Store Data on Users Doubles Web Traffic Amid NSA Tapping Scandal' (*Mail Online*, 11 July 2013) <http://www.dailymail.co.uk/news/article-2360059/DuckDuckGo-little-known-search-engine-refuses-store-data-users-doubles-web-traffic-amid-NSA-tapping-scandal.html>, accessed 12 July 2013.

[112] Commission Staff Working Paper Executive Summary of the Impact Assessment, SEC/2012/0073 final, 6.2, 25/01/2012, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52012SC0073:EN:NOT>, accessed 1 August 2013.

[113] European Commission, 'Annexes to the Impact Assessment' 119 (25 January 2012) <http://ec.europa.eu/justice/data-protection/document/review2012/sec_2012_72_annexes_en.pdf>, accessed 15 August 2013.

The regulation would also cause companies to incur new expenses. Those with 5000 or more customer contacts a year will be expected to designate data processing officers to demonstrate compliance with the law by documenting data processing activities and producing Data Protection Impact Assessments.[114] Because ninety percent of large companies—with more than 250 employees—and half of small-to-medium enterprises already employ data protection officers on a full or part-time basis, the expected increase in expenditures will be €320 million for large firms and another €4.9 million for those in small-to-medium range.[115]

Each nation already has its own data protection authority to ensure that data protection rules are followed. Under the current system, a company that operates in more than one EU country has to work with several data protection authorities that may apply different rules based on their nation's interpretation of the Data Protection Directive. When data violations affect EU citizens in more than one country, data protection authorities from those countries may issue different opinions with no system to reconcile them. Under the new regulation, the only data protection authority able to issue a binding decision in such a case would be the data protection authority in the nation in which the company has its primary EU establishment.[116] This 'one stop shop' would make it easier and less expensive to do business in the EU.

The potential addition of a new over-arching EU Data Protection Board would provide advisory opinions to national data protection authorities when data privacy actions affect more than one nation. Its proposed budget would add €3 million per annum on average for the first six years.[117]

The Commission also estimates that the cost of data breach notifications will increase. Approximately 3,000 data breach notifications take place in the EU each year at a cost of €20,000 each. Extending the notification requirement to all sectors would potentially add 1000 more and cost another €20 million per year.

The commission concludes that €5,257,752,500 is currently spent on data protection in the EU each year. Almost €3 billion is due to fragmentation. After taking advantage of that saving, but adding on new expenditures, the estimated savings would be approximately €1.5 billion.[118]

This accounting has not gone undisputed. The UK justice minister argued that the new data regulation would cost up to €576 million a year for the UK alone.[119] However,

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114 Albrecht et al. (n 30).

115 ibid 101–2.

116 ibid.

117 ibid.

118 ibid 122.

119 Ministry of Justice, 'Government response to Justice Select Committee's opinion on the European Union Data Protection framework proposals' 6 (January 2013) <http://www.parliament.uk/documents/commons-vote-office/November_2012/22-11-12/7-Justice-DataProtection.pdf >, accessed 15 August 2013.

this number appears inflated.[120] It assumes Data Protection Officers would have to be hired at an expected cost of €256 million per year, but does not account for the number that are already in place. It also assumes separate costs for documenting that the data protection officer was hired, doing Data Protection Impact Assessments, documenting that the impact assessments were carried out, and documenting data processing activities—activities largely attributable to the Data Protection Officer and therefore accounted for already.

US compliance costs

In the United States, the government is also required to do a cost-benefit analysis for statutes and regulations.[121] However, the president's proposed Consumer Privacy Bill of Rights has not been introduced into legislation, so no analysis has been done. Nevertheless, two financial assessments done previously for other privacy proposals could be used to determine the likely financial impact of an online privacy protection regulation. In 2002, the Congressional Budget Office estimated the cost of a Senate bill called the Online Personal Privacy Act, which would have required online service providers and operators of commercial websites to obtain users' consent before collecting sensitive data and to provide users with the opportunity to 'opt out' before gathering non-sensitive data.[122] It also would have given users a right of access to their data, a right to notification if it were breached, and required the designation of a privacy compliance officer.[123] The Federal Trade Commission would have been responsible for enforcing the regulation and developing rules regarding the collection of personal data by means other than the Internet. The CBO estimated the FTC would need $9 million over a five-year period to meet its anticipated responsibilities under the proposed legislation. It was not able to estimate the cost of the private sector mandate due to uncertainties about the number of firms online.

However, the Federal Trade Commission's 2013 cost/benefit analysis of proposed changes to the Children's Online Privacy Protection Act (COPPA) include financial impacts on the private sector. COPPA was amended to offer enhanced data privacy protections similar to those proposed in the EU Data Regulation, but only for children under 13. The law applies to all website operators and online services directed toward children, or with actual knowledge that they are collecting personal information from

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120 'Data Protection Regulation cost of compliance. Has the UK published suspect numbers?' (Amberhalk HalkTalk, 25 November 2012) <http://amberhawk.typepad.com/amberhawk/2012/11/data-protection-regulation-cost-of-compliance-has-the-uk-published-suspect-numbers.html>, accessed 20 August 2013.

121 *Public Law* 93–344, 88 Stat 297, 2 USC §§ 601–88 (supporting the Congressional Budget Office); Executive Order 12866 of 30 September 1993 (requiring agencies that propose regulations to engage in a cost/benefit analysis).

122 Congressional Budget Office, 'Cost Estimate for S 2201 Online Personal Privacy Act' (18 June 2002) <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/35xx/doc3549/s2201.pdf>, accessed 30 August 2013.

123 S 2201, 107th Cong (2002).

children, or that integrate plug-ins or advertising networks that collect information from visitors. All operators are required to get verifiable parental consent before collecting personally identifiable information from children, to provide parents with notices detailing the site's information collection practices and access to their children's information, and to delete the information upon the parents' request.

The Commission estimated that 2910 web operators, plus 280 more each year, would be affected by the new privacy rules. It calculated that the Act would cost new and existing operators $21,508,900 to create new privacy policies and design mechanisms for notice.[124] The cost divided among them would average $6,742 per operator. The expected expense for Internet behemoths such as Google and Facebook would be markedly higher. However, this should be largely offset by the privacy measures they have already committed to undertake as members of the Safe Harbor Framework.

That number can be extrapolated to the larger body of firms engaged in e-commerce. The market research company IBIS lists the number of US businesses engaged in e-commerce at 119,280.[125] Assuming each had to absorb a figure like the $6,742 associated with the cost of the COPPA privacy legislation, the total cost would be $804,185,760. Figuring in the $9 million expense estimate for the FTC to monitor compliance, the total cost of an online privacy protection regulation would be roughly $813 million.

This figure does not extend to data collectors offline, who would still need to conform to Safe Harbor rules to transact business involving data transfers with the European Union. Also, there would be no expected cost savings from reduced fragmentation of laws. Despite an apparent laissez faire attitude toward data collection in the United States, there are more than 700 separate federal and state statutes covering privacy and surveillance.[126]

Lost opportunities

Opportunities lost due to privacy regulations may be related to the ability to take advantage of big data for marketing purposes or larger discoveries that benefit society.

According to research by Andrew McAfee and Erik Brynjolfsson (2012), companies that use data and analytics in their operations show productivity rates and profitability that are five to six percent higher than those of their peers.[127] In arguing against data restrictions, businesses consistently point to the fact that they are able to more effectively target their markets for products and services through data gathering.

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[124] 78 Fed Reg 3972, 4002, 17 January 2013.

[125] 'E Commerce and Online Auctions in the US: Market Research Report' (*IBIS World*, June 2013) <http://www.ibisworld.com/industry/default.aspx?indid=1930>, (last visited 1 September 2013).

[126] RE Smith, 'Compilation of State and Federal Privacy Laws' (2013) *Privacy Journal*.

[127] D Barton and D Court, 'Making Advanced Analytics Work for You' (*Harvard Business Review*, October 2012) <http://hbr.org/2012/10/making-advanced-analytics-work-for-you/ar/1>, accessed 3 May 2013.

A 2011 study by Avi Goldfarb and Catherine Tucker appears to support this contention. Following implementation of the EU's e-Privacy directive requiring users to opt in to cookies, the researchers found that the effectiveness of online display advertising dropped. Surveys of online users who received targeted advertising compared with those who did not showed a difference among the groups of as much as sixty-five percent in stated intention to buy the product advertised.[128] The difference was more apparent on sites where specific audience desires are less recognizable and therefore harder to match without targeted advertising.

General interest websites that find it harder to attract advertising revenue without targeted marketing may be forced to reduce the 'free' information and entertainment they are providing to their users. Instead of paying for that service with their data, consumers may have to pay for it in real currency.

Restrictions on data collection also may pose lost opportunities to create social goods if privacy legislation is not worded carefully. We've grown accustomed to hearing about the instrumental value of big data for marketers, but scientists are also finding new ways to use it for the greater good. The drug Herceptin, for example, was developed after the HER-2 oncogene was identified from records of 9000 breast cancer patients.[129] At this point we have no way of knowing how to calculate the unexpected value of data analysis.

In contrast, not adopting privacy reforms would lead to tremendous opportunities lost if US firms could no longer engage with European consumers. With 28 countries negotiating, the EU may not adopt the Data Protection Regulation in the timeframe the European Commission would prefer. But there is general agreement that the current directive is outdated and likely to be replaced with something more protective and uniform.[130] To maintain trade currently in place, US businesses will have to adapt to those new requirements. To enjoy the benefits of a new trade agreement, Congress may have to pass new privacy legislation. The estimated cost of an online privacy regulation would be roughly $813 million for companies engaged in e-commerce. This number is a fraction of the $278 billion US e-commerce generated in 2012.[131] More importantly, it is less than half the sum traded between the EU and the US in one day.[132] The US economy cannot afford to lose that trade and could certainly benefit from a potential increase of $65 billion if treaty negotiations are successful.[133]

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[128] A Goldfarb and C Tucker, 'Privacy Regulation and Online Advertising' (2011) 57 *Management Science* 1, 57–71.

[129] Kerry (n 84).

[130] See Interinstitutional File, 2012/0011 (COD), 18 July 2012 (listing member nations' reservations and suggestions for amendments, but no refusals to update the directive).

[131] T Reuter, 'US E-commerce to Grow 13% in 2013' (*Internet Retailer*, 13 March 2013) <http://www.internetretailer.com/2013/03/13/us-e-commerce-grow-13-2013>, accessed 4 June 2013.

[132] European Commission (n 10).

[133] Invest in EU (n 86).

Conclusion

Europeans and Americans are at a crossroads on data privacy protection. The European Union, which is already committed to the intrinsic value of privacy, has asserted that privacy also has an instrumental value in promoting e-commerce. It is moving forward with plans to enhance data security for its citizens. The United States is focused on the instrumental value of data access to the economy and national security. While privacy is recognized as beneficial, protecting it is viewed as potentially too costly. This paper has examined the cost of enhanced privacy protection and found that it would not only save money in the EU, but in the US as well. Not only is the cost of online privacy protection significantly less than the amount that would be lost in trade, investing in greater privacy for the purpose of successful trade negotiations would benefit both Internet users and the economy. The United States should pass online privacy protection and modify the Safe Harbor as necessary to accommodate more stringent EU protections that US law does not include.

6.
Hate speech and terrorism

Robert A Kahn

Offensive symbols and hate speech law: Where to draw the line?

An American perspective

Introduction[1]

One of the thorniest areas of hate speech regulation involves symbols.[2] Traditional hate speech laws punish speech that directly harms a specific ethnic, racial or religious group. To be sure, there are disagreements both about whether to ban hate speech and, if so, how much speech to ban. In general, Europeans (and much of the rest of the world) are far more willing to ban hate speech than the United States.[3] That said, the arguments for and against criminalization are relatively straight forward: Will banning hate speech have a chilling effect? Is the government to be trusted to use the bans in an appropriate manner? If a society foregoes hate speech bans, is it willing to accept the consequences, such as a lack of respect for human dignity and a heightened danger of extremist racist groups once again seizing state power as they did in the 1930s and 1940s?[4]

Symbols complicate this analysis. In part this relates to the diversity of symbols. Symbols can be sacred (a religious book, deity or prophet) or secular (for example, the Holocaust as a symbol of human suffering). Symbols can be protected from offensive speech (as, for example, in traditional blasphemy statutes) or the symbol itself can become the source of offense (as is the case with the Nazi swastika, a burning cross, or the Communist red star). What unites symbols, despite this diversity, is a definitional challenge: When is the symbol (or speech that denigrates it) actually about a distinct

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[1] I would like to thank Jacqueline Baronian for her helpful comments on this essay.

[2] In this paper I use the term 'symbol' broadly to include not only physical symbols such as a swastika, red star, or Ku Klux Klan mask but also religious doctrines and events of great human suffering, such as the Holocaust. What these ideas and physical objects share is the potential for the object, or speech denigrating it, to cause the type of harm to a discrete victim group that hate speech laws traditionally protect against.

[3] For a general overview of differences between American and European perspectives on hate speech regulation see Erik Bleich, *The Freedom to Be Racist: How the United States and Europe Struggle to Preserve Freedom and Combat Racism* (OUP 2011). Until the 1950s the gap between Europe and the United States was relatively small. It grew as Americans, in response to the use of speech laws against the civil rights movement and protesters against the Vietnam War, became skeptical of speech restrictions. See S Walker, *Hate Speech: The History of an American Controversy* (Nebraska 1994).

[4] For example, Robert Post has argued that hate speech bans are undemocratic because they deprive citizens of the information they need to know to make rational decisions. For an application of these ideas to the European context, see R Post, 'Religion and Speech, Portraits of Muhammad' (2007) 14 *Constellations* 72. For a critical response, see RA Kahn, 'Why do Europeans Ban Hate Speech: A Debate between Karl Loewenstein and Robert Post' 61 *Hofstra Law Review* 545, 576–81.

group of people the symbol represents? If it is, is the symbol (or message about it) equivalent to the denigration of human dignity that undergirds hate speech regulation?

The more a society answers 'yes' to these questions, the greater the chance of discouraging a wide range of public discourse. On the other hand, symbols can be powerful. If a picture is worth a thousand words, the same is true of a symbol that, like Proust's madeleine, knits together a series of shared cultural, religious or social experiences and beliefs. Statements denigrating symbols (such as blasphemy, or Holocaust denial), can, as the sociologist Mary Douglas points out, be experienced as a form of ritual pollution.[5] In other instances, as with the swastika and red star, the symbol itself is experienced as a form of pollution.

The power of symbols (and attacks on them) to cause harm explains why, despite the general absence of hate speech laws in the United States, bans on symbols exist on both sides of the Atlantic. In the United States, these restrictions often involve the Ku Klux Klan. For example, in response to masked demonstrations by the Klan, several American states mostly in the South have banned mask wearing[6] and in 2003 the United States Supreme Court upheld the right of states to ban burning crosses when done with the intent to intimidate others.[7]

Despite these differences, regulations over symbols raise a common dilemma. Often, the most logical reason to ban the symbol (or denigration of it) is off-limits in a modern society committed to secular pluralist values. While from a religious perspective blasphemy is an offense against God, blasphemy prosecutions in modern Europe are acceptable only when the speech act harms believers. This was the message of *Otto Preminger Institut v Austria*, in which the European Court for Human Rights (ECtHR) upheld the ban of a play critical of the Holy Family largely because of its impact on the highly Catholic region of Tyrol.[8] Likewise, bans on Holocaust denial are justifiable not because Holocaust revisionism is bad history but because of a connection between Holocaust denial and anti-Semitism.[9]

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[5] M Douglas, *Purity and Danger: An Analysis of Concepts of Pollution and Taboo* (Routledge 1966).

[6] American States with mask laws included, as of 1992, eight of the eleven states of the Confederacy (Alabama, Florida, Georgia, Louisiana, North Carolina, South Carolina, Tennessee, and Virginia). For more, see SJ Simoni, 'Note, Who Goes There? Proposing a Model Anti-Mask Act' 61 *Fordham Law Review* 241, n 6.

[7] *Virginia v Black*, 538 US 343 (2003).

[8] Mary Whitehouse's lawyers made this type of argument in *Whitehouse v Lemon*, in which she challenged a homoerotic poem about Jesus published in the Gay News. In particular, they argued that the harm caused by the publication of the poem was not to Christianity as such, but to Christian believers. For an overview of the case, see L Levy, *Blasphemy: Verbal Offense against the Sacred, from Moses to Salman Rushdie* (North Carolina 1995) 534–50.

[9] For example, in *Faurisson v France* (1996) the UN Human Rights Committee upheld a French prosecution of a Holocaust denier in large part because of the connection between Holocaust denial and anti-Semitism in France. Communication No 550/1993, UN Doc CCPR/C/58/D/550/1993(1996) (see the concurring opinion of Justices Elizabeth Evatt and David Kretzmer). Conversely, the absence of such a connection is often given as a reason for not criminalizing Holocaust denial. See A Julius, G Bindman, J Jowell, J Morris, D Rose, and M Shaw, 'Combatting Holocaust Denial through Law in the United Kingdom' (Institute for Jewish Policy Research 2000).

To put it another way, restricting speech about symbols requires harm. The harm can be to individuals. Or it can be to society at large. But harm to the symbol itself does not count. Nor do abstract claims about the harm an offensive symbol will cause to society. To be sure, the harm does not have to be immediate. For example, in the 1930s Karl Loewenstein advocated for a ban of a wide variety of political symbols.[10] But this was generally on the consequentialist ground that extremist organizations were using these symbols to undermine democracy, rather than out of a concern about the impact of the symbols on the victims of political extremism.

But here the problem emerges. How precisely does one draw a connection between a symbol and the group it supposedly represents? For example, do attacks on the *Qur'an* or the Prophet Mohammed count as hate speech directed at Muslims? Does 'bare' Holocaust denial represent an attack on Jews? Or, to take a Hungarian example, does the display of extremist symbols, such as the Nazi swastika, the arrow cross, or the red star, inflict actionable harm on victims of the Holocaust, the Arrow Cross regime or the Soviet domination of Hungary?

Four possible positions

There are four ways of answering these questions. Let me lay them out on a continuum. At one extreme, one can argue that given the historical, political or social context, the symbol in question always refers to the victimized group. These blanket bans are, as we shall see, often quite common, although they often have exceptions to moderate their range.

Second, one can punish the use or denigration of a symbol only when certain aggravating factors are present. For example, *Virginia v Black* allows for punishing cross burning when done with the intent to intimidate.

Third, one can draw a clear line between groups on the one hand, and the symbols that represent them. This is what the Amsterdam trial court did in the *Geert Wilders* case when it distinguished between what he said about Islam (which it largely refused to consider) and what he said about Muslims (which it examined on a case by case basis).[11]

Finally, at the opposite extreme, one can refuse to treat the group the symbol represents as constituting a category worthy of hate speech protection. This is the position of those who question whether hate speech can never be directed at Muslims, because Muslims are not an ethnic or racial group.

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[10] See K Loewenstein, 'Legislative Control of Political Extremism in European Democracies I.' (1938) 38 *Columbia Law Review* 591; K Loewenstein, 'Legislative Control of Political Extremism in European Democracies II.' 38 *Columbia Law Review* 725.

[11] *Geert Wilders* verdict, BQ:9001 Rechtbank Amsterdam, 23 June 2011. In this article, I rely on the court's English language translation.

In what follows, I describe each of the four positions, highlight the strengths and weaknesses of each, and give examples of where they have been used. One interesting aspect of this analysis is how free speech jurisprudence of the United States (most notably the cross burning case *Virginia v Black*) plays a prominent role. To explore this further, I examine the recent Supreme Court case on offensive speech at funerals, *Snyder v Phelps*.[12] Finally, I make some general comments about the four solutions to offensive expression about symbols, concluding that, for those symbols (especially secular ones) a society deems offensive, one often finds either a blanket ban laden with exceptions, or the requirement of an aggravating factor.

Blanket bans

Let me start with the first option, blanket bans on a) offensive symbols or b) expressive acts that denigrate symbols a given group or society holds dear. The rationale behind such bans is that, given the context of the society in question, the offensiveness of the symbol (or of the attack on it) is clear. Justice Clarence Thomas made this type of argument in his *Virginia v Black* dissent, in which he argued that given the history of the Ku Klux Klan in terrorizing African-Americans for over a century, the burning cross could only have one meaning.[13] On this view, criticism of the *Qur'an* (or Mohammed) always insults Muslims, Holocaust denial is always anti-Semitic, and the display of a red star always indicates a disrespect for the victims of Communist rule in Hungary.

Many bans on Holocaust denial take this form. In 1990 the French Gayssot Law made it illegal to contest any act labeled as genocide by an international tribunal; four years later, Germany passed a law making it illegal to deny or trivialize the Holocaust. The previous law in Hungary banning extremist political symbols also took this form. There are two reasons for enacting blanket bans. First, such bans often come after failures in the legal system to prosecute offensive symbols (or expression about them) under classic hate speech laws. For example, Germany passed its Holocaust denial law in response to a decision by the Federal Supreme Court that 'bare' Holocaust denial does not by itself establish incitement to hate.[14] Likewise, the French Gayssot Law was intended at least in part to respond to the difficulties encountered in prosecuting deniers under other laws, including the civil charge of falsifying history.[15] This suggests that societies enact blanket bans only when they have 'good reason' (ie conventional bans have failed).

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[12] *Snyder v Phelps*, __ US __, 131 SCt 1207 (2011).

[13] *Virginia v Black* (n 7) 376 (Thomas J, dissenting).

[14] NJW (1994): 1421 (BGH, 13 March 1994). For more, see RA Kahn, *Holocaust Denial and the Law: A Comparative Study* (Simon Wiesenthal Center 1994) 20–22.

[15] In particular, the civil prosecution of Faurisson for falsifying history led to a 1983 Court of Appeals ruling that, while holding for the civil plaintiffs, refused to call Faurisson's 'scientific' theories about the Holocaust 'frivolous' but chided him for the manner in which he expressed his position. See Kahn (n 14) 37.

Moreover, the scope of blanket bans can be overstated. Even the broadest blanket law will not cover all instances of cross-burning, red stars, or Holocaust denial. Most blanket bans of offensive symbols make exceptions for educational and artistic uses. For example, the old section 269 of the Hungarian Penal Code banning the swastika, arrow cross, and red star makes an exception when it is done for educational, artistic, scientific or informative uses. Laws in the United States banning masked demonstrations make similar exceptions.[16] Moreover, courts must still interpret these laws, often giving criminal defendants the benefit of the doubt. For example, a Georgia appellate court held that the state's mask law was not violated when a man in a clown suit scared a small child.[17] Likewise, a French court held that the Gayssot Law did not apply to a flyer reading 'Auschwitz: 125,000 deaths'.[18]

That said, there are two major difficulties with blanket bans. The first problem is the classic slippery slope question. If some symbols deserve the blanket treatment, how does one draw the line? This has become an issue in France, where the ban on Holocaust denial is just one of several 'memory laws' enacted over the past 20 years.[19] If Holocaust denial is coded language symbolizing anti-Semitism, what message does denial of the Armenian genocide send? Does the answer to this question depend on where one asks the question? Could denial of the Armenian genocide mean one thing in Turkey, another in France (a country with a large Armenian *émigré* community) and another thing entirely in a country such as Denmark with little apparent connection to the genocide? One could make the same argument about the red star. The crushing of the Hungarian uprising in 1956 may well give the star a symbolic meaning lacking in other places, even in other countries that suffered under Soviet domination.

While the scope of blanket bans raises practical difficulties (ones that have become apparent in the wake of the 2008 Framework decision establishing a European norm on Holocaust denial bans) these difficulties are, in theory, solvable if one takes a case-by-case, country specific approach. This is less true with a second concern, largely surrounding religious symbols, which is that blanket bans of offensive symbols will stifle debate on important public issues.

These concerns appeared in the debate in recent years over proposals by majority Muslim countries to establish a global norm against defamation of religion.[20] At times,

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[16] For example, Georgia's ban on mask wearing makes exceptions for masks worn as part of holiday celebrations, sporting events and theatrical productions. See GaStatAnn 16-11-38 (b)(1)–(3).

[17] *Daniels v State*, 448 SE2d 185 (Ga 1994).

[18] The case is described in Kahn (n 14) 114. The court acquitted the accused even though it conceded that at least 800,000 people died at Auschwitz. ibid.

[19] In addition to the Gayssot Law, the French have passed laws about the Atlantic slave trade, and the contribution of French overseas settlers, and have considered criminalizing the denial of the Armenian genocide. For more, see D Fraser, 'Law's Holocaust Denial: State, Memory, Legality' in L Hennebel and T Hochmann (eds), *Genocide Denials and the Law* (OUP 2011) 3–48.

[20] For an overview of the defamation of religions debate, see RA Kahn, 'A Margin of Appreciation for Muslims, Viewing the Defamation of Religions Debate through *Otto-Preminger-Institut v Austria*' (2011) 5 *Charleston Law Review* 401, 406–18.

this debate has taken on a 'clash of civilizations' cast as Western countries line up to defend secularism and the right to insult religious beliefs against a supposed Islamic incursion.[21] This is often combined with a fear that any concessions to the Organization of Islamic Countries will encourage the strict application of blasphemy laws (often with draconian penalties) in Muslim countries.

But the concern that a robust ban on denigrating religious symbols will stifle debate over religious questions is a legitimate one. Criminalizing the statement critiquing a religion ('X is a bad religion') is in theory hard to distinguish from criminalizing comments believers of other religions (or atheists) might make about it ('I think that X is false' or 'I happen not to believe in X'). Here the defamation of religion critics have identified a theoretical difficulty with the extreme position that symbols (or attacks on them) should be punished because they always harm the victimized group. Clearly, there needs to be some additional line drawing to distinguish hateful discourse directed toward the victim group and ordinary comments about belief, at least in the area of religious symbols. This leads us to the second spot on the continuum.

Require an aggravating element

The second position allows for a connection between the symbol and the group it represents, but only under certain aggravating circumstances.[22] For example, Justice O'Connor, writing for the majority in *Virginia v Black* held that cross burning could be proscribed when done with the *intent to intimidate*.[23] To give another example, the new version of the Hungarian law banning the red star, arrow cross, and swastika only applies when the symbols upset peace and order.[24] The new law was passed after the Hungarian Constitutional Court struck down a blanket law covering all extremist symbols.[25] In both cases the goal is to balance freedom of expression with the recognition that, in some instances, a symbol or its denigration can harm a group associated with it.[26]

The question then becomes how to identify those situations that cause harm. Justice O'Connor based the intent to intimidate standard on an earlier case, *Watts v United States* which held that the government has the right to act against 'true threats', as, for example,

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[21] For example, at one point Ireland adopted a blasphemy law for reasons unrelated to Muslims. In response, critics of defamation of religions accused the Irish of betraying the West. ibid 412–13.

[22] Such an approach is common in hate speech law. For example, in incitement to hatred cases, Dutch courts look to evidence of an 'amplifying' element that shows 'extreme emotion', 'deep resentment', and 'animosity'. *Wilders* ruling (n 11) 4.3.1.

[23] *Virginia v Black* (n 7) 358–63.

[24] 'Hungary's parliament approves new rules restricting public use of swastika, red star' *Associated Press*, 22 April 2013.

[25] IV/02478/2012 (decided 23 February 2013).

[26] Incidentally, this is how Holocaust denial was prosecuted before the enactment of special laws targeting revisionism.

when someone threatens the life of the President of the United States.[27] Interestingly, *Watts* was decided in 1969, the same year as *Brandenburg v Ohio* in which the court limited seditious libel to speech that incites imminent lawless action.[28] While *Brandenburg* has become a symbol of American First Amendment 'absolutism', the emphasis on 'true threats' in *Watts* shows that militant democracy concerns are not completely absent in the United States.

Justice O'Connor's use of the intent to intimidate standard helps with the line drawing concerns. It eases the fear that bans on genocide denial will lead to an official state created truth. It suggests that there may be some instances in which the red star, swastika, or arrow cross is innocent. On the other hand, as with Holocaust denial, it may well work out that the intent to intimidate (or breach of peace) standards capture almost all conduct that would be covered by a blanket symbol with an extensive set of exemptions. To put it another way, if a Ku Klux Klan style mask is not worn for health, safety, sporting, or theatrical reasons—why else would it be worn?

Perhaps the biggest upside with the intent to intimidate type standard is with religious symbols. As we have seen, under a blanket ban, any statement about a religion could potentially be subject to hate speech laws. By contrast, if one adds an additional intent requirement, it becomes easier to distinguish statements about one's beliefs ('I am not Jewish. Instead, I believe that Jesus Christ is my savior') from statements made with a hateful intent ('The Jews killed Christ'). It will also raise empirical questions. What was the intent of Wilders when he compared the *Qur'an* to *Mein Kampf*? Was it to denigrate Muslims by comparing them to Nazis? Or was the goal to call on Muslims to reject parts of the *Qur'an* Wilders disagreed with? Or did he have a different goal altogether?[29]

The same logic (and concerns) apply to other symbols as well. For example, Justice O'Connor in her majority opinion gave examples of cross-burnings that were not, in her opinion, done with intent to intimidate. For example, she mentions how crosses were burnt at a joint Nazi-Klan rally in 1940 in which two Klan members were married.[30] There would appear to be no intent to intimidate—much the way the red star used as a symbol of Heineken beer is not a symbol of Soviet Communism.[31] Here the move from

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[27] *Watts v United States*, 394 US 705 (1969).

[28] *Brandenburg v Ohio*, 395 US 444 (1969).

[29] In my reading of *Wilders*, I believe his references are playful and insensitive. In his stump speeches, he often makes the connection between the two books in the context of censorship. If *Mein Kampf* is censored, why not the *Qur'an*—with a wink and nod suggesting that neither book should be banned. B Waterfield, 'Ban the *Koran* like *Mein Kampf*, Dutch MP says' *The Telegraph*, 9 August 2007. At another point, one can almost see Wilders snickering as he tells a *Spiegel* interviewer that the *Qur'an* has more anti-Semitic passages than *Mein Kampf*, knowing the embarrassment the statement will cause his German interviewer. See 'Merkel is Afraid' *Spiegel* Interview with Geert Wilders (*Spiegel Online*, 11 September 2010).

[30] *Virginia v Black* (n 7) 356. For more on the debate over the historical meaning of the burning cross, see RA Kahn, 'Did the Burning Cross Speak? *Virginia v Black* and the Debate Between Justices O'Connor and Thomas over the History of Cross Burning' (2006) 39 *Studies in Law, Politics and Society* 75–90.

[31] That said, during the Cold War, the company changed its logo for beer sold in Hungary to a white star with a red border. See 'Hungary: Swastikas, SS symbols legal to display as of May' (*Romea.cz*, 21 February 2013) <http://www.romea.cz/en/news/hungary-swastikas-ss-symbols-legal-to-display-as-of-may>.

a blanket ban to an additional requirement of incitement and intimidation (as Hungary did in 2013 after the Constitutional Court threw out its blanket ban on extremist symbols) makes all the difference.

Another example raised by Justice O'Connor, however, raises some doubts. In her opinion, she writes that in 1960, the Klan burned crosses in support of then presidential candidate Richard Nixon. In response, Nixon himself a supporter of civil rights distanced himself from the Klan.[32] But how clear is the intent here? While the Klan was not, in this instance, seeking to threaten an African-American family who moved into a white neighborhood, it was seeking to take part in the political process by using its trademark symbol, one that many people find frightening.

This points to a key difficulty with the intent to intimidate position: When is a symbol (or an attack on a symbol) threatening? Is what makes Justice O'Connor's example compelling the fact that candidate Nixon immediately repudiated the Klan? Would the situation be different if a cross was burned in a local election where one of the major candidates was relying on Klan support? Turning to Europe, does a swastika become more dangerous when the extreme right has mobilized behind a single candidate who is receiving 10–20 percent of the vote? One survey of Dutch Muslims revealed that well over half were afraid of Geert Wilders[33]—does this make his statements about banning the *Qur'an* any more threatening than if he were a minor candidate? Or a private citizen?

Then there is the question of defenses the accused might raise. As we shall see, despite making a number of claims about Islam, Geert Wilders also stated (at times) that he had no objection to Muslims *per se* and took issue with anyone who suggested that Muslims who assimilate were any less worthy than other Dutch citizens. While Wilders has made other less friendly comments about Muslims, the Amsterdam trial court, in acquitting him of group libel and breaking hate speech laws, took this argument into account. Likewise, Flemming Rose, defending his decision to run the Mohammed Cartoons, argued that the cartoons, far from being a threat, were a symbol that Muslims were included in a national culture of satire.[34] Should these types of arguments carry any weight when assessing intent to intimidate?

Finally, how does the intent to intimidate standard apply when the symbol or its denial has multiple meanings? Consider the following two cases. The first example comes from Hungary. Twice in the past decade the ECtHR has found violations of Article 10 in cases in which Communists or members of left-leaning parties displayed the red

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[32] ibid 356–57.

[33] 'Half of Dutch Muslims want to leave because of Wilders' Radio Netherlands Worldwide, 29 June 2009. In particular, fifty-seven percent of residents from Morocco and Turkey felt uncomfortable about the rising popularity of the Party for Political Freedom (PVV), Wilders' political party. This polling took place before the 2010 elections, in which the PVV grew from 9 to 24 seats in the Dutch parliament and gave indirect support to the majority coalition.

[34] See eg Rose, 'Why I Published those Cartoons' *Washington Post*, 19 February 2006. For an analysis of this argument, see RA Kahn, 'Flemming Rose, the Danish Cartoon Controversy, and the New European Freedom of Speech' (2010) 40 *California Western International Law Journal* 253.

star.[35] In defending himself, the accused in *Vajnai*, the president of the left-wing workers party who wore the star on his jacket,[36] argued that the star was not simply a symbol of Communism, it was also a symbol of socialism more generally and of the working class.[37] This was one reason why the ECtHR held for the accused.[38] Given the multiple meanings of the red star, this outcome is justifiable given the specific facts of the case, in particular that the star was displayed by someone with 'no known totalitarian ambitions'.[39]

Compare this to a second example. In 1995 the Hamburg police arrested a group of youths with neo-Nazi connections who set up a phone line that would greet callers with a prerecorded message claiming that the Steven Spielberg film *Schindler's List* helped 'keep the Auschwitz myth alive'.[40] The trial and appeal court held that this statement did not violate Germany's new law making it illegal to deny or trivialize the Holocaust because the phrase Auschwitz-myth was used in several other contexts, including in discussions by Jews and Holocaust survivors about how the Holocaust was used or misused in public debates. The German court reached this conclusion, even though the phone callers were most likely not using the term in the same way the Jews or survivors did.[41]

In both instances, the possibility of multiple meanings let the accused avoid criminal liability. But in the *Auschwitz-Myth* case, the second, exculpatory meaning did not seem to be the one the accused was using. The way forward here is a context-heavy, case by case analysis. A requirement of amplification (such as the intent to intimidate) will not completely resolve the line drawing problem, but it protects more speech than the blanket bans and is more in line with traditional hate speech laws. That said, it does not remove all ambiguities, a consequence that leads to the next spot on the continuum.

Limit protection to the group the symbol represents

The basic idea here is to restrict criminal penalties to speech that directly targets groups. This was largely the approach the Amsterdam Trial Court used when it acquitted Dutch

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[35] *Vajnai v Hungary* (App No 22629/06), 8 July 2008, 55, (App No 29459/10), 3 November 2011.

[36] ibid 6.

[37] ibid [35]–[36].

[38] ibid [54]. The court both faulted the Hungarian law for failing to draw any distinction between acceptable and unacceptable uses of the red star, and noted the availability of other laws should the use of the red star provoke public disturbances. ibid [55].

[39] ibid [56]. The court did, however, note the 'systematic terror applied to consolidate communist rule in several countries' and the 'uneasiness' symbols like the red star could arouse in victims. It concluded that 'such sentiments … cannot *alone* set the limits to freedom of expression.' ibid (emphasis added), language that leaves the door open to narrower restrictions on the red star and similar symbols. Likewise, the ECtHR in *Fratanoló v Hungary*, faulted the Hungarian courts for failing 'to analyze if the expression had resulted in intimidation'—language that recalls *Virginia v Black*. ibid [27].

[40] For an overview, see Kahn (n 14) 77–81.

[41] For example, other recordings from the same network included right-wing slogans and threats of violence to anti-fascists. Kahn (n 14) 77.

politician Geert Wilders of hate speech and group libel for a series of interviews about what he would do if his party won power and his film *Fitna*.

The *Wilders* case would be a great law school exam question. He raised a number of statements. Some of these mentioned Muslims directly ('We have a huge problem with Muslims') or could be inferred from the context to apply to Muslims ('Everyone adopts our dominant culture. The one who does not do so, is not here anymore. He will be expelled').[42] Other comments referred to the *Qur'an* and Islam ('the foundation of the problem is the fascist Islam, the sick ideology of Allah and Mohammed as laid down in the Islamic *Mein Kampf*').[43]

In looking at these statements, the court took two steps. First, it distinguished between the comparisons between 'fascism' and National Socialism, arguing that only the latter fell within the purview of the charges set forward by the Amsterdam Court of Appeals, which in 2009 had ordered the public prosecutor to file charges against Wilders. This distinction reflects the sensitive nature of National Socialism in the Netherlands,[44] while showing that courts can, in practice, identify those symbols that have the power to shock, offend or harm in a given society. In this respect, the *Wilders* decision might reassure those concerned about the potentially open-ended possibilities of blanket bans of expression about and against symbols.

But the Amsterdam trial court did not stop here. Instead, it took a second step. Relying on both the legislative history of Dutch hate speech laws as well as a recent Dutch Supreme Court ruling holding that comparing Islam to cancer did not defame Muslims, the court dismissed the counts related to the *Qur'an* and Islam in a peremptory fashion. In dismissing the group defamation charges, the court summarized the rule as follows: 'The sole circumstance that disturbing utterances about a religion hurt the followers of that religion as well, does not suffice, according to the Dutch Supreme Court, to align those utterances with utterances … about a group of people based on their religion.'[45]

In reaching this conclusion, the Amsterdam trial court was aided by Wilders' own ideological position which combined very harsh comments about Islam with much more ambivalent statements about Muslims. For example, Wilders referred to the 'friendly people' who live in Iran, explained that he had something against the religion, but not the people, and said that if Muslims assimilated they were 'full citizens, not one millimeter of lesser value than you or I.'[46] One could, therefore, read the *Wilders* ruling as following

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[42] The comments came from an interview in *De Volksrant* on 7 October 2006 under the title 'The pope is completely right.' They are listed on page 11 of the English language translation of the court ruling in the *Wilders* case.

[43] This statement is described on page 3 of the opinion.

[44] The emergence of Wilders as a public figure has led to a competition between Wilders and his opponents, each attempting to tar the other with the National Socialist past. For more, see RA Kahn, 'Who's the Fascist, Uses of the Nazi Past at the *Geert Wilders Trial*' (2012) 14 *Oregon Review of International Law* 279.

[45] *Wilders* decision (n 11) 6.

[46] These quotes, from Wilders' 2006 *Volksrant* interview, were cited on page 10 of the *Wilders* verdict.

the second category, in which the connection between the symbolic harm directed at Islam and ordinary Muslims was discounted due to the lack of an aggravating circumstance. This interpretation would cast the *Wilders* ruling in line with current ECtHR jurisprudence which, ever since the *Otto-Preminger* case, has been open to at least some prosecution of hate speech based on attacks on religious ideas and symbols.[47]

But it is more reasonable to take the *Wilders* court at its word and see it as restricting Dutch hate speech and group libel laws to statements about Muslims. As the *Wilders* case shows, this does not portend the end of Dutch hate speech laws (as Wilders himself would like) or the move toward a Dutch (or European) First Amendment. Indeed, the Amsterdam Trial Court had a great deal of difficulty with the film *Fitna* and the statement by Wilders in his 2007 *De Pers* interview calling on his readers to 'walk the street' and declaring that 'a conflict is going on and we have to defend ourselves.' The latter comment's 'vehement wording' brought it right to 'the border of what is acceptable pursuant to the criminal law'.[48]

That said, the *Wilders* ruling would work a major retrenchment of hate speech law—especially if it were applied to all symbols. On this view, Holocaust denial would not constitute hate speech unless there was additional language that Jews or Zionists caused or benefited by the 'Auschwitz Lie'. Likewise, the red star, swastika, or arrow cross would not be banned—as hate speech—unless there was some added element connecting the symbol to the group of survivors of the Holocaust, Nazi rule or Soviet domination. While this result may appear overly restrictive—especially when, as is the case with the Holocaust and the Soviet domination of eastern Europe, survivors of these events are still alive—it is the logical outcome of requiring hate speech to directly target a given victim group.

This logic, however, raises two problems. First, as a practical matter, it allows extremists to bypass hate speech laws by making indirect assaults on their targets. Instead of blaming the Jews for the 'Holocaust lie', they can deny the Holocaust with impunity. On one level, this type of problem is a function of line drawing; a committed radical will always find a way to speak in code. Germany bans the swastika; in response neo-Nazis have adopted a three cornered white, red, and black cross that looks very similar.

Second, however appropriate it is to separate direct and indirect harm in the religious context, the dichotomy becomes more problematic when dealing with secular symbols. In modern societies people of many different faiths often live in close proximity to one another. One might, therefore, be expected to tolerate negative statements about one's religious belief. On one level, everyone who is not Muslim in theory has something negative to say about it. The same goes for Judaism, Catholicism or atheism. The

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[47] One such case is *IA v Turkey* in which the ECtHR upheld blasphemy charges against the author of a novel, The Forbidden Phrases which supposedly contained 'an abusive attack on the Prophet of Islam.' For a critique of the ruling, see T McGonagle, 'An Ode to Contextualization: *I.A. v Turkey*' (2010) *Irish Human Rights Law Review* 237.

[48] *Wilders* verdict (English translation), 14.

toleration runs right up to the point where negative statements about a religion become negative statements about its adherents (eg 'The Jews killed Christ').

By contrast, cross burning, Holocaust denial, and swastikas exist primarily to express negative judgments about an out-group. This is true even if, in a sociological sense, these symbols sometimes also reflect a life path chosen by Klan members, Nazis and Soviet-style Communists. At bottom, these symbols are not about affirmation; they are about destruction. Indeed, bans on Holocaust denial and the red star often come out of a desire to spare survivors the pain of reliving these horrific events. As such, a society that bans hate speech will have a difficult time expecting victims to tolerate symbols associated with their oppression, suffering or extermination.

The failure of the direct *versus* indirect dichotomy to capture enough hate speech, however, is not the only critique of the position. In fact, the greater opposition may come from libertarian opponents of religious incitement laws, such as Eric Barendt, who express concern that the lines drawn between belief and believer and idea and individual are porous, and unstable, and will lead to a criminalization of a wide variety of speech about religion.[49] As we shall see in the next section, Barendt proposes a radical solution to the problem of religious symbols: namely, to exclude religious incitement from the universe of hate speech regulation altogether.

Exempting groups symbols represent from hate speech protection

Are victims of the Holocaust a cognizable group under hate speech laws? What about victims of the Ku Klux Klan, or the Soviet domination of Hungary? At first blush, the answer to these questions seems clear. A Jewish Holocaust survivor is covered by hate speech laws (at least to the extent they cover religious incitement, or view Jews as an ethnicity). Likewise, under American sentence enhancement laws, African-Americans are covered as a racial group.[50] The fact the Holocaust survivor might suffer symbolic harm from Holocaust denial, or the African-American might suffer special harm from the burning cross is not a reason to restrict the coverage of anti-hate laws.

But this is the argument Barendt and his supporters in the defamation of religions debate make about Muslims. Concerned about the efforts of majority Muslim countries to adopt a global norm that, if applied to all critiques of Islam, could well inhibit religious discussion, they speed through the middle ground of requiring an aggravating factor or distinguishing between belief and believers to reach the conclusion that anti-Muslim hate speech is not-cognizable because Muslims are not an ethnic or racial group.

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[49] E Barendt, 'Religious Hatred Law: Protecting Groups or Belief?' (2011) 17 *Res Publica* 41–53.

[50] While the United States does not ban hate speech, it does allow courts to enhance the sentences of individuals who commit crimes for racist motives. See *Wisconsin v Mitchell*, 508 US 476 (1993).

In making this argument, Barendt explains that membership in a religious group is voluntary, unlike a member of an ethnic or racial group who can never change that categorization.[51] As such, a Muslim who feels offended by negative comments about Muslims is free to change his or her beliefs. Conversely, an African-American or a Pole, when attacked, is always attacked, at bottom, on the basis of a racial or ethnic characteristic.[52]

As a sociological statement, the statement about religious groups is open to question. Like religion, race and ethnicity are socially constructed categories. An African-American can, in some instances, change appearance or cultural habits to pass as 'white', especially in a virtual age. Meanwhile, a dark-skinned Muslim immigrant from Bangladesh may well still face anti-Muslim slurs even if she converts to Christianity.[53] Even when, if the slur is based primarily on religion—as when a Jew is attacked for wearing a yarmulke, or a Muslim woman for wearing a headscarf,—the ability to disregard a lifetime of wearing religious clothing may be less 'voluntary' than defamation of religion critics imagine.

But there is a second, more serious concern, raised by the 'religion is voluntary' argument. Coming from the United States, I am well aware of the dictum from *New York Times v Sullivan* that public debate be 'uninhibited, robust, and wide-open'.[54] If the concern is about hate speech as a whole, then Barendt and the defamation of religion critics should, in the name of consistency, argue for an adoption of an American style protection of most hate speech—although, as I will suggest shortly, this is not as straightforward as it seems.

Instead, opponents like Barendt make statements that are rather condescending to religious believers, especially Muslims. For instance, in explaining why religious incitement laws will fail, Barendt questions whether Muslims could distinguish between 'a vituperative attack on the wearing of the *niqab* or *burqa*' from 'an attack on Muslims generally'. Likewise, he asks whether Catholics could distinguish between 'a vicious satire on the Catholic Church' from 'hate speech against Catholics'.[55] Because believers lack these skills, it makes 'no sense' to distinguish 'hate speech directed at religious groups' from 'legitimate discussion of matters of religion'.[56]

In effect, Barendt is saying that Muslims and Catholics do not know how to draw lines. This is likely suspect as an empirical matter. In response to the Danish cartoon controversy, Muslims had a variety of responses, some religious (how dare they insult the Prophet), some secular (viewing the cartoons as part of a series of racist acts targeting Muslims and other non-ethnic Danes). Rather than viewing religious hate speech from

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[51] Barendt (n 49) 45.

[52] ibid 46.

[53] In this regard, anti-Muslim sentiments have much in common with anti-Semitism, something Barendt struggles with a little bit. ibid 45 (describing Jews as an ethnic rather than a religious group).

[54] *New York Times v Sullivan*, 376 US 254, 270 (1964).

[55] Barendt (n 49) 49.

[56] ibid.

the perspective of a 'defense of the sacred', one might instead focus on the impact of the speech on 'the subjective emotional world' of a member of a vulnerable minority group.[57]

If this is the case, then hate speech—religious or not—should be punished when it 'clearly and intentionally targets persons and groups in an effort to impose unnecessary and unreasonable social and political burdens on them for the sake of others' enjoyment or advantage.'[58] This test, while fuzzy around the edges, has the benefit of not using the potential for a wide-scale ban of speech about religion as a reason to ban speech that harms religious believers. The same type of test would apply if someone wanted to exclude Jews from hate speech laws because of the danger someone might enact a blanket ban on Holocaust denial, or African-Americans from hate crime laws out of a fear that more states would enact laws banning cross burning or Klan paraphernalia, or excluding insults directed at survivors of 1956 out of fear that the Hungarian state would enact a broad ranging law against communist symbols.

An American perspective: *Snyder v Phelps*

If, on the other hand, Barendt's opposition to religious hate speech laws is less about religion and more about hate speech laws, as his reliance on Robert Post's theory of public discourse would appear to suggest, then perhaps the solution is to adopt an American style protection of most hate speech from regulation.[59] But as a brief overview of the recent *Snyder v Phelps*[60] case suggests, such a solution would not, necessarily, resolve concerns about line drawing. At the same time, an overview of the case also helps show how even the position taken by the Amsterdam trial court in the *Wilders* case is still a considerable distance from the American position on hate speech regulation.

Snyder v Phelps involved a protest at a funeral of an American soldier by members of the Westboro Baptist church, who believe that the United States faces eternal damnation for, among other things, tolerating gays and lesbians. For the past several years they have attended funerals and similar events with signs expressing their point of view. They did the same at the funeral of Matthew Snyder. The signs, which were 100 yards away from the funeral but visible on television, included messages such as 'God Hates the USA/Thank God for 9/11', 'Priests Rape Boys', and 'God Hates Fags'.[61]

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[57] AF March, 'Speech and the Sacred: Does the Defense of Free Speech Rest on a Mistake about Religion?' (2011) 4 *Political Theory* 1–28, 4.

[58] ibid.

[59] Barendt (n 49) 44 (citing Post, n 4).

[60] *Snyder v Phelps* (n 12).

[61] ibid [1213].

The case turned on the question of whether the signs expressed an opinion on a 'matter of public concern'. If it did, then under *New York Times v Sullivan*, it was protected speech. This was the position reached by Chief Justice Roberts writing for the majority.[62] Justice Alito dissented. He argued that the speech in question related to the Snyder family because it took place at Matthew Snyder's funeral. He also wondered why 'actionable speech should be immunized simply because it is interspersed with speech that is protected.'[63]

From the perspective raised here, *Snyder v Phelps* is relevant for two reasons. First, the broad protection of speech shows that the direct *versus* indirect solution used by the Amsterdam trial court in the *Wilders* case still captures a great deal of speech that the current American First Amendment doctrine tolerates. This is true even if, in the part of the opinion dealing with Wilders' comments about Muslims, the court placed an American style emphasis on the political debate over immigration and multiculturalism in the Netherlands.[64] For all the references to Wilders' status as a politician, the court still asked whether his utterances about Muslims were provocative, subversive, or had vehement wording. This is very different from the logic of *New York Times v Sullivan*, which excludes only deliberately false statements from the public debate.[65]

Second, to the extent the motive to move from blanket bans to requiring an aggravating factor to the direct *versus* indirect dichotomy was to avoid line drawing, the *Snyder v Phelps* decision shows the futility of this quest. Even the broad language of *New York Times v Sullivan* about the robust place of free speech in American democracy could not dissuade Justice Alito from disagreeing with Chief Justice Roberts about whether offensive signs about gays, Catholics, and the United States at a private funeral were public speech. Speech acts involving symbols raise difficult interpretive problems. While there are some conclusions one can draw about the different options for dealing with such speech, no interpretive scheme will remove the need for careful case-by-case analysis.

This reality serves as a cautionary note in two respects. First, it suggests that efforts to arrive at definitions of a common, European 'minimum' of hate speech protection will always be provisional. The late Ronald Dworkin's dictum that hard cases make bad law holds true. Second, and perhaps more important, the line drawing in *Snyder v Phelps* says something to critics of European hate speech law (in the United States and abroad) who use the necessity of drawing distinctions inherent in the legal enterprise as an excuse to rail against the European decision to punish some forms of hate speech.

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62 ibid [1217].

63 ibid [1227] (Alito J, dissenting).

64 For example, the Amsterdam Trial Court viewed Wilders' plan to expel Muslims who do not assimilate as a political proposal rather than an expression of discrimination. *Wilders* decision (English Translation), 11.

65 *New York Times v Sullivan* (n 54) 280.

Conclusion

Faced with symbols that can convey hurtful messages about specific groups of people, I have sketched four options. First, societies can adopt blanket bans of the symbols (or speech that denigrates them); second, they can opt for a more restrictive ban that requires an aggravating element (such as an intent to intimidate); third, they can draw a sharp line between speech about the symbol (which is always protected) and speech about people identified with the symbol (which may be actionable); and finally, they can use the existence of the symbol as a reason to refuse to punish hate speech targeting the group the symbol represents.

Advocates for all four positions exist in the debate over hate speech. In general, however, there is a greater willingness to punish symbols that do not involve religious issues. In part this is because laws that outlaw a specific symbol (such as a swastika, a red star, or a burning cross) are easier to define, and less likely to cover core political speech, than general bans on offense against religious symbols. This is true, even though the focus of modern day blasphemy laws has shifted away from harm to the religious symbol (or a deity the symbol represents) toward a narrower focus on harm to believers.

The concern about religious symbols is in accord with the expectations of life in a modern pluralist society. One expects to encounter people of differing faiths who, in expressing them, necessarily call one's own faith into question. This is why even the *Otto Preminger* case places restrictions—aggravating factors—on when one can punish a symbol. Such restrictions are only permissible when the harm to religious sensibilities is so severe that it compromises the victim's ability to express his or her own religious beliefs.[66]

By contrast, bans of symbols of extremist activity and Holocaust denial are more common, at least in Europe. There are two reasons for this. First, it is easier to restrict such bans to specific symbols. While Hungary bans the red star, France does not. Likewise, the United Kingdom has not adopted a ban on Holocaust denial, in part because the Holocaust did not take place there. This type of analysis also explains why the one area where Americans do prosecute hate speech involves cross burning and masked demonstrations—both legacies of the Ku Klux Klan.

Second, the symbols that are banned (swastikas, red stars, burning crosses, and the denial of the Holocaust) are often viewed in the societies in question as symbols of destruction. To use the words of Justice Thomas dissenting in *Virginia v Black*, they have only one meaning. While someone might be expected to tolerate religious insults (at least when not accompanied by aggravating circumstances) it is hard to ask a member

[66] The dissent in *Otto-Preminger-Institut*, attempting to draw a narrower line between blasphemy and protected speech makes this point directly. The dissent would restrict freedom of expression only when 'the behavior reaches so high a level of abuse, and comes so close to a denial of the religious freedom of others, as to forfeit for itself the right to be tolerated in society.' *Otto-Preminger-Institut v Austria* (App No 13470/87), 20 September 1994 (dissenting opinion of Judges Palm, Pekkanen, and Markarczyk, 7).

of a vulnerable minority group to tolerate a symbol of oppression, domination or extermination. At least, this is the case in a society that already has committed itself to punishing other forms of offensive speech.

One sees this concern in play when calls arise to roll back bans on hateful symbols. For example, Pierre Nora, a leading opponent of the French memory laws stops short of opposing the Gayssot law out of a concern not to give encouragement to anti-Semites in France.[67] Likewise, one could argue that refusing to act after the Hungarian Supreme Court invalidated the law on extremist symbols would create the impression that Hungary did not oppose political extremism of the left and right.

That said, there needs to be some restriction on bans on offensive symbols lest the state prosecutes behaviour that, while violating the statute, does not in any way harm the group the symbol represents. One can reach the restriction in a piecemeal fashion by enacting a blanket ban on masked demonstrations, red stars, or the swastika, but then carve out exceptions for innocent uses. When one adds the contextual factors that drive any specific litigation (as when the court in *Daniels v State* refused to apply Georgia's mask law to a clown mask), one arrives at a fairly broad set of restrictions. Alternatively one can follow the path of the United States Supreme Court in *Virginia v Black*, and explicitly require an aggravating factor (such as the intent to intimidate) to establish a violation of the law.

While they have different doctrinal feels to them—a series of cobbled together exceptions vs. a broad sweeping rule—in practice they lead to the same place, a legal system that recognizes that harmful speech about symbols can, but does not always, harm the groups the symbols represent. This is the likely future of European bans on Holocaust denial and extremist symbols. Indeed, as the United States Supreme Court case *Virginia v Black* suggests, this position has some appeal even in the homeland of First Amendment absolutism.

From a normative perspective, this is also a reasonable result. All societies have symbols (sacred or profane) that play a central role in the religious, political, and communal beliefs of specific groups of people. Offensive symbols (or denigration of cherished ones) can do harm. Therefore, some restrictions are necessary, even in countries like the United States that protect a very wide range of political speech. Blanket bans, at least when rigidly enforced, risk punishing too much speech. By contrast a focus on aggravating circumstances, such as an intent to intimidate, best balances the right to express oneself while at the same time also shielding vulnerable minority groups from harm.

[67] P Nora, 'History, Memory and the Law in France, 1990–2010' (paper presented at the 21st International Congress of Historical Sciences, Amsterdam, 23 August 2010).

Jeroen Temperman

Prohibitions of incitement under international law: The case of religion

Introduction

In their recent book on the issue of hate speech, Michael Herz and Peter Molnar demonstrate that '[c]ontext matters'.[1] 'It is at least questionable,' they contend, 'whether it would be either possible or desirable to establish a standard global regulatory policy toward "hate speech." International law can be helpful in pushing for narrower restrictions on freedom of speech and thus reducing the risk of regulatory abuses … [However] there is no single means by which "hate speech" can and should be addressed … [B]oth "context *and* content" count.'[2]

In the present contribution we will assess if international law is indeed 'helpful' in this respect: how *narrow* are the restrictions on hate speech international law pushes for? And second, does international law indeed allow for a degree of flexibility in terms of sufficiently taking account of both *content and context*? For those purposes we will mostly concern ourselves with advocacy of *religious* hatred.

International law's narrow restrictions on religious hate speech

160 States have,[3] by ratifying the United Nations International Covenant on Civil and Political Rights (ICCPR), pledged to 'prohibit by law' *any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence* (Article 20, Paragraph 2 of the ICCPR). Of all the key words Article 20(2) is composed of 'incitement' certainly is the most crucial for it—rightly—raises the threshold of the

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[1] M Herz and P Molnar (eds), *The Content and Context of Hate Speech* (CUP 2012) 4. This chapter draws on sections of a chapter shortly to be published as 'Blasphemy *versus* Incitement' in C Beneke, C Grenda and D Nash (eds), *Profane: Sacrilegious Expresion in a Multicultural Age* (University of California Press, forthcoming).

[2] ibid 4.

[3] Ie all ICCPR States Parties minus the 7 states that have entered reservations to Article 20 specifically. Australia, Belgium, Luxembourg, Malta, New Zealand, United Kingdom, and the United States have deposited reservations or interpretative declarations that limit their obligations under Article 20(2) ICCPR, mostly to the effect that these governments hold that no further national legislation shall be required under the terms of this provision. (Full text of these reservations available at <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en>.) A number of States have entered reservations to Article 20(1) on war propaganda.

hate clause enormously. Indeed, 'incitement' is what defines the advocacy provision: it makes Article 20(2) of the ICCPR not a hate speech clause but indeed an incitement clause proper—incitement perhaps best portrayed as one extreme sub-species of hate speech. 'Incitement' introduces a third required actor (besides an 'Advocator' and a 'Target Group'): an Audience. What we minimally need under Article 20(2) is an *Advocator* that expresses his / her intense (religious) hatred of a *Target Group* and incites a third-party, the inciter's *Audience*, to acts of discrimination, hostility or violence *vis-à-vis* the Target Group.

Indeed, only 'advocacy of national, racial or religious hatred *that constitutes* incitement' must be prohibited: these words are, evidently, premised on the idea that there are forms of advocacy of national, racial or religious hatred *that constitute* incitement and forms of advocacy *that do not constitute* incitement. This in turn presupposes that it would be possible to distinguish between these two using certain factors and criteria. What should this incitement threshold-test look like?

Specifically, in order to establish whether 'incitement' takes place, are we to look at the *Advocator* or are we to look at the *Audience*, or both? In the abstract, 'incitement' could, firstly, be conceived as an expression of hatred that includes an *express call for action* (discrimination, violence, etc). This would entail focusing on the *Advocator* and specifically on the *content* of the speech.

Secondly, 'incitement' could be an expression of hatred which *creates a risk or likelihood* that such adverse acts (discrimination, violence, etc) will follow the hateful statements. Though this notion still commences with the Advocator's hate speech, by principally focusing on 'risks' we focus on factors *external* from the person of the Advocator, ie the larger *context*, which notably consist of the likelihood of the *Audience* adversely responding to the speech (ie attacking or discriminating against the Target Group).

Thirdly, in the abstract, 'incitement' could focus on the likelihood of *speech itself doing direct harm to the Target Group* (ie without the agency of an Audience). The third conception we can strike out straightaway. The language of Article 20(2) implies this—the Target Group (eg a religious minority) itself feeling victimized, outraged, dehumanized—cannot be considered a relevant factor in establishing the presence of 'incitement.' Article 20(2) requires, after all, *incitement to discrimination, hostility or violence*; that is, a relation between an *Advocator* and an *Audience that could possibly engage in acts of discrimination or violence*. Establishing the fact that the Target Group itself has directly experienced victimization does not shine a light on the question of whether they are at risk of being harmed by the Audience. It is true that Article 20(2) does not provide *who* must be engaged in the adverse acts (hostility etc) for the provision to be triggered. However, it is in line with the system of Articles 19 and 20(2) of the ICPPR to consider first and foremost, if not exclusively, the hate speech *Audience* here, not the Target Group. The word 'discrimination' makes that clearest of course: that act always presupposes a third party, the Audience. Accordingly, it is submitted that the words 'hostility' and 'violence' should be construed in a similar vein; that is, as potentially perpetrated by an *Audience*. Certainly, a Target Group may very well become hostile or

violent confronted with hate speech: they may become violent and hostile *vis-à-vis* the Advocator. However, including the potential responses of the Target Group itself in our definition of 'incitement' effectively means that the Target Group is in a very strong position to *make* a statement incitement. For by becoming hostile or violent 'incitement' would be pretty much established and the state would need to interfere with free speech as a consequence. Indeed, even orchestrated outrage could then decide the limits to free speech. That train of thought would seem rather contrary to the object and purpose of freedom of speech as codified by Articles 19 of the ICCPR (robust free speech standards which in any event already include the 'regular' *reputations of others* and *public order* restrictions) and 20(2) (on qualified *incitement* clearly as an extraordinary category), especially when taken in conjunction. Also, the history of Article 20(2)—public incitement to racial and religious hatred, indeed to genocide, in the Third Reich—is one exclusively linked to the *Audience* as potential harmful factor.

Accordingly, that leaves two plausible conceptions: 'incitement' as *expressly calling upon the hate speech Audience for certain actions against the Target Group* (discrimination, violence, etc) and/or 'incitement' as an expression of hatred which *creates a risk or likelihood that such adverse acts (discrimination, violence) are perpetrated by the Audience against the Target Group*. Next we need to assess which conception resonates best with the meaning of Article 20(2): *content* and/or *context*?

Content and context factors in UN discourse on hate speech

Indeed, do only statements that literally call for 'discrimination, hostility or violence' trigger Article 20(2) of the ICCPR or can statements in which an express incitement ('go harm them!'; 'go discriminate against them!') is absent still engage Article 20(2) because of the risk that 'discrimination, hostility or violence' will ensue? And with respect to statements that do literally call for 'discrimination, hostility or violence' (qua *content*): is Article 20(2) here automatically triggered to the extent that states must enforce their incitement legislation or could a low risk of 'discrimination, hostility or violence' by the hate speech's Audience (*context*) remove the *prima facie* 'incitement' element?

Let us consider some dominant definitions and concepts from the workings of the Human Rights Committee and from the legal doctrine. The second revised draft of General Comment No 34 defined 'incitement' as follows: '"Incitement" refers to the need for the advocacy to be likely to trigger imminent acts of discrimination, hostility or violence against a specific individual or group.'[4] This conception clearly hinges on *likelihood:* an advocacy has 'constituted' (in the meaning of Article 20(2)) incitement as soon as the likelihood of these adverse acts by a third party, the hate speech Audience, against the speech's Target Group is established.

[4] Draft General Comment No 34, Article 19, 2nd Revised Draft, CCPR/C/GC/34/CRP.3 (28 June 2010), para 53. This definition was deleted in the final Comment.

The Camden Principles definition of incitement resonates very well with Professor O'Flaherty's (ultimately deleted) definition: 'The term "incitement" refers to statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups.'[5]

The focus on 'imminent risk'—echoing the US judicial doctrine of a 'clear and present/imminent danger'—implies that no actual causal link with already occurring acts of violence or discrimination is required for the prohibition of Article 20(2) to be engaged, but rather the likelihood—here *'risk'*—that such may occur in the very near future. It is clear then that, alongside the *content* of the hate speech, *context* certainly is deemed a major factor as far as these conceptualizations are concerned.

Whether or not an advocacy 'is likely to trigger imminent acts' (cf. early draft General Comment No 34), or whether a statement 'creates an imminent risk' (cf. Camden Principles), or whether 'likelihood, including imminence' (cf. Rabat Plan of Action) can be proven, will depend partly on the content of the hate speech, partly on the intent of the speaker, but also significantly on the overall—social, historical, political—context in which the speech is made.

What, then, could be such relevant content and context factors? The content or form of the speech act will of course always be of paramount importance. It provides us with the first *prima facie* answers as to whether the extreme level of incitement within the meaning of Article 20(2) is reached. As the Rabat Plan of Action formulates it, the 'content of the speech constitutes one of the key foci of the court's deliberations and is a critical element of incitement. Content analysis may include the degree to which the speech was provocative and direct, as well as a focus on the form, style, nature of the arguments deployed in the speech at issue or in the balance struck between arguments deployed, etc'. Thus, in relation to scrutinizing the content of the speech, in the abstract one may think of such factors as:

– *Target*: does the speaker seek out a particular group based on the latter's religion or belief (or race or nationality)?;
– *Express incitement*: are 'fighting words' used, that is, is the Audience expressly invited to engage in adverse action, specifically were calls for 'discrimination', 'hostility' or 'violence' discernible?;
– *Tone*: the intensity of any express statements, feelings, expressed emotions of opprobrium, enmity and detestation; notably: to what extent is the Target Group dehumanized or depicted as inferior beings in the speech?

All other relevant questions can be deemed 'contextual', for they influence how the content may be received and if it may result in adverse actions. Indeed, it is context that may be the answer to the question of why the exact same content may in one time and place lead to adverse action (discrimination, hostility or violence) but not in another. The *Rabat Plan of Action*, here heavily drawing on ARTICLE 19's work, lists as those other

[5] ARTICLE 19, 'Camden Principles on Freedom of Expression and Equality' (2009) art 12(iii).

factors 'context' per se, the 'speaker', 'extent of the speech', and 'likelihood, including imminence'.[6] Arguably, all those other factors are *contextual* factors, ie different circumstances under which the speech was made. Those 'circumstances', obviously, are of both a general nature (societal, historical, political variants, including the socio-historical position of the Target Group) and of a concrete nature (who spoke, who was in the Audience, what was the reach of the speech act, etc).

Thus, using the *Rabat Plan of Action* prongs, this is how *context* can be preliminarily described:

> *Socio-historical and political context*: Context is of great importance when assessing whether particular statements are likely to incite to discrimination, hostility or violence against the target group and it may have a bearing directly on both intent and/or causation. Analysis of the context should place the speech act within the social and political context prevalent at the time the speech was made and disseminated.
> *Speaker/person responsible for the communication*: The position or status of the speaker in the society should be considered, specifically the individual's or organisation's standing in the context of the audience to whom the speech is directed.
> *Extent of the speech*: This includes elements such as the reach of the speech, its public nature, magnitude and the size of its audience. Further elements are whether the speech is public, what the means of dissemination are, considering whether the speech was disseminated through one single leaflet or through broadcasting in the mainstream media or internet, what was the frequency, the amount and the extent of the communications, whether the audience had the means to act on the incitement, whether the statement (or work of art) was circulated in a restricted environment or widely accessible to the general public.
> *Likelihood, including imminence*: Incitement, by definition, is an inchoate crime. The action advocated through incitement speech does not have to be committed for that speech to amount to a crime. Nevertheless some degree of risk of resulting harm must be identified. It means the courts will have to determine that there was a reasonable probability that the speech would succeed in inciting actual action against the target group, recognising that such causation should be rather direct.[7]

Let us now scrutinize if human rights monitoring bodies indeed consider such questions, as well as possible additional factors.

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[6] 'Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence', Conclusions and recommendations emanating from the four regional expert workshops organised by OHCHR, in 2011, and adopted by experts in Rabat, Morocco on 5 October 2012, 6. Compare ARTICLE 19, 'Prohibiting incitement to discrimination, hostility or violence (policy brief)' (2012) 29–40, where this free speech NGO outlines its 6-prong incitement test. This test used to be a 7-prong test in early ARTICLE 19 conceptualizations of incitement, see ARTICLE 19, 'Towards an Interpretation of Article 20 of the ICCPR: Thresholds for the prohibition of incitement to hatred' (A study prepared for the regional expert meeting on Article 20, Organized by the Office of the High Commissioner for Human Rights, Vienna, 8–9 February 2010).

[7] Rabat Plan of Action, 6 (the captions have been italicized and slightly modified).

Content and context factors in UN Human Rights Committee case-law

Arguably, of the different relevant cases brought before the Human Rights Committee to date the facts of the *Maria Vassilari et al. v Greece* case seem most comprehensively (*prima facie*) to satisfy both *content* and *context* criteria.[8] However, as this case was brought by alleged hate speech victims rather than a previously punished inciter, and as the Committee (with the exception of member Amor)[9] did not yet dare to pronounce on the possibility of *standing* under Article 20(2) of the ICCPR, the Committee chose rather uncritically to dismiss this case as inadmissible.[10] The impugned letter published in a local newspaper—an anti-Roma letter, calling for the forceful 'removal' and for 'militant action'—would seem, *prima facie*, to satisfy the 'incitement' factor within the meaning of Article 20(2). Abdelfattah Amor convincingly argued in his dissenting opinion that Ms Vassilari and others made all but a strong case in light of Article 20(2):

> The case in point concerns a letter signed by 1,200 non-Roma individuals, entitled 'Objection against the Gypsies: Residents gathered signatures for their removal.' The letter accuses the Roma, as a group, of physical assault, battery and arson. The signatories demand that the Roma be 'evicted'—'removed' according to the State party—from their settlement and threatened to take 'militant action'.

Accordingly, Ms Vassilari and others should have been granted standing to argue their complaint and the Committee should have taken a decision on the merits. These '*merits*', however, would have been atypical when compared to 'standard' Article 20(2) cases where the main question tends to be whether or not a state was authorized by Article 20(2) to interfere with the free speech of an alleged inciter. Here the merits of the case would have revolved around the question of whether or not the berated letter amounted to incitement within the meaning of Article 20(2) and if so, whether Greece *should have taken* measures with respect to the authors of the letter. The latter type of assessment, revolving around the *context* of the case (provided by the position of the Roma and other such factors) and consequently revolving around the *necessity* of the *interference* with free speech *in principle mandated by Article 20(2) in this concrete case*, unfortunately was cut short as a result of the Committee's questionable pronouncement on admissibility.

In some of the Human Rights Committee's jurisprudence, however, we do recognize both content as well as context assessments. For instance, in *Malcolm Ross* the Committee concluded that:

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[8] *Maria Vassilari et al v Greece*, UN Doc CCPR/C/95/D/1570/2007, Communication No 1570/2007, Views of 19 March 2009, [2.1]–[2.7].

[9] See individual opinion of Committee member Abdelfattah Amor (dissenting).

[10] ibid [6.5].

> restrictions may be permitted on statements which are of a nature as to raise or strengthen anti-semitic feeling, in order to uphold the Jewish communities' right to be protected from religious hatred. Such restrictions also derive support from the principles reflected in Article 20(2) of the Covenant. The Committee notes that both the Board of Inquiry and the Supreme Court found that the author's statements were discriminatory against persons of the Jewish faith and ancestry and that they denigrated the faith and beliefs of Jews and called upon true Christians to not merely question the validity of Jewish beliefs and teachings but to hold those of the Jewish faith and ancestry in contempt as undermining freedom, democracy and Christian beliefs and values.[11]

Accordingly, the Committee here scrutinizes the content of Ross's statements (his anti-Semitic pamphlets and other off-duty statements) and comes to the conclusion that, beyond merely being offensive, an *objective incitement element* is present: a literal *call upon others* (the Audience) to act hostilely *vis-à-vis* Jews. In this case, Ross's call upon others 'to hold Jews in contempt' appears to be a call for *discrimination* specifically (not so much 'hostility' or 'violence'). The Committee, even though it expressly refers to Article 20(2) in the above considerations, does not specify this.

In the same case, *context* also appears to be significant for the Committee. The Committee is not satisfied with the mere fact that a literal call for adverse action be discerned in Ross's statements; it still makes some risk assessment. In this case some of the harm has already been done and the Committee is in a position simply to second what the national authorities found out in that area:

> In this particular case, the Committee takes note of the fact that the Supreme Court found that it was reasonable to anticipate that there was a causal link between the expressions of the author and the 'poisoned school environment' experienced by Jewish children in the School district. In that context, the removal of the author from a teaching position can be considered a restriction necessary to protect the right and freedom of Jewish children to have a school system free from bias, prejudice and intolerance.[12]

This conclusion was of course very much facilitated by the fact that actual acts of discrimination *vis-à-vis* the Target Group were ongoing and on the rise ostensibly as a direct result (the Committee even speaks of causality) of the teacher's acts. However, the definitions of 'incitement' in the meaning of Article 20(2) do not necessarily presuppose *successful incitement*. What all definitions we have seen have in common is that they are premised on *likelihood* (or the risk of imminent adverse actions by the Audience). This is an autonomous question (*will the berated hateful speech/publication lead to adverse effects on the Target Group?*), meaning that it is not necessary in all instances in which Article 20(2) is engaged to establish such causal links to discrimination, hostility or violence.

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[11] *Malcolm Ross v Canada*, Communication No 736/1997, UN Doc CCPR/C/70/D/736/1997 (2000), [11.5] (essentially seconding the findings of the Canadian Board of Inquiry; see [4.2]).

[12] ibid [11.6].

In *Faurisson*, too, individual Committee members (albeit in their separate opinions) use a mix of content and context factors so as to establish 'incitement' within the meaning of Article 20(2) ICCPR. France itself repeatedly argued that Robert Faurisson had committed incitement as condemned by the Covenant:

> Applying these arguments to the case of Mr. Faurisson, the State party notes that the tenor of the interview with the author which was published in Le Choc (in September 1990) was correctly qualified by the Court of Appeal of Paris as falling under the scope of application of Article 24 bis of the Law of 29 July 1881, as modified by the Law of 13 July 1990. By challenging the reality of the extermination of Jews during the Second World War, the author incites his readers to anti-semitic behaviour (*conduit ses lecteurs sur la voie de comportements antisémites*) contrary to the Covenant and other international conventions ratified by France.[13]

Therefore, France expressly invoked Article 20(2) of the Covenant.[14] Faurisson denied that his statements could be construed as 'incitement':

> the State party has failed to provide the slightest element of proof that his own writings and theses constitute a 'subtle form of contemporary anti-semitism' (see para 7.2 above) or incite the public to anti-semitic behaviour (see para 7.5 above). He accuses the State party of hybris in dismissing his research and writings as 'pseudo-scientific' ('*prétendument scientifique*'), and adds that he does not *deny* anything but merely challenges what the State party refers to as a 'universally recognized reality' ('*une réalité universellement reconnue*'). The author further observes that the revisionist school has, over the past two decades, been able to dismiss as doubtful or wrong so many elements of the 'universally recognized reality' that the impugned law becomes all the more unjustifiable.[15]

Given France's direct 'invocation' of Article 20(2) and given the substantive disagreement between France and Mr Faurisson as to the meaning and scope of 'incitement' it is all the more remarkable that the Committee ignores the issue and decides not to reflect on Article 20(2) in any direct way. The Committee largely resolves the case by reference to freedom of speech and the regular restrictions provided by Article 19(3).[16] That said, one key sentence ('Since the statements made by the author, read in their full context, were of a nature as to raise or strengthen anti-semitic feelings, the restriction served the respect of the Jewish community to live free from fear of an atmosphere of anti-semitism')[17] appears to be a hint at Article 20(2); yet, the Committee's reasoning clearly falls short of a robust analysis of why the statements would, in addition to falling within the grounds for regular Article 19 restrictions, amount to illegal incitement in the meaning of Article 20(2). For that additional analysis, we need to assess the concurring opinion of individual Committee members.

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[13] *Robert Faurisson v France*, Communication No 550/1993 , UN Doc CCPR/C/58/D/550/1993(1996), [7.5].

[14] ibid [7.7].

[15] ibid [8.3].

[16] ibid [9.6].

[17] ibid.

Taking account of the context of the statements made (anti-semitism in present-day France), Committee members Elizabeth Evatt and David Kretzmer (in a statement co-signed by Eckart Klein) accept the French courts' evaluation of Faurisson's statements as being 'of a nature as to raise or strengthen anti-semitic tendencies.'[18] They concede that unpopular or offensive speech should often-times not be prohibited.[19] Despite having serious doubt about the drastic nature of the French Gayssot Act as such,[20] these Committee Members accept the national courts' evaluation of the specific nature of the statements made by Faurisson during the impugned interview. It is in these considerations that we get a glimpse of what, in particular, 'incitement to discrimination' may entail:

> The French courts examined the author's statements in great detail. Their decisions, and the interview itself, refute the author's argument that he is only driven by his interest in historical research. In the interview the author demanded that historians 'particularly Jewish historians' ('*les historiens, en particulier juifs*') who agree that some of the findings of the Nuremburg Tribunal were mistaken be prosecuted. The author referred to the 'magic gas chamber' ('*la magique chambre à gaz*') and to 'the myth of the gas chambers' ('*le mythe des chambres à gaz*'), that was a 'dirty trick' ('*une gredinerie*') endorsed by the victors in Nuremburg. The author has, in these statements, singled out Jewish historians over others, and has clearly implied that the Jews, the victims of the Nazis, concocted the story of gas chambers for their own purposes. While there is every reason to maintain protection of *bona fide* historical research against restriction, even when it challenges accepted historical truths and by so doing offends people, anti-semitic allegations of the sort made by the author, which violate the rights of others in the way described, do not have the same claim to protection against restriction. The restrictions placed on the author did not curb the core of his right to freedom of expression, nor did they in any way affect his freedom of research; they were intimately linked to the value they were meant to protect - the right to be free from incitement to racism or anti-semitism; protecting that value could not have been achieved in the circumstances by less drastic means. It is for these reasons that we joined the Committee in concluding that, in the specific circumstances of the case, the restrictions on the author's freedom of expression met the proportionality test and were necessary in order to protect the rights of others.[21]

Thus, the 'incitement' factor (here: 'incitement to racism or anti-semitism') was decisive for these members (hence, no violation of free speech). Again, it must be borne in mind that these Committee members came to this conclusion after having made an assessment of the *context* of the hate speech. Member Lallah concurs with Evatt and Kretzmer, and accepts the French courts' findings of illegal incitement:

> Those Courts came to the conclusion that the statements propagated ideas tending to revive Nazi doctrine and the policy of racial discrimination. The statements were also found to have been of such a nature as to raise or strengthen anti-semitic tendencies. It is beyond doubt that, on the basis of the findings of the French Courts, the statements of the author amounted to the advocacy of racial

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18 Individual opinion by Elizabeth Evatt and David Kretzmer, co-signed by Eckart Klein (concurring), [7].
19 ibid [8].
20 ibid [9].
21 ibid [10].

> or religious hatred constituting incitement, at the very least, to hostility and discrimination towards people of the Jewish faith which France was entitled under Article 20, paragraph 2 of the Covenant to proscribe.[22]

Member Bhagwati appears to accept incitement too. The excerpt dealing directly with the promotion of hatred reads:

> Since the statement made by the author, read in the context of its necessary consequence, was calculated or was at least of such a nature as to raise or strengthen anti-semitic feelings and create or promote hatred, hostility or contempt against the Jewish community as dishonest fabricators of lies, the restriction imposed on such statement by the Gayssot Act was intended to serve the purpose of respect for the right and interest of the Jewish community to live free from fear of an atmosphere of anti-semitism, hostility or contempt.[23]

However, he does not expressly link his findings up to Article 20(2) of the ICCPR; on the contrary, he seems determined to assess the case exclusively under the regular restrictions provided by Article 19 (like the overall Committee decision).

In their criticism of the national law at stake (Gayssot Act) in the *Faurisson* case, the said individual Committee members profile themselves as proponents of the 'likelihood'-definition of incitement. Members Elizabeth Evatt and David Kretzmer criticize first and foremost the fact that the Gayssot Act does not seem to criminalize 'incitement' proper, but much more broadly, the denial of crimes against humanity (specifically, the Holocaust).[24] Moreover, they contend, the 'Gayssot Act is phrased in the widest language and would seem to prohibit publication of *bona fide* research connected with matters decided by the Nuremburg Tribunal. Even if the purpose of this prohibition is to protect the right to be free from incitement to anti-semitism, the restrictions imposed do not meet the proportionality test. They do not link liability to the … *tendency of the publication to incite to anti-semitism*.'[25] Member Lallah, too, observes that 'the Gayssot Act is formulated in the widest terms and would seem to prohibit publication of bona fide research connected with principles and matters decided by the Nuremberg Tribunal. It creates an absolute liability in respect of which no defence appears to be possible. It does not link liability … to the prejudice that it causes to respect for the rights or reputations of others.'[26] *A contrario*, then, these Committee members would require national incitement laws to incorporate a *risk factor*, ie a threshold pertaining to the *prima facie likelihood* of imminent acts of discrimination, hostility or violence being triggered by the speech act.

Such likelihood or risk factor, accordingly, is bound to feature *twice* in any human rights assessment of a case in which national incitement laws have been enforced.

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22 Individual opinion by Rajsoomer Lallah (concurring), under F.
23 Individual opinion by Prafullachandra Bhagwati (concurring).
24 Individual opinion by Elizabeth Evatt and David Kretzmer, co-signed by Eckart Klein (concurring), [4].
25 ibid [9] (second italics added).
26 Individual opinion by Rajsoomer Lallah (concurring), [6].

First, if 'likelihood' (eg cf early draft General Comment No 34)[27] or 'imminent risk' (eg cf Camden Principles)[28] is in fact part and parcel of our very definition of 'incitement', this is bound to impact what type of acts may and what type of acts may not be prohibited. Generally speaking, it will thus be clear that only *very extreme cases* of hate speech are to be banned a priori: advocacy of hatred *likely to trigger imminent acts* of discrimination, hostility or violence against a specific individual or group. Second, 'likelihood' or 'imminent risk' (etc) are factors that are bound to recur during any subsequent assessment of the *necessity* of the *actual enforcement of a concrete hate speech law on a concrete case of alleged incitement*.

Conclusion

In sum, in line with contemporary conceptualizations to that effect, context factors such as *who is the speaker/person responsible for the communication?*, and *what is the extent of the speech?*, are increasingly addressed by the Human Rights Committee. It must be noticed, however, that the (plenary) Human Rights Committee has not dwelled extensively on the notion of 'likelihood'. In fairness, the Committee has not had much opportunity to shine a light on likelihood (including imminence) on account of the scarcity of relevant cases put before it.[29] As we have seen just now, such decisive context factors as 'likelihood' have, however, been supported in the concurring opinions of individual Committee members who saw fit to provide more comprehensive analysis and conceptualizations in support of their views.

In addition, other UN experts have made a case for contextual requirements. Notably, the UN Special Rapporteur on freedom of religion or belief has opined that Article 20(2) is premised on a firm likelihood requirement: only expressions that constitute incitement to '*imminent acts* of violence or discrimination against a specific individual or group' are to be prohibited under the Covenant.[30]

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[27] Draft General Comment (n 4) [53].

[28] ARTICLE 19 (n 5) art 12(iii).

[29] As said, the *Vassilari* case was a notable exception. In fact, it was the perfect case to elucidate such paramount factors as 'likelihood' (here, of adverse acts against a group of Roma people), but the Committee declared it inadmissible for obscure reasons.

[30] 'Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, further to Human Rights Council decision 1/107 on incitement to racial and religious hatred and the promotion of tolerance' UN Doc A/HRC/2/3, 20 September 2006 (the chapter 'Defamation of Religion and the Right to Freedom of Religion or Belief", paras 22–50, was prepared by the Special Rapporteur on Freedom of Religion or Belief), para 47 (emphasis added).

Clive Walker

Terrorism speech and militant democracy

Introduction

One strong and persistent strand of analysis of the experiences of political extremism in the 1930s is that there were hard lessons to be drawn by liberal democracies. Those lessons were spelt out by some notable contemporary commentators, such as Karl Lowenstein, who warned forcefully, but largely in vain, about the need for democracies to become 'militant' and to avoid 'legalistic self complacency and suicidal lethargy'.[1] This discourse was reinforced in the immediate post-war era by the likes of Clinton Rossiter,[2] who were even prepared to countenance 'constitutional dictatorship', with extensive emergency regulation powers in the hands of the executive, in order to defend against the renewed forms of totalitarianism which then assailed free societies.

These messages became more muted as time passed. But there has been a strong revival of the concept of 'militant democracy' after the events of September 11, with several important academic commentaries appearing under that title.[3] Indeed, in its current guise, the concept of militant democracy arguably suffers from the opposite failing to that encountered in Lowenstein's time. Rather than failing to heed the call, there are now warriors for militant democracy whose prescriptions appear more dramatic and dangerous than the threat of terrorism which they seek to address. Into this category may be placed the contemplators of torture,[4] as well as theorists[5] who are willing to overturn all constitutional niceties on a scale on a hope and a prayer of constitutional

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[1] K Lowenstein, 'Militant Democracy and Fundamental Rights' (1937) 31 *American Political Science Review* 417, 638, 431–32. For more general critiques of totalitarianism during that era, see FA Hayek, *The Road to Serfdom* (University of Chicago Press 1944); K Popper, *The Open Society and Its Enemies* (Routledge 1945).

[2] CL Rossiter, *Constitutional Dictatorship* (Harcourt, New York, 1948). See also KA Berriedale, 'War and the Constitution' (1940–1941) 4 *Modern Law Review* 1, 82; WI Jennings, 'Rule of Law in Total War' (1940–1941) 50 *Yale Law Journal* 365; EA Gilmore, 'War Power: Executive Power and the Constitution' (1943–1944) *Iowa Law Review* 463; B Schwartz, 'War Power in Britain and America' (1944–1945) 20 *New York University Law Quarterly Review* 325; J Eaves, *Emergency Powers and the Parliamentary Watchdog: Parliament and the Executive in Great Britain, 1939–1951* (Hansard Society 1957).

[3] See A Sajo (ed), *Militant Democracy* (Eleven International Publishing 2004); J Ferejohn and P Pasquino, 'The Law of Exception' (2004) 2 *International Journal of Constitutional Law* 210; M Thiel (ed), *The 'Militant Democracy' Principle in Modern Democracies* (Ashgate 2009).

[4] See A Dershowitz, *Why Terrorism Works* (Yale University Press 2002); O Gross, 'Are Torture Warrants Warranted?' (2004) 88 *Minnesota Law Review* 1481.

[5] B Ackerman, 'The Emergency Constitution' (2004) 113 *Yale Law Journal* 1029.

restitution, rather like the Reichspräsident's approval of the Reichstag Fire Decree of 28 February 1933.[6] Even more extreme expressions of militancy are Agamben's 'zone of anomie in which all legal determinations are deactivated'[7] and theories of 'enemy criminal law' posited by Jakobs.[8] These successors to Carl Schmitt[9] seek to propagate notions which inevitably dehumanise and delegitimize state action.

Of course, 'militant democracy' is a political construct rather than a legal term of art. As such, it can easily be manipulated for good or bad in its meanings and purposes. It is not claimed here that it bears an essential meaning, but the meaning adopted in this paper involves the endorsement that the state has a right and a duty to take action against significant forms of terrorism, such as the nationalist and highly organised terrorism of the likes of the Irish Republican Army or the 'new' terrorism[10] propagated by more transnational and loosely based groupings, epitomised by Al-Qa'ida. In that sense, the state should indeed be 'militant'. At the same time, state action must recognise that these forms of terrorism are endemic reactions to modernity and late modernity. Thus, contrary to the promise of the concept, the 'war on terror',[11] terrorism is not going to be wholly vanquished in this decade, in this generation, nor probably in the next century, just as it did not vanish in the past decade, generation, or century. From this insight flows a reminder to the state that its purpose is the maintenance and triumph of its own values, such as democracy, individual rights, and the rule of law.[12] The 'smart militant state' must therefore work out its own forms of militant reaction which become more or less permanent and which must therefore adopt policies which can be accommodated within fundamental values rather than displacing them even during a temporary period of 'emergency'.

The United Kingdom is not the smartest of 'smart militant states'. There are many dark pages within its manual of militancy. They include the application of measures bordering on torture as applied to selected Irish terror suspects in 1971.[13] Even the attempt to enjoin these techniques of 'deep interrogation' were apparently forgotten by the British Army by the time of the invasion of Iraq in 2004, with shameful reminders of the dire consequences now played out in the Aitken Report[14] and the Baha Mousa inquiry.[15] Collusion with contras is not just exclusive to US involvement in Nicaragua[16]

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6 See I Müller, *Hitler's Justice: The Courts of the Third Reich* (Harvard University Press 1991) 46–47.

7 G Agamben, *The State of Exception* (University of Chicago Press 2005) 50.

8 G Jakobs and M Cancio Meliá, *Derecho Penal Del Enemigo* (2nd edn, Civitas 2006).

9 C Schmitt, *Political Theology* (MIT Press 1985). See D Dyzenhaus, *The Constitution of Law* (CUP 2006).

10 See B Lia, *Globalisation and the Future of Terrorism* (Routledge 2005); P Neumann, *Old and New Terrorism* (Polity 2009).

11 See G Bush, 'Address to a Joint Session of Congress and the American People' <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html>.

12 These points are more fully elaborated in C Walker, *Terrorism and the Law* (OUP 2011) ch 1.

13 *Ireland v United Kingdom*, App No 5310/71, Ser A 25 (1978).

14 (R Aitken) *Investigation into cases of Deliberate Abuse and Unlawful Killing in Iraq in 2003 and 2004* (Ministry of Defence 2008).

15 Baha Mousa Inquiry, *Report* (2010-12 HC 1452).

16 *Nicaragua v United States* (1986) ICJ 14.

but also has its counterpart in collusion with paramilitaries in Northern Ireland,[17] now augmented by allegations of collusion with disreputable foreign regimes.[18] The unnecessary or excessive use of lethal force has also formed a recurrent thread, from Bloody Sunday 1972[19] to the shootings of the Gibraltar Three in 1988[20] and Jean de Menezes in 2005.[21] The foregoing are perhaps the most egregious abuses, involving the most fundamental rights to life and freedom from torture, inhuman and degrading treatment. However, there are numerous other excessive and persistent state incursions into rights to life, liberty, privacy, and expression which could be recounted.

This negative record notwithstanding, the label, 'smart militant state', can at a stretch be fairly assigned to the United Kingdom state. Few would deny the label, 'militant'. The United Kingdom can assuredly claim to have encountered more configurations and episodes of revolutionary terrorism than most other polities, and it has not been slow to devise special laws to deal with the situation.[22] Experience has derived from the bygone era of British Empire, from the intermittent, irredentist campaigns of terrorism in Ireland against colonisation and then incorporation within the British state over a period of more than three centuries, and now the advent in Britain of Al-Qa'ida has generated further legislation which especially seeks to avert its threat of mass casualties on an anticipatory and precautionary basis.[23]

Whether the current United Kingdom anti-terrorism laws can equally be designated as 'smart', in the sense of appreciating the need for prolonged and broad policies which maintain legitimacy, remains a matter of fierce debate. Many express disquiet, including the newly elected government which has promised to introduce further safeguards against abuse.[24] Yet, there may be three features which can be claimed to be redolent of 'smart' militancy, even though none is entirely convincing.

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[17] See J Stevens, *Stevens Enquiry: Overview and Recommendations* (Metropolitan Police Service 2003); Cory Reports on Patrick Finucane (2003-04 HC 470), Robert Hamill (2003-04 HC 471), Billy Wright (2003-04 HC 472) and Rosemary Nelson (2003-04 HC 473); Police Ombudsman for Northern Ireland, 'Statement by the Police Ombudsman for Northern Ireland on her investigation into the circumstances surrounding the death of Raymond McCord Jr and related matters' (Belfast, 2007), RUC Investigation of the 'Alleged Involvement of the late Father James Chesney in the bombing of Claudy on 31 July 1972' (2010), 'The Bombing of McGurk's Bar, Belfast on 4 December 1971 (2011), The Murders at the Heights Bar, Loughinisland on 18 June 1994' (2011); Lord MacLean, 'Billy Wright Inquiry Report' (2010-12 HC 431); Sir M Morland, 'Rosemary Nelson Inquiry' (2010-12 HC 947); Sir D de Silva, 'Report of the Patrick Finucane Review' (2012-13 HC 802); Robert Hamill Inquiry <http://www.roberthamillinquiry.org>.

[18] *R (Binyam Mohammed) v Secretary of State for the Foreign & Commonwealth Office,* [2008] EWHC 2048, 2100, 2519, 2549, 2973 (Admin), [2009] EWHC 152 (Admin), [2010] EWCA Civ 65, [2010] EWCA Civ 158. See Joint Committee on Human Rights, *Allegations of UK complicity in torture* (2008-09 HL 152/ HC 230) and Government Reply (Cm 7714, London, 2009).

[19] See *Report of the Bloody Sunday Inquiry* (2010-11HC 29).

[20] See *McCann v United Kingdom*, App No 18984/91, Ser A 324 (1995).

[21] See Independent Police Complaints Commission, *Stockwell One and Stockwell Two* (IPCC 2007).

[22] See CP Walker, *The Prevention of Terrorism in British Law* (2nd edn, Manchester University Press 1992) ch 4 and C Walker, *The Anti-Terrorism Legislation* (2nd edn, OUP 2009) ch 1.

[23] See C Walker, 'Terrorism and Criminal Justice' (2004) *Criminal Law Review* 311.

[24] *The Coalition: Our Programme for Government* (Cabinet Office 2010) 11. See also Joint Committee on Human Rights, 'Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In' (2009-10 HL 86/HC 111).

First, there is recognition of permanence. In the current United Kingdom anti-terrorism legislation, only the measures relating to Terrorism Prevention and Investigation Measures,[25] and non-jury 'Diplock' courts[26] are subject to any form of sunset clause. In fact, the sun need never set, since all these measures are endlessly renewable for further periods of years. For instance, the 'Diplock' courts have persisted in one form or another since 1973.[27] However, this permanence has imparted a sense that the measures must be sustainable in terms of the narratives of legitimacy on which the United Kingdom state relies. The result has been a move away from measures which are labelled 'Temporary Provisions' and which expressly derogate from rights. In this way, there occurred a very important transition when the Terrorism Act 2000 replaced the Prevention of Terrorism (Temporary Provisions) Act 1989 and Northern Ireland (Emergency Provisions) Act 1996, its very name signalling a claim to sustainability. In addition, the derogation under Article 15 of the European Convention on Human Rights which had existed in Northern Ireland since ratification in 1954 (with a break of four years between 1984 and 1988),[28] was removed in February 2001. It therefore represented a considerable reversal when a new derogation notice was lodged in December 2001 so as to permit detention without trial of foreign terror suspects under the Anti-Terrorism, Crime and Security Act 2001. But that policy was reversed in March 2005,[29] when detention without trial was terminated following an adverse court decision on the compatibility of detention without trial with human rights requirements. Moreover, throughout the period since September 11, there has been a marked divergence from the rhetoric of the 'war on terror', as one would expect if policies are to be sustained and legitimate. British dalliance with a 'war model' has been confined to military operations in Afghanistan and Iraq where the term 'counter-insurgency' is the preferred label for the foreign aspects of policy.[30] Even in this sphere, the operative rules have remained the regular international humanitarian and human rights laws. In this way, there has emerged no British 'legal black hole'[31] equivalent to

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[25] Terrorism Prevention and Investigation Measures Act 2011. See C Walker and A Horne, 'The Terrorism Prevention and Investigation Measures Act 2011: One Thing But Not Much the Other?' (2012) *Criminal Law Review* 421.

[26] See Report of the Commission to consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland (Cmnd 5185, London, 1972).

[27] See now Justice and Security (Northern Ireland) Act 2007.

[28] See <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=005&CV=0&NA=&PO=999&CN=999&VL=1&CM=9&CL=ENG>; *Brogan* v *United Kingdom*, App Nos 11209, 11234, 11266/84, 11386/85, Ser A, 145-B, (1989); *Brannigan and McBride v United Kingdom*, App Nos 14553/89, 14554/89, Ser A 258-B (1994).

[29] *A v Secretary of State for the Home Department,* [2004] UKHL 56. See B Dickson, 'Law *versus* Terrorism: Can Law Win?' (2005) *European Human Rights Law Review* 1; C Walker, 'Prisoners of "War all the Time"' (2005) *European Human Rights Law Review* 50; D Feldman, 'Proportionality and Discrimination in Anti-Terrorism Legislation' (2005) 64 *Cambridge Law Journal* 271. The House of Lords decision was largely confirmed by the European Court of Human Rights in *A v United Kingdom*, App No 3455/05, 19 February 2009.

[30] See Cabinet Office, 'The National Security Strategy of the United Kingdom: Update 2009. Security for the Next Generation' (Cm 7590, London, 2009) para 6.47.

[31] J Steyn, 'Guantanamo Bay' (2003) 53 *International & Comparative Legal Quarterly* 1. See also *R (Al-Skeini) v Secretary of State for Defence,* [2007] UKHL 27.

the regime at Guantánamo Bay.[32] Nor has there been any overt emulation of US programmes of executive domestic surveillance[33] or rendition for interrogation.[34] Instead the UK government has rejected even the terminology of the 'war on terror' and claims instead that 'prosecution is—first, second, and third—the government's preferred approach when dealing with suspected terrorists.'[35] As the former Foreign Secretary, David Miliband, has declared, 'We must respond to terrorism by championing the rule of law, not by subordinating it, for it is the cornerstone of the democratic society.'[36] There is much room for dismay about the outcomes of the current legislation, but the disposition to constitutionalism at least makes a claim that the current legislation is 'not a mask but the true image of our nation'[37] and offers real protection from naked state power.[38]

A second feature of 'smart' militancy is a growing acceptance of the need to accommodate rights.[39] There may be four aspects to this change, which has been very much encouraged by the advent of the Human Rights Act 1998. The first is a framing perspective by which human rights rule in and rule out potential approaches to counter-terrorism—such as torture or rendition. At the same time, the suppression of terrorism can itself be founded on rights arguments (for example, about the right to life and democracy),[40] and special laws are certainly not debarred *per se*. The second perspective is rights-specific and relates to the interpretation of individual rights in a way which does not wholly prioritise national security interests in a way which was common pre-2000 with doctrines such as non-justiciability.[41] Activities which are seen as within the purview and expertise of courts—such as procedure—have been subjected to stricter standards than activities which rarely trouble the courts (such as surveillance). The third impact is

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[32] US Presidential Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 13 November 2001 (66 Federal Register 57831).

[33] US Department of Justice, 'White Paper on NSA Legal Authorities, Legal Authorities Supporting the Activities of the National Security Agency Described by the President' 19 January 2006 (Washington DC, 2006). But regular United Kingdom statutory powers are already very broad; see *Liberty and Others v the United Kingdom*, App No 58243/00, 1 July 2008; Regulation of Investigatory Powers Act 2000, s 8(4).

[34] See Intelligence and Security Committee, 'Rendition' (Cm 7171, London, 2007) and 'Government Response' (Cm. 7172, London, 2007); All Party Parliamentary Group on Extraordinary Rendition, 'Extraordinary Rendition: Closing the Gap' (London, 2009); C Walker, 'The Treatment of Foreign Terror Suspects' (2007) 70 *Modern Law Review* 427.

[35] Hansard (HL) vol 472, col 561 (21 February 2008), Tony McNulty.

[36] *The Guardian*, 15 January 2009, 29.

[37] M Ignatieff, *The Lesser Evil* (Edinburgh University Press 2005) 144.

[38] See S Marks, 'State Centrism, International Law and the Anxieties of Influence' (2006) 19 *Leiden Journal of International Law* 339; C Campbell and I Connelly, 'Making War on Terror?' (2006) 69 *Modern Law Review* 935, 939; B Vaughan and S Kilcommins, *Terrorism, Rights and the Rule of Law* (Willan 2008) 13.

[39] See C Walker, 'The Threat of Terrorism and the Fate of Control Orders' (2010) *Public Law* 3.

[40] See *Klass v Germany*, App No 5029/71, Ser A 28 (1978) [48]: 'Democratic societies nowadays find themselves threatened by highly sophisticated forms of espionage and by terrorism, with the result that the State must be able, in order effectively to counter such threats'.

[41] See for example *R v Secretary of State for the Home Department, ex parte Adams* (1994), *The Times*, 10 August 1994, [1995] All ER (EC) 177; *Adams and Benn v United Kingdom*, App Nos 28979/95 and 30343/96, 13 January 1997; CP Walker, 'Constitutional Governance and Special Powers Against Terrorism' (1997) 35 *Columbia Journal of Transnational Law* 1.

temporal—that rights scrutiny gains traction as counter-terrorism campaigns mature. The fourth point is that the treatment of rights in counter-terrorism can have socially transformative impacts by affecting negatively or positively the mobilising factors for or against terrorism. Thus, anti-terrorism laws may create suspect or supportive communities, and the tempering process encourages an ultimate resolution of the emergency by ruling out grievous breaches of international law and maintaining the recognition of common humanity.[42]

A third feature of 'smart' militancy is the ability to conceive counter-terrorism approaches in broad terms and to avoid over-reaction to the latest event—the 'politics of the last atrocity'. Such a stance has now emerged with the publication of a clear, clever, and comprehensive counter-terrorism strategy ('CONTEST'), as issued in 2006 and revised in 2009.[43] Delivery of the strategy continues to be organized around four principal work-streams as follows: Pursue: to stop terrorist attacks; Prevent: to stop people becoming terrorists or supporting violent extremism; Protect: to strengthen our protection against terrorist attack; Prepare: where an attack cannot be stopped, to mitigate its impact. Traditional criminal justice effort is focused around 'Pursuit'. Out of these strands, 'Prevent' has risen to the fore since the July 2005 bombings, which obliged the government and public to confront the unpalatable fact that the terrorism was not the work of alien foreigners but involved attacks by their erstwhile neighbours.[44] Therefore, efforts must be made to reduce this propensity, including efforts to nullify extreme narratives,[45] adding to the emphasis on anticipatory risk and pre-emption rather than aftermath response[46] as well as a resort to intelligence rather than evidence.[47]

Having thus set the scene for action by a 'smart militant democracy', it is intended in this paper to consider the performance by the United Kingdom state in the context of a classical dilemma facing militant democracies and one which greatly exercised polities in the 1930s.[48] That context is the appropriate response to militant speech—speech which in some ways encourages extremist political behaviour and even violence but

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[42] See B Dickson, 'The House of Lords and the Northern Ireland Conflict: A Sequel' (2006) 69 *Modern Law Review* 383.

[43] Home Office, 'Countering International Terrorism' (Cm 6888, London, 2006); Home Office, 'Pursue, Prevent, Protect, Prepare: The United Kingdom's Strategy for Countering International Terrorism' (Cm 7547, London, 2009) para 7.07. See F Gregory, 'National Governance Structures to Manage the Response to Terrorist Threats and Attacks' in P Wilkinson (ed), *Homeland Security in the UK* (Routledge 2007).

[44] See C Walker, '"Know Thine Enemy as Thyself": Discerning Friend from Foe under Anti-Terrorism Laws' (2008) 32 *Melbourne Law Review* 275. The extent to which foreign influences continue remains unclear, but see A Hayman, *The Terrorist Hunters* (Bantam Press 2009) 286.

[45] G Kepel, *The War for Muslim Minds* (Harvard University Press 2004).

[46] See A Dershowitz, *The Case for Preemption* (WW Norton 2006); R Suskind, *The One Per Cent Doctrine* (Simon & Schuster 2007).

[47] See C Walker, 'Intelligence and Anti-Terrorism Legislation in the United Kingdom' (2006) 44 *Crime, Law & Social Change* 387.

[48] Lowenstein also concentrated on this aspect and praised the Public Order Act 1936 as one appropriate response in Pt II of his study: K Lowenstein, 'Militant Democracy and Fundamental Rights' (1937) 31 *American Political Science Review* 638.

which is delivered in a mode which avoids participation in violence or even the traditional inchoate crimes of incitement or solicitation. This divorce between militant speech and militant action may arise either because of the equivocal nature of the words being spouted or because of the distance in time, place, or both between speaker and intended audience. The problem therefore is to be militant against terrorism in all its guises but to be smart enough to uphold the value of freedom of expression and to recognise that political platforms of secession or the revolutionary establishment of a workers' dictatorship or a Caliphate are all part of the rich tapestry of the marketplace of ideas. Unfortunately, there is no Manichean divining rod between the encouragement of terrorism and the encouragement of Millian good. There are plenty of reasons to doubt George Bush's glib aphorism, voiced on 20 September 2001, that 'either you are with us, or you are with the terrorists.'[49] Rather, the contemporary complexity is illustrated by the pronouncement in 1981 of Danny Morrison, a leader of Sinn Féin, that 'Who here really believes we can win the war through the ballot box? But will anyone here object if, with a ballot paper in this hand and an Armalite in the other, we take power in Ireland?'[50] Morrison recognised more than anyone that he was 'walking on eggshells' when treading the path between legality and illegality. As the Director of Publicity for Sinn Féin, he paid the price with several years of imprisonment for his proximity to the IRA's punishment machinery.[51]

Just two responsive state measures of 'militancy' will be selected for discussion in this paper. Both were enacted by the Terrorism Act 2006, and both relate to indirect incitement and glorification of terrorism. They both reflect the 'Prevent' element of the CONTEST strategy by allowing for criminalisation of speech at a much earlier stage than previous measures, the point being to suppress it and to shape discourse rather than to seek a multitude of prosecutions.

Because of this focus, a number of other measures against militant speech will not be considered, even though the United Kingdom state has a very long record of action against militant speech about terrorism, and the chronology certainly did not commence after 11 September 2001. Perhaps the most venerable tools of the trade are the offences against the state, such as treason and sedition. A modicum of interest has been shown in the US for these offences. In 2006, a Federal grand jury issued an indictment for treason, charging Adam Yahiye Gadahn with involvement in Al-Qa'ida videos.[52] Seditious conspiracy was charged in the US against Sheikh Omar Abdel Rahman arising from the

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[49] Address to a Joint Session of Congress and the American People, <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html>.

[50] I McAllister, '"The Armalite and the ballot box": Sinn Fein's electoral strategy in Northern Ireland' (2004) 23 *Electoral Studies* 123, 124.

[51] His conviction for involvement in the IRA false imprisonment in 1990 of a suspected informant (Sandy Lynch) was later overturned because of the involvement of British informants which the state had suppressed: *R v Morrison,* [2009] NICA 1.

[52] See DA Kash, '*The United States v Adam Gadahn*: A case for treason' (2008) 37 *Capital University Law Review* 1.

1993 World Trade Center attack and other plans.[53] However, there is virtually no corresponding interest in the United Kingdom. The offences are seen as complex and obscure, and the death penalty for treason, its foremost lure in the eyes of many proponents, was removed by the Crime and Disorder Act 1998, s 36.[54] Likewise, ancient common law speech offences of sedition and seditious libel were abolished with virtually no public debate by the Coroners and Justice Act 2009, s 73. Neither has been applied for many years, and abolition had been recommended long ago.[55] The main approaches now comprise the proscription of organisations which take part in violence under Part II of the Terrorism Act 2000 (explained further below), media restrictions which became acute after 1988 in the form of a broadcasting ban on interviews with Sinn Féin representatives but which were lifted in 1994,[56] and restrictions on forms of political participation. These include, first, requiring declarations of non-violence as a condition of candidature, implemented by the Elected Authorities (Northern Ireland) Act 1989, ss 3 and 5.[57] Second, the candidature of prisoners in parliamentary elections, highlighted by the election of Republican hunger-striker, Bobby Sands, in 1981 provoked furious state reaction.[58] The Representation of the People Act 1981 disqualifies from nomination for, and membership of, the House of Commons any person convicted of an offence and sentenced to more than 12 months' imprisonment either in the United Kingdom or in the Republic of Ireland.

In summary, it is intended in this paper to explain and analyse the measures taken in 2006 against militant speech about terrorism in the United Kingdom's special anti-terrorism laws. These sources comprise, firstly, the proscription of organisations which advocate and encourage terrorism, and secondly the prosecution of individuals who engage in such conduct. These two strands are selected as the most direct serious incursions into speech rights in connection with terrorism. Are these provisions 'smart' enough to sit well within the armoury of a 'smart militant democracy'?

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[53] *United States v Rahman*, 189 F3d 88 (1999) 94.

[54] Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty (ETS 114, 1983).

[55] See Law Commission Working Paper No 72, Treason, Sedition and Allied Offences (London, 1977).

[56] See C Banwell, 'The Courts' Treatment of the Broadcasting Bans in Britain and the Republic of Ireland' (1995) 16 *Journal of Media Law & Practice* 21; G Hogan, 'The Demise of the Irish Broadcasting Ban' (1995) 1 *European Public Law* 69. Challenges under Article 10 to such restrictions were rejected at the time (*Brind and McLaughlin v United Kingdom*, App Nos 18714/91, 18759/91, 77-A DR 42 (1994); *Purcell v Ireland*, App No 15404/89, 70 DR 262 (1991); *Hogefeld v Germany*, App No 35402/97, 20 January 2000), but the Court has since indicated that it will not accept bans based on affiliation alone (*Kanat and Bozan v Turkey*, App No 13799/04, 21 October 2008) and applies a more stringent test to prior restraints on the press (*Ürper v Turkey*, App No 14526/07, 20 October 2009 and *Ürper v Turkey No 2*, App No 55036/07, 26 January 2010; *Turgay v Turkey*, App Nos 8306, 8340, 8366/08, 15 June 2010).

[57] See C Walker, 'Elected Representatives and the Democratic Process in Northern Ireland' (1988) 51 *Modern Law Review* 605.

[58] C Walker, 'Prisoners in Parliament: Another View' (1982) *Public Law* 389; J Finn, 'Electoral Regimes and the Proscription of Anti-Democratic Parties' (2000) 12 *Terrorism & Political Violence* 51.

Proscription on grounds of encouragement

Part II of the Terrorism Act 2000 responds not so much to militant expressions as to militant associations. It permits the proscription of selected organisations and, on the back of that device, then criminalises membership and specified activities. These are time-honoured devices—the IRA has been proscribed since 1918 and Al-Qa'ida since February 2001.[59] Nowadays, many more foreign-based *jihadi* groups are proscribed than Irish groups, though there is still a reluctance to extend the measure to fascists and racists,[60] Welsh and Scottish extremists, or animal rights and environmental militants, since all lack sophistication and strength. In its paper on *Animal Rights Extremism*, the Home Office expressed itself as not persuaded that proscription would assist[61] and recommended alternatives.[62]

In many ways, proscription of terrorist groups has become a British tradition which is so much a fixture of the legal and political environment that it barely sparks any public debate or criticism. That lax stance is not endorsed here, but this traditional form of proscription is not the prime focus of this paper not only because it is not novel but, more pertinently, because it is relatively easy to justify in principle the curtailment of expressive and associational rights for those who wish to invoke them in order to destroy the lives and rights of others and, in the case of some groups, the very existence of a liberal democracy. Thus, the smart militant democracy's objectives of the protection of life and the preservation of democratic discourse unsullied by threats appear compelling. Challenges under European Convention standards will be answered either under Article 17[63] or under the limitations to Articles 10 and 11.[64] Any association with violent methods will produce condemnation under one or both of these provisions, even if its ultimate policy goals are acceptable.[65] Conversely, those with peaceful ambitions to change constitutional foundations should not be debarred.[66] But if the proposed new

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[59] For pre-2000 history, see C Walker, *The Prevention of Terrorism in British Law* (2nd edn, Manchester University Press 1992) ch 5. Post-2000, see C Walker, *Terrorism and the Law* (OUP 2011) ch 8.

[60] Hansard (HC) Standing Committee D (25 January 2000), David Maclean; Hansard (HL) vol 656, col 169 (7 January 2004) Lord Greaves.

[61] (London) para 3.7.5.

[62] ibid para 3.4.2.

[63] 'Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.'

[64] 'The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime.'

[65] See further *Gündüz v Turkey*, App No 59745/00, 2003-XI; *Herri Batasuna and Batasuna v Spain*, App Nos 25803/04, 25817/04, 30 June 2009.

[66] See *United Communist Party of Turkey and Others v Turkey*, App No 19392/92, Reports 1998-I; *Socialist Party v Turkey*, App No 21237/93, Reports 1998-III; *Partidul Comunistilor (Nepeceristi) and Ungureanu v Romania*, App No 46626/99, 2005-I.

constitutional model is inherently inimical to the rights of others, then restrictions can again bite. Thus, the banning of bodies which seek to impose s*haria* law has been sustained on the basis that s*haria* law would inherently discriminate against women.[67] In contrast to the more absolutist US constitutional position, expressive and associational rights are depicted as being instrumental to democracy and pluralism rather than goods in themselves.[68] In this way, a rather dismissive response to disquiet about proscription is easier to maintain under the relativist approach of the European Convention on Human Rights 1950 (as adopted for the UK Bill of Rights, The Human Rights Act 1998)[69] than it would be under US First Amendment jurisprudence.[70]

It is not intended to describe in detail the implementation of this tradition of proscription.[71] It is sufficient to understand for present purposes that much of the purpose of proscription is symbolic[72]—to express society's revulsion at violence as a political strategy as well as its determination to stop to it. It is also important to underline its executive basis. The process of proscription begins with s 3(3), by which the Secretary of State may by order add an organisation to those already listed on the face of the Act in Schedule 2. The criteria for action under s 3(3) are subjectively worded—by s 3(4), orders can be made against a group if 'he believes that it is concerned in terrorism', a belief which may be derived under s 3(5) if an organisation (a) commits or participates in acts of terrorism; (b) prepares for terrorism; (c) promotes or encourages terrorism; or (d) is otherwise concerned in terrorism. While subjective on paper, in *Lord Alton of Liverpool & others (In the Matter of The People's Mojahadeen Organisation of Iran) v Secretary of State for the Home Department,*[73] the test in s 3(4) has been interpreted as applying in two stages. The first stage is whether the Secretary of State has an honest

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[67] *Refah Partisi v Turkey*, App Nos 41340/98, 41342/98, 41343/98 and 41344/98, 2003-II; *Leyla Şahin v Turkey*, App No 44774/98, 2005-XI; *Kalifatstaat v Germany*, App No 13828/04, 11 December 2006; *Hizb ut-Tahrir v Germany,* App No 31098/08, 12 June 2012. The level of political support is no longer treated as crucial, and there is the counter-balance that *jihadi* groups unequivocally espouse violence; compare: I Cram, *Terror and the War on Dissent* (Springer 2009) 61.

[68] *German Communist Party v Germany*, App No 350/57, 1 YBEC 222; *Retimag v Germany,* App No 712/60, 4 YBEC; *Norwood v United Kingdom*, App No 23131/03, 2004-XI. See E Brems, 'Freedom of Political Association and the Question of Party Closures' in W Sadurski (ed), *Political Rights Under Stress in 21st Century Europe* (OUP 2006).

[69] See C Walker and R Weaver, 'The United Kingdom Bill of Rights' (2000) 33 *University of Michigan Journal of Law Reform* 497.

[70] See S Sottiaux, *Terrorism and the Limitation of Rights: The ECHR and the US Constitution* (Hart 2008).

[71] For detailed criticisms, see C Walker, *Terrorism and the Law* (OUP 2011) ch 8; D Anderson, *Report on the Operation in 2011 of the Terrorism Act 2000 and Part I of the Terrorism Act 2006* (Home Office 2012); Home Affairs Committee, 'The Roots of Violent Radicalisation' (2010-12 HC 1446) para 87 (for the non-committal response see (Cm.8368, London, 2012)).

[72] See the view of Home Secretary, Roy Jenkins, *IRA Terrorism in Great Britain* (C(74)139, National Archives, London, 1974) para 3.

[73] PC/02/2006, 30 November 2007 at paras 67, 68; *Secretary of State for the Home Department v Lord Alton of Liverpool,* [2008] EWCA Civ 443 [22].

belief on reasonable grounds to satisfy the statutory test in s 3(4). Then a second stage addresses whether discretion should be used to apply proscription on policy grounds. An honest belief on reasonable grounds can only be formed through materials known to the decision-maker—the decision is personal and cannot be delegated.[74] That case also demanded 'current, active steps' by way of proof of being 'concerned in' terrorism; the mere contemplation of the possibility of some future violence is not enough.[75] Thus, the Court of Appeal distinguished between one group that has temporarily ceased terrorism 'for tactical reasons' and another that has decided to resile from violence, 'even if the possibility exists that it might decide to revert to terrorism in the future.'[76]

There is little doubt that the vast majority of the 50 or so listed organisations have in fact engaged in terrorism and are still capable of doing so. Few have ever challenged their banning orders, and only one, the People's Mojahadeen Organisation of Iran, has been successful. Many of the same groups are banned by other countries, and some appear in terrorism finance lists issued by either the United Nations or the European Union.[77]

However, the same degree of complacency does not exist in relation to the second tranche of proscription powers, as granted by the Terrorism Act 2006. The Act essentially extends the basis for militant responses from deeds to words. It represents one of a number of policies[78] which reflect the stark warning from the Prime Minister, Tony Blair, issued in the aftermath of the July 2005 bombings in London on the 5 August 2005: 'Let no one be in any doubt, the rules of the game are changing.'[79]

Commitment to legislation on glorification had been promised in the Labour Party's May 2005 election manifesto,[80] but the perceived need for action became acute after the London bombings of 7 July 2005.[81] Fear of the radicalization of young Muslim men by foreign extremists who were seen as poisoning vulnerable minds, drew from the Prime Minister a 12-point plan which included the banning of organisations which encourage extremism.[82] In the background, the intolerance of foreign dissidents was marked after 11 September 2001 at an international level by UNSC Resolution 1373 which calls for action against asylum-seekers involved in terrorism.[83] International law took more definite shape, with Article 5 of the Council of Europe Convention on the Prevention of Terrorism of 2005 demanding domestic offences to outlaw the public provocation of

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[74] ibid [130].
[75] ibid [124], [128].
[76] *Secretary of State for the Home Department v Lord Alton of Liverpool,* [2008] EWCA Civ 443 [38].
[77] See UN Security Council Resolutions 1267 and 1373; EU Council Regulation (EC) No 2580/2001.
[78] See C Walker, 'The Treatment of Foreign Terror Suspects' (2007) 70 *Modern Law Review* 427.
[79] *The Time*s, 6 August 2005, 1.
[80] Labour Party, *Britain Forward not Back* (Labour Party 2005) 53.
[81] See Home Office, 'Report of the Official Account of the Bombings in London on the 7 July 2005' (2005-06 HC 1087).
[82] *The Time*s, 6 August 2005, 1.
[83] (28 September 2001) art 3(f).

terrorism offences.[84] Further impetus for action was provided by the United Nations Security Council Resolution 1624 of 14 September 2005. The Resolution 'Calls upon all States to adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to: (a) Prohibit by law incitement to commit a terrorist act or acts'. Having proposed new domestic legislation, in the shape of what became the Terrorism Act 2006, including its section 1 offence, Prime Minister Blair then found himself the following month in New York as a principal mover of this resolution. From his position of power, he was able to lay the text of the resolution and speak forcefully for action against 'poisonous propaganda'.[85] As a neat trick, the passage of the UN Security Council Resolution was then cited in aid as one justification for the suppression of speech under what became section 1 of the Terrorism Act 2006.[86]

The first relevant measure in the 2006 Act extends proscription to groups engaging in glorification. Though s 3(5) of the 2000 Act already allows proscription where an organisation (c) promotes or encourages terrorism, the link to action is even less direct under the 2006 Act. Its emphasis is on speech and not deeds. Furthermore, the thrust of the power is aimed for the first time against domestic-based non-Irish groups.

Powers to proscribe organisations which glorify terrorism are inserted by the Terrorism Act 2006, s 21. A new s 3(5A) to the Terrorism Act 2000 specifies that the power to proscribe under s 3(5)(c) shall encompass the 'unlawful glorification of the commission or preparation (whether in the past, in the future, or generally) of acts of terrorism'. 'Glorification' requires the reasonable expectation that the audience will emulate terrorism in present circumstances (s 3(5B)), and it comprises any form of praise or celebration (s 3(5C)). The boundaries of glorification are uncertain and threatening to free speech since they exceed the encouragement of crime,[87] but changes made in the drafting to Part I of the 2006 Act were reflected here too. As a result, the sponsoring government minister was sure that the final formula would distinguish 'cultural events or those that celebrate a part of our collective memory, such as Guy Fawkes and bonfire night, and people who glorify acts of terror to try to encourage similar acts here and now in existing circumstances.'[88] The same distinction would apply to Irish celebrations of the past deeds of Michael Collins or William of Orange, depending on whether the praise relates to a heroic history or future emulation.

A potential problem with the focus on speech might be the ascription of responsibility to an organisation. Must every remark by every member be taken as 'official' policy, or

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[84] CETS No 196. See further Committee of Experts on Terrorism, 'Apologie du Terrorisme' and 'Incitement to Terrorism' (CODEXTER, Strasbourg, 2004); Joint Committee on Human Rights, The Council of Europe Convention on the Prevention of Terrorism (2006-07 HL 26/HC 247); A Hunt, 'The Council of Europe Convention on the Prevention of Terrorism' (2006) 4 *European Public Law* 603; Walker (n 78) 427.

[85] UN Security Council, (S/PV.5261) 9.

[86] Hansard (HC) vol 438, col 329 (26 October 2005), Charles Clarke. See B Saul, 'Speaking of Terror' (2005) 28 *University of New South Wales Law Review* 868.

[87] Hansard (HL) vol 438, col 985 (2 November 2005).

[88] Hansard (HL) vol 438, col 994 (3 November 2005), Paul Goggins.

must impugned statements emanate from prominent or multiple members?[89] The same point could arise with unsanctioned activities, but violent acts probably require joint planning and often evince formal claims of responsibility. It is easier to make a wayward impulsive remark than to carry out an impromptu bombing.

Two groups (Al-Ghurabaa and The Saved Sect) were banned in July 2006, fairly soon after the passage of the legislation on 30 March 2006.[90] Five more groups were listed in January 2010 and 2011.[91] These were claimed by the Home Office to be variant names of the two groups banned in 2006,[92] though in terms of organisational history, the founding body was al Muhajiroun.

Table 1: Proscription of group glorification

Al-Ghurabaa	Al-Ghurabaa ('The Strangers') is an Islamist group. It succeeded Al-Muhajiroun.
Al-Muhajiroun	Al-Muhajiroun ('The Emigrants') was founded by Omar Bakri Muhammad and others in Saudi Arabia in 1983. It was disbanded in 2004 but relaunched in 2009.
Call to Submission	A variant name of the other groups here listed.
Islam 4 UK	This Islamist group was led by Anjem Choudary and became prominent for its involvement in public protests.
Islamic Path	A variant name of the other groups here listed.
London School of Sharia	A variant name of the other groups here listed. Anjem Choudary adopted the title of 'Judge of the Shari'ah Court of the UK'.
The Saved Sect	The Saved Sect (formerly the Saviour Sect) pursues the mission of speaking out for proper standards for Muslims living in Western countries so as to ensure their salvation.
Muslims against Crusades	A variant name of the other groups here listed.

A minimal amount of detail was divulged by way of justification for the selections in 2006. One element of evidence against Al-Ghurabaa concerned the following comments by a representative about the London bombings of 2005: 'What I would say about those who do suicide operations or martyrdom operations is that they're completely praiseworthy. I have no allegiance to the Queen whatsoever or to British society; in fact if I see mujahideen attack the UK I am always standing with the Muslims.'[93]

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[89] Saul (n 86) 880.

[90] SI 2006/2016, Hansard (HL) vol 449, col 490 (20 July 2006). See Q Wiktorowicz, *Radical Islam Rising* (Rowman & Littlefield 2005).

[91] SI 2010/34 and SI 2011/2688.

[92] The proscription power to deal with variant names is in the Terrorism Act 2006, s 22. It allows for a statutory instrument without the scrutiny of the affirmative procedure (ie a positive vote for the order which in turn requires a debate).

[93] Hansard (HL) vol 449, col 493 (20 July 2006).

The 2010 proscriptions were much more openly argued. These bans were provoked by the announcement by Islam 4 UK of a protest march through Wootton Bassett, the location where the corteges of service personnel killed in Afghanistan are informally honoured by the public after the bodies have been flown to nearby RAF Lyneham. The protest was not intended to coincide with any funeral processions, but it was condemned by Prime Minister Gordon Brown as 'abhorrent and offensive'.[94] The Home Secretary, Alan Johnson, initially indicated there might be a ban on any procession under the Public Order Act 1986, s 13.[95] Section 13 is regularly used against the marches of the far-right and their Muslim opponents or by Muslim groups and their far-right opponents.[96] However, Islam 4 UK gave no advance notice of any procession (required under s 11) and then announced it was cancelling any plans before the proscription order came into force. Thus, its action might be interpreted as primarily a provocation, designed to achieve publicity about itself and its views and to focus public attention on the legitimacy of British military action in Afghanistan. It was markedly successful in achieving its aims. Thus, the key figure in Islam 4 UK, Anjem Choudary, appeared in the mainstream media and thereby gained a degree of public exposure beyond his wildest dreams.[97]

The officially appointed independent reviewer of anti-terrorism legislation, Lord Carlile, predicted in 2005 that there could be 'a significant number of additional proscriptions' through 'reducing the opportunity for disaffected young people to become radicalized towards terrorism'.[98] In response, the government has shown restraint at most times in relation to potential candidates.[99] Most notably, Hizb ut-Tahrir,[100] a transnational

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[94] *The Guardian*, 5 January 2010, 4.

[95] '(1) If at any time the chief officer of police reasonably believes that, because of particular circumstances existing in any district or part of a district, the powers under section 12 will not be sufficient to prevent the holding of public processions in that district or part from resulting in serious public disorder, he shall apply to the council of the district for an order prohibiting for such period not exceeding 3 months as may be specified in the application the holding of all public processions (or of any class of public procession so specified) in the district or part concerned.'

(2) On receiving such an application, a council may with the consent of the Secretary of State make an order either in the terms of the application or with such modifications as may be approved by the Secretary of State.'

[96] Examples have occurred in Burnley in June 2009 <http://www.burnley.gov.uk/site/scripts/news_article.php?newsID=11584> and Luton in August 2009 <http://www.luton.gov.uk/0xc0a80123%200x0e6fb2a6>.

[97] See <http://www.quilliamfoundation.org/index.php/component/content/article/612>.

[98] Lord Carlile (a), *Proposals by Her Majesty's Government for changes to the laws against terrorism* (Home Office 2005) paras 51, 52. Compare Lord Carlile (b), *Report on the Operation in 2007 of the Terrorism Act 2000* (Home Office 2008) para 50.

[99] For example, Ahlus Sunnah wal Jamaah, the Muballigh, the Islamic Thinkers Society, the Society of Muslim Lawyers, the Supporters of Sharia, and Tablighi Jama'at: Hansard (HC) vol 449, col 496 (20 July 2006), Patrick Mercer.

[100] See E Karajiannis and C McCauley, 'Hizb ut-Tahrir' (2006) 18 *Terrorism & Political Violence* 315; H Ahmed and H Stuart, *Hizb ut-Tahrir: Ideology and Strategy* (Centre for Social Cohesion 2009).

movement established in 1953 which advocates the establishment of a Caliphate and *sharia* laws in Arab countries, has not been banned in the United Kingdom, unlike, for example, in Germany.[101] Nevertheless, it 'remains an organisation of concern and is kept under close review.'[102] It was mentioned in the 2010 election manifesto of the Conservative Party as a candidate for proscription.[103] Whether that course of action will prove to be a worthwhile venture may be doubted. The profusion of organisational names ensnared in the 2010 order points to an endemic weakness in the mechanism of proscription as applied to many *jihadi* movements. These groups are far removed from the historically defined and geographically confined proponents of Irish political violence or other nationalist groups whose names are the legends in songs and on gravestones. Thus, little social or political capital is invested in names such as Islam 4 UK and their adherents have no compunction about inventing new variants as replacements if necessitated by proscription.

The idea of further restraints on militant speech about terrorism has gathered further international pace since 2006. Aside from the United Nation resolution and the Council of Europe Convention already mentioned, the European Union Council Framework Decision on Combating Terrorism was amended in 2008 so as to require the national implementation of offences against public provocation, recruitment, and training, subject to 'fundamental principles relating to freedom of expression'.[104] Few European countries have adopted proscription on the British model. However, some comparable jurisdictions beyond Europe are now banning organisations on the basis of advocacy, such as the (Australian) Anti-Terrorism Act (No 2) 2005. The Act allows listing by the Attorney-General and prosecutions for activities where the organisation advocates a terrorist act contrary to s 102(1A) of the Criminal Code. A fuller assessment of the worth of these measures will be offered once the second part of the Terrorism Act 2006 response to militant speech has been described.

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[101] On 10 January 2003 the German *Bundesministerium des Innern* issued a decision under the Law on Associations (*Vereinsgesetz*) by which it proscribed the group's activities and ordered the confiscation of assets. The group failed to overturn the order in the German courts, and the ban was also upheld by the European Court of Human Rights: *Hizb ut-Tahrir v Germany*, App No 31098/08, 12 June 2012. The group is also banned in several countries with a Muslim majority population, especially within the Middle East.

[102] Hansard (HL) vol 472, col 588w (19 February 2008), Tony McNulty. The position was confirmed at Hansard (HL) vol 716, col 86wa (5 January 2010).

[103] 'Invitation to Join the Government of Britain' (2010) 105.

[104] 2008/919/JHA, art 3. See House of Commons European Scrutiny Committee, *Seventeenth Report* (2007-08 HC 16-vii) para 8.14; SM Boyne, 'Free Speech, Terrorism, and European Security' (2010) 30 *Pace Law Review* 418, 449.

Offences of incitement of terrorism

Provisions

The principal and highly controversial changes brought about by the Terrorism Act 2006 in relation to extremist speech are set out in offences in ss 1 and 2. The core offence in s 1(1) relates to the publication of any statement that is 'likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism' or specified offences (referred to as 'Convention offences' and listed in Schedule 1, subject to change by affirmative order under s 20(9)). Publication of one's statement is the core of the *actus reus* (s 1(2)(a)). The 'statement' may take many formats under s 20(6), including words, sounds, or images, and, by s 20(4), can be published 'in any manner' such as through an electronic service.[105] A 'statement' may be part of a wider message and need not be confined to terrorism or offences in, or with respect to, the United Kingdom.[106] But s 1(4) demands that account be taken of the contents as a whole and the circumstances and manner of publication. For instance, 'there is a difference in how an academic thesis on an issue and a radical and inflammatory pamphlet are likely to be understood.'[107]

The statement must be made to 'members of the public', who must be in the multiple and are distinct from 'persons' in a private conversation.[108] If the statement is made at a meeting, it must be a meeting or other group of persons which is open to the public.[109] By s 20(3), the 'public' can include the public (or any section of it) of any part of the United Kingdom or of a country or territory outside the United Kingdom. Furthermore, in so far as it relates to 'Convention offences', s 1 is within the parameters of s 17 of the Act (discussed below), which means that the offence could be committed by Palestinians in Gaza and Pakistanis in Peshawar.[110] The offence does not require that all targeted members of the public are likely to be affected; the influenced subset must comprise 'some' which could mean one or more affected recipients.[111] In applying the impact test, juries may face challenging calculations where the statement is confined to a section of the public consisting of 'small cohesive congregations'.[112] The limit in the offence to a public context is odd, given the mischief of radicalization.[113]

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[105] By s 20(5), providing a service includes making a facility available.

[106] LH Leigh, 'The Terrorism Act 2006: A Brief Analysis' (2006) 170 *Justice of the Peace* 364, 364.

[107] Home Office Circular 8/2006, The Terrorism Act 2006, para 3.

[108] Hansard (HL) vol 676, col 435 (5 December 2005), Baroness Scotland.

[109] s 20(3). Compare Public Order Act 1986, s 16.

[110] See A Jones, R Bowers, and HD Lodge, *The Terrorism Act 2006* (OUP 2006) paras 1.26–28. Prosecution is subject to s 19(2).

[111] It has been suggested that 'some' requires more than a single person (and compare s 2(6)): Jones, Bowers, and Lodge (n 110) para 2.18. But see further s 1(2)(b), as discussed below.

[112] ibid para 2.35.

[113] Compare Public Order Act 1986, s 18. See 'Review of Public Order Law' (Cmnd 9510, London, 1985) para 6.7.

As for the *mens rea*, in s 1(2)(b), the publisher must either intend members of the public to be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare, or instigate acts of terrorism or specified offences, or be subjectively reckless as to whether members of the public will be so directly or indirectly encouraged by the statement. The original draft of the offence lacked this element of subjective specific intent—it was sufficient that there was intent as to publication and reasonable belief as to encouragement.[114] There was prolonged opposition to that version,[115] which was seen as reviving the version of inadvertent recklessness in *Metropolitan Police Commissioner v Caldwell*[116] despite its reversal in *R v G.*[117] The other notable aspect of the *mens rea* is that the defendant must seek to affect multiple members of the public, so some of the queries about the extent of publication may become irrelevant. The requirement points again to a strong public order element.

By s 1(5), it is irrelevant whether the encouragement relates to one or more particular acts either of terrorism or specified offences, or of a particular description, or generally. This provision should not, however, excuse the prosecution from specifying the one or more acts or offences which were relevant.[118] It is also no defence under s 1(5)(b) to show that the dissemination fell on deaf ears—in other words, that no person was in fact encouraged or induced by the statement. The offence considers the objective tendency of the publication. However, where the allegation is of a recklessly made statement, it is a defence under s 1(6) to show that the statement neither expressed the originator's views nor had his endorsement and that it was clear, in all the circumstances of the statement's publication, that it did not express his views and (unless in receipt of a notice under s 3(3)) did not have his endorsement. Thus, the government intended a legal rather than an evidential burden to be placed on the defence,[119] though the precedent of the *Attorney General's Reference (No 4 of 2002)*[120] strongly suggests that the courts might take another view.

The most controversial aspect of the offence is indirect encouragement, and so Parliament sought to apply further clarifications and limits.[121] By sub-section (3), the indirect encouragement of terrorism includes a statement that 'glorifies' the commission or preparation of acts of terrorism or specified offences (either in their actual commission or in principle) but only if members of the public could reasonably be expected to infer that the glorified conduct should be 'emulated by them in existing circumstances'. The continued mention of 'glorification' reflects a vestige of the pre-parliamentary draft of

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114 2006-06 HC No 55. See Hansard (HL) vol 438, col 834 (2 November 2005), Dominic Grieve.

115 Hansard (HL) vol 676, col 430 (5 December 2005), Baroness Scotland.

116 [1982] AC 341.

117 [2003] UKHL 50 [45], per Lord Browne-Wilkinson.

118 Compare A Hunt, 'Criminal Prohibitions on Direct and Indirect Encouragement of Terrorism' (2007) *Criminal Law Review* 441, 445.

119 Hansard (HL) vol 676, cols 455 (5 December 2005), Baroness Scotland, vol 678, col 217 (1 February 2006), Lord Goldsmith.

120 [2004] UKHL 43. See also Jones, Bowers, and Lodge (n 110) para 2.52.

121 See Hansard (HL) vol 679, col 136 (28 February 2006), vol 680, col 241 (22 March 2006).

the Bill, which included an offence of glorification distinct from the offence of encouragement.[122] The impact is on members of the public at large and not a particular audience, as under s 1(1). In this way, a predictive application of 'likely impact' is replaced by a wholly objective test where the jury can put themselves in the shoes of an audience.[123] It follows that it is no defence to show that an actual audience did not believe there was glorification, though this circumstance can be pleaded to direct incitement or other indirect incitements.

The notion of 'emulation' ensures that the words uttered should be understood as more than rhetorical. Consequently, praise for historical violence, such as the armed occupation of the General Post Office, Dublin, in 1916, is not an offence, unless the statements can be understood to resonate with the present and to guide future action. The position may be clearer where the speaker glorifies ongoing or future (but not futuristic) acts of terrorism since the possibility of replication is then more palpable and practicable. Thus, a declaration that most devout British Muslims were 'over the moon' about the September 11 attacks refers to an historical act when uttered in 2005, but must sail close to s 1(3) when allied to the statement that 'Ultimately, if your brothers and sisters were being killed in any part of the world, you would make your utmost effort to try to help them.'[124] The element of emulation is an important qualification. Speech which encourages violence is argued to be potentially harmful if it creates an atmosphere conducive to terrorism. This impact is potentially dangerous in the era of 'leaderless jihad',[125] when neither rationality nor the authority of the speaker is a necessary attribute of a successful proponent of terrorism.[126] After all, Osama bin Laden held no position of authority, and many of his pronouncements lacked sound foundation in either religious or political doctrine. Yet, history teaches us that the power of rhetoric, unrelated to the holding of office, may still carry the day.

'Glorify' is partly defined in s 20(2) as including 'praise or celebration'. An all-embracing working (non-legal) definition was proffered by a Home Office Minister as follows: 'To glorify is to describe or represent as admirable, especially unjustifiably or undeservedly.'[127] Section 20(7) clarifies that references to conduct to be 'emulated in existing circumstances' include references to conduct that is illustrative of a type of conduct that should be so emulated. For example, a statement glorifying the bombing of a bus at Tavistock Square on 7 July 2005 and encouraging repeat performances may be interpreted as an encouragement to emulate by attacks on the transport network in general. The government's advice for speakers wishing to avoid glorification is that they

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122 See Carlile (n 98a) para 21; E Barendt, 'Threats to Freedom of Speech in the United Kingdom' (2005) 28 *University of New South Wales Law Journal* 895, 897.

123 See Jones, Bowers, and Lodge (n 110) para 2.41.

124 These words were spoken by Hassan Butt: A Taseer, 'A British Jihadist' (2005) 113 *Prospect* <http://www.prospect-magazine.co.uk/pdfarticle.php?id=6992>.

125 M Sageman, *Leaderless Jihad* (University of Pennsylvania Press 2008).

126 Compare S Sorial, *Sedition and the Advocacy of Violence* (Routledge 2012) 31.

127 Hansard (HL) vol 677, col 583 (17 January 2006), Baroness Scotland.

should 'preface their remarks with the statement that they do not condone or endorse acts of terrorism or encouraging people to kill others. They could express sympathy and even support for the activity, but not in a way that encourages people to commit acts of terrorism.'[128] This 'love – hate' formula—love the cause but hate violent means—is not a magic incantation which wards off all iniquity. Juries may consider the context of words and the sincerity of speakers, as made clear by s 1(4).

There is no illumination of the meaning of 'indirect incitement' beyond the concept of glorification.[129] Presumably, an incitement is not direct when less than an explicit stimulus but still predictably steering towards an outcome. Within this residue of indirect incitement, any requirement of emulation is absent.

The overall impact is to criminalize generalized and public encouragements that terrorism would be a good thing, without stating where or when or against whom. In comparison, the 'normal' law of criminal encouragement in Part II of the Serious Crime Act 2007 requires the encouragement of an act which would amount to one or more offence, and at least with the belief that one or more offences would be committed as a consequence. Section 1 advances these normal boundaries, in the case of direct incitement, by specifying that it is an offence 'to incite people to engage in terrorist activities generally' and extra-territorially.[130] In the case of indirect incitement, it is an offence 'to incite them obliquely by creating the climate in which they may come to believe that terrorist acts are acceptable.'[131] How this differs from 'normal' incitement remains uncertain. The 'normal' law does not use the terms 'direct' and 'indirect' but does occasionally accord a wide meaning to 'encourage', such as in cases of speed trap detection machines or books giving advice on the production of cannabis.[132] Perhaps the absence of any requirement of intended emulation outside of the realm of glorification could be one key difference, though the absence of actual audience reaction is less of a distinction under the 2007 Act.[133]

Having dealt with the originators of statements in s 1, s 2(1) seeks to put a stop to the secondary dissemination of terrorist publications with intent or recklessness as to direct or indirect encouragement to acts of terrorism.[134] Closely parallel to s 1(3), the meaning

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[128] Hansard (HL) vol 439, col 429 (9 November 2005), Hazel Blears. See also Hansard (HL) vol 676, col 458 (5 December 2005), Baroness Scotland.

[129] See Hunt (n 118) 452; T Choudhury, 'The Terrorism Act 2006: Discouraging Terrorism' in I Hare and J Weinstein (eds), *Extreme Speech and Democracy* (OUP 2009) 468.

[130] But see Criminal Justice (Terrorism and Conspiracy) Act 1998.

[131] Hansard (HL) vol 676, cols 432–33 (5 December 2005), Baroness Scotland. Compare Leigh (n 106) 365; R Cohen-Almagor, 'Boundaries of Free Expression Before and After Prime Minister Rabin's Assassination' in R Cohen-Almagor, *Liberal Democracy and the Limits of Tolerance* (University of Michigan Press 2000).

[132] *Invicta Plastics Ltd v Clare* [1976] RTR 251; *R v Marlow* [1998] 1 Cr App Rep (S) 273; Hunt (n 118) 453–55.

[133] See Law Commission, 'Inchoate Liability for Assisting and Encouraging Crime' (Report No 300, Cm 6878, London, 2006) para 1.3.

[134] Subjective recklessness was inserted in line with s 1: Hansard (HL) vol 677, col 551 (17 January 2006), Baroness Scotland.

of indirect encouragement is explained in s 2(4). The activity involved in a 'terrorist publication' is distribution, circulation, giving, selling, lending, offering for sale or loan, provision of a service to others that enables them to access or acquire,[135] transmitting electronically, or possessing 'with a view' to the foregoing activities (s 2(2)).[136] Possession was added at the last stage of the Bill and reflects race hatred legislation.[137] It is sufficient that possession is one of the defendant's purposes and not necessarily the prime purpose. The publication may take many formats—it means an article or record[138] which may be read, listened to, looked at, or watched (s 2(13)).

In content, a 'terrorist publication' is defined in s 2(3) as containing matter of two distinct types. First, it covers matter likely to be understood, by some or all of the persons to whom it is or may become available as a consequence of publication, as a direct or indirect encouragement or other inducement to them to the commission, preparation, or instigation of acts of terrorism. Second, it covers matter likely to be useful in the commission or preparation of such acts and to be understood, by some or all of those persons, as contained in the publication, or made available to them, wholly or mainly for the purpose of being so useful to them. This second leg compensates for the fact that 'Convention offences' (as in Schedule 1) are not mentioned under s 2(1). The explanation for this distinction is that s 1 is tied more closely to the terms in Article 5 of the Council of Europe Convention, namely, 'public provocations', whereas s 2 is more an artefact of British legislative design.[139] As a result, there is no application of extra-territorial effect under s 17.

The effect of a terrorist publication can be judged by reference to one or more persons to whom it is or may become available as a consequence (s 2(6)). The possibility of affecting a single person contrasts with the position under s 1. In contrast too is the possibility of judging likely impact not only on persons who were exposed but also on those who may be exposed to the materials. In this way, the audience may in part be determined by the designs of the defendant, but it might also be affected by the choice of medium. For example, it will be difficult to delimit the audience for an internet posting. It is also notable that the offence mentions 'persons' and not members of the public as in s 1, which means that private circulations of public statements can be prohibited. An explanation for the distinction is again that s 2 does not directly derive from Article 5 of the 2005 Convention.

The concept of 'terrorist publication' is explained further by s 2(5). The nature of the publications must be determined at the time of the conduct in s 2(2) and having regard

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135 An example might be the running of a market stall: Leigh (n 106) 364.

136 This definition is exclusive to s 2 and so s 20(4) does not apply.

137 See Hansard (HL) vol 678, col 197 (1 February 2006); Public Order Act 1986, s 23 (as suggested by the 'Review of Public Order Law' (Cmnd 9510, London, 1985) para 6.8). Lord Carlile also suggested an analogy with paedophile offences as in Criminal Justice Act 1988, s 160 ((n 98a) para 25), but possession *per se* is not an offence under s 2.

138 See further s 20(2), (8).

139 Hunt (n 118) 444, 445.

both to the entire contents of the publication and to the circumstances in which that conduct occurs. It is irrelevant whether the dissemination relates to particular, generic, or general acts of terrorism [s 2(7)].

The *mens rea* of s 2 presumably requires intention as to the forms of dissemination in s 2(2)(a) to (e), while, for the possession offence under s 2(2)(f), there must be an intent to possess with future intent to disseminate. In addition, it is specified in sub-section (1) that the person must intend or be reckless that an effect of his conduct (not necessarily the sole or prime effect) amounts to a direct or indirect encouragement or other inducement to the commission, preparation, or instigation of acts of terrorism or assistance in the commission or preparation of such acts.

Parallel to s 1(6), it is a defence under s 2(9) to show that the statement neither expressed the publisher's views nor had his endorsement and that this position was clear in all the circumstances [unless in receipt of a notice under s 3(3)].[140] By s 2(10), the defence is again confined to reckless and not intentional actions, and is also confined to encouragement offences and not offences relating to useful materials. Of course, it is conceivable that materials will be prosecuted as relating to both types of offence in s 2(3), and if the defence is raised in those circumstances, the jury might find it difficult to disentangle liability.[141] The defence can benefit 'all legitimate librarians, academics and booksellers' (and the same applies to news broadcasters) who may have examined the article but still do not endorse the contents.[142] Nevertheless, where, for example, an academic officer suspects or believes that a student intends to use the available materials for terrorist purposes rather than scholastic endeavour, she should 'as a good citizen' inform the security authorities.[143]

This injunction was taken to heart by the University of Nottingham when a student, Rizwaan Sabir, was arrested in 2008 for downloading materials in connection with his postgraduate research, together with his friend and ex-student, Hicham Yezza, to whom he had passed the materials.[144] The offending materials were an Al-Qa'ida training manual which had been published in redacted form on the US Department of Justice website.[145] The Vice Chancellor, Sir Colin Campbell, warned, without much regard for the defences in ss 1 and 2, that it is illegitimate to study the operational or tactical aspects

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[140] The government intended that the defendant carries a legal burden of proof: Hansard (HL) vol 678, col 218 (1 February 2006), Lord Goldsmith. Compare Carlile (n 98a) para 25. The courts are likely to impose an evidential burden: *Sheldrake v Director of Public Prosecutions; Attorney General's Reference (No 4 of 2002)* [2004] UKHL 43.

[141] See Jones, Bowers, and Lodge (n 110) para 2.87.

[142] Hansard (HL) vol 676, col 465 (5 December 2005), Baroness Scotland. See also Hansard (HL) vol 677, col 554 (17 January 2006), Baroness Scotland; *Explanatory Notes to the Terrorism Act 2006* (HMSO 2006) para 27.

[143] Hansard (HL) vol 676, col 629 (7 December 2005), Baroness Scotland.

[144] See *The Guardian*, 24 May 2008, 8; <http://freehicham.co.uk/>.

[145] <http://www.usdoj.gov/ag/manualpart1_1.pdf, 2005>.

of terrorism, as opposed to its political dimensions.[146] Lord Carlile had rightly cautioned before enactment that there was a danger that academic research into terrorism might be 'turned into samizdat activity'.[147]

As with s 1, it is no defence that the dissemination fell on deaf ears. By sub-section (8) it is irrelevant whether any person is in fact encouraged or induced or makes use of the materials. However, where under sub-section (10) the offence is one of direct or indirect encouragement only (and so this is not applicable to material useful to terrorists) and the person was not acting intentionally within sub-section (1)(a), there is a defence of unauthorized dissemination under sub-section (9) by which it is a defence to show that the publication neither expressed the defendant's views nor had his endorsement and that this position was clear in all the circumstances [subject to receiving a notice under s 3(3)].

Section 2 exceeds the 'normal' law of incitement in many respects, though much of its potential impact on third party publishers is moderated by s 2(9). Thus, the important impact is upon sympathetic disseminators or possessors of materials, where the accused is one step away from the original incitement and where it might be difficult to prove the sharing of the same *mens rea* as the author.[148]

These measures are applied to cyber-terrorism[149] via s 3 of the Terrorism Act 2006, which applies the ss 1 and 2 offences to electronically produced or delivered 'unlawfully terrorism-related' articles or records[150] on the internet and devises a short-circuit enforcement power. 'Unlawfully terrorism-related' means, under s 3(7): either material which constitutes either a direct or indirect encouragement or inducement to terrorism or Convention offences; or information which is likely to be useful to the commission or preparation of such acts.[151] As in ss 1 and 2, indirect encouragement is refined in s 3(8) to include glorification provided that there is a suggestion of emulation in existing circumstances.

The short-circuit process is that, under s 3(3), where a constable forms the opinion that a statement, article, or record held on the system of the service provider is 'unlawfully terrorism-related', a notice[152] can be issued which requires the provider to arrange for the material to become unavailable to the public and also warns that a failure to comply

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146 S Hunt, 'Feeding Culture of Fear won't Defend Freedom' *Times Higher Educational Supplement* 24 July 2008 28.

147 Lord Carlile (n 98a) para 28.

148 See further Hunt (n 118) 445.

149 See T Thomas, 'Al Qaeda and the Internet' (2003) XXXIII *Parameters* 112; GR Bunt, *Islam in the Digital Age* (Pluto 2003); G Weimann, *Terror on the Internet* (United States Institute of Peace 2006); C Walker, 'Cyber-Terrorism' (2006) 110 *Penn State Law Review* 625; MC Golumbic, *Fighting Terror Online* (Springer 2008); J Brandon, *Virtual Caliphate: Islamic Extremists and their Websites* (Centre for Social Cohesion 2008).

150 s 3(7). The meaning is by reference to the two categories of matter within s 2(3), with the usual definition of 'indirect incitement' in s 3(8).

151 The phrase in sub-s (7)(a), 'likely to be understood' demands a higher standard of proof than 'capable of being understood': Hansard (HL) vol 676, col 700 (7 December 2005), Baroness Scotland.

152 See further s 4.

within two working days[153] will result in the matter being regarded, under s 3(2) as having his endorsement, and explains the possible liability under sub-section (4). A failure to comply under sub-section (4) can equally arise where a person initially complies with the notice but subsequently publishes or causes to be published a statement to the same effect (known as a 'repeat statement').

There is a defence under sub-sections (5) and (6) if the person can demonstrate to a legal burden of proof[154] that he has taken 'taken every step he reasonably could' to prevent a repeat statement or took 'every step he reasonably could' to deal with it once aware of it. The phrase, 'every step he reasonably could' is meant to impose a higher duty of attention than 'taking reasonable steps', a standard which may be satisfied overall without taking some reasonable steps. The threat regarding failure to comply is not tantamount to the commission of an offence through endorsement under s 1 or 2, since other elements of those offences must be proven, nor are all Convention offences covered by s 2. Furthermore, the refusal to comply with a notice is not itself an offence, nor even is there any police power to enforce the take-down of materials.

Critics felt it to be mistaken that these restrictions on freedom of expression do not engage a judicial officer, who, more likely than a commercial service provider, could be expected to stand up for the principle of expression.[155] The government's retort was that judicial process would cause undue delay in a 'fast moving world'.[156] However, the possibility that an over-enthusiastic police officer might tread too heavily is taken up by the *Home Office Guidance on Notices Issued under Section 3 of the Terrorism Act 2006*, which was promised in response to parliamentary apprehensions.[157] The Guidance advises that notices can be initiated by any constable but in practice ought to be confined to officers of the Metropolitan Police Service Counter-Terrorist Command (SO15) who are trained and experienced in electronic policing. They will apply in writing or electronically, setting out reasons, for the giving of the notice, to an authorizing officer of superintendent rank or above. There should also be consultation with the Association of Chief Police Officers Terrorism and Allied Matters policy lead.[158]

This Guidance, not amounting to formal 'law', may not save the scheme from challenge under Articles 6, 10, and 13 of the European Convention by web publishers. Aside from lacking legal credentials, the scheme does not require reasons to be given, does not pay express regard to free expression, and does not encompass any scheme for objections.[159]

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153 See s 3(9).

154 Hansard (HL) vol 678, col 217 (1 February 2006), Lord Goldsmith. This burden of proof is said to be fair and reasonable: Hansard (HL) vol 676, col 709 (7 December 2005), Baroness Scotland. Lord Carlile viewed it as an evidential burden: (n 98a) para 25. The courts may impose an evidential burden: *Sheldrake v Director of Public Prosecutions,* Attorney General's Reference (No 4 of 2002) [2004] UKHL 43.

155 See Hansard (HL) vol 679, col 168 (28 February 2006); Carlile (n 98a) para 27.

156 Hansard (HL) vol 676, col 677 (7 December 2005), Baroness Scotland.

157 Hansard (HL) vol 442, col 1472 (15 February 2006), Hazel Blears.

158 paras 13–16.

159 Compare *Zaoui v Switzerland*, App No 41615/98, 18 January 2001.

The potential operation of s 3 has to be curtailed by the impact of the Electronic Commerce Directive[160] where an information society service provider acts as an automatic 'conduit' of information (Article 12), provider of a cache for information (Article 13), or host of information without actual knowledge of illegal activity (Article 14). It is also forbidden under Article 15 to impose a general obligation on providers, when providing the services covered by Articles 12, 13, and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity. The government conceded during debates on the 2006 Act that UK-based providers who are blocked from taking action against information held on a computer in a third country by the laws of that land will be viewed as having a reasonable excuse under s 3(2).[161] It was also conceded that s 3(5), as applied to repeat statements, should not be interpreted as imposing a duty of general monitoring or prevention.[162] There was also the promise that the police should first act against the webmaster rather than the service provider.[163] The Electronic Commerce Directive (Terrorism Act 2006) Regulations 2007[164] further clarify the relationship to the Electronic Commerce Directive. The government resisted any further, domestic exemption for common carrier services.[165]

Alongside s 3, the download of internet materials may be prosecuted as an offence of the possession of information useful to terrorism contrary to s 58 of the Terrorism Act 2000. An example is *R v Muhammed,* where the defendant downloaded a vast amount of information from the internet and was involved in the running of the At-Tibyaan website.[166] There is also an offence under s 59 of incitement of terrorism abroad where the act would, if committed within jurisdiction, constitute any offence listed in sub-section (2).[167] The listed offences are meant to equate roughly to the definition of 'terrorism' in s 1 of the Terrorism Act. An illustration is *R v Younis Tsouli* who, under the tag of ' Irhabi007', was convicted of inciting terrorism abroad (as well as fraud) arising from his websites which carried praise for beheadings and other terrorist violence.[168] In *R v Saleem*,[169] the defendants, including Abu Izzadeen (Trevor Brooks), were charged with inciting terrorism overseas under s 59 (and also offences under s 15) arising from

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160 2000/31/EC. See Electronic Commerce (European Communities Directive) Regulations 2002, SI 2002/2013.

161 Hansard (HL) vol 676, col 671 (7 December 2005), Baroness Scotland.

162 ibid col 672. See also 'Guidance', para 42.

163 ibid col 612. This point is not reflected in the 'Guidance', para 10.

164 SI 2007/1550.

165 Hansard (HL) vol 677, col 611 (17 January 2006), Baroness Scotland. 'Electronic communications network' is defined in the Communications Act 2003, s 32.

166 [2010] EWCA Crim 227.

167 Home Office and Northern Ireland Office, 'Legislation against Terrorism' (Cm 4178, London, 1998), paras 4.18, 4.19.

168 *Attorney General's References (Nos 85, 86, and 87 of 2007) R v Tsouli,* [2007] EWCA Crim 3300.

169 [2009] EWCA Crim 920.

DVDs of speeches in 2004 which encouraged support for the *mujahideen* in Fallujah and elsewhere in Iraq. Since there was no evidence that funds had been collected or terrorism committed, the sentence of four and a half years was reduced by one year.

Implementation

The penalties under ss 1 and 2 are, on indictment, imprisonment not exceeding seven years, a fine, or both; on summary conviction in England and Wales, imprisonment not exceeding twelve months[170] (six months in Scotland or Northern Ireland), or a fine not exceeding the statutory maximum, or both.

In *R v Rahman R v Mohammed*,[171] the conviction of Rahman under s 2(2)(f) arose from an instruction to disseminate to six named persons a letter containing instructions for the distribution of Al-Qa'ida propaganda and a description of fighting. Mohammed sold Islamist materials at stalls in the North of England, some of which breached s 2. The Court of Appeal gave guidance that: any reduction in sentence for recklessness rather than intention would be small; the volume and content of the material disseminated would be relevant; s 2 offences are likely to be less serious than breaches of ss 57 and 58 of the Terrorism Act 2000.[172] The conviction under s 2 of Shella Roma underlines the sentencing point. A three-year community order sufficed for seeking to print and distribute an extremist pamphlet.[173] Likewise, the 'Blackburn Resistance' consisting of Ishaq Kanmi, Abbas Iqbal, and Ilyas Iqbal, were accused of promoting through internet forums martyrdom operations against Prime Ministers Blair and Brown, as well as filming for propaganda purposes 'military' exercises in a Blackburn Park.[174] In *R v Faraz*,[175] the manager of an Islamic bookshop in Birmingham was prosecuted but acquitted on appeal because of misdirection to the jury.

Section 28 provides for an alternative mode of disposal of s 2 materials, modelled on Schedule 3 of the Customs and Excise Management Act 1979. A justice of the peace (or sheriff in Scotland), if satisfied that there are reasonable grounds for suspecting that articles falling within ss 2(2)(a) to (e)[176] are likely to be found on any premises, may issue

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170 Subject to the commencement of the Criminal Justice Act 2003, s 154(1).

171 [2008] EWCA Crim 1465. Note also *R v Malcolm Hodges*, who was convicted in 2008 of reckless encouragement of jihadis to attack accountancy organisations: <http://www.dailymail.co.uk/news/article-516448/Man-urged-terror-attacks-accountancy-institutes--10-years-failing-professional-exams.html>.

172 ibid at paras 5, 7, 41. The sentences were five and a half years (Rahman) and two years (Mohammed).

173 *The Times*, 31 March 2009, 17 (Manchester Crown Court).

174 Kanmi was sentenced to three years, Abbas Iqbal to two years, and Ilyas Iqbal to 15 months under s 58: *The Times*, 20 March 2010, 40, 11 May 2010, 23.

175 Kingston-upon-Thames Crown Court, 27 May 2011, [2012] EWCA Crim 2820.

176 The private possession covered by s 2(2)(f) is thereby excluded. There is also a saving for legally privileged materials under the Police and Criminal Evidence Act 1984, s 19(6): Hansard (HL) vol 676, col 1244 (7 December 2005), Baroness Scotland.

a search and seizure warrant. Proceedings for forfeiture may then be taken on information laid by, or on behalf of, the Director of Public Prosecutions, except in Scotland where no special process is specified.[177]

Forfeiture procedures are governed by Schedule 2. By para 2, the relevant constable must give notice to owners or, in default, occupiers of the premises where the article was seized. Any person disputing forfeiture may give written notice within one month under para 3 to any police station in the police area in which the premises where the seizure took place are located. If no such counter-claim is issued, the article can be treated under para 5 as automatically forfeited at the end of the relevant periods. If there is a counter-claim, the relevant constable must decide under para 6 whether to proceed. If so, the court can make an order if it finds that the article was liable to forfeiture at the time of seizure, and it is not satisfied that its forfeiture would be inappropriate. If either the constable does not take proceedings or the court is not convinced to order forfeiture, the article must be remitted.[178] The venues for these civil proceedings can be, in England or Wales, either in the High Court or in a magistrates' court (with appeal to the Crown Court), in Scotland, either in the Court of Session or in the sheriff court, and in Northern Ireland, either in the High Court or in a court of summary jurisdiction (with appeal to the county court).[179]

Disposal by this route follows the pattern of s 3 of the Obscene Publications Act 1959.[180] However, the danger is that this administrative route underplays the value of free expression. An owner or occupier might conceivably decline to take on the forces of the state and incur a dubious reputation. Lord Carlile argued that the jurisdiction should be exercised by professional district judges (magistrates' courts) and not magistrates,[181] though a lay element is desirable in principle.

No use has yet been made of s 3 because service providers are highly responsive to police 'advice'.[182] Indeed, the Guidance suggests making contact with the service provider before any notice is issued and that a 'voluntary approach' should be adopted where the provider is not viewed as encouraging publication.[183]

A practical enforcement measure, which may strengthen s 3, is the establishment in 2010 by the Home Office of a government website which feeds into the (police) Counter Terrorism Internet Referral Unit (CTIRU), which invites members of the public to report internet pages which carry messages of hate, extremism and terrorism.[184] This follows the initiative of the Internet Watch Foundation which deals with child pornography.[185]

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177 s 28(5), (10).
178 It can be disposed of if it is not practicable within 12 months: para 13.
179 paras 7, 10.
180 See G Robertson, *Obscenity* (Weidenfeld & Nicolson 1979) ch 4.
181 Carlile (n 98a) 75.
182 See Carlile (n 98b) para 297.
183 paras 20, 27, Annex C.
184 <https://www.gov.uk/report-extremism>.
185 <http://www.iwf.org.uk/>.

Examples of terrorism materials include bomb-making, weapons, or poisons instructions and guides to targets, while violent extremist content is said to include 'videos of beheadings with messages of "glorification" or praise for the attackers; speeches or essays calling for racial or religious violence; messages intended to stir up hatred against any religious or ethnic group; chat forums with postings calling for people to commit acts of terrorism.'[186] The reports are channelled to the police, though whether the sites are closed under s 3 may depend on intelligence gathering considerations.

There is no international system to replicate 'take down' measures in other jurisdictions, even though the amended EU Framework Directive on Combating Terrorism recites that 'The Internet is used to inspire and mobilise local terrorist networks and individuals in Europe and also serves as a source of information on terrorist means and methods, thus functioning as a "virtual training camp."'[187]

Foreign comparisons

The notion of *apologie du terrorisme* appeared in some European jurisdictions well before 2001.[188] Thus, the French Law of 29 July 1881 on Freedom of the Press, art 24(4), makes it an offence to utter an *apologie* for attacks on human life or criminal damage which endangers life. The Spanish Penal Code, art 578, defines apology as praise of specified (terrorist) offences or bringing about the discredit, contempt, or humiliation of victims or their families. The offence itself, in art 18(2) requires the presentation of ideas or doctrines that praise or justify a crime or its perpetrator, but in a way which, by its nature and circumstances, amounts to a direct incitement to commit an offence. Neither jurisdiction uses the offence frequently,[189] but its deployment in Spain has resulted in the closure of two Basque newspapers.[190]

Other jurisdictions have responded to the European Convention of 2005 by the passage of new offences. The German Criminal Code, s 91, passed in 2009, forbids instruction in the commission of a serious act of violence that endangers the state provided the instruction encourages the commission of the act.[191]

Away from the influence of the European concept of *apologie*, the Canadian House of Commons Standing Committee on Public Safety and National Security called for an offence of glorification in 2007, but it has not been enacted.[192] Likewise, the Australian

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186 <http://www.direct.gov.uk/en/CrimeJusticeAndTheLaw/Counterterrorism/DG_183993>.

187 Council Framework Decision 2008/919/JHA. See further U Sieber and PW Brunst, *Cyberterrorism* (Council of Europe 2007) 97.

188 See O Ribbelink, *'Apologie du Terrorisme' and 'Incitement to Terrorism'* (Council of Europe 2004) 7.

189 ibid 35, 39.

190 See I Cram, 'Regulating the Media' (2006) 18 *Terrorism & Political Violence* 335.

191 See U Sieber, 'Blurring the Categories of Criminal Law and the Law of War' in S Manacorda and MA Nieto (eds), *Criminal Law Between War and Peace* (Universidad de Castilla-La Mancha 2009).

192 'Rights, Limits, Security' (2007) 12.

Law Reform Commission firmly rejected an offence of 'encouragement' or 'glorification' of terrorism; such an offence would be too vague and would amount to 'an unwarranted incursion into freedom of expression and the constitutionally protected freedom of political discourse.'[193] However, publications, films, and computer games can be refused classification under the Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Act 2007 if deemed to advocate the doing of a terrorist act. This system, operated through the Office of Film and Literature Classification, appears unduly cumbersome and blunt since it fails to take account of the circumstances of publication and consumption.[194]

Advocacy offences are of course constrained by US constitutional law which demands express propagation of immediate law violation which is likely to occur,[195] though less imminent and less explicit 'true threats' may alternatively found a conviction.[196] The US constitutional rejection of speech content offences may also come into play.[197] Yet, as already noted, the Federal offence of 'seditious conspiracy' in 18 USC s 2384 was invoked against Sheik Omar Abdel Rahman, who stirred his congregation to 'do jihad with the sword, with the cannon, with the grenades, with the missile'.[198]

Assessment

There may be two aspects to a critique of the banning of militant speech about terrorism in the ways pursued by the Terrorism Act 2006. The first is to assess whether these are legitimate tactics for a smart militant democracy. A ban should be ruled out if it infringes basic values and thereby delegitimizes the state response. The second approach might

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193 'Fighting Words' (Report 104, 2006) para 6.24.

194 See <http://www.classification.gov.au> for its decisions in 2006 on *The Absent Obligation* (allowed) and *Join the Caravan* (refused). Repeal is recommended by the Law Council of Australia, Anti-Terrorism Reform Project (Canberra, 2009) para 6.3.3. An attempt to block the film, *The Baader-Meinhof Complex*, under German privacy laws was rejected: B Clark, '*In Dubio Pro Arte*? No Ban for the Film "Der Baader-Meinhof-Komplex"' (2009) 20 *Entertainment Law Review* 178.

195 *Brandenburg v Ohio,* 395 US 444 (1969); *Hess v Indiana,* 414 US 105 (1972). Interpretation of these terms has become less rigorous: *United States v Timimi* (1:04cr385, 2005); T Healey, 'Brandenburg in Time of Terror' (2009) 84 *Notre Dame Law Review* 655. Compare D Barnum, 'Indirect Incitement and Freedom of Speech in Anglo-American Law' [2006] *European Human Rights Law Review* 258; E Barendt, 'Incitement to, and Glorification of Terrorism' in Hare and Weinstein (n 129).

196 *Watts v United States,* 394 US 705 (1969); *Planned Parenthood of the Columbia/Willamette v ACLA,* 290 F3d 1058 (2002); *Virginia v Black,* 538 US 343 (2003).

197 *RAV v St Paul,* 505 US 377 (1992). See E Parker, 'Implementation of the UK Terrorism Act 2006' (2007) 21 *Emory International Law Review* 711, 747.

198 *United States v Rahman*, 189 F3d 88 (1999) 104, 107. See J Cohan, 'Seditious Conspiracy, the Smith Act, and Prosecution for Religious Speech Advocating the Violent Overthrow of the Government' (2003) 17 *St John's Journal of Legal Commentary* 199. Note also the offence of weapons training: PL 106-54, 18 USC s 842(p); LK Donohue, 'Terrorist Speech and the Future of Free Expression' (2005) 27 *Cardozo Law Review* 233, 280.

inquire as to whether viable alternative methods can have more impact without such impingement upon fundamental values. In this way, the question becomes whether the infringement upon expressive and associational rights is a proportionate tactic.

Inherent infringement?

On the first approach, it has already been argued that expressive speech and associational activity which encourages violence need not be tolerated.[199] In *Zana v Turkey*,[200] the applicant's statement of sympathy for the PKK (Partiya Karkeren Kurdistan) was regarded as exacerbating a violent situation and could be punished, even though he was a mayor in the region. In *Gündüz v Turkey*,[201] the leader of an Islamic sect criticized moderate Islamic intellectuals and called his supporters to produce 'one brave man among the Muslims to plant a dagger in their soft underbelly and run them through twice with a bayonet.' Even as a rhetorical flourish, such language did not deserve protection from the European Court of Human Rights, nor, at the extreme end of the margin of appreciation, did a cartoon in praise of the September 11 attacks, published in the Basque country in *Leroy v France*.[202] But where, as in *Arslan v Turkey*,[203] the Court was sure that the words used did not incite violence, then it defended statements which alleged that the Turkish state oppressed the Kurds and so explained Kurdish 'resistance' and 'intifada'. As made clear in *Gerger v Turkey*,[204] broad words such as 'resistance', 'struggle' and 'liberation' do not necessarily constitute an incitement to violence but may do when reporting the utterances of hunger striking prisoners.[205] Latitude is also accorded to the neutral reporting of the declarations or interviews of terrorist representatives by media professionals, as in *Sürek and Özdemir v Turkey*,[206] to artistic and academic speech,[207] and to demonstrators protesting about genuine issues of public concern.[208] However, the limits of tolerance were again demonstrable in the review of banning in Spain of Batasuna in 2002 and Herritarren Zerrenda in 2004 as well as to individual Basque party candidates.

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[199] See *Arrowsmith v United Kingdom*, App No 7075/75, DR 19, 5.

[200] App No 18954/91, 1997-VII. See also *Sürek v Turkey (No 1)*, App No 26682/95, 1999-IV; *Sürek v Turkey (No 3)*, App No 24735/94, 8 July 1999; *Falakaoğlu and Saygılı v Turkey*, App Nos 22147/02, 24972/03, 23 January 2007. See H Davis, 'Lessons from Turkey: Anti-Terrorism Legislation and the Protection of Free Speech [2005] *European Human Rights Law Review* 75.

[201] App No 59745/00, 2003-XI.

[202] App No 36109/03, 2 October 2008.

[203] App No 23462/94, 8 July 1999 [48]. See also *Ceylan v Turkey*, App No 23556/94, 1999-IV; *Erdoğdu v Turkey* App No 25723/94, 2000-VI.

[204] App No 24919/94, 8 July 1999 [50]. See also *Erdoğdu and Ince* v *Turkey*, App Nos 25067/94; 25068/94, 8 July 1999; *Okçuoglu* v *Turkey*, App No 24246/94, 8 July 1999; *Polat* v *Turkey*, App No 23500/94, 8 July 1999.

[205] *Saygılı and Falakaoğlu v Turkey*, App No 38991/02, 17 February 2009.

[206] App Nos 23927/94, 24277/94, 8 July 1999. See also *Sürek v Turkey (No 2)*, App No 24122/94, 8 July 1999; *Sürek v Turkey (No 4)*, App No 24762/94, 8 July 1999.

[207] *Başkaya and Okçuoğlu v Turkey*, App Nos 23536/94, 24408/94, 1999-IV; *Karataş v Turkey*, App No 23168/94, 1999-IV.

[208] *Yılmaz and Kılıç v Turkey*, App No 68514/01, 17 July 2008.

The European Court of Human Rights concluded that the banning of parties sympathetic to ETA (Euskadi ta Askatasuna) met a pressing social need which had been fully considered by national courts whose margin of appreciation was to be respected, especially given its reflection of the 'international preoccupation with condemning apology of terrorism'.[209]

It may be concluded that being one step removed from direct incitement to violence and being uncertain that anyone is roused to action and/or that any offence will result from publication may all cast doubt on the compliance of ss 1 and 2 of the 2006 Act with rights to expression.[210] However, judgment can only be finalised in the context of specific facts, and no British case has as yet been taken to Strasbourg. The cited precedents are not clear-cut indications as to how a British application would be treated for the level and nature of enforcement in Britain are certainly not equivalent to those in Turkey. For instance, the Kurdish politician, Leyla Zana, was convicted in Turkey for a speech delivered at the University of London in 2008 which was not the subject of any British legal action.[211] The extension of the law beyond direct intent to violence does not breach Article 10 according to the English court judgment in *R v Faraz*.[212]

A further possible criticism of the 2006 Act is based on its wording and inherent imprecision of 'incitement' and other terms in ss 1 and 2, which are riddled with uncertainties and anomalies.[213] The precise mechanisms by which radicalisation turns into extremism and begets terrorism are unclear, and the 2006 Act might prove counterproductive where it 'blurs rather than clarifies the lines between radicals and terrorists.'[214] However, the English courts have viewed as compatible with Article 10 words such as 'insulting',[215] while the European Court of Human Rights has upheld the term 'breach of the peace'.[216] On that basis, it is doubtful whether the 2006 Act is intrinsically more incapable of acting as a guide to action.

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[209] *Herri Batasuna and Batasuna v Spain*, App Nos 25803/04, 25817/04, 30 June 2009 [91]. Action was taken in France on grounds of foreign funding: *Parti Nationaliste Basque v France*, App No 71251/01, 7 June 2007.

[210] See Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights: 'Terrorism Bill and Related matters' (2005-05 HL 75, HC 561) para 34; Hunt (n 118) 452; Barendt (n 195) 447, 458.

[211] BBC Monitoring Europe 28 July 2009. She was sentenced to 15 months' imprisonment under the Anti-Terror Law 1991 (Act 3713) art 7(2) for propaganda on behalf of a terrorist organisation.

[212] (Kingston-upon-Thames Crown Court, 27 May 2011) 38–42, 81 (in relation to the TA 2006 s 2).

[213] Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights, 'Terrorism Bill and related matters' (2005-05 HL 75, HC 561) paras 27–28. See also Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/61/267, 2006) para 7.

[214] Choudhury (n 129) 487.

[215] *Hammond v DPP,* [2004] EWHC 69 (Admin) [27].

[216] Compare *Steel and Others v the United Kingdom*, App No 24838/94, 1998-VII; *Hashman and Harrup v United Kingdom*, App No 25594/94, 1999-VIII.

Disproportionate infringement?

The test of proportionality might initially be tested out in relation to the question whether the myriad of clearer and less contentious offences which already circumscribe militant speech make irrelevant the more sweeping (and therefore more dangerous) efforts of the Terrorism Act 2006.[217] Offences already within the terrorism legislation catalogue include the offences under ss 58 and 59, as already noted. Beyond that category, soliciting murder under the Offences against the Person Act 1861, s 4, can be used even when no victim is specified.[218] Public order offences can apply to outrages such as beheading videos[219] or vituperative protests outside an embassy.[220] The availability of alternative charges was illustrated by the first recorded conviction under the 2006 Act. Arising from materials in his possession when arrested at Glasgow Airport, Mohammed Atif Siddique was convicted not only of collecting and distributing terrorist materials, but also of offences under the Terrorism Act 2000, ss 54, 57, and 58, plus the Scottish offence of breach of the peace.[221]

In response to this point, a significant factor in the justification of ss 1 and 2 must reside in its ability to catch a wider range of militant speech—not just concerned with 'information' as under s 58 or calls to arms abroad as under s 59—and yet still remain limited by the element of emulation of action. Subject to the exception of the largely unexplained non-glorifying indirect incitements, these are not pure speech crimes,[222] but they do seek to intervene before one militant speaker generates multiple militant actors.[223] Nevertheless, there may be four important qualifications to any endorsement.

First, the application of these offences in the context of foreign regimes is problematic.[224] This point is really a criticism of the definition of 'terrorism' in s 1 of the Terrorism Act 2000 and the extension of jurisdiction for offences listed under s 17 of the Terrorism Act 2006. However, the effect can be illustrated when the s 1 offence is applied to support, during his term of imprisonment, for the revered Nelson Mandela, who condoned acts of political violence against official property,[225] or for the statement of

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[217] This point is disputed: Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights: 'Terrorism Bill and related matters' (2005-05 HL 75, HC 561) para 25; SC Ekaratne, 'Redundant Restriction: The UK's Offence of Glorifying Terrorism' (2010) *Harvard Human Rights Law Journal* 205.

[218] See *R v el-Faisal,* [2004] EWCA Crim 456; *R v Hamza,* [2006] EWCA Crim 2918; *R. v Saleem, Javed, and Muhid,* [2007] EWCA Crim 2692; T O'Donoghue, 'Glorification, Irish Terror and Abu Hamza' (2006) 170 *Justice of the Peace* 291.

[219] See the case of Subhann Younis (Glasgow District Court, *The Times*, 29 September 2005, 3).

[220] See the case of Anjem Choudary (*The Guardian*, 22 July 2006, 14).

[221] *The Times*, 18 September 2007, 31; *The Scotsman*, 24 October 2007, 7. For the views of his lawyer, see *Re Anwar* [2008] HCJAC 36.

[222] Hunt (n 118) 450–56.

[223] See O Fiss, 'Freedom of Speech and Political Violence' in Cohen-Almagor (n 131) 75.

[224] Joint Committee on Human Rights, 'Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters' (2005-06 HL 75, HC 561) para 12.

[225] <http://www.anc.org.za/ancdocs/history/rivonia.html>, 1964.

Cherie Booth, the wife of Prime Minister Tony Blair, that 'in view of the illegal occupation of Palestinian land I can well understand how decent Palestinians become terrorists.'[226] What if Saddam Hussein were still in power and called upon the British government to take action against any surviving 'terrorists' of Dujail who, in 1982, had attempted to assassinate him (reprisals against whom resulted in his execution in 2006)? Plots against the Libyan regime were possibly encouraged years ago,[227] but now there is rapprochement. Conversely, plots against Syria are openly tolerated.[228] The extension of jurisdiction leads to a slippery slope of judgments which take sides in foreign disputes and sometimes in favour of despots.

The second qualification is that the policy of closing down channels of discourse may be counter-productive in political terms. Surely, the Northern Ireland experience illustrates the folly of freezing out political fronts. Whilst much of what violent groups have to say is unpalatable or even reprehensible, their views must be debated so that the extremists, government, and public can be educated and respond with intelligence,[229] rather than receiving only the hateful bulletins of 'martyrs' such as the July 2005 suicide bomber, Mohammed Siddique Khan.[230] In line with these concerns, the European Court of Human Rights has been particularly wary of restraints on the speech of politicians.[231] Likewise, even Lord Lowry recognised membership as a 'political offence' in *R v Adams*.[232]

Third, any gains from reducing the tolerance of extreme speech may be overshadowed by resentment of stigmatization and selective repression, which may hinder policing by reducing flows of intelligence.[233] As stated by the House of Commons Home Affairs Committee,[234] rather than the sole pursuit of suppression, 'the Government must engage British Muslims in its anti-terrorist strategy.'

Fourth, the offences in the 2006 Act go beyond what is required by the Council of Europe's Convention on the Prevention of Terrorism of 2005.[235] The militant United Kingdom government views this discrepancy as unproblematic,[236] but the consequent curtailments of rights may later be assessed as excessive in international forums.

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226 Hansard (HL) vol 438, col 844 (2 November 2005), Bob Marshall-Andrews.

227 Allegations were made by David Shayler: <http://cryptome.org/shayler-gaddafi.htm>.

228 See the activities of the 'National Salvation Front': *The Times*, 5 June 2006, 30.

229 Hansard (HL) vol 438, col 326 (26 October 2005), Charles Clarke.

230 <http://news.bbc.co.uk/1/hi/uk/4206800.stm>, 2005.

231 *Castells v Spain*, App No 11798/85, Ser A, vol 236 (1992); *Association Ekin v France,* App No 39288/98, 2001-VIII; *Isak Tepe v Turkey*, App No 17129/02, 21 October 2008.

232 [1987] 5 NIJB (BCC).

233 Choudhury (n 129) 481.

234 'Terrorism and Community Relations' (2005-05 HC 165) para 225.

235 See Joint Committee on Human Rights, 'Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters' (2005-05 HL 75, HC 561) para 41; Joint Committee on Human Rights, 'The Council of Europe Convention on the Prevention of Terrorism' (2006-07 HL 26/HC 247) paras 26–39.

236 Government Response to the Joint Committee on Human Rights, 'Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters' (2005-06 HL 114, HC 888) 7.

As a proviso to this somewhat theoretical debate about proportionality, it should be realised that the United Kingdom gaols are not full of *jihadi* demagogues, though there are certainly some in that category who have fallen foul not only of s 1 but also ss 58, 59, and, above all, solicitation of murder. The evidence from the statistics below is that any impact from the new offences has been largely symbolic, much as predicted and probably as expected in line with the history of proscription.[237] Few prosecutions and convictions have been recorded, though the impression from workers in the field, such as the police and groups such as Quilliam,[238] is that militant speech in public has been toned down since 2006.

Table 2: Terrorism offence convictions in Great Britain[239]

Date of conviction	Membership and support ss 11, 12, 13 TA 2000	Possessing materials s 57 TA 2000	Possessing information s 58 TA 2000	Inciting overseas s 59 TA 2000	Incitement ss 1, 2 TA 2006	Offences under ss 5, 6, 8 TA 2006	Total
2001/2	5	2	0	0	–	–	**7**
2002/3	3	24	2	0	–	–	**29**
2003/4	7	17	0	1	–	–	**25**
2004/5	4	1	2	0	–	–	**7**
2005/6	3	7	3	3	–	–	**16**
2006/7	7	16	5	1	0	13	**42**
2007/8	2	7	4	5	2	2	**22**
2008/9	1	1	3	0	2	10	**17**
2009/10	0	0	3	0	2	7	**12**
2010/11	0	0	1	0	0	9	**10**
2011/12	0	0	12	0	0	12	**24**
2012/13	0	1	9	0	0	14	**24**
Total	**32**	**76**	**44**	**10**	**6**	**67**	**235**

Aside from the alternative more specific criminal offences mentioned earlier, other approaches might be considered to see if they would be 'smarter' than the Terrorism Act 2006 approach. For instance, a classical US constitutional response might be to argue for more speech not less, and to overwhelm militant speech with more persuasive non-militant speech. Surely, the values of peace and democracy are more appealing than

[237] Compare Parker (n 197) 712.

[238] Source: interviews with the author during 2009 and 2010. Quilliam is a counter-extremism think tank which mainly concentrates on *jihadi* extremism and is partly funded by the government: <http://www.quilliamfoundation.org/>.

[239] Source: Home Office.

what one United Kingdom government minister, Liam Fox, recently referred to (in connection with Afghanistan) as the conditions of 'a broken thirteenth century state'.[240] A fine example of this approach is that some jurisdictions have indeed sought to challenge extremist speech with more speech, especially on the internet where the chances of actually closing down communications are dim because of the transborder nature of internet servers. For instance, the Saudi Ministry of Islamic Affairs runs the 'Campaign Assakina (or Al-Sakinah)' which focuses on the correct understanding of Islamic doctrines about violence.[241] Yet, at the same time, there is also a very robust and at times abusive criminal justice and security campaign against *jihadis* in Saudi Arabia,[242] while the impact of Campaign Assakina is untested. It might be thought to be problematic for western governments to intervene effectively in debates about Islamic religious doctrine, and the very process of backing selected independent Islamic scholars to speak on behalf of the state may obviously compromise their independence. Nevertheless, the United Kingdom government has dallied with this idea by funding activities such as the 'Preventing Extremism Together' (PET) Scholars' Roadshows, which involve the promotion of religious scholars who can offer alternatives to extremist doctrines.[243] In addition, the Department for Communities and Local Government has floated the idea of a board of academics and scholars based in the Universities of Oxford and Cambridge to ensure that any false ideology is corrected.[244]

Another model for responding to militant speech (and militant deeds) arises from the array of governmental responses to animal rights extremism, primarily directed at corporate targets.[245] Environmental, anti-war, and anti-globalisation groups have sometimes adopted similar tactics. Whilst activists have not faced proscription, the armoury of responses includes the application of 'normal' laws and some new laws.[246]

The array of 'normal' laws includes the mundane use of common law powers relating to breach of the peace,[247] the Public Order Act 1986, the Malicious Communications Act 1988, and, above all, the Protection from Harassment Act 1997.[248] Conspiracy to

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[240] *The Times*, 22 May 2010, 34.

[241] <http://en.assikina.com>.

[242] See <http://www.amnesty.org/en/region/saudi-arabia/report-2009>. Reconciliation and 'deradicalisation' do form a part of that campaign (the 'Munasaha Programme'): see T Bjørgo and J Horgan (eds), *Leaving Terrorism Behind* (Routledge 2009) chs 10, 13.

[243] Home Office, 'Countering International Terrorism' (Cm.6888, London, 2006) para 58.

[244] Department for Communities and Local Government, 'Preventing Violent Extremism: Next Steps For Communities' (London, 2008) para 65.

[245] Individuals such as farmers may also be victims, as with the stealing of the body of G Hammond: '*R v Ablewhite and others*', *The Times,* 12 May 2006, 37.

[246] See Home Office, *Animal Rights Extremism* (2001); Home Office, *Animal Welfare – Human Rights* (2004).

[247] The concept of breach of the peace in this context was upheld in *Steel and Others v the United Kingdom*, App No 24838/94, 1998-VII.

[248] See: *Silverton v Gravett,* [2001] All ER (D) 282 (Oct); *Daiichi UK Ltd v Stop Huntingdon Animal Cruelty,* [2003] EWHC 2337 (QB); *Emerson Developments Ltd v Avery,* [2004] EWHC 194 (QB); *Chiron Corporation Ltd v Avery,* [2004] EWHC 493 (QB); *Huntingdon Life Sciences Group v Stop Huntingdon Animal Cruelty,* [2004] EWHC 1231 (QB), [2004] EWHC 3145 (QB), [2005] EWHC 2233 (QB), [2007]

blackmail has been sustained against Greg Avery and others in relation to their campaigns against Huntingdon Life Sciences.[249] Beyond the criminal law are anti-social behaviour orders under the Crime and Disorder Act 1998, s 1, or exclusion orders under s 46 of the Criminal Justice and Courts Services Act 2000. An indefinite ASBO, forbidding the organising of any demonstration about animal experimentation or any contact with Huntingdon Life Sciences or linked persons or companies, was imposed on Avery and others, alongside a nine year prison sentence for blackmail since no remorse had been shown and future preventative measures were justified. Within the province of civil law, affected companies, traders, and farmers have also resorted to private injunctions.

Amongst the more specialist laws are ss 68 and 69 of the Criminal Justice and Public Order Act 1994 which establishes the concept of aggravated trespass.[250] By s 42 of the Criminal Justice and Police Act 2001, the police are given broad powers to direct protestors away from the residence of another where it is reasonably believed that the presence of the protestors amounts to harassment or is likely to cause alarm or distress.

The Serious Organised Crime and Police Act 2005 adds offences involving interference with contractual relationships so as to harm animal research organisations (s 145) and the intimidation of persons concerned with animal research organisations (s 146). The latter are very broadly constituted in that they can be committed via the infliction or threat of an act amounting to any criminal offence or any tortious act causing loss or damage of any description.[251] In *R v Harris*,[252] the defendant pleaded guilty to three offences under s 145, involving criminal damage amounting to £29,000, such as by slashing vehicle tyres and gluing locks of companies which had traded with Huntingdon Life Sciences but were intimidated to desist. Concurrent sentences of two years' imprisonment were imposed. A similar level of offending under s 145 was dealt with in the *Attorney General's Reference (No 113 of 2007)*.[253] The offender pleaded guilty to six counts of blackmail, one count of attempted blackmail and five counts under s 145. Over a period of five years, she sent threatening messages to employees of a bank who provided financial services to Huntingdon Life Sciences, to a veterinary surgeon who provided services to a family which bred guinea-pigs for medical research, to the owner of a

EWHC 522 (QB); *Hall v Save Newchurch Guinea Pigs (Campaign),* [2005] EWHC 372 (QB); *Green v DB Group Services (UK) Ltd,* [2006] EWHC 1898 (QB); *Oxford University v Webb,* [2006] EWHC 2490 (QB); *Chancellor, Masters and Scholars of the University of Oxford v Broughton,* [2006] EWCA Civ 1305, [2006] EWHC 2490 (QB), [2008] EWHC 75 (QB); *SmithKline Beecham plc v Avery,* [2007] EWHC 948 (QB), [2009] EWHC 1488(HC); *AGC Chemicals v Stop Huntingdon Animal Cruelty,* [2010] EWHC 3674 (QB); *DHL Services Ltd v Stop Huntingdon Animal Cruelty,* [2010] EWHC 1995 (QB); *Astellas Pharma Ltd v Stop Huntingdon Animal Cruelty,* [2011] EWCA Civ 752; *UPS Limited v Stop Huntingdon Animal Cruelty,* [2011] EWHC 3199 (QB); *Eli Lilly & Company Limited v Stop Huntingdon Animal Cruelty,* [2011] EWHC 3527 (QB); *Harlan Laboratories UK Ltd v Stop Huntingdon Animal Cruelty,* [2012] EWHC 3408 (QB).

[249] [2009] EWCA Crim 2670.

[250] See T Bucke and Z James, *Trespass and Protest* (Home Office Research Study 190 1998).

[251] See the criticisms as to necessity and certainty of the Joint Committee on Human Rights, 'Scrutiny: Seventh Progress Report' (2004-05 HL 97/HC 496) paras 2.3–2.7.

[252] [2006] EWCA Crim 3303.

[253] [2008] EWCA Crim 22.

company which carried out maintenance work for an organisation involved in animal research, and to another company. Some of the threats were by letters which contained white powder, and one recipient was taken to hospital for decontamination. The offender, who had acted alone, had been sentenced to eight months' imprisonment, which was viewed by the Court of Appeal as unduly lenient. The Court considered that the starting point was six years. Aggravating factors were that she conducted a sustained campaign, that she gave the impression of acting on behalf of an organised and dangerous group, and that she sent unidentified powder (akin to anthrax). Two years' imprisonment was substituted.

Corporate law has also been amended. The Criminal Justice and Police Act 2001, s 45, allows for 'confidentiality orders' to be issued by the Secretary of State (for Trade and Industry) relating to the addresses of company officers on grounds of serious risk of violence and intimidation. Next, following the sending of letters to shareholders of GlaxoSmithKline in 2006, asking them to ensure disinvestment from Huntingdon Life Sciences, the company obtained an injunction against 'persons unknown'.[254] The government then moved to restrict access to shareholder identities. So, by the Companies Act 2006, s 116(3), any request for shareholder information must be accompanied by an explanation of purpose. If the company declines to grant the request, it may apply for court review. Next, by s 240, persons becoming directors can have their home addresses kept on a separate list to which access will be restricted without proof of serious risk.[255] Third, information about persons with whom the company has business arrangements can be withheld under s 417 so as to avoid, in the opinion of the directors, serious prejudice.

This mixture of criminal law and civil law responses against animal welfare extremists raises the question of whether a more subtle range of measures than under the Terrorism Act 2006 could be used against the practitioners of militant speech in favour of terrorism. The avoidance of proscription and offences based on speech content may also make it a more appealing and constitutionally palatable model for other militant democracies, such as the US. Indeed, there is evidence of such an approach already being followed in that jurisdiction. Thus, the Animal Enterprise Protection Act of 1992 and Animal Enterprise Terrorism Act of 2006 have promulgated in the US an offence of causing disruption or damage to an animal enterprise, with enhanced penalties based on the level of economic damage and restitution orders, but subject to a saving for expressive conduct.[256] This offence was upheld as constitutional in the 'SHAC-7' case of *United States v Fullmer*[257] because of either the imminence of electronic attacks on the enterprises or the 'true threat' against individual officers. The confinement to animal enterprises has

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254 *The Times,* 10 May 2006, 44. See *Pelling v Families Need Fathers Ltd* [2001] EWCA Civ 1280.

255 See further Companies (Disclosure of Address) Regulations 2009, SI 2009/214.

256 PL102-346, 109-374; 18 USC s 43. See JS Goodman, 'Shielding Corporate Interests from Public Dissent' (2008) 16 *Journal of Law & Policy* 823.

257 584 F3d 132 (2009); <http://www.shac7>.

meant that more general offences, such as conspiracy to damage, must be raised against 'eco-terrorism'.[258] Civil injunctions have also been used by Huntingdon Life Sciences and related enterprises against the American branches of their opponents.[259]

Another reason for emulation is the prospect of an impact which is more than symbolic. The Association of the British Pharmaceutical Industry (ABPI) reports a substantial decline in attacks and intimidation by animal extremists in the United Kingdom since the peak years of 2003 and 2004.[260] The ABPI contends that civil injunctions and anti-harassment legislation have secured this impact, though its conclusion also relies upon the further factor of improved local policing (bolstered by extra central funding).[261] A full assessment would also point to national policing improvements. The National Extremism Tactical Coordination Unit (NETCU)[262] provides tactical advice to businesses. The National Public Order Intelligence Unit[263] gathers and collates intelligence for policing purposes, while the National Domestic Extremism Team[264] helps with investigations. All are headed by the National Coordinator for Domestic Extremism (within the NETCU) who reports to the Association of Chief Police Officer's Terrorism and Allied Matters Committee.[265] However, despite all these changes, the most targeted company, Huntingdon Life Sciences, still complains that 'insufficient consideration was given to counter-terrorism powers in what was widely considered in practice (but not in name) to be domestic terrorism.'[266]

Can this record of relative success be replicated using the same techniques against militant speech about terrorism? Arguably, it is easier to fashion and apply more limited responses to animal extremists. Their techniques are less dangerous since they more often than not target property not persons, and they appear to have clear fixations (above all, Huntingdon Life Sciences) which make the work of law enforcement much more predictable. Furthermore, their targets are primarily in the private sector rather than the public sector or the public itself. This difference inevitably has the effect of reducing the interest in symbolic condemnation through criminal justice. Nevertheless, the panoply of

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[258] See *United States v McDavid,* [2008] US Dist LEXIS 25591; W Potter, 'The Relationship Between National Security and Other Fundamental Values' (2009) 33 *Vermont Law Review* 671; <http://www.greenisthenewred.com>.

[259] See *Huntingdon Life Sciences v Rokke,* 986 F Supp 982 (1997); *Huntingdon Life Sciences v Stop Huntingdon Animal Cruelty USA* 129 Cal App 4th 1228 (2005); *City of Los Angeles v Animal Defense League* 135 Cal App 4th 606 (2006); *SmithKline Beecham v Stop Huntingdon Animal Cruelty USA,* 959 A.2d 352 (2008).

[260] <http://www.abpi.org.uk>. But there remained 70 instances of damage (146 in 2003; 177 in 2004) and 10 'home visits' (compared to 259 and 179).

[261] See Joint Committee on Human Rights, *Demonstrating respect for rights?* (2008-09 HL 141/HC 522) Memorandum submitted by the Association of the British Pharmaceutical Industry.

[262] <http://www.netcu.org.uk>.

[263] <http://www.acpo.police.uk/NCDE/NPOIU.aspx>. See Hansard (HC) vol 449, col 339w (10 November 2009).

[264] <http://www.acpo.police.uk/NCDE/NDET.aspx>.

[265] <http://www.acpo.police.uk/ncde/>.

[266] ibid Memorandum submitted by Huntingdon Life Sciences.

refined offences plus civil law restraint is worthy of further consideration in the terrorism field. Civil law is playing an increasing role against terrorism as a way of empowering victims,[267] and perhaps the state should see it as a weapon for shaping behaviour which might encourage terrorism beyond just the financial arena.

Conclusions

The anti-terrorism legislation reflects long-standing notions of 'militant democracy' in which a state based on legitimate foundations should be ready and willing to confront opponents who abuse its tolerance. However, even when this stance of state militancy is legitimate, consideration should be given as to whether, on a rights audit, less intrusive measures than associational or speech crimes would better distinguish the legitimacy of extreme speech which, for example, seeks the overthrow of the existing constitutional order and the illegitimate propagation of violence as the means to achieve it. The expanded basis for proscription and the added offences in the Terrorism Act 2006 and most aspects of its application can probably be justified in terms of the relativist rights discourse of the European Convention. At the same time, the breadth of the definition of terrorism, including its extra-territorial application, compounds the dangerous latitude of these measures. These criticisms do not imply that extreme speech and associations should be tolerated, but they do emphasise that the main retort in a liberal democracy must be engagement. The 'Prevent' strategies of CONTEST have latterly opened a new front which commendably seeks dialogue, and there may also be value in turning to civil law responses, as is often the inclination with animal extremists, instead of the blunter criminal law. Nevertheless, recent developments do firmly confirm that the tolerance of militant speech is on the wane, and that risk and offense aversion are driving new legislation. That trend is occurring within the United Kingdom, but it is also a regional and international movement, as represented by the United Nations Security Council Resolution 1624 and the reformulation of the EU Framework Decision on Combating Terrorism. As far as the United Kingdom state is concerned, there is some evidence from the modest statistics on enforcement to suggest that it is not just militant but smartly militant and appreciates that the prime message being conveyed is symbolic. However, the dangers remain both that chance events and provocations will prompt precipitate action against expressive and associational rights within the United Kingdom (as with Islam 4 UK) and that the United Kingdom will further foist its favoured mechanisms onto other countries which have far less capacity for accountability or tradition of respect for individual rights.

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[267] See *Murphy and Daly v Lord Chancellor and Northern Ireland Legal Services Commission,* [2007] NIQB 46; DM Strauss, 'Reaching out to the international community: Civil lawsuits as the common ground in the battle against terrorism' (2009) 19 *Duke Journal of Comparative & International Law* 307.

Bernát Török

Can religions or religious people be protected against blasphemy? Comments on the case law of the European Court of Human Rights

Introduction

Exploring the various issues relating to freedom of expression one inevitably goes beyond the immediate subject matter and fine details of the life of society are revealed. In our context, this means that inquiries into freedom of expression cast light upon the status, quality and features of our democracy. Western civilization has long been devoted to free speech, recognising that freedom of thought and opinion is indispensable to the freedom of the individual—which, in turn, is indispensable to the prosperity of the community. This feature of freedom of expression also means that the processes and events in the development of society often enter into the realm of fundamental rights through discourses relating to free speech. Freedom of expression and Western civilization are thus in a somewhat intertwining and intimate relationship, and inquiries into the limits on free speech lead us to define and re-define, time and time again, our fundamental thoughts on ourselves as a society and as a democratic community. It is no wonder that sensitive issues have the most to teach us during our common discourse, as they reveal the fundamental considerations underpinning our arguments. The issue of blasphemy and of the relationship between blasphemy, on the one hand, and the law and state power, on the other hand, is one of these sensitive areas. Do religions and/or religious people need protection against blasphemy and the defamation of religions—and if so, to what extent? Can free speech be limited in any special way on the basis of the need to respect the religious convictions of others?

This paper seeks to consider the question of whether religions and/or religious people can be protected against blasphemy (not including all aspects of the issue of blasphemy). The case law of the European Court of Human Rights (ECtHR) provides abundant materials in this context, so the observations on the subject matter are presented in this paper as reflections on the arguments raised before the ECtHR. Though only a handful of ECtHR rulings apply to such issues—and one would be hard pressed to find judgments on this field from the last five or six years—earlier decisions of the ECtHR are highly informative. This paper is not limited to the description of the case law of the ECtHR, but—having regard to the European context—also seeks to take account of the more general aspects of the subject matter, and makes an attempt to outline a possible solution. Critical observations on the arguments of the ECtHR are also related to some exciting

analyses presented in the international professional literature.[1] Despite their varying emphases, it is common for such analyses to attack the Strasbourg case law—that accepts the prohibition of blasphemy—as incorrect, or even outright wrong. Not even the most lenient of these opinions moves beyond regarding the efforts of the ECtHR with a certain degree of understanding.

It will be argued in this paper that, despite any and all justified criticism, there is space left to find an answer to the social questions—correctly sensed by the ECtHR—that is fully consistent with the democratic understanding of freedom of expression. Primarily, attention will be drawn to the distinction between the possible legal grounds for, and the proportionality of, the limitation of free speech. On the one hand, arguments for justifying the legal basis of the limitation need to be examined as an independent issue, while, on the other hand, the proportionality of the regulations and of official practices remains a decisive factor, even if there is a justified legal basis for limitation. In the context of criticising the case law of the ECtHR, this distinction leads to different conclusions, thereby providing a fine general example of the importance of the proportionality test with regard to fundamental rights.

Case law of the ECtHR

Otto-Preminger-Institut v Austria

The first substantial judgment was delivered in the *Otto-Preminger-Institut v Austria* case,[2] and the arguments presented by the ECtHR in the judgment also defined its subsequent case law. The applicant association opposed the seizure and forfeiture of the film *Das Liebeskonzil* (The Council of Love). The Austrian authorities took action against the film being shown because, in their opinion, the content of the film fell within the definition of disparaging religious precepts. The film—based on a stage-play written in 1894—portrayed God, Jesus, the Virgin Mary, and the Devil—with whom the former are in a friendly relationship—agreeing to punish mankind for its immorality by unleashing a sexually transmitted disease (syphilis). Also, God is portrayed as an apparently senile old man, Jesus Christ as a low grade mental defective, and the Virgin Mary is shown as being in erotic tension with the Devil. The association noted that it had planned to show the film in its cinema, which was accessible to persons above the age of 17 only after a fee had been paid; it was also noted that its public consisted on the whole of persons with an interest in progressive culture.

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[1] The arguments presented in the following papers are particularly taken into consideration: RC Post, 'Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment' (1988) *California Law Review* 3; E Barendt, *Freedom of Speech* (OUP 2005); J Temperman, 'Blasphemy, Defamation of Religions and Human Rights Law' (2008) 26 *Netherlands Quarterly of Human Rights* 4, 517–46; A Dacey, *The Future of Blasphemy* (Continuum 2012); H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (OUP 2006) 488–500.

[2] *Otto-Preminger-Institut v Austria*, No 13470/87, judgment of 20 September 1994.

According to the judgment of the ECtHR the Austrian authorities did not violate the freedom of expression provided for under Article 10 of the Convention.[3] In its justification, the ECtHR elaborated in detail the considerations that became decisive factors in its subsequent case-law and that are also of key importance for the issue discussed herein. The judgment examines separately (1) whether the interference by the authorities with freedom of expression had a legitimate aim, and (2) whether it was necessary to achieve that aim in a democratic society. The separate consideration of these two questions is necessitated by the structure of the test applied and is also necessary because the arguments applied by the ECtHR on both issues give rise to further questions and critical observations.

Ad (1) In establishing the *aim* of the measures taken by the Austrian authorities, the ECtHR started from the frequently quoted understanding of freedom of expression, according to which this freedom constitutes one of the essential foundations of a democratic society and is applicable not only to ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that shock, offend or disturb the state or any sector of the population. However, Article 10 Paragraph 2 of the Convention specifies the legal grounds that can justify the limitation of free speech. The ECtHR—accepting the arguments submitted by Austria—made it clear that the measures being challenged were deemed justifiable for the protection of the 'rights of others'. According to the ruling, the freedom of expression of those wishing to show the film conflicted with the rights of others provided for under Article 9 of the Convention. Under Article 9, everyone has the right to freedom of thought, conscience and religion, and this right includes the freedom to change his or her religion or belief and the freedom, either alone or in community with others and in public or private, to manifest his or her religion or belief through worship, teaching, practice and observance. Accordingly, the ECtHR started its reasoning with reference to the judgment delivered in the case of *Kokkinakis v Greece*[4] which provided a comprehensive interpretation of Article 9 and which was also the first judgment to find a violation of freedom of religion. According to the judgment, freedom of thought, conscience and religion is one of the foundations of a democratic society and it is one of the most vital elements that go to make up the identity of believers and their concept of life. While religious persons are expected to tolerate criticism of their religious beliefs and the hostile doctrines of others, the ECtHR held that the manner in which religious beliefs are opposed or denied is a matter which may engage the state's responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9. In extreme cases, the effects of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them. The reasoning made it clear that the respect for the religious feelings of believers is a requirement that forms

[3] Note that the European Commission of Human Rights was the first to consider the matter and it also held that Article 10 of the Convention was violated.

[4] *Kokkinakis v Greece*, No 14307/88, judgment of 25 May 1993.

part of the right guaranteed under Article 9 of the Convention. In the context of religious beliefs, the responsibility of exercising freedom of expression includes an obligation to avoid expressions that are gratuitously offensive to others and which do not contribute to any form of public debate. In other words, the ECtHR held that a right of citizens not to be insulted in their religious feelings by the publicly stated opinions of others could be deduced from the provisions of Article 9 of the Convention. Since the actions of the Austrian authorities sought to ensure this right, the court accepted that the disputed measures pursued a legitimate aim and were, therefore, in conformity with the Convention.

Ad (2) In the course of considering whether the interference by the Austrian authorities was *necessary* in a democratic society, the ECtHR emphasised that—similarly to moral issues and to a definition of public morals—it is not possible to discern a uniform concept of the significance of religion in society throughout Europe and that such conceptions may vary even within a single country. For this reason, it is not possible to arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression, where such expression is directed against the religious feelings of others. A certain 'margin of appreciation' is therefore left to the national authorities in assessing whether and to what extent interference is necessary. Accordingly, the ECtHR emphasised in this case that it had balanced the conflicting rights—the right to impart controversial views to the public, on the one hand, and the right of other persons to appropriate respect for their freedom of religion, on the other hand—with due regard to the margin of appreciation of the Austrian authorities. The judgment accepted the arguments submitted by Austria, according to which there was a pressing social need for the preservation of religious peace in the region and for preventing some people from feeling under attack for their religious beliefs, especially because the Roman Catholic religion is the religion of the overwhelming majority (eighty-seven percent) of the population in Tyrol, the planned location for the showing of the film. The ECtHR also noted in its judgment that the margin of appreciation of the Austrian authorities included the possibility of forfeiture, thereby making it permanently impossible to show the film anywhere in Austria, so this measure was also deemed proportionate.

Wingrove v United Kingdom

In the case of *Wingrove v United Kingdom*, the real question was whether the ECtHR would confirm the arguments it had presented in *Otto-Preminger-Institut*, which were fundamentally challenged by Mr Wingrove. The applicant, a film director, complained that the British authorities had prevented the distribution of his short video work entitled *Visions of Ecstasy*. To be more specific, the British Board of Film Classification rejected the application for a classification certificate for the film, which was required for the distribution of the film, because its content would fall under the definition of blasphemy under criminal law. The approximately eighteen minute film shows the erotic fantasies

of St Teresa of Avila, including images of St Teresa hugging and kissing the crucified Christ. The authority made it clear in its decision that it would not interfere with the expression of opinions criticising or hostile to the Christian religion, but the method of expressing such views might justify the rejection of applications for a classification certificate. Two arguments made by Mr Wingrove in his application to the ECtHR are of great importance to the purpose of this paper. First, in the context of whether the interference served a legitimate aim, he vehemently contested that the expression 'rights of others' serving as grounds for limiting his freedom of expression, would include the right of citizens not to be offended by the thoughts of others. Second, in the context of whether the interference was necessary, Mr Wingrove submitted that the authorities had had the opportunity to set special requirements for the distribution of the film: it could have been restricted to licensed sex shops and the description of its content could have been provided on the packaging of the film. For these reasons, prevention of the distribution of the film was a disproportionate measure.

The ECtHR did not find the interference by the British authorities to be in violation of the Convention,[5] and essentially upheld all the main points of the arguments presented in *Otto-Preminger-Institut*.[6] First, the ECtHR explained again that, under Article 9 of the Convention, freedom of expression may be limited with regard to the protection of the 'rights of others' (Article 10.2 of the Convention), to protect religious persons against the treatment of religious subjects in a certain manner, ie against verbal attacks against holy subjects. As for the necessity of state interference, the ECtHR referred to the lack of European consent again, emphasising that there is not sufficient common ground in the legal and social orders of the member States of the Council of Europe to object to rights restricting the propagation of blasphemous materials. The 'margin of appreciation' of the states in such cases is wider than in cases of restricting political speech or debate of questions of public interest. As such, the ECtHR—respecting the margin of appreciation of British authorities—did not question the social need for the measures applied or the proportionality of imposing full 'prohibition' on the distribution of the film. The other options for restriction, as mentioned by the applicant, did not guarantee beyond any doubt that the film would not be presented to a wider audience in any form; hence the refusal of all forms of distribution was a logical consequence of the position of the British authorities.

Murphy v Ireland

The judgment in *Murphy v Ireland*[7] can be placed into the same category as the cases discussed above with certain reservations only, as it is significantly different from the

[5] *Wingrove v United Kingdom*, No 17419/90, judgment of 25 November 1996.

[6] *Wingrove* is also similar to *Otto-Preminger-Institut* in that the European Commission of Human Rights found the violation of Article 10 of the Convention in both cases.

[7] *Murphy v Ireland*, No 44179/98, judgment of 10 July 2003.

expressions discussed in the above-mentioned cases in terms of the content and genre of the restricted speech, as well as the circumstances of the publication. However, certain points of the reasoning provided by the ECtHR in this case highlight details that are definitely relevant to the subject matter of this paper. Mr Murphy, a pastor attached to the Irish Faith Centre (a Christian organisation in Dublin), submitted an advertisement to an independent, local and commercial radio station for transmission, including the following text: 'What think ye of Christ? Would you, like Peter, only say that he is the son of the living God? Have you ever exposed yourself to the historical facts about Christ?' The Irish media authority stopped the broadcast of the advertisement, pursuant to the statutory prohibition on advertising.

First, the ECtHR made it clear that it regarded the case as one that raises questions in relation to freedom of speech, rather than freedom of religion, so it considered the restriction with regard to Article 10 of the Convention. The applicant did not contest that the interference pursued a legitimate aim, so the ECtHR accepted the arguments submitted by Ireland stating that the aims of the disputed provision were public order and safety together with the protection of the rights and freedoms of others. As for the necessity of the prohibition, the starting point of the ECtHR was essentially the same as the argument already elaborated in the previous cases: while freedom of expression includes the freedom to express views that may shock, offend or disturb others,—possibly due to their religious sensitivity—states have a wider margin of appreciation regarding the necessity of restricting expressions attacking religious beliefs. For this reason, the ECtHR accepted the arguments submitted by the government—instead of those of the applicant claiming that the advertisement was innocuous and completely inoffensive—stating that the propagandising nature of the advertisement might be offensive to adherents of other religious beliefs, due to the unusual sensitivity to religious issues in contemporary Irish society. In this respect, the reasoning of the judgment quotes in detail the arguments of the Irish authorities as to why Irish society was unusually sensitive to the treatment of religious matters under the particular historical and sociological circumstances. The ECtHR also took into consideration that the official measure applied to advertisements in electronic media, where special restrictive measures were also justifiable.

IA v Turkey

The ruling in *IA v Turkey*[8] also shows that the arguments used in the *Otto-Preminger* judgment are to become part of the consistent case law of the ECtHR. The applicant was the proprietor and managing director of a publishing house that published a book conveying the author's views on philosophical and theological issues in a novelistic style. The Turkish authorities launched a criminal proceeding against the applicant and ordered him to pay a fine for blasphemy, noting that the published book offended and

[8] *IA v Turkey*, No 42571/98, judgment of 13 September 2005.

ridiculed the religion of Islam and portrayed its followers as people who have been brainwashed by fanciful stories and are trying to improve their pathetic lives with primitive ideas. The book also included references to the sex life of Mohammed.

The ECtHR consistently repeated its understandings already elaborated in previous decisions, and concluded that, notwithstanding the fact that there is a certain tolerance of criticism of religious doctrine within Turkish society (which is deeply attached to the principle of secularism), believers may legitimately feel themselves to be the object of unwarranted and offensive attacks in certain passages of the book. The ECtHR confirmed that the state is entitled to provide protection against such insults. According to the judgment, Turkey did not overstep its margin of appreciation and—with regard to the sanctions applied—the action taken against the blasphemous expressions was proportionate.

Giniewski v France

In the last two cases discussed here—unlike in the previous cases—the ECtHR held that the state violated the provisions on the freedom of expression. In the case of *Giniewski v France*, a historian-journalist complained because he was ordered by a civil court to publish an announcement and to pay a symbolic fine because of an article he published in a national newspaper. The article criticised the Catholic Church on the basis of a papal encyclical, claiming that the dogma of papal infallibility and the presentation of the Old Testament and of the Jews on the basis of the New Testament contributed to the tragedy of the Holocaust to a significant extent. The French courts held that the author harmed the reputation of others—ie of Catholic believers.

Before the ECtHR, the French Government stated that the actions taken by the authorities were in full conformity with the relevant case law of the ECtHR: the ruling against the journalist served the rights of others—ie followers of the Catholic religion—and the authorities enjoyed a wider margin of appreciation in the context of restricting freedom of expression as the case raised issues in relation to the respect of religious beliefs. However, the ECtHR found other circumstances to be of decisive importance in the case.[9] The court held that the applicant contributed to a recurrent and important debate in society, so that the States' margin of appreciation was limited in cases concerning freedom of expression with regard to political speech, and that the article did not present any idea that could be taken as an attack against a religious belief. Obviously, the piece criticised papal teachings and the position of the Pope, which might be found offensive by some Catholics, but the criticism by the author was not directed against the Christian religion, was not gratuitously offensive, and did not incite disrespect or hatred. For the above reasons, the ECtHR found that state interference—even such a negligible sanction—was unnecessary.

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[9] *Giniewski v France*, No 64016/00, judgment of 31 January 2006.

Klein v Slovakia

An essentially similar decision was reached in the case of *Klein v Slovakia*.[10] Martin Klein, a journalist and film critic, wrote an article that appeared in a weekly newspaper, wherein he criticised (using vulgar language) the Archbishop of the Slovak Catholic Church, who had made a strongly-worded protest in a television show against the 'licensing' of a film and the poster promoting that film, because they were offensive to Christians. In his response, the applicant expressed his opinion that, with it headed by such a person, decent Catholics should leave their church. The author of the article was found guilty by criminal courts of denigrating the religious faith of members of a community.

In addition to the arguments raised in the above-mentioned cases, Slovakia also argued before the ECtHR that the defamation of the highest representative of the Roman Catholic Church in Slovakia also offended Catholics, the opinion of whom was represented by the Archbishop in the case. With regard to the necessity of state interference, Slovakia also noted that the overwhelming majority of the Slovak population followed the Catholic religion. However, the ECtHR distinguished the circumstances of this case from the above decisions and explained that not even such harsh criticism of the Archbishop participating in a public debate can be regarded as a general insult against the Catholic religion or Catholics, though it may be considered offensive by some people. In its reasoning, the court pointed out that the article of the applicant was published in a weekly journal aimed at a more highbrow readership and that, by publishing the article, the applicant did not interfere with the right of others to freedom of religion and did not defame the Christian religion. For these reasons, the court held the state interference to be unjustified.

The role of the ECtHR case law

The cases and the arguments collected from the case law of the ECtHR offer an excellent basis for taking stock of the major aspects of approaching the issue of blasphemy from a legal point of view. First, the subject of our inquiry needs to be defined from two major angles. On the one hand, our interest concerns the legal treatment of blasphemous and defamatory expressions, the possibility of state interference, and the extent of such interference, but—as has been frequently misunderstood in the sensitive context of free speech, however obvious it may be—it does not consider the moral or cultural dimension of such expressions. The range of acts that can be restricted by the state is far from being the same as the range of acts that can be condemned by moral judgments: as a general truth, this applies especially in the context of freedom of expression. The fact that a legal norm that can be enforced by the state cannot be established does not mean that there is

[10] *Klein v Slovakia*, No 72208/01, judgment of 31 October 2006.

no other—for example moral—clear expectation in the society as to the behaviour to be followed. On the other hand, this paper does not consider the problem of inciting hatred against religious groups or even their defamation. The above-mentioned case law of the ECtHR does not cover such issues either; the expressions discussed in the above cases did not raise the problem of hate speech and thus they constitute other, less offensive forms of expression. This is the very subject of the dispute concerning the above decisions—while there is a general agreement on the need to take action against the incitement of hatred, and arguments both for and against taking action against defamation are presented regularly, there seems to be a general agreement among analysts regarding the issue of what should be done, if anything, with regard to expressions that do not reach the threshold of the previous categories. Religious people are to be protected (against incitement, certainly)—the question is whether the level of protection allowed by the ECtHR is an appropriate level of protection.

The facts of the cases and the arguments of the decisions of the ECtHR are examined along three lines: the acceptable legal grounds for state action against blasphemy, the object of the protection, and the extent of acceptable interference. Before analysing the substantive arguments of the ECtHR, it is important to note—as a 'zero' step—the frequently used argument that, in the absence of general consensus in Europe, governments enjoy a wider margin of appreciation in the context of blasphemous expressions.[11] This argument means that the arguments of the ECtHR are rather relative in our context: the case law of the ECtHR does not indicate one correct course to follow but, on the contrary, grants a wide set of options to governments. States may decide freely whether to introduce any restriction, and if they do, they also enjoy wide freedom regarding the proportionality of the interference. In effect, the ECtHR gives the floor to unique national characteristics, so all stakeholders—including government authorities and professional participants in the debate—remain responsible for defending their arguments on the basis of their respective national constitutional considerations. Of course, this task is common in relation to the case law of the ECtHR; but the situation is rather different from cases where the ECtHR stands for a clear and determined position on a given matter and this position is to be met by the minimum guarantees provided for under the case law of the national constitutional court.[12] The issue of blasphemy is different. The arguments of the ECtHR are important because they offer the means and a basis for articulating competing solutions that can be supported by constitutional arguments, and not because they indicate a legal position that must be met under the respective national circumstances. For the above reasons, this paper will, at some points, go beyond the criteria considered by the ECtHR to include references to Hungarian constitutional considerations.

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[11] I note here that the case law of the ECtHR gives an answer to charges that challenge the protection of human rights in Europe on the basis of consequently ignoring special national and local characteristics and that, in the heat of the debate, even question the mere justification for the existence of international protective mechanisms.

[12] Decision No 61/2011 (VII. 13.) of the Hungarian Constitutional Court, reasoning, V.2.2.; confirmed by eg Decision No 22/2013 (VII. 19.) of the Hungarian Constitutional Court, Reasoning [16].

Is there a legitimate aim in state action against blasphemy?

As for the possibility of state action against blasphemy being a legitimate aim, the rulings of the ECtHR show that the restriction of freedom of expression can be justified by the provisions of the Convention in relation to blasphemous expressions. According to Article 10 Paragraph 2 of the Convention, the exercise of freedom of expression may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary. In the case of *Otto-Preminger-Institut v Austria*, the ECtHR clarified that, among the possible legal grounds mentioned above, it accepts that the restriction of blasphemous expressions may serve the legitimate aim of protecting 'the rights of others'. References to the provisions of Article 10 Paragraph 2 are made in the subsequent decisions accordingly. Before examining whether this interpretation of the ECtHR is justifiable or not, another possible ground for restriction needs to be considered.

Public order

While references are always made to the protection of 'the rights of others' as a formality, the reasoning of the ECtHR also includes significant references to public order: the need to ensure religious peace in Tyrol (where the majority of the population was Catholic) was an important argument in *Otto-Preminger-Institut*, and the logic of the argument in *Murphy v Ireland* was based on the consideration that disrespecting the religion of others involves extraordinary risks in Irish society for historical and sociological reasons. This line of argument is not followed merely by accident: it is a popular argument submitted by the governments concerned. However, such references exceed the issue of protecting the rights of others and are more closely related to the category of social peace and 'public order'. It may be argued that state interference regarding the expressions discussed in these cases may also be justified on the grounds of public order.

However, the possible restriction of free speech on the grounds of public order-related considerations must be excluded,[13] despite the fact that there are significant differences between European regulations and practices as to what degree of violating or jeopardising public order is required for the restriction of freedom of expression to be possible. In the context and cases considered in this paper, it seems clear that such interference with free speech could not be justified by the Convention or even national constitutional requirements. The text of the Convention does not simply mention 'public order',

[13] A clear position on the relationship between blasphemy and public order is presented in A Dacey, *The Future of Blasphemy* (Continuum 2012) 74–81.

but presents a more specific phrase: freedom of expression may be restricted 'for the prevention of disorder'. As for the requirements of national constitutional law, it suffices to refer to the consistent case law of the Constitutional Court, which states that the arguments for restricting freedom of expression are considered with greater weight if the aim of the restriction is to protect and ensure the enjoyment of another fundamental right, while they are considered with lesser weight if such rights are protected only indirectly, through the mediation of an institution, and with the smallest weight if the object of the protection is an abstract value.[14] A practical consequence of this approach is that only the clearly manifested consequences of each expression are to be taken into account whenever considering the possible restriction of the freedom of expression on the grounds of public order. The well-known dispute concerning the meaning of 'clearly manifested' is irrelevant for the purpose of this paper, as the blasphemous expressions scrutinised in the ECtHR's cases do not raise any danger of disorder—or, at least, references to such circumstances are not included in the reasoning of the judgments. It should be noted in this respect that the occurrence or threat of such violations are rather hard to conceive under the circumstances of the disputed expressions. While it cannot be excluded that the showing or distribution of one or more of the works objected to could have caused public outrage that could have led to public protests, it seems certain that such events would not qualify as 'disorder' in terms of violating and endangering the public order. The emergence of heated and vehement debates—even if accompanied by protests—regarding a public issue is part of the normal working of democratic public opinion and does not constitute the violation of public order.

In this respect, the ECtHR correctly believed that the protection of public order may not constitute a legitimate aim of restricting freedom of expression, even if references to public order are made to support its justifications.[15] In the context of free speech, it would have been a grave mistake for the ECtHR to 'sacrifice' the general category of public order with a view to restricting the expressions considered in the above-mentioned cases, by transforming its content so that the examination of the consequences of an expression would no longer be required. The ECtHR chose a much more strict line of argument when it set out its arguments in terms of a right guaranteed under the Convention.

Rights of others

The ECtHR is consistent in that it regards the protection of the 'rights of others' as the legitimate aim of interfering with the respective expressions: the right to freedom of expression of speakers expressing themselves in different media and genres may be in

[14] Decision No 30/1992. (V. 26.) of the Constitutional Court, reasoning, V.1.

[15] This also indicates the transformation of the issue, since the prohibition of blasphemy is rooted in historic times, when even verbally revolting against God amounted, by definition, to attacking the existing social order. See Post (n 1) 306.

conflict with the right of others to their freedom of religion. In other words, the arguments attempt to reconcile the exercise of the rights guaranteed under Articles 9 and 10 of the Convention.

The starting point of the ECtHR is twofold. On the one hand, it is a consistently maintained principle in all the above-mentioned cases that freedom of expression is a fundamental feature of a democratic society, which is applicable not merely to ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but particularly to those that shock, offend or disturb the state or any sector of the population.[16] This is a postulate marking the theoretical limits of interference. On the other hand, similarly noble statements may be made in relation to freedom of religion, as freedom of thought, conscience and religion is one of the foundations of a democratic society and, in its religious dimension, it is one of the most vital elements that go to make up the identity of believers and their view of life. This is the abstract postulate underlying any interference. According to the reasonings to the judgments, the reconciliation of these two postulates means that religious persons are basically expected to tolerate criticism concerning their religious beliefs and the hostile doctrines of others, but particular methods of opposing or denying religious beliefs may lead to the restriction of free speech with a view to safeguarding freedom of religion. This is the theoretical starting point. The success of reconciliation—ie of reaching a solution that guarantees the free exercise of both rights and does not restrict any of the rights to an unjustified extent—depends on whether a framework for interference by the state has been worked out and is in place. The ECtHR offers two tests to examine the justification of state interference, but applies only one of them—which happens to be the more questionable one—in its case law.

Inhibition of the exercise of rights

The first test is mentioned in *Otto-Preminger-Institut* only—but not in subsequent judgments—and only as a theoretical postulate without being applied in practice. Under this test, freedom of expression may be restricted if the particular methods of opposing or denying religious beliefs are such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them. In my opinion, this test may be regarded as the traditional and perhaps irrefutable definition of 'the protection of the rights of others' in such cases. It means that a person may not express his or her opinion in a manner that inhibits others from exercising their right to freedom of religion. Emphasis is put on the exercise of rights: the test does not apply to some abstract hypothesis, but to the practical problem of religious people being unable to exercise their fundamental right to freedom of religion. The necessity of legal protection in such matters is obvious. However, in the context of the judgments of the ECtHR, two

[16] *Handyside v United Kingdom*, No 5493/72, judgment of 7 December 1976, [49]; consistently upheld ever since.

observations need to be made in relation to this test, with a view to explaining why it has never been applied in the case law of the ECtHR. First, it is recognised, even by the ECtHR itself, that this test may be applied in extreme cases only. Second, in all the above-mentioned cases the rights of the followers of the majority religion in the given state or region was the object of protection—a fact that also strengthens the first observation. It is rather hard to conceive that individual blasphemous or defamatory statements would prevent—or intimidate—the followers of a majority religion from exercising their rights.[17] It should therefore not be a surprise that the ECtHR developed another test to justify its decisions.

Protection of religious feelings

According to the other test applied in practice by the ECtHR when considering state measures taken with a view to protecting the rights of others, restriction may also be justified if an expression made in public insults the religious feelings of citizens. Under this approach, Article 9 of the Convention includes the right of citizens not to be insulted in connection with their religious feelings. From another point of view, under the ECtHR case law, a person is required to respect the religious feelings of others. This is a point in the ECtHR's argumentation that has been vehemently criticised by numerous analysts of the case law. Some even reject this legal ground outright, regardless of the practical application of the respective tests—ie regardless of the extent of possible interference reserved by the various governments. In this context, critics emphasise that a right not to be insulted over one's religious feelings cannot be deduced from the provisions of the Convention. According to Robert Post, the suppression of opinions in order to protect a sacrament is inconsistent with the freedom of expression, because it excludes those who dispute the government's idea of sanctity from public debate; similarly, it would also be inconsistent with freedom of expression to restrict expressions in order to protect the sensitivity of religious groups, as doing so would exclude those whose convictions would be offensive to the members of such religious groups from public debate.[18] Austin Dacey indicated that the ECtHR moved far beyond the provisions of international documents by deducing a right not to be insulted in one's religious feelings, and it thereby created a *sui generis* right that is inconsistent with the standards of international law.[19] A main proposition of Jeroen Temperman's essay on the subject is that the provisions of human rights, including those of the Convention, do not recognise any right not to be insulted in one's religious feelings.[20] Eric Barendt also believes that the ECtHR fails to provide

[17] eg under this test, a person is not allowed to express his or her blasphemous views by screaming out loud while taking part in a liturgical procession.

[18] R Post, 'Religion and Freedom of Speech: Portraits of Muhammad' in A Sajó (ed), *Censorial Sensitivities: Free Speech and Religion in a Fundamentalist World* (Eleven Publishing 2007) 329–51.

[19] Dacey (n 1) 83.

[20] Temperman (n 1).

sufficient support for the requirement not to insult the religious feelings of others and, in the absence of convincing arguments, it reaches an outcome that is inconsistent with the fundamental postulate on the protection of offensive and shocking opinions.[21] Finally, András Sajó holds that the fact that a person follows a particular religion is sufficient to be accepted as giving them the same human dignity as any other person, but his or her intensive belief in something is not a reason for respect in itself.[22]

Indeed, several issues regarding the arguments of the ECtHR need clarification, and the ECtHR has failed to provide such clarification in the course of deducing the right not to be insulted in one's religious feelings or at the time of analysing the necessity and proportionality of state interference. Such clarifications may, however, be provided in academic papers, so for the time being the arguments of the ECtHR do not need to be rejected fully and absolutely when considering the matter of legitimate aims. Attempts will be made later on to answer to some of the reasonable doubts expressed by the above-mentioned critics, as the sustainability of the legal basis and test set out by the ECtHR may be also subject to the specific object and method of protection. However, it must first be considered here, and without any further distinction, whether it can be justified to distinguish religious beliefs and feelings from other convictions and opinions for the purpose of affording special protection. While it will be argued that this question in itself can be answered in the affirmative, the sustainability of any position one may eventually reach will depend on the definition of the 'special protection' to be afforded.

I believe that such a distinction of the religious sphere of human life is consistent with, and can be justified by, the postulates of constitutional law. Such a position is also supported by legal history: the emergence of freedom of religion played an essential role in the recognition of fundamental rights, and historical tradition considers religion to be of higher importance than other forms of self-expression. This approach resulted in religions being distinguished from other thoughts and ideas and being protected in specific provisions of international human rights law and national constitutions.[23] But the issue means more than a mere relic of history. The ECtHR is correct to argue that religion is one of the most vital elements that make up the identity of believers and their concept of life. The Hungarian Constitutional Court also pointed out that—due to the close relationship between freedom of religion and human dignity—religious beliefs and actions require and deserve special constitutional protection, as actions taken under the aegis of general personality rights are considered with special weight when they are also rooted in convictions or religious beliefs that form part of the substance of the identity of a person.[24] This approach recognises and takes into account the substance of religious

[21] Barendt (n 1) 192.

[22] A Sajó, 'Mit is akarunk védeni?' (2006) *Beszélő* 3.

[23] P Paczolay, 'A lelkiismereti és vallásszabadság' in G Halmai and GA Tóth (eds), *Emberi jogok* (Osiris 2003) 532.

[24] Decision No 4/1993 (II. 28.) of the Constitutional Court, Statement of Reasons, A) I.1.a.

beliefs: a person has deeper and more comprehensive ties to his or her religious faith (if any) than to any other conviction.[25] Religion transcends the spiritual, intellectual, and moral spheres of a person and constitutes his or her moral entity, defining one's personality more intimately than any other thought or idea. Individual decisions regarding one's religion are special decisions deriving from the dignity of human beings. Religion is the most vital conviction and has a decisive impact on all other beliefs and ideas.

For the above reasons it is reasonable to argue that special legal treatment should be afforded to religions. However, clarification is needed regarding the possible grounds for doing so. It needs to be recognised that the 'rights of others', as invoked by the ECtHR, do not refer to specific subjective rights, as the members of the receiving public cannot be identified individually. Legal protection is thus not rooted in specific individual rights but in the institutional protection afforded to the right to human dignity and freedom of religion: the government may protect values relating to freedom of religion, even by going beyond the protection of individual rights.[26] Hence, it can be concluded that the legislator has the necessary justification—consistent with the requirements of constitutional law—to grant some kind of special protection for persons with religious convictions in the course of designing the rules of social coexistence. However, the range of options available in such cases is fundamentally different from those available in the course of protecting the individual rights of specific persons.[27]

Consequently, it cannot be stated that the legislator or an authority violates free speech simply by taking into account features of religious life in the course of designing the framework of exercising freedom of expression. The requirement to be neutral in religious matters does not mean that the state is required to remain indifferent to such matters.[28] It would be unduly hasty to condemn the ECtHR simply for this reason—condemnation can wait until the attention paid to religions exceeds the threshold of reason and thereby becomes inconsistent with the principles of freedom of expression.

What objects are eligible for protection against blasphemy?

One aspect of the required clarifications and limitations relates to the object the state can take action against with regard to the religious beliefs of citizens by interfering with the process of disseminating ideas in public. More specifically, clarification is required as to what kind of expressions may be affected with the aim of interference recognised by the

[25] Following the case law of the ECtHR, this paper focuses on religious beliefs, and does not consider if similar arguments may be raised in the context of other convictions and beliefs. Without making any judgment in this respect, it seems relevant to note that these statements certainly apply to religious faith.

[26] Decision No 4/1993 (II. 28.) of the Constitutional Court, Statement of Reasons, A) I.1.d.

[27] See (n 14).

[28] Regarding the difference between the ideological neutrality and indifference of the state, see B Schanda, *Magyar állami egyházjog* (Szent István Társulat 2000) 58–63.

ECtHR case law—ie the protection of religious feelings. While the ECtHR does not provide an answer to this fundamental question, the governing criteria can be identified in its case law.

Religious sensitivity *versus* religious belief

The first criterion—which is still insufficient in itself—relates to the content of the relevant expressions. As a starting point, it can be noted that the meaning of the category of 'expression disturbing to religious sensitivities' is rather hard to process, even if this legal ground refers to the protection of religious feelings. As pointed out quite rightly by Harold J Laski, history shows that there is almost no view that religious people would not find blasphemous under certain circumstances.[29] It is not the—otherwise correct—reference to the historical dimension that is important in this context, but the implied meaning that the level of sensitivity of each and every religious person is different. While an expression may be laughed at or be acknowledged with a simple shrug by one person, the same expression may be deemed by another to be an outrageous vilification of one's religion. The application of thousands of unique standards is obviously impossible in practice, not to mention that any attempt to this end may also render freedom of expression meaningless. As such, individual religious sensitivities may not be accepted as the basis for identifying certain expressions as blasphemy on the basis of their content. It may seem a paradox, but is nevertheless true, that a norm offering some kind of protection for the feelings and relationship of religious people to their religion may not be based on the protection of religious sensitivities. As far as possible, a uniform and objective test is needed, which may not be based on the myriad kinds of sensitivities of religious people (who differ by religion and, indeed, as individuals).

The religious convictions held by believers may serve much more appropriately as the starting point for identifying blasphemous expressions on the basis of their content. This approach seems to be more feasible, both for theoretical and practical purposes. On the one hand, the protection of the sensitivities of individuals does not seem to be an acceptable basis for affording special protection, but the distinction that religion—in a manner that is justifiable on the basis of human dignity—is the most personal sphere of the personality, among other beliefs and convictions, does. Moreover, religious conviction is an objective category and, as such, is capable of being used as grounds for identifying the relevant expressions. Thus, the decisive factor for content-related purposes is whether the blasphemous expression affected a sacred faith of religious people, or a fundamental conviction or relevant component of a faith. The picture seems to be deceptive, as the case law of the ECtHR appears to protect religions, while they are not protected by the

[29] HJ Laski, *Liberty in the Modern State* (Harper & Brothers 1930). Freedom of the Mind. 80–194, 93.

Convention.[30] In reality, the ECtHR protects religious persons, but, in order to avoid any arbitrary application of the law, protection may not be based on anything other than postulates forming part of religious beliefs.

While it does not emphasise this detail specifically, the case law of the ECtHR follows this approach: while the stated aim of interference is to protect the religious feelings of others, the relevant expressions are deemed objectionable because they attack the religious faith itself. The ECtHR refers to the 'respect for religious beliefs' in *Otto-Preminger-Institut*, to 'offensive attacks on matters regarded as sacred' in *Wingrove*, and to a margin of appreciation afforded the state in relation to expressions attacking religious beliefs in *Murphy*. The cases of *Giniewski* and *Klein* are fine example of situations where the expression objected to is not directed at the belief itself and hence it does not justify the restriction of freedom of expression, regardless of the number of persons who may feel offended by it. Legal remedy is thus not available, for example, against the harsh or offensive criticism of a church or the head thereof, even if the criticism, for understandable reasons, is offensive to members of the given church. Similarly, the category of blasphemy does not include cases where religious people themselves are criticised or offended, however harshly, for some reason. The special protection is not afforded to the specific personal situation, but applies to the special relationship between faith and human dignity.

Public debate

The distinguishing features of the two latter cases need to be mentioned here. The decisive factor in *Giniewski v France* and *Klein v Slovakia* seems to be that the possibly offended religious feelings of a person are not taken into account where the communicator contributes to a current public debate. In this respect, the ECtHR adds its general principle to the issue, that any and all scope for restricting freedom of expression must be construed in an especially narrow manner in the context of political speech.[31] With regard to the case law of the ECtHR, some important observations need to be made in relation to this most welcome line of argument.

On the one hand, it may have adverse effects if the strong arguments applicable to public debates are given a decisive role in the context of blasphemous expressions. While expressions offensive to religions may certainly be connected to the widely understood social and cultural debate of public matters, it is much more difficult for such statements to make it into the narrower realm where the arguments relating to the freedom of public debate are the most powerful.[32] It is no accident that this aspect was found to be relevant

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[30] Indicated by Temperman (n 1).

[31] Eg *Lingens v Austria*, No 9815/82, judgment of 8 July 1986, [42], and a recent confirmation in *Cholakov v Bulgaria,* No 20147/06, judgment of 1 October 2013, [29]–[31].

[32] Barendt makes a similar distinction as well: the issues of blasphemy are discussed as part of the comprehensive category of political speech, but it is also noted that, in a restrictive sense, the defamation of religious beliefs is not a form of political speech. See Barendt (n 1) 189.

by the ECtHR in two cases only, while it could have also been found relevant in the context of expressions relating to the social role of religions and their detrimental impact on religious persons, for example in the judgment in *IA v Turkey*. In other words, the ECtHR accepted the restriction of freedom of expression in cases where it did not consider the argument of protecting public debate to be specific enough. The criticism of this approach is not limited to the fact that the category of protecting the freedom of public debate could and should be understood in a wider sense. It also needs to be emphasised that a significant number of the expressions considered in the above-mentioned cases of the ECtHR did not seek to engage in a public debate but to express the ideas, typically the artistic freedom, of the communicating person. While political speech does form part of the very substance of freedom of expression, expressions not —or not closely—falling into the category of public speech are still subject to the core principle that their freedom is a fundamental feature of a democratic society and is indispensable to the development of the individual and of society. This is especially true where the protection of self-expression is also strengthened by other constitutional requirements (eg artistic freedom). These considerations do not render the references of the ECtHR to public debates in *Giniewski* and *Klein* incorrect, but they certainly signal that particular care should be exercised, even in matters that are not—or not closely—related to public debates, as strong arguments may support the protection of speech, even if a blasphemous expression is not directly related to a current public debate.

On the other hand, the importance of the protection of public debate in the understanding of the ECtHR is not quite clear from *Giniewski* and *Klein* in the context of blasphemy. The reason for this is that these cases are different from the other cases, in that the expression objected to did not attack a religious belief itself or an object of religious veneration—as was emphasised by the ECtHR in both cases. Still, as discussed in the previous point, this would be the substance of the concept of blasphemous expressions. As such, while these cases in themselves do not support any conclusion that the ECtHR started to deviate from the direction it previously followed, the arguments used in them indicate an understanding that even expressions offending religious beliefs are untouchable if they are connected to the debate of public matters.

It can be concluded from the above considerations that the cases of *Giniewski* and *Klein* add highly important postulates to the case law of the ECtHR—stating that the criteria of the freedom of public debates are to be taken into account even in the context of expressions that may offend religious feelings—but they are in line with it. Only a wider set of arguments can ensure that the arguments of the communicating person are duly taken into account.

Defamation

Another aspect of the definition of blasphemy which is worth examining is the analysis of the defamatory nature of the given expression. It would be misguided to assume that the mere content of critical, hostile, or merely disadvantageous expressions regarding a

religious faith would justify any interference by the state. The particular legal rules may be applied to highly offensive or defamatory views. It has been argued that special legal protection may be afforded to religious beliefs that form part of the most intimate sphere of human dignity, meaning that defamatory and insulting expressions may clash with a constitutional boundary. That boundary is rooted in the institutional side of the protection of human dignity and freedom of religion. It must be emphasised time and time again that the proportionality of the protection is of decisive importance, especially in cases where individual rights are not affected directly.

The ECtHR tries to capture this 'extra-content' requirement (ie 'defamation') by distinguishing between the content and the method and style of the expression.[33] According to a frequently quoted postulate of the judgment in *Otto-Preminger-Institut*, religious persons must tolerate and accept the denial by others of their religious beliefs, and even the propagation by others of doctrines hostile to their faith, but the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9. The line of argument of the ECtHR is certainly honourable, as it tries to maintain in the reasoning the principle of content-neutral restriction of freedom of expression, despite approving of interference by the state, by stating that any critical or hostile opinion on a faith or religion could be expressed if articulated in a decent, non-offensive style that is fit for debate. However, it must be seen that while clear boundaries are defined for the various means of expression available (eg speaker on the street vs. national television), serious difficulties arise in relation to the style and expression employed. On the one hand, the distinction between content and style lies in the assumption that all statements can be expressed in both an offensive and a non-offensive manner without any alteration of their content. However, this assumption is not generally applicable as, in some instances, the content of an opinion and the style of its expression are inexorably intertwined, and constitute the essence of the expression as a unit. On the other hand, for a wide range of expressions it is not their primary objective to be fit for debate, but to reflect the sincere views of the communicator, without—or not necessarily with—the aim of being offensive to others. It must be admitted that the distinction between the content and form of an expression does not provide us with the necessary means to identify objectionable expressions.[34] This also underlines that even if there are suitable grounds for restricting defamatory speech we must proceed with extreme care to follow the right path and to avoid any and all prohibitions.

[33] With the passing of time, even the British ban on blasphemy was reduced to taking this distinction into account. See Post (n 1) 306–10.

[34] ibid 309.

The decisive factor: proportionality

As already noted throughout this paper, the question posed in the title cannot be answered without making definite statements concerning the extent of any possible protection. While it is of fundamental importance, it is also quite a meaningless position, in the context of the legal ground of protection, which considers the possibility of interference justifiable on the grounds of protecting the rights of others and, more specifically, of protecting the special relationship between religious people and their religion. As any and all kinds of protection against blasphemy interfere, by definition, with the exercise of freedom of expression, it is not the primary task for proponents of this idea to argue for the necessity of such restrictions. Most of all, they need to give an account of the extent of the restriction they consider justifiable. The recognition of the possibility of state interference cannot be maintained any further unless it is accompanied by considerations relating to its proportionality.

While the case law of the ECtHR includes cases that are highly enlightening concerning the issue of proportionality, the ECtHR itself does not offer much help in this respect. Though the ECtHR emphasises its supervisory power even in these '*margin of appreciation* cases', it is apparent in the most typical cases of the problem discussed herein[35] that the ECtHR 'gave up all control' and relied entirely on the discretion of the states. According to the reasoning in *Otto-Preminger-Institut*, the ECtHR did not accept the arguments submitted by the applicant—stating that it had planned to show the film in its cinema, which was accessible to those above the age of 17 only after a fee had been paid, and that its public consisted on the whole of persons with an interest in progressive culture—but concluded that the margin of appreciation of the Austrian authorities included the option of forfeiture, which made it permanently impossible to show the film anywhere in Austria. In this sense, the prohibition on showing the film anywhere, anytime and under any circumstances was not deemed disproportionate. The authorities also interfered quite significantly in *Wingrove*, where the distribution of the video was 'prohibited' in advance. The applicant challenged the proportionality of this measure by claiming that the authorities could have prescribed special conditions regarding the distribution of the film, eg distribution could have been restricted to licensed sex shops and special packaging and a warning label concerning the content of the film could have been required. The ECtHR found no proportionality-related problems in this case either: as the chosen solution was the sole and absolutely certain means of guaranteeing that the public would not be exposed to the video in any form, the state interference was upheld.

While, unlike other critics, I find the interpretation of the ECtHR reasonable—with certain reservations—regarding the legal basis of restriction, this aspect of legal practice is more difficult to defend. Firstly, it seems that the adoption of a restrictive standard of the type that can be deduced from the above-mentioned rulings could not be justified in

[35] The two cases where the ECtHR found that the concerned states violated the Convention (ie *Giniewski* and *Klein*) are not considered to be such 'typical' cases.

the reality of Hungarian society and constitutional requirements. However, this observation would not necessarily be inconsistent with the case law of the ECtHR, as it seems to focus on the recognition of a wide margin of appreciation on the side of the state. But secondly, the following observations will point beyond the Hungarian reality: it may be argued that the leniency of the ECtHR is already inconsistent with the generally recognised and commonly followed principles of freedom of expression that were drawn up on the basis of, among other laws, the Convention itself. The legal grounds for restricting freedom of expression as discussed in this respect do not allow the state and its authorities to interfere with the free dissemination of ideas to such an extent.

As an important starting point in this respect, we have already rejected the possibility of allowing such a wide range of restrictions on freedom of expression on the basis of public order (or, as more clearly put by the Convention, to prevent disorder), which becomes relevant in the situations discussed here. As such, the single legitimate aim of taking action against blasphemy in such circumstances is the protection of the religious life of religious persons on the basis of human dignity. Nobody should face a situation where something he or she believes to be sacrosanct can simply be denigrated and defamed. However, this level of protection can also be afforded if religious persons are not exposed—against their will—to expressions denigrating their religious beliefs. This is the maximum level of protection required to achieve the legitimate aim pursued. On the other hand, no person can reasonably expect to live their life and not to know that his or her religion is being subject to derogatory expressions somewhere. At this point, it becomes justifiable to design a regulatory scheme that allows religious persons to avoid such opinions and expressions if they wish. In most cases, such regulations would not take the form of prohibition or content-related restriction, but rather as formal requirements applying to the form and means of exercising freedom of expression in various means of mass communication. This means that, in the *Otto-Preminger-Institut* case for example, showing a scandalous film with appropriate age warnings to an audience that is familiar with the substance of the movie and is used to watching artistic films could not be prevented. Nor would the restricted distribution of a movie be objected to—as in *Wingrove*—if it has been subject to the standard classification process and displays warnings that its content may be offensive to religious beliefs. A similar approach should be applied to television broadcasts, where special warnings could be used to inform the viewers about the provocative content of a programme.[36] However, it must be admitted, even without covering all possible issues relating to dissemination, that prohibition is the only available means of preventing publication under certain circumstances. For example, blasphemy may not be shown on billboards.[37]

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[36] As required in relation to television and radio broadcasters by all Hungarian acts on media regulation since 1996. See art 5(1) of Act I of 1996 on radio and television, and art 14 of Act CLXXXV of 2010 on media services and mass communication.

[37] This consideration of proportionality should include the fact that billboards are typical forms of advertising, and the protection of freedom of expression in the context of advertisements is somewhat more lenient.

As for the above types of content, the application of requirements for advance notification and connected to the circumstances of the presentation—unlike a regulatory scheme focusing on the prohibition of all public expressions—is a proportionate restriction of free speech. It affords reasonable consideration of the sensitivities of religious persons without simply setting aside the principles of freedom of expression. Such a form of regulation would be consistent with the postulate that requires freedom to express even shocking, offending, or disturbing ideas, as the obviously applicable additional requirements do not impose any content-related restriction on the person expressing his or her views. On the contrary, state measures that lead to the overall banning of such expressions in a state that is democratic, pluralistic, and ideologically neutral (but not indifferent toward religions) are disproportionate to the aim pursued. Such interferences may be carried out only on other grounds (eg public order) and subject to an entirely different set of standards. But those standards were not designed to handle the kinds of issues discussed herein.

Summary

Can religious or religious people be protected against blasphemy? This is the question raised in the title of this paper, and the relevant factors were taken into account with a view to answering that question. In the course of searching for the answer, one might have the impression that the sensitive issues associated with freedom of expression —such as the issue of mocking religions—point beyond themselves and make us confront our ideas about democratic societies and the relationship between the individual and the community. The inquiry into the case law of the ECtHR revealed two sharply different approaches. One approach gives priority to the arguments of the recipient group, ie the community offended in its religious sensitivity, due to the highly sensitive nature of religious matters. The other approach gives preference to the right to freedom of expression of those making a point which touches on a sensitive matter. The former approach enforces the 'norms' of certain groups against persons, while the latter protects the privileges of individuals against the community.[38]

It was argued here that there is a possible solution that may achieve a balance between the freedom of expression of individuals and the special communal interests relating to religious matters. On the one hand, this approach accepts—with corrections—the position of the ECtHR on the legitimate aim of affording special protection to religious persons: due to the most intimate nature of religious faith, human dignity and freedom of religion may serve as grounds for special regulation by the state. On the other hand, it does not agree with the ECtHR, in allowing such regulation even to silence a person exercising his or her right to freedom of expression, unless a more serious impact

[38] Post (n 1) 319–20.

(eg incitement of hatred) results than disrespecting someone's religious convictions. On the basis of the above considerations, I find regulation acceptable if it allows religious people to avoid seeing or hearing content they would find blasphemous on mass communications platforms, without seeking to impose a ban on such content. Respect for the plurality of society is the relevant issue in this context, where the individual right to express one's (even extreme) views is not questioned, but due attention must also be paid to clearly definable and justifiable considerations of the community. As such, religious persons can be protected, but those mocking a religion should not be silenced. In the words of Emperor Tiberius, if the gods wanted to exact revenge, it was their own business, nothing to do with man.

7.
Commercial communications and political advertising

Thomas Gibbons and Irini Katsirea

Commercial influences on programme content: The German and UK approaches to transposing EU rules on product placement*

Creative integrity and commercial sponsorship

Product placement raises an old problem in a modern context. How far are art and culture compromised by commercial subsidy? Over the centuries, artists and musicians have been sponsored by wealthy patrons, whose position and tastes have been flattered in the creative product. But we can still notice the skills of a great painter, such as Michelangelo Buonarroti, or a great composer, such as Wolfgang Amadeus Mozart, and, closer to contemporary media, we may not think the less of Dickens because he adopted an episodic style of writing to facilitate publishing in periodicals. There is some ambivalence in our attitudes to the subsidy of creativity, however. We do not like the idea that the sponsor makes demands of the creator, because that smacks of interference with, or censorship of, expression. Yet, we would rather have it that the expression took place, and we also know that it has somehow to be financed. Often, we are prepared to leave it to the creator to decide whether the creative impulse has been compromised. At the same time, it seems to make a difference whether we are aware of the nature of the relationship between creativity and commerce, and that is a theme which is dominant in recent discussion of product placement and concerns with its identification and with transparency regarding its role.

The connection between creativity and commerce involves a broadly asymmetric relationship between three sets of interests. One is that of the creator, who is anxious to preserve his or her freedom of expression, without material constraints. Another is that of the public audience, which wishes to be assured that creative expression is authentic. A third set of interests is that of the sponsor which, in a purely philanthropic guise, has a neutral impact on those other interests. However, when the sponsor's aim is to secure self-promotion, that runs counter to those other interests and generates a risk that creativity will be stifled and that audiences will be lulled into behaviour which they do not fully appreciate. In the broadcasting sector, these various interests are reflected in a complex way, because broadcasters may be aligned with commercial interests against viewers and consumers, but producers will also want to maintain the integrity of programmes against excessive intrusion from advertising.[1]

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* This article is a development of ideas set out in (2012) 4 *Journal of Media Law* 2, 159.

[1] A point made in J Harrison and L Woods, *European Broadcasting Law and Policy* (CUP 2007) 198.

As we will see, product placement has now been accepted as a permissible feature of contemporary television programming, as a result of changes introduced by the Audiovisual Media Services Directive 2007 (AVMSD).[2] But the process of reform and its implementation has manifested a high degree of uncertainty and concern regarding the advisability of such a transformation and its implications. The wider context is one of increased integration between programming and commercial references. Advertisers have long been recognised as having at least the potential for indirect influence over content, because they have the power to withdraw financial support for programming of which they disapprove.[3] Brand promotion finds its way into many kinds of apparently neutral programme content, such as celebrity-'plugging' interviews or coverage of events, notably sporting, that are independently sponsored. More recently, there have been concerns that editorial judgment may be compromised in the use of interactive forms of programming as a means of obtaining income from premium rate telephone or text services.[4] Generally, as audiences, we have some awareness of these phenomena, and we can deploy avoidance behaviour in the face of more overt commercial attempts to attract our attention: examples are time-shifting of programming, caller ID on telephones, or the way that we skim newspapers and magazines. Indeed, Shiner mentions this behaviour to suggest that there are no 'hearers' rights' to receive advertising which would be affected by its regulation and restriction.[5]

Because there is such ambivalence about the process of integrating content with commercial references, the transposition of the AMVSD into domestic law has presented some difficult decisions. This article discusses the solutions adopted in two countries, Germany and the United Kingdom. It will be suggested that neither country has adopted a regime which enables viewers to have a clear understanding of the relationship between the producers or broadcasters and commercial funding. With the prospect of increased presence of product placement in the next few years, as production cycles come to reflect the new provisions, it is a matter of concern that better provision has not been made to protect editorial judgment.

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[2] European Parliament and Council Directive 2010/13/EU 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 L 95/1 (AVMSD). References are to this official Codified version, in which art 11 deals with product placement. In the original Directive of 2007, which took the form of amendments to the Television Without Frontiers Directive, measures concerning product placement were recitals 60 to 63, arts 1(h) and (m), and art 1.7 which inserted new arts 3e and 3g into the original Directive.

[3] A recent example was advertisers' disapproval of the former *News of the World* newspaper's involvement in phone hacking in the UK. See <http://www.marketwatch.com/story/more-advertisers-withdraw-from-news-of-the-world-2011-07-06>.

[4] See Ofcom, 'Report of an Inquiry into Television Broadcasters' Use of Premium Rate Telephone Services in Programmes' 18 July 2007, <http://stakeholders.ofcom.org.uk/broadcasting/reviews-investigations/premium-rate> (Ayre Report). All websites accessed December 2013.

[5] R Shiner, *Freedom of Commercial Expression* (OUP 2003) 228.

The reform process

Until the adoption of the AVMSD, the regulation of advertising in the EU was characterised by an important principle: advertising should be separated from creative or editorial content.[6] Other advertising rules under the Television Without Frontiers Directive had supplemented this principle by aiming to 'guarantee a minimum standard of protection for certain objectives of general interest: protecting the integrity of works, protecting the consumer-viewer, protecting human dignity and public health and protecting minors. They also guarantee[d] a homogeneous competitive framework in the Internal Market.'[7] The separation principle was intended to ensure that viewers did not confuse commercial and editorial content. It was supported by a prohibition on surreptitious advertising, which was aimed at non-identifiable advertising within programmes. Consistent with the separation principle, the rules relating to advertising breaks and duration had, as an underlying concern, the value and integrity of programming. It was understood that '[t]he dual requirement of identification and separation implicitly has the effect of not authorising, within the current legal framework, recourse to product placement in programmes produced by broadcasters covered by the TWF Directive.'[8] However, the exercise to reform the Television Without Frontiers Directive became an opportunity to introduce radical reform, in response to 'users' degree of choice and control'.[9] By the time of the Liverpool conference in 2005, the introduction of product placement, as a form of audiovisual commercial communication, was a major item on the agenda and was subsequently incorporated into the AVMSD.

A number of recurring arguments featured in the reform process in the European Union and were articulated in the implementation process in the UK.[10] Advocates of product placement argued that it enabled a new source of revenue, both generally and as a response to viewers' avoidance of advertising by resorting to time-shifting. (Incidentally, the latter was never prominent as a justification for change, yet it clearly has been a primary motivation). These points were supplemented by a combination of pragmatism in the face of product placement in non-UK produced programming, claims about

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[6] See the Commission interpretative Communication on certain aspects of the provisions on televised advertising in the 'Television Without Frontiers' Directive (2004) OJ C 102/2.

[7] Council Directive of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (1989) OJ L 298/23; EU Focus Group 2, 2004, 2.

[8] European Commission, Issues Paper on Commercial Communications, Liverpool Conference, July 2005, 4 (Liverpool Issues Paper).

[9] EU Focus Group 2 (n 7) 4.

[10] For the European Union, see EU Focus Group 2 (n 7) 2; Liverpool Issues Paper (n 8) 4. For UK discussion, see Department for Culture, Media and Sport, 'Consultation on Product Placement on Television' November 2009, paras 8–11, <http://webarchive.nationalarchives.gov.uk/20100407120701/http://www.culture.gov.uk/images/consultations/Consultation_productplacement.pdf>(DCMS2009);Ofcom, 'Broadcasting Code Review: Commercial References in Television Programming. Statement on the Ofcom Broadcasting Code' 20 December 2010, <http://stakeholders.ofcom.org.uk/consultations/bcrtv2010/statement>, especially Annexes 3 and 4 which detail earlier consultations.

regulatory creep, and optimism that regulation can work. It was queried whether the ban on product placement was advisable, given that some programmes over which broadcasters under Community jurisdiction have no production responsibility were already broadcast with product placement. It was said that UK viewers already accepted product placement in films shown on television and in non-UK television programming. Such product placement operated outside a regulatory environment and it would be better to have explicit authorisation accompanied by clear identification (in common with other audiovisual commercial communications). It was also noted that the European Commission's Interpretative Communication on television advertising in 2004 already allowed product 'presentation' (if not 'placement') for the purpose of identifying a sponsor.

Advocates of product placement also argued that, in any event, viewers are able to recognise when something is being sold to them, and there is no evidence to show that viewers have been misled or harmed by existing product placement. It was also claimed that audiences like product placement, because it makes content look more realistic, and that it is self-regulating, in that audiences will not view programmes with obvious or excessive placement. Generally, it was maintained that it is possible to create safeguards for audiences, and to protect the integrity of programming, by ensuring that the presence of product placement is identified in a transparent way. In the UK, in addition, the Department of Culture, Media and Sport reported that, '[i]n response to our consultation last year, advocates of allowing product placement argued that it would generate funding to encourage production and innovation, and that it would help the UK's commercial public service broadcasters—ITV, Channel 4, Five, and S4C—to continue to meet their obligations. They also argued that a continued prohibition of product placement would leave UK television broadcasters and programme-makers at a disadvantage as compared with international competitors especially in the EU and across the Atlantic.'[11]

Against these points, opponents of product placement raised concerns about the integrity of the programme-making process, should the separation principle be abolished and replaced by the weaker notion of distinction, whereby commercial references are sufficiently identified to distinguish them from other content. The claim was that the consequent introduction of product placement would have a negative effect on editorial decisions, making programming decisions vulnerable to commercial pressures. There was particular concern about product placement not only in 'children's' programmes (made specifically for them) but also in programmes watched by children, such as sports and popular entertainment; such placement especially included depictions of food and drink high in fat, salt and sugar (HFSS), and depictions of alcohol.

More mundanely, but no less important, media organisations were concerned about the impact of product development on existing advertising and sponsorship budgets. However, there is much uncertainty on that point. In its 2009 consultation, the Department of Media, Culture and Sport noted: 'Our consultation therefore elicited widely varying estimates of the potential value of product placement to UK commercial television

[11] DCMS 2009 (n 10) para 3.1.

broadcasters. It also demonstrated little certainty about the extent to which television product placement, were it to be allowed, would generate additional revenue for television broadcasters as opposed to displacing money from the existing revenue streams of spot advertising and sponsorship.'[12]

The Audiovisual Media Services Directive

The AVMSD rules are a compromise between these two sets of countervailing arguments. As notably advocated by Germany, product placement is prohibited as a matter of principle. At the same time, in line with the European Commission's position it is exceptionally allowed, subject to certain conditions. This uneasy settlement has been reached at the expense of legal certainty and has resulted in a regime that is opaque and fraught with complexity.

The Directive defines product placement as 'any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or the trade mark thereof so that it is featured within a programme, in return for payment or for similar consideration.'[13] It places a general prohibition on such product placement, in Article 11(2), but by way of derogation from that prohibition allows Member States to decide whether to permit product placement in cinematographic works, films and series made for audiovisual media services, sports programmes and light entertainment programmes, in Article 11(3)(a).[14] However, the derogation does not apply to product

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[12] ibid para 3.5.

[13] AVMSD, art 1(1) (m).

[14] It is helpful to cite AVMSD art 11(3) in full in this context:

'By way of derogation from paragraph 2, product placement shall be admissible in the following cases unless a Member State decides otherwise:

(a) in cinematographic works, films and series made for audiovisual media services, sports programmes and light entertainment programmes;

(b) where there is no payment but only the provision of certain goods or services free of charge, such as production props and prizes, with a view to their inclusion in a programme.

The derogation provided for in point (a) shall not apply to children's programmes.

Programmes that contain product placement shall meet at least all of the following requirements:

(a) their content and, in the case of television broadcasting, their scheduling shall in no circumstances be influenced in such a way as to affect the responsibility and editorial independence of the media service provider;

(b) they shall not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services;

(c) they shall not give undue prominence to the product in question;

(d) viewers shall be clearly informed of the existence of product placement. Programmes containing product placement shall be appropriately identified at the start and the end of the programme, and when a programme resumes after an advertising break, in order to avoid any confusion on the part of the viewer.

By way of exception, Member States may choose to waive the requirements set out in point (d) provided that the programme in question was neither produced nor commissioned by the media service provider itself or a company affiliated to the media service provider.'

placement in children's programmes. The Directive leaves it to Member States to decide whether to allow 'prop placement' (discussed in more detail below) in any types of programme (Article 11(3)(b)).

Where programmes, whether linear or non-linear, contain product placement, they must meet the following requirements (Article 11(3)).[15] Their content (and for broadcasting, their scheduling) 'shall in no circumstances be influenced in such a way as to affect the responsibility and editorial independence of the media service provider.' They must not directly encourage the purchase or rental of goods or services, 'in particular by making special promotional references to those goods or services'. They 'shall not give undue prominence to the product in question'. Finally, to avoid any confusion on the part of the viewer, viewers must be 'clearly informed' of the existence of product placement, which 'shall be appropriately identified' at the start and end of the programme and after any advertising break during the programme. This latter requirement may, however, be waived for feature films and programmes which have not been produced by the media service provider concerned or a company affiliated to it.

There are, however, total prohibitions on product placement for tobacco products and cigarettes, and from undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products. Similarly, product placement is prohibited for specific medicinal products or medical treatments available only on prescription in the jurisdiction under which the media service provider falls.

Concepts and tools

The AVMSD contains a number of concepts and tools to replace or supplement the removal of the principle of separation between commercial references and editorial content. As the European Commission noted: 'For product placement to be made possible, the principle of separation should cease to be an essential criterion and should simply be one of the means to enable users to identify commercial content and to distinguish it from editorial content.'[16] The assumption is that there will be no confusion in the audience if they can simply recognise product placement. This assumption applies more generally to the extension of the prohibition on surreptitious advertising to a wider category of 'surreptitious audiovisual commercial communication', which 'means the representation in words or pictures of goods, services, the name, the trade mark or the activities of a producer of goods or a provider of services in programmes when such

[15] For a definition of linear *versus* non-linear services see Audiovisual Media Services Without Frontiers Directive, <http://europa.eu/legislation_summaries/audiovisual_and_media/l24101a_en.htm>; linear audiovisual media services are 'received passively by the user, such as traditional television broadcasting services, the Internet and mobile telephony ("push content").' Non-linear audiovisual media services are non-programmed services 'requested by the user, such as "video-on-demand" ("pull content")'.

[16] Liverpool Issues Paper (n 8) 4.

representation is intended by the media service provider to serve as advertising and might mislead the public as to its nature. Such representation shall, in particular, be considered as intentional if it is done in return for payment or for similar consideration.'[17]

Reliance on programme-makers' or broadcasters' intentions is difficult to enforce and involves regulators in scrutinising the production process. Thus, there is an emphasis, in both bans, on the presence of a commercial transaction, which is more likely to be capable of being evidenced. However, it is implicit in the scheme that, for permitted categories of product placement, if they are identifiable, the placement will not be surreptitious. Here, a concern may be that, even if we know it is there, there may be a 'subversive influence' nevertheless—does product placement work despite us knowing about it? To deal with that potential problem, in relation to product placement, the requirement of no undue prominence introduces an objective dimension (which had indeed been mooted as a basis for the surreptitious advertising ban). As the Department for Culture, Media and Sport (DCMS) noted, 'it is easier to see from a programme whether a product is "unduly prominent" than to be able to demonstrate that money has changed hands to secure the inclusion of a product in a programme.'[18] Yet the idea of undue prominence raises questions about the way product placement may work. The placer will want some prominence, but not too much. There is research which suggests that the less obvious may be more effective,[19] so the absence of 'undue' prominence may increase the impact! Effective placements might even be accidental: as one respondent pointed out in response to the DCMS consultation, 'Clark Gable famously removed his shirt in a movie and decimated the vest market because he wasn't wearing one.'

Does this suggest that the regulatory scheme should not after all distance itself from producer motivations, albeit acknowledging (as mentioned above) that this is a difficult area to enforce? Should regulators call producers' judgments and motivations to account? Should we know, for example, whether a cartoon film has been deliberately created in order to make a good brand, even if it provides excellent viewing in itself? These problems are analogous to introducing sexual titillation or violence to attract viewers and increase audience size—the question is always whether it is artistically or dramatically justified. For that reason, perhaps, the regulatory scheme in practice places much weight on the editorial integrity of the producer / broadcaster. Transparency and identification in the absence of undue prominence mean that audiences still have to trust that integrity has been maintained.

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[17] AVMSD, art 1(1)(j).

[18] DCMS 2009, para 2.4.

[19] See, for example, J Matthes, C Schemer, and W Wirth, 'More than Meets the Eye: Investigating the Hidden Impact of Brand Placements in Television Magazines' (2007) 26 *International Journal of Advertising* 477; E Cowley and C Barron, 'When Product Placement Goes Wrong: The Effects of Program Liking and Placement Prominence' (2008) 37 *Journal of Advertising* 89; PM Homer, 'Product Placements: The Impact of Placement Type and Repetition on Attitude' (2009) 38 *Journal of Advertising* 21; E Bressoud, JM Lehu, and CA Russell, 'The Product Well Placed: The Relative Impact of Placement and Audience Characteristics on Placement Recall' (2010) 50 *Journal of Advertising Research* 374.

In thinking about these issues, we may note that the existence of an outright ban on product placement for the protection of public health and of children rather suggests that it would otherwise compromise content, even if the audience did know about it—because, and especially for children, the audience may not be able to detect its possible impact. It is interesting to note that, although it has now changed its mind, in 2005, Ofcom had suggested the following:

> In relation to news and current affairs, Ofcom believes that any use of product placement as a funding technique risks damaging audience perception of editorial integrity and due impartiality. In relation to children's programmes, Ofcom accepts that there are unlikely to be ways in which transparency can be ensured. It recognises the reduced ability of children to distinguish between commercial and editorial content and acknowledges parents' expectations that children should not be exposed to excessive commercialisation.[20]

A more fundamental consideration is that the move to product placement signals a rejection of the idea that viewers should be able to decline programming they do not want to watch. The response to audience avoidance, in the shape of time-shifting, has been to introduce a new way of imposing commercial content on the viewer. Under the current scheme, even attempts to resist commercial intrusion are made difficult, because the transparency and identification that is required is only generalised. The 'existence' of product placement somewhere in the programme is all that needs to be highlighted, rather than pinpointing its exact location. Possibly, if attention is drawn to the product in an obtrusive way, its advertising potential will be diminished and viewers may choose to change channel. But we may ask whether the viewer should be expected to do the analysis in isolating which products are placed and whether there is some anxiety that, if audiences do not like product placement, they have the options to choose services which are entirely public service or are financed by advertising-free subscription.

Yet, for audiences, the desirable viewing experience may well be one where they are confident that programmes reflect some critical detachment from the commercial message—some sense of primary substance that is independent of branding and commerce. With that assurance, that programming is not merely a vehicle for commercial messages, they may be willing to tolerate some amount of product placement. At present, however, the conceptual tools that are made available under the AVMSD do not encourage the supply of the kind of information needed. That is information which clearly explains the relationship between the producer or broadcaster and commercial funding—and for each programme. Would that really be so much of a commercial disincentive that programming would cease to be done?

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[20] Ofcom consultation, in anticipation of TWF revision: 'Product Placement: A Consultation on Issues Related to Product Placement' December 2005, <http://stakeholders.ofcom.org.uk/consultations/product_placement>.

So as to understand the problems attached to the new liberalised product placement regime better, we will now take a step back and discuss the legal treatment of product placement in Germany and the UK before the implementation of the AVMSD.

Illustrating the problems: Product placement in Germany before AVMSD

The central provisions on product placement under the 12th Interstate Broadcasting Treaty (*Rundfunkstaatsvertrag*, RStV), ie prior to the implementation of the AVMSD, were the principle of separation of advertising and programme elements and the prohibition of surreptitious advertising. The principle of separation dictated that advertising and teleshopping had to be readily recognisable as such and to be kept quite separate from other parts of the programme by optical means in television or by acoustic means in radio.[21] It entailed that surreptitious advertising was not allowed.[22] Foreshadowing the phrasing adopted in the AVMSD, surreptitious advertising was defined as 'the reference to or representation of goods, services, names or activities of a producer of goods or a provider of services in programmes when such representation is intended by the broadcaster to serve advertising and might mislead the public as to its nature. Such reference or representation is considered to be intentional in particular if it is done in return for payment or for similar consideration.'[23] The terms 'product placement' and 'surreptitious advertising' were used synonymously at the time. In fact, the prohibition of surreptitious advertising could rarely be enforced in view of the practical difficulties associated with proof of payment or of other similar consideration.[24] Other indications of intentional acting such as contractual arrangements and the discounting of programme rights in return for product placement are equally hard to prove.[25] Moreover, according to the prevailing view at the time there was no advertising intention when props were provided free of charge as long as the use of these props was motivated mainly by editorial rather than commercial considerations and no assurances were given concerning the integration of these props.[26]

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[21] Interstate Treaty on Broadcasting and Telemedia modified by the 12th Amendment to the Interstate Broadcasting Treaties of 18 December 2008, para 7(3) (12th RStV).

[22] 12th RStV, para 7(6)1.

[23] ibid para 2(2) No 8.

[24] J Müller-Rüster, *Product Placement im Fernsehen: Die Legalisierung programmintegrierter Werbung im Lichte der deutschen und europäischen Kommunikationsgrundrechte* (Mohr Siebeck 2010) 234.

[25] I Katsirea, *Public Broadcasting and European Law: A Comparative Examination of Public Service Obligations in Six Member States* (Kluwer 2008) 54.

[26] ibid 55; Müller-Rüster (n 24) 237; A Hesse, 'Die Umsetzung der Werbebestimmungen der EU-Richtlinie über audiovisuelle Mediendienste in deutsches Recht aus Sicht des öffentlich-rechtlichen Rundfunks' (2009) 10 *Zeitschrift für Urheber- und Medienrecht* 718, 719.

This treatment of prop placement attests to a fundamental tension between the principle of separation and broadcasting freedom. Prior to the implementation of the AVMSD, the representation of goods or services or of their providers outside of traditional advertising was allowed if it was indispensable on mainly editorial or artistic grounds, especially so as to depict the real world or to fulfil information duties.[27] This principle emanated from programming freedom as an essential element of broadcasting freedom, constitutionally guaranteed by Article 5(1)2 Basic Law (*Grundgesetz*, GG). Programming freedom means that both state as well as any alien influence on the selection, content and structuring of programming is prohibited.[28] Therefore, neither the principle of separation nor commercial interests should unduly curtail the editorial independence of broadcasters. On the one hand, an unduly strict interpretation of the principle of separation could prevent products and services from featuring in programming even if their appearance was not the result of a commercial arrangement and even if the context of their appearance justified a greater degree of information about them. On the other hand, a light-hearted dilution of this principle could put the editorial integrity of programmes at risk.

So as to ease the tension between the principle of separation and broadcasting freedom, the public broadcasters' Advertising Guidelines recommend that the art of representation should, as far as possible, not promote advertising interests. Market reports should be used as opposed to references to a single product. Promotional advertising techniques should be avoided, and—especially in the case of series—changes of products and of décor / fixtures should be frequent.[29] However, drawing the line between the principle of separation and broadcasting freedom has been controversial in practice.

In a case concerning a documentary on the thirtieth anniversary of the Barbie doll, the Higher Administrative Court Lüneburg accepted that the representation of the Barbie doll on the occasion of its anniversary might have been editorially justified given that this doll is part of the real world of children and of their parents. However, the court characterised this reportage as surreptitious advertising in view of the unnecessarily frequent, excessively positive and uncritical references to the doll, her outfits and accessories.[30] The same court reached a similar verdict in another case decided on the same day concerning the representation of the motorcyclist club ADAC.[31] The court held that the advertising intention behind this documentary became evident by the lack of reference to other competing undertakings as well as by the fact that ADAC's modern equipment was presented as a guarantee of qualitatively superior services.[32]

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[27] ARD/ZDF Advertising Guidelines of 6 June 2000, s 8.3; the same position is taken in ARD/ZDF Advertising Guidelines of 12 March 2010, s 8.3 (ARD/ZDF Advertising Guidelines); Common Guidelines of the State Media Authorities for advertising, product placement, sponsoring and teleshopping on television of 23 February 2010, s 4 No 1 (WerbeRL/Television).

[28] See BVerfGE 59, 231, 258; 87, 181, 201; BGH, judgment of 22 February 1990, I ZR 78/88, (1990) *Neue Juristische Wochenschrift* 3199, 3201.

[29] ARD/ZDF Advertising Guidelines (n 27) s 8.3.

[30] OVG Lüneburg, judgment of 15 December 1998, 10 L 5935/96, <http://www.dbovg.niedersachsen.de>.

[31] OVG Lüneburg, judgment of 15 December 1998, 10 L 3927/96, <http://www.dbovg.niedersachsen.de>.

[32] ibid para 5.

These judgments stand in sharp contrast to the findings of the Higher Administrative Court Berlin-Brandenburg in a case concerning the representation of a hardware store in a programme on DIY.[33] The court agreed that the chosen form of representation verged on surreptitious advertising, but that the relevant indications for the existence of an advertising intention were not clear enough. It stressed that the assessment of these indications should not unduly restrict the editorial independence of the programme-maker. The lodestar by which to make this assessment should be the justifiability of the chosen editorial concept, not the question of whether an altogether different editorial concept might have been conceivable. Even though the programme focused almost exclusively on the said hardware store and described it as a 'shopping paradise for DIY people', the court held that the language used was not so superlative as not to be objectively justifiable and that the programme's consumer advice motivation could not be disputed.

These contradictory judgments demonstrate that courts have much room for manoeuvre when applying the principle of separation in practice. How favourable must the language used be so as to be classified as 'superlative'? When is the chosen editorial concept objectively justifiable, and which circumstances might justify a greater degree of exposure of products or services within programmes? Before examining whether the new AVMSD rules on product placement, as implemented in the 13th Interstate Broadcasting Treaty, provide a clearer answer to these questions, a brief comparison with the UK position will be helpful.

Illustrating the problems: Product placement in the UK before the AVMSD

For commercial broadcasters in the UK, the regulation of commercial references in programming is contained in Ofcom's Broadcasting Code.[34] The BBC, which is not allowed to carry advertising in those of its services which are funded by the licence fee or grant in aid, has similar guidelines for dealing with editorial integrity and independence from external interests.[35] Prior to the liberalisation of product placement, Section 10 of Ofcom's Broadcasting Code, dealing with 'Commercial References and Other Matters', required separation between the advertising and programme elements of a service.[36]

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[33] OVG Berlin-Brandenburg, judgment of 6 June 2007, OVG 11 N 2.07, <http://www.gerichtsentscheidungen.berlin-brandenburg.de>.

[34] The Code is required by, and reflects the requirements of, the Communications Act 2003, s 319 and ss 321–25.

[35] BBC, 'Editorial Guidelines', <http://www.bbc.co.uk/editorialguidelines/guidelines>, s 14 (dealing with public service programming generally) and Appendix 5 (Guidelines for BBC Commercial Services on editorial integrity and independence from external interests).

[36] Ofcom, Broadcasting Code, October 2008. See also the BCAP Television Advertising Standards Code, 13 March 2007, s 2.1.1.

There was a prohibition on the giving of any undue prominence to a product or service in a programme. Undue prominence could result from the lack of editorial justification for a commercial reference or from the manner in which the reference is made. Ofcom found, for instance, that Channel 4 gave undue prominence to the energy drink Red Bull in its Richard and Judy show, both in the number of direct references to this product and also in the use of an 'expert' and sporting personalities linked to the product and extolling the benefits of caffeine and Red Bull.[37]

Product placement was also prohibited. It was defined as 'the inclusion of, or a reference to, a product or service within a programme in return for payment or other valuable consideration to the programme-maker or broadcaster (or any representative or associate of either).' But, dealing with what would now be described as 'prop placement' references to products or services acquired at no, or less than full, cost were not considered to be product placement where their inclusion within the programme was justified editorially.[38] A further exception to the prohibition on product placement applied to the inclusion of products or services in programmes acquired from outside the UK and films made for cinema, provided that the broadcaster did not directly benefit from the arrangement.[39] Ofcom's Guidance Notes acknowledged that there could not be an absolute prohibition on the appearance of branded products or services within programmes, given that they were an integral part of modern society. Editorial justification therefore depended on the nature of the programme, and there were certain types of programme, such as sports and music coverage in television programmes, where there was a general acceptance that brands would feature.[40]

As with the German experience, some fine judgments were required in applying the rules. For example, the Code also made special reference to programme-related material, ie products and services that were both directly derived from a specific programme and intended to allow listeners and viewers to benefit fully from, or to interact with, that programme. Such material might only be promoted in programmes where it was editorially justified.[41] In a case concerning a lifestyle magazine launched by Channel 4, Ofcom found that it did not satisfy the Code's criteria for programme-related material. The magazine was very similar to other homes and interiors magazines on the market and contained very few references to Channel 4 programmes in any of the features. Ofcom clarified that similarity, in terms of genre or theme, between a programme and product or service was not in itself sufficient to establish that the product or service was 'directly derived' from the programme.[42] The broadcaster would need to demonstrate

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37 Ofcom, Content Sanctions Committee, 19 July 2004.

38 Ofcom, Broadcasting Code, October 2008, s 10.5.

39 ibid.

40 Ofcom, 'Guidance Notes. Section 10 (Television): Commercial References and Other Matters', 20 December 2010, <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/812612/section10-tv.pdf>.

41 Ofcom, Broadcasting Code, October 2008, s 10.6.

42 This has also been clarified in the Ofcom Guidance Notes, s 10.

that the material in question was directly derived *to a significant extent* from each of the programmes and that it was editorially based.[43] Again, in relation to the ban on product placement, Ofcom had to decide whether a CNN 'YouTube Debate on Climate Change' programme had breached the rule. In exchange for the promotion of the programme, and the provision of the YouTube platform, CNN had agreed to provide Google and YouTube with extensive visual branding references during the programme. Ofcom decided that the arrangement amounted to 'valuable consideration', despite the absence of any payments as such.[44]

Implementation

The AVMSD rules on product placement have been transposed in Germany by means of the 13th Interstate Broadcasting Treaty (*Rundfunkstaatsvertrag*, RStV) of 1 April 2010.[45] The liberalisation of product placement met with the initial resistance of the *Länder*, public service broadcasters, publishers, journalists, trade unions and the churches.[46] The new rules do not apply to programmes produced before 19 December 2009.[47] It follows that, *a contrario*, these rules apply to programmes produced on or after the cut-off date. The AVMSD, on the other hand, prescribes that Article 11(2), (3) and (4) shall apply only to programmes produced *after* 19 December 2009. Consequently, the German legal regime does not entirely correspond with the AVMSD as regards the temporal application of the product placement rules. This discrepancy is, however, probably due to a drafting error, and should be ironed out by way of the interpretation of Paragraph 63 RStV in conformity with the AVMSD.[48]

In the UK, the (Labour) Government initially decided against introducing product placement, in March 2009. But it had changed its mind by the following November, following an extensive consultation, albeit maintaining that the matter was still finely balanced:

> Adherence to our current position in which UK TV programme-making cannot benefit at all from the income potentially to be generated by product placement would lead to continuing damage to its finances at a time when this crucial part of our creative industries needs all the support we can give it. It has become the more important to make this move now that every other EU Member State, with the sole current exception of Denmark, has either allowed television product placement already

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[43] ibid.

[44] Ofcom, Broadcast Bulletin 158, 24 May 2010, 22.

[45] Interstate Treaty on Broadcasting and Telemedia modified by the 13th Amendment to the Interstate Broadcasting Treaties of 1 April 2010 (13th RStV).

[46] KP Potthast, 'Die Umsetzung der EU-Richtlinie über audiovisuelle Mediendienste aus Ländersicht: Eine vorläufige Bestandsaufnahme' (2009) 10 *Zeitschrift für Urheber- und Medienrecht* 698.

[47] 13th RStV, para 63.

[48] M Holzgraefe, *Werbeintegration in Fernsehsendungen und Videospielen: Product-Placement und verwandte Formen im Spiegel des Medien- und Wettbewerbrechts* (Nomos 2010).

> or has expressed a firm intention to do so. Not to do so would jeopardise the competitiveness of UK programme-makers as against the rest of the EU, and this is something which we cannot afford to do.[49]

The Government decided to implement the change indirectly, by enabling Ofcom to modify its Broadcasting Code. But it banned product placement in current affairs, consumer and religious programming and, in addition to the EU-required ban on tobacco and medicinal products, banned the placement of products and services in relation to alcoholic drinks, HFSS foods and drinks, gambling, smoking accessories, over-the-counter medicines, and infant formula and follow-on formula. The outright ban in relation to HFSS and alcohol avoided the need to distinguish between children's 'viewing' and children's 'programmes' in respect of those categories. The changes were implemented by the Audiovisual Media Services (Product Placement) Regulations 2010, SI 2010 No 831. They amend the Communications Act 2003, in particular sections 319, 321, 324 and 325, relating to Ofcom's duties to set standards for broadcasting. They require that the product placement requirements contained in a new Schedule 11A should be met in all television programmes whose production began after 19 December 2009. Ofcom duly consulted (following up an earlier consultation in 2009 in relation to the Government's previous position) and published a revised Section Nine of its Broadcasting Code in December 2010, which came into force on 28 February 2011.[50] Ofcom took the opportunity to rationalise the Code so as to group together all provisions dealing with commercial references. For our purposes here, it introduced a set of principles and rules to reflect the requirements of the legislation but also incorporated rules to clarify its provisions, provide additional protection for audiences, and make changes which it considered 'appropriate in light of the changes to the regulatory landscape resulting from the introduction of product placement'—in particular, changes to the sponsorship rules.

In both Germany and the UK, the transposition of the AMVSD's product placement provisions has given rise to a number of difficulties in definition and implementation. These reflect the Directive's underlying tensions between editorial integrity and commercial influence. They also reflect a German inclination to implement the AMVSD more restrictively than the UK's more pragmatic stance. The following sections examine some of the more important issues.

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[49] B Bradshaw, 'Written Ministerial Statement on Television Product Placement', 9 February 2010, <http://webarchive.nationalarchives.gov.uk/+/http://www.culture.gov.uk/reference_library/minister_speeches/6624.aspx>.

[50] Ofcom, 'Broadcasting Code Review: Commercial References in Television Programming. Statement on the Ofcom Broadcasting Code', 20 December 2010, <http://stakeholders.ofcom.org.uk/binaries/consultations/724242/statement/statement.pdf>.

Distinction between product placement and surreptitious advertising

The AVMSD and the Ofcom Code do not draw a clear distinction between product placement and surreptitious advertising. Article 1(m) AVMSD defines product placement as 'any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or the trade mark thereof so that it is featured within a programme, in return for payment or for similar consideration.' Article 1(j) AVMSD defines surreptitious audiovisual commercial communication as 'the representation in words or pictures of goods, services, the name, the trade mark or the activities of a producer of goods or a provider of services in programmes when such representation is intended by the media service provider to serve advertising and might mislead the public as to its nature. Such representation is considered to be intentional in particular if it is done in return for payment or for similar consideration.' The Ofcom Code defines product placement and surreptitious advertising in a similar way.[51]

It follows from the juxtaposition of these two definitions that product placement requires the provision of payment or other consideration, while surreptitious advertising does not. The European Court also confirmed recently that 'whilst the provision of payment or of consideration of another kind is a criterion indicative of a television broadcasting company's intention to advertise, it is none the less clear from the wording of Article 1(d) of Directive 89/552, and from the purpose and general scheme of that Directive, that the lack of such payment or consideration of another kind does not mean that the existence of such an intention can be ruled out.'[52] Where there is provision of payment or similar consideration an overlap between the rules on product placement and on surreptitious advertising is possible. Under the AVMSD regime, the representation of goods, services etc can fulfil the conditions for both surreptitious advertising and illegal product placement when there is no identification and possibly other requirements under Article 11(3)(a)–(d) are not met.[53] Under the Ofcom Code, the conditions for surreptitious advertising and product placement may also be fulfilled at the same time.

German law, on the other hand, draws a clear line between product placement and surreptitious advertising. Product placement is defined as 'the *identified* representation in words or pictures of goods, services, names, trade marks, activities of a producer of goods or a provider of services in programmes in return for payment or for similar consideration in order to promote sales.'[54] It follows that there is no surreptitious advertising if the representation is identified, while, on the contrary, there is no product placement if the representation is not identified.

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[51] Ofcom, Broadcasting Code, February 2011, R 9.3 (Ofcom Code).

[52] Case C-52/10 *Alter v Ipourgos Tipou* [2011] ECR I-4973.

[53] C Angelopoulos, 'Product Placement in European Audiovisual Productions' in S Nicoltchev (ed), *Product Placement, Iris Plus* 2010–3 (European Audiovisual Observatory 2010) 20.

[54] 13th RStV (n 45) para 2(2) No 11.

It has been argued that this distinction has one problematic consequence: when there is no identification, there is no product placement, and no sanction for illegal product placement can be imposed under Paragraph 49 (1) 1 Nr 8 RStV. A sanction could only be imposed under Paragraph 49 (1) 1 Nr 7 RStV if the proof of surreptitious advertising, and hence of advertising intent, was to succeed.[55] This is a tall order since proof of intentional acting is hard to furnish. However, this argument disregards Paragraph 49 (1) 1 Nr 9 RStV. This provision stipulates that a sanction must be imposed when programme placement is not signalled clearly. Given that there is, by definition, no product placement when there is no identification, it could be argued that Paragraph 49 (1) 1 Nr 9 RStV only applies to cases where there is some form of signalling, but this is not adequate because, for instance, the names of the suppliers of props of significant value have not been disclosed as required by the Advertising Guidelines of ARD and ZDF, Germany's public service broadcasters.[56] This interpretation would, however, considerably reduce the scope of Paragraph 49 (1) 1 Nr 9 RStV. It seems more plausible that this provision is intended to redress the legal lacuna that would otherwise ensue in cases of unidentified 'product placement'. This would mean that 'product placement' that has not been signalled would still attract a sanction. This interpretation might stretch the wording of Paragraph 49 (1) 1 Nr 9 RStV somewhat, but it is arguably more in line with the legislative intent behind this norm.

Editorial justification

In Germany, all programmes containing product placement need to fulfil requirements that mirror those laid down in Article 11(3)(a)–(d) AVMSD. Product placement must not affect the responsibility and independence of the media service provider as regards content and scheduling; programmes containing product placement must not directly encourage the purchase or rental of goods or services; they must not give undue prominence to the product in question; they must be appropriately identified at the start and the end of the programme, and when a programme resumes after an advertising break.[57] The substance of these rules is also set out in the Ofcom Code.[58]

In addition, the Advertising Guidelines of the State Media Authorities (Landesmedienanstalten)—the bodies in charge of licensing and controlling commercial radio and television in Germany—prescribe that product placement must be editorially justified.[59] This is the case when a product has been integrated in the action on mainly

[55] Müller-Rüster (n 24) 278.
[56] ARD/ZDF Advertising Guidelines (n 27) s 9.4.
[57] 13th RStV (n 45) para 7(7).
[58] They are set out in, respectively, Section 9, rr 9.8, 9.4 with 9.9, 9.5 with 9.10, and 9.14.
[59] WerbeRL/Television (n 27) s 4 No 6.

editorial or artistic grounds or the use of the product is necessary so as to clarify the content of the programme.[60] This is a tall order given that product placement is usually not editorially justified. Integrating products in such a way that their brand is recognisable is never unavoidable. It is always possible to obscure brand names and logos or to hide them through appropriate camera work.[61]

As has been discussed above, the position prior to the implementation of the AVMSD was that the editorially justified representation of goods, services etc did not constitute product placement/surreptitious advertising. It has been suggested that this must still be the case under the 13th RStV. The legislator, so the argument goes, could not restrict broadcasting freedom and fall behind the previously existing standard.[62] However, as the discussion of the relevant case law showed, the distinction between editorially justified and commercially motivated product placement has been fraught with difficulties. It is not conceivable that the legislator intended to make the need for identification of product placement dependent upon such an uncertain criterion. Nor do the 13th RStV or the Advertising Guidelines suggest that this would be the case. On the contrary, the Advertising Guidelines require that all product placements be editorially justified. Nonetheless, for the abovementioned reasons, a literal interpretation of this requirement would hardly leave any room for permissible product placement.[63] Therefore, this requirement needs to be interpreted narrowly in the sense that placements must be sensibly integrated into storylines.[64] In other words, they need to be integrated in a way that fits aesthetically the context of the scene in question and does not seem artificial.

In the UK, Ofcom has dealt with this problem by linking the prohibition on undue prominence with editorial integrity. Thus, '[u]ndue prominence may result from the presence of, or reference to, a product, service or trade mark in programming where there is no editorial justification.'[65] Obviously, this shifts some responsibility from the regulator to the production process because, at least in marginal cases, Ofcom will not wish to substitute its own view for an editor's justified judgment about appropriate prominence.

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[60] ibid.

[61] Institut für Medienforschung, 'Die Regelungen zur Produktplatzierung im Rundfunkstaatsvertrag und in den Gemeinsamen Werberichtlinien der Landesmedienanstalten ind ihre Umsetzung im TV: Eine Bestandaufnahme und erste Einordnung', 26 May 2011, <http://www.die-medienanstalten.de/fileadmin/Download/Publikationen/Gutachten_Produktplatzierung_23052011.pdf>.

[62] ibid 64, n 87.

[63] O Castendyk, 'Rundfunkwerberecht – Besonderer Teil' (Kapitel 3 § 2) in A-A Wandtke (ed), *Medienrecht Praxishandbuch* (De Gruyter 2011) vol 3, 222, para 104.

[64] ibid 26.

[65] Ofcom Code, r 9.5.

Genres in which product placement is allowed

In the UK, the Code duly implements the prohibitions in the Directive and the Communications Act 2003. Product placement is allowed in the same genres as under the AVMSD, ie in films, series made for television (or other audiovisual media services), sports programmes, and light entertainment programmes unless they are news programmes (this appears to have been in response to the Government's wishes, although the legislation does not specifically mention it) or children's programmes.[66] Stricter rules apply to programmes produced under UK jurisdiction, where product placement is also prohibited in the following genres: religious programmes, consumer advice programmes and current affairs programmes, as well as programmes that contain an element of content that falls within these genres.[67]

In Germany, product placement is also allowed in the same genres as under the AVMSD. Given that this is an exception to the prohibition on product placement, it needs to be narrowly defined. German law clarifies that light entertainment programmes shall exclude in particular programmes which—alongside elements of entertainment—are of a predominantly informative nature, are consumer programmes or advice programmes including elements of entertainment.[68] This rule corresponds to the UK rule, which prohibits product placement in consumer advice programmes and current affairs programmes as well as programmes that contain an element of content that falls within these genres, albeit only in the case of programmes produced under UK jurisdiction.[69]

To some extent, the UK rule is potentially more far-reaching as it suggests that the inclusion of an element of content falling within these genres, eg a consumer advice item in a magazine format programme, is enough to 'taint' this programme.[70] The German rule, on the other hand, requires a detection of the predominant nature of the programme. Mere elements of informative content do not suffice to preclude product placement. The programme must be predominantly informative for the exclusion to come into force. This interpretation is also supported by the explanatory memorandum to the 13th Interstate Broadcasting Treaty, which clarifies that product placement is only prohibited in mainly informative programmes whereby single short entertainment elements—such as those that are increasingly encountered in the area of infotainment—do not justify the categorisation as 'light entertainment'.[71] Despite the different emphasis in the German and UK rules, both of them seem to reject the automatic classification of infotainment as 'light entertainment'. Given that both sets of rules call for an intricate distinction between information and entertainment, the outcomes of their application might not be so dissimilar after all.

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66 Ofcom Code, rr 9.6, 9.7.
67 Ofcom Guidance Notes, 28 February 2011, s 1.65.
68 13th RStV (n 45) para 15(2).
69 Ofcom Code, r 9.12.
70 Ofcom Guidance Notes, s 1.110.
71 13th RStV (n 45) Interpretative Memorandum, 11.

As far as documentaries are concerned, the German position is stricter than the UK one. Documentaries are not listed among the genres in which product placement is allowed under the AVMSD. Consequently, product placement in such programmes is banned under the Directive, and also under German law.[72] On the contrary, the Ofcom Code allows product placement in single documentaries and single dramas alike.[73] It takes the view that single documentaries and single dramas can be subsumed under the term 'films'.

The equation of single dramas and films raised an interesting problem of interpretation. Article 11 of the AVMSD permits product placement in 'cinematographic works' (films made for cinema) and 'films and series made for audiovisual media services' (including television programme and on-demand programme services). Article 20 of the AVMSD refers to 'cinematographic works' and 'films made for television' in relation to advertising breaks. However, 'films made for television' is not defined, and the Directive does not mention single television dramas. If such single dramas are not film, they will not be able to include product placement. However, if single dramas are film, they will have to follow the rule, in Article 20(2), that allows only one advertisement every 30 minutes. Many stakeholders maintained that they used conventional (more frequent) programme break patterns for single dramas, and would be concerned about the loss of income, and consequent lack of incentive to commission UK-produced single dramas, if single dramas were classified as film for advertising break purposes. Essentially, the UK broadcasters wanted the rules to allow both product placement and non-film advertisement breaks.

As mentioned above, the exceptions to the ban on product placement need to be narrowly defined so as not to undermine it. However, Ofcom considered that the meaning of 'film' in the AVMSD is very broad, and that the intention of the Directive and the legislation was to allow product placement in single televised dramas, otherwise there would be an anomaly with its being allowed in dramas that form part of a series. At the same time, since single dramas are not specifically excluded from the film break rules in Article 20 of the AVMSD (as opposed to 'series, serials and documentaries'), they should be taken to be included.

In the UK, there was also discussion about the possibility of an outright prohibition on product placement in specialist factual programming. Again, Ofcom backed away from its original proposal to ban it, given that it was a difficult genre to define. It opted to rely on general safeguards such as editorial justification, the absence of promotion, and the maintenance of the distinction between editorial and advertising elements.[74]

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[72] See Angelopoulos (n 53) 13.

[73] Ofcom Code, r 9.6.

[74] See Ofcom, 'Broadcasting Code Review: Commercial References in Television Programming. Proposals on Revising the Broadcasting Code', 28 June 2010, <http://www.stakeholders.ofcom.org.uk/binaries/consultations/724242/summary/tvcondoc.pdf>; Ofcom, 'Broadcasting Code Review: Commercial References in Television Programming. Statement on the Ofcom Broadcasting Code', 20 December 2010, <http://stakeholders.ofcom.org.uk/binaries/consultations/724242/statement/statement.pdf> (Broadcasting Code Review).

Prohibited advertising

In the UK and Germany, product placement is not allowed for categories of product which cannot be advertised under Article 11(4) AVMSD, ie tobacco products and the like, and medicinal products and medical treatments available only on prescription.[75]

On the relationship between prohibited categories in product placement and in advertising, Ofcom's view, supported by the industry, was that it would not be appropriate for a product that cannot be advertised to be placed in programmes. Therefore, more categories of product were excluded from placement in programmes produced under UK jurisdiction. They consist of: electronic or smokeless cigarettes, cigarette lighters, cigarette papers, or pipes intended for smoking; alcoholic drinks; HFSS foods and drinks; gambling; infant and follow-on formula; all medicinal products; and any product, service or trade mark that is not allowed to be advertised on TV.[76]

Prop placement

Prop placement is an industry term which describes the donation of products for inclusion in a programme. The associated budget saving makes it the most common form of consideration for the inclusion of or reference to a product in a programme. However, the Directive's operative part does not distinguish between product placement and prop placement, thus seemingly subjecting both to the same rules, which is what the European Commission had preferred. In Article 11(3)(b), prop placement is treated as a class of derogation from the general prohibition on product placement. But the AVMSD provides in Recital 91 that 'the provision of goods or services free of charge, such as production props or prizes, shall only be considered to be product placement if the goods or services included are of *significant value*.'

It has been a subject of debate in Germany whether 'significant value' should be defined in absolute terms or in relative terms, ie as a percentage of the production budget. The advantage of a definition in absolute terms is that its application by regulators is more straightforward. On the other hand, it could lead to inequitable results if the absolute value of the saving was negligible compared to the production budget.[77] As a result, the legislator has opted for a combination of both methods: Props are of significant value when their value exceeds 1 per cent of the programme budget and the amount of €1,000.[78]

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[75] See section 3 above; Ofcom Code, r 9.11; Medicinal Products Advertising Law of 11 July 1965, last modified by art 2 of the Law of 26 April 2006 (BGBl I, 984); Provisional Tobacco Law of 15 August 1974, last modified by art 4 of Law of 9 December 2010 (BGBl I, 1934).

[76] Ofcom Code, r 9.13.

[77] O Castendyk, 'Die Neuregelung der Produktplatzierung im Fernsehen: Definition, Systematik, Prinzipien und Probleme' (2010) *Zeitschrift für Urheber- und Medienrecht* 1, 29, 32.

[78] ARD/ZDF Advertising Guidelines (n 27) s 9.1; WerbeRL/Television (n 27) s 1(2)2.

The value of the products is combined when they emanate from the same source.[79] Consequently, the definition of 'significant value' is much more precise in Germany than in the UK.

Ofcom defines 'significant value' rather vaguely as 'a residual value that is more than trivial', and 'residual value' as a value that is greater than the cost saving a broadcaster, programme producer or broadcaster has made as a result of acquiring the prop for use in the programme.[80] However, as is shown by its CNN decision (discussed above) on defining 'valuable consideration', Ofcom is prepared to look beyond monetary calculations for the purposes of deciding what product placement is.[81] But some anomalies remain: a can of a leading brand fizzy drink may have much more significance in marketing terms than its retail cost; by contrast, it seems that, however well justified its placement might be editorially, a luxury car can never be a prop.

In Germany, props of significant value may not be placed in news programmes, current affairs programmes, consumer advice programmes, programmes for children or religious broadcasts.[82] This rule is stricter than the AVMSD, which places no restriction on the genres in which props may be included.[83] In the UK, props of significant value are treated as product placement and, consequently, the same restrictions apply to the genres in which they can be placed as in Germany. Props of no significant value, on the other hand, are allowed in all genres in Germany[84] and are subject to one restriction only, namely that they may not be unduly prominent.[85] In the UK, even props of no significant value are required to comply with the Ofcom rules on: the independence of editorial control over programming; the separation between editorial content and advertising; the prohibition of surreptitious advertising; the prohibition of promotion of products, services and trade marks in programming; and the prohibition of undue prominence.

Identification

As required by Article 11(3)(d) AVMSD, product placement in programmes produced or commissioned by the broadcaster must be signalled clearly at the beginning and at the end of the programme, and also when the programme recommences after commercial breaks.[86] The Ofcom Guidance Notes specify that a 'P' logo must be displayed for no

[79] ibid.
[80] Ofcom Guidance Notes, s 1.47, 1.48.
[81] See section 6 above.
[82] para 15(1) No 2 RStV.
[83] AVMSD, art 11(3)(b).
[84] ARD/ZDF Advertising Guidelines (n 27) s 9.2.3.
[85] 13th RStV (n 45) para 7(7)2 No 3.
[86] ibid para 7 (7) 4.

fewer than three seconds.[87] The ARD/ZDF Advertising Guidelines also stipulate that it is necessary to use the logo 'P' for three seconds, followed by the phrase 'contains product placement' or 'is supported by prop placement' depending on whether the product has been supplied with or without consideration. If a programme contains both product and prop placement, the phrase 'contains product placement' should be used.[88] The Guidelines of the State Media Authorities applicable to private broadcasters, on the other hand, do not prescribe the use of a specific phrase, and instead suggest only the phrase 'is supported by product placement' by way of example.[89] This possible inconsistency in signalling as regards the public and private broadcasters ignores the Interstate Broadcasting Treaty's exhortation to adopt a unified signalling method and is likely to confuse the viewer.[90] Moreover, in the case of prop placement, the ARD/ZDF Guidelines require broadcasters to provide viewers with a list of placers in the programme's end credits or, if none exist, at the end of the programme. The use of logos or trade marks is prohibited.[91] On the contrary, under the Guidelines of the State Media Authorities, the provision of such additional information is facultative and the use of logos is allowed. Further information can be provided via teletext or online.[92]

In Germany, the identification requirement can be waived in the case of acquired programmes in accordance with Article 11(3) AVMSD. The German rule is however stricter than the Directive since it allows such a waiver only if it is not possible to establish at reasonable expense whether the programmes, which have neither been produced nor commissioned by the broadcaster itself, contain product placement. Information to this effect shall be given.[93] The Interstate Broadcasting Treaty leaves open what exactly constitutes a reasonable effort to identify product placement and what kind of information should be given. The ARD/ZDF Guidelines suggest the use of a phrase which reveals that the existence of product placement could not be established with certainty (eg 'This programme may contain product placement'). They clarify further that it is sufficient for the broadcaster to prompt its supplier, contractually or otherwise, to disclose the existence of product placement.[94] It follows that a contractual disclosure obligation is not mandatory. Nor are broadcasters expected to carry out their own investigations, which would in any event be quite impracticable. This 'secondary'[95] or 'minor'[96] identification requirement therefore has less clout than appears at first sight.

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87 Ofcom Guidance Notes, Annex 1.

88 ARD/ZDF Advertising Guidelines (n 27) s 9.4.

89 WerbeRL/Television (n 27) s 4 No 7.

90 13th RStV (n 45) para 7(7)5.

91 ARD/ZDF Advertising Guidelines (n 27) s 9.4.

92 WerbeRL/Television (n 27) s 4 No 8.

93 13th RStV (n 45) para 7(7)5.

94 ARD/ZDF Advertising Guidelines (n 27) s 9.5.

95 Müller-Rüster (n 24) 290.

96 H von Duisburg, 'Gezielt und preiswert: die Soap im Internet: Werberechtliche Aspekte zu Webisodes' (2011) 2 *Zeitschrift für Urheber- und Medienrecht* 141, 149.

What is more, no administrative offence is committed and no sanction can be imposed in cases of breach of the duty to establish whether an acquired programme contains product placement.

In the UK, while the requirement for the universal logo is clear, the content and extent of signalling information has not been discussed as fully as might be expected. Ofcom notes that, while acquired programmes do not need signalling, the other provisions of the rules do apply. It has not imposed a requirement for placed products, services or trade marks to be listed at the end of a programme, but has stated that, if that is done, it must not break the rules against promotion, and undue prominence or inclusion of promotional information—such as brand slogans or advertising messages—about the placements is prohibited.[97] Broadcasters will be expected to educate audiences about product placement, but exactly how this will be done is not settled. Ofcom has decided to collect revenue data about product placement, but that is not necessarily information which will inform viewers about the extent to which they may have been subjected to product placement.

Thematic placement

Following consultation, Ofcom backed away from its original proposal for an outright ban on product placement arrangements involving thematic placement, that is, the payment by a third party for the creation of storylines or scripts as vehicles for the purpose of featuring particular issues or references (including generic references) to the third party funder's aims, objectives, beliefs or interests. There is a reference to thematic placement in Recital 93 of the AVMSD, as an example of interference with editorial responsibility and independence. However, Ofcom has emphasised that 'the statutory definition of product placement encompasses the paid-for placement of references in programmes to products, services and trade marks *only*. Therefore the product placement Code rules do not enable the inclusion in programmes of paid-for references to a third party's aims, objectives or beliefs.' In relation to other kinds of thematic placement, Ofcom now considers that editorial independence can be protected by the other rules relating to editorial justification (mentioned above), namely, absence of promotion, the maintenance of the distinction between editorial and advertising content, and the ban on undue prominence.[98]

Contrary to the situation in the UK, Germany has explicitly banned thematic placement.[99] The German rule goes beyond the exhortation in the preamble to the AVMSD that thematic placement should be prohibited.[100] The German *Länder* justify the

[97] Ofcom Guidance Notes, s 1.123.
[98] Broadcasting Code Review, paras 4.59–4.76.
[99] 13th RStV (n 45) para 7(7)1.
[100] AVMSD, rec 93.

ban on thematic placement on the ground that it affects the responsibility and editorial independence of the media service provider.[101] This is the same rationale as is found in the AVMSD. Thematic placement is regarded as a particularly pernicious form of product placement as it is nearly impossible for viewers to detect the deliberate interweaving of storylines and generic references to themes.

Thematic placement is not defined in the RStV. However, the Advertising Guidelines of the State Media Authorities (Gemeinsame Richtlinien der Landesmedienanstalten für die Werbung, die Produktplatzierung, das Sponsoring und das Teleshopping im Fernsehen, WerbeRL/Television) define thematic placement as 'the integration of advertising messages in relation to specific product or service genres in return for payment or for similar consideration in order to promote sales.'[102] This corresponds to what is known in the advertising industry as 'generic placement', ie the integration of a well-known branded product without showing its logo or its trade mark. At first sight, the German definition of thematic placement seems narrower than the one drawn in Ofcom's 2010 consultation, which defined thematic placement as 'the payment by a third party for the creation of storylines/scripts as vehicles for the purpose of featuring particular issues or references (including generic references) to the third party funder's aims, objectives, beliefs or interests.'[103] The Common Guidelines of the State Media Authorities, by defining thematic placement as the reference to specific product or service genres, do not seem to encompass general references to the third party funder's aims, objectives, beliefs or interests that do not intend to promote sales.[104] A prominent case of thematic placement involved the promotion of fitted carpets and last minute travel in the popular ARD 'Marienhof' series. An interest group representing the producers of fitted carpets paid substantial sums of money for the insertion into one episode of a dialogue praising the advantages of fitted carpets compared to parquet flooring. Also, the concept of 'last minute travel' was extolled in a number of episodes. The promotion of specific product and service genres in this case undoubtedly constituted thematic placement.

However, the Advertising Guidelines of the State Media Authorities also prohibit thematic placement of economic, political, religious or ideological art.[105] It is not conceivable that the Advertising Guidelines only outlaw such messages of an economic, political, religious or ideological nature if they seek at the same time to promote the sale of specific product or service genres. It follows that the promotion of certain themes, such as development aid or school-based smoking prevention, also falls under the prohibition of thematic placement. Consequently, the German definition of thematic placement has a wider scope than appears at first sight, similar to that applicable in the UK.

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101 Müller-Rüster (n 24) 284.

102 WerbeRL/Television (n 27) s 1(3)1.

103 Ofcom, Broadcasting Code Review, para 4.59.

104 Institut für Medienforschung, 'Regelungen', 10; R Schwartmann, *Praxishandbuch Medien-, IT- und Urheberrecht* (2nd edn, CF Müller 2011) 131, para 51.

105 WerbeRL/Television (n 27) s 1(3)2.

The ban on thematic placement is triggered when an agreement entered into by the broadcaster or producer limits the scriptwriter's freedom to decide whether to integrate a certain message. Mere suggestions or the provision of relevant information are allowed as long as the scriptwriter is free to choose whether to take these cues.[106] What, then, are the implications of the German ban on thematic placement for advertiser-funded programmes in which the funder is integrally involved in the creation of content from the outset? It is arguable that such close alignment between programme-making and commercial interests should be prohibited *a fortiori*. However, if such 'branded entertainment' serves the promotion of a specific brand as opposed to an entire industry sector, then it does not contravene the ban on thematic placement. The better view is that it constitutes illegal product placement on account of the curtailment of the media service provider's editorial independence.[107] An example of such prohibited 'branded entertainment' can be seen in ProSieben's designer-casting-show *Fashion & Fame—Design your Dream!*, which has been created by ProSieben in close cooperation with the mail-order clothes retailer Otto. In this programme, aspiring young designers fight for the title of chief designer of the new label 'GoldCut'. The best of their creations are sold exclusively on Otto's website. The Otto logo and trade mark are visible throughout the programme. In the UK, on the other hand, 'branded' programmes are allowed provided that the general protection rules, mentioned above, are observed.[108] The uncertain impact of an outright prohibition of thematic placement on advertiser-funded programmes has been one of the main reasons for deciding against it in the UK.[109]

Sponsorship

In Recital 91 of the AVMSD, it is stated that '[t]he decisive criterion distinguishing sponsorship from product placement is the fact that in product placement the reference to a product is built into the action of a programme, which is why the definition in point (m) of Article 1(1) contains the word "within". In contrast, sponsor references may be shown during a programme but are not part of the plot.' There is clearly a link between product placement and sponsorship, and Ofcom took the opportunity, in revising the Code, to ensure that sponsorship credits should not be used as a means of circumventing the product placement requirements. Thus, '[w]ith the exception of the sponsorship credits, any reference to a sponsor that appears in a sponsored programme as a result of a commercial arrangement with the broadcaster, the programme-maker or a connected person will be treated as product placement and must comply with [the relevant rules].'

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106 Castendyk (n 63) para 127.

107 Institut für Medienforschung (n 104) 21.

108 For industry optimism on this point, see 'The Product Placement Soap to Premiere on UK TV on 28 February 2011', <http://www.taylorwessing.com/topical-issues/details/the-product-placement-soap-to-premiere-on-uk-tv-on-28-february-2011-2011-02-18.html>.

109 Ofcom, Broadcasting Code Review, paras 4.67, 4.68.

A new rule requires clarity about identification of a sponsor and its association with the sponsored content. However, there may be situations where references to sponsors do appear in programmes, for example, incidentally in sports coverage, or where there is prop placement, or where a competition is sponsored and credited. In those cases, Ofcom relies on the general rules governing editorial independence, no promotion and no undue prominence.

In relation to overlaps between sponsorship credits and a reference to the sponsor's placed product, Ofcom recognised that this 'has the potential to give the sponsor an excessive level of prominence', but it pulled back from imposing an outright ban and decided that the problem could be tackled through guidance regarding undue prominence. In Germany, sponsored programmes must not encourage the sale, rental purchase or lease of products or services of the sponsor or a third party, in particular by making special references.[110] Sponsorship and placement of the sponsor's products are therefore considered to be incompatible in principle.[111] Title sponsoring is, for instance, only allowed if the products or services of the title sponsor do not feature in the broadcast. A particularly controversial issue is the legal treatment of the contribution of sets and costumes. While it was treated as sponsoring in the past, some argue that it now falls under the rules on product placement.[112] This would, however, contradict the provision in the Advertising Guidelines according to which outfitter credits (*Ausstatterhinweise*) are allowed independently of the rules on product placement.[113]

Finally, for consistency, Ofcom has imposed the rule that, '[w]here a sponsor is prohibited from product placing in the programme it is sponsoring, sponsorship credits may not be shown during the sponsored programme.'[114] In Germany, sponsorship credits may be broadcast at the beginning and/or end of the programme.[115] They may only be broadcast during a sponsored programme at the point of entering and/or leaving a commercial break.[116] Sponsorship is prohibited in news and current affairs programmes, as in the UK. Sponsorship of religious and children's programmes is allowed, but the sponsorship logo may not be transmitted.[117]

110 13th RStV (n 45) para 8(3).
111 Institut für Medienforschung (n 104) 21.
112 ibid 66.
113 WerbeRL/Television (n 27) s 4 No 9; s 12.
114 Ofcom Code, r 9.23.
115 13th RStV (n 45) para 8(1).
116 WerbeRL/Television (n 27) s 7(5) No 2.
117 13th RStV (n 45) para 8(6).

Conclusion: Has the new regime achieved its aims?

Product placement has been liberalised in Germany and the UK, as in all other EU Member States with the exception of Denmark, with the aim of tapping into an additional source of revenue for commercial television companies and programme-makers while at the same time ensuring that they retain editorial control over programmes they transmit and protecting viewers from surreptitious advertising. Is the new regime likely to achieve its aims?

In the UK, the industry has adopted a cautious approach since 2011. Industry sources suggest that fewer than 20 instances of product placement have appeared. However, it was anticipated that the market would grow substantially in 2013.[118] According to a study conducted by the Institute for Media Research (Institut für Medienforschung) IMGÖ, Göttingen and Köln, the use of product placement in Germany in the first year following its liberalisation has been limited. The study attributes this to a number of different factors. First of all, it is unclear how income generated from product placement should be divided between producers and broadcasters. Producers are unwilling to go down the product placement route if they are not certain that they will be adequately compensated.[119] Secondly, the early integration of placements into storylines is a complex task, not least due to the need for close supervision of advertising clients on the film set and for more demanding legal advice.[120] Thirdly, broadcasters fear negative viewer reactions to product placement. This concern is particularly pronounced among public service broadcasters. They resent having to earmark their programmes with the P logo on account of an often relatively small contribution. They go as far as renting a car for a series instead of accepting it as a free prop so as to avoid signalling.[121] Compounding these problems, advertising clients are also hesitant as they perceive product placement to be an overly expensive promotion method, with no fixed tariff, and of questionable efficacy. Furthermore, according to some, the limited genres in which product placement is allowed pose a hurdle to the credible integration of products.[122] However, a 2010 study conducted by RTL 2's marketing agency El Cartel Media in cooperation with Düsseldorf polytechnic calls this argument into question. This study shows that series, films and light entertainment programmes are the genres most suited to product placement.[123] Consequently, the 'limitation' of product placement to these genres does not really curb this marketing strategy. Nonetheless, given that advertising budgets cannot be indefinitely

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[118] See 'Product Placement Set to Take Off in 2013', <http://www.marketingweek.co.uk/disciplines/advertising/product-placement-set-to-take-off-in-2013/4000041.article>.

[119] Institut für Medienforschung (n 104) 14.

[120] ibid.

[121] ibid 15.

[122] ibid.

[123] Fachhochschule Düsseldorf and El Cartel Media, 'Aktueller und zukünftiger Stellenwert von Product Placement in der Kommunikation bei Werbetreibenden und Agenturen', <http://www.elcartelmedia.de>.

stretched, it is likely that product placement will not generate additional advertising revenue, leading simply to a shift of income from traditional advertising to product placement.

Limited though the penetration of product placement might have been so far, it is worth asking whether the scheme set up in the Ofcom Code and the 13th Interstate Broadcasting Treaty is capable of protecting the editorial integrity of programmes. In Germany, the narrow interpretation of the term 'light entertainment programmes' and the outright prohibition of thematic placement are commendable. Likewise, the UK has outlawed product placement in news programmes and has further tightened the rules on product placement in programmes produced under UK jurisdiction. However, these steps, combined with the aspirational principles laid down in Article 11(3) AVMSD, still do not offer sufficient guarantees against the creation or distortion of editorial content as a vehicle for the promotion of placed products, services or trade marks. Agreements regarding content and scheduling are hard to prove and are part and parcel of product placement.[124] What is more, the 'safeguards' attached to the relaxation of product placement do not sufficiently account for the fact that there are still many grey areas. Product placement can take on the guise of 'innovation placement', ie the launch of a new product by means of its placement; 'corporate placement', ie the placement of a service or of a company name; or the more insidious 'image placement', where an entire movie is tailored to a single company, product or location. It is hard to distinguish these types of product placement from the unobjectionable practice of 'derived products'—whereby certain products such as action-figure toys are inspired from the movie in which they appear—and from the legitimate representation of the real world.

Admittedly, it may not be fair to heap all the problems associated with the commercialisation of programming solely on the liberalisation of product placement. The advertising industry has influenced the content and scheduling of programmes since the birth of commercial television.[125] However, the replacement of the principle of separation with the principle of identification has exposed programmes to the vagaries of the marketplace even further. The only factor genuinely differentiating product placement from the related threat of surreptitious advertising is the requirement of identification. But there is little that signalling of product placement can do to protect broadcasters' editorial independence.

Has the signalling requirement at least increased transparency for the viewer? Unfortunately, this is not the case. It is ludicrous to suggest that viewers would remain glued to their television set from the beginning of a programme until its very end or at least until after the first advertisement break so as to witness the product placement logo. Channel hopping and the use of personal video recorders empower viewers to skip

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[124] G Gounalakis and C Wege, 'Product Placement und Schleichwerbunsverbot: Widersprüche im neuen Fernsehrichtlinien-Entwurf' (2006) 3 *Kommunikation & Recht* 97, 101.

[125] R Platho, 'Die Systematik von Schleichwerbung und Produktplatzierung und ihre Verfehlung in der AVMS-Richtlinie' (2008) 9 *Multimedia und Recht* 582, 587.

advertising messages as well as any product placement warnings, but not the intricately interwoven commercial references within programmes. What is more, even if the most media literate viewer were to stumble upon the 'P' logo, the regulatory scheme does not make obvious the precise location of a placement. Our media literate viewer might not, despite best efforts, be able to make out any instances of product placement because of the discreet way in which products might have been placed, as required by the prohibition of undue prominence. Or he or she might be able to detect some instances of product placement, in which case the 'P' logo may have succeeded in emphasising the advertising effect. The situation is still more complicated if the viewer succeeds in spotting some placed products, but there is no 'P' logo to accompany them. It will hardly be possible to tell whether these are illegal placements, prop placements of no significant value, or whether their inclusion is merely fortuitous and unintended.

The treatment of prop placements of significant value as product placements is not convincing and exacerbates this confusing state of affairs. In the case of product placement, a greater degree of product exposure is normally part of the contractual arrangement between the broadcaster or producer and the third party funder. This does not apply in the same way to prop placements, which do not in general influence an editorial decision which has already been taken in advance.[126] Admittedly, the distinction between product placement and prop placement is hard to draw, as it hinges on proof of payment. If the legislative intention was to prevent the product placement rules from being sidestepped, then product and prop placement should have been treated equally in all respects. The exemption for prop placements of no significant value is untenable. A can of Coca-Cola may undermine the editorial integrity of a programme in no less drastic a way than the use of an expensive car for free. The crucial question is therefore whether there is editorial justification for the inclusion of a certain prop. The rule on undue prominence would have sufficed for this purpose, while the signalling requirement for props of significant value is simply misleading.

The uncertainty as to how to treat prop placement is exemplified further by the fact that both Germany and the UK have allowed it in public service broadcasting regardless of whether it is of significant value. However, paid product placement is not allowed in BBC services funded by the licence fee, nor is it allowed in programmes which are produced by the German public service broadcasters themselves or produced or commissioned by a company affiliated to them.[127] If paid product placement and prop placement of significant value merit equal treatment, how can this disparity in the area of public service broadcasting be justified?

The discussion regarding the merits and demerits of product placement has been resolved in favour of allowing it, and that decision is unlikely to be reversed. So the current topical question is how to balance the pressures for commercial advantage against

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[126] Hesse (n 26) 719.

[127] 13th RStV (n 45) para 15 No 1; BBC Editorial Guidelines, s 14: 'Editorial Integrity and Independence from External Interests. Product Placement'.

standards of creative and editorial integrity. Editorial integrity has undoubtedly been prominent in Ofcom's deliberations. But, where it has had some discretion in regulating beyond the requirements imposed by statute, it appears to have made a number of concessions to industry perspectives, by relying on the application of regulatory standards rather than prescription. It has not directly addressed the tensions that are reflected in the various interests which product placement involves. Likewise, the German *Länder,* initially sceptical of the liberalisation of product placement, have adopted rules that are stricter in parts than those laid down in the AVMSD. However, these rules cannot sufficiently protect the vulnerable interests at stake, nor can they solve the problems attached to the over-complex and ill-considered AVMSD framework. Although the requirements for 'signalling' have some potential for reconciling some of the conflicts, bolder steps such as the stipulation of quantitative restrictions on product placement or of obligations to disclose product placement arrangements to the broadcasting authorities should have been considered. As an almost unspoken acknowledgement of the dangers that lurk once product placement has infiltrated TV programmes, both Germany and the UK have declared public broadcasting as the last bastion where the principle of separation holds sway. Is, however, the fact that public broadcasting is asked to hold high the banner of editorial integrity sufficient justification to allow private broadcasting to ride the roller coaster of commercialism at an even higher speed?

Tom Lewis

From activism to self-restraint: The strange case of the European Court's volte-face on broadcasting bans on political advertising[1]

Introduction: Freedom of political expression versus equality of political opportunity

Of the underlying theoretical justifications of freedom of expression the one which is perhaps most easily graspable and which seems to find favour with the courts is that it is a necessary precondition of effective political democracy.[2] Of all forms of expression, political expression tends to receive the highest level of protection both under national constitutional free speech clauses and under the right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR).[3] The European Court of Human Rights (the ECtHR) has stated on numerous occasions that freedom of expression constitutes one of the essential foundations of democratic society. Freedom of political debate is said to be at the 'very core of the concept of democratic society which prevails throughout the Convention'.[4]

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[1] This chapter draws heavily on and reproduces parts of previous articles on this area (footnoted as appropriate), in particular my article with P Cumper, 'Balancing Freedom of Political Expression Against Equality of Political Opportunity: The Courts and the UK's Broadcasting Ban on Political Advertising' (2009) *Public Law* 89, and my article, '*Animal Defenders International v United Kingdom*: Sensible Dialogue or Bad Case of Strasbourg Jitters?' (2014) 77 *Modern Law Review* 3, 460.

[2] On the philosophical justifications of the free speech right generally see E Barendt, *Freedom of Speech* (OUP 2005) ch 1; F Schauer, *Free Speech: A Philosophical Enquiry* (CUP 1982). Other justifications include the pursuit of truth, individual self-fulfilment and autonomy. For the examples of the judicial approach see eg *New York Times v Sullivan,* 376 US 254 (1964); *Handyside v United Kingdom* (1976) 1 EHRR 737 [49]; *Castells v Spain* (1992) 14 EHRR [42]; *Kuliś v Poland*, App No 15601/02 (ECHR 18 March 2008) [36]; *Incal v Turkey* (2000) 29 EHRR 449 [46]. The first part of this essay reproduces part of Lewis and Cumper (n 1) 89–92.

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

[4] See eg *Lingens v Austria* (1986) 8 EHRR 103 [42]; *Castells v Spain* (1992) 14 EHRR 445 [43]; *Thorgeir Thorgeirson v Iceland* 14 EHRR 843 [63]; *Éditions Plon v France* (2004) 42 EHRR 36 [42]. See further A Mowbray, 'The Role of the European Court of Human Rights in the Promotion of Democracy' (1999)

On this view, expression is valued for instrumental reasons, being regarded as a *sine qua non* of political democracy. Furthermore, political democracy is at the very hub of the system of rights protection provided for under the ECHR. The Court has stated that democracy appears 'to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it.'[5] Lord Steyn summed up the rationale in *R v Secretary of State for the Home Department Ex parte Simms*:

> Freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.[6]

Since, according to courts at any rate, political democracy is the main virtue whose preservation bestows upon freedom of expression its great value, it follows that the preservation of democracy *itself* must be of equal, if not greater, importance. Thus, the question arises: what should be done when unfettered freedom of expression threatens to undermine the integrity of democratic processes? This conflict most obviously arises where political organisations espouse policies which, if put into effect, would subvert democratic processes and institutions.[7] However, it may occur not just because of the content of the message but also because of the nature of the medium in which the message is conveyed.

Despite the growth of the internet in recent years, the most powerful medium of modern mass communication is still, probably, broadcasting. It can be used to communicate messages to millions of people, simultaneously, in persuasive, seductive and effective ways. For this reason broadcasting is one of the most popular and successful tools of the commercial advertiser. Yet broadcast advertising can be used, not solely by companies wishing to advertise branded products, but also by organisations with political or quasi-political agendas wishing to communicate their message and persuade people to their way of thinking. It immediately becomes apparent that those organisations willing and/or able to purchase air time will be at a significant advantage in the game of political persuasion as compared to those organisations unwilling and/or unable to afford such expenditure. There will be a tendency for the field of political discourse to be tilted in favour of the wealthiest players, and this will create a risk that equality of opportunity in the democratic process will be undermined. There are therefore strong

Public Law 703. The Preamble to the Convention stresses the interconnectedness of political democracy and human rights protection; and limitations on various Convention rights may only be to the extent that is 'necessary in a democratic society'.

[5] See eg *Lingens* (n 4).

[6] *R v Secretary of State for the Home Department Ex parte Simms,* [2000] 2 AC 115 HL, 126.

[7] See eg *Refah Partisi (Welfare Party) v Turkey* (2003) 37 EHRR 1; I Cram, 'Constitutional Responses to Extremist Political Associations: ETA Batasuna and Democratic Norms' (2008) 28 *Legal Studies* 68.

arguments for having some restrictions on the freedom of political expression in order to protect the equality of political opportunity and the integrity of the democratic process.

There exists, therefore, a tension: between *freedom* of political expression—which includes the freedom to communicate one's message in the medium of one's choice—on the one hand, and the *equality* of opportunity to communicate one's message in as effective a way as possible, on the other.[8] There are obvious problems with setting the balance too far in favour of freedom of expression. As Cass Sunstein has put it in the context of First Amendment challenges to legislative restrictions on campaign expenditure in the United States:

> People who are able to organise themselves in such a way as to be able to spend large amounts of cash should not be able to influence politics more than people who are not similarly able … it is most troublesome if people with a good deal of money are allowed to translate their wealth into political influence. It is equally troublesome if the electoral process translates poverty into an absence of political influence.[9]

In the United States this tension has, nevertheless, been resolved very much in favour of freedom of speech. In *Buckley v Valeo* the Supreme Court held that laws which placed limitations on campaign expenditure were in breach of the First Amendment.[10] The Court said that the concept that the government may restrict the speech of some in our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.[11] Moreover, the Court added that if the purpose of such laws was to promote political equality they would be constitutionally unacceptable.[12]

Many European states, however, strike the balance with much more emphasis on protecting the equality of political opportunity and the integrity of democracy. When they *do* impose legislative restrictions on broadcast speech for this purpose it is often the case, as we shall see, that they use 'blanket' prohibitions, prohibiting *all* forms of political advertisements, broadly defined, rather than merely those concerned with party political or electoral matters. The oft-stated rationale for such wide bans is that it is far easier, and far less prone to uncertainty, arbitrariness and abuse, if there exists a 'bright line' rule: it is better have a clear demarcation, one side of which everything is banned, rather than

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[8] This is perhaps a particular manifestation of a fundamental tension that runs through the whole of liberalism—that between freedom and equality, see eg R Dworkin, 'Liberalism' in R Dworkin, *A Matter of Principle* (Harvard UP 1985) 181.

[9] C Sunstein, 'Political Equality and Unintended Consequences' (1994) 94 *Columbia Law Review* 1390, 1392. See also C Sunstein, *Democracy and the Problem of Free Speech* (The Free Press 1995).

[10] *Buckley v Valeo,* 424 US 1 (1976). See also *Citizens United v Federal Election Commission,* 558 US 310 (2010). cf *Austin v Michigan Chamber of Commerce,* 459 US 652 (1990).

[11] *Buckley* ibid [48]–[49].

[12] ibid [49]–[50]. The US model is frequently held up as undesirable, see eg the speech of Baroness Hale in *R (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15; [2008] 1 AC 1312 [47]–[48]. In 1998 the Neill Committee on Standards in Public Life recommended that the United Kingdom's broadcasting ban on political advertising be retained for these reasons, 'Fifth Report, The Funding of Political Parties in the United Kingdom' (Cm 4057-1, 1998) 173–76.

risk acrimonious disputes about which side of the line a particular case falls. The issue for courts in these cases has been whether such blanket bans which interfere with freedom of expression are justifiable on the grounds that more fact-sensitive alternatives would entail greater evils (eg abuse, uncertainty of adjudication, litigation etc). But the problem with blanket bans is that they gain certainty at the expense of fact sensitivity. They may well catch those who do not *themselves* pose any threat to the integrity of democratic process but are merely trying to use TV advertising space to get their message across—for example social advocacy groups, those campaigning for social change on matters of controversy. Can such wide bans be considered proportionate restrictions with the human right to freedom of expression? Of course this tension between the competing goods of fact sensitivity on the one hand, and certainty on the other, has been present since time immemorial. As HLA Hart states: 'all systems … compromise between two social needs: the need for *certain* rules which can, over great areas of conduct, safely be applied … without fresh guidance or weighing up of social issues, and the need to *leave open*, for later settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case.'[13]

Closely related to the substantive questions concerning where the appropriate balance should be struck between freedom of political expression and equality of political opportunity, and how to deal with fact-insensitive laws that deal with the issue, there is an equally important procedural question: what should be the mindset of the court in the adjudication of challenges to the balance that has been struck by a democratically elected legislature? Should it adopt an attitude of activism or restraint? Frederick Schauer, writing in the context of First Amendment challenges to legislative restrictions on campaign finance in the United States, touches on the fundamental question at the centre of the issue:

> Absent textual or historical guidance, how are we to think about the case in which some democratic body—say, a legislature—makes a decision about the devices of democratic process themselves? Is the appropriate posture toward a legislative act that specifies democratic procedures to be one of deference or one of skepticism? It is at this point that the questions about the status of democratically enacted procedural decisions are squarely before us, and it is at this point that we confront the central question of the proper role, if any, of courts as overseers of democratic procedure.[14]

With regard to the Article 10 case law of the ECtHR on political adverting bans on political expression in the broadcast media, until recently the position has been very clear—the Court adopted a posture of scepticism. Whilst it acknowledged that *some* restrictions may be permissible in order to protect democracy, blanket bans have not been well received, especially where the speaker itself has posed no threat to democracy. However, in *Animal Defenders International v United Kingdom* (*ADI*) the Grand

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[13] HLA Hart, *The Concept of Law* (2nd edn, OUP 1994).

[14] F Schauer, 'Judicial Review of the Devices of Democracy' (1994) 94 *Columbia Law Review* 1326, 1334.

Chamber of the ECtHR has radically shifted its posture from one of activism to one of deference to state's bodies.[15] This transition from scepticism to self-restraint in the case law will be traced in the following sections. Thereafter a critical appraisal of the Grand Chamber's judgment in *ADI* will be offered.

The traditional Strasbourg position

As explained above, the protection afforded by the ECtHR to political speech and speech in relation to matters of public concern has been very strong. Restrictions have been subjected to close scrutiny and the margin of appreciation granted to states has been narrow. With regard to broadcasting bans on political advertising in particular, the ECtHR has, until very recently, similarly adopted a posture of scepticism. The cases embodying this approach will now be discussed.

VgT Verein gegen Tierfabriken v Switzerland

In *VgT Verein gegen Tierfabriken v Switzerland* (*VgT*) a Swiss animal rights organisation, in response to commercials by the meat industry, wished to broadcast an advert highlighting the plight of factory-farmed pigs.[16] It produced a 55-second film juxtaposing a scene of wild pigs and piglets in the forest with scenes of distressed factory farmed pigs in cramped pens. The film ended with the exhortation: 'Eat less meat, for the sake of your health, the animals and the environment'.

In Switzerland broadcast political advertisements were banned by virtue of Section 18(5) of the Federal Radio and Television Act. The aim of the Act, as the Swiss government explained using classic 'equality of opportunity' terminology, was to:

> prevent financially powerful groups from obtaining a competitive political advantage, to protect the formation of public opinion from undue commercial influence, to bring about a certain equality of opportunity among different forces of society, and to contribute towards independence of radio and television broadcasters in editorial matters.[17]

As a result of the ban, VgT's film was refused permission to air. Having failed in their claim of a breach of Article 10 before the domestic courts the organisation applied to the ECtHR.

The ECtHR accepted that it was legitimate to impose limits on broadcast advertising in order to protect democracy in 'certain situations'.[18] However the blanket ban constituted

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15 *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21.
16 *VgT Verein gegen Tierfabriken v Switzerland* (2002) 34 EHRR 4 (Chamber, Second Section).
17 ibid [14].
18 ibid [73] and [75].

a disproportionate interference since VgT was clearly *not* a wealthy group that was in a position to distort the political process in the way envisaged by the legislation. All it intended to do was to 'participate in an on-going general debate on animal protection and the rearing of animals'.[19] The reasons for the ban given by the Swiss authorities, the ECtHR held, did not demonstrate 'in a "relevant and sufficient" manner why the grounds generally advanced in support of the prohibition of political advertising also served to justify the interference in the particular circumstances of [VgT]'s case'.[20]

The Swiss federal court had stressed that VgT still had other means of disseminating its ideas eg the print media, cinema and internet, and it was right to single out television for special treatment because of its power and immediacy.[21] The ECtHR, by contrast, held that 'while the domestic authorities may have had valid reasons for this differential treatment, a prohibition of political advertising which applied only to certain media, and not to others, does not appear to be of a particularly pressing nature.'[22]

With regard to the margin of appreciation to be afforded, even though in the area of commercial advertising the margin of appreciation was normally widened, this case concerned political speech and the margin, the ECtHR held, was necessarily narrowed: 'at stake [was] not a given individual's purely "commercial" interests, but his participation in a debate affecting the general interest.'[23] Thus in *VgT* the ECtHR applied its long standing 'skeptical' approach to restrictions on political and public interest speech to the specific sphere of broadcasting bans: careful scrutiny and a narrow margin of appreciation.

TV Vest AS and Rogaland Pensjonistparti v Norway

ECtHR emphatically reaffirmed its activist approach to broadcasting bans on political advertising in *TV Vest AS and Rogaland Pensjonistparti v Norway*.[24] In the run up to regional elections in 2003 the broadcaster TV Vest transmitted three 15-second commercials by the Rogaland Pensioners Party, a small political party representing the interests of the elderly. One of the adverts, representative of the others in tone and content, ran as follows:

> Tor Kristian Rønneberg, Pensioners Party: A sufficient number of good nursing home places. Secure jobs, particularly for older workers, and decent pension schemes. If you are interested in any of this, vote for the Pensioners Party
> *Picture with text*:
> We need your vote on 15 September! Vote for the Pensioners Party

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19 ibid [75].
20 ibid.
21 ibid [22] and [65].
22 ibid [74].
23 ibid [71].
24 *TV Vest AS and Rogaland Pensjonistparti v Norway* (2009) 48 EHRR 51 (Chamber, First Section). See T Lewis, 'Reasserting the Primacy of Broadcast Political Speech after *Animal Defenders International*' (2009) 1 *Journal of Media Law* 37.

The adverts were broadcast despite warnings from the State Media Authority that to do so would breach Norway's statutory ban on political TV advertising under Section 3-1(3) of the Broadcasting Act 1992. The broadcaster was fined NOK 35,000.

After a series of unsuccessful domestic appeals ending in the Supreme Court, TV Vest and the Pensioners Party took their case to Strasbourg claiming a breach of Article 10. They argued that because the Pensioners Party was small and impecunious it rarely secured any coverage on TV and thus had a 'real need to establish a direct communication with the electorate'.[25] There was no system of free party political broadcasts on Norwegian TV, which meant that political speech on TV was 'canalised through broadcaster's editorial staff functioning as gatekeepers' which had the effect of favouring established political parties at the expense of small ones which were prevented from gaining access to public space through television.[26] The Norwegian government argued along political equality lines: this was not a case about freedom of expression but rather about ensuring that 'all political parties could compete on an equal footing'.[27] Television was a powerful and persuasive medium and there was no international consensus on the issue. Therefore, the government argued, the margin of appreciation should be wide: in other words the Court should adopt a stance of deference.

The ECtHR rejected this approach. As in *VgT* it did accept that the audio-visual media are more powerful and immediate than the print media and that sometimes it might be necessary to restrict freedom of expression in order to protect the integrity of the democratic process itself.[28] Furthermore this was an issue on which there was no pan-European consensus. Both these factors would normally widen the margin of appreciation afforded to the state when restricting political speech. However the ECtHR could not accept that the interference with the Article 10 rights in *this* case was within Norway's margin of appreciation: 'the political nature of the advertisements … called for a *strict scrutiny on the part of the Court and a correspondingly circumscribed national margin of appreciation.*'[29] Whilst the Norwegian ban was intended to pursue the legitimate aim of preventing powerful and wealthy interests from obtaining unfair advantage, the Pensioners Party *itself* did not fall into this category.[30] It was small and impecunious, and as such fell into the very category of parties whose interests the ban was intended to protect. The major Norwegian political parties were given 'large amounts' of coverage on TV whilst the Pensioners Party was 'hardly mentioned'. The 'only way' for *it* to get its message across to the public in this medium was through paid advertising.[31] Further, being denied this possibility it was placed at a disadvantage as compared to the major parties that could not be offset by the access it did have to other less potent media such

[25] ibid [33].
[26] ibid [34].
[27] ibid [41].
[28] ibid [61].
[29] ibid [64] (emphasis added).
[30] ibid [72].
[31] ibid [73].

as newspapers.[32] Moreover, in this area of political speech it was not apparent that a blanket ban was necessary in order to prevent sensitivities or divisiveness, which would have militated against a system of filtering on a case-by-case basis.[33] Again, as in *VgT*, the fact that the 'audio-visual' media has a more immediate and powerful effect than other media could not justify the prohibition and fine, and overall the government's argument that there was no alternative to a blanket ban had to be rejected.[34]

Murphy v Ireland

The difference in the ECtHR's approach to broadcasting bans involving other types of expression has been striking. *Murphy v Ireland* concerned, on the face of it, very similar facts to those of *VgT* and *TV Vest*.[35] Mr Murphy, a pastor for the Irish Faith Centre, submitted an advertisement for a religious gathering to a local commercial radio station for transmission.

> What think ye of Christ? Would you, like Peter, only say that he is the son of the living God? Have you ever exposed yourself to the historical facts about Christ? The Irish Faith Centre are presenting for Easter week an hour long video by Dr Jean Scott PhD on the evidence of the resurrection from Monday 10th-Saturday 15th April every night at 8.30 and Easter Sunday at 11.30am and also live by satellite at 7.30pm.

However Section 10(3) of the Irish Radio and Television Act 1988, imposed a blanket ban on, amongst other things, broadcast *religious* advertisements. The purpose of the ban was to prevent religious tensions from being exacerbated, particularly problematic given Ireland's long history of sectarian conflict. Furthermore, it was argued, a more nuanced system which did allow inoffensive religious advertisements would unduly favour the wealthy majority, religions, at the expense of a 'level playing field' for all religions.

Pastor Murphy's submission was duly refused by the Independent Radio and Television Commission and his appeals within the domestic courts failed. He therefore applied to Strasbourg claiming a breach of Article 10 on the same basis as had been claimed by *VgT,* that a blanket ban constituted a disproportionate interference with his right to freedom of expression.

The ECtHR accepted that the state's aims of ensuring respect for religious doctrines and beliefs of others met the Article 10(2) aims of ensuring public order and safety and the rights and freedoms of others.[36] The key question, as in *VgT* and (the later case of) *TV*

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32 ibid.

33 ibid [75].

34 ibid [76]–[77].

35 *Murphy v Ireland* (2004) 38 EHRR 13.

36 ibid [63]–[64]. The government argued that any proclamation of the truth of one religion necessarily proclaims the untruth of another. As such, even innocuous religious expression could lead to 'volatile and explosive reactions' [38].

Vest, was whether a blanket prohibition on a type of broadcast expression was a proportionate way of attempting to achieve these aims.

Murphy claimed (in exactly the same way as VgT and, later, TV Vest and the Pensioners Party) that, rather than impose a blanket ban, the state could have achieved its aims by way of a more fact-sensitive rule that could take more account of *his particular circumstances*. After all *he* did not pose any threat to religious harmony or the rights and freedoms of others. The ECtHR, however, accepted the Irish government's arguments that a more finely tuned approach would not have been practicable:

> a provision allowing one religion, and not another, to advertise would be difficult to justify and … a provision which allowed … filtering by the State or any organ designated by it, on a case by case basis, of unacceptable or excessive religious advertising would be difficult to apply fairly, objectively and coherently.[37]

The ECtHR accepted the government's argument that the exclusion of *all* religious groupings generated 'less discomfort than any filtering of the amount and content of such expression by such groupings'.[38] Further, it was reasonable for the state to conclude that such a system would favour the dominant religion over those with fewer adherents and resources—the level playing field between religions in the medium with the most powerful impact would be jeopardised.[39] Finally there was no consensus on the delicate matter of religion or religious advertising throughout Europe.[40]

Even though the actual advertisement at issue in *Murphy* was not offensive, was innocuous and informational, and the applicant was not a wealthy organisation that would have been able to buy up large chunks of airtime and dominate the airwaves, the ban was still held to be proportionate. Furthermore, in stark contrast to *VgT* the ECtHR in *Murphy* made reference to the alternative avenues available for the communication of his message, and far from saying that their existence demonstrated how the broadcasting ban could not have been all that pressing, in contrast found that this made the ban *more likely* to be proportionate.

> The prohibition concerned only the audio-visual media. The State was … entitled to be particularly wary of the potential for offence in the broadcasting context, such media being accepted by this Court and acknowledged by the applicant, as having a more immediate, invasive and powerful impact including, as the Government and the High Court noted, on the passive recipient. He was consequently free to advertise the same matter in any of the print media (including local and national newspapers) and during public meetings and other assemblies.[41]

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37 ibid [77].
38 ibid.
39 ibid [78].
40 ibid [81]–[82].
41 ibid [74].

The key to understanding the differing resolutions in *Murphy* on the one hand, and *VgT* and *TV Vest* on the other, despite the outwardly similar facts—blanket bans on a form of broadcast advertising—lies in the margin of appreciation that the ECtHR was willing to allow.[42] This in turn depended on the nature of the right being claimed. Indeed the ECtHR in *Murphy* expressly stated that it was the *religious* nature of the expression that resulted in a wider margin of appreciation being afforded than was the case in *VgT* where *political* expression was concerned:

> there is little scope under Article 10(2) of the Convention for restrictions on political speech or on debate of questions of public interest … However, a wider margin of appreciation is generally available to … States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion … it is this margin of appreciation which distinguishes [*Murphy*] from [*VgT*]. In the latter case … the advertisement … concerned a matter of public interest to which a reduced margin of appreciation applied.[43]

The ECtHR placed much more store in the importance of political and public interest speech than religious expression, such that the 'sensitivities' and divisiveness, especially in Ireland, over religion, meant that an all-encompassing blanket ban was justifiable. As Andrew Geddis says:

> because religious expression is not thought to generate as great an externalised benefit for society as a whole when compared to political expression, there is less of a 'thumb on the scale' when it comes to weighing the value of the speech against the possible harms it may engender.[44]

The Strasbourg approach to the issue of blanket broadcasting bans after this trio of cases, *VgT*, *TV Vest*, and *Murphy* was pretty clear: states imposing advertising bans on political speech, broadly construed, were granted only a narrow margin of appreciation due to the importance to democracy of political expression and its iconic place within the ECHR schema. With regard to religious broadcasting, on the other hand, the state was afforded much greater latitude. However, the ECtHR's position on political advertising on TV and radio was very far from an advocacy of a US style 'free-for-all'. It accepted that some limitations on political advertising may be necessary in order to protect the integrity of democracy. Nevertheless, it is clear from these cases that

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[42] See A Geddis, 'You Can't Say "God" on the Radio: Freedom of Expression, Religious Advertising and the Broadcast Media after *Murphy v Ireland*' (2004) *European Human Rights Law Review* 181. It should be noted that whilst the State in *VgT* did advance arguments as to why restrictions were necessary it did not address the question of why a rigid blanket ban was necessary. Its reasons were therefore not considered to be 'relevant and sufficient' [75]. By contrast in *Murphy* the State's arguments as to why a *blanket* ban was needed were fully developed, reaching deep into Irish history, [71], and referring to detailed legislative and judicial consideration of the issue [73].

[43] *Murphy* (n 35) [67].

[44] Geddis (n 42).

blanket bans in the sphere of broadcast political advertising were likely to be held to be disproportionate interferences with Article 10.[45]

This state of affairs has, however, been turned on its head with the judgment of the Grand Chamber of the ECtHR in *Animal Defenders International v United Kingdom* and it is to this case that our attention now turns.

Strasbourg's U-turn on political advertising: *Animal Defenders International v United Kingdom*

In *ADI* the Grand Chamber of the ECtHR, having deliberated for over thirteen months, and by the narrowest of margins, 9:8, reversed its approach to cases involving broadcasting bans on political advertising.[46] It shall be argued below (following a summary of the legal and factual background to the case) that this *volte-face* raises serious issues concerning the adjudication of freedom of expression cases and of human rights cases more generally.

Broadcasting bans on political advertising in the United Kingdom: The legal background

The Communications Act 2003 prohibits the broadcasting of political advertisements on United Kingdom television and radio.[47] This follows previous statutory bans going back to the inception of commercial television in 1954.[48] The justification for the ban is along classical anti-distortion / equality of democratic opportunity lines, as the government minister explained during the passage of the Communications Bill: '[b]y denying powerful interests the chance to skew political debate, the current ban safeguards the

[45] The Grand Chamber of the ECtHR reaffirmed its judgment in *VgT*, and found a fresh breach of Article 10 in *VgT Verein gegen Tierfabriken v Switzerland No 2*, App No 32772/02 (24 June 2009) after the failure of the Swiss authorities to repeal the ban.

[46] *Animal Defenders International v United Kingdom* (n 15). The oral hearing was on the 7 March 2012 and the judgment was given on the 22 April 2013. In the Fourth Section the Court relinquished jurisdiction to the Grand Chamber under Article 30 ECHR on 29 November 2011.

[47] Communications Act 2003, s 319(2)(g). Section 333 retains the previous regime which applied to Party Political and Party Election Broadcasts, time for which is allocated, free of charge, to the biggest political parties.

[48] See eg the Television Act 1954, sched 2; Broadcasting Act 1990, s 92. See *R v Radio Authority Ex parte Bull,* [1998] QB 294 CA (Civ Div); J Stevens and D Feldman, 'Broadcasting Advertisements by Bodies with Political Objectives, Judicial Review and the Influence of Charities Law' (1997) *Public Law* 615. For a general review of this area see J Rowbottom, *Democracy Distorted: Wealth Influence and Democratic Politics* (CUP 2010).

public and democratic debate, and protects the impartiality of broadcasters'.[49] The example of the USA, where money is a—perhaps *the*—key determinant of electoral success, is frequently held up as the unpalatable likely consequence of removing the ban.[50]

The aims of protecting democracy from distortion by wealthy interests and preserving the broadcaster's impartiality are promoted by Section 321 of the Communications Act: an advertisement will contravene the prohibition if it is either 'by or on behalf of a body whose objects are wholly or mainly of a political nature'[51] or is 'directed towards a political end'.[52] However the Communications Act's reach is far greater than party political and electoral matters.[53] Under Section 321(3) the terms 'objects of a political nature' and 'political ends' are defined widely so as to include: 'influencing the outcome of elections and referendums';[54] 'bringing about changes in the law' and/or 'influencing the legislative process';[55] promoting the interests of political parties and groups;[56] 'influencing the policies or decisions of governments';[57] 'persons on whom public functions are conferred by law'[58] or 'international agreements';[59] and 'influencing public opinion on a matter which, in the United Kingdom, is a matter of public controversy'.[60] The provision has been subjected to much academic criticism on account of its breadth, catching as it does not just political parties but social advocacy groups seeking to take part in debate about matters of controversy.[61]

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[49] Secretary of State for Culture, Media and Sport, Tessa Jowell MP HC Deb vol 395, col 788, 3 December 2002. In 1998 the Neill Committee (n 12) recommended that the ban be retained for these reasons, 173–76.

[50] See eg the speech of Baroness Hale in *R (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* (n 12) [47]–[48].

[51] Communications Act 2003 s 321(2)(a).

[52] ibid s 321(2)(b).

[53] Lord Scott described the width of the prohibition as 'remarkable' in *Animal Defenders* (n 12) [41].

[54] Communications Act 2003 s 321(3)(a). Covers the UK and elsewhere.

[55] ibid s 321(3)(b).

[56] ibid s 321(3)(g).

[57] ibid s 321(3)(c). In the UK or elsewhere.

[58] ibid s 321(3)(d). In the UK or elsewhere.

[59] ibid s 321(3)(e). In the UK or elsewhere.

[60] ibid s 321(3)(f).

[61] See eg A Scott, '"A Monstrous and Unjustifiable Infringement"?: Political Expression and the Broadcasting Ban on Advocacy Advertising (2003) 66 *Modern Law Review* 224; T Lewis, 'Political Advertising and the Communications Act: Tailored Suit or Old Blanket?' (2005) 3 *European Human Rights Law Review* 290; E Barendt, *Freedom of Speech* (OUP 2006) 444–45 and 484–86; H Fenwick and G Phillipson, *Media Freedom under the Human Rights Act* (OUP 2006) 1015–36; C Munro, 'Time up for the Ban?' (2007) 157 *New Law Journal* 886. The impact of the prohibition can be seen on the 'Make Poverty History' campaign whose 'One Click' advert was banned, see *Ofcom Bulletin* issue 43, 12 September 2005, 4–14. See also *R (on the application of London Christian Radio Ltd & Anor v Radio Advertising Clearance Centre,* [2013] EWCA Civ 1495; 1 WLR 307.

Animal Defenders International: The challenge in the United Kingdom

It is against this statutory backdrop that Animal Defenders International (ADI), a non-profit, non-charitable animal rights NGO submitted a short film to be broadcast on commercial television networks as part of its 'My Mate's a Primate' campaign highlighting the abuse of primates by humans. The film juxtaposed a girl and a chimpanzee in a cage, accompanied by the text 'A chimp has the mental and emotional age of a 4 year old child', and concluding with a request for donations.[62] Clearance for the advert was refused on the basis that it would fall foul of the Communications Act since ADI was a body whose objects were 'mainly of a political nature'.[63] Therefore ADI sought, by way of a judicial review, a declaration under Section 4 of the Human Rights Act 1998 (HRA) that the statutory prohibition on broadcast political advertisements was incompatible with Article 10 of the ECHR.

Both the Divisional Court[64] and a unanimous House of Lords[65] held that the ban was not incompatible with Article 10. Their Lordships accepted the 'anti-distortion' argument—that restrictions on political advertising were necessary to ensure that 'the playing field of debate should as far as possible be level.'[66] However the real question, as in the Strasbourg cases discussed above, was not whether *some* limitations were necessary, but rather whether such an *all-encompassing* prohibition was proportionate, especially given that ADI itself is clearly not one of those wealthy groups whose domination of the air-waves the legislation is intended to prevent. Alternative, more finely-tuned regimes might be feasible (for example a system involving spending caps, or time rationing, or tightened restrictions around election times) which would achieve the objectives of protecting democracy and yet still allow groups such as ADI to get their message across in the most effective medium. However, their Lordships held that the question of how to balance freedom of expression and the protection of democratic process was best resolved by elected Members of Parliament. Given the power and pervasiveness of TV, 'great weight' should be accorded to Parliament's view that it was necessary to impose a blanket ban on *all* 'political' advertisements in the broadcast media and that more nuanced systems taking account of individual cases, or rationing or

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62 The film can be seen here: <http://www.youtube.com/watch?v=qON_lFQE4HY>, accessed 5 December 2013.

63 By the Broadcasting Advertising Clearance Centre, an informal body funded by commercial broadcasters to monitor proposed advertisements.

64 *R (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2006] EWHC 3069 (Admin) (4 December 2006); (2007) HRLR 9 (Auld LJ and Ousely J).

65 *R (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* (n 12). Lord Bingham, Lord Scott and Baroness Hale gave fully reasoned speeches. Lords Carswell and Neuberger agreed with the reasons given by Lord Bingham. The appeal from the Divisional Court was 'leapfrogged'. Hereinafter, for ease of reference, the House of Lords stage of the case will be referred to as '*Animal Defenders*', and the European Court of Human Rights stage as '*ADI*'.

66 ibid [28] (Lord Bingham).

capping, were not workable since they would lead to uncertainty, unfairness and many legal challenges.[67] 'Government had considered that no fair and workable compromise solution could be found which would address the problem—a judgment which Parliament accepted' and which their Lordships saw 'no reason to challenge'.[68]

When ADI applied for judicial review in the domestic courts it was doubtless confident that its prospects were good, given the high levels of protection afforded to political expression in general and to broadcast political advertisements in particular. Indeed, the ECtHR's judgment in *VgT* had posed problems for the United Kingdom government during the passage of the Communications Bill itself. Because of the *VgT* ruling the government had taken the highly unusual step of making a statement under Section 19(1)(b) of the HRA to the effect that it was unable to make a statement that the Bill was compatible with Convention rights.[69] Moreover the Swiss case presented difficulties for the House of Lords in *ADI*, bound as it was to 'take [it] into account' by virtue of Section 2 of the HRA. However Lord Bingham held that the argument that it was necessary to maintain the 'level playing field of debate' had not been 'deployed' to its 'full strength' in *VgT* which was in any event distinguishable as the animal rights group in that case had been seeking to *respond* to a meat industry campaign, which was not the case in *Animal Defenders*.[70] Lord Scott stressed the fact-sensitivity of Strasbourg judgments, saying that it was therefore 'perilous to transpose the outcome of one case to another where the facts are different'.[71]

Their Lordships preferred the logic of *Murphy* to that of *VgT* both with regard to the fact that other avenues of communication were open to ADI,[72] and in relation to the margin of appreciation—their Lordships holding that the lack of consensus across Europe on political advertising bans was equivalent to the lack of consensus on religious advertising.[73]

Animal Defenders at Strasbourg

Having failed before the domestic courts ADI applied to Strasbourg.[74] The central question for the Grand Chamber was not whether *some* restriction on political advertising

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[67] ibid [31]–[33] (Lord Bingham).

[68] ibid [31].

[69] See the Parliamentary Joint Committee on Human Rights Report on the Draft Communications Bill, Nineteenth Report of Session 2001-02, HL Paper 149, HC 1102, 19 July 2002, [58]–[64].

[70] *Animal Defenders* (n 12) [28]–[29].

[71] ibid [43].

[72] ibid [32] (Lord Bingham).

[73] ibid [35] (Lord Bingham). The UK government intervened in *TV Vest AS and Rogaland Pensionistparti v Norway* attaching a copy of the House of Lords' judgment in *Animal Defenders* for the Court's consideration [54]–[57], but to no avail.

[74] This section and the subsequent sections substantially reproduce my article in the *Modern Law Review,* (n 1).

was legitimate to protect democratic processes from distortion: all sides agreed that it was.[75] Rather, it was whether a wide broadcasting ban that caught not just wealthy political actors but also social advocacy groups, themselves posing no threat to democracy, was a proportionate interference with ADI's Article 10 rights.

Going against *VgT* and *TV Vest*, the majority held that it was—the ban did not breach Article 10.[76] The crucial step in the Grand Chamber's reasoning was its characterisation of the ban as a 'general measure'.[77] Referring to the case law, the majority divined a principle: 'in order to determine the proportionality of a general measure, the Court must primarily assess the legislative choices underlying it.'[78] Of particular importance, the majority held, was 'the quality of the parliamentary and judicial review of the necessity of the measure', and the 'risk of abuse if the general measure were to be relaxed', a question that was 'primarily for the state to assess'.[79] Where a system of 'case by case examination' would 'give rise to a risk of significant uncertainty', then it was more likely that a general measure would be found to be a 'more feasible means of achieving the legitimate aim'.[80] Further, 'the more convincing the general justifications for the general measures are, the less importance the Court will attach to its impact in a particular case'.[81] Crucially, the majority stated:

> The central question as regards … [general] measures is not, as the applicant suggested, whether less restrictive rules should have been adopted, or indeed, whether the State could prove that, without the prohibition, the legitimate aim would not be achieved. Rather the core issue is whether, in adopting the general measure and striking the balance it did, the legislature acted within the margin of appreciation afforded to it.[82]

Moreover, on the question of the margin of appreciation, the Grand Chamber noted, since there 'is a wealth of historical, cultural and political differences [sic] within Europe … it is for each State to mould its own democratic vision' and because of their close contact with the 'vital forces of their countries, their societies and their needs, the legislative and judicial authorities are in the best place to assess the particular difficulties of safeguarding the democratic order in their State.'[83]

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[75] *ADI* (n 15) [106] and [112].

[76] The majority comprised Judges Casadevall, Vajić, Steiner, Hirvelä, Nicolaou, Poalelungi, Pardalos, and Keller. Judge Bratza gave a separate concurring opinion. Judges Ziemele, Sajó, Kalydjieva, Vučinić, and De Gaetano gave a joint dissenting opinion. Judge Tulkens gave a dissenting opinion, joined by Judges Spielmann (President) and Laffranque.

[77] *ADI* (n 15) [107]. Meaning a general measure whose impact is not tailored to the facts of individual cases.

[78] ibid [108]. See also Judge Bratza (concurring) [4] and [7].

[79] ibid.

[80] ibid.

[81] ibid [109].

[82] ibid. See also Judge Bratza (concurring) [17].

[83] ibid [111].

Having set up the question in this way it was a comparatively easy step for the majority to find that the interference with ADI's rights was proportionate. Crucially, they found that there had been 'exceptional examination by parliamentary bodies of the cultural, political and legal aspects of the prohibition' coupled with the detailed debate and analysis by the domestic courts. The former, it was noted, possessed 'particular competence' in this area and 'considerable weight' was attached 'to [the] exacting and pertinent reviews' held by both Parliament and the courts leading to their finding that 'general measures were necessary to prevent distortion of crucial public interest debates' and the 'undermining of the democratic process'.[84] Furthermore, the ban was 'specifically circumscribed', and minimally impaired freedom of expression because it applied only to paid advertising on TV and radio, leaving ADI free to participate in ordinary discussion programmes and to use other means of communication such as print, posters, public protest and the internet or, alternatively, set up a non-political charitable arm which would be exempt from the ban.[85] In addition the Grand Chamber noted that the United Kingdom's system of free party political broadcasts for political parties mitigated, in a general sense, the harshness of the ban, although (as the Grand Chamber admitted) this did not help ADI itself.[86]

ADI had argued that alternative, more finely tuned, regimes would be preferable, which would allow social advocacy groups to advertise outside of election periods and could, for example, allow adjudication on a 'case by case' basis or utilise a system of spending caps.[87] However the Grand Chamber held that this was primarily an issue for determination by domestic authorities and the United Kingdom bodies had reached the conclusion that such alternative schemes would not be feasible either due, respectively, to the risk of arbitrariness (with accompanying uncertainty, litigation, expense and delay) or abuse (for example political organisations setting up fronting social advocacy groups to circumvent any spending cap). Further, these alternative schemes might compromise the principle of broadcasting impartiality.[88] On the question of restrictions placed on political advertising on TV and radio, the majority reiterated, there was no consensus among contracting states and the margin of appreciation to be afforded should

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[84] ibid [114]–[116]. See also Judge Bratza (concurring) [12] and [13]. For a summary of the various stages of legislative examination and consultation see [41]–[54]. The bodies consulted included the Joint Committee on Human Rights, the Independent Television Commission and the Electoral Commission.

[85] ibid [117] and [124]. See also Judge Bratza (concurring) [15].

[86] ibid [121]. See also Judge Bratza (concurring) [15] and Judge Tulkens et al (dissenting) [14].

[87] Such 'nuanced' systems exist in many European countries (eg Switzerland, Denmark, Norway, Sweden, Italy the Czech Republic, and Belgium). The range of systems, across Europe (from complete bans to systems with no restrictions at all) was surveyed by the European Platform of Regulatory Authorities, May 2006, summarised in *ADI* (n 15) [65]–[69].

[88] ibid [122].

be 'somewhat wider than … that normally afforded to restrictions on matters of public interest'.[89] In conclusion the Grand Chamber found that the 'reasons adduced by the authorities to justify the prohibition of [ADI's] advertisement [were] relevant and sufficient … [and] the prohibition [could not] therefore be considered to be a disproportionate interference with the applicant's right to freedom of expression.'[90]

Critique of *ADI*

The Grand Chamber judgment in *ADI* raises several issues of concern, both with regard to the adjudication of freedom of expression cases specifically, and also in relation to the European Convention system for human rights protection more broadly.

General measure or blanket ban?

The first area of concern is in relation to the Grand Chamber's identification of the case as one involving 'general measures'. Essentially the majority seems to be saying, as a general proposition, that where a state interferes with human rights by way of a broad legal prohibition that has a legitimate aim but which catches within its broad sweep or fine mesh those whose circumstances place them outside the scope of the legislation's aim then, as long as there has been a proper debate by the legislative organs that introduced it in the first place, it will likely be found to be proportionate. This approach is open to criticism for several reasons.

In its well-established Article 10 jurisprudence the ECtHR's method of establishing whether a particular interference is justified as being 'necessary in a democratic society' is to determine whether it is in response to a 'pressing social need', whether it is 'proportionate to the legitimate aim pursued' and 'whether the reasons given to justify it by the national authorities are relevant and sufficient.'[91] At this stage regard must also be had to the appropriate margin of appreciation to be afforded to the state.[92] However, as Judges Ziemele, Sajó et al pointed out in their dissent, the majority judgment in *ADI* significantly waters down this approach in cases where a state's legislature has sought to achieve a particular aim by way of a 'general measure'.[93] In such circumstances, at least where a 'general measure' has been used because it is claimed that alternatives

[89] ibid [123]. The Court acknowledged that in the area of political advertising it was particularly difficult to assess the level of consensus between states and compare systems due to the differing meaning accorded to the term 'political' under different legal regimes.

[90] ibid [125].

[91] *Sunday Times v United Kingdom* (1979) 2 EHRR 245 [62]. Admittedly this test is rather sporadically and inconsistently applied, see Fenwick and Phillipson (n 61) 93–106.

[92] *Handyside v United Kingdom* (n 2) [48]–[49].

[93] *ADI* (n 15) Judges Ziemele, Sajó et al (dissenting) [3]–[4].

would lead to uncertainty or abuse then, following *ADI,* the emphasis is to be placed on the question of whether the reasons given for adopting the general measure are relevant and sufficient. This is indicated by the Grand Chamber's subtle re-definition of its own role in respect of the Article 10(2) 'necessary in a democratic society' test, viz to 'assess whether the reasons adduced to justify the prohibition were both "relevant" and "sufficient" *and thus* whether the interference corresponded to a "pressing social need" and was proportionate to the legitimate aim pursued.'[94] Thus in 'general measures' cases the relevancy and sufficiency of the reasons provided becomes *the* crucial determinant of whether the 'social need' is 'pressing' and the interference proportionate, rather than merely the *final* element of the analysis.[95]

The problem with this 'general measures' approach is that scrutiny of the legislation's impact on the individual applicant will be significantly diminished. If a state introduces a general ban, but ensures that its legislative bodies properly deliberate upon it, this will lead to a reduced intensity of examination by the ECtHR, arguably to the point where it becomes merely a review of the quality of the debate at national level, rather than of the measure's impact in the 'particular case' before it.[96] The Grand Chamber stated that 'the application of the general measure to the facts of the case remains … illustrative of its impact in practice and is thus material to its proportionality.'[97] But this, in effect, writes the individual applicant out of the equation. It is difficult to see, from the right holder's perspective, why the quality and quantity of debate should have a determinative impact on whether there has been a violation of their rights.[98] Furthermore, as the dissenting judges commented, the approach of the majority disregards the well-established principle that in order for a measure to be proportionate and necessary 'there must be no other means of achieving the same end that would interfere less seriously with the fundamental right concerned.'[99]

In the United Kingdom's domestic human rights jurisprudence, since the passage of the HRA, a strong stance has been taken against a 'formalist' approach which examines the adequacy of the decision-making process behind a measure that interferes with Convention rights.[100] In particular the domestic courts have expressly rejected approaches

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[94] *ADI* (n 15) [105] (emphasis added).

[95] As Fenwick and Phillipson (n 61) point out 'the requirement that the "reasons" given be "relevant and sufficient" is largely meaningless [since] it is self-evident that they must be "relevant" [and] what counts as "sufficient" evidence will depend on how closely the Court is minded to scrutinize the factual matrix, which really depends upon how intensely it is applying the proportionality test', 94.

[96] *Murphy v Ireland* (n 35) [68]; *VgT* (n 16) [75]; *TV Vest* (n 24) [63], [69].

[97] *ADI* (n 15) [108].

[98] This point was made forcefully by Judges Ziemele, Sajó et al (dissenting) in *ADI* (n 15) [8]–[10].

[99] *ADI* (n 15), Judge Tulkens et al (dissenting) [16] and Judges Ziemele, Sajó et al (dissenting) [14]. The former noted that in all of the debate by the domestic legislative bodies and courts, no convincing arguments were put for rejecting the *less restrictive* solutions that do operate in other Contracting States.

[100] *R (on the application of Begum) v Headteacher and Governors of Denbigh High School,* [2006] UKHL 15, [2007] 1 AC 100; *Belfast City Council v Miss Behavin' Limited (Northern Ireland),* [2007] UKHL 19, [2007] 1 WLR 1420.

which would allow consideration of the quality of debate in Parliament as going to whether a measure is proportionate or not, holding that this would contravene Article 9 of the Bill of Rights 1689.[101] Thus in *Wilson v First County Trust Ltd* Lord Nicholls held: '[i]t is a cardinal constitutional principle that the will of Parliament is expressed in the language used by it in its enactments. The proportionality of legislation is to be judged on that basis … [it] is not to be judged by the quality of reasons advanced in support of it in the course of parliamentary debate.'[102]

In contrast, recent Strasbourg jurisprudence has tended to emphasise the presence or absence, or quality of, parliamentary debate. Indeed in the case concerning the UK's legislative ban on convicted prisoners' voting, *Hirst v United Kingdom (No 2),* the *failure* to have such a debate counted against the United Kingdom and was one of the factors leading the ECtHR to find an absence of proportionality and a breach of the right to vote under Article 3 of Protocol 1 ECHR.[103] This line of reasoning leads to an uncomfortable inference: that states may legislate to impose broad restrictions on Convention rights, and as long as they *do* tick the correct boxes in terms of debate, this will exempt them from the rigours of full proportionality review at any subsequent Strasbourg hearing. By the same token, states which may adopt *identical* measures, but whose legislatures do not conduct such full debates will be far more likely to be found in breach.[104] The question arises: if the law makers in Switzerland and Norway had conducted more extensive reviews when introducing their own broadcasting bans, might those states have escaped censure by the ECtHR in *VgT* and *TV Vest* respectively? The conclusion to be drawn from the majority judgment in *ADI* is that they would.

It might also be noted that it was only because of the *VgT* judgment that such 'exceptional examination' by the United Kingdom's parliamentary and judicial bodies took place at all. Had it not been for *VgT* it is virtually certain that the pre-legislative and legislative scrutiny (and judicial review) would have been far less searching.[105] The irony here is obvious—the *VgT* case itself provoked the discussion that accompanied the passage of the Communications Bill in the United Kingdom. The very fact that this

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[101] *Wilson v First County Trust,* [2003] UKHL 40; [2004]1 AC 816. Article 9 of the Bill of Rights 1689 provides: 'That the Freedome of Speech and Debates or Proceedings in Parlyment ought not to be impeached or questioned in any Court or Place out of Parlyament.'

[102] ibid *Wilson* [67] (Lord Nicholls). Their Lordships all agreed, Lord Hope [115]–[118], Lord Hobhouse [140]–[145], Lord Scott [173], Lord Rodger [178]. See also *R v Secretary of State for Education and Employment ex parte Williamson,* [2005] UKHL 15; [2005] 2 AC 256 [51] (Lord Nicholls).

[103] *Hirst v United Kingdom No 2* (2006) 42 EHRR 41 [79]. See Judge Bratza's concurring opinion in *ADI* (n 15) [12]. The question arises: what if there *had* been a full debate on prisoner voting prior to the passage of the Representation of the People Act 1983 (the impugned measure in *Hirst*)? See further T Lewis, '"Difficult and Slippery Terrain": Hansard, Human Rights and *Hirst v UK*' (2006) *Public Law* 209.

[104] In this regard it is notable that the ECtHR in *VgT*, in which the broadcasting ban was arguably *less* broad than the UK's, (see Judges Ziemele, Sajó et al in *ADI* [2] and Judge Tulkens et al [12]) held that the reasons given by the Swiss authorities were not relevant and sufficient, [75].

[105] The Neill Committee report (n 12) predated *VgT* and whilst supportive of the ban on political broadcast advertising, focussed on the issue as it related to political parties and did not address the allegation of over-breadth in relation to social advocacy groups.

debate had taken place contributed, in turn, to the quasi-overruling of *VgT* by the Grand Chamber in *ADI*. A crucial factor seems to have been the mere happenstance of the timing of the passage of the legislation *vis-à-vis* the ECtHR's judgments: had the Communications Bill completed its passage *before* the *VgT* ruling, the parliamentary deliberations would, without doubt, have been nowhere near as thorough.

Given that the consequence of categorising a provision as a 'general measure' is now (apparently) so critical, it would seem to be imperative to have a clear definition of this term. This is made all the more important by the fact that the essence of a 'general measure' appears to be strikingly similar to what, in other cases, the ECtHR has categorised as a 'blanket ban',[106] and/or as 'prior restraint'.[107] In these latter instances, however, the ECtHR has insisted that such restrictions be subjected to careful scrutiny with the state being afforded only a narrow margin of appreciation. In reality, however, it is difficult to discern a difference between these 'bad' forms of restraint and the acceptable and justifiable 'general measure'.

It could be argued that the difference in *ADI* was that the prohibition was 'specifically circumscribed': it applied only to broadcast advertising, and *other* means of communication—eg newspapers, demonstrations, posters and the internet—were still available for social advocacy groups to get their message across.[108] This is a weak argument. If the ban *had* covered these other means of communication, this would have constituted such a drastic interference with freedom of political expression that it could *never* have withstood a human rights challenge. The Communications Act ban *was* a blanket ban in the sense that it denied access completely to broadcast advertising, arguably *the* most effective means of mass communication.[109]

It is clear, then, that in future cases a great deal will turn on whether the ECtHR classifies a restriction as a 'general measure' or 'blanket ban'. By way of illustration, consider the prisoner voting ban case, *Hirst.* The ban in that case was arguably not so very different to that in *ADI*. It too could be said to have been 'specifically circumscribed' in that it applied *only* to those convicted of crimes serious enough to warrant a custodial sentence, and only during their period of incarceration. Moreover, it did not apply to criminals subject to fines, suspended sentences or community service, or to people

[106] See eg *Hirst* (n 103) [76].

[107] *Observer and Guardian v United Kingdom* (1992) 14 EHRR 153 [60]. In *ADI* (n 15) above Judges Ziemele, Sajó et al (dissenting) noted that this was 'almost a blanket restriction' [2], which 'border[ed] on prior restraint' [10].

[108] *ADI* (n 15) [117] and [124].

[109] ibid Judge Tulkens et al [12]–[13]; Judges Ziemele, Sajó et al [2]. There was some discussion in *ADI* over whether the internet has replaced television as the most influential medium. The majority stressed the 'immediate and powerful effect of the broadcast media', their 'synchronicity' as compared to the internet, and the fact that they were 'familiar sources of entertainment in the intimacy of the home'. ADI had argued that to single out broadcasting in the legislation was 'illogical' since the internet was equally, if not more, influential, but the majority held that there had been 'no significant evidence of a sufficiently serious shift in the respective influences of the new and the broadcast media … to undermine the need for the special measures for the latter' [117].

detained on remand or for contempt of court, fine default, or to unconvicted detained mental patients.[110] But the Grand Chamber of the ECtHR in *Hirst* did not hesitate to categorise that ban as a 'blanket restriction', and this was *the* key determinant in its finding a breach of the right to vote under Article 3 of Protocol 1.[111]

There is therefore a troubling lack of clarity about the crux question of what constitutes a 'blanket ban' and what constitutes a 'general measure'. If a ban is designated as 'blanket' this will benefit the applicant—it will be an uphill struggle for the defendant state to justify it; but if it is labelled a 'general measure' then all the state has to demonstrate is that its legislators have carried out a thorough ventilation of the issues before coming down on the side of restriction. The initial categorisation will in effect determine the outcome of the case. Consequently the adjudicative battleground, post-*ADI*, may become a struggle over categories.

Finally, as five dissenting judges explained, the 'general measures' doctrine is of distinctly dubious doctrinal provenance.[112] The ECtHR has dealt on multiple occasions with cases involving general prohibitions and 'bright line rules'.[113] But the Grand Chamber's statement in *ADI* that '[i]t emerges from that case-law that, in order to determine the proportionality of a general measure, the Court must *primarily* assess the legislative choices underlying it'[114] is loosely based on the limited and ageing authority of *James and others*, a case concerning leasehold enfranchisement legislation and the right to peaceful enjoyment of possessions under Article 1 of Protocol 1.[115] Certainly the 'general measures' principle has not been deployed in the ECtHR's Article 10 case law hitherto. In particular, no mention was made of the doctrine in its recent jurisprudence concerning bans on broadcast advertising. Furthermore, the Grand Chamber's key assertion that 'the more convincing the general justifications for the general measure are, the less importance the Court will attach to its impact in the particular case' is vaguely

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110 *Hirst* (n 103) [51].

111 ibid [82].

112 *ADI* (n 15), Judges Ziemele, Sajó et al (dissenting) [4]–[8].

113 Principles concerning 'general measures' have mainly been discussed by the Court, though not using this term, in cases concerning: intimate and sensitive issues of personal autonomy and dignity (eg *Pretty v United Kingdom,* [2002] 35 EHRR 1 [74]; *Evans v United Kingdom* (2006) 43 EHRR 21 [86] and [89]); economic and social policy (eg *James and others v United Kingdom* (1986) 8 EHRR 123 [36] and [68]; *Hatton & Others v United Kingdom* (2003) 37 EHRR 28 [128]); pensions and welfare (eg *Runkee and White v United Kingdom*, App Nos 42949/98 and 53134/99 (ECHR, 10 May 2007) [39]); and electoral law (eg *Zdanoka v Latvia* (2007) 45 EHRR 17 [112]–[114]; *Hirst v United Kingdom (No 2)* (n 103). For a general review of this area see P Sales and B Hooper 'Proportionality and the Form of Law' (2003) 119 *Law Quarterly Review* 426.

114 *ADI* (n 15) [108] (emphasis added).

115 *James and Others v United Kingdom* (1986) 8 EHRR 123 [36], though this principle was not expressly stated in these terms in the ECtHR's judgment, its origins appearing to lie in the UK government's argument before the Commission, see *James and others v United Kingdom*, App No 8793/79, (Eur Comm HR, 28 January 1983) (HUDOC) 47 and 57. See Ronan Ó Fathaigh 'Ban on Political Advertising Does Not Violate Article 10: *Animal Defenders International v UK*' *Strasbourg Observers* blog, <http://strasbourgobservers.com/2013/04/24/ban-on-political-advertising-does-not-violate-article-10/>, 24 April 2013 (accessed 5 December 2013).

stated to be based on 'elements of its analysis' in *VgT*, *Murphy* and *TV Vest*, with a conspicuous absence of any specific paragraph references.[116] The case whose result would most support the Grand Chamber's conclusion is the religious advertising ban case of *Murphy* and no such 'general measures' methodology was used there. Rather that case was expressly distinguished from the political expression case, *VgT,* by virtue of the type of expression involved—religious, not political—and the particular sensitivities associated with religion, especially in Ireland, leading the ECtHR to afford a wider margin of appreciation to the Irish state.[117]

Previous case law

Perhaps the other most striking feature of *ADI* is the Grand Chamber's apparent rejection of its approach in *VgT* and *TV Vest*.[118] The ECtHR does not operate a system of binding precedent, the Convention being a 'living instrument which … must be interpreted in the light of present day conditions.'[119] Nevertheless the ECtHR has previously held the position that 'it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases.'[120]

The Grand Chamber in *ADI* declined to follow its earlier approach, notwithstanding the 'essentially identical' facts of the *VgT* case,[121] and the later reaffirmation of the *VgT* approach in *TV Vest*. But it is not at all clear, from the majority judgment, what status these earlier authorities retain. They were not expressly overruled, and there are hints that the earlier cases might be distinguished: the group in *VgT* was *responding* to a particular advertising campaign, as compared to ADI which had been seeking to *initiate* a debate, whilst *TV Vest* concerned a political party (as opposed to an NGO) and a different kind of regulatory regime.[122] But these points were never clearly spelled out by the Grand Chamber and as a result we are left in a state of uncertainty.

As the dissentient Judges Ziemele, Sajó *et al* pointed out, there appears to be a 'double standard' operating within the Convention 'whose minimum standards should be equally applicable to all [Contracting] States.' [123] Why were the 'essentially identical "general prohibitions"' considered to be 'not necessary in Swiss democratic society, but

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[116] *ADI* (n 15) [109]. See Ó Fathaigh (n 115).

[117] *Murphy v Ireland* (n 35) [67]. *ADI* (n 15) Judges Ziemele, Sajó et al (dissenting) [8].

[118] *ADI* (n 15) Judges Ziemele, Sajó et al (dissenting) [1] and of Judge Tulkens et al (dissenting) [12].

[119] *Tyrer v United Kingdom* (1978) 2 EHRR 1 [31].

[120] *Christine Goodwin v United Kingdom* (2002) 35 EHRR 18 [74]; *Stafford v United Kingdom* (2002) 35 EHRR 32 [68].

[121] *ADI* (n 15) Judges Ziemele, Sajó et al (dissenting) [1]. Lord Bingham described the facts of the cases as being very similar, *Animal Defenders* (n 12) [9].

[122] *ADI* (n 15) UK government's arguments [98].

[123] ibid Judges Ziemele, Sajó et al (dissenting) [1].

… necessary in the … United Kingdom'?[124] States such as Switzerland, Norway and Denmark, all of which reformed their systems in order to comply with the *VgT* ruling, might be forgiven for feeling aggrieved at the Grand Chamber's apparent late U-turn.

The irony here is inescapable. One of the main reasons why the Grand Chamber found for the United Kingdom was because the Communications Act ban avoided the uncertainty of more finely tailored regimes.[125] But the Grand Chamber's failure to deal clearly and explicitly with the earlier case law means that uncertainty still abounds. For example: would a group in the United Kingdom, *responding* to a commercial advertising campaign on an issue of public controversy (as opposed to initiating a debate), be found to have its Article 10 rights breached by the ban?[126] Or if Switzerland, Norway or Denmark decided to reintroduce their own bans, and their legislative organs conducted searching debates on the issue, would they now, in the wake of *ADI*, be entitled to do so? Unfortunately, rather than clarifying these issues, the judgment of the Grand Chamber tends to muddy the waters.

Freedom of expression

The eight dissentient judges in *ADI* summed up the Communications Act prohibition thus:

> this is a ban which concerns the most protected form of expression (discussion on matters of public interest) by one of the most important categories of actors in the democratic process (an NGO) and a form of media which remains influential (radio and / or television), without the least exception.[127]

To illustrate the effects of the ban by way of example, under the current state of affairs a car manufacturer may advertise its SUVs on television without limit (finances permitting), but an NGO wishing to publicise the impact of such vehicles on the environment is prohibited, by law, from doing so. Likewise, a fast food corporation may target television advertisements at children, yet an organisation campaigning against

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[124] ibid.

[125] *ADI* (n 15) [122].

[126] This possibility was suggested, obiter, in *Animal Defenders* (n 12) by Lord Bingham [34] and Lord Scott [41]. The latter gave examples: adverts for burgers might offend those groups who disagree with the way beef cattle are reared and slaughtered; adverts for Christmas turkeys might offend those who oppose factory farming of poultry.

[127] *ADI* (n 15) Judge Tulkens et al (dissenting) [13]. Almost identical words were used by Judge Ziemele, Sajó et al [2].

child obesity may not; and clothes and sports shoe companies may advertise their wares on television, yet groups wishing to publicise the plight of workers in developing countries employed by such corporations may not.[128]

It may be that, as discussed above, it is possible to reconcile the approaches in *VgT* and *ADI*. The cases may be distinguishable (though this was not done explicitly by the Grand Chamber) on the basis that VgT was seeking to *respond* to meat industry TV commercials, whereas ADI was trying to *initiate* a debate on animal welfare.[129]

The European Commission of Human Rights stated on several occasions that Article 10 could 'not be taken as including a general and unfettered right for any private citizen or organisation to have access to broadcasting time … in order to forward its opinion.'[130] However if this 'responding' feature is the key factor differentiating *VgT* from *ADI*, then the implication is that if an organisation did wish to *respond* to a commercial advertising campaign in the broadcast media then it should be able to claim an enforceable right of access to broadcasting facilities after all.

One example of how this may play out may be in relation to the current debate over climate change.[131] Environmental issues, once considered to be peripheral, are now located at the centre of the party political agenda. Either because of genuine concern over the perils of global warming, or because of a perception that playing the 'green card' will go down well with increasingly environmentally aware voters, political capital is now frequently made by main stream politicians proclaiming green policies.[132]

Commercial organisations have not been slow to jump aboard this (carbon neutral!) bandwagon and produce a spate of television commercials that claim green credentials for their products.[133] An environmental NGO might wish to counter such environmental claims by broadcasting its own advertisement explaining that whilst such products might be less damaging than their non-green alternatives they are nevertheless more damaging to the environment than not consuming at all. Such groups surely would have a strong case even if the organisation or the adverts' content fell within the ambit of the legal ban on broadcast political advertising.

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[128] Judge Tulkens et al (dissenting) commented that whilst ADI is prohibited from airing its views via broadcast advertisements, 'a commercial firm … would have full freedom, limited only by its financial resources, to screen advertisements using animals to promote its products, an approach directly contrary to the views of [ADI]' [19]. See Lewis (n 61).

[129] It will be recalled that Lord Bingham and Lord Scott made this point in *Animal Defenders* (n 12).

[130] See eg *Haider v Austria,* App No 25060/94 (Eur Comm HR, 18 October 1996) 66; although in the following sentence the Commission stated that the denial of broadcasting time to a specific group or person may raise issues under Article 10 or Articles 10 and 14, for example if one political party was excluded from broadcasting facilities at election time while other parties were given it.

[131] The remainder of this section is taken from Lewis and Cumper (n 1) 107–9.

[132] See eg G Jones and C Clover 'Cameron Turns Blue to Prove Green Credentials' *The Telegraph* (London, 21 April 2006).

[133] See eg the adverts for the Toyota Prius <http://www.youtube.com/watch?v=FuGJtIUow3o> and BMW Efficient Dynamics <http://www.youtube.com/watch?v=6G2KzENC_ww>, accessed 5 December 2013.

One might wonder, however, why this new 'right of response' should be restricted to such narrow, 'rebuttal' type situations. There is a strong argument that the entire edifice of commercial advertising—persuading as it does millions of people literally to 'buy into' a certain version of unbridled free market consumerism—is, in a very real sense, 'political'. Jonathan Porritt has referred to consumerism as 'our pastime, our zeitgeist, our ideology all rolled into one';[134] a 'big idea … more powerful than any cause or even religion, [reaching] into every corner of the globe.'[135] It is difficult to see why, in response to this all-pervasive ideological onslaught, a *generalised* anti-consumerism message —'stop shopping'—should not be permitted?

One might go further still. *If* an organisation does have the right of access to broadcast facilities in order to *counter* the message of commercial organisations with which it disagrees why should it not be permitted to *initiate* such a discourse? Why should such a group have to bide its time and wait until its opponents throw the first punch? Why can't it, to coin a phrase, 'get its retaliation in first'? If, for example, an organisation opposes factory farming on the grounds of cruelty to animals why must it wait for the producers of factory farmed meat to advertise their product in order to be able to respond using the same powerful medium? The adverts which trigger its right of response themselves will, presumably, lead to an increase in sales of the factory farmed brand in question and thus, inevitably, to an increase in the very animal cruelty that the campaign group opposes.

Conclusion

Perhaps unsurprisingly the Grand Chamber's judgment in *ADI* was greeted with dismay by those who feel that social advocacy groups get a raw deal under the current regime.[136] Nevertheless, many were relieved by the decision, closing the door as it does on any slide towards US-style political advertising. Moreover, the judgment holds the line against the potential provision of a commercial broadcasting platform for those with views far more controversial than those of Animal Defenders International.[137]

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[134] J Porritt, 'Big Ideas that Changed the World' at <http://www.mymultiplesclerosis.co.uk/big-ideas/consumerism.html>. See also N Klein, *No Logo* (Flamingo 2000).

[135] 'Stop Shopping' *The Observer* (London, 8 April 2007); A Scott (n 61) 234.

[136] R English, 'Strasbourg Ties itself in Knots over Advertising Ban' (*UK Human Rights Blog*, 22 April 2013) <http://ukhumanrightsblog.com/2013/04/23/strasbourg-ties-itself-in-knots-over-advertising-ban>, accessed 5 December 2013; O Bowcott, 'Animal Rights Group Fails to Overturn Ban on Political Advertising' *The Guardian,* 22 April 2013; J Creamer, 'Comment: Political Advertising should be Allowed on UK Television' (*politics.co.uk* 24 April 2013) <http://www.politics.co.uk/comment-analysis/2013/04/24/comment-political-advertising-should-be-allowed-on-uk-tv>, accessed 5 December 2013.

[137] J Rozenberg, 'Government will be Mightily Relieved at Decision to Uphold Political Ads Ban' *The Guardian*, 22 April 2013; J Rowbottom, 'A Surprise Ruling? Strasbourg Upholds the Ban on Paid Political Ads on TV and Radio' (*UK Constitutional Law Blog*, 22 April 2013) <http://ukconstitutionallaw.org/2013/04/22/jacob-rowbottom-a-surprise-ruling-strasbourg-upholds-the-ban-on-paid-political-ads-on-tv-and-radio/>.

Setting to one side the free speech arguments, however, one cannot help feeling that the majority of the Grand Chamber were desperate to reach the conclusion they did, casting to the wind established case law and essentially *creating* a whole new 'general measures' doctrine.

Much has been written recently of the possibility of dialogue between national institutions and the ECtHR.[138] Perhaps *ADI* is a perfect example of just such a dialogue. A more cynical conclusion would be that, against the backdrop of the famously hostile reaction by the UK government and Euro-sceptic press to the ECtHR's judgment in *Hirst* that the UK's blanket ban on convicted prisoner voting violated the ECHR, the Grand Chamber had reason to think twice before interfering *again* with the mechanisms of British democracy.[139] It may be that the Court adopted a posture of deference in order to avoid another standoff with the British political classes and media. However, if the analysis in this chapter is correct, the jurisprudential price that has been paid may turn out to be high indeed.

Judge Bratza in his concurring opinion in *ADI* [7] provided examples of more 'controversial' areas: 'abortion, immigration, gay marriage and climate change'. See also Lord Bingham *Animal Defenders* (n 12) [30].

[138] M Amos, 'The Dialogue Between United Kingdom Courts and the European Court of Human Rights' (2012) *International & Comparative Law Quarterly* 557; J-P Costa, 'The Relationship Between the European Court of Human Rights and the National Courts' (2013) *European Human Rights Law Review* 264.

[139] David Cameron declared that it would make him 'physically ill even to contemplate having to give the vote to anyone who is in prison' HC Deb vol 517, col 921, 3 November 2010. See P Wintour and A Sparrow, 'I Won't Give Prisoners the Vote, Says David Cameron' *The Guardian* (London, 24 October 2012). After a debate on 10 February 2011 the House of Commons voted by 234 to 22 in favour of retaining the blanket ban on prisoner voting, HC Deb vol 523, col 493–585, 10 February 2011. The ECtHR reaffirmed its position in *Greens and MT v United Kingdom*, App Nos 60041/08 and 60054/08 (23 November 2010), setting a six month deadline (running from 11 April 2011) for the 'introduction of proposals' to reform the law, [115]. The draft Voting Eligibility (Voting) Bill proposes three options one of which is to retain the status quo in defiance of the ruling in *Hirst,* <http://www.parliament.uk/business/committees/committees-a-z/joint-select/draft-voting-eligibility-prisoners-bill/>, accessed 5 December 2013; J Chapman and J Groves, 'MPs Begin Historic Debate over Whether to Take a Stand against Europe and Overturn Ruling that Prisoners must Have the Vote' (*Mail Online*,18 February 2011) <http://www.dailymail.co.uk/news/article-1355376/Prisoners-vote-MPs-stand-UK-rights-overturn-EU-ruling.html>, accessed 5 December 2013; C Woodhouse, 'Prison Paedos "will Get Vote": Euro Judges Demand Ballot for Lags' *The Sun*, 23 December 2012, <http://www.thesun.co.uk/sol/homepage/news/politics/4711067/Prison-paedos-will-get-vote.html>, accessed 5 December 2013.

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