Contents

3. Media freedom and the right to gather news

4. Media regulation and press freedom in EU law

5. Defamation and privacy issues

6. Hate speech and blasphemy

Introduction

In 2012 the Hungarian Academy of Sciences established 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 at 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 in law entitled "The fundamentals of European thought on media law", which is scheduled to run until 2016. 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 distinguish 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, 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 to send manuscripts for a planned publication of a collection of essays. The participation of diverse authors from various countries and backgrounds has greatly contributed to the value of the research.

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The book entitled *Media Freedom and Regulation in the New Media World* (Budapest: Wolters Kluwer, 2014) was published in 2014 as a result of the research team's work. The studies included in this book were also presented by the authors themselves at a conference held in Budapest in April 2015 (the video recordings of the lectures are

available at www.newmediaworld.hu). And now a new, even thicker book is about to be published, the continuation of the first volume, presenting chapters addressing a great variety of media law and freedom of speech issues.

The book is composed of six larger structural units dealing with (1) the fundamental theoretical questions of freedom of the press, (2) the regulation of new media, (3) the legal status of journalists, (4) the means available to the European Union to safeguard and regulate freedom of the press, as well as the eternal, fundamental questions of freedom of speech, (5) the law on defamation and the protection of privacy, and lastly, (6) the limitation of hate speech, including the problems related to blasphemy and "denial laws".

The authors are, without exception, noted and recognised experts in their respective fields; scholars and university lecturers. We are greatly honoured they accepted the invitation of the Hungarian Academy of Sciences to participate in this project. It is a special privilege that many authors from the United States accepted our invitation as well. The legal approach and jurisprudence of the USA have an unquestionable role in European freedom of the press-related legal thinking, even though the solutions chosen in the different European legal systems or in the European Union often greatly differ from the legal solutions applied overseas.

Since the authors come from numerous different countries, their viewpoints are also quite diverse and multifaceted. The texts address the most topical and important issues of media regulation and freedom of speech, including (among others), the legal liability of the intermediaries in the media market (Internet service providers, search engines) or even the legal perception of drones, being one of the new technical tools available to journalists, not to mention the questions put into the limelight again as a result of the *Charlie Hebdo* murders. Several of the papers focus on the legal problems related to the 'new media', i.e. the services available on the Internet. Another part of the questions examined is not new, but still, given the modern, Western approach to freedom of the press, it cannot be circumvented. These issues, such as the limits of freedom of speech or the latest adjustments and amendments to the democratic freedom of the press theory, need to be scrutinised time and time again.

Freedom of the press and media regulation in democratic countries, by their nature, cannot be static, but are constantly changing. Still, a book such as this one must be closed and delivered to the readers at some point. Nevertheless, the editor of this volume can do so with the reassuring thought that the conclusions drawn in these studies will defy time and remain valid for a long time. These writings not only keep for posterity a specific part of the current scholarly standpoints and record a snapshot of the cross-section of current press freedom-related issues, but also they can even actively form scholarly and public thinking about these questions. We hope they will prove to be a great source, thanks to their conclusions standing the test of time, for international readers, such as researchers, university students and media policy decision-makers, who are interested in the legal aspects of freedom of the press.

Budapest, August 28, 2015

András Koltay
editor

1. Fundamental issues of free speech and press freedom

Richard Albert

The unamendable core of the United States Constitution*

Introduction

In a series of earlier Articles on the structure of constitutional amendment, I have taken the position, which I hold still today, that unamendability poses significant challenges to democratic constitutionalism. The concept of unamendability, which refers to a formally entrenched provision or an informally entrenched norm that prohibits an alteration or violation of that provision or norm, raises fundamental questions in constitutional law implicating sovereignty, legitimacy, democracy and the rule of law.[1] In my view, unamendability undermines the basic promise of democratic constitutionalism because it limits the universe of constitutional possibilities open to those whom the constitution governs.[2] Unamendability, I have argued, withholds from citizens 'more than a mere procedural right' to amend the constitution; it 'hijack[s] their most basic of all democratic rights'.[3] I have also suggested that constitutional rigidity becomes a defect where it makes amendment impossible,[4] and I have illustrated how unamendability confers upon courts disproportionately vast powers in comparison to those exercised by coordinate branches.[5]

As a matter of constitutional *theory*, I therefore resist unamendability as a democratically legitimate constitutional design. But I have often wondered whether I could on any *practical* basis justify some form of unamendability, however limited, as a necessary feature of democratic constitutional design. After all, all rules admit of exceptions, especially in law where the justification for an exception often strengthens the need for a rule of general application. In much the same way, I wonder whether a strong proceduralist committed to democratic first principles could conceivably, even if reluctantly, find value in the political utility of a particular manifestation of unamendability while nonetheless defending a general rule against it.

* The author extends his sincere thanks to Or Bassok, Laurie Claus, Joel Colón-Ríos, Yaniv Roznai, and Alex Tsesis for comments on earlier drafts of his article appearing in this volume.

1 Richard Albert, 'Nonconstitutional Amendments' (2009) 22 *Canadian Journal of Law & Jurisprudence* 5, 9–10.

2 Richard Albert, 'Counterconstitutionalism' (2008) 31 *Dalhousie Law Journal* 1, 47–48.

3 Richard Albert, 'Constitutional Handcuffs' (2010) 42 *Arizona State Law Journal* 663, 698.

4 Richard Albert, 'Constructive Unamendability in Canada and the United States' (2014) 67(2) *Supreme Court Law Review* (2d) 181, 186.

5 Richard Albert, 'Amending Constitutional Amendment Rules' (2015) 13 *International Journal of Constitutional Law* [forthcoming].

In this Article, I inquire whether the United States is one such example. I ask specifically whether anything *should* be regarded as unamendable in the United States but I pose the question in a particular way. The question I wish to explore is narrow but important, and it requires constraining the parameters of the inquiry in order to force an answer at a very low level of abstraction rather than to satisfy ourselves with an answer that remains at a high level of theory.

My objective is to ask whether the United States Constitution should require some form of unamendability, either explicit or implicit, in order to survive according to its own terms. I conclude that the Constitution may indeed require the implicit unamendability of the First Amendment's protections for democratic expression,[6] which I suggest forms the unamendable core of the United States Constitution. I also inquire into the capacity of courts to enforce unamendability in the United States, and I suggest in closing that unamendability may be more effective as an expressive declaration of importance than as a referent for judicial enforceability.

I note, before proceeding, that my choice to focus exclusively on the United States Constitution is driven by both prudence and what I perceive to be necessity. One could certainly advance the claim that democratic expression is an unamendable core of all democratic constitutions, and proceed then to draw from bills of rights around the world to build the case that democratic expression, even where it is not absolutely entrenched, should be unamendable. But I prefer to approach the comparative enterprise with modesty in the face of real differences in the constitutional traditions that underpin constitutional texts, particularly where, as here, the task is to evaluate what holds foundational yet particularised importance in a given constitutional regime.[7]

The democratic objection to unamendability

A formally unamendable constitutional provision, also known as an eternity, perpetuity or entrenchment clause, is impervious to formal amendment, even with supermajority or unanimous agreement from the political actors whose consent is required to alter the constitutional text.[8] Formal unamendability was once rare but it is now increasingly

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[6] It is worth considering whether the First Amendment was a mere 'amendment' or whether it amounted to a 'revision' that transformed the United States Constitution, as did the Fourteenth Amendment. See Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (Yale University Press 1998) 288–94. On my reading, the First Amendment made explicit the democratic values of self-government that were already embedded in the Constitution. See Alexander Meiklejohn, 'The First Amendment is an Absolute' (1961) *Supreme Court Law Review* 245, 252.

[7] A further reason that compels caution in too quickly generalising across jurisdictions is the extraordinary difficulty of formally amending the United States Constitution as compared to other national constitutions. See Donald S Lutz, *Principles of Constitutional Design* (CUP 2006) 170.

[8] Of course, no constitutional provision, not even an unamendable one, can survive revolution. See Jeffrey Goldsworthy, *Parliamentary Sovereignty* (CUP 2010) 70. For a recent illustration of the limited constraining force of formal unamendability in the face of violent change, see Yaniv Roznai and Silvia

common in modern constitutions. From 1789 to 1944, no more than 20 percent of all new constitutions entrenched formal unamendability, as compared to 25 percent between 1945 and 1988, and over 50 percent from 1989 to 2013.[9] Unamendability need not always be formal. Unamendability may also be *informal*, a phenomenon that poses its own challenges. In this Part, I distinguish between formal and informal unamendability, and I evaluate their consequences for democratic constitutionalism.

The purposes of formal unamendability

Although nothing in the United States Constitution is today formally unamendable, the Constitution entrenches two expired examples of formal unamendability as well as a current example of constructive unamendability. Constructive unamendability refers to a constitutional provision that is unamendable not as a result of constitutional design but as a result of the present political climate that makes it today practically unlikely, despite being theoretically possible and perhaps even practically possible in the future, to gather the required majorities to amend it using the constitution's formal amendment rules.[10] It is therefore *not* unamendable by virtue of a textual rule against its amendment. The Equal Suffrage Clause, for example, guarantees that 'no State, without its Consent, shall be deprived of its equal Suffrage in the Senate'.[11] It is *constructively* unamendable because no state would today agree to a diminution in its representation in the Senate. Constructive unamendability is not my focus in this Article.

Formal unamendability, in contrast, effectively disables a constitution's formal amendment rules. It refers to one or more provisions in the constitutional text that are expressly designated as unalterable under the formal amendment rules. Constitutional designers can make anything unamendable: a principle, rule, value, structure, symbol or institution.[12] Absolutely entrenching something against amendment creates a distinction between it and a freely amendable constitutional provision, signalling the greater relative significance of the provision that has been shielded from formal amendment.[13]

The United States Constitution entrenches a now-expired temporary form of formal unamendability in the following clause of its amendment rule in Article V: 'Provided that no Amendment which may be made prior to the Year One thousand eight hundred

Suteu, 'The Eternal Territory? The Crimean Crisis and Ukraine's Territorial Integrity as an Unamendable Constitutional Principle' (2015) 16 *German Law Journal* 542. My inquiry here is limited to continuous constitutional change governed internally by amendment rules.

[9] See Yaniv Roznai, 'Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers' ch 2, 28 (unpublished dissertation on file with author).

[10] Richard Albert, 'Constitutional Disuse or Desuetude' (2014) 94 *Boston University Law Review* 1029, 1043.

[11] US Const, art V (1789).

[12] On the structure of unamendable provisions, see Yaniv Roznai, 'Unamendability and the Genetic Code of the Constitution' (2015) *European Review of Public Law* [forthcoming]

[13] Lech Garlicki and Zofia A Garlicka, 'External Review of Constitutional Amendments? International Law as a Norm of Reference' (2011) 44 *Israel Law Review* 343, 349.

and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article'.[14] The first and fourth clauses of Article I, Section 9 were formally unamendable from the moment of the coming-into-force of the Constitution in 1789 until the year 1808. Article I, Section 9, Clause 1 authorised states to move and import slaves, and Article 1, Section 9, Clause 4 guaranteed that taxation would be census-based.[15] Both clauses formed part of the Constitution's institutionalised framework for the protection of slavery.[16] These two formally unamendable provisions were necessary for the slave holding states to approve and ratify the Constitution. The authors of the Constitution entrenched these slave trade protections as temporarily unamendable until the year 1808 with the objective of later returning to the subject in twenty years to reconsider it 'with less difficulty and greater coolness'.[17]

These two now-expired temporarily unamendable slave trade clauses reflect one of the five purposes of formal amendability: to secure a constitutional bargain.[18] Where political actors reach an impasse on a divisive question of constitutional design, they may choose to make a resolution formally unamendable only for a defined period of time or they may alternatively opt to make an enduring compromise formally unamendable, a constitutional design choice that frees them to deal with other matters of basic governmental structure and function.[19] The use of formal unamendability to secure a constitutional bargain is appropriate for temporary agreements that political actors may choose to revisit after the constitution has been given time to take root in the political culture.[20] It is not uncommon, for instance, for new constitutions to prohibit formal amendments for a fixed number of years immediately upon their ratification.[21]

Formal unamendability may also be deployed for a second purpose: to preserve a core feature of the self-identity of the state. This preservative function of unamendability privileges one or more constitutional principles, rules, values, structures or institutions as fundamentally constitutive of the regime. Preservative unamendability reflects the

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[14] ibid.

[15] US Const, art I, § 9, cl 1; US Const, art I, § 9, cl 4.

[16] Jamal Greene, 'Originalism's Race Problem' (2011) 88 *Denver University Law Review* 517, 518–19.

[17] Douglas Linder, 'What in the Constitution Cannot Be Amended?' (1981) 23 *Arizona Law Review* 717, 721.

[18] Rosalind Dixon and Tom Ginsburg, 'Deciding Not to Decide: Deferral in Constitutional Design' (2011) 9 *International Journal of Constitutional Law* 636, 644. One can understand unamendability in this respect as a 'gag rule' that silences debate on matters of contention. See Stephen Holmes, 'Gag Rules or the Politics of Omission' in Jon Elster and Rune Slagstad (eds), *Constitutionalism and Democracy* (CUP 1993) 19–58.

[19] For more on temporary unamendability in the United States and elsewhere, see Ozan O Varol, 'Temporary Constitutions' (2014) 102 *California Law Review* 409, 439–48.

[20] For an analysis of the forms of temporal restrictions on formal amendment, see Richard Albert, 'The Structure of Constitutional Amendment Rules' (2014) 49 *Wake Forest Law Review* 913, 952–54.

[21] See eg Cape Verde Const, pt VI, tit III, art 309(1) (1980) (prohibiting formal amendments for five years following ratification of the constitution).

judgment of the drafting generation that the unamendable feature is important at the time of the adoption of the constitution and that successor generations should respect the sacredness of both this founding judgment and the entrenched feature itself.

Constitutional states entrench many examples of preservative unamendability. For example, Brazil and Germany both make federalism unamendable as a way both of preserving a governmental structure that has historically been necessary to manage conflict and disagreement, and of recognizing its centrality to political life.[22] We can likewise interpret the absolute entrenchment of an official religion, or indeed of secularism, as an expression of the importance of religion or non-religion in that constitutional regime, either as a reflection only of the views of the constitutional drafters or of the views of citizens as well, or indeed both. Algeria and Iran make Islam unamendable as the official state religion, whereas Portugal and Turkey establish secularism as an unamendable feature of the state.[23] Both reflect a founding value intended to be preserved.

In contrast to its preservative function, formal unamendability may also be used to transform a state. This is a third purpose of unamendability. Transformational unamendability seeks to repudiate something about the past and to adopt a new operating principle that will shape and inform a new constitutional identity.[24] This is sometimes more of an aspiration than a justiciable commitment, but it nevertheless serves to express a constitutional value deemed important enough by the authoring generation to make it unremovable from the constitutional text. Transformational entrenchment is intended to reflect the state's commitment to pursuing the values served by the entrenched constitutional provision and to urge respect for the entrenched provision by present and future political actors, present and future citizens, as well as present and future external actors.

Constitutional states entrench many examples of transformational unamendability. For example, under the new Bosnian and Herzegovinian Constitution, all civil and political rights are formally unamendable,[25] in contrast to the regime that predated the new constitution.[26] The Ukrainian Constitution today likewise makes all rights unamendable,[27] something that would have been unimaginable before the new constitution came into force.[28] As a final illustration, consider the Namibian Constitution,

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[22] Albert (n 2) 679.

[23] Compare Algeria Const, tit IV, art 178(3) (1989), Iran Const, art 177 (1980), with Portugal Const, pt IV, tit II, art 288(c) (1976), Turkey Const, pt I, art 4 (1982).

[24] For useful illustrations of the use of unamendability as a transformative device in Germany, India, and South Africa, see Gábor Halmai, 'Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?' (2012) 19 *Constellations* 182, 183–88, 190–91.

[25] Bosnia and Herzegovina Const, art X, para 2 (1995).

[26] Anna Morawiec Mansfield, 'Ethnic But Equal: The Quest for a New Democratic Order in Bosnia and Herzegovina' (2003) 103 *Columbia Law Review* 2052, 2056.

[27] Ukraine Const, tit XIII, art 157 (1996).

[28] Richard CO Rezie, 'The Ukrainian Constitution: Interpretation of the Citizens' Rights Provisions' (1999) 31 *Case Western Reserve Journal of International Law* 169, 175–81.

which makes rights and liberties unamendable,[29] also in contrast to its own problematic past infringements on rights.[30] These examples suggest how formal unamendability may be used to help transform a state's default posture from rights infringement to rights enforcement.[31] Although formal unamendability cannot by itself defend rights from abuse, it can express the significance that constitutional designers attribute to rights enforcement along with their hope that their successors will ultimately and durably agree.

Fourth, formal unamendability may be a reconciliatory device. The purpose of reconciliatory unamendability is to achieve peace by absolving factions and their leaders of criminal or civil wrongdoing in an effort to move past conflict and discord. For example, reconciliatory unamendability is illustrated by a formally unamendable grant of amnesty or immunity for prior conduct leading to a coup or an attempted one. By conferring amnesty upon political actors, constitutional designers seek to avoid a contentious and potentially destabilizing criminal or civil prosecution of wrongdoers by putting prosecution off the table altogether. The goal is instead to allow opposing factions to start afresh, free from threat of legal action, and sometimes in tandem with a Truth and Reconciliation Commission to give victims the opportunity to air their views and to record their memories but without invoking the consequence of legal duty and violation.[32] An example of reconciliatory unamendability is the now-superseded 1999 Constitution of Niger, which entrenched an unamendable amnesty provision for those involved in two coups—on 27 January 1996 and 9 April 1999—in order to give the new constitutional settlement a chance to succeed without the looming threat of the governing party prosecuting the opposition for earlier acts.[33]

The fifth purpose of unamendability is related to each of the other purposes: to express constitutional values. Where a constitutional text distinguishes one provision by making it immune to the formal amendment rules that ordinarily apply, the message both conveyed and perceived is that this provision is more highly valued than those not granted the same protection.[34] Whether or not the absolute entrenchment of a given provision is intended to be enforceable, unamendability is nevertheless an important statement about the value, either objective or subjective or both, of the provision to that constitutional community. It is the ultimate expression of importance that can be communicated by the constitutional text. For example, the Cuban Constitution's absolute entrenchment of socialism is a statement of the importance of socialism,[35] just

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[29] Namibia Const, ch XIX, art 131 (1990).

[30] Adrien Katherine Wing, 'Communitarianism vs. Individualism: Constitutionalism in Namibia and South Africa' (1993) 11 *Wisconsin International Law Journal* 295, 337–44.

[31] Albert (n 2) 685–87.

[32] ibid 693–98.

[33] Niger Const, tit XII, art 136 (1999) (superseded); Niger Const, tit XII, art 141 (1999) (superseded).

[34] Richard Albert, 'The Expressive Function of Constitutional Amendment Rules' (2013) 59 *McGill Law Journal* 225, 254.

[35] Cuba Const, s 3 (1976) (as amended in 2002).

as the Afghan Constitution's absolute entrenchment of Islam and Islamic Republicanism reflect its highest constitutional values,[36] according to the authors of these constitutions. The expressive purpose of unamendability differs from its transformational purpose, the latter entailing a temporally-prior social or political referent that the unamendability seeks to repudiate. The expressive purpose need not necessarily reflect a repudiation of the past; it may instead reflect altogether new values without reference to an old or superseded constitutional order or text.

The roots of informal unamendability

As illustrated by these examples, unamendability generally derives from its formal entrenchment in a constitutional text. But unamendability may also derive informally from judicial interpretation. Where the constitutional text does not expressly immunise a constitutional provision from formal amendment, a court may, in its own interpretation of the constitutional text, identify either a written provision or an unwritten principle as implicitly entrenched against formal amendment. Although the forms of unamendability differ in these two cases—in the former, the text entrenches unamendability, and in the latter, the court imposes it—the result is indistinguishable insofar as both forms of unamendability bind political actors in that constitutional regime. There is therefore little functional difference between the informal unamendability that judges interpret and the formal unamendability that constitutional designers affirmatively choose to entrench in the text. Both forms of unamendability may serve the same five functional purposes.

Informal unamendability is rooted in the distinction between formal amendment and revision.[37] Both are types of constitutional change, though only the former preserves legal continuity in the regime. Formal amendment authorises alterations to the constitutional text 'only under the presupposition that the identity and continuity of the constitution as an entirety is preserved'.[38] An amendment may therefore delete, refine or add to the text provided that it does not 'offend the spirit or the principles' of the constitution.[39] It must, in other words, be consistent with the existing constitution and must 'preserve the constitution itself'.[40] Perhaps the best way to conceptualise an

[36] Afghanistan Const, art 149 (2003).

[37] It is important to recognise that there is no consensus on the terminology used to refer to this distinction. Indeed some national constitutions use the term 'revision' to refer to amendment. See eg France Const, tit XIV, art 89 (1958); Japan Const, ch IX, art 96 (1947). The concept of 'revision' may alternatively be referred to as 'total reform' or 'replacement' and there are also many variations in the terms used to refer to an 'amendment', namely 'partial reform' or 'reform'. The point is to draw a distinction between major and minor consequences of textual alteration.

[38] Carl Schmitt, *Constitutional Theory* (Jeffrey Seitzer transl, ed, Duke University Press 2008) 150.

[39] ibid 153.

[40] ibid 150.

amendment in contrast to a revision is a useful ship analogy: an amendment keeps the constitution on course and does not change its direction in midstream.[41]

A revision is something more dramatic than an amendment. It constitutes a substantial change to the constitution, one that takes the constitution off its course in a departure from its fundamental presuppositions and organizational framework.[42] A revision, unlike an amendment, ruptures continuity in the legal order and effectively creates a new regime, even if the constitution that is subject to the revisionary change remains in force unchanged textually except to the extent of the revision.[43] Revision therefore achieves large, often wholesale, constitutional change, for example the repeal of the First Amendment or the transformation of the structure of government from a parliamentary to presidential system.[44] In contrast, amendment is more commonly used to refer to narrow, non-transformative alterations, for instance a change in the date of the installation of the head of government from March to January in a given year.[45]

Distinguishing amendment from revision requires a theory about what in a given constitution is fundamental. Some constitutional texts clearly express their non-negotiable values somewhere in the constitutional text, whether in the preamble or elsewhere.[46] We can infer from these values what kinds of changes would fall within the permissible scope of the amendment power and which may be changed only by invoking the more elaborate and participatory process that revision requires.[47] Still, the

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[41] Jason Mazzone, 'Unamendments' (2005) 90 *Iowa Law Review* 1747, 1776.

[42] Thomas M Cooley, 'The Power to Amend the Federal Constitution' (1893) 2(4) *Michigan Law Journal* 109, 118.

[43] Peter Suber, *The Paradox of Self-Amendment* (Peter Lang Publishing 1990) 18–20.

[44] Note that it is in theory possible for a change labelled as a 'revision' to preserve the identity of the constitution while a change labelled as an 'amendment' could on its own transform the entire framework of government.

[45] John Rawls, *Political Liberalism* (Columbia University Press 1996); Walter F Murphy, *Constitutional Democracy: Creating and Maintaining a Just Political Order* (Johns Hopkins University Press 2007) 498 n 4. In the United States, the Twentieth Amendment changed the date of presidential installation from 4 March to 20 January. See US Const, amend XX (1933).

[46] See eg Angola Const, prmbl (2008); Kazakhstan Const, art 1(1) (1995); Paraguay Const, prmbl (1992); South Africa Const, s 1 (1996); Spain Const, s 1 (1978); Zambia Const, prmbl (1991).

[47] One might well wonder, as Alex Tsesis suggested to me in an earlier exchange, whether the preamble to the United States Constitution could or should be regarded as unamendable. The Supreme Court, in 1905, suggested that the preamble is non-justiciable but said nothing about its amendability:

> Although that Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the Government of the United States or on any of its Departments. Such powers embrace only those expressly granted in the body of the Constitution and such as may be implied from those so granted. Although, therefore, one of the declared objects of the Constitution was to secure the blessings of liberty to all under the sovereign jurisdiction and authority of the United States, no power can be exerted to that end by the United States unless, apart from the Preamble, it be found in some express delegation of power or in some power to be properly implied therefrom.

Jacobson v Massachusetts, [1905] 197 US 11, 22.

distinction between amendment and revision remains largely theoretical.[48] Whether a given change amounts to an amendment or a revision is often if not always contestable. In the United States, the Constitution's fundamental norms and self-identity are debatable.[49] The Constitution does not reveal in its text what is 'most' important; all constitutional provisions are today freely formally amendable. Yet even if we posited that one norm was implicitly unamendable, reasonable observers could disagree about which one holds that special status.[50] And even if we could somehow agree on that front, we might still disagree on how to interpret the scope of the norm that holds special status, be it the freedom of expression, the separation of powers, or something else.

Although the distinction between amending and revising a constitution appears nowhere in the text of the United States Constitution, it is well rooted in the American *state* constitutional tradition.[51] The California Constitution is a useful illustration of a state constitution distinguishing between an amendment and a revision. The text acknowledges the distinction in recognising both amendment and revision,[52] but California courts have had to elaborate its meaning. As early as 1894, the Supreme Court of California defined an amendment as 'such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed.'[53] A revision, on the other hand, is a 'far reaching change in the nature and operation of our governmental structure'[54] or that 'substantially alter[s] the basic governmental framework set forth in our Constitution.'[55] More recently, the California Supreme Court reaffirmed that a constitutional revision is a 'fundamental change in the basic governmental plan or framework established by the pre-existing provisions of the California Constitution.'[56] Other state courts have interpreted the distinction in a similar fashion.[57] But federal courts in the United States have yet to interpret the United States Constitution consistent with this distinction.

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[48] But some constitutions make explicit the distinction between amendment and revision, or between a partial and total revision, by requiring political actors to satisfy different procedures for each. See eg Austria Const, ch II, art 44(3) (1920); Spain Const, pt X, arts 166–68 (1978); Switzerland Const, tit VI, ch 1, arts 192–95 (1999).

[49] Laurence H Tribe, 'A Constitution We Are Amending: In Defense of a Restrained Judicial Role' (1983) 97 *Harvard Law Review* 433, 440.

[50] Melissa Schwartzberg, *Democracy and Legal Change* (CUP 2007) 148.

[51] Gerald Benjamin, 'Constitutional Amendment and Revision' in G Alan Tarr and Robert F Williams (eds), *State Constitutions for the Twenty-First Century, Vol 3: The Agenda of State Constitutional Reform* (State University of New York Press 2006) 178 (noting that 23 state constitutions expressly reference the term 'revision').

[52] California Const, art XVIII, paras 1–4 (1879).

[53] *Livermore v Waite*, [1894] 102 Cal 113, 118–19 (Cal).

[54] *Amador Valley Joint Union High School District v State Board of Equalization*, [1978] 22 Cal 3d 208, 221 (Cal).

[55] *Legislature v Eu*, [1991] 54 Cal 3d 492, 510 (Cal).

[56] *Strauss v Horton*, [2009] 46 Cal 4th 364, 441–42 (Cal).

[57] See eg *Bess v Ulmer*, [1999] 985 P 2d 979, 982 (Alaska); *Adams v Gunter, Jr*, [1970] 238 So 2d 824, 829–30 (Fla); *In re Opinion to the Governor*, [1935] 178 A 433, 439 (RI).

Where the text does not express its non-negotiable constitutional values nor does it entrench formal rules entrenching unamendability, judges may in the course of interpreting the constitution designate a provision, principle, rule, structure or institution as unamendable. The prompt for courts to declare something unamendable is commonly, though not always, a formal amendment that political actors have duly passed into law in conformity with the procedures entrenched in the constitutional text. A party then argues in court that the formal amendment violates a constitutional norm, either written or unwritten, the result being that the formal amendment, although having satisfied the textual strictures for amending the constitution, comes under judicial review for its constitutionality. The possibility of an unconstitutional constitutional amendment may be a difficult concept to understand since the very basis of the formal rule of law is to legitimate the actions of political actors who successfully adhere to and execute fair legal rules.[58] But courts around the world are increasingly embracing the idea of an unconstitutional constitutional amendment, with subscribers in one form or another in Brazil, the Czech Republic, Germany, India, Italy, South Africa, Turkey and elsewhere.[59]

The Indian Supreme Court illustrates how courts may use the distinction between amendment and revision to informally entrench something as unamendable. In India, the text of the Constitution establishes no limits on the formal amendment power; no subject-matter is off limits, be it federalism, republicanism, secularism or human rights.[60] Nor does the text of the Constitution contemplate the possibility of an unconstitutional constitutional amendment. Yet today, the Supreme Court possesses the power to invalidate a duly passed constitutional amendment for violating the 'basic structure' of the Constitution, a doctrine the Court has created by judicial interpretation.[61] The 'basic structure doctrine' reflects the distinction between amendment and revision insofar as it establishes a judicially enforceable limit on the kinds of constitutional changes that political actors may make using the procedures of formal amendment.

According to the Court, formal amendment is appropriate for constitutional changes that respect the internal architecture of the Indian Constitution because 'in the result the basic foundation and structure of the Constitution remains the same.'[62] But where a constitutional change would violate the basic foundation and structure of the Constitution—for example, a change to constitutional supremacy, democracy, and the separation of powers—formal amendment is inappropriate. Changes to these fundamental features of Indian constitutionalism must instead occur via revision, which effectively entails the adoption of a new constitution, or at the very least the recognition and accompanying validation by special amendment procedures that the constitutional

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[58] Vincent J Samar, 'Can a Constitutional Amendment Be Unconstitutional' (2008) 33 *Oklahoma City University Law Review* 667, 694–95.

[59] See Yaniv Roznai, 'Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea' (2013) 61 *American Journal of Comparative Law* 657, 676–713.

[60] India Const, pt XX, art 36 (1950).

[61] Granville Austin, *Working a Democratic Constitution: The Indian Experience* (OUP 1999) 197–202.

[62] *Kesavananda Bharati v State of Kerala*, [1973] 4 SCC 225, 366 (Sikri, CJ).

transformation is extraordinary.[63] The Court has therefore given itself the role of enforcing the distinction between amendment and revision. In India, as in other countries that have adopted the doctrine of unconstitutional constitutional amendments,[64] the power of formal amendment is limited—even where the text entrenches no substantive limit on how, whether or when political actors may formally amend the constitution.

The consequences of unamendability

The prevalence of formal and informal unamendability should not be used as a shorthand to defend its legitimacy. There is good reason to resist, or at the very least to question, unamendability in both formal constitutional design and informal constitutional evolution, particularly from the perspective of democratic constitutionalism, which I take to require the continuing right of political actors and citizens to redefine themselves through their constitution.

Exercising the right to constitutional amendment requires more than having the nominal right to change the constitutional text by formal alteration or informal evolution. Anchored in the values of participatory democracy, the right to constitutional amendment is the product of prior rights in democratic constitutionalism, including the right to adequate and equal opportunities for participating in public debate, voting equality, informed citizenship and deliberative procedures, as well as the right to effective representation.[65] Unamendability undermines each of these. It disables public discourse as to the unamendable matter, dilutes the vote of present and future generations as compared to the entrenching generation, negates informed citizenship and devalues deliberation, and denies effective representation to the constitutionally-bound generation.

The effect of unamendability, then, is problematic for democratic constitutionalism. Not only does unamendability presuppose perfection in the design and interpretation of the constitutional text,[66] it also stifles democratic innovation and the collective learning that may persuade present and future generations of the desirability of departing from

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63 ibid.

64 One of the most recent jurisdictions to adopt the doctrine of unconstitutional constitutional amendment is Belize. See *British Caribbean Bank Limited v Attorney General of Belize*, [2012] Claim No 597 of 2011, online: <http://www.belizejudiciary.org/web/supreme_court/judgements/legal2012/eighth%20amendment.pdf> (invalidating portions of duly-passed constitutional amendment); *Barry M Bowen v Attorney General of Belize*, [2009] Claim No 445 of 2008, <http://www.belizelaw.org/web/supreme_court/judgements/CJ%20Jugments/Claim%20No.%20445%20of%202008%20-%20Barry%20M.%20Bowen%20and%20The%20Attorney%20General%20of%20Belize%20AND%20Belize%20Land%20Owners%20Association%20Limited%20et%20al%20and%20Attorney%20General%20of%20Belize%20-%20Judgment.pdf>.

65 Robert A Dalh, *Toward Democracy: A Journey* (University of California Press 1997) 61–68.

66 Schwartzberg (n 50) 202–203.

an absolutely entrenched constitutional provision or norm.[67] Unamendability also has an additional negative practical consequence: it denies political actors and citizens the power to check the courts' own power to interpret the constitution's formal provisions and informal norms.[68] Divesting political actors and citizens of this power risks freezing the text or its interpretation—and often constitutional designers entrench unamendability for this problematic purpose, laudable though the unamendable value may be, for instance the German Basic Law's unamendable right to human dignity.[69]

The two failures of unamendability are therefore its uncompromising orientation to the past and its restrictions on the freedom of democratic expression.[70] In neglecting the importance of the present political process as a basic protection for the exercise of democratic self-government,[71] unamendability raises the problematic possibility of a disjunction between the founding values entrenched in the constitutional text and the actual values that may later evolve to define the polity. The force of constitutionalism, which is the product of a people constituting and reconstituting itself,[72] should derive from the promise that the social contract into which the governed enter with themselves and their governors is to remain a living charter, one whose terms are neither static nor unreflective of the contemporary views of the polity but rather open, dynamic, receptive to new influences, and also adaptable to modern social and political contexts.

A limited theory of democratic unamendability

The democratic objection to unamendability may be grave but it is not fatal to the claim that nothing in the United States Constitution should be unamendable. Although no textual provision in the Constitution today remains formally unamendable nor has the Supreme Court interpreted the Constitution as implicitly requiring any provision or norm to be informally unamendable, unamendability may nonetheless be a condition precedent to democracy in the United States. Indeed one could argue that the democratic roots of the United States Constitution require some form of unamendability, however modest, if the Constitution, which is rooted in the concept of popular sovereignty, is to remain internally coherent on its own terms. In this Part, I advance a limited theory of democratic unamendability in the United States. I suggest that the First Amendment's protections for the exercise of democratic rights could be deemed unamendable and a necessary corollary of the Constitution's promise of robust democracy.

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[67] ibid 197.

[68] ibid 200.

[69] Donald P Kommers, 'The Basic Law: A Fifty Year Assessment' (2000) 53 *SMU Law Review* 477, 479.

[70] One example of a problematic form of unamendability is the Honduran Constitution's prohibition on even proposing changes to the unamendable single-term limit for presidents. See Honduras Const, tit V, ch VI, art 239 (1982).

[71] Edward L Rubin, 'Getting Past Democracy' (2001) 149 *University of Pennsylvania Law Review* 711, 731.

[72] Martin Loughlin, *The Idea of Public Law* (OUP 2003) 113.

The contestability of fundamental values

Although, as a descriptive matter, neither the Constitution's text nor its interpretation makes anything unamendable, scholars have argued that certain features of the United States Constitution *should* as a normative matter be considered unamendable. Yet scholars do not agree on precisely what should be unamendable in the United States. For example, Walter Murphy has written that human dignity, though it is mentioned nowhere in the constitutional text, is an unamendable constitutional value.[73] Similarly, Bruce Ackerman has proposed that the entire Bill of Rights should be made unamendable.[74] Others, like Corey Brettschneider and Jeff Rosen, have contended respectively that the Eighth Amendment[75] and natural rights[76] should be regarded as unamendable despite there being no rule against their formal amendment in the Constitution. Still others, for instance Miriam Galston and David Harmer, have suggested respectively that religious liberty[77] and the Second Amendment[78] should be treated as implicitly unamendable even though the United States Constitution does not designate either, or anything else, as expressly unamendable.

The contestability of fundamental values derives from reasonable disagreement about the core features of the United States Constitution. The relative importance of constitutional norms is debatable and indeed so is the basic identity of the polity in the absence of any peremptory textual delineation of a hierarchy according to which we can reliably prioritise one norm over another.[79] Melissa Schwartzberg is therefore correct to respond to the inescapable scholarly disagreement on the relative importance of fundamental values that '[e]fforts at restricting the boundaries of constitutional amendment are bound to be challengeable, and reasonable people are likely to disagree about what constitutes an unalterable principle'.[80] It is a feature not a flaw of the

[73] Walter F Murphy, 'The Art of Constitutional Interpretation: A Preliminary Showing' in M Judd Harmon (ed), *Essays on the Constitution of the United States* (Kennikat Press 1978) 156.

[74] Bruce Ackerman, *We the People: Foundations* (HUP 1991) 16.

[75] Corey Brettscheider, *Democratic Rights: The Substance of Self-Government* (PUP 2010) 156.

[76] Jeff Rosen, 'Was the Flag Burning Amendment Unconstitutional?' (1991) 100 *Yale Law Journal* 1073, 1084–89.

[77] Miriam Galston, 'Theocracy in America: Should Core First Amendment Values Be Permanent?' (2009) 37 *Hastings Constitutional Law Quarterly* 65, 124.

[78] David Harmer, 'Securing a Free State: Why the Second Amendment Matters' (1998) *Brigham Young University Law Review* 55, 77.

[79] Tribe (n 49).

[80] Schwartzberg (n 50) 147. This is true also with respect to some formally unamendable constitutional provisions that are cast at a high level of abstraction. In these cases, it is reasonable to expect disagreement on the meaning of the absolutely entrenched provision and how it should be applied to police the conduct of political actors. For example, the German Basic Law makes 'human dignity' unamendable. See German Basic Law, tit I, art 1(1) (1949). The German Constitutional Court has interpreted this formally unamendable provision to require the state to protect pre-natal life over the mother's autonomy interest. See Donald P Kommers and Russell A Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd edn, Duke University Press 2012) 377 (translating, describing and discussing the Abortion I Case (1975), 39 BverfGE 1). It would not be unreasonable for others to disagree with that interpretation.

Constitution that its textual indeterminacy privileges no particular view because this in turn preserves what Heather Gerken describes as 'the ongoing contestability of constitutional law'.[81]

In the face of contestable claims about what should be unamendable, the Supreme Court of the United States has adopted a process-based approach to determining the validity of a constitutional amendment. For the Supreme Court, the text of Article V is the sole source of authority on the constitutionality of amendments. As long as an amendment adheres to the procedural strictures specified in Article V, it is valid and binding. The Court has at least twice declined to invalidate a constitutional amendment challenged as unconstitutional.

One major instance involved the Eighteenth Amendment, which imposed prohibition.[82] In a series of cases before the Supreme Court, the Court dismissed arguments about the amendment's unconstitutionality, holding that the Eighteenth Amendment, '[b]y lawful proposal and ratification, has become part of the Constitution, and must be respected and given effect the same as other provisions of that instrument.'[83] One class of arguments for invalidating the amendment concerned its intrusion into the scope of state police powers.[84] The second class of arguments turned on whether the amendment impermissibly authorised the federal government to interfere with the private lives of individuals.[85] Specifically, some argued that the amendment exceeded the power of government under Article V because the amendment was essentially a legislative act constraining the choices of individuals.[86] Others insisted that the amendment was an unconstitutional violation of the inalienable right to pursue happiness.[87] None of these convinced the Court. The amendment was passed and ratified, and though it was ultimately repealed,[88] it was repealed via Article V itself, not as a result of a judicial declaration of its unconstitutionality.

The Supreme Court also ruled on the Nineteenth Amendment, which granted women the right to vote.[89] Opponents of the measure argued that it was unconstitutional because

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[81] Heather K Gerken, 'The Hydraulics of Constitutional Reform: A Skeptical Response to *Our Undemocratic Constitution*' (2007) 55 *Drake Law Review* 925, 937.

[82] US Const, amend XVIII (1919).

[83] *National Prohibition Cases,* [1930] 253 US 350, 386.

[84] See eg Fred B Hart, 'The Amendatory Power Under the Constitution, Particularly With Reference to Amendment 18' (1920) 90 *Central Law Journal* 229, 232; Robert Post, 'Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era' (2006) 48 *William & Mary Law Review* 1, 48–49; George D Skinner, 'Intrinsic Limitations on the Power of Constitutional Amendment' (1919–1920) 18 *Michigan Law Review* 213, 219–21.

[85] Henry S Cohn and Ethan Davis, 'Stopping the Wind that Blows and the Rivers that Run: Connecticut and Rhode Island Reject the Prohibition Amendment' (2009) 27 *Quinnipiac Law Review* 327, 272.

[86] Edward Hartnett, 'Why is the Supreme Court of the United States Protecting State Judges from Popular Democracy?' (1997) 75 *Texas Law Review* 907, 951.

[87] Everett V Abbot, 'Inalienable Rights and the Eighteenth Amendment' (1920) 20 *Columbia Law Review* 183, 185–87.

[88] US Const, amend XXI (1933).

[89] US Const, amend XIX (1920).

it divested non-ratifying states of their power over the administration and regulation of elections.[90] The Tenth Amendment, it was argued, was meant to guarantee that a state would not be deprived of that power.[91] According to critics, pushing through the amendment, and in the process violating the Tenth Amendment, was an unconstitutional displacement of sovereignty away from the states.[92] The Supreme Court rejected these state sovereignty claims that the Nineteenth Amendment was unconstitutional: 'The argument is that so great an addition to the electorate, if made without the State's consent, destroys its autonomy as a political body. This Amendment is in character and phraseology precisely similar to the Fifteenth. For each the same method of adoption was pursued. One cannot be valid and the other invalid.'[93] What mattered for the Court was again whether the amendment had been proposed and ratified in accordance with Article V. And as it had done before, the Court rejected the possibility of an unconstitutional constitutional amendment.

Democracy's core

There is a deep structural reason why the United States Constitution makes nothing unamendable. The intricate design of the separation of powers places significant institutional and political barriers along the legislative process. Quite deliberately, this makes it difficult to achieve institutional consolidation among the various political actors in the branches of government.[94] This uncompromising separation of powers and parties mitigates against the peril of parliamentary majoritarianism,[95] where the governing majority can generally do what it pleases.[96] In the American model of presidentialism, institutional consolidation behind an amendment requires an extraordinary convergence of preferences. That this is difficult to do makes consolidation worthy of deference when it is achieved. (The separation of powers in the United States therefore assuages the concern that animated the rise of the basic structure doctrine in India, where an amendment may be achieved with few exceptions by a parliamentary majority alone.) Successfully navigating the political process in the United States leads

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[90] William L Marbury, 'The Nineteenth Amendment and After' (1920) 7 *Virginia Law Review* 1, 2–3, 28–29.

[91] Everett P Wheeler, 'Limit of Power to Amend Constitution' (1921) 7 *American Bar Association Journal* 75, 78.

[92] Geo Stewart Brown, 'The Amending Clause Was Provided for Changing, Limiting, Shifting or Delegating "Powers of Government." It Was Not Provided for Amending "The People." The Amendment is Therefore Ultra Vires' (1922) 8 *Virginia Law Review* 237, 239–41.

[93] *Leser v Garnett*, [1922] 258 US 130, 136.

[94] Daryl J Levinson and Richard H Pildes, 'Separation of Parties, Not Powers' (2006) 119 *Harvard Law Review* 2311, 2330–47.

[95] Robert J Lipkin, 'The New Majoritarianism' (2000) 69 *University of Cincinnati Law Review* 107, 149.

[96] Richard Albert, 'The Fusion of Presidentialism and Parliamentarism' (2009) 57 *American Journal of Comparative Law* 531, 562–64.

to an unassailable legitimacy,[97] though not necessarily moral legitimacy but certainly legal legitimacy.[98] Although in practice the last word in constitutional interpretation may belong to the Supreme Court, in theory at least it belongs to the political process.[99] Were Article V not so unusually difficult to use,[100] there would possibly be more than the current handful of examples of constitutional amendments overturning the Court's judgments.[101]

Yet it is worth asking why, given the sacredness of the United States Constitution[102]—a document modelled in the founding period after a 'political Bible'[103]—nothing in it is shielded from the kinds of alterations that could threaten to change its basic structure and content. We can understand the choice to leave the constitutional text open to infinite possibilities as a way to ensure flexibility and endurance.[104] In his farewell presidential address, George Washington spoke to the interrelationship between the Constitution's sacredness and its susceptibility to amendment. 'The basis of our political systems', he emphasised, 'is the right of the people to make and to alter their Constitutions of Government.'[105] But, he added, until the Constitution is duly amended, it 'is sacredly obligatory upon all'.[106] The message here is plain but powerful: whether the choices the people make are good or bad, their choices demand fidelity until they change their view.

It is not the actual choice—yea or nay, one or the other—that matters, however. What matters is the very act of choosing and the way the choice is reached. The Constitution makes no judgment about whether a choice is politically right or wrong; it assesses only whether the choice conforms to the legal process that the constitutional text requires for it to have been made at all. The Supreme Court confirmed this fact of the United States Constitution in a much earlier time, observing of the slave trade clause, census-based taxation, and the Equal Senate Suffrage clause that 'right or wrong politically, no one can deny that the constitution is supreme.'[107] If popular choices like

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97 Sanford Levinson, *Constitutional Faith* (PUP 1988) 64.

98 Richard H Fallon, Jr, 'Legitimacy and the Constitution' (2005) 118 *Harvard Law Review* 1787, 1794–1801.

99 Charles M Freeland, 'The Political Process as Final Solution' (1993) 68 *Indiana Law Journal* 525, 526–27.

100 See eg Sanford Levinson, *Our Undemocratic Constitution* (OUP 2006) 21; Arend Lijphart, *Patterns of Democracy* (Yale University Press 1999) 220; Astrid Lorenz, 'How to Measure Constitutional Rigidity' (2005) 17 *Journal of Theoretical Politics* 339, 358–59.

101 Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* (PUP 1988) 201–204.

102 See Wayne Franklin, 'The US Constitution and the Textuality of American Culture' in Vivien Hart and Shannon C Stimson (eds), *Writing a National Identity: Political, Economic, and Cultural Perspectives on the Written Constitution* (Manchester University Press 1993) 10.

103 Thomas Paine, *Rights of Man* (Hypatia Bradlaugh Bonner ed, Watts & Co 1910) 98.

104 Beau Breslin, 'Is There a Paradox in Amending a Sacred Text?' (2009) 69 *Maryland Law Review* 66, 72. Although it may have been the intention at the time of its design, the Constitution cannot today be described as formally flexible.

105 Horace Binney, *An Inquiry into the Formation of Washington's Farewell Address* (Parry & McMillan 1859) 215.

106 ibid.

107 *Dodge v Woolsey*, [1856] 59 US 331, 348.

those are acceptable, we can conclude only that rather than privileging substantive outcomes the Constitution hoists above all else norms of legal process and procedure.[108]

Perhaps, then, the most appropriate way to frame the concept of popular choice in the United States is to understand that it is anchored in the procedural value of outcome neutrality.[109] Under the United States Constitution, no end supported by popular consent is foreclosed because legitimacy is defined by *how* not *what* the people choose.[110] If the requisite number of political actors expresses its will according to the rules of Article V, the constitutional culture of self-government in the United States dictates that its will be done. That is both the origin and the continuing source of the legitimacy of the Constitution. Indeed, the predicate of Article V is that legitimacy derives from the act of successfully assembling the requisite supermajorities to amend the text. Successfully amending the Constitution requires such an overwhelming aggregation of political and popular will that it makes the very fact of agreement the reason why we accept as valid all changes to the constitutional text.[111] It is not the agreement itself but more specifically the difficulty of securing that agreement that breathes legitimacy into the resulting amendment.[112]

First Amendment democratic rights

Popular choice, however, is not an expressly entrenched constitutional right nor would it be self-executing even if it were. It emanates from what the *Griswold* Court might have called the 'penumbra' of the various democratic rights entrenched in the Constitution, and more specifically in the Bill of Rights.[113] But among those democratic rights, the First Amendment's outcome-neutrality and robust protections for the exercise of democracy double as guarantors of popular choice. For a Constitution that makes no unalterable pre-commitment to substantive values, this feature is indispensable because outcome-neutrality facilitates the expression and aggregation of popular choice. The paradox of the United States Constitution, then, is that in order for it to cohere internally as a charter that is freely amendable as a reflection of the prevailing views of political

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[108] Akhil Reed Amar, 'Civil Religion and Its Discontents' (1989) 67 *Texas Law Review* 1153, 1164–65. A recent article takes the view that the Supreme Court's reading of the Constitution as 'neutral' in this sense is only a modern development. See Or Bassok, 'The Court Cannot Hold' (2014) 30 *Journal of Law and Politics* 1, 34-35.

[109] Akhil Reed Amar, 'Philadelphia Revisited: Amending the Constitution Outside Article V' (1988) 55 *University of Chicago Law Review* 1043, 1044 n 1.

[110] *The Federalist* No 46 (James Madison) (Jacob E Cooke ed, Wesleyan University Press 1961) 315 (defending the proposition that 'ultimate authority, wherever the derivative may be found, resides in the people alone').

[111] Brannon P Denning and John R Vile, 'The Relevance of Constitutional Amendments: A Response to David Strauss' (2002) 77 *Tulane Law Review* 247, 274.

[112] Michael C Dorf, 'Equal Protection Incorporation' (2002) 88 *Virginia Law Review* 951, 987.

[113] *Griswold v Connecticut*, [1965] 381 US 479, 484.

actors and the public, whatever those views may be, we must interpret the Constitution as implicitly making the First Amendment's democratic rights formally unamendable.[114]

The First Amendment states that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.'[115] In order to remain consistent according to its own terms, the First Amendment's democratic rights must be afforded special deference and treated as implicitly unamendable. That is not to suggest that the First Amendment's democratic rights are or should be eternal, even in the face of revolution. Unamendability, whether formal or informal, is defenceless against any effort to create a new constitutional regime. But unamendability can be enforced within an existing, legally continuous regime where political actors operate by the textual rules of legal change.

The distinction between legally continuous and discontinuous change returns us to our earlier discussion on amendment and revision.[116] In his study of Article V, John Rawls inquires whether it is 'sufficient for the validity of an amendment that it be enacted by the procedure of Article V?'[117] Rawls rejects the formalist view, most effectively advocated by John Vile,[118] that there are no substantive limits to formal amendment under the United States Constitution. Rawls suggests that the Supreme Court could follow the Indian model of judicial review to invalidate a constitutional amendment that had satisfied all of the procedural strictures of Article V. He bases his theory of judicial invalidation of a constitutional amendment on the distinction between amendment and revision. The idea of amendment, he explains, entails two possibilities. First, as in the case of the Reconstruction Amendments, it is 'to adjust basic constitutional values to changing political and social circumstances, or to incorporate into the constitution a broader and more inclusive understanding of those values.'[119] And second, as illustrated by the Sixteenth Amendment's authorisation to Congress to impose an income tax, it is 'to adapt basic institutions in order to remove weaknesses that come to light in subsequent constitutional practice.'[120]

Where constitutional change is more significant than these two kinds, the result, explains Rawls, is to revise the Constitution, not to amend it. In these cases, Rawls explains, the Court should defend the Constitution's basic framework and presuppositions

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[114] The claim here echoes the argument that it would result in more than a mere 'amendment' to the Constitution to alter fundamental rights that are essential to democratic self-government. See Stephen Macedo, *Liberal Virtue: Citizenship, Virtue, and Community in Liberal Constitutionalism* (Clarendon Press 1990) 183.

[115] US Const, amend I (1791).

[116] See text accompanying notes 37–65.

[117] John Rawls, *Political Liberalism* (Columbia University Press 2005) 238.

[118] John Vile, 'The Case Against Implicit Limits on the Constitutional Amending Process' in Sanford Levinson (ed), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (PUP 1995) 213.

[119] Rawls (n 117).

[120] ibid 239.

from alteration by simple amendment. Rawls illustrates his theory with reference to the First Amendment. Because its repeal would create a new regime, the Court, he suggests, should be prepared to invalidate an amendment repealing or proposing to repeal the First Amendment absent the recognition and self-awareness, reflected in special procedures, that the people were affecting a revolution-level change:

> The Court could say, then, that an amendment to repeal the First Amendment and replace it with its opposite fundamentally contradicts the constitutional tradition of the oldest democratic regime in the world. It is therefore invalid. . . . Should that happen, and it is not inconceivable that the exercise of political power might take that turn, that would be constitutional breakdown, or revolution in the proper sense, and not a valid amendment of the constitution. The successful practice of its ideas and principles over two centuries place restrictions on what can now count as an amendment, whatever was true at the beginning.[121]

The view that even a freely amendable constitution requires some minimal impairment of the right to constitutional amendment is intriguing in the case of the United States.[122] Rooted in a revolutionary tradition of popular sovereignty, democratic government in the United States rejects unamendable constitutional constraints because the constitutional traditions of the polity disclaim the right of one generation to make fundamental choices of self-definition for another.[123] Thus the right to popular choice —the right of rights, as Jeremy Waldron calls the right to participate[124]—must itself be protected from present and future majorities, even if it is their freely expressed choice to waive forever their right to choose. The implicit unamendability of the right to popular choice in turn frustrates the 'illegitimate entrenchment of the *status quo*'.[125] Here, then, the exception to the general rule against unamendability in the United States presents itself: the First Amendment's democratic rights must themselves be unamendable in order to preserve the free amendability of the United States Constitution.[126] Accordingly, we could interpret the First Amendment's democratic rights as implicitly entrenched against amendment on the theory that 'constitutional rules that disentrench by keeping open the channels of constitutional change must themselves be entrenched.'[127] Popular choice, then, entails some unamendable core of democratic expression.[128] The challenge of course remains determining what precisely this core democratic right requires.

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121 ibid (internal citations omitted).

122 For a useful discussion, see Samuel Freeman, 'Political Liberalism and the Possibility of a Just Democratic Constitution' (1994) 69 *Chicago-Kent Law Review* 619, 662–67.

123 Gordon S Wood, *The Creation of the American Republic, 1776–1787* (University of North Carolina Press 1998) 378–83.

124 Jeremy Waldron, *Law and Disagreement* (OUP 1999) 232 (quoting William Cobbett).

125 Amar (n 109).

126 This could also entail the same rule under state constitutions insofar as art V requires states to ratify amendments in either conventions or legislatures.

127 Amar (n 109).

128 Akhil Reed Amar, 'The Consent of the Governed: Constitutional Amendment Outside Article V' (1994) 94 *Columbia Law Review* 457, 505.

The judicial role in constitutional amendment

Interpreting the United States Constitution as implicitly entrenching an unamendable core of First Amendment democratic rights presupposes an authoritative body to delimit the boundaries of the Constitution's unamendability.[129] One choice is the United States Congress, the legislative branch, which formally exercises the lawmaking power under the Constitution.[130] By comparison, the Norwegian Constitution authorises the Parliament to internalise the power to review constitutional amendments within the lawmaking process,[131] as would be the case were Congress given the power to review amendments. Yet assigning this power to the legislature would, at the very least, be an unconventional choice because the judiciary is more commonly the institution authorised to declare an amendment unconstitutional in constitutional democracies that recognise the concept of an unconstitutional constitutional amendment.[132] In the United States, where the power of constitutional review has historically resided in courts,[133] tradition would dictate that the judiciary possess the power to review constitutional amendments, if the power is to exist at all.

Procedure and substance

A constitutional court may review the constitutionality of an amendment on either procedural or substantive grounds.[134] A constitutional amendment may be deemed procedurally unconstitutional where, for example, it fails to conform to the textual strictures on majorities, quorums, sequencing or other requirements on the process by which an amendment is proposed, ratified or promulgated. In contrast, an amendment may be ruled substantively unconstitutional where its content is judged contrary to an explicitly or implicitly unamendable provision. As discussed above, the Supreme Court of the United States has rejected challenges to the Eighteenth and Nineteenth

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[129] Conrado Hübner Mendes, 'Judicial Review of Constitutional Amendments in the Brazilian Supreme Court' (2005) 17 *Florida Journal of International Law* 449, 455 (exploring the role of the Brazilian Supreme Court in interpreting the Brazilian Constitution's 'cláusulas pétreas').

[130] US Const, art I, § 1.

[131] Eivind Smith, 'Old and Protected? On the "Supra-Constitutional" Clause in the Constitution of Norway' (2011) 44 *Israel Law Review* 369, 383–87.

[132] See generally Kemal Gözler, *Judicial Review of Constitutional Amendments* (Ekin Press 2008) (identifying courts in constitutional democracies that possess the power to review the constitutionality of constitutional amendments).

[133] *Marbury v Madison*, [1803] 5 US (1 Cranch) 137; Eugene V Rostow, 'The Democratic Character of Judicial Review' (1952) 66 *Harvard Law Review* 193, 195–96. For a study of the pre-constitutional roots of judicial review, see Mary S Bilder, 'The Corporate Origins of Judicial Review' (2006) 116 *Yale Law Journal* 502.

[134] For illustrations of each, consider the Turkish Constitutional Court, which has invalidated amendments on both procedural and substantive grounds. See Aharon Barak, 'Unconstitutional Constitutional Amendments' (2011) 44 *Israel Law Review* 321, 322–25.

Amendments, and in doing so appears to have refused to recognise the possibility of an unconstitutional constitutional amendment with respect to the substance of an amendment. But in its review of constitutional amendments, the Court appears to have remained open to the possibility of invalidating an amendment on the basis of its procedural failure or irregularity.[135]

The Court has heard at least five cases in which it has reviewed, on procedural grounds, the constitutionality of a constitutional amendment. In its first decade, the Court rejected the argument that a constitutional amendment proposed by Congress, in this particular case the Eleventh Amendment, must conform to the Constitution's presentment requirement.[136] The president, wrote the Court, 'has nothing to do with the proposition, or adoption, or amendments to the Constitution'.[137] Later, in denying a challenge to the Eighteenth Amendment, the Court held that the Article V requirement of two-thirds vote to propose an amendment refers to two-thirds in each house, assuming a quorum, and not to two-thirds of the entire composition of the legislature.[138] The Eighteenth Amendment was subsequently once again the subject of a constitutional challenge when the Court held that the choice of the method of amendment ratification, whether state legislative vote or convention, belongs to Congress exclusively.[139]

The other two cases must be read together. Both concern the matter of contemporaneity between proposal and ratification, and ask two questions: first, how long is too long between the proposal and ratification of an amendment; and second, which institution should judge the adequacy of contemporaneity between proposal and ratification? In 1921, the Court rejected the argument that Congress had improperly imposed a seven-year time limit on states to ratify an amendment proposal.[140] The Court held Congress could indeed impose a time limit in order to ensure that ratification is 'sufficiently contemporaneous in that number of states to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do.'[141] Twenty years later in 1939, the Court narrowed its holding. The Court held that where Congress has not imposed a time limit for states to ratify an amendment proposal, ratification must nonetheless occur 'within some reasonable time after the proposal'[142] and, in the event of disagreement on what is reasonable, the view of Congress, not of the Court, governs.[143] Thus the Twenty-Seventh

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135 One scholar has argued that the Court should assert the power to police the formal rules of art V. See Walter Dellinger, 'The Legitimacy of Constitutional Change: Rethinking the Amendment Process' (1983) 97 *Harvard Law Review* 386, 432.

136 *Hollingsworth v Virginia,* [1798] 3 US (3 Dallas) 378.

137 ibid 382.

138 *National Prohibition Cases* (n 83).

139 *United States v Sprague*, [1931] 282 US 716, 730.

140 *Dillon v Gloss*, [1921] 256 US 368.

141 ibid 375.

142 *Coleman v Miller,* [1939] 307 US 433, 452.

143 ibid. That *Coleman* was decided only by a plurality has raised doubts about its precedential value. See Michael Stokes Paulsen, 'A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment' (1993) 103 *Yale Law Journal* 677, 718–21.

Amendment, which had been proposed in 1789 but not ratified until two centuries later in 1992, was unopposed by Congress at the time of its ratification,[144] its procedural regularity was defended by the Department of Justice,[145] and a federal court refused to hear a challenge to its constitutionality.[146]

Modest substantive judicial review

Interpreting First Amendment democratic rights as implicitly entrenched against amendment would therefore require the Court to exercise the power to review constitutional amendments on substantive grounds, a power that the Court has historically rejected. In light of the extraordinary nature of this power in a constitutional democracy as well as the United States Supreme Court's expressed reluctance to invoke it, there are two questions in need of answers: first, can we justify, on democratic bases, conferring this vast power upon the Court; and, second, can there be a *democratic* form of judicial review of constitutional amendments?

On the first question, I concede that I do not have what I consider to be a winning answer, which is why I have long held the contrary view.[147] For the purposes of this Article, however, I presuppose an answer for the sake of argument. The answer, if a satisfactory one exists, would distinguish between constituent and constituted powers, and within constituent powers, its original and derived forms.[148] On this theory, the Court's role is to enforce the limits of unamendability imposed by the original constituent power, and judges may therefore invalidate a constitutional amendment that changes the essential nature of constitution that the original constituent power had authorised, and that the constituent power alone can change.[149] We could build an argument that this is a democratically legitimate judicial role in light of the constituent power's implicit entrenchment of First Amendment democratic rights against amendment.[150]

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144 Paul E McGreal, 'There is no Such Thing as Textualism: A Case Study in Constitutional Method' (2001) 69 *Fordham Law Review* 2393, 2431.

145 Memorandum Opinion for Counsel to the President, 16 Op Off Legal Counsel 87 (November 2, 1992).

146 See *Boehner v Anderson*, [1992] 809 F Supp 138 (DDC).

147 Albert (n 1); Albert (n 2); Albert (n 3).

148 Yaniv Roznai and Serkan Yolcu, 'An Unconstitutional Constitutional Amendment—The Turkish Perspective: A Comment on the Turkish Constitutional Court's Headscarf Decision' (2012) 10 *International Journal of Constitutional Law* 175, 191–94.

149 ibid.

150 That the First Amendment was the result of an amendment to the Constitution—and therefore the result of proposal and ratification by the constituted power, not by the constituent power—weakens this justification. But it can perhaps be redeemed in part or in whole by observing that the textual entrenchment of the First Amendment, as part of the Bill of Rights, was a condition to the ratification of the Constitution. See Leonard W Levy, *Origins of the Bill of Rights* (Yale University Press 2001) 1–43; Akhil Reed Amar, 'The Bill of Rights and the Fourteenth Amendment' (1992) 101 *Yale Law Journal* 1193, 1202.

On the second question—whether in the United States there can be a *democratic* form of judicial review of constitutional amendments that are said to violate First Amendment democratic rights—it is just as difficult to persuade judicial sceptics.[151] One possible answer is to propose a modest form of substantive judicial review in the United States that does not extend as far as the Indian Supreme Court's basic structure doctrine but that nonetheless authorises the Court to protect the Constitution's implicitly unamendable core democratic rights under the First Amendment. This would be a middle ground of sorts between what Joel Colón-Ríos has termed strong-form basic structure judicial review and conventional strong-form judicial review.[152]

Here, the Supreme Court would be operationalising the distinction between amendment and revision. The dividing line between the two, for the Court, would be the First Amendment's freedom of democratic expression. A constitutional alteration that does not affect those implicitly entrenched rights would qualify as a proper amendment, provided it conforms to the procedural strictures of Article V. In contrast, a constitutional alteration that did indeed violate the First Amendment's implicitly entrenched democratic rights would work a revision to the Constitution, and could therefore not be accomplished using the constitutional amendment procedures in Article V. The role of the Court would be to enforce that distinction in the service of both the distinction itself and also of the democratic foundations of the United States Constitution.[153]

On this theory of democratic judicial review, it is the Court's role to invalidate an amendment to First Amendment democratic rights in order to defend democracy in the United States. Defending democracy would entail enforcing the Constitution's fundamental presuppositions about the centrality of popular choice—an umbrella of rights implicitly protected against amendment by the First Amendment. This would create a paradoxical circumstance: in order to preserve the free amendability of the Constitution, the Supreme Court would have to interpret and enforce the Constitution as implicitly entrenching First Amendment democratic rights against amendment. This

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[151] In the United States, where the Constitution is extraordinarily difficult to amend formally, the case for judicial review of constitutional amendments is weaker than it is in India, for example, where the formal rules of constitutional amendment are, by comparison, much easier to satisfy. The more difficult it is to achieve cross-institutional consolidation behind a constitutional amendment, the greater the legitimacy we attribute to a successful amendment and, in my view, the lesser the appropriateness of judicial intervention. See Albert (n 1) 44–46.

[152] See generally Joel Colón-Ríos, 'A New Typology of Judicial Review of Legislation' (2014) 3 *Global Constitutionalism* 143 (outlining a five-part typology of judicial review).

[153] The question becomes whether *any* violation is sufficient to warrant judicial involvement. A reasonable way for judges to approach this question, though one that is still difficult to operationalise with reliability across time and among different judges, is to intervene only where the violation would amount to a fundamental abandonment of the unamendable right, that is to say a violation that is not a mere deviation from the unamendable principle but an attack on it. See Yaniv Roznai, 'Legisprudence Limitations on Constitutional Amendments? Reflections on the Czech Constitutional Court's Declaration of Unconstitutional Constitutional Act' (2014) 8 *Vienna Journal on International Constitutional Law* 29, 39–40.

'democratic' form of judicial review ironically authorises the Court to invalidate a constitutional amendment, which seems decidedly undemocratic. Yet the irony would reflect a basic truth in law: every rule admits of some exception, often in reinforcement of the general rule. Here, the exception to the free amendability of the United States Constitution would be intended only to make possible its continued democratic amendability.

To illustrate how the United States Supreme Court might invalidate a constitutional amendment in defence of democracy, consider a recent case from the Czech Constitutional Court. In 2009, the Constitutional Court invoked the idea of an unwritten 'substantive core' of the Czech Constitution to strike down a constitutional amendment proposing to shorten the legislative term of office in mid-stream of an ongoing term.[154] The Court explained that the unwritten substantive core of the Czech Constitution consists of rights and values, including popular sovereignty, the right of resistance, basic principles of fair election, and the rule of law principles of generality, non-retroactivity and predictability of law.[155] The Court held that the notion of predictability in legislative terms was a fundamental feature of democracy under the Czech Constitution, a feature that could not be violated by a constitutional amendment, not even an amendment that met all procedural conditions entrenched in the constitutional text.[156] For the Court, this democratic feature was central to the Constitution's identity, and the Court saw its role as protecting the Constitution's substantive core from attacks concealed as constitutional amendments.[157]

The elusive unconstitutional constitutional amendment

The role of the Supreme Court in the United States could be much the same were First Amendment democratic rights understood to be implicitly entrenched against amendment. The Court would see itself, and it would be seen, as defending the unamendable substantive core of the Constitution where it was faced with a challenge to a constitutional amendment alleged to impinge on a First Amendment democratic right. In theory, then, we can envision how the Court, and indeed all other federal courts, would conduct themselves as guardians of the Constitution in a regime with an implicitly unamendable constitutional principle, rule, value, structure or institution. In reality, however, it is important to inquire how and even whether theory maps onto application.

Consider for example the recently failed Twenty-Eighth Amendment proposal. In June 2013, Senator Tom Udall proposed an amendment that would have authorised

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[154] Kieran Williams, 'When a Constitutional Amendment Violates the 'Substantive Core': The Czech Constitutional Court's September 2009 Early Elections Decision' (2011) 36 *Review of Central and East European Law* 33, 42.

[155] ibid 42–43.

[156] ibid 43.

[157] ibid 49–50.

Congress and the states to regulate campaign fundraising and expenditures.[158] The proposal was a direct response to the Supreme Court's controversial judgment in *Citizens United v Federal Election Commission*,[159] which deregulated much of electoral campaign finance. The Court held in *Citizens United* that Congress may not ban corporations and unions from making independent expenditures in connection with an election campaign.[160] Udall's amendment proposal was one of several that had been introduced to reverse the Court's ruling in *Citizens United*.[161] But his proposal came closer than most others to becoming law, as it was approved for debate in the Senate by a vote of 79 – 18,[162] only to later be defeated by a narrow margin of 54 – 42.[163]

This campaign finance amendment proposed to give electoral regulatory powers to the legislative branch in both levels of government.[164] The stated purpose of the proposal was 'to advance the fundamental principle of political equality for all, and to protect the integrity of the legislative and electoral processes.'[165] The proposal intended to authorise Congress to 'regulate the raising and spending of money and in-kind equivalents with respect to Federal elections'[166] including but not limited to imposing limits on contributions to candidates in both primary and general elections, and on expenditures 'by, in support of, or in opposition to such candidates'.[167] The proposal also sought to give the same powers to states with respect to state elections.[168] Importantly, the proposal insisted that 'nothing in this article shall be construed to grant Congress the power to abridge the freedom of the press.'[169]

Suppose the Twenty-Eighth Amendment had passed the House, the Senate and ultimately been properly ratified by three-quarters of the states, as required by Article V. Suppose also that, after failing in the lower federal courts, a plaintiff with standing had successfully petitioned the Supreme Court to review the substantive constitutionality of the amendment. Suppose further that the First Amendment's democratic rights were

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158 Press Release, 'Udall Introduces Constitutional Amendment on Campaign Finance Reform', Senator Tom Udall Official Website, 18 June 2013 <http://www.tomudall.senate.gov/?p=press_release&id=1329>.

159 558 US 310 (2010).

160 ibid 365–66.

161 See eg H J Res 31, 113th Cong (2013) (proposing amendment on campaign finance); S J Res 29, 112th Cong (2011) (same); see also Byron Tau, 'Obama Calls for Constitutional Amendment to Overturn Citizens United' Politico, 29 August 2012 <http://www.politico.com/politico44/2012/08/obama-calls-for-constitutional-amendment-to-overturn-133724.html> (reporting that President Barack Obama urges a 'serious look at a constitutional amendment to revise the Supreme Court's *Citizens United* ruling').

162 Kathleen Hunger, 'Senate Advances Campaign-Finance Constitutional Amendment', Bloomberg News, 9 September 2014 <http://www.bloomberg.com/news/2014-09-08/senate-advances-campaign-finance-constitutional-amendment.html>.

163 Burgess Everett, 'Senate Blocks Campaign Finance Amendment' Politico, 11 September 2014 <http://www.politico.com/story/2014/09/senate-block-campaign-finance-amendment-110864.html>.

164 S J Res 19, 113th Cong (2013).

165 ibid para 1.

166 ibid.

167 ibid paras 1(1)–(2).

168 ibid para 2.

169 ibid para 3.

generally understood to be implicitly unamendable. Faced with these circumstances, would the Court invalidate the amendment today as infringing the presently-recognised rights of corporations and unions to exercise democratic rights?[170] [I use this example because of its timeliness, not necessarily because it is the best one for analytical purposes. A better though less timely example would be an amendment prohibiting people from burning the American flag.]

The Court would have at least four options, none of which would be compelled by the implicit unamendability of the First Amendment's democratic rights. First, the Court could uphold the amendment as a procedurally proper exercise of the amendment power conferred upon political actors. Yet the doctrine of unconstitutional constitutional amendments precludes such a formalist analysis because the very theory of a substantively unconstitutional constitutional amendment presupposes that procedural correctness alone is ineffective to shield an amendment from invalidation. Second, the Court could theoretically uphold the amendment as substantively constitutional. Notwithstanding the currently constituted Court having issued the judgment reversed by the amendment,[171] the Court could find a way to construe the amendment as consistent with the unamendable First Amendment by carving out an exception to its own absolutist language.

In the third and fourth options, respectively, the Court could invalidate the law on either procedural or substantive grounds. There being no procedural irregularity in the posited counterfactual, what would remain is the fourth option: the possibility of a substantively unconstitutional constitutional amendment. Just as the Court could construe the First Amendment's implicitly unamendable democratic rights as admitting of an exception, it could just as easily interpret those rights as absolutes subject to no violation even in exceptional circumstances. In this scenario, the Court would strike down the amendment. Yet invalidation strikes me as unlikely in light of the robust culture of popular choice the Court would be seeking to vindicate by treating First Amendment democratic rights as implicitly unamendable. It would raise too sharp a contrast for the Court to recognise on the one hand that the Constitution is anchored in popular choice, and therefore requires making First Amendment democratic rights implicitly unamendable, and on the other to invalidate an amendment whose intent is to create a more egalitarian model of campaign finance and political speech than currently exists.

It is not clear what an unamendable First Amendment would change in the United States in terms of interpretation or enforcement, particularly given the politicisation of

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[170] Kyle Langvardt, 'Imagine Change Before and After *Citizens United*' (2012) 3 *Alabama Civil Rights & Civil Liberties Law Review* 227, 241–43 (exploring how corporate and union rights would be violated in overruling *Citizens United*).

[171] However, it would not be unprecedented for a Court to abandon a position on a matter of constitutional interpretation that had been repudiated by political actors as well as the public. A prominent example is the Court's acquiescence to political and public pressure in the New Deal era. Compare *US v Darby*, [1941] 312 US 100, 123 (overruling *Hammer*) with *Hammer v Dagenhart*, [1918] 247 US 251, 273–74 (distinguishing commerce from manufacturing and prohibiting Congress from regulating manufacturing).

the Court, whose composition is often determinative of the outcome. Unamendability would not be self-executing in the sense that it would itself bar political actors from trying to pass a constitutional amendment that divests or seriously impinges upon First Amendment democratic rights. Nothing about explicit or implicit entrenchment against amendment dictates the outcome when the entrenched value is interpreted by the ultimate arbiter of constitutionality. And this may in fact be a virtue: the continued contestability of constitutional meaning is consistent with popular choice and outcome-neutrality, two fundamental pillars that support the whole of the Constitution.

It is true, though, that the very fact of the implicit unamendability could cause political actors to pause before acting. Courts, for their part, would have to resolve each challenge to the constitutionality of a constitutional amendment in much the same way that they today resolve challenges under the First Amendment: with vast powers of interpretive and methodological latitude that make it possible to defend any reasonable view of the Constitution. (Here, I am assuming that the political actors in the United States, now a mature democracy, would not today pass an unreasonable amendment that openly and nefariously denies democratic rights to one or more classes of persons.)

Despite the difficulty of projecting with any assurance how the informal entrenchment of the First Amendment's democratic rights would change the Court's interpretation of those rights, there is one clear and valuable consequence of implicitly recognising the unamendability of First Amendment democratic rights: the expressive role that such recognition plays. Scholars have theorised that constitutions express values. For instance, they have argued that constitutions may be designed to reflect a jurisdiction's constitutional identity,[172] to show how a 'nation goes about defining itself',[173] to 'create a shared consciousness',[174] or to make a statement about a nation's objectives and aspirations.[175] Constitutions are commonly designed to reflect these values in the preamble[176] or elsewhere in the main text.[177] But constitutional designers also use unamendability as a way to convey internally and to the wider world the values that matter most to their constitutional community. Where constitutional designers disable formal amendment rules as to one or more constitutional provisions the message

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[172] Gary J Jacobsohn, *Constitutional Identity* (HUP 2010) 348.

[173] Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (PUP 2009) 12.

[174] Tom Ginsburg, 'Written Constitutions and the Administrative State: On the Constitutional Character of Administrative Law' in Susan Rose-Ackerman and Peter L Lindseth (eds), *Comparative Administrative Law* (Edward Elgar 2010) 117, 118.

[175] Cass R Sunstein, 'On the Expressive Function of Law' (1996) 5 *East European Constitutional Review* 66, 67.

[176] See eg France Const., prmbl. (1958) (identifying justice as a constitutional value); Switzerland Const, prmbl (1999) (identifying liberty as a constitutional value); Venezuela Const, prmbl (1999) (identifying democracy as a constitutional value).

[177] See eg Kazakhstan Const, § I, art 1(1) (1995) (identifying human dignity as a constitutional value); South Africa Const, ch 1, § 1 (1996) (identifying the rule of law as a constitutional value); Spain Const, art 1 (1978) (identifying secularism as a constitutional value).

is that the provision or provisions are special and worthy of special designation, if not enforceable protection. As I have explained elsewhere:

> The degree to which a constitutional provision is insulated from formal amendment and from the unpredictability of constitutional politics is in this case a proxy for preference. The stricter its entrenchment, the higher the constitutional worth of a given provision. Absolute entrenchment against formal amendment is thus the strongest statement of a provision's value.[178]

Recognizing the implicit unamendability of the First Amendment's democratic rights may therefore be useful even where the interpretation and enforcement of unamendability risks being both unreliable and ineffective. Perhaps, then, the best function of the implicit unamendability of the First Amendment's democratic rights is to express what is most valued in the constitutional culture of the United States. The expressive function of unamendability is, in my view, more compelling where the inviolability of the protected value is textually entrenched than where the inviolability of the value is rooted only in a judicial opinion. Nonetheless, the judicial recognition of the centrality of the First Amendment's democratic rights—even where the Court's interpretation of those rights is contestable—would convey their special importance in the United States.

Conclusion

I began with a challenge: does the United States Constitution make anything unamendable? We know that nothing in its text is today formally unamendable. But the question remains whether the Constitution could be interpreted as requiring some form of unamendability in order to survive according to its own terms. I suggested that we could understand the Constitution and its political and judicial evolution over time as requiring First Amendment democratic rights to be implicitly unamendable.[179] This, I argued, is a great paradox of the United States Constitution: in order for it to cohere internally as a freely amendable social contract, we must interpret it as implicitly making the First Amendment's democratic rights formally unamendable, and consequently restricting in this narrow but important way the fundamental democratic right of constitutional amendment. I suggested a modest form of substantive judicial review and questioned whether it could be an effective way of enforcing these implicitly unamendable democratic rights. My sceptical posture toward unamendability persuaded me that the answer was unclear at best, though I closed by recognising the value of unamendability, both formal and informal, in its expressive function.

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[178] Albert (n 34) 254.

[179] An equally useful approach would not ask whether the First Amendment is implicitly unamendable, but whether in the First Amendment's absence from the constitutional text the Supreme Court would find the democratic rights it entrenches nonetheless implied. The High Court of Australia, for example, has found an implied right to political expression where the constitutional text entrenches no such right. *See Australian Capital Television*, [1992] HCA 45; [1992] 177 CLR 106.

David A Anderson

The press and political community

Legal systems in most Western democracies provide some special solicitude for the press.[1] The press gets benefits not accorded to others—for example, guarantees of freedom from governmental control, access to places from which others are barred, subsidies, and dedicated broadcast channels.[2] Sometimes these perquisites are derived from a constitution, but more often they are the product of legislation or custom.[3] Whatever the source, this preferential treatment of the press usually is thought to be necessary because of the press's usefulness in gathering and disseminating news.[4] But the press and its audience are changing, in ways that invite rethinking just what it is that makes the press uniquely valuable.

Today there are many non-press newsgatherers. So-called citizen journalists often report the news earlier (and sometimes more comprehensively) than the press, particularly in situations such as disasters and wars where there is no immediate press presence. Photographs of, and details about, a tsunami in Japan[5] or a plane shot down in Ukraine may reach the outside world directly through communications from people on the site.[6] Governments are prolific gatherers of news, especially news about the economy—employment statistics, factory orders, mining and drilling activity, foreign trade, retail sales, agricultural production, and weather, to name a few. Nongovernmental organisations gather news about the subjects that interest them, such as poverty, health, crime, economic development, and education.

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[1] By 'the press', I mean those subsets of the media that report on public affairs, whether they do so in print, through broadcasting, or online.

[2] For a country by country survey of sources of these benefits, see 'Freedom of the Press 2013' Freedom House <https://freedomhouse.org/sites/default/files/FOTP%202013%20Full%20Report.pdf>.

[3] In some countries this is accomplished by press-specific provisions, such as the free press clause of the United States Constitution, and in others by special protection given under general free speech principles. Russell L Weaver, 'The Press and Freedom of Expression' in András Koltay (ed), *Media Freedom and Regulation in the New Media World* (Wolters Kluwer 2014) 36.

[4] Sonja R West, 'Press Exceptionalism' (2014) 127 *Harvard Law Review* 2434, 2437.

[5] Brett DM Peary – Rajib Shaw – Yukiko Takeuchi, 'Utilization of Social Media in the East Japan Earthquake and Tsunami and its Effectiveness' (2012) 34 *Journal of Natural Disaster Science* 3, 3.

[6] Mark Glasser, 'Your Guide to Citizen Journalism' *PBS*, 27 September 2006 <http://ec2-23-21-180-28.compute-1.amazonaws.com/mediashift/2006/09/your-guide-to-citizen-journalism270>.

Even the news reported by the press is often gathered by others. This is true of newspapers, television, magazines, and online news sites. Crime reporting relies on information gathered by the police, prosecutors, or defence attorneys, or on evidence elicited in judicial proceedings. News about more complex forms of wrongdoing—securities scams, collusive bidding, fraudulent bank dealings, anti-competitive business practices—is uncovered by government investigators or regulators. Information about fires, floods and natural disasters comes from fire officials, law enforcement, and disaster relief entities. News about important subsets of the economy is gathered by entities such as banking regulators and stock exchanges. A great deal of news comes from scientists, economists, medical researchers, and other experts who report the results of their studies. News about demographics, lifestyles, fashions, and spending habits comes from vital statistics offices, the census department, and industry and trade groups.

The press often adds value to the information gathered by others, for example by making the information more easily digestible, or by adding a historical or comparative perspective. And some of the newsgathering done by others occurs because the press is there to give it an outlet: an agency generates a report because it seeks the publicity the report will attract; a prosecutor collects information about the suspect's background because the press seeks it.

To be sure, the press is still an important newsgatherer. Traditional outlets—newspapers, news magazines, and television—have been cutting staff and closing bureaus,[7] but online news sites are proliferating. In the United States in 2014 there were roughly 5,000 full-time professionals working at nearly 500 digital news outlets, most of which were created in the past half dozen years.[8] The press reports news that enterprising journalists uncover through their own efforts. Investigative journalism exposes venality, waste, or inattention in government, business, education, health care, sports, and other human endeavours. History is full of instances in which enterprising journalists have performed valuable public service.[9] But as staffs and resources of 'legacy media' are decimated,[10] many of the functions formerly performed by

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[7] US newspapers have cut some 14,000 newsroom positions in recent years, or nearly 30 percent of their total employment, according to the American Society of Newspaper Editors. Paul Farhi, 'Charting the Years-long Decline of Local News Reporting' *Washington Post*, 26 March 2014 <http://www.washingtonpost.com/lifestyle/style/charting-the-years-long-decline-of-local-news-reporting/2014/03/26/977bf088-b457-11e3-b899-20667de76985_story.html>.

[8] Amy Mitchell, 'The State of the News Media 2014: Overview' Pew Research Center, 24 March 2014 <http://www.journalism.org/2014/03/26/state-of-the-news-media-2014-overview/>.

[9] In a recent example, the *Daily Telegraph* and a television channel exposed alleged corruption by two former ministers in the British government. Stephen Castle and Alan Cowell, 'Two Former Cabinet Ministers in Britain Deny Wrongdoing After Graft Allegations' *New York Times,* 23 February 2015 <http://www.nytimes.com/2015/02/24/world/europe/malcolm-rifkind-jack-straw-deny-wrongdoing.html?ref=topics&_r=0>.

[10] In the United States, employment in newsrooms declined by 26 per cent from 2007 to 2012. See Fred Vultee, 'A Look at the Numbers: Editing Job Losses in the Newsroom' American Society of Copy Editors, 1 June 2013 <http://www.copydesk.org/blog/2013/06/01/editing-job-losses/>.

investigative journalists are being performed by other entities—not just Wikileaks and whistleblowers, but independent organisations such as the National Security Archive,[11] which have the expertise, resources, and staying power to investigate subjects that are too massive or impenetrable for most journalists. Many of the new online news sites do investigative journalism, but they generally lack the resources that the legacy media devoted to investigative journalism in their heyday.[12]

The press is no longer an essential disseminator

News, whether gathered by the press or by others, is of little value to the public until it is disseminated, of course. The press was once the essential disseminator, but no longer. Everyone who gathers news now has the capacity to disseminate it to the public directly. Governments and NGOs used to be dependent on the press to disseminate the information they gather, but now those entities have their own websites from which people can get the information directly.[13] There are many other online sources of news. Some of it is actually gathered by the entity that posts it, but the vast majority of online sites report news gathered by others. The news aggregators identify the gatherers, but many others simply incorporate news gathered by others into their own reports.[14] Many people get their news from Facebook and similar platforms, which is to say they get their news from other users who may be scrupulously accurate, wildly irresponsible, or anything in between. Many Internet users apparently are indifferent to the lack of independence in their news sources; the fastest growing revenue source in the digital media world is 'native advertising', which embeds the advertiser's message in a format that makes it indistinguishable from the surrounding content. Spending on such ads totalled 4.7 billion dollars in 2013 and was expected to grow to 7.9 billion in 2014 and 21 billion by 2018.[15]

Historically, the press has been a watchdog, providing what Justice Stewart called 'organized, expert scrutiny of government'.[16] But at least in the US, the press is rapidly abdicating that role—closing Washington bureaus, withdrawing reporters from

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[11] 'About the National Security Archive: 29 Years of Opening Governments at Home and Abroad' The National Security Archive <http://www2.gwu.edu/~nsarchiv/nsa/the_archive.html>.

[12] See Mitchell (n 8), reporting that the vast majority of original reporting still comes from the newspaper industry.

[13] Indeed, the press often gets the news it reports from these government and NGO websites without talking directly with representatives of the entity.

[14] Marc Fisher, 'Steal This Idea: Why Plagiarize When You Can Rip Off Another Writer's Thoughts Without Fear of Penalty?' (2015) *Columbia Journalism Review* 30 (reporting on 'the growing practice of producing articles based entirely or mostly on the work of others').

[15] Mark Hoelzel, 'Spending on Native Advertising Is Soaring As Marketers and Digital Media Publishers Realize the Benefit' Business Insider, 18 Feburary 2015 <http://www.businessinsider.com/spending-on-native-ads-will-soar-as-publishers-and-advertisers-take-notice-2014-11>.

[16] Potter Stewart, 'Or of the Press' (1975) 16 *Hastings Law Journal* 631, 634.

Congress and federal agencies, closing statehouse bureaus, and reducing coverage of city halls and courthouses.[17] The metaphor of a 'fourth estate' sitting in the reporter's gallery keeping an eye on the branches of government has diminishing contemporary relevance. The watchdog role has been largely ceded to interest groups; the watchful eyes of the National Rifle Association or the Sierra Club are more likely to constrain public officials today than those of the press.

If the press has any claim to special protection in today's world, it arises from the proven ability of the press to facilitate democratic dialogue. The press creates communities by assembling an audience, providing a forum, and sometimes by serving as the community's conscience or provocateur.[18] More important, perhaps, the press helps form public agendas. In this process, the relationship between the press and its audience is symbiotic; the agenda must reflect the audience's interests, but those interests are formed in part by the issues the press chooses to address and what it says about them.[19]

These communities may be geographical, from a neighbourhood to a nation and anything in between. They may be communities without geographical boundaries, such as scientific communities or the audiences of BBC World or CNN International. More often, probably, they are communities defined by more than one characteristic; eg *The New York Times* is a national newspaper in the US, but its audience is a tiny (though influential) subset of the nation's citizens who share a desire for more thorough coverage of the nation and world than their local press provides.

Language, of course, is a characteristic that trumps all others; even scientists in a narrow discipline or citizens of a small neighbourhood can't be full members of the community, no matter how fully their interests coincide, if they do not speak the same language. Indeed, language is itself a powerful creator of communities; it sometimes unites or divides people more completely than national boundaries.[20]

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[17] Jodi Enda, 'Capital Flight' *American Journalism Review*, June 2010 <http://ajrarchive.org/Article.asp?id=4877>.

[18] Democracy 'is a complex web of communication—a storing and sharing of knowledge that forms publics or communities out of mere masses of individuals.' Jeffrey Scheuer, *The Big Picture: Why Democracies Need Journalistic Excellence* (Routledge 2008) xix.

[19] The interdependence of the press and democratic government is explored extensively in the Scheuer book. ibid.

[20] For example, the growth of the Hispanic population in the United States has made the Spanish-language television network Univision a major competitor to the four largest networks. Emily Guskin and Amy Mitchell, 'Hispanic Media: Faring Better than the Mainstream Media' The State of the News Media, 2011 <http://www.stateofthemedia.org/2011/hispanic-media-fairing-better-than-the-mainstream-media/>.

Democracy and geography

Democracy, however, reflects an overwhelmingly geographical conception of community. Despite the efforts of the last century to form supranational governments, the world is still governed primarily by national governments. This is true even of nations that are divided by language, such as Canada, or by divergent economic interests, such as China.[21] In most Western democracies the political system is geographically based even within nations; representation is by districts, and where citizens live determines who they can vote for and who speaks for them in the government. The power of this geographical conception varies from country to country. Representatives in parliamentary systems usually are elected by districts too, but often they need not live in the district they serve,[22] and national party politics may have more to do with their election than local sentiment. For this reason, citizens of European parliamentary systems may have difficulty appreciating the power of geography in the American political system.

In the US the belief that the relevant community for political purposes is geographical is deeply embedded. Americans vote for dozens of local, state and national officials in an array of different districts that partially overlap. A citizen usually lives in one district for election of school board members, another for members of the city council, another for the county governing body, another for state legislators, another for members of Congress, and perhaps other districts for different levels of judges. These officials almost always must live in the districts they represent, on the perhaps dubious assumption that only a resident can adequately represent the interests of the district. Most districts must be redrawn at least once every ten years,[23] which sometimes means that incumbents must change their residence if they want to continue to hold the office.

Traditionally the press has been geographically based too. A few outlets manage to be both local and national—*The New York Times*, the *New Yorker*—but most are either local or regional (*Atlanta Journal*, *Detroit Free Press*, *Texas Monthly*), or aimed at a specific audience (*Wall Street Journal*, *Sporting News*). Television broadcasters are local by law—each station is licensed to a specific city or metropolitan area.[24]

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[21] See eg Teresa Wright, 'Tenuous Tolerance in China's Countryside' in Peter Hayes and Stanley Rosen (eds), *Chinese Politics: State, Society and the Market* (Routledge 2010) 112–13 (reporting several ways in which Chinese success in the global marketplace has disadvantaged Chinese farmers).

[22] Members of the European Parliament need not even live in the country they represent. See Treaty on the Functioning of the European Union (2007) art 22(2) (stating that a member may be elected either from the country of which he is a national or the country in which he is resident).

[23] This is because of a federal constitutional requirement that districts contain roughly comparable numbers of citizens as counted in the latest decennial census, commonly called the 'one man one vote' principle. See *Baker v Carr*, 369 US 186 (1962).

[24] 'The Public and Broadcasting: How to Get the Most Service from Your Local Station' Federal Communications Commission, July 2008 <http://transition.fcc.gov/mb/audio/newsite/docs/public_and_broadcasting.html#_Toc319313288> (stating that each television broadcaster must be 'responsive to the needs and problems of its local community of license').

The localism of the press corresponds roughly to that of the political system. The press reports on issues important to the district (or the various districts within its audience), furnishes a forum for public discussion of those issues, covers the election campaigns and results in the districts, and informs voters of the actions of the various governmental bodies. The relationship between the press and the political system is two-way: most of the communication between the governors and the governed takes place through the press. Political rallies, governmental meetings, newsletters and petitions provide some first-hand contact, but most of the interchange takes place through the press.

The congruence of political and press geography has eroded considerably. For one thing, the press has become less local. Most newspapers are owned by national or regional chains,[25] which vary widely in the extent to which they control or influence their local outlets. Most subscribe to the Associated Press, which gives all of them access to the same national news. Although television stations are local, most are affiliated with a national network that provides the same news and entertainment programming to all its affiliates.[26] Until 20 years ago The Federal Communications Commission required television stations to carry a significant amount of news and public affairs programming targeted specifically at their local communities, but the deregulation of broadcasting in the 1990s greatly weakened those requirements.[27] Most stations still at least broadcast some local news and weather, but other local programming has all but vanished.[28]

Perhaps the biggest change of the past 30 years has been the growth of cable and satellite TV. Most cable and satellite programming has no local content whatever; CNN, Fox News, MSNBC, and hundreds of other cable and satellite networks deliver a single programming package to all their subscribers everywhere. A few cable and satellite providers carry local news, and all are required to carry the programming of local over-the-air broadcasters in their area,[29] but as noted above those local stations carry less local programming than in the past. Viewers who prefer the cable networks to over-the-air broadcasters may not be exposed to local news at all.

Political changes have also weakened the connection between press and politics. Congressional districts are not required to reflect real communities of interest; instead they are gerrymandered to include legally-required proportions of minority voters or voters desired by the political party that controls the drawing of districts. For example, I live in a dragon-shaped district that is 200 miles long and one county wide; it does not

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25 Eli M Noam, *Media Ownership and Concentration in America* (OUP 2009) 139.

26 David Kordus, 'What's on (Digital) TV? Assessing the Television Broadcasting System, Its Potential and Its Performance in Increasing Media Content Diversity' (2014) 19 *Communication Law and Policy* 55, 69 (indicating that national 'networks increase homogeneity of content across the country').

27 'The Policy and Regulatory Landscape' Federal Communications Commission, 285 <http://transition.fcc.gov/osp/inc-report/INoC-26-Broadcast.pdf>.

28 Mitchell (n 8), reporting that a quarter of the 952 US television stations that air newscasts do not produce their own news programmes.

29 Federal Communications Commission (n 24).

lie within the circulation area of any single newspaper or the range of any single television station. What the elected representative tells voters in one end of the district may be entirely different from what he says in the other end. At the other extreme, districts may be too small to attract significant press coverage; when there are dozens of local governing bodies in the circulation area of the local newspaper, they do not all get coverage.

The upshot is that while the political system is still geographically based, most people's sources of news and information are not. The community that matters for political purposes no longer conforms closely to a community for news purposes. This has many consequences, the most obvious of which is that the press is a less effective forum for discussion of issues that matter to the political community.

The Internet both exacerbates and alleviates this trend. The Internet makes it easier for citizens to access only sites that isolate them, not only from local news, but also from entire subjects and viewpoints. To the extent that these are conscious decisions to avoid certain content, it is no different from choosing not to watch particular television programming or not to read a particular newspaper. But it can also produce an unconscious narrowing of interests; newspaper readers and television viewers are exposed to headlines, photos, and teasers that may attract them to a subject they would not have sought out on their own. Some Internet sites do this, but most do not expose users to subjects other than those that their algorithms predict will interest user.

On the other hand, the Internet makes it easier to create new, ad hoc forums for discussion of local issues or specific subjects. It has never been easier to identify an issue, generate discussion, and mobilise opinion, locally or globally. Some of these facilitate self-government by fostering discussions about community issues, but the vast majority deal with entertainment, sports, consumer choices, or other subjects not of importance to the political community.

Cumulatively, these factors push towards interest-group politics rather than community-based politics. They encourage people to focus single-mindedly on matters they already care about. They do little to induce people to inform themselves about matters they need to care about if community-based democracy is to function.

Engaging the new breed of communities

Of course, engaging public attention to public affairs has never been easy. Readers and viewers have always been adept at ignoring matters that do not engage their interest.[30] Finding ways to attract attention is the currency of both the art of politics and the craft of journalism. We should have no illusions about the extent to which the public has ever

[30] For example, a study showed that only 61 per cent of local newspaper readers regularly read local news stories. See '2011 Community Newspaper Readership Survey' Center for Advanced Social Research, October 2011 <http://www.rjionline.org/sites/default/files/2011_nna_community_readership_survey_report_2.pdf>.

been well informed about the things they are asked to make decisions about. Many years ago I worked for a former politician named Calvert, who attributed his first electoral success to the fact that during the election campaign, the maker of Calvert Whisky happened to be engaged in a widespread advertising programme to get its name before the public. Today politicians spend millions on their own ads for that purpose,[31] and additional millions on consultants to tell them what messages will engage public attention.

The congruence of political and press geography has also been eroded by changes in the nature of communities. Many people today identify less with the place where they live than with their occupation, their religion, their avocation, or some other aspect of their lives. These non-geographical communities used to be more dependent on organs of mass communication than traditional communities, because there were fewer opportunities for face-to-face meetings. The Internet changes all that, making it possible to communicate without either face-to-face meetings or mass media. Facebook and Twitter are examples of communities held together by Internet communication only.

The weakening of geographical ties is one reason for the difficulties that mass media face. As people cease to identify strongly with their city or their state, they have less reason to read a local newspaper or watch a local television station. Government based on geographical communities seems increasingly irrelevant to people to whom those are not the important communities. This may account for some of the decline in voting percentages;[32] people have less incentive to participate when political communities do not correspond to the communities that are important to them.

The fact that the new breed of communities does not correspond to the communities on which the political system is based poses a large problem for democracy in the US, and perhaps other democracies as well. It is a problem that threatens the foundations of democracy. When citizens do not participate, it leaves the decisions to those who are motivated by single hot-button issues and those who can use government to advance their self-interest over the welfare of the common weal.

The problem may be less acute if the political system is less intensely local. To the extent that important decisions are made nationally rather than locally, democracy can work if people who have lost interest in local government still pay attention to national affairs. This may be the case in some countries with parliamentary systems where most of the decisions that matter to people are made by the central government. It may also help to explain the growth of the federal government in twentieth century America. If people whose ties to local communities are weakening still retain their identification with the nation, they might well be expected to look to the federal government for solutions to their problems.

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[31] '2014 House and Senate Campaign Finance' Federal Election Commission <http://www.fec.gov/disclosurehs/hsnational.do>.

[32] 'Federal Primary Election Runoffs and Voter Turnout Decline, 1994–2014' Fairvote, November 2014 <http://www.fairvote.org/assets/Primaries/Federal-Primary-Election-Runoff-Turnout-2014-updated-11.17.14.pdf>.

Democratic government requires some level of civic engagement, and that requires some sense of shared values, aspirations, and responsibilities. In a world in which those are not anchored to a locale, it is not clear whether the press, or any other institution, can create such engagement. The rise of social media does not seem to have fostered civic engagement.[33] If the principal shared value is the maximisation of individual satisfaction, it is not clear whether democracy can function.

An informed citizenry often seems more aspirational than real, but it is the foundational assumption of popular sovereignty. In the US at least, the press is the principal means by which people are informed about the governmental matters they are asked to decide.[34] Since the founding of the Republic, American political institutions have depended on the press to provide a forum for the discussion of matters relating to self-government. Benjamin Franklin was an evangelist for the nascent newspaper business, providing equipment, advice, content, and financing for newspapers from Philadelphia to Virginia and South Carolina.[35] The printers of the revolutionary period produced the pamphlets and newspapers in which grievances against Great Britain and aspirations for independence were aired.[36] Public debate about the constitution and the Bill of Rights took place largely in those forums.[37] As the country expanded westward, newspapers were usually among the first businesses established in the new settlements. Debates over slavery filled the newspapers in the 1840s and 1850s. Later in the nineteenth century newspapers crusaded against political corruption and instigated governmental reforms. Newspapers helped foment zeal for US participation in the Spanish American War and reluctance to participate in World War I. The press, especially television news, is credited with (or blamed for) turning the tide of public opinion against the Vietnam War.[38]

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[33] Americans tend to limit themselves to narrowly focused communities of like-minded people, and 'Rather than breaking down barriers between communities, social media [have] primarily recreated existing community patterns online.' Daniel Clark – Elana Goldstein – Christoph Berendes, 'Integrating News Media, Citizen Engagement, and Digital Platforms Towards Democratic Ends' Democracy Fund, July 2013 <http://www.democracyfund.org/media/uploaded/IntegratingTowardsDemocraticEnds.pdf>.

[34] The same appears to be true in Great Britain, where 'only a tiny percentage of voters will actually see a party leader in the flesh or attend a rally to hear him or her speak.' In the 2001 election 88 per cent got news about politics from television and 74 per cent from newspapers. David Denver, *Elections and Voters in Britain* (Palgrave Macmillan 2003) 130.

[35] Jean Folkerts and Dwight L Teeter, *Voices of a Nation: A History of Mass Media in the United States* (4th edn, Allyn and Bacon 2002) 29.

[36] Jeffrey A Smith, *Printers and Press Freedom: The Ideology of Early American Journalism* (OUP 1988) 74–92.

[37] Leonard W Levy, *The Emergence of a Free Press* (OUP 1985) 176.

[38] The role of the press in each of these controversies is canvassed in Folkerts–Teeter (n 35) 483–85.

Conclusion

In the past the press has been a crucial assembler of audiences. By sifting, selecting, massaging, and packaging the news, guided by the editor's judgment as to what his or her audience wants or needs to know, the press pulled together a community of people with at least some shared interests. There is no reason why this function cannot be performed by some new, digital iteration of the press, and to some extent that is already happening. A few new online news sources have emerged, such as Politico at the national level, Texas Tribune at the state level, and DNAInfo.com at the city level. Most of those that have succeeded are nonprofits dependent on donations.[39] Legacy media are scurrying to expand to, or move entirely to, digital platforms, but whether the traditional advertiser-supported business model will work in the digital world remains to be seen. But if the demand is there, it is likely that some viable business model will evolve.

Whether there is sufficient demand is the big question. In America, at least, many people—maybe even most people—seem to be massively indifferent to the kind of news that makes self-government work. They are interested in news about sports or entertainment or fashion or consumer options, but not in news about politics and government. Judging by voter turnouts,[40] most people are content to have governmental decisions made without their input. Some might say this is only because citizens have become disenchanted with government, or are disappointed by the choices presented to them, or believe their voice does not matter. But political parties and candidates who would benefit from changing those beliefs have been trying to do so for many years with little success. Until someone finds a way to motivate these nonparticipating citizens, the demand for news relating to self-government will be limited to a fraction of the population.

Even among those who do follow such news, many do not want the press to choose their news; they want to choose for themselves what to read or hear. What they may not realise is that someone else—or some*thing* else—*is* choosing their news. No one can navigate the vast universe of available news and information without some assistance. Today that assistance is often provided by algorithms rather than editors. Algorithms tell the search engines and online news sites what they think each of us wants to hear or read.[41] These algorithms may be simple ones, based on the reading choices we

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[39] 'Getting Local: How Nonprofit News Ventures Seek Sustainability' Knight Foundation, October 2011, 19 <http://www.knightfoundation.org/media/uploads/publication_pdfs/13664_KF_NPNews_Overview_10-17-2.pdf>.

[40] Fairvote (n 32).

[41] This type of algorithm is exemplified by Amazon's suggestions to users of possible new purchases based on the user's past purchases. See Jure Leskovec – Anand Rajaraman – Jeff Ullman, 'Recommendation Systems' in Jure Leskovec – Anand Rajaraman – Jeff Ullman, *Mining of Massive Datasets* (CUP 2010) 309–10.

have made in the past,[42] or they may be complex ones, drawing on compilations of information from public records, credit card transactions, Internet and telephone use, arrest records, political contributions, homeownership, mail order purchases, and innumerable other results of digital spying.

These mechanisms may be very good at maximizing individual preferences, but self-government requires something more. It requires communities of interest within which dialogue about public issues can occur. In a world in which millions of voices are clamouring for attention, the ability to assemble an audience may be a more important function of the press than the gathering and dissemination of news. The press has the proven ability to create political communities in which democratic dialogue can occur. Other entities may be able to perform that function, but so far none has demonstrated that capability.

[42] Frank Pascuale, 'Beyond Innovation and Competition: The Need for Qualified Transparency in Internet Intermediaries' (2010) 104 *Northwestern University Law Review* 105, 138 (describing the efforts of Internet Service Providers to compile and sell data bases reflecting information from all these types of records).

András Koltay

What is press freedom now?

New media, gatekeepers, and the old principles of the law

The concept of media freedom, in modern European philosophical and legal thinking, is constantly changing. Originally, back in the eighteenth and nineteenth centuries, it did not necessarily mean more than the exclusion of state intervention prior to publication, while still allowing prosecutions to begin after publication. By the twentieth century, in the age of mass media, this narrow definition was no longer sustainable. With the recognition in various jurisdictions of the idea that the media have a fundamental task in the democratic public sphere, these states needed to draw the respective conclusions which, in turn, affected the concept of media freedom. This concept is about to be redefined once again, thanks to new participants that have become active players in transmitting various content to the general public. In this paper we wish to examine whether it is justified to rethink the notion of media freedom, having regard to these new participants. In part 1, we examine the differences between freedom of speech and media freedom (freedom of the press) in order to identify the content of the currently used notion of 'media freedom'. Part 2 provides an overview of the different elements of the legal notion of 'media'. In part 3 we shall reveal who might be the holders of the right to media freedom, which new players might claim protection under this right and the unique tasks they play in the operation of the democratic public sphere. Part 4 discusses the relationship between the internet and the democratic public sphere, and briefly assesses the fading hopes that were present at the dawn of the internet age. In part 5 we briefly draw possible conclusions from the previous parts with respect to the future role of the state. (Hereinafter the notions of 'media freedom' and 'freedom of the press' will be used interchangeably, as synonyms.)

The difference between freedom of speech and media freedom

Differences between the American and European approaches

In order to define what constitutes media freedom and the related constitutional rules, it is first necessary to clarify whether press freedom is different from the fundamental right of freedom of speech. The answer to this question will have serious consequences for defining the tasks of the state related to protecting fundamental rights.

In the past, freedom of speech and the freedom of the press were not typically differentiated within legal doctrines. Even the prominent English constitutional lawyer Albert Dicey used both these terms alternately, as synonyms.[1] They were used with identical meanings in the legal system of the United States, in the rulings and legal literature related to the First Amendment, despite the fact that the freedom of the press is mentioned distinctly, in the form of the Press Clause, in the American Constitution.[2] This lack of distinction is quite evident: not even the Supreme Court of the United States has been able to assign distinct and independent substance to the fundamental right of the freedom of the press.[3] This lack of distinction does not, however, disadvantage the operation of the media, thanks to the extensive protection granted to the freedom of speech. The media are thus not subject to stringent legal restrictions, although neither are they awarded any additional rights.

All this has not, however, dissuaded certain American authors from arguing for the distinction between the freedom of the press and freedom of speech.[4] Justice Potter Stewart argued that the freedom of the press, as opposed to freedom of speech, is not an individual right but is the right of the media as an institution.[5] The media constitute the only type of private enterprise which enjoys specific constitutional protection.[6] The freedom of the press does not protect any individual working for a media outlet but the institution itself and, consequently, it is also the institution that is entitled to any additional rights and should bear any additional obligations attached to this freedom.[7]

Justice William Brennan opined in an address that he did not view the freedom of the press as a right which must be broadly unrestricted, unlike the freedom of speech.

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[1] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan 1885).

[2] Melville B Nimmer, 'Introduction: Is Freedom of the Press a Redundancy. What Does it Add to Freedom of Speech?' (1975) 26 *Hastings Law Journal* 640; David Lange, 'The Speech and Press Clauses' (1975) 23 *UCLA Law Review* 77; William W Van Alstyne, 'The Hazards to the Press of Claiming a "Preferred Position"' (1977) 28 *Hastings Law Journal* 761.

[3] Edwin C Baker, 'The Independent Significance of the Press Clause under Existing Law' (2007) 35 *Hofstra Law Review* 955–59; Eugene Volokh, 'Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today' (2012) 160 *University of Pennsylvania Law Review* 459.

[4] First surely Jerome A Barron, 'Access to the Press: A New First Amendment Right' (1967) 80 *Harvard Law Review* 1641, and Jerome A Barron, *Freedom of the Press for Whom? The Right of Access to Mass Media* (Indiana University Press 1975).

[5] Potter Stewart, '"Or of the Press"' (1975) 26 *Hastings Law Journal* 631.

[6] *Zurcher v Stanford Daily*, 436 US 547, 576 (1978), Justice Stewart's dissenting opinion. See also Keith J Bybee, 'Justice Stewart Meets the Press' (2014) in Helen J Knowles and Steven B Lichtman (eds), *Judging Free Speech: First Amendment Jurisprudence of US Supreme Court Justices* (Palgrave Macmillan, 2015).

[7] Similarly in American legal literature see also Randall P Bezanson, 'Institutional Speech' (1995) 80 *Iowa Law Review* 823; Frederick Schauer, 'Towards an Institutional First Amendment' (2005) 89 *Minnesota Law Review* 1256; Edwin C Baker, *Human Liberty and Freedom of Speech* (OUP 1989) in particular 229 and 233; Edwin C Baker, 'Press Rights and Government Power to Structure the Press' (1980) 34 *University of Miami Law Review* 819; Owen M Fiss, 'Free Speech and Social Structure' (1986) 71 *Iowa Law Review* 1405; Allan C Hutchinson, 'Talking the Good Life: From Free Speech to Democratic Dialogue' (1989) 1 *Yale Journal of Law and Liberation* 17.

He suggested that the media must acknowledge that the nature of their work is such that they have to take multiple, possibly conflicting, interests into consideration, as well as fulfilling certain extra obligations.[8] Brennan, similarly to Stewart, underlines the interests of the community as the basis of freedom of the press, which is what distinguishes it from the freedom of speech.

Although they are yet to feature in the jurisprudence of the Supreme Court, similar views are aired in recent literature on the subject. Lyrissa Lidsky criticised the decisions of the Court (the 'Roberts Court', currently led by Chief Justice Roberts) for failing to recognise freedom of the press as a right distinct from those enjoyed when exercising freedom of speech, with the result that the media cannot be granted additional rights specific to them.[9] Sonja West also argues for the 'separate identity' of the media,[10] suggesting that the freedom of the press should not be restricted to the right of publication and distribution, and that it does not simply protect the free use of certain technologies, but also fulfils a democratic function.[11] According to West, if we grant the protection of the freedom of the press to everyone who exercises their freedom of the speech, and to the same extent, this will paradoxically result in the devaluation of press freedom, since this approach would fail to take the unique social role of the media into consideration.[12] The media and the journalists working in the media not only publish different opinions but, first and foremost, they also act as the main driver, engine and forum of public discourse. The media cannot be treated on the same footing as a group of individuals exercising their right to freedom of speech through loudspeakers, not even if today, thanks to the advent of new technologies, anyone can collect and even publish news.[13] Lidsky and West's arguments today are thus in the tradition of Brennan and Stewart.

Although not even these thoughts can be considered as a majority view in American legal literature, they are even so much 'gentler' than the approach of Edwin Baker, who can be considered as a radical compared to mainstream theoreticians of freedom of the press. Baker viewed the different participants in the media as among the representatives of 'private power' who, based on their economic and political interests, deliberately distort democratic publicity. He therefore not only argued for the separation of the freedom of speech and the freedom of the press, but also for the limitation of media operation.[14]

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[8] William J Brennan, 'Address' (1979) 32 *Rutgers Law Review* 173.

[9] Lyrissa Barnett Lidsky, 'Not a Free Press Court?' (2012) *Brigham Young University Law Review* 1819, in particular 1831–35.

[10] Sonja R West, 'Press Exceptionalism' (2014) 127 *Harvard Law Review* 2434, and Sonja R West, 'Awakening the Press Clause' (2011) 58 *UCLA Law Review* 1025.

[11] See West (n 10) 2441.

[12] ibid 2442.

[13] ibid 2445.

[14] Edwin C Baker, 'Press Performance, Human Rights, and Private Powers as a Threat' (2011) 5 *Law & Ethics of Human Rights* 217; Edwin C Baker, 'Private Power, the Press and the Constitution' (1993) 10 *Constitutional Commentary* 421; Edwin C Baker, *Media, Markets and Democracy* (CUP 2001); Edwin C Baker, *Advertising and a Democratic Press* (Princeton University Press 1994).

Turning from the American authors and legal system, we find that European constitutions and, based on these, the individual legal systems try to separate freedom of speech from the freedom of the press. There are independent laws governing the media in all of the countries of Europe. The European Union has also drawn up specific regulations on audiovisual media services.[15] This distinction between the two rights is similarly reflected in legal literature.[16] Thomas Gibbons stressed in a recent article that the freedom of speech is a right enjoyed by individuals and not by institutions (media enterprises), whereas the owner's right attached to the media is not unconditional and is not the same as the freedom of speech.[17] At the same time, the recognition of the media as an 'institution' is important, because if it is strong enough it can resist external pressure. That said, it may also be subject to restrictions in the interest of the community.[18]

Although article 10 of the European Convention on Human Rights on freedom of expression does not mention media freedom as a separate right, the recognition of this right is implied by the text when it makes specific reference to the imparting of ideas and the operation of radio and television. Furthermore, the jurisprudence founded on this Convention has been contributing to the body of law dealing with the limits of press freedom for decades. It is also worth noting that paragraph 2 of Article 10 states that 'the exercise of these freedoms . . carries with it duties and responsibilities.' The jurisprudence of the European Court of Human Rights (ECtHR) consistently stresses that the media have a duty, or rather an obligation, to impart information of public interest and ideas related to matters of public interest.[19]

If one recognises freedom of the press as a right which is independent in nature then certain special rights and obligations stem from that recognition. As such, making a distinction between freedom of speech and freedom of the press is not only a matter of principle. If these two rights are considered as distinct then different partial rights and obligations can be attached to them. Obviously, media workers enjoy freedom of speech, but this right can only be exercised within the framework of the special regulations applied to the media as an institution. On the other hand, taking into account

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[15] 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 (codified version).

[16] For the clarification of theoretical issues, see eg Eric Barendt, 'Inaugural Lecture. Press and Broadcasting Freedom: Does Anyone Have any Rights to Free Speech?' (1991) *Current Legal Problems* 79; Geoffrey Marshall, 'Press Freedom and Free Speech Theory' (1992) *Public Law* 40.

[17] Thomas Gibbons, 'Free Speech, Communication and the State' in Merris Amos – Jackie Harrison – Lorna Woods (eds), *Freedom of Expression and the Media* (Nijhoff 2012) 36.

[18] ibid.

[19] See eg *Observer and Guardian v the United Kingdom* (App no 13585/88, judgment of 26 November 1991), *Sunday Times v the United Kingdom* (App no 13166/87, judgment of 26 November 1991), *Thorgeir Thorgeirsson v Iceland* (App no 13778/88, judgment of 25 June 1992), *MGN Ltd v the United Kingdom* (App no 39401/04, judgment of 18 January 2011), *Uj v Hungary* (App no 23954/10, judgment of 19 July 2011).

the special role of the media in furthering democracy, they are also entitled to additional protection. These extra rights may include the protection of journalists' sources, the partial immunity of editorial offices against searches of their premises by the authorities, special entry and access rights (for example, to the location of otherwise private or restricted access events), the protection of journalists against the owners of the given media outlet and the advertisers, or certain tax benefits provided to the media. At the same time, the media in Europe are subject to special content regulations such as the restriction of hate speech and content harmful to children, the protection of human dignity and the restriction of commercial communications. It is also subject to copyright regulations, limitations on entrance to the market and restrictions on ownership to prevent excessive market influence. Also relevant are the must-carry and must-offer rules whereby the minimum quantity of the broadcast European (and in, certain states, even national) content is defined on the basis of programme quotas and many states require balanced coverage and the right of reply. In consequence of the recognition of the positive character of the media, every state in Europe maintains, operates and finances a system of public service broadcasting (public media services), which is assigned, among others, two important functions: to take into account the needs of the audience not satisfied by the market and to provide an authoritative and comprehensive news service.

The existence of and rationale behind these rights and obligations are rooted in the 'old' media system in which, apart from the printed press, there were no media other than radio and television. However, in 2007 the AVMS Directive also placed certain new services (on-demand media services, most of which are accessible via the Internet) under the scope and effect of a European-level framework of regulations. The High Level Group commissioned by the European Commission to review the situation of media freedom and pluralism in Europe established, in its report dated January 2013, that the proliferation of Internet services results in legal uncertainty, since it is difficult to discern which rules apply to the different services and which state has jurisdiction over any given service. The report found that journalists continue to have rights and duties in the new media landscape, but that new regulations are definitely required.[20]

The negative and positive character of media freedom

If we recognise the independent characteristics of media freedom, we have to deal with a new problem stemming from it. Fundamental rights typically have a negative character, since these oblige the state to respect these rights *vis-á-vis* its citizens, for the

[20] The Report of the High Level Group on Media Freedom and Pluralism (hereinafter referred to as High Level Group) 33 <ec.europa.eu/information_society/media_taskforce/doc/pluralism/hlg/hlg_final_report.pdf>.

benefit and protection of those citizens. However, the negative character of media freedom in itself is not sufficient to accommodate the entirety of the important interests related to the operation of the democratic public sphere.

It is thus necessary also to recognise the positive character of freedom of the press. This differentiation between the different fundamental rights has its roots in the theory of Isaiah Berlin.[21] Berlin considered the scope of action provided to an individual, free of external interference, as a negative freedom (freedom *from something or somebody*), whereas he viewed the freedom to decide, ie the individual's freedom of self-mastery, as a positive freedom (freedom *to do something*). John Rawls also stresses that, for most individuals, it is not the civic status of being free that is really important, but the opportunity to enjoy liberty.[22] As far as the freedom of the press is concerned, the negative character means that communication via the media is free from external interference, whereas the positive character means the protection of the interest to ensure that anyone can have free access to media content and that media content is diverse and imparts diverse opinions (the latter might also be called the right to information—or, more simply, the 'right to know'—which, however, has not yet been recognised as a real, independent fundamental right). This means that whereas the negative character (freedom from the interference of external powers, hence primarily from the state) is an actual right of the media, it is in the interest of the media audience (and hence, in a broader sense, of all society) that its positive character be recognised. It also follows from the recognition of this interest that media regulations impose certain public service obligations on the media that serve to satisfy the interest of free access to information. By taking these (seemingly conflicting) positive and negative characters into account jointly, by subjecting them to a single legal regulatory framework and by ensuring a certain balance between rights and obligations, the content and contours of the freedom of the press are defined. It is important to highlight that the recognition of its positive character is not the same as positive media freedom, since the latter means direct access to the different forums of the media. An example of the latter is the recognition of the right of reply in certain legal systems.[23] This entails that the holder of the right of reply is entitled to express their position, even against the will of the given media outlet, following news coverage affecting them. Another good example of this right to access is the mandatory publication of political advertisements in television and radio broadcasts during election periods. The positive character of media freedom —which is distinct from the direct access rights—does not shift the audience out of its passivity. They cannot influence media content actively; nevertheless, their interest in regard to obtaining a wide range of information can be recognised under law.

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[21] Isaiah Berlin, *Four Essays on Liberty* (OUP 1969).

[22] John Rawls, *A Theory of Justice* (Harvard University Press 1971) 204.

[23] András Koltay, 'The Right of Reply in a European Comparative Perspective' (2013) 54 *Acta Juridica Hungarica* 73.

In the early stages of the discussion of media freedom it was naturally the negative character of press freedom that predominated, and this right was then identified as the prohibition of censorship. Today, external interference in media freedom is possible on a much broader scale than simply by directly restricting the communication of opinions. The media market is much more regulated than other enterprises. The law restricts the ownership of media outlets, defining a limit beyond which the same owner is not permitted to obtain additional rights. The different programme flow structure requirements imposed on radio and television media service providers directly affect the content of the media. Some of these rules stipulate negative requirements (time limitation of advertisements, parental ratings, restriction of pornographic content, etc.), whereas other requirements demand expressly positive, active behaviour from the media outlets (balanced news coverage and programme quotas).

The recognition of the positive character of press freedom (the audience's interests) originates in the acknowledgement of the democratic tasks and duties of the media. These issues had already spawned a substantial body of literature before the spread of the Internet. The notion of the media's social responsibility is not unheard of in the United States either, though it has not appeared in the media regulations. In its report issued in 1947, the Hutchins Commission, entrusted to review and redefine the social role of the media, created a theory of the social responsibility of the media, hitherto unknown in the United States.[24] According to the Commission, the greatest risk to media freedom is that, despite technical developments and the increase in the volume of the press (which, at the same time, made market entry significantly more expensive), access to the media is more restricted, fewer voices may be heard in the media, and for the most part, even those few fail to acknowledge their responsibility towards society.[25]

Some of the American authors expressed ideas which would be familiar to Europeans, notwithstanding the differences between the two legal systems. A frequently cited article by Judith Lichtenberg asserts that the freedom of the press is a tool necessary for the proper operation of democracy, which can obviously be used for economic purposes as well, but which is always subject to certain requirements to serve the public interest.[26] In his book, Cass Sunstein argues for a 'second New Deal', since modern media not only fail to help the operation of democracy but may even hinder it. As the commercial media expand, hope that the training of active citizens will play a crucial role in participatory democracies is waning.[27] Owen Fiss expressly warned the

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[24] Commission on Freedom of the Press, *A Free and Responsible Press. A General Report on Mass Communication: Newspapers, Radio, Motion Pictures, Magazines, and Books* (University of Chicago Press 1947); John C Nerone, *Last Rites: Revisiting four Theories of the Press* (University of Illinois Press 1995) 77–100.

[25] Lee C Bollinger, *Images of a Free Press* (University of Chicago Press 1991) 28–34.

[26] Judith Lichtenberg, 'Foundations and Limits of Freedom of the Press' in Judith Lichtenberg (ed), *Democracy and the Mass Media* (CUP 1990) 104–105.

[27] Cass R Sunstein, *Democracy and the Problem of Free Speech* (2nd edn, Free Press 1995). See also Cass R Sunstein, 'A New Deal for Speech' (1994–1995) 17 *Hastings Communications and Entertainment Law Journal* 137; Cass R Sunstein, 'Free Speech Now' (1992) 59 *University of Chicago Law Review* 255.

citizens of the former socialist countries who had just recently regained their liberty of the risk of adopting the media regulatory solutions of the Western world without criticism and proper consideration. He concluded that the media conditions spawned by the 'creative power' of the free market would have many characteristics similar to those of the media conditions of the former, dictatorial regimes.[28] The notion of *equality* appears alongside and supplementary to the democratic concept of media freedom as the justification for state intervention.[29] This equality is formal rather than substantial; it means creating a balance in terms of access.

A portion of the recent legal literature (in Europe, in a fundamentally changed media landscape) acknowledges the differentiation between the positive and negative characters of media freedom. Gibbons stresses that, in respect of the media, private enterprises may also fulfil public functions over and above the service of their private interests. In relation to the media, it is not credible to maintain that private organisations do not have a public function in addition to their private activities.[30] In the interest of ensuring access to the media, privately held media enterprises are also required to take into account the interests of their audiences and to convey different opinions, the materials published by them should not exclusively reflect the tastes and views of their owners or editors.[31]

Arguments against the recognition of the positive character of media freedom usually originate from the United States. According to mainstream US legal literature, anything, including the *laissez-faire* operation of the market is better than state intervention or state regulation: intervention by the state is, at best, unnecessary, or even evil. Andrew Kenyon presents a brief summary of these arguments, on the basis of which media freedom is a right to which everyone is equally entitled, with the implication that everyone may express their opinions freely and may freely use the media to disseminate such opinions without any restrictions from the state. Equality is thus achieved without any state or government intervention (action). According to this model, state intervention inevitably distorts the operation of the media and provides certain actors with advantages over others, thereby encroaching upon the rights stemming from the First Amendment.[32]

European legal thought, conversely, does not have any theoretical objections to state measures intended to ensure fair access to the media and accepts the regulations described above on the duties of the media, the vast majority of which (with the exception of the protection of minors, the limitation of the concentration of ownership

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[28] Owen M Fiss, 'Building a Free Press' in András Sajó and Monroe E Price (eds), *Rights of Access to the Media* (Kluwer Law International 1996).

[29] Kenneth L Karst, 'Equality as a Central Principle in the First Amendment' (1975) 43 *University of Chicago Law Review* 20.

[30] See Gibbons (n 17) 33.

[31] ibid 39.

[32] Andrew T Kenyon, 'Assuming Free Speech' (2014) 77 *The Modern Law Review* 379, 381–85.

and the regulation of commercial communications) would be unacceptable and indeed unconstitutional, under US law, even in principle. In areas where regulation does exist, the intervention is much less robust than that applied under European legal systems.

Eric Barendt argues that the freedom of speech can be subjected to regulation in order 'to make its exercise more effective'.[33] According to Gibbons, 'the state should not avoid responsibility for the protection of the freedom of speech, in particular, access to the audience and fair participation in dialogue.'[34] Kenyon, having analysed the legal literature examining the positive character of media freedom, states that 'debate and diversity of ideas cannot be assumed in market-based mass media; for debate and diversity to flourish requires support beyond markets.'[35]

Kenyon also notes that the jurisprudence of the ECtHR provides no firm foundations for the positive right of press freedom. At the same time, several decisions of the Court make mention of the importance of media pluralism.[36] Although even attempting to define the concept would be a bold undertaking,[37] in essence media pluralism is a value which is served by several rules related to the positive character of media freedom that are intended to ensure access to the media, for example, the requirement of balanced coverage, the right of reply, the must-carry rule and programme quota regulations may be regarded as such. At the same time, media pluralism is supported by not only positive, but also negative provisions such as, for example, the limitations on ownership in the media market. Although the ECtHR has not passed decisions on all of these, the tribunal has, on several occasions, recognised the role of the right of reply in reinforcing the positive character of press freedom.[38] We cannot ignore the importance of the enhancement of media literacy either, as this may contribute to the exercise of media freedom in a positive sense. At the same time, however, media literacy is not primarily a legal issue and, if it is provided with regulatory support, usually no objections made on the basis of constitutional press freedom will be upheld.

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33 Eric Barendt, *Freedom of Speech* (2nd ed, OUP 2005) 69.

34 See Gibbons (n 17) 42.

35 See Kenyon (n 32) 398.

36 ibid 393–95. These decisions are as follows: *Informationsverein Lentia v Austria* (App nos 13914/88, 15041/89, 15717/89, 15779/89, 17207/90, judgment of 24 November 1993), *Tele 1 Privatfernsehgesellschaft mbH v Austria* (App no 32240/96, judgment of 21 September 2000), *Centro Europa 7 S.R.L. and Di Stefano v Italy* (App no 38433/09, judgment of 7 June 2012), *Manole v Moldova* (App no 13936/02, judgment of 17 September 2009).

37 Peggy Valcke et al, 'The European Media Pluralism Monitor: Bridging Law, Economics and Media Studies as a First Step towards Risk-Based Regulation in Media Markets' (2010) 2(1) *Journal of Media Law* 85.

38 *Ediciones Tiempo SA v Spain* (App no 13010/87, judgment of 12 July 1989); *Melnychuk v Ukraine* (App no 28743/03, judgment of 5 July 2005); *Vitrenko and others v Ukraine* (App no 23510/02, judgment of 16 December 2008); *Kaperzynski v Poland* (App no 43206/07, judgment of 3 April 2012).

The concept of 'media'

Having come closer to identifying the concept of the 'freedom of the press', the next step is to examine who and which entities may be subject to or hold this right.

Despite the fact that newer and newer forms of media have evolved, for a long time the substance of the concept remained uncontroversial. The classification of the printed press, as well as radio and television, under the concept of 'media' was beyond dispute. It is also beyond dispute that films shown in cinemas, books and flyers distributed on the streets cannot be regarded as media (ie as belonging under the scope of media regulation), nor can the products of organisations also involved in the collection and publication of data, such as credit agencies, financial service providers, travel agencies and meteorological institutions.[39]

The previous, 'traditional' concept defines which activities are relevant to it on the basis of the various forms (publication and distribution methods) of the media. Technology has now reached a stage of development, however, where this in itself cannot provide sufficient guidance. As a result of the phenomenon of media convergence, the relationship between the various types of content and the forms of publication of the media that carry them has weakened: today, printed newspapers can be read on the Internet and we can watch television on our mobiles. Furthermore, the newly evolving forms of communication (blogs, comments, private websites and social media) can be classified in the earlier categories only with great difficulty and at the cost of major inconsistencies.

To define the concept of the media, the notion of 'audiovisual media service' provided by the AVMS Directive may be of help,[40] according to which the Directive applies to services that are:

a) offered as a commercial service,
b) offered under the editorial responsibility of the service provider,
c) offered with a purpose to inform, entertain or educate,
d) offered with the purpose of reaching the general public.

In principle, the concept may be extended to include other media, such as radio and the press, too, although this is not present in the Directive. It is important to note that, since the primary goal of the EU in respect of the Directive was to regulate the single market, it only deals with for-profit services (ie those that are provided commercially, with the objective of achieving a financial profit and are operated at a financial risk; including public service media and community media). This is a major restriction in comparison with the 'traditional' substance of the concept of the media. If we were to adapt this concept to the press, for example, this would result in the exclusion of student or local government newspapers and any other publications in which the

[39] David A Anderson, 'Freedom of the Press' (2002) 80 *Texas Law Review* 442–44.
[40] AVMS Directive, art 1(1)a).

publisher has no major commercial interest. This is also an acceptable approach; for example, Hungarian media regulation extends the concept of the Directive over both radio stations and the press.[41]

The other three conceptual elements (editorial responsibility, informative, educational or entertainment purpose and provision to the general public) conform to the 'traditional' concept of the media; however, it is questionable whether they are sufficient to cover everything that may be regarded as 'media' today and, conversely, that it would exclude everything that should not be regarded as such.

However strong the role of the press may be in this area, the debates of public life are not limited to the forums provided by the press: discussions between friends are probably more effective in shaping the views of their participants than the nightly news programmes. At the same time, not all media players wish to act as a forum for the community's disputes: nowadays, the vast majority of the content available in the media has absolutely no relevance to public life. It is for just this reason that David Anderson argues in a paper that, since the concept of the media cannot be circumscribed precisely on the basis of the form of its publication, and since the operation of a substantial part of the traditional media is not directed at performing the task expected of it in the interest of the community, it would therefore make more sense to redefine the concept on the basis of its function.[42] That is, if a given newspaper, television station, or website operates in such a way as to ensure conformity with its traditional media role, it is to be regarded as 'media' in the legal sense, too. According to the European concept, this traditional role is the service and operation of the democratic public sphere. All polemical papers, expert materials and recommendations dealing with the new concept of the media emphasise the media's democratic tasks.[43]

A paper by Jan Oster presents arguments that are similar to those of Anderson. Examining the issue from the perspective of the democratic tasks of the media, he recommends a new, functional approach, on the basis of which only such individuals or undertakings may be regarded as media who are involved in the 'gathering and disseminating to a mass audience information and ideas pertaining to matters of public interest on a periodical basis and according to certain standards of conduct governing the news-gathering and editorial process.'[44]

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[41] Article 1 of the Press Freedom Act (Act no CIV of 2010). See András Koltay (ed), *Hungarian Media Law* (CompLex 2012) ch 3.

[42] See Anderson (n 39).

[43] See also, among others, High Level Group (n 20) ch 1, and European Broadcasting Union, 'On the Road to a Hybrid World of TV and Web Thoughts for the Future of Connected TV by the EBU' (background paper) <www3.ebu.ch/files/live/sites/ebu/files/Knowledge/Initiatives%20-%20Policy/Topical%20Issues/Hybrid/2012%20EBU%20Background%20Paper%20on%20Connected%20TV.pdf>; Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media (hereinafter referred to as Recommendation), para 2 <https://wcd.coe.int/ViewDoc.jsp?id=1835645>.

[44] Jan Oster, 'Theory and Doctrine of "Media Freedom" as a Legal Concept' (2013) 5(1) *Journal of Media Law* 74.

Oster's argument is logical and well-structured. It proceeds from the proposition that the media constitute a legally recognised institution with specific rights and duties.[45] The protection granted to the media is not identical to the protection of the freedom of speech, because the role of the media is indispensable for the operation of democracy and the informing of citizens.[46] (Section 1 of the present paper has also touched upon these notions.) This responsibility calls for media that are actors in the marketplace of ideas[47], serving the operation of this marketplace in a regular, responsible and professional manner according to the appropriate professional and ethical norms.[48] This concept of Oster's, then, does not include those actors—whether bloggers or traditional journalists—who, although they regularly communicate to broad audiences, do so without the intention of serving the cause of the democratic public sphere as described above.[49]

Within the context of the decisions of the US Supreme Court, Sonja West also stresses that the undue extension of the concept of media to include the new services carries the risk of imperilling the extra protection awarded to the media, and that members of the press must be differentiated from 'occasional public commentators'.[50] The function of the media is to oversee and collect information about the social and political elites and to safeguard democracy. The mere intention or the actual opportunity or exercise of public expression is not sufficient to fulfil these criteria. The blogger peering at the computer screen and the media as an institution that is granted constitutional protection must be differentiated in the interest of the society.[51] This does not mean, however, that the former is to be left without protection: bloggers remain protected by the right of freedom of speech and are, in a certain respect, in a better position than the media—although they enjoy no extra rights, while unlike the media they are not burdened with extra obligations, either.

In a paper prepared for the Council of Europe, Karol Jakubowicz examined the possible elements of the new concept of the media. Rather than providing a definition, he outlined new approaches to its examination and some possible further categories within the new media. He pointed out that all 'old' media (the press, television, radio) become 'new' media as well, once they become accessible online. Furthermore, he

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45 ibid 59−62, 64−68.

46 ibid 68−74.

47 See the dissenting opinion of Justice Holmes, *Abrams v the United States*, 250 US 616 (1919).

48 See also the British test of 'responsible journalism', the cases of *Reynolds v Times Newspapers* ([2001] 2 AC 127) and *Flood v Times Newspapers* ([2012] 2 WLR 760), the Defamation Act of 2013, and the report closing the Leveson Inquiry (An Inquiry into the Culture, Practices and Ethics of the Press) <https://www.gov.uk/government/publications/leveson-inquiry-report-into-the-culture-practices-and-ethics-of-the-press>. See also the decisions of the ECtHR, eg *White v Sweden* (App no 42435/02, judgment of 19 September 2006); *Flux and Samson v Moldova* (App no 28700/03, judgment of 23 October 2007).

49 See Oster (n 44) 78.

50 See West (n 10) 1070.

51 ibid 2451−57.

distinguished between content created by users but published in the institutional media (*user generated content*) and content created by users that is published outside of the institutional media (*user created content*).[52]

The report of the High Level Group on Media Freedom and Pluralism also states that, in the interest of granting their rights effective protection and, in parallel with this, defining their duties and liabilities, journalists need first to be identified.[53] Although the report does make mention of certain such identification criteria—participation in organised journalism training, membership of mandatory journalists' chambers and professional organisations, full-time journalistic employment—in the end it rejects them one by one, leaving the issue open.

The 2011 recommendation of the Council of Europe also calls for the definition of a new concept of the media.[54] The recommendation takes off from the premise that the 'new ecosystem' of the media includes all those actors who participate in the process of the generation and distribution of content, transmitting such content to a potentially large number of people (content aggregators, application developers, users who create content, enterprises responsible for the operation of the infrastructure), on condition that such actors possess editorial control or oversight over the given content.[55] The decisive element here, then, is the existence of editorial responsibility.

The annex of the Recommendation sets forth six criteria that a service should fulfil in order to be regarded as media. These are:

(1) Intent to act as media,

(2) Purpose and underlying objectives of media—to produce, aggregate or disseminate media content,

(3) Editorial control,

(4) Professional standards,

(5) Outreach and dissemination,

(6) Compliance with public expectations, such as accessibility, diversity, reliability, transparency, etc.

This recommendation by the Council of Europe suggests points of comparison rather than providing a solid concept for the definition of the media. Its weakness is that these criteria throw up a multitude of problematic details (just what are the professional standards and who should define them? What are the expectations of the community and whose task is it to identify them?). While Oster's definition of 'media' also leaves a number of issues unresolved it is much narrower and thus more 'manageable', although it clearly poses a number of risks. If legal regulation is to decide what qualifies as media

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[52] Karol Jakubowicz, *A new Notion of Media? Media and Media-like Content and Activities on new Communication Services* (background text, Council of Europe, 2009). <www.coe.int/t/dghl/standardsetting/media/doc/New_Notion_Media_en.pdf>.

[53] See High Level Group (n 20) s 4(3), 34.

[54] See Recommendation (n 43).

[55] ibid, paras 6−7.

and, within that, what falls within the scope of 'public affairs' and what information it is in the public interest to publish, this will lead to difficulties of codification and the resulting definition may easily be off the mark, missing certain important media while unnecessarily including others. At any rate, emphasising the professional nature of the media is no longer just a theoretical issue of media law: the Internet has transformed the previous forms of news service and news consumption to such an extent that the economic foundations of traditional media (both in print and online) are in jeopardy. Today, the redefinition of the concept of the media is, first and foremost, a fundamental concern of journalists and the media themselves.

The report of the High Level Group dealing with media freedom and pluralism also substantiates this when it emphasises the importance of the 'quality of sources' and defines the task of the media as delivering high quality journalism.[56] Apart from this, the issue is also important for legal regulation and for the state that is required to represent the interests of the community, since the scope of media regulation is obviously limited to the media, and the existence of free, open, diverse but responsible media can only be supported by regulatory methods once such media have been properly identified. We must not believe, however, that a unified media concept will be a panacea to treat the problems noted: the different types of media services are subject to different regulatory burdens (even today, in respect of the 'traditional' media) and their roles in democratic public life may only be identified individually, taking their different functions, tasks and scopes of editorial responsibility into account.

To whom does media freedom belong?

The increasingly crowded 'media ecosystem'

If we are unable to define, with absolute certainty, what the concept of the 'media' is, can we at least state who holds the right of media freedom? Who are the actors whose rights should be recognised by the state via the instruments of the law?

It would seem reasonable to nominate the owners of the media as holders of the right of media freedom. On the basis of their property right they are entitled to pass decisions on the affairs of their enterprises, to employ or dismiss journalists and editors and they are free to define the political stance and cultural level of their media. Yet, when we speak of media freedom, it is not the owner that first comes to mind when we seek the holder of the right. In the media it is the journalists and the presenters and, indirectly, the editors who communicate information to us; it is they who have their say, while the owners usually remain silent.

[56] See High Level Group (n 20) ch 3, 26, 29.

If, in keeping with what we have said previously, we look upon the media as an institution, and media freedom as a right held by this institution, then we have to conclude that all 'constituents' of this institution are entitled to media freedom. An entirely different issue is that of the protection of journalists and editors from the owners ('inner press freedom'), a task that is not easy to resolve by legal means, although it can be easily stated in terms of media ethics.[57]

At the same time, however, in discussing the media the issue of the rights of the audience, or, in a broader sense, the rights of society as a whole should also be raised. Media freedom is a right which is still held by the media, albeit with the qualification that its exercise must be in the interest of society (democracy). Following my earlier line of reasoning, at this point the recognition of public interest is not a limitation of media freedom—on the contrary, it is the very essence of that freedom.

In parallel with the development of technology, new actors may appear who also claim to be the holders of the right of media freedom. The ecosystem of the media comprises those actors, too, who play a role in transmitting the content to the user. Would they, too, be subjects of media freedom (and, at the same time, subject to the obligations prescribed by law)? According to the German Constitutional Court, media freedom is a fundamental right of all actors in the media market whose activities include the delivery of content published via the media to the audience.[58] Although they produce no content, media service distributors do perform a certain editorial activity by selecting the services they transmit to the audience; in the interest of the public this is limited by the must-carry and must-offer rules.

Today, however, we have to reckon with newer and newer actors in the media market value chain than previously. This phenomenon has been brought about by the proliferation of services that are accessible online. These actors may be involved in a certain type of editorial activity without generating content (content aggregators, search engines, social media, Internet service providers, the content providers of websites that support user comments) or may generate material, such as user generated content or comments, that finds its way into the mainstream media, but without being subject to 'traditional' editorial responsibility. They can also deliver audiovisual content to viewers in a radically different manner than previously in the form of over-the-top[59] services, multi-screen content deployment and so on. It is not clear which of these may be regarded as subjects of media freedom, bearing at least a part of the related responsibilities.

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[57] See *Royal Commission on the Press 1974–1977, Final Report* (HMSO, 1977). Hungarian media regulations made an attempt (so far not yet applied in practice) to regulate this issue under law, see Article 7 of Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules of Media Content.

[58] BVerfGE 77, 346, 354 (Beschluß des Ersten Senats vom 13 January 1988).

[59] If we wish to provide a general definition of over-the-top services, we can say that OTT services are those where the service provider providing the service over the Internet is not responsible for the signal transmission; it is accessed by the user over the open Internet and is independent from and in no contractual relationship with the Internet access provider.

Several actors have vested interests in the media market and these interests may collide with each other. When all is said and done, all these parties have the ability to facilitate the access of their users or audiences to the democratic public sphere. A paper prepared by the European Parliament,[60] describes these interested parties as including device manufacturers (producers of television sets, computers, tablets, smartphones, set-top boxes, game consoles and media players), Internet service providers, 'traditional' media service providers (mainstream, free-to-air and pay-tv service providers), over-the-top service providers and content producers, social media sites and software developers. These actors are both allies and competitors of each other, and for each of them the question arises as to what extent it is worthwhile or necessary to regulate them.

The phenomenon of media convergence has brought about a curious development: as the means used for the publication of media content, along with the content that was previously bound to a single mode of transmission, have begun to converge and overlap, convergence has also appeared among the producers and editors of that content. It is now clear that editing is not exclusively performed by the producer of the media content and that media content is not only produced by the professionals charged with this task. From the previously cited Recommendation of the Council of Europe, we may even infer that content aggregators, application developers and operators of smart platforms and operating systems, as well as Internet service providers, are themselves subjects of media freedom if they bear 'editorial responsibility'. These mediators appear between the reader / viewer and the media in ever-increasing numbers and different forms, and have an increasing capability to influence or distort the flow of information between the communicator and the recipient. Nevertheless it would not be justified to apply the same (legal) assessment to these actors as to the actors of the 'traditional' media, ie the subjects of media freedom. Their activities are different in the important regard that these mediators do not produce content, but merely facilitate the transmission to the audience of content produced by others. Since, however, their activity can nevertheless qualify as a sort of 'editing', as they are able to define or at least influence the scope of the transmitted content, certain obligations derived from the positive character of media freedom are applicable to them and should actually be applied in the public interest.

In respect of media service distributors, such a legal obligation (must-carry) has long been in existence; in the future, obligations intended to promote access may be prescribed for the operators of smart platforms, and search engines and Internet service providers may also be regulated. This does not mean that these carrier agents become

[60] Directorate-General for Internal Policies, European Parliament, *The Challenges of Connected TV. Note* (2013) <www.europarl.europa.eu/RegData/etudes/note/join/2013/513976/IPOL-CULT_NT%282013%29513976_EN.pdf>.

'full-fledged' subjects of media freedom, and thus the related obligations may not be applied to them in full (eg compliance with the requirement of the right of reply); rather, they will assume the role of holders of a certain 'limited scope' right of media freedom.

On the other hand, these agents must respect the right of others to media freedom, and must ensure the free distribution of content and opinions in the course of their activities. Today, the 'traditional' subjects of media freedom need not only be wary of the state when striving to safeguard their freedom from external intervention, but also of these agents. Dawn Nunziato presents a host of concrete examples to illustrate how such agents interfere with the free flow of opinions. According to her, contrary to popular belief, the major American Internet enterprises do this not only on the basis of their business interests, with the intention of increasing their revenues, but also in respect of political opinions, applying a sort of private censorship. Examples include Internet service providers, who are able to restrict the sending of emails or public access to certain content; for news aggregators who are in a position to omit certain, otherwise important, news items; and for search engines that can restrict access to certain types of content.[61] The task of the state in these cases is not only to refrain from intervening in the exercise of media freedom (apart from defining and operating the necessary legal framework), but also to eliminate, or at least minimise, the possibility of intervention by private parties.

As the majority of the new types of services lack exact and detailed regulation, they give rise to several novel issues and questions. Although within the EU the single market provides all European service providers with protection and opportunity (although the service providers of an economically weaker Member State will never compete on an equal footing with British, German or French enterprises), it is unable to provide protection against enterprises outside the Union (which usually come from the USA). Surveys of the Hungarian media market indicate that content aggregators (eg Google) and social media (eg Facebook) pose a threat to the existence of national content producers by siphoning off their vital resource, advertising revenues, while over-the-top services (eg Netflix) that are also mainly American make market entry *ab ovo* difficult for the media market actors of the Member States. Moreover, these services do not necessarily belong under European jurisdiction and so the scope of their legal obligations may be more limited, and, even if they are established in an EU Member State (as, for example, Netflix in Belgium), the media regulations of other Member States do not apply to them.

[61] Dawn C Nunziato, *Virtual Freedom. Net Neutrality and Free Speech in the Internet Age* (Stanford University Press 2009) 5−17, 110−14. Although the book was published in 2009, the examples are numerous and impressive, ranging from blocking the non-governmental initiative, AfterDowningStreet.org through the censorship of the onslaught of the singer from Pearl Jam on GW Bush to the lopsided treatment of the issue of abortion.

New editors and new media service providers

Over-the-top services and smart platforms

Over-the-top (OTT) media services are those media services that are accessed by users through the open Internet, the providers of which bear no responsibility for signal transmission, ie the user's Internet service provider is independent of the OTT service provider. While the range of OTT services is not limited to media services we shall not discuss the other types of services (eg speech and messaging) here. OTT is not, then, a service but a method of reaching the user / audience. This new type of service may offer both linear and on-demand audiovisual content, and the various service providers can aggregate the content of different media services on their pages or can produce their own content.[62]

OTT media services pose several legal questions related to the definition of media freedom discussed above. First of all, it is questionable how these services should be defined on the basis of the current legal regulations (as media services, as media service distribution, as electronic communications services or, perhaps, as something entirely different). OTT service providers that publish individually downloadable content probably qualify as on-demand media services, while those OTT services that provide 'live' broadcasts (streams) of the programmes of other media service providers probably do not fit into either category. It is this uncertainty that raises doubts surrounding the question of just what regulatory burdens apply to them. A further question is what can be done with the American OTT service providers that are present in the European media market or have strong aspirations for entry: is there any chance that they could be forced to respect, if not the national media regulations then at least the provisions of the AVMS Directive? (Obviously the answer is yes, if they are considered as entities established in any of the member states of the European Union but, even in that situation, the specific regulations of the other member states do not oblige them to do so.)

Several further important issues arise in relation to access. The menu, or the 'application environment' of smart devices used for the consumption of media content plays an increasingly important role in the ecosystem of digital content deployment. The operators of these menu systems or application environments, play an editorial role similar to that of the media service distributors: it is they who decide which service providers' applications are included in the menu and in what position. This could result in a violation of the principle of equal access, nor is there even any guarantee of at least the transparency of inequality.[63] At present, however, by contrast with 'traditional' media service distributors, they are not bound by either the must-carry or the must-offer rules.

In addition, several further issues related to content regulation (advertisements, protection of minors, media pluralism), competition law, copyright law, privacy and consumer protection arise, as does the question of what will happen to the privileged

[62] See Directorate-General for Internal Policies (n 60) 11–22.
[63] See Directorate-General for Internal Policies (n 60) 33–35.

status of public service media in the future (eg the adaptation of their must-carry rights to the new environment).[64] It is likely that Europe (the EU) will not easily give up the objective of passing on the values and considerations supporting media regulation to the new services.[65]

Internet service providers

The dispute over net neutrality (or 'Internet neutrality', or the 'open Internet') has already built up considerable traditions.[66] According to this principle, Internet service providers may not discriminate between the data and content transmitted via their networks, and the practice of traffic management must be independent of the content forwarded, the application, the end device connected to the network and the IP addresses of the sender and the recipient.[67] The principle of net neutrality demands that Internet service providers provide their service to users according to transparent principles, that they refrain from blocking any—not illegal—content, and do not limit access to such content, and that they do not apply unreasonable discrimination to the range of content, but provide equal access to it[68] in the interest of achieving the goal of 'the operation of the Internet as an open platform that is of fundamental importance from the aspect of the freedom of expression.'[69] Several actors have also emerged on the Internet who are independent of the state and who are capable of restricting the freedom of speech. In the case of Internet service providers this can be achieved indirectly, by restricting access to the various opinions. At the same time it should be noted that—at least at present—most often their motivation is not to exert an influence on disputes of public life and politics, but to promote their economic interests,[70] for example by realising revenues from the content providers they advantage.

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[64] ibid 31−33, 35−36, European Broadcasting Union (n 43) 15−19.

[65] The Green Paper of the European Commission opening the debate points in this direction, see Preparing of a Fully Converged Audiovisual World: Growth, Creation and Values. Green Paper of the European Commission (2013) <eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0231:FIN:EN:PDF>.

[66] The debate is still going on both in the EU and in the United States. About its current standing see 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' in András Koltay (ed), *Media Freedom and Regulation in the New Media World* (Wolters Kluwer 2014).

[67] Body of European Regulators of Electronic Communications, 'Response to the European Commission's consultation on the open Internet and net neutrality in Europe' 30 September 2010, BoR (10) 42, summarised in Bartóki-Gönczy (n 66) 117. <www.irg.eu/streaming/BoR%20%2810%29%2042%20BEREC%20response_ECconsultation_Net%20neutrality_final.pdf?contentId=546969&field=ATTACHED_FILE>.

[68] FCC Guide (Open Internet) <www.fcc.gov/guides/open-internet>. It should be noted that according to the position of the US communications authority, therefore, 'reasonable' discrimination is admissible, and may even be based on the economic interest of the Internet service provider; this is something that is unacceptable to the proponents of net neutrality.

[69] See Bartóki-Gönczy (n 66) 118.

[70] ibid.

As such, Internet service providers can become gatekeepers, whose role is, on the one hand, to provide the infrastructure for accessing online content and, on the other hand, to perform certain editorial tasks.[71] This latter activity is analogous in one respect to that of media service distributors operating cable networks, as they, too, are able to influence what content can potentially reach the audience, as well as its chances of actually doing so. At the same time, the capacity of the Internet is much less limited than that of the analogue cable network; users are much better able to control what contents they 'consume' than is the case with cable television;[72] and the type of contractual relationship they are in—economic co-dependency, that is characteristic of the relationship between media service distributors and media service providers—does not exist between Internet service providers and content providers.

According to a view that is gaining ground in the United States, Internet service providers also enjoy the protection granted by the First Amendment, ie the protection of the freedom of speech and media freedom.[73] If this is accepted, they may also be entitled to discriminate between the various contents, because—irrespective of the reasons for it—this sort of 'editorial' activity also qualifies as a certain form of expression. This notion, however, is in sharp contrast with the interests related to the unrestricted, open Internet.[74] In the United States, this is one of the central issues of the debates surrounding the freedom of speech, and strong objections have been formulated against the notions of the Federal Communications Commission that are made public from time to time.[75] To return to Potter Stewart's observation, according to which the media are the only private enterprises which enjoy constitutional protection (see section 1.1 above), McChesney and Foster object that since at a previous stage of technical development the publicly owned communications networks became the private property of the communications service providers, which now also enjoy constitutional protection, in the future these private enterprises may assume the role of censors (ie may discriminate between opinions by defining the conditions of access), yet they do not take on the responsibilities that go hand in hand with media freedom according to American legal thinking.[76]

If, however, Internet service providers do have a right to media freedom—and this is a question that may already be raised in Europe too—and thereby the law does not

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[71] Amit M Schejter and Moran Yemini, '"Justice, and Only Justice Shall Pursue": Network Neutrality, the First Amendment and John Rawls's Theory of Justice' (2007) 14 *Michigan Telecommunications and Technology Law Review* 167.

[72] ibid.

[73] ibid, and Nicholas Bramble, 'Ill Telecommunications: How Internet Infrastructure Providers Lose First Amendment Protection' (2010) 17(1) *Michigan Telecommunications and Technology Law Review* 109.

[74] See Schejter–Yemini (n 71) 173.

[75] Most recently see, for example, the position statement of Freedom House: 'The United States Must Lead in Upholding Net Neutrality' <www.freedomhouse.org/blog/united-states-must-lead-upholding-net-neutrality#.U_70O6NqMik>.

[76] John B Foster and Robert W McChesney, 'The Internet's Unholy Marriage to Capitalism' (2011) 62(10) *The Monthly Review*.

support the principle of net neutrality in its entirety, exactly what it is that media freedom includes with regard to these particular services should be clarified, as well as the restrictions and liabilities that accompany it.

Search engines

According to Jakubowicz, search engines are 'information services' and as such cannot be considered media (this is also supported by the 2011 Recommendation of the Council of Europe, which does not make mention of them), but they 'create special challenges and pose considerable risks' to a number of values important in the context of press freedom, as well as to the effective application of regulations such as those for the exclusion of access to infringing contents, discrimination between various types of content and influencing the exercise of the freedom of opinion and for preventing the fragmentation of public life and the distortion of market competition.[77]

Several legal issues have arisen in connection with Google, the largest enterprise in the online world. A number of these relate to the unique editorial role played by Google and by search engines in general.[78] The search engine is only one of Google's services, albeit the most used one, which is indispensable to Internet usage and which has several magnitudes more users than its competitors combined. Rather than producing content itself, Google's search engine service publishes the contents of others in the order dictated by the company's algorithms. At the same time, the search engine is involved in 'editing', since it ranks content, which is something that could lead to or further aggravate legal infringements.[79] The personality rights-infringing nature of the system of autocomplete suggestions that record frequent searches and provide recommendations on the basis of them has also been pointed out.[80] Furthermore, in respect of the 'right to be forgotten' (whereby Google is obliged to remove from the search results certain content that does not serve the public interest and is injurious to the applicant), the enterprise performs direct editorial tasks which may even extend over opinions of

[77] See Jakubowicz (n 52) 3, 34–35.

[78] The scope of the present paper, however, does not include the issues raised by search engines and, in particular, by Google, unless those issues are directly related to the fundamentals of the freedom of the press. Such, for example, are the alleged antitrust violations committed by Google (see European Commission, 'Antitrust: Commission probes Allegations of Antitrust Violations by Google' Press release, 30 November 2010; European Commission, 'Statement on the Google Investigation' Press release, 5 February 2014). For a comprehensive review of the legal issues related to search engines, see James Grimmelmann, 'The Structure of Search Engine Law' (2007) 93 *Iowa Law Review* 1.

[79] The order of the search results and the prominent ranking of infringing content among them may contribute to and strengthen the effect of acts violating honour and reputation (see 'French blogger fined over review's Google search placing' BBC News, 16 July 2014 <www.bbc.com/news/technology-28331598>).

[80] Corinna Coors, 'Reputations at Stake: The German Federal Court's Decision concerning Google's Liability for Autocomplete Suggestions in the International Context' (2013) 5 *Journal of Media Law* 322.

politics and public life.[81] Let us not dwell upon the criticism of the decision of the European Court of Justice on this issue or the fact that the decision can hardly be regarded as the final solution to it: suffice it to say that, in the wake of this decision, Google clearly, and in a legally mandatory manner, became an 'editor'—albeit against its will and only in a certain regard—while the company had previously been engaged in such editing according to its own priorities and interests, too.

The algorithm which Google uses to rank search results is not public. What we do know about it is that Google's business interests influence the search results, ie companies pay Google to ensure that their websites end up at the top of the list (in principle, this is only true for the first three places in the ranking of search results on the basis of Google's AdWords service; however, the listing system is not entirely transparent). At the same time, the service provided by search engines may not only serve business, but political interests as well. The most popular, state-owned, Chinese search engine, for example, does not list websites that stand for the creation of democracy in China. According to the US Manhattan District Court, by acting in this way, the search engine is simply exercising its right protected by the First Amendment, ie such peculiar 'editing' enjoys the protection of the freedom of speech and media freedom.[82] Co-authors Volokh and Falk take a similar position, saying that the activities of search engines assume editorial decision-making roles similar to those of press publishers.[83]

In a somewhat similar case, Google took action against advertisements by US health institutions that reject abortion. Using one of Google's methods, if one searches for a given term ('abortion clinic' in the present case), then, on the page listing results, paid advertisements will also appear alongside the 'genuine' results (in the present case, the websites of institutions that reject abortion and offer alternative solutions). According to the complaint from 'genuine' abortion clinics, such advertisements mislead the users of the search engine. Accepting the complaint, Google deleted the ads in question.

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[81] See the judgment of the European Court of Justice in case no C-131/12. *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González*. In connection with the problem of 'disabling the searchability of political opinions', see 'Google reverses decision to delete British newspaper links' Reuters.com, 3 July 2014 <www.reuters.com/article/2014/07/03/us-google-searches-idUSKBN0F82L920140703>, and 'Google removing BBC link was "not a good judgement"' BBC News, 3 July 2014 <www.bbc.co.uk/news/technology-28144406>. For an extensive analysis see David Lindsay, 'The "Right to be Forgotten" by Search Engines under Data Privacy Law: A Legal Analysis of the Costeja Ruling' (2014) 6 *Journal of Media Law* 159.

[82] *Jian Zhang et al v Baidu.com, Inc*., United States District Court Southern District of New York, 11 Civ. 3388 (27 March 2014). See also 'China's Baidu Defeats US Lawsuit over Censored Search Results' Reuters.com <www.reuters.com/article/2014/03/27/us-baidu-china-lawsuit-idUSBREA2Q1VS20140327>. For another decision that affirmed the search engine providers' right to free speech, see *S Louis Martin v Google, Inc.,* CGC-14-539972 (Cal. Sup. Ct. 13 November 2014).

[83] Eugene Volokh and Donald M Falk, 'First Amendment Protection for Search Engine Search Results' <papers.ssrn.com/sol3/papers.cfm?abstract_id=2055364>. About a contrary position, see Oren Bracha, 'The Folklore of Informationalism: The Case of Search Engine Law' (2014) 82 *Fordham Law Review* 1629.

Although indirectly, it thereby took a certain stand on an important public issue. Even if we accept that the basis for deleting the ads was to combat deceptive advertising, the restriction of the exercise of the freedom of speech is clear.[84]

Matthew Hindman concludes that the operation of search engines is not democratic, since they direct attention to a mere fraction of the existing content. This, of course, is inherent in the concept of any kind of 'listing', but the publication and transparency of the listing criteria and the requirement to take democratic considerations within those criteria into account—such as diversity, or at least similar chances for different opinions to make their way to the public—are reasonable demands. Another contributing factor is the typical behaviour of users, as users searching for information are usually satisfied with the content preferred by the search engine. Accordingly, the number of public affairs websites with a measurable number of visitors is surprisingly low, even in the United States (ie the market shows strong concentration on the Internet, too), and the most effective opinion leaders on the Internet are the same major media enterprises which play a key role in the offline world as well, or those bloggers whose qualifications, background and social position would grant them a prominent place in the offline media, too.[85]

Similarly to the paradigm of net neutrality, the concept of search engine neutrality also exists. According to James Grimmelmann, these principles include equality between the various websites, the production of results that objectively conform to the search terms entered, restraint from bias, the suspension of the self-interest of the search engines and the transparency of the search algorithms.[86] At the same time, Grimmelmann points out that, although apparently intended to achieve equality between the various contents, in actual fact full search neutrality actually contributes to the maintenance of inequalities caused by financial, technical and other differences; that is, although Google's methods distort the public sphere, even a principled solution to the problem would not be sufficient to eliminate distortion.[87]

Social media

One of the consequences of the spread of social media services was that the market positions of the printed and online press products deteriorated even further with the widespread use of these services, thereby transforming reading (consumption) habits.[88]

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[84] 'Google Removes Anti-Abortion Ads Deemed Deceptive' Wall Street Journal blogs <blogs.wsj.com/digits/2014/04/29/google-removes-anti-abortion-ads-deemed-deceptive/>.

[85] Matthew Hindman, *The Myth of Digital Democracy* (Princeton University Press 2008).

[86] James Grimmelmann, 'Some Scepticism About Search Neutrality' in Berin Szoka and Adam Marcus (eds), *The Next Digital Decade: Essays on the Future of the Internet. Is Search Now an 'Essential Facility'?* (TechFreedom 2010) 438.

[87] ibid 459.

[88] Lili Levi, 'Social Media and the Press' (2012) 90 *North Carolina Law Review* 1531, 1537–39; Emily Bell, 'What's the Right Relationship Between Technology Companies and Journalism?' *The Guardian,* 23 November 2014 <http://www.theguardian.com/media/media-blog/2014/nov/23/silicon-valley-companies-journalism-news>.

The youngest generations have long forgotten what it is to hold the printed press in their hands. Moreover, even on the Internet they tend to look for brief and quickly digestible content (of a few lines) with eye-catching titles, and not to click on the website of the online press product originally publishing that content. Hence, Facebook or Google News, for example, can generate substantial revenue for themselves without producing any of their own online content. These services simply collect the content of others. All this would seem to foreshadow the decline of investigative journalism, which is an extremely expensive genre.[89]

Basically, social media cannot be considered as a subject of media freedom, for two reasons. On the one hand, social media services cannot be considered as press products or media services and hence do not fall under the scope of media regulations. On the other hand, they do not produce or edit their 'own' content. What they are doing (collecting user content and providing a platform for it) does not resemble the 'traditional' activity of media.

Social media themselves therefore cannot be considered, from the perspective of legal regulations, as 'media' since they do not carry out any editorial activity, at least not in the traditional sense. They do not make a selection of content prepared by the journalists working according to their instructions, as an editor-in-chief of a newspaper would normally do, but rather they offer, or present, lists of different content for their users, according to pre-defined algorithms. However, the content itself is always produced independently from the social media platform (eg Facebook). Furthermore, it is fundamentally the user's decision (by defining their friends and the content which they follow) that determines the scope of content displayed for them, and the operation of social media sites lacking 'editing' algorithms (Instagram, Twitter) is based even more on the user's decision. Although the collection and delivery or presentation of content by social media can also be considered as a kind of editing, it is not, however, the kind which meets the criteria of 'editorial responsibility' defined under media regulations.

While social media do not produce professional media content they can widely popularise and share the online press's own content. Nevertheless, users often settle for the leads of the articles accessible directly from social media or the short comments of their friends sharing the article and do not click on the website of the press product where they originated. Media consumption via social media also has an impact on the advertising revenues of the press. As such, although in principle social media can help

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[89] See also, among others, Robert W McChesney and John Nichols, *The Death and Life of American Journalism*: *The Media Revolution that Will Begin the World Again* (Nation Books 2011); Robert W McChesney and Victor Pickard (eds), *Will the Last Reporter Please Turn out the Lights: The Collapse of Journalism and What Can Be Done To Fix It* (New Press 2011); Dean Starkman, *The Watchdog That Didn't Bark: The Financial Crisis and the Disappearance of Investigative Journalism* (Columbia Journalism Review Books 2014). How Facebook and Google Now Dominate Media Distribution. Monday Note, 19 October 2014 <http://www.mondaynote.com/2014/10/19/how-facebook-and-google-now-dominate-media-distribution/>.

the press to reach their audience as a unique distributor or intermediary, in practice the relationship between social media and the online press also involves many disadvantages for the latter.

News service in transition

Not only those who envisage the death of old-fashioned journalism and investigative journalism, but also less pessimistic observers have pointed out numerous problems caused by the spread of the Internet. Robin Foster examined the options for news diversity in the digital era in a paper published in 2012. His starting point was that although the Internet seemingly contributes a great deal to the distribution, and increase in diversity (the number of sources) of news, it still entails new risks. These risks arise from the activities of 'digital intermediaries'. According to Foster, these intermediaries (news aggregators such as Yahoo, search engines such as Google, social media sites such as Facebook and online stores and devices such as Apple) can control the news available on the Internet to a great extent, as (1) they represent bottlenecks, through which the users get their news; (2) they make editorial-type decisions about which news items to transmit or make available; (3) they shape the future business models of news services; and (4) they are inclined and able to influence political agendas.[90] Accordingly, the activities of these intermediaries need to be regulated for the purpose of ensuring democratic publicity, or more precisely, to ensure the right of citizens to have access to the news.[91]

Independently from this, the Internet has started to erode the obstacles standing between professional journalists and independent opinion leaders and has contributed to the democratisation of journalism, at least in a sense that it has made possible the emergence of more voices in the public space. How the Internet will influence the future of journalism, however, is at least open to question. First, the Internet news services and social networking websites have greatly transformed the former reader / user habits and turned a considerable public away from professional media products, thereby undermining the economic foundations of the latter.[92] Second, the news aggregator sites and social networking websites profit (also) from the content produced by professional journalists, without any real performance on their part (i.e. content production), thereby disrupting the earlier business models.[93] Third, the change in user habits does not affect certain key characteristics of the former *status quo*: even these days, the most important medium (the one generating the most advertising revenues) in the media market is

[90] Robin Foster, *News Plurality in a Digital World* (Reuters Institute for the Study of Journalism 2012) 25–42.

[91] Foster proposes that the intermediaries should transmit a predefined amount of news of public interest through all means, coming from different sources, and an independent body should be established which would analyse the practice of access and would receive related complaints. ibid 43−52.

[92] ibid 16–24.

[93] The impact of the operation of online aggregators. ibid.

television, the number one source of news,[94] whereas the blogs, regarded as independent forums, do not attract great masses at all,[95] and for the most part, the most dominant offline media can boast of the strongest and most popular online versions on their websites. Hence, in this respect, market conditions have not been drastically rearranged as a result of the spread of the Internet.[96]

The world of news services is thus changing, but not necessarily in the way one could have hoped for. The biggest loser in the market restructuring is the primary 'home' of serious journalism, the printed press. Though the voices replacing the printed press are indeed numerous, their power is negligible and their function is not the same as that of professional journalism. The breed of spare-time writers or (on the contrary) elite opinion leaders disguised as 'independent bloggers', incapable of investigative journalism due to their obvious financial constraints, and the mainstream media products adapted to the Internet do not especially contribute to the growth of the diversity of content and opinions.

Besides these issues, it is almost only a matter of detail to decide what we should do about the obligation of balanced coverage (impartiality) imposed on 'traditional' television and radio in most European states. A possible answer is that, since the former scarcity of access has been eliminated and hence, in this new media world, everyone can obtain information from countless sources, the former solutions of regulation therefore have become redundant, or one could say anachronistic.[97] By contrast, Steven Barnett and Mike Feintuck argue for the maintenance of balanced (impartial) coverage, emphasising the importance of reliable media operating under ethical standards which are taken seriously, even in the new media environment.[98] As Barnett notes, as long as television journalism can be differentiated from Internet journalism, there is no reason to stop having media-specific rules.[99] Feintuck argues that the former assumption, suggesting that, in a free and unrestricted media market, a diversity of opinions would automatically appear and hence impartiality would be created, proved to be false.[100] As Richard Sambrook argues: 'if the words "impartiality" and 'objectivity' have lost their meanings, we need to reinvent them or find alternative norms to ground journalism and help it serve its public purpose—providing people with the information they need to be free and self-governing.'[101]

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94 James Curran, 'Reinterpreting the Internet' in James Curran – Natalie Fenton – Des Freedman (eds), *Misunderstanding the Internet* (Routledge 2012) 18−19.

95 ibid 18−20; Hindman (n 85).

96 Curran (n 94) 19.

97 A good summary of this issue is provided by Mike Feintuck who takes an opposing standpoint in 'Impartiality in News Coverage: The Present and the Future' in Merris Amos – Jackie Harrison – Lorna Woods (eds), *Freedom of Expression and the Media* (Nijhoff 2012) 88.

98 ibid, and Steven Barnett, 'Imposition or Empowerment? Freedom of Speech, Broadcasting and Impartiality' in Amos–Harrison–Woods (n 97).

99 Barnett (n 98) 58.

100 Feintuck (n 97) 88.

101 Richard Sambrook, *Delivering Trust: Impartiality and Objectivity in the Digital Age* (Reuters Institute for the Study of Journalism 2012) 39.

New content producers—old and new holders of responsibility

There are several issues surrounding user-generated content but we shall only dwell on those that relate to the field of the media (understanding 'media' as a professional activity of a commercial nature). One approach holds that if users produce content they shall qualify as journalists, just as professional journalists do and therefore they are entitled to equal rights, bear equal responsibilities and are subject to the same ethical rules as apply to professional journalists.[102] However, it is clear from our previous reasoning that the interpretation of the concept of media freedom we have arrived at necessitates a distinction between 'media' and 'non-media' (professional journalists and occasional commentators) precisely in order to avoid the devaluation of the concepts of the media and of media freedom. Accepting this, we have to take a position on the question of whether the media bear responsibility if they include such content among their own content (if the statuses of professional journalists and users were identical, this question would not arise at all).

With regard to user generated content, therefore, it is not clear who is liable for any infringing nature of the content. Although the earlier responses offered by legal systems prior to the emergence of the online world seemed to favour the position that it is the adopting medium that is responsible for the adopted content, the court decisions arrived at according to this logic are generating widespread and strong protest.[103]

Although the ECtHR has taken no universal position on this issue, it did indicate in two decisions that the unsatisfactory resolution of this question within the legal systems of the Member States may lead to infringements of the rights provided for by the ECtHR. In the *Editorial Board of Pravoye Delo and Shtekel v Ukraine* case[104] the sanction against the applicant newspaper for publishing libellous user content qualified as infringing, due to a lack of clear provisions on liability in Ukrainian law. In the *KU v Finland* case[105] it qualified as an infringement of the right to a private life that no effective remedy existed under Finnish law to reveal the identity of the person who had posted an erotic ad on the Internet in the name of the complainant minor. In another case, a German court decision held the web encyclopaedia Wikipedia liable for the libellous content inserted into an article by one of the authors of the encyclopaedia,

[102] Tarlach McGonagle, 'User-generated Content and Audiovisual News: The Ups and Downs of an Uncertain Relationship' *Open Journalism. IRIS plus*, 2013-2, 13.

[103] 'European Court strikes serious blow to free speech online' Statement of Article 19, 14 October 2013 <http://www.article19.org/resources.php/resource/37287/en/european-court-strikes-serious-blow-to-free-speech-online>; 'Ruling of Hungarian Constitutional Court can further curb freedom of expression, warns OSCE media freedom representative' Vienna, 29 May 2014 <http://www.osce.org/fom/119216>.

[104] *Editorial Board of Pravoye Delo and Shtekel v Ukraine* (App no 33014/05, judgment of 5 May 2011).

[105] *KU v Finland* (App no 2872/02, judgment of 2 December 2008).

even though, according to the editorial principles of Wikipedia, anyone may freely write articles or amend or correct existing ones and the operator of the site is not aware of the identities of its authors.[106]

At the same time, Tarlach McGonagle points out that the editorial method or control employed may also affect the extent of liability, as the various forms of moderation—preliminary / posterior, active / reactive—allow, in principle, the application of different rules related to liability.[107] (Accordingly, in principle, the stronger the editorial control is, the greater the liability could be. In practice, this would mean that the existence or non-existence of moderation of Internet forums would be a decisive factor in deciding whether or not the service provider of the given forum is at the same time the 'editor' of the given forum, and hence moderated forums would become closer to the traditional concept of media.)

Jackie Harrison highlights the quality problems of user generated content as regards accuracy, informedness and comprehensiveness.[108] In this respect Lorna Woods declares that 'the issue is more complex than simply that of more speech equals more freedom.'[109] Media freedom is intended to protect content produced by high quality, systematic and reliable work; this, however, cannot prevent users from producing content, nor can adherence to the relevant professional-ethical standards be expected from them. However, this is precisely why appropriate balance is required from the professional media, and prudent decisions need to be made at times about publishing a piece of potentially infringing user-generated content.[110]

The issue of online comments (ie anonymous commentaries attached to an article produced by the professional media or published in a private blog or on a private website) is worthy of separate consideration. To date, no general and mature answer has been provided, even to the question of whether the content service provider of the website, unaware of the identity of the commenter, may be held responsible for the infringing nature of the comment, even though it was not they themselves who published it (but only provided a space for its publication). The answers to the question provided from the legal perspective usually do not preclude the liability of the content service provider. This is demonstrated by both the only decision of this kind from the ECtHR, which decided against the website in question,[111] and by a decision of the

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[106] OLG Stuttgart Urteil vom 2.10.2013, 4 U 78/13 <lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&nr=17388>. Wikimedia is liable for contents of Wikipedia articles, German court rules. *PC World*, 27 November 2013 <www.pcworld.com/article/2067460/wikimedia-is-liable-for-contents-of-wikipedia-articles-german-court-rules.html>.

[107] See McGonagle (n 88) 18.

[108] Jackie Harrison, 'Freedom of Expression: The BBC and User Generated Content' in Amos–Harrison–Woods (n 97).

[109] Lorna Woods, 'User Generated Content: Freedom of Expression and the Role of the Media in a Digital Age' in Amos–Harrison–Woods (n 97) 168.

[110] ibid.

[111] *Delfi AS v Estonia* (App no 64569/09, judgment of 10 October 2013). The Grand Chamber later affirmed the decision of the First Section, see its decision taken on 16 June 2015.

Hungarian Constitutional Court.[112] The arguments of the proponents of the freedom (ie the illimitable status) of comments are manifold; however, what is important from the perspective of the conceptual elements of media freedom is that all such arguments either deny or disregard the connection between the comment and the content service provider (the 'media', if you like) enabling its publication. This means not only that, in most cases, the two parties are not acquainted with each other, but also that, according to the proponents of these arguments, there is no overlap between their interests. Yet, in the *Delfi* case, it was just such interests that one of the arguments of the ECtHR was built upon, namely that 'making public the readers' comments on these articles was part of the applicant company's professional activity'. The news portal had a vested interest in increasing the number of its readers and comments, as their advertising revenues depended on this.[113] The comments, argued the ECtHR, although not authored by employees of the news portal, nevertheless became part of its content.

Internet and democratic publicity

On the regulation of the Internet

Some of the content made available via the Internet is certainly considered as 'media,' even if we are not quite sure where its borders lie. Hence, based on the reasoning given above, the Internet, as a medium, could be made subject to legal regulation. However, the issue of regulating the Internet generates a great deal of uncertainty right from the starting line. Before turning to the various questions of detail, we must first examine whether the Internet, as a medium, can be the subject of a distinct, special set of regulations or not.

In the past, every time a new medium became widespread, sooner or later a distinct set of regulations was adopted to govern it (press law, radio law or later the regulations governing electronic media). However, no such special set of rules has been created in the Western world regarding the Internet in the last two decades and more that have passed since the dawn of the World Wide Web. One academic view which became popular from the 1980s onwards proclaimed that the nature of a (media) technology defines the legal form of its regulation, and hence the law adapts itself to the technology.[114] It follows from this approach that, since the Internet is so hard to regulate (due to issues of jurisdiction, implementation and enforcement and problems related to liability), it does not need to be regulated at all. We wish to highlight here that the Internet is not as 'new' as it is often held to be, in the sense that it has inherited, or to

[112] Resolution No 19/2014. (V. 30.) AB of the Hungarian Constitutional Court.

[113] *Delfi* case (n 111) [89]—we shall not dwell upon the complex arguments of the court and the criticism thereof, as they are not closely related to our subject matter.

[114] First see Ithiel de Sola Pool, *Technologies of Freedom* (Harvard University Press 1983).

put it more precisely, respawned numerous problems of the 'traditional' media, reproduced them in the new environment, and in certain regards magnified these problems, including the spectre of arbitrary state intervention, inequalities in the efficiency of expression of opinions and in the access to opinions, as well as commercialisation. Beyond these, the Internet has also generated new, unforeseen problems, as the new modes of private restrictions jeopardise the diversity of opinions, offer greater scope for the violation of privacy and frustrate the economic foundations of quality journalism. The Internet is far from being lawless. The content available on the Internet is subject to general legislation (civil law, criminal law, etc.) and numerous Internet-specific sub-issues are legally well regulated, mainly at the EU level (electronic commerce, electronic communications, on-demand media services, right of reply, copyright issues, etc.). If truth be told, however, there is no separate 'Internet Act' and the application of the existing legislation is far from being as effective as it is in the 'traditional' world.

Tambini, Leonardi and Marsden call 'the ideal of a pristine Internet, free from regulation', a myth, since it cannot be detached from social life, and hence from all the responsibilities, legal and ethical rules, disputes and harms that come with it.[115] Des Freedman reminds us that it is a misconception to regard anything related to the Internet as being 'inherently subordinated' to technology.[116] According to Freedman, the Internet is a technological system that serves private and public interests at exactly the same time, and as such, it is not the first in history.[117] In line with this approach, it is a totally legitimate proposal that democratic states (and also the representatives not of 'outsourced' private interests, authoritarian regimes or non-transparent supranational organisations), recognising the public interest, apply regulations to the Internet in order to ensure both greater access for their citizens and accountability.[118]

The technical difficulties of regulation are not an argument against regulation *per se*, or at least not a convincing one. Instead, the key question is what we want from the Internet. If we want it to make the greatest possible contribution to the operation of democratic publicity, the diversity of opinions, the democratisation of access to these, and elimination of the economic and political inequalities present in the offline media world then the question arises of whether legal regulation will be able to facilitate the implementation of these objectives. If we feel that certain phenomena related to the Internet expressly jeopardise these objectives then we may well consider trying to eliminate these harms by legal means. However, before inspecting the nature and content of the possible regulations (which topic is not covered by this paper), the current status of the Internet should be assessed—or more precisely the current status of the

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[115] Damian Tambini – Danilo Leonardi – Chris Marsden, *Codifying Cyberspace. Communications Self-regulations in the Age of Internet Convergence* (Routledge 2007) 294.

[116] Des Freedman, 'Outsourcing Internet Regulation' in James Curran – Natalie Fenton – Des Freedman (eds), *Misunderstanding the Internet* (Routledge 2012) 116.

[117] ibid.

[118] ibid 98.

online publicity defined by the entirety of services made available on the Internet, which, based on their function and purpose, qualify as 'media'. It is also worth examining how the free market of the Internet operates, without its own proper, 'sectoral' Act, with numerous options for circumventing the applicable general legislation, and hence to an extent unconcerned by the law. Obviously, this paper cannot strive to make a thorough and complete assessment. It only aims to indicate possible starting points and aspects of such a study.

Nunziato talks about the need to apply the 'public forum doctrine', developed in American constitutional law, to the Internet as well. This doctrine stipulates that public spaces (parks, streets, etc.) are legitimate venues for the expression of opinion and hence can only be restricted for good reason.[119] Nunziato argues that the Internet should be considered as a public forum, despite the fact that most of the assets operating its infrastructure are owned by private parties.[120] This is also corroborated by the train of thought put forward by Robert McChesney and John Foster. They argue that the deregulation and privatisation implemented in the field of telecommunication are primarily responsible for the concentration of ownership found on the Internet and hence for dimming our hopes of a better Internet.[121]

Equal opportunities—new democracy

According to a widespread view, the Internet can serve to renew the democratic social structure; moreover, it can help societies in authoritarian states to bring about a grassroots democratisation. Russell Weaver raises many examples of both of these processes in his book (most typically in the connection between the 'Arab Spring' and Twitter use).[122] At the same time, James Curran emphasises that, in those societies wishing to embark on the road to democratisation, it was not the Internet or the social networking websites made available via the Internet that generated social change, but rather already existing processes which these only amplified and boosted.[123] Without doubt, the Internet is an extremely effective means for activists to connect with each other, exchange opinions and organise different events. However, the increased

[119] For the first time in the jurisprudence of the Supreme Court see *Hague v CIO*, 307 US 494 (1939); Nunziato (n 61) 42−48, 70−87.

[120] At the same time, based on this doctrine, the right to the freedom of expression can also be exercised freely, subject to certain restrictions, in private institutions open to the general public, see *Pruneyard Shopping Center v Robins*, 447 US 74 (1980), and *International Society for Krishna Consciousness v Lee*, 505 US 672 (1992).

[121] John B Foster and Robert W McChesney, 'The Internet's Unholy Marriage to Capitalism' (2011) 62(10) *The Monthly Review* <http://monthlyreview.org/2011/03/01/the-internets-unholy-marriage-to-capitalism/>.

[122] Russell L Weaver, *From Gutenberg to the Internet: Free Speech, Advancing Technology, and the Implications for Democracy* (Carolina Academic Press 2013) 73−142.

[123] James Curran, 'Rethinking Internet History' in Curran–Fenton–Freedman (n 116) 45.

communicational ability should not be confused with the actual impact of such a communication.[124] At any rate, the contribution that Internet usage has made to the development of democracy in the Western countries is unclear at best.[125] It seems that the political relations of the real world are more or less reproduced on the Internet. The strongest voices on the Internet are actually the duplicated voices of the mainstream media in the offline world, while the independent opinion leaders, if any, are forced to stay in the background.[126] Jerome Barron's remark from the 1960s is still valid: 'The test of a community's opportunities for free expression rests not so much in an abundance of alternative media but rather in an abundance of opportunities to secure expression in media with the largest impact.'[127]

What is more, no one can say that states which wish to stand up against freedom of speech are without measures against the Internet. States such as Iran or China 'successfully protect' their political structure. Furthermore, the Internet lends them a helping hand in suppressing the private sector and in the constant surveillance of their citizens. As such, it seems that the statement that the Internet simply cannot do any harm to demands for democratisation, and the movements fighting for it, is simply false.[128]

Equal opportunities—commercialisation

Early expectations of the Internet were that the new medium could have been the catalyst of a democratisation process of a different nature, meaning that it could have shaken the market positions taken by certain entities in the mainstream media. It was hoped that, since the Internet can be used to express opinions freely and without considerable expense and, since the storage capacity is available for storing a theoretically unlimited amount of content, the Internet could therefore accommodate many more voices and more diverse opinions and the 'barrier to entry' (meaning the serious costs required for printed press, radio, television), which so far had crippled the expression of independent opinions, would actually be eliminated. All these would benefit the audience too, as they could choose the voice they wanted from a wide range of voices. No external player could restrict access and access would have no significant costs for the audience, either.

In reality, however, the economic differences did not vanish on the Internet at all. The costs of successful content services are also huge, and hence market scarcity remained - in a different way, but with similar results.[129] Everyone else, the many

[124] Curran (n 94) 7.

[125] Jacob Rowbottom, *Democracy Distorted. Wealth, Influence and Democratic Politics* (CUP 2010) 243.

[126] Jacob Rowbottom, 'Media Freedom and Political Debate in the Digital Era' (2006) 69(4) *The Modern Law Review* 489.

[127] Barron (n 4) 1653.

[128] See Evgeny Morozov, *The Net Delusion. The Dark Side of Internet Freedom* (Public Affairs Publishing 2011).

[129] Kenyon (n 32) 403.

independent bloggers and opinion leaders, are invisible to the general public. Their content is sought after and read by only a few. Not even the Internet is free from corporate dominance, market concentration, gatekeepers controlling content and economics-based exclusion.[130] Eli Noam goes so far as to say that the 'fundamental economic characteristics of the Internet' suggest that 'when it comes to media pluralism, the Internet is not the solution, but it is actually becoming the problem.'[131] It may seem to be an exaggeration, but there is no doubt that the Internet has failed to bring about a more balanced playing field for small and large companies alike.[132] Large Internet companies have 'colonised' cyberspace.[133] The most visited websites are owned, without exception, by those companies that have strong market positions in the offline world and that are interested in business success.

Nevertheless, it is undisputed that the Internet actually has increased the latitude for democratic publicity and that this kind of commercialisation contributed to the rapid spread and popularity of the Internet and to the continuous development of technology. However, the Internet turned out to be less capable of fulfilling the initial hopes invested in it, as 'profit conquers principles'.[134]

Where is the regulation of media freedom heading, and what is the role of the state?

The Internet has enriched our lives and has contributed to the diversity of the media but simultaneously it has not only reproduced the problems of the 'traditional' world of the media but also raised new issues. But the desire for regulation should be carefully kept within the appropriate limits. On the one hand, the legal solution is by no means a panacea but, at best, merely a useful prop for achieving the objectives of public interest and, on the other hand, state intervention in the still fluid, never predictable, continuously changing Internet is an inherently risky venture, since its effectiveness is doubtful and it may even do greater damage than it was intended to avert. Moreover, due to the very nature of the Internet, its regulation can hardly be the task of individual states; if such regulation is to be effective, it should operate on a European or even on a 'universal' level.

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[130] James Curran – Natalie Fenton – Des Freedman, 'Conclusion' in Curran–Fenton–Freedman (n 116) 180.

[131] Philip M Napoli and Kari Karppinen, 'Translating Diversity to Internet Governance' *First Monday*, 2 December 2013 <http://firstmonday.org/ojs/index.php/fm/article/view/4307/3799>, cited by Kenyon (n 32) 404.

[132] Curran (n 94) 14.

[133] Curran (n 123) 54.

[134] Sandor Vegh, 'Profit over Principles: The Commercialization of the Democratic Potentials of the Internet' in Katharine Sariakis and Daya K Thussu (eds), *Ideologies of the Internet* (Hampton 2006) 63−78.

The tasks of (EU and Member State level) media regulation will not be limited to defining the concept of the media and the holders of the right of media freedom, but will also include the creation of truly equal conditions for the media services accessible in Europe (and for the other actors within the value chain of the media market), and the definition of the various levels of regulation as they relate to the different types of services. We have to accept that providers of several new types of services now belong among the stakeholders of media freedom. If we are to uphold our earlier principles related to the democratic tasks of the media then besides providing them with rights we may also prescribe duties for them. Several regulatory burdens and solutions could be realistically implemented, even in the near future, such as obliging Internet service providers to refrain from discriminating between content, prescribing transparent operation for search engines, settlement of the issues of copyright with regard to content aggregation and sharing, reinterpretation of the must-carry rules and state support for the 'quality press'. However, the extent to which these measures would actually contribute to the operation of the democratic public sphere, and what other possible avenues exist for the state to act in the interest of the media are questions for the future.

Although it would be tempting to say that the first step towards equal market conditions, and one that requires no external approval or consent, would be a dramatic liberalisation of the regulatory environment, in actual fact this would undermine the common foundations of European media regulations. These are the foundations which underpin the protection of the democratic public sphere and the recognition of the public interest vested in it. At present neither the EU, nor the various NGOs and interest bodies holding membership in international organisations envisage the elimination of these regulations, and consequently the protection of minors, the right of reply and the prohibition of hate speech, defamation and violation of privacy, as well as the various access rights, the must-carry and must-offer rules, media pluralism and cultural diversity, the regulation of competition, the European programme quotas and publicly funded public service media must remain in place.[135] It is an entirely different question, of course, whether the rules may change or may not apply in the same way to each and every service.

It is clear, then, that European states face numerous tasks. On the one hand, they have to reach agreement on the details of the new, common European media regulations, defining a uniform regulatory framework. A solution enabling action against services originating from outside of Europe, in the interest of European audiences, must be a part of this. Furthermore, they will have to do something about media regulations in their own Member States. In this respect, ironing out the various national (regulatory) peculiarities is the easier, but by no means necessarily the more expedient option: national media regulations may, conversely, be regarded as the 'cultural products' of the

[135] See Directorate-General for Internal Policies (n 60); European Broadcasting Union (n 42).

individual states and thus the values (or, from the aspect of the single market, the necessary nuisances) of a Europe of diversity, just like many other characteristics worthy of preservation.

By this logic, the state exercises self-restraint *vis-á-vis* freedom of speech and the freedom of the press and at the same time it tries to protect these rights against those private interests that are actually capable of restricting them. Clearly, regulation has to live up to its name to accomplish this twofold task. Hence, the state and the system of regulation we are talking about here 'may not be the state we have and therefore not the regulations to which we are currently exposed, but it is certainly those to which we should aspire.'[136]

[136] Freedman (n 116) 117.

Péter Smuk

The constitutional guarantees of democratic political discourses and their regulation in Central Europe

Laying the foundations—democratic public opinion as a constitutional value

Public opinion is a social phenomenon derived from the fundamental right of the freedom of opinion; its sound (democratic) functioning is a constitutional value and interest. The constitutional definition of public opinion is rooted in the right to the freedom of expression and the essential criterion of democracy, according to which members of the political community share power and the various manifestations of exercising (public) authority require their participation. Legitimate public power originates from the people, based on the requirement of popular sovereignty and the people—the political community—can exercise their power directly or through their elected representatives. In the course of the direct exercise of power, on the exceptional occasions of referenda and in the transfer of power to representatives, we trust that citizens will make responsible, conscious, well-informed decisions. Obtaining information is not only possible by state bodies providing citizens with data related to their operations. This mass of information is impossible to process, both in terms of quantity and quality; it is unstructured and so it needs to be processed. The assessment of the performance of a political system is only possible by means of information available in a 'ready for consumption' form. This type of processing of data of public interest for the members of the political community takes place in the course of public discourse.

It is easy to see that the role of the state in granting freedom of expression is not limited to refraining from censorship or suppressing opinions. Freedom of opinion can truly prevail if the state actively participates in organising pluralistic political discourses. The constitutional guarantees on the shaping of democratic public opinion embody the positive obligations of the state, which my paper will examine on the most important platforms of discourse. In respect of certain legal institutions, political discourses are of paramount importance. I consider these as the arenas of discourse: the media, election campaigns and the representative bodies of popular sovereignty with special regard to the sittings of the Parliament. In this context, both the Council of Europe and the European Union have adopted several sources of law and documents, which serve as standards or norms for legal systems in Central Europe. My paper will illustrate the specific implementation of the fundamental principles of the European constitutional culture and patterns by describing the legal institutions and regulatory solutions in the constitutional systems of Central and Eastern European countries, which formally were

under the influence of the Soviet Union and which have now become members of the EU. These countries are Estonia, Latvia, Lithuania, Poland, the Czech Republic, Slovakia, Hungary, Romania, Bulgaria, Slovenia, and Croatia.[1]

The regulation of the arenas of political discourses: A Central European landscape

One of the extremely interesting fields of analysis with respect to the constitutional legal situation of democratic public opinion is the development of the young democracies of Central Europe. First, let us take a closer look at the environment of regulations adopted in these legal systems. The transition and the changing of the public sphere in Central Europe can be traced along two dimensions: one is the changes in the legal regulatory environment; the other is the substantial restructuring resulting in personal and ownership-related changes in the social sub-system. The latter dimension does not fall under the scope of my study, even though its political significance has on many occasions overshadowed the errors or merits of legal norms. My overview will primarily focus on constitutional guarantees, as well as the adoption of democratic laws on the public sphere.

After the fall of communist regimes, the states of Central Europe adopted democratic constitutions or constitutional amendments. Most of these contained, or at least referred to, rules for the democratic rule of law, freedom of expression, and the guarantees for them. It goes without saying that the dates and forms of adopting new constitutional provisions, followed by further legislative provisions regulating the details, were not insignificant in any of these countries.[2] We can identify three waves of relevant legislative activity.

1) In the course of the transition of their political and economic systems, the content of constitutions took a direction towards democracy, which enabled free social dialogue. This freedom proved viable, even if earlier rules and customs with non-democratic content lingered on in several spheres. The press was very soon able to take advantage of this experience of freedom; however, political and state actions against the media did

[1] For an extended discussion of the issue, see Péter Smuk, *A politikai diskurzusok alkotmányjogi szerkezete* (MTA 2014).

[2] A methodological remark: to make an overview of the regulations, I relied on the sources of law available on the websites of the given country that can be considered as official and credible. Amongst these can also be found English translations of sources of law that are considered as official and non-official. The risks of interpretation stemming from the reliability of secondary sources and translations are necessarily inherent in this paper, though I made efforts to consult with national experts on individual items. A comprehensive and comparative source is Alexander Scheuer et al, 'The Citizens' Right to Information. Law and Policy in the EU and its Member States' Study requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs. European Parliament (2012) <http://www.europarl.europa.eu/committees/fr/studiesdownload.html?languageDocument=EN&file=75131>.

not cease to exist, the struggle over certain state channels having a monopoly position or changes in ownership, 'early' privatisation and frequency allocations without any legal basis were of extraordinary political significance. The state-owned channels set off towards fulfilling a public service function.

2) The second wave was brought about by the conflicts, legal disputes and various constitutional actors (eg constitutional courts) in the 1990s. New laws on the press-media were adopted and the institutional foundations of the freedom of information were laid down. Certain hastily compiled laws adopted during the time of the changeover were replaced by new codes. According to Bajomi-Lázár and Sükösd, the key institutions of the freedom of the press were established by the end of the 1990s; however, the freedom of the press was not consolidated. The legally regulated entry onto the scene of commercial channels[3] took place mostly during this phase, and this at the same time divided (weakened) political pressure on media which were previously in a monopoly position. Direct censorship was substituted by influence exerted by the owners (private owner or state) and political marketing.[4]

3) The third wave was the result of two impulses. The countries examined joined the EU between 2004 and 2007 (Croatia in 2013) and so they had obligations relating to legal harmonisation;[5] at the same time, the spread of digital services necessitated a paradigm-shift. Since 2004 national legislators have most frequently addressed both challenges.

Public and party politics focusing on the media resulted in the following orientations in the region:[6]

a) *Idealistic*: This can be illustrated by an example, especially from the era of the change of the political regimes, namely samizdat journalism, which promotes the function of the media supporting political discourse, freedom, and the rule of law. Freedom fighter journalists made great efforts to present and promote the processes of the political and economic changeover.

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[3] In Slovenia commercial media appeared in 1990, in Lithuania in 1992, in the Czech Republic and Poland in 1994, in Romania in 1995, in Latvia and Slovakia in 1996, in Hungary in 1997, in Bulgaria in 2000. Péter Bajomi-Lázár Péter and Miklós Sükösd, 'Médiapolitikai trendek Kelet-Közép-Európában 1989–2008' (2009) *Politikatudományi Szemle* 145.

[4] The consolidation of the press and media in the region was also made more difficult by problems in the community of journalists, such as 'clan journalism', the absence of specialist and investigative journalism, the tabloidisation of quality papers, and the poor infrastructure and working conditions. ibid 148–51.

[5] Legal harmonisation related to EU accession proceeded more or less in parallel with efforts to meet the democratic requirements of the Council of Europe, eg art 10 of the European Convention on Human Rights. Gabriela E Chira, 'Pluralist over Profitable: The Audiovisual Transformation Dilemma in Central and Eastern Europe' Alec Charles (ed), *Media in the Enlarged Europe: Politics, Policy and Industry* (Intellect Books 2009) 40–41.

[6] Karol Jakubowicz and Miklós Sükösd, 'Twelve Concepts Regarding Media System Evolution and Democratization in Post-Communist Societies' Karol Jakubowicz and Miklós Sükösd (eds), *Finding the Right Place on the Map. Central and Eastern European Media Change in a Global Perspective* (Intellect Books 2008) 9–40.

b) *Mimetic*: This attitude is based on the fact that political systems in Central and Eastern Europe after the fall of communist regimes considered the 'West' and Western institutions as worthy of following and as their development prospect. A clear example of this is legal harmonisation related to EU accession. Of course, the functioning of Western institutions in the Eastern environment was far from being smooth, which gave birth to frustration.

c) *Atavistic*: The presence of which is based on the practical observation that in several countries after 'imitating the imitation', political elites feel nostalgic about the control mechanisms of the previous non-democratic systems and they are searching for ways to regain these old tools.

Let us take a brief look at the waves of adopting laws on the public sphere and the legal development of individual states, with a brief reference to the social environment after the political and economic transition.

Estonia:[7] The Constitution of Estonia (1992) guarantees the freedom of obtaining information and everyone's right to freely disseminate ideas, opinions, beliefs, and other information by word, print, picture or other means (Articles 44–45). The Constitution, with certain specific general legislative provisions, eg those on the protection of the language, competition law, laws on advertising and state secrets, was able to establish a free environment for the press. Specific legislation on the press and media started in 1994 (Act on Broadcasting), then this was amended by Parliament to bring it in line with EU Directives. The specific regulation on public service broadcasting companies took effect in 2007. The most recent law covering media services was adopted in 2010. The amendment of the law in May 2013 phased the powers of the Ministry of Culture to license and supervise broadcasting out of the system and transferred these powers to the Technical Regulatory Authority (Tehnilise Järelevalve Amet), which was established in 2008 to perform other tasks. The modern, currently effective legislative provisions of Estonia on parliamentary procedures, the electoral system, and the freedom of information were adopted between 2000 and 2003, therefore they have been applied in practice for more than a decade.

Latvia:[8] Article 100 of the Constitution of Latvia of 1922, as restored in 1991, ensures the freedom of expression and everyone's right to obtain and disseminate information, and prohibits censorship. The Latvian free press had approximately one decade of democratic traditions (1924–1934) before its revival and the new Act on the Press was adopted relatively quickly, in 1991. However, in spite of Westernised constitutional provisions and the regulation of the press, the possibility of interfering in the freedom of the press enabled by other legal branches (institutions for the protection of the personality) caused problems for a long time. The law on radio and television

[7] <http://ejc.net/media_landscapes/estonia>.

[8] <http://ejc.net/media_landscapes/latvia>.

broadcasting was adopted in 1995, but was replaced in 2010 by a new comprehensive law (adopted in the course of a procedure with a presidential veto). A scandal generated by the proceedings started against a state television journalist has justified adopting legislation on the enhanced protection provided for journalists' sources, an area regulated by the act. The media authority was also reorganised in 2010 (Nacionālā elektronisko plašsaziņas līdzekļu padome). The Latvian Act on the Freedom of Information was adopted in 1998 and the effective Rules of Procedure of the Parliament are even older. In 2004, in addition to the Latvian law on elections, a specific law was adopted on the rules of election campaigns.

Lithuania:[9] In Lithuania we witnessed speedy legislation in the process of gaining independence and after. The Constitution (1992) grants the freedom to express one's 'convictions' (Article 25), and provisions prohibiting mass media monopolies and the censorship of mass information are enshrined in a separate article (Article 44). The Act on the Press, covering other tools of mass communication, was born in 1990, and between then and 1996, the laws relevant to this paper were also adopted (Act on Radio and Television, the parliamentary rules of procedure, Act on Information, Act on the Electoral System). The currently effective law on the freedom of information is dated 2011, the comprehensive law on electronic communication comes from 2004 and was already in compliance with the prevailing EU requirements. The Lithuanian Act on Information (Article 9) guarantees for everybody the right to public criticism: every person shall have the right to publicly criticise the activities of state and municipal institutions and agencies as well as officials. Persecution for criticism is prohibited in the Republic of Lithuania. Experts underline that, in spite of the existing competition regulations, monopolies could not be prevented from emerging and large companies (MG Baltic, Achemos grupė) dominate broad sectors of the media.

Poland:[10] The Polish press was regulated by an act inherited from 1984 and amended during the period of political and economic changes and constitutional reforms (1989, 1992). Almost the entire spectrum of broadcasting is regulated by the Act on Radio and Television adopted in 1992 (aligned with EU Regulations in 2004). The new Constitution of 1997 (Article 54) guarantees the freedom to express opinions, and to acquire and disseminate information to everyone. It prohibits preventive censorship of the means of social communication and the licensing of the press is prohibited. Statutes may require the receipt of a permit for the operation of a radio or television station. The Constitution regulates the National Council of Radio Broadcasting and Television (Krajowa Rada Radiofonii i Telewizji) amongst state bodies protecting rights (Articles 213–15). According to experts, the regulations on the media authority might ensure its formal independence; however, the specific elected members of the authority strengthen

9 <http://ejc.net/media_landscapes/lithuania>.
10 <http://ejc.net/media_landscapes/poland>.

political ties.[11] The rules of procedure of the Sejm date back to 1992, regulations on electoral procedures were adopted in 2011, while the effective Information Act comes from 2001.

The Czech Republic:[12] The Czech Charter of Fundamental Rights and Basic Freedoms (1992), in the first line of the section on political rights, regulates the freedom of expressing an opinion in any form, in speech, in writing, in the press, in pictures (Article 17), as well as the right to information, the prohibition of censorship and the obligation of the state and local government bodies to provide information. Laws on state radio and television were adopted in 1991 (then they were replaced by a new code in 2001), and in the 1990s the currently effective rules of procedure (1995, 1999), the Act on the Freedom of Information (1999) and electoral rules (1995) were born. In 2000 a new Act on the Press and in 2005 a law on electronic communication were born. The Media Act, adopted in 2001 and amended most recently in 2010 to be aligned with EU regulations, regulates the licensing, supervisory and regulatory tasks and powers of the Radio and Television Council (Rada pro rozhlasové a televizní vysílání).

Slovakia:[13] The Slovak Constitution (1992) also guarantees the freedom of speech and the right to information (Article 26), and prohibits censorship, as well as the licensing of press products. It obliges public authority bodies to provide information on their activities in an appropriate manner and in the state language. The Act on Radio and Television adopted in 1991 and inherited from the Czechoslovakian Parliament was replaced only in 2000, just as in the Czech Republic. Separate legal acts regulated broadcasting (2000), state radio (2003) and television (2004), and digital broadcasting (2007). Act 532 of 2010 merged the separate state radio and television organisations into one single institution.[14] The parliamentary rules of procedure were adopted in 1996, the election law was passed in 2004, and the Act on Freedom of Information was adopted in 2000. The Media Act of 2000 regulates public service and commercial channels and the powers of the media authority (Rada pre vysielanie a retransmisiu). The currently effective Act on the Press and News Agencies (2008) 'was born in a 20-year-long process' and its adoption was preceded by heated political debates, especially on the right of reply (right to correction, reply; what is more, to an additional announcement). The rule was simply ignored, even by prestigious papers. The adoption

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[11] Karol Jakubowicz, 'Finding the Right Place on the Map: Prospects for Public Service Broadcasting in Post-Communist Countries' Jakubowicz and Sükösd (n 6) 116–20.

[12] <http://ejc.net/media_landscapes/czech-republic>. As regards the Czech, Slovak, and Romanian media law, see also Nikola Belakova and Silvana Tarlea, 'How National Parliaments Legislate the Media in CEE: The Adoption and Implementation of Media Legislation in the Czech Republic, Romania and Slovakia' A Fieldwork Report of the ERC-funded Project on Media and Democracy in Central and Eastern Europe (2013) <http://mde.politics.ox.ac.uk/images/stories/documents/mdcee%20legislative%20report_ro-cz-sk_pv.pdf>.

[13] <http://ejc.net/media_landscapes/slovakia>; Andrej Školkay, *Media Law in Slovakia* (Kluwer Law International 2011).

[14] Jana Markechova, 'Act on Slovak Radio and Television' (2011) <http://merlin.obs.coe.int/iris/2011/2/article39.en.html>.

of the Acts on language[15] of 2009, which affected the press and the media, also stirred sensitive political debates. In 2009 the Slovak Constitutional Court handed down a decision of fundamental importance in order to protect journalists' activities and the freedom of the press.[16]

Hungary:[17] The text of the Hungarian Constitution, which was brought in line with the democratic principles during the political and economic changes (1989/1990), ensured the freedom of expression, the right to obtain and disseminate data of public interest and the freedom of the press (Article 61). As regards legislative provisions regulating the freedom of the press and information, the radio, television, news agencies, and the prevention of information monopolies, the Constitution prescribed a two-thirds majority. The new system inherited rules pertaining to television and radio from the 1970s, which were adopted by the Council of Ministers, whereas the press was regulated by provisions dating back to 1986. This new system, even during the first parliamentary term, experienced a noisy 'media war' relating to state-owned channels. The Media Act of 1996, by establishing the National Radio and Television Committee (Országos Rádió és Televízió Testület), established the institutional system of licensing and media supervision; furthermore, it regulated public service and commercial broadcasting. In spite of the second media war after 1998, regulation and the large number of resulting dysfunctions remained stable until 2010. The freedom of information in Hungary was regulated on the one hand by the Act on the Protection of Personal Data and Public Access to Data of Public Interest of 1992; on the other hand, by the Act on the Freedom of Information by Electronic Means of 2005. The parliamentary rules of procedure were adopted in 1994 and the Code of Electoral Procedure was passed in 1997. In 2010 the Government, having a two-thirds majority, reformulated Article 61 of the Constitution (by describing the criteria of public service) and completely replaced the old press and media regulations: this drew severe criticism domestically and in the EU as well, especially due to the legal status and supervisory powers of the media authority (Médiatanács). The relevant Article IX of the new Fundamental Law (2011) was subjected to two amendments in 2013. This article, in addition to guaranteeing the freedom of opinion, recognises and protects the freedom and diversity of the press, and ensures the conditions for free dissemination of information necessary for the formation of democratic public opinion; it stipulates campaign-related rules and protects the dignity of individuals and communities *vis-à-vis* the freedom of opinion. In that parliamentary term, a new Act on Parliament (2012), supplementary new parliamentary rules of procedure (2014), a new act on the electoral system (substantive provisions 2011, procedural code and campaign regulations 2013) and a new Act on the Freedom of Information (2011) were also passed.

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[15] Veronika Haász, 'The Compliance of the Slovak Language Law with the Council of Europe's System' (2012) <http://haasz.org/en/2012/03/the-compliance-of-the-slovak-language-law-with-the-council-of-europes-system/>.

[16] <http://www.concourt.sk/rozhod.do?urlpage=dokument&id_spisu=334889>.

[17] <http://ejc.net/media_landscapes/hungary>.

Romania:[18] The Romanian Constitution (1991) ensures that the freedom of expression of thoughts, opinions, or beliefs, and freedom of any creation, by words, in writing, in pictures, by sounds or other means of communication in public are inviolable (Article 30). It contains provisions on basic rules of liability and the prohibition of defamation. In a separate article (31) it provides for the right of access to information, the freedom of information, the independence of the media (at the same time, it also prescribes the obligation to provide adequate information for the public and the obligation to provide transmission time (airtime) to 'important' social and political groups). The effective Romanian press law was passed in 1974; so far only weak attempts have been made to replace it (in practice there is no legislation to regulate the press). The Parliament has used other means to influence the freedom of the press, namely by amending other laws (regulations pertaining to civil and criminal liability). The access to information of public interest is regulated in an act of 2001; audio-visual services, television and the radio fall under the law adopted in 2002. In the latter, we find provisions on the legal status and powers of the National Audio-Visual Council (Consiliul Naţional al Audiovizualului (CNA)), established as the autonomous regulatory authority. The CNA, in its decision No 220/2011, provided comprehensive content-regulation of audio-visual services. Included in this are, for example, the right of response, the requirement to provide pluralistic and fair information, the protection of personality rights and social groups, rules of advertising, etc. The rules of procedure in the two chambers of Parliament date back to 1992 (the effective rules of procedure in the Lower House come from 2003), whereas the election campaign is regulated in the Act on the electoral procedures adopted in 2008.

Bulgaria:[19] According to the Bulgarian Constitution (1991) nobody can be persecuted due to their views and everyone has the right to express an opinion in any form (Articles 38–39). The freedom of the press and any other instrument of mass media, as well as the prohibition of their censorship, are constitutionally declared, as is the right to search for or obtain and disseminate information (Articles 40–41). The Act on Radio and Television of 1998 was based on the principles enshrined in decision No 7/1996 of the Constitutional Court interpreting the freedom of opinion and the freedom of the press.[20] The Act on the Freedom of Information was born in 2000. The Media Act was amended on several occasions after Bulgaria's accession to the EU in order to settle the role of the media council (Svet zha Elektronni Medii) in protecting the pluralism of the freedom of opinion and information and the independence of media service providers. The Bulgarian parliamentary rules of procedure are brand new; they were adopted in 2013, while rules relating to election campaigns were set forth when adopting the election code in 2011. Due to the lack of transparency of election

[18] <http://ejc.net/media_landscapes/romania>; Peter Gross, 'Dancing with Wolves: A Meditation on the Media and Political System in the European Union's Romania' Jakubowicz and Sükösd (n 6) 125–43.

[19] <http://ejc.net/media_landscapes/bulgaria>.

[20] <http://merlin.obs.coe.int/iris/1996/8/article12.en.html>.

campaign services and media-ownership relations, as well as due to atrocities affecting journalists, human rights organisations also expressed their concerns regarding the situation of the freedom of the press in Bulgaria.[21]

Croatia:[22] The Constitution of the newest EU Member State (1990) ensures the freedom of expression and the freedom to establish 'institutions' of media and public communication (Article 38). It prohibits censorship and protects access to data of public interest and the right of journalists to freedom of reporting and access to information. The constitution provides for the right to correction if constitutionally and legally established rights are violated. The operation of radio and television was regulated in a law adopted as early as in 1990, which was re-codified first in 2001, then in 2010. In 2006, as a result of the EU accession negotiations, the entire regulation of the media was revised. The currently effective law on electronic media services was passed in 2009. This contains provisions on the legal status and power of the electronic media agency (Agencija za elektroničke medije, its bodies include the Director and the media council also has regulative competence). The currently effective Information Act replaced the previous one (of 2003) in 2013 by, among other things, establishing the new and independent institution of the ombudsman responsible for freedom of information. Electoral rules were adopted in 2003, whereas the parliamentary rules of procedure date from 2002. It is worth noting that in 2005 the Sabor adopted specific and detailed regulations on the public nature of parliamentary procedures and access to operational and other documents.

Slovenia:[23] The Slovenian Fundamental Law (1991) ensures the freedom of expression of thought, freedom of speech and public appearance, of the press and other forms of public communication and expression (Article 39). Everyone has the right to collect and disseminate information. A specific article (40) contains provisions on the right to correct published information which has damaged a right or interest of an individual, organisation or body, and also the right to reply to such published information. The freedom of the press in Slovenia is related to the national news agency (Slovenska tiskovna agencija), established during the civil war in the summer of 1991. The first round of Slovenian media regulation took place in 1994; however, the Media Council, set up in this period, inherited frequencies and operating licences allocated without any legal basis, the content of which was impossible to check. The next two waves (in 2001 and 2006) of media legislation covering the entire spectrum of the media focused on regulating the ownership structure and the right to correction, which was interpreted in such a broad manner that rendered its practical application dysfunctional. Similarly, severe criticism was drawn by the legal status of the supervisory body of public service television. The Act on Audio-Visual Services

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[21] Freedom House, 'Freedom of the Press 2013: Bulgaria' (24 July 2013) <http://www.refworld.org/docid/51f0dbae26.html>.

[22] <http://ejc.net/media_landscapes/croatia>.

[23] <http://ejc.net/media_landscapes/slovenia>.

adopted in 2011 made efforts to align the rules with EU norms. The Act on electronic communication was passed in 2012. The Media Supervisory Authority (Agencija za pošto in elektronske komunikacije, after its reorganisation in 2014, Agencija za komunikacijska omrežja in storitve Republike Slovenije) is also responsible for content regulation. Amongst further legal acts regulating the public sphere, attention should be paid to the act on access to information of public interest (2003), the act on election campaigns (2007) and the parliamentary rules of procedure, which were adopted relatively late (2002).

While our analyses lay emphasis on considerations relating to constitutional law and we use legal text as our point of departure, we must not forget about two aspects. Constitutional and normative legislative texts might provide a favourable picture of the situation in the country's public sphere. However, in most cases, the challenges relating to the freedom of speech and the freedom of the press are rooted in the deficiencies in the process of the application of the law, or from the misinterpretation or violation thereof (in the words of András Sajó, 'they are attributable to the extra-legal persecution of independent thought').[24] On the other hand, neither can we claim that the penetration of European standards, international law or EU law into internal law is an unequivocal success story. In spite of a more effective set of tools to enforce the latter, historical traditions and specific situations generated by struggles in the market and in the political arena have led to major differences, even between post-communist states, now EU member states.[25]

Media standards and challenges

Media services and national media policies are given priority in the European context due to their economic importance, the cross-border nature of media, and political-democratic values. In order to identify European standards, we might use documents containing EU and Council of Europe policies[26] from which we will now refer to some statements relating to the relationship between the state and the media.[27]

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[24] András Sajó, *A szólásszabadság kézikönyve* (KJK–Kerszöv 2005) 121.

[25] Marta Dyczok, 'Introduction' Marta Dyczok and Oxana Gaman-Gotuvina (eds), *Media, Democracy and Freedom* (Peter Lang 2009) 11–12.

[26] For its comprehensive description see András Koltay et al, 'Az audiovizuális média szabályozása az Európai Unióban, joghatósági kérdések az európai médiapiacon' András Koltay and Levente Nyakas (eds), *Magyar* és *európai médiajog* (CompLex 2012) 157–87; Levente Nyakas, 'Az Európa Tanács médiapolitikája' Koltay and Nyakas ibid 189–97.

[27] 1) Recommendation CM/Rec(2007)3 of the Committee of Ministers to Member States on the remit of public service media in the information society; 2) Recommendation CM/Rec(2011)7 of the Committee of Ministers to Member States on a new notion of media; 3) 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, AVMS); 4) Res 1636 (2008) indicators for media in democracy; 5) CM/Rec(2007)2 on media pluralism and diversity of media content.

For European democratic systems, it is fundamental that the freedom of speech and the freedom of information unfolding through the media are prerequisites for democracy. With respect to democratic decision-making procedures, it is a requirement to have well-informed public opinion and to have opportunities to discuss diverging opinions freely. The media should be open to technological innovations; they should offer content on diverse platforms, which serves diversity and inclusion and social integration.
European documents underline the following additional considerations and values:

- *The protection of journalists:* Journalists should be free to criticise public officials, they must not be abused or imprisoned, no unfair conditions should be set as regards the exercise of the journalist profession, journalists have the right to employment contracts providing fair protection, etc.
- *Public interest in the market:* Media organisations have the right to equal access to distribution channels (eg frequencies); ownership structures of the media should be transparent, the state has the right to act against dominant market positions; 'private' service providers cannot be owned by the state or state companies; the state cannot limit access to foreign media; editorial independence is to be guaranteed vis-a-vis owners as well; states can run public service channels.
- *Promoting public interest in terms of content:* Public service media counterbalance market failures; it is necessary to disseminate the values of democratic society, such as cultural and political pluralism, the integration of disadvantaged groups, etc.; to provide a reliable source of information concerning events of public interest and the control of the government function; to prepare people for participation in public life and in inter-cultural dialogue; information on democratic procedures.
- *The protection of the status of public service media:* Public service media must be protected from direct political influence; high positions in the public service media should not be filled with people having clear ties to political parties; a clear legal regulatory environment and an adequate system of funding need to be established; editorial independence and institutional autonomy are to be guaranteed.
- *Exercising the right to the freedom of speech and the freedom of information in order to conduct free political debates and information:* Printed press and on-line news sites should be able to operate without preliminary or prior authorisation; information by the state and information of public interest should not be unfairly limited by legislation on the protection of classified information; the government, the Parliament and the judiciary should be open to the media based on the principle of fair and equal access; the balanced and efficient functioning of media authorities need to be guaranteed; political parties, and candidates should be given fair access to media, eg in election campaigns.

Interference in order to promote public interest is not entirely obvious: Actors in the media market, mostly the 'large ones' are far from thinking that their performance is full of failures and should be improved. However, the market freedom protected by them is the freedom of investors, and not the freedom of citizens; communication markets restrict the freedom of communication, market competition generates market

censorship. As Keane put it, commercial actors who publish opinions are less interested in the *non-market* preferences of viewers. Individuals are treated as consumers oriented by the market and not as active citizens availing of rights and obligations.[28] Therefore, from the perspective of democratic procedures, we might consider this as a severe defect.

The other area of problems is that the definition of public interest is not unambiguous, either. It should encompass content and values which can easily be used for opposite purposes:

– it endeavours to achieve balance and diversity;
– to strengthen social cohesion and represent the values and interests of minorities;
– to entertain and broadcast 'quality' programmes;
– to preserve cultural heritage and produce / creative innovative programmes;
– to protect the national *and* European identity.[29]

Serving the public, ie being in the service of the public, can be considered a project of primary importance when analysing the constitutional legal environment of political discourses. Public service provides platform and content which are indispensable for the development of democratic public opinion and which, according to experience, cannot be obtained in any other way. However, we must not forget about the constitutional challenges relating to state supervision (exclusion of direct political influence) affecting the entire media market and especially public service media.

With regard to the constitutional framework, emphasis should be placed on the fact that the precise legal regulation of the legal status and the exercising of the power of media authorities, etc. is essential. The legal requirements in the spirit of the rule of law as regards administrative procedures include the following: proper legal basis of administrative decisions, proper reasoning / justification, legal remedy (judicial review), and clear, transparent, objective rules meeting the requirement of legal certainty with respect to the regulation of mechanisms capable of influencing the operation of the authority (eg powers of dismissal).[30] Power over the media and the media authority can be expected to be divided. Examining the multi-channel procedure for electing board members and leaders, and the prescription of professional requirements and incompatibility rules, we may come to the conclusion that the political elite in Central and Eastern Europe still apply creative solutions in order to circumvent legislative requirements.[31]

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[28] John Keane, *The Media and Democracy* (Polity 1991) 88–91.

[29] Péter Bajomi-Lázár, Václav Štětka, Miklós Sükösd, 'Közszolgálati televíziózás az Európai Unióban' *Médiakutató* (2010) <http://www.mediakutato.hu/cikk/2010_04_tel/01_kozszolgalati_televizio_unio>.

[30] Recommendation Rec(2000)23 of the Committee of Ministers to Member States on the independence and functions of regulatory authorities for the broadcasting sector. See also the Declaration of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector (2008).

[31] Bajomi-Lázár–Stetka–Sükösd (n 29) identify political, civil and professional mechanisms as regards the leadership of public service institutions, noting that the social, political and cultural preconditions for each are of decisive importance. These mechanisms are also applicable in the context of media authorities.

In the table below, we make an overview of the aspects of organisational independence in Central and Eastern European countries, which relates to the members of the media authority, more precisely, to their election rules.

Organisation and election of the members of media authorities[32]

Country, *authority*	**Organisation and membership of the authority**	**Election of members**
Estonia[(a)] *Tehnilise Järelevalve Amet*	Technical Supervisory Authority Department of Electronic Communication – Communication and Media Services Division – Radio Frequency Management Division – Electronic Communication Market Division Director General	The Authority operates as an autonomous government office, its Director General is appointed by the competent minister (responsible for economic affairs and communication) for 5 years, which can be renewed once.
Latvia[(b)] *Nacionālā elektronisko plašsaziņas līdzekļu padome*	Council (5) (National Media Council) President, Vice-President	The members of the Council are elected by Parliament on the proposal of the Human Rights Committee for 5 years (for 2 terms maximum). The President and Vice-President are elected by the Council from among its own members.
Lithuania[(c)] *Lietuvos radijo ir televizijos komisija*	Lithuanian Radio and Television Committee (11)	– 2 members are appointed by the President of the Republic for 5 years; – 3 members are appointed by Parliament for 4 years, of whom one is appointed by the parliamentary groups of the opposition; – 5 members are appointed by the specific professional organisations of journalists; – 1 member is appointed by the Episcopal Conference.

[32] Source: author's own collection based on the laws referred to.

Country, *authority*	**Organisation and membership of the authority**	**Election of members**
Ryšių reguliavimo tarnyba	President of the Committee Director and Council of the Communications Regulatory Authority	The President is elected from among the members for 2 years. The Director and members of the Council are appointed by the President of the Republic on the proposal of the Prime Minister for 5 years.
Poland[(d)] *Krajowa Rada Radiofonii i Telewizji, KRRiT*	National Radio and Television Council (5) President	Members of the Council are appointed as follows: – 2 members by the Sejm; – 1 member by the Senate; – 2 members by the President of the Republic. Their term of office is 6 years, which cannot be renewed. The President is elected by the Council from among its members.
The Czech Republic[(e)] *Rada pro rozhlasové a televizní vysílání, RRTV*	Radio and Television Broadcasting Council (13) President	Members of the Council are appointed by the Prime Minister on the proposal of the Lower House of Parliament for 6 years. Their terms of office can be renewed once. The President is elected by the Council from among its members.
Slovakia[(f)] *Rada pre vysielanie a retransmisiu*	Broadcasting and Retransmission Council (9) President	Members of the Council are elected by Parliament for 6 years, their terms of office can be renewed once. Proposals can be made by MPs, professional organisations of culture and journalists and organisations of disadvantaged and disabled persons. The Council must be renewed by one-third every two years. The President is elected by the Council from among its members.
Hungary[(g)]	NMHH President	The President is appointed by the President of the Republic on the proposal of the Prime Minister for 9 years.

Country, *authority*	**Organisation and membership of the authority**	**Election of members**
Nemzeti Média- és Hírközlési Hatóság (NMHH)	Media Council (5)	The President and 4 members of the Media Council are elected by Parliament for 9 years; they cannot be re-elected. Members are proposed by the *ad hoc* committee comprising representatives of parliamentary groups, whereas the appointed President of NMHH is *ex officio* (and *ex lege*) candidate for president.
	NMHH Office, Director General	The Director General is appointed by the President of the NMHH for an indefinite period of time.
	Media and Infocommunications Commissioner	The Commissioner is appointed by the President of the NMHH for an indefinite period of time.
Romania[h] *Consiliul Naţional al Audiovizualului*	Council (11)	Members of the Council are elected by Parliament for 6 years; nominations are performed as below: – 3 members are nominated by the Senate; – 3 members are nominated by the Chamber of Deputies; – 2 members are nominated by the President of the Republic; – 3 members are nominated by the government.
	President	The President is elected by Parliament from among the members of the Council on the proposal of the Council for 6 years.
Bulgaria[i] *Svet zha Elektronni Medii*	Board of Directors (5)	Members of the Board of Directors are elected for 6 years, – 3 members are appointed by Parliament; – 2 members are appointed by the President of the Republic. The quota of Parliament is renewed every two years, whereas the quota of the President is renewed every three years. Members can be re-elected once.

Country, *authority*	**Organisation and membership of the authority**	**Election of members**
	President	The President is elected by the Board of Directors from among the members, for one year.
Croatia[j] *Agencija za elektroničke medije*	Electronic Media Council (7) *(Vijeća za elektroničke medije, VEM)* Electronic Media Office	The President and members of the Council are elected by Parliament on the proposal of the government for 5 years; they can be re-elected. The Office is managed by the VEM.
Slovenia[k] *Agencija za komunikacijska omrežja in storitve Republike Slovenije (AKOS)*	AKOS Council (5) AKOS Director General	Members of the AKOS Council are appointed by the government for 5 years. The Director General of the AKOS Council is appointed by the government on the proposal of the AKOS Council, and on the basis of an application, for 5 years.
	Broadcasting Council (7) Director General	Members of the Broadcasting Council are elected by Parliament for 5 years on the basis of applications where corporations (universities, arts chamber, Chamber of Commerce and industry, Association of Journalists of Slovenia) can submit proposals. Members can be re-elected. The Broadcasting Council elects its own president from among its members.

[a] Media Services Act, art 54 (2010; its amendment in 2013 transferred the media supervisory powers of the Ministry of Culture to the authority!); as for the legal status of the authority, see Government of the Republic Act (1995), arts 63 and 105.
[b] Electronic Mass Media Law (2010), arts 56, 62–63, 65.
[c] Law on electronic communications (2004), arts 6–7.
[d] Broadcasting Act (1992), art 7. See also art 214 of the Constitution of Poland.
[e] Act 231/2001 on Radio and Television Broadcasting, arts 7, 9.
[f] Act 308/2000 on Broadcasting and Retransmission, arts 6–9.
[g] Media Act, arts 109, 111/A, 114, 123–130, 139.
[h] The Audiovisual Law no 504/2002, arts 11–14.
[i] Radio and Television Act (1998), arts 24, 29.
[j] Electronic Media Act (2009), arts 66–68.
[k] Mass Media Act (2001), arts 100–103; Electronic Communications Act (2011), arts 174–175, 181.

Election campaigns

Election campaigns are intensive, busy periods of political discourses. In the period prior to the decision, political activities are intensified, during the course of which information and interpretations of reality concerning parties and governance compete, past events are evaluated and promises or alarming warnings appear with respect to future processes. As such, this is a very sensitive period for freedom of expression and information. This period has a specific legal regulatory regime, which presents the general functions of freedom of expression and freedom of the media from a somewhat novel perspective.

Of course, a preliminary guarantee for the emergence of political discourses is political pluralism—the freedom of association and the right to nominate candidates / alternatives during elections.[33] Therefore, the point of departure for state participation (the protection of institutions) is to ensure the freedom to establish parties and, if necessary, to contribute financially to the running of candidates and their campaign activities.[34]

During campaign periods, political discourses can be evaluated according to actors (candidates, voters, the state) and vehicles. Campaign regulations have impact on various communication means, not only on the press and online media, but on posters, personal marketing, and election conventions as well. As regards the media of election campaigns, for us important questions are the right of voters to receive information and elements of access to them (air time / transmission time offered free of charge, paid political advertisements, right to participate in organised debates during the campaigns, putting up posters, campaign rallies), within the general framework of the right of candidates and nominating organisations to disseminate information and conduct campaigns. Furthermore, these elements come under the umbrella of equal opportunities as a general value.[35]

The United Nations Human Rights Committee also pointed out the importance of the free flow of information during period of the campaign and claimed the following:

> In order to fully ensure the exercise of the right to political participation, it is indispensable to freely disseminate information and ideas relating to public affairs and political issues for citizens, candidates and their elected representatives. This implies the requirement of the press and other media having the freedom to comment on public affairs without censorship and the right to freely inform the public, furthermore, it requires the freedom to discuss public affairs, criticism, election campaigns and political advertisements.[36]

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[33] Electoral Law, CDL-EL(2013)006, 120.

[34] Péter Smuk, 'Pártjog és politikai pluralizmus' (2007) 16(3) *Politikatudományi Szemle* 111–26.

[35] See also Tom Lewis, 'From activism to self-restraint: The strange case of the European Court's volte-face on broadcasting bans on political advertising' in A Koltay (ed.): Media Freedom and Regulation in the New Media World (Wolters Kluwer 2014) 565−569.

[36] Eszter Bodnár, *A választójog alapjogi tartalma és korlátai* (HVG–ORAC 2014) 128–29.

With respect to access to discourse arenas, rules providing advertising time free of charge in the media can be considered as rules enhancing potential campaign opportunities; the same applies to rules on state financing in order to ensure equal opportunities and pluralism, and rules differentiating between election conventions, and general rules on the freedom of assembly, and authorities making specific platforms (carriers) in public spaces available for posters to be displayed.

It should be underlined that certain services during campaigns provide specific challenges for the authorities and an analysis from the perspective of constitutional law. Here mention could be made of new forms of on-line communication and information distributed on web 2.0 platforms (or hysteria campaigns), the effectiveness of which cannot be questioned. If, on the other hand, we consider this as the sphere of private communication then corrective mechanisms are likely to be inapplicable, whether in terms of misinformation becoming professional, or in terms of the violation of any moratorium (day of reflection).[37] Due to the disintegration of the fora of the public sphere, large-scale, intensive interactive data sharing and the limited time available, opportunities to respond or criticise are insignificant. A further function of campaign publicity is to provide an opportunity for competing parties to examine one another through the information published by themselves. For this purpose, it is also of outstanding importance to provide equal access to various arenas of publicity and the right to participate in organised political debates.

The recommendation of the Committee of Ministers of the Council of Europe, with respect to the media activity granting the rights of voters and candidates during election campaigns, focuses on the following as fundamental principles:[38] the importance and independence of public service media in the information society ensuring fair and balanced reports, multi-layer regulation, the freedom of expression, and promoting free and democratic elections. It extends the concept of media to include the printed press and, in addition to classic media services, to new non-linear and online media services. However, it attaches prime importance to the role of television and radio, emphasising the specific responsibility and role of these types of media in establishing regulation, which reflects and ensures the diversity and pluralism of opinions. As regards the obligation of balanced information relating to election campaigns—and respecting editorial freedom at the same time—it considers this a requirement which can be prescribed for both state (public service) and privately owned media.

Amongst the general principles of application, the recommendation deals with the freedom of the press in a broad sense. The recommendation thus formulates, as a point of departure, requirements in the areas of the independence of and fair information by the press and other media. Of paramount importance is the recommendation, according to which states should ensure the conditions and guarantees of fair, impartial, balanced

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[37] Bernd Holznagel, 'Internet Freedom, the Public Sphere and Constitutional Guarantees' Monroe E Price, Stefaan G Verhulst, Libby Morgan (eds), *Routledge Handbook of Media Law* (Routledge 2013) 150–51.

[38] CM/Rec(2007)15 of the Committee of Ministers to Member States on measures concerning media coverage of election campaigns. See also CDL-EL(2013)006.

information from state-owned media. If state-owned media broadcast paid political advertisements, advertisers should enjoy this opportunity under equal conditions. The regulation of the media can be expected to ensure that the political character of advertisements should be clearly visible and recognisable in the programme flow. If politicians or parties act as media owners, the state has to guarantee that this fact is made clear to the public. In the course of editing daily news and news programmes, balanced information has to be guaranteed. It should entail the appearance of state bodies, which logically have more opportunities to appear, and the same principle should be applied to debates or interviews. Taking the limited length of campaign periods into account, it is important to provide an opportunity for candidates and parties to exercise their right of reply or other legal remedy within an appropriate deadline. The recommendation offers for consideration rules to declare the day prior to elections a '*day of reflection*', during which voters can prepare for their decisions without being bombarded with political advertisements.

Air time (transmission time) in the campaign—free of charge

Providing the service free of charge (which is a form of campaign financing) might promote the media appearance of small or new parties and the channelling of their opinions into the democratic discourse. In any case, democratic processes are harmed by the outcome of the elections being basically determined by the amount of capital used to finance campaign activities. Regulations on election campaigns and the media generally provide for airtime or transmission time free of charge on public service (state) channels.[39]

Of the states examined, it is only Bulgaria, where free of charge media platforms are not provided for the purpose of campaigning, which drew criticism from international observers.[40] At the same time, the Electoral Procedures Act provides for 1 minute of advertising in the public media (Article 142(1)) per party and nominating organisation at the beginning and at the end of the election campaign. In Poland, free of charge airtime is provided only to those nominating organisations which were able to nominate candidates in at least half of the constituencies. It goes without saying that the division and allocation of the limited airtime / transmission time should be made in a fair and non-discriminative manner based on transparent and objective criteria. The Czech elections act prescribes a draw in order to establish the specific airtime of advertisements in the campaign period (Article 16(4)).

[39] Latvia: Act on Campaigns, arts 3–5; Lithuania: Act on Elections, art 51; Poland: Election Code, art 117; the Czech Republic: Act of Elections, art 16(4); Romania: Elections Act, art 38(1); Slovenia: Act on State Radio and Television, art 12(1).

[40] See joint opinion on the election code of Bulgaria, CDL-AD(2011)013, 43. A payment obligation is prescribed by art 147 of the law, with the only exception provided for being in presidential election campaigns.

In Hungary, the regulation of political advertising has taken several different directions recently due to amendments to the Fundamental Law adopted in 2013 and the new Act on Electoral Procedures implementing them (Fundamental Law, Article IX(3), Electoral Procedures Act, Article 147). First, the constitutional provision stipulated that political advertising may only be published free of charge and the advertisements of organisations establishing a national list were to appear only in public service broadcasting. Later, Parliament abolished this limitation with respect to public service media. The Hungarian Constitutional Court, as well as the Venice Commission, criticised the prohibition contained in the first version because depriving larger parties of the opportunity to buy advertising time in commercial channels results in diminishing the opportunities for the opposition in an environment where the government naturally has more chances of appearing in the news. The Hungarian Constitutional Court concluded that the ban of commercial media reaching the largest number of viewers is an unconstitutional (unfounded, unjustified) limitation of the freedom of voters to obtain information, as well as the freedom of political opinion during elections.[41] The rules of electoral procedure corresponding to the new solution were adopted only at the end of 2013 by Parliament. The Fundamental Law states that political advertisements may only be published in media services free of charge. The new Articles 147 and 147/A–147/F of the Electoral Procedure Act contain provisions on the obligations of public and private media to broadcast political advertisements. These obligations include the obligation of commercial media service providers and press products to announce their advertising intentions and price lists by the deadline, otherwise they are not allowed to broadcast campaign advertising. Public service channels are to provide 600 minutes of airtime free of charge, which is divided by the National Elections Committee. The practical criticism of this solution is that although publishing campaign materials by commercial service providers is not prohibited, the offer of advertising airtime free of charge is likely to be limited for economic reasons.

Paid political advertisements

In practice, the use of paid political advertisements goes beyond the simple fact of parties being able to influence electors more effectively through the tools of mass communication. Purchasing paid advertising time in media also ensures access to transmission time for opposition parties. As in programmes of a political nature, the government and parties of government can be present more easily due to public policy decisions and the nature of public events.[42] This might be counterbalanced, on the one

[41] Constitutional Court decision no 1/2013. (I. 7.) 93–100: it annulled the art 151 of the new Act on the Electoral Procedure and the rule included in the Fundamental Law was adopted in response to this decision. The Venice Commission commented on the latter (Opinion on the Fourth Amendment to the Fundamental Law of Hungary, CDL-AD(2013)012, 37–47), saying that the European examples cited by the government do not constitute appropriate justification for the ban.

[42] Guidelines on Media Analysis During Election Observation Missions, CDL-AD(2009)031, 54.

hand, by applying the editorial principle of balanced coverage, on the other hand by the access of the opposition to media in other ways.[43] (Let us remember that air time / transmission time free of charge is mostly available in state media.)

In comparison, in the Czech Republic, paid political advertisements can only be published in papers, not in electronic media.[44] In Poland the Election Code of 2011 was going to prohibit the publication of paid political campaign advertisements in public and commercial media completely. The Polish Constitutional Court annulled this provision, considering it as a disproportionate restriction of the freedom of opinion.[45] The Latvian commercial media are obliged to send, at least 150 days before the elections, the price list they apply to their advertising to the media authority and the anti-corruption committee, which they cannot modify later on. Should they fail to provide data, they will be banned from publishing any political advertisement.[46] Bulgarian media service providers are obliged to notify the State Audit Office and the Elections Committee.[47]

States can consider the restriction of advertising time available to be purchased by candidates. The Slovak Act on Parliamentary Elections contains a provision stipulating that private service providers can use a maximum of 10 hours for political advertisements and each nominating organisation or coalition may purchase 30 minutes at most.[48] Favourably, commercial broadcasters are not supposed to include this advertising time in their otherwise restricted (non-political) advertising time.[49] The Romanian Elections Act (Article 38(3)) prescribes that the air time provided by commercial channels for those running in the elections should be 'proportionate' with the 'practice' of the public media. A stern criticism relating to Bulgarian elections was that paid advertisements are not restricted in time, and so only a few wealthy candidates dominate the campaign arenas.[50] As regards the Latvian regulations, according to which paid political advertising is prohibited in the 30 days prior to the elections, some trying to defend them say that this serves the purpose of equal opportunities, while others are of the opinion that this regulation renders the campaign boring.[51]

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[43] CDL-AD(2013)012, 45.

[44] 'OSCE/ODIHR Needs Assessment Mission Report ahead of Parliamentary Elections in the Czech Republic on 28-29 May 2010' OSCE/ODIHR Mission Report (2010) 7–8 <http://www.osce.org/odihr/elections/67702>.

[45] Decision of 20 July 2011, K 9/11. See 'The Citizens' Right to Information. Law and Policy in the EU and its Member States' (2012) 533.

[46] Campaign Act, art 7(2).

[47] Elections Code, art 138. Similarly, the Hungarian Act on Electoral Procedure in art 148 prescribes data provision for the State Audit Office with respect to press products.

[48] The Slovakian Elections Act, art 24(3).

[49] The Polish Parliamentary Elections Act, art 185(3); Slovakian Elections Act, art 24(9).

[50] 'Bulgaria, Early Parliamentary Elections, 12 May 2013' OSCE/ODIHR Election Observation Mission, Final Report. Warsaw (2013) 13–14. <http://www.osce.org/odihr/elections/103878>.

[51] 'Republic of Latvia Parliamentary Elections 4 October 2014' OSCE/ODIHR Needs Assessment, Mission Report (2014) 8 <http://www.osce.org/odihr/elections/latvia/120933>.

The principle of balanced coverage

Broadcasters not only broadcast political advertisements during the campaign period but they also produce reports and news programmes about the events of the campaign and they might also organise debates. I am going to discuss, amongst their editorial principles, the principle of balanced coverage, though it determines the entire campaign and the presence in the media during the election period. Although, generally speaking, the regulations on elections and the media tend to contain this principle and include further detailed provisions as well, the Venice Commission draws attention to the fact that, in several countries, both public and private media have violated the principle of equal access.[52]

Programmes which provide identical opportunities for relevant parties or in which relevant parties are present on the screen simultaneously may be supported: these include debate programmes and comprehensive campaign coverage. Pertaining to the Polish Elections Code (Article 120), equal opportunities must be ensured to elaborate on positions in the debates provided by public service television and radio. The Elections Code of Bulgaria (Article 139) includes more detailed provisions—the details of the political campaign debate in the public media are settled in an agreement concluded between the general directors of state channels and the representatives of the parties. Pursuant to the law, public media have to broadcast at least 3 debates, the total length of which is at least 180 minutes. At least (!) half of this time is allocated to parliamentary parties and the remaining time is divided between extra-parliamentary parties. We cannot say that the method of dividing airtime is fortunate because, according to these rules, parliamentary parties might as well receive the whole 'cake'. A more favourable solution is applied in Slovenia, where one-third of the time allocated to campaign coverage in the public media is to be allocated to extra-parliamentary parties. Of course, small parties might feel at a disadvantage concerning the allocation of air time. Editorial practices have been seriously criticised in several countries due to certain parties being ignored.[53]

Parliamentary discourses

Starting from the deliberative democracy concept of Habermas, the examination of communication arenas from the perspective of constitutional theory might focus on the spread of political discourses in society and the search for consensus based on the free and active participation in public debates. Those criticising the model of Habermas call

[52] CDL-EL(2013)006, 117.

[53] As regards the parliamentary elections in Slovenia in 2011, see <http://www.osce.org/odihr/elections/Slovenia/87786?download=true> 17.

attention to the fact that several deliberative preconditions for political discourse and democracy are met in actual terms through representatives in an institutional framework, in the representative bodies.[54]

When taking account of the various arenas of political discourses, the bodies of representation, especially Parliament, are obviously indispensable. Through the victory of representative democracy, 'politics' as a concept 'describes the sort of debate and discussion that takes place in legislatures; its procedures allow for participation, discussion, and, potentially, compromise. Political processes are suited to the consideration of all potentially relevant aspects of a decision', even if—certainly—one of the most important of these is the reference to 'the people'.[55]

The manifestation of political pluralism in Parliament takes the form of the presence of governing and opposition parties. It is important to note that the driving force of political discourse is the opposition, by performing its functions. The functions of the opposition are the following: providing political alternatives and making them compete with government proposals, representing the interests of their voters, improving parliamentary decision-making procedures through debates, reflection and opposition, scrutinising the government and public administration, as well as legislative and budgetary proposals, and, generally speaking, guaranteeing stability, legitimacy, responsibility, and transparency in political processes.[56]

The public nature of parliamentary debates

The transformation of feudal representative parliaments into civil bodies of popular representation meant, among others, the turn which Habermas describes as follows: as of the eighteenth century, the discourse of 'arguing citizens' and parliamentary debates were linked. He is of the opinion that the new leading stratum of capitalism (in England),

> without now being represented in Parliament, formed something like a steadily expanding pre-parliamentary forum. Here, as a critical public soon to be aided by appropriate publicist organs, they followed the deliberations and decisions of Parliament, regardless of whether they still had for the most part the vote, as in London and Westminster or whether (as elsewhere) they were part of the disenfranchised mass. Parliament's change in function was not reducible solely to the fact that the sovereign, bound by the Bill of Rights, was demoted to a King in Parliament. In addition,

[54] The thoughts of Jürgen Gerhards is referred to by Gábor Polyák, 'Párhuzamos valóságok. Az Alkotmánybíróság nyilvánosság- és médiaképe társadalomtudományi eredmények tükrében' (2012) 16(4) *Fundamentum* 24.

[55] Paul Scott, '(Political) Constitutions and (Political) Constitutionalism' (2013) 14(12) *German Law Journal* 2164.

[56] Péter Smuk, *Ellenzéki jogok a parlamenti jogban* (Gondolat 2008); Report on the Role of the Opposition in a Democratic Parliament, CDL-AD(2010)025.

> it took the new relationship of Parliament to the public sphere that ultimately led to the full publicity of the parliamentary deliberations to bring about a qualitative difference from the previous system.[57]

We may remark that it was only in 1803 that the Speaker officially authorised journalists to stay in the chamber (in the gallery). However, Habermas in his historical overview also discusses the modern development relevant for us, according to which, as a result of the broadcasting of parliamentary sittings, MPs stopped talking to one another; they indeed address the 'audience'. Parliamentary debate transforms into a show, critical dialogue turns again into representative demonstration and arguments are replaced by symbols.[58] However, recently this has raised few problems regarding the constitutional guarantees of the relationship between the parliamentary representation and the public; we have to treat this as sociological background rather than anything else, because as we will see, constitutional practice, irrespective of this observation, takes the course leading towards full publicity.

In the introduction, we pointed out that popular sovereignty prevails through participatory rights, and these rights are fleshed out with the information necessary for well-informed decisions and their debatable nature. We can present the relationship through the guarantees of the parliamentary procedures and their public nature because these create the forum of political debate and the link between parliamentary debates (information) and the public. The Council of Europe adopted a recommendation on the description of the latter as early as in 1997.[59]

The Council of Europe felt that parliaments had great difficulty in trying to remain the key actors of the democratic institutional system, and wanted to provide a solution for that problem. According to the Council of Europe, the modern tools of mass communication need to be used to bridge the gap between voters and representatives. The difficulties are obvious: the media prefer to entertain, the government is also in a privileged position as compared to the legislative body, because it can 'use' the media for its own purposes faster and more professionally, etc. As a result, the Council of Europe comes to the conclusion that the most important fora for public debates do not include parliaments any more, and this, according to the recommendation, entails the risk of citizens starting to use other forms of mediation in order to express popular will. Amongst the specific recommendations of the Council of Europe, we find the guarantee of the publicity of parliamentary work as broadly as possible, covering also the work of committees, the improvement of the working conditions of parliamentary correspondents, and the establishment of on-line communication platforms for

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[57] Jürgen Habermas, *The Structural Transformation of the Public Sphere. An Inquiry into a Category of Bourgeois Society* (MIT 1991) 62–63,

[58] ibid 206; Klaus von Beyme, *Die parlamentarische Demokratie. Entstehung und Funktionweise 1789–1999* (3rd edn, Westdeutscher 1999) 275.

[59] Res 1142 (1997) on parliaments and the media.

journalists and for citizens in general; support must be given for setting up media channels dedicated to covering the work of parliaments.

As regards the public nature of parliamentary work, opinions diverge. We have seen the critical position of Habermas, according to which, in modern parliaments that have changed the free mandate into illusion, members of parliament do not wish to convince one another but make statements for the public. It is not only by chance that permanent television broadcasting started to spread only towards the end of the twentieth century: Permanent television broadcasting of parliamentary sittings has been allowed as of 1979 from the USA House of Representatives, as of 1986 from the Senate and as of 1989 from the House of Commons of the British Parliament.[60]

In addition to the function of parliamentary publicity to ensure legitimacy, mention should be made of its function to enhance control. In the course of the debates in plenary or committee meetings, the opposition forces the government to come up with arguments or at least underpin its decisions; furthermore, it might reveal issues and information for the public. These questions and answers inform the public about the state of public affairs and the performance of the government. As the Hungarian Constitutional Court put it: 'free parliamentary debate contributes to voters being able to have a proper picture of the activities of MPs and other officials holding high public offices and enables them to participate in political discourse and decision-making equipped with adequate information' (Constitutional Court decision No 50/2003. (XI.5.)). Therefore, publicity is the general tool for exercising control; it is its natural environment. The specific tools to obtain information in the course of parliamentary control operate within the following: political debates, questions, interpellations and investigation committees.

For the purpose of analysing the legal institution of parliamentary publicity, we may define the following further considerations beyond democratic legitimacy. The starting point is the general rule of public sittings usually enshrined in constitutions,[61] its practical implementation raises

a) the rules guaranteeing the ordering of in-camera plenary and committee sittings;
b) the accessibility of the plenary and committee sittings, including:
   i) the presence of 'outsiders' in the hall;
   ii) the possibility of a media broadcast of the sittings;
c) furthermore, access to parliamentary papers, documents, including the operational data of Parliament as a state body, legislative proposals and the minutes of votes and checks.

[60] William McKay and Charles W Johnson, *Parliament and Congress: Representation and Scrutiny in the Twenty-First Century* (OUP 2012) 101–105.

[61] As the basis of the constitutional interpretation, see Siegfried Magiera, 'Art. 42' (Öffentlichkeit, Mehrheitsprinzip, Berichterstattung)' Michael Sachs (ed), *Grundgesetz Kommentar* (CH Beck 2011) 1253–58.

Presence in the meeting rooms embodies an obvious, direct but specific form of publicity. Those who have the opportunity to be present in person might gain direct experience of Parliament's work and obtain certain information. However, their personal chance of obtaining information does not guarantee that the public also obtains information in practice. Due to physical constraints, these people are only a few in number and information can reach the broader public only through mediators. Mediation might take the form of reports made by the participants and / or by 'broadcasting', through technical equipment, pictures, audio and video recordings from the sittings.

The Estonian, Polish, Romanian and Bulgarian parliamentary rules of procedure identify the public of the 'gallery', whereas the Croatian Sabor designated the northern section of the gallery for visitors. In Hungary, it is the Speaker of Parliament who might designate places for visitors and the representatives of the media. In this context, a rule that provides a guarantee is Article 59(3) of the Act on Parliament, according to which 'the Speaker can only designate a place for the purpose of broadcasting or recording a programme that does not prevent the conditions for free dissemination of information necessary for the formation of democratic public opinion.'

According to the parliamentary rules of procedure, visitors (the public of the gallery) are obliged to refrain from any form of expressing an opinion, agreement or dislike and generally from interrupting the session.[62] The Act on the publicity of the Croatian Sabor lists specific forms of conduct considered as disturbing and therefore not permitted, such as applause, loud talk, use of mobile telephones, holding placards, taking photographs, etc. (Article 4 (3)).

The specific feature of media presence, compared to the above outlined 'gallery public', is that journalists on the one hand, carry out professional activities when broadcasting sittings; on the other hand, the presence of the technical equipment necessary for broadcasting is given an evaluation different from that of personal observation made by visitors or amateur devices suitable for making recordings, pictures or videos used by them. The right of broadcasting the sittings is recognised in all examined countries without any exceptions. Parliamentary rules of procedure enshrine the right of broadcasting and information concerning journalists' accreditation and codes of conduct similar to the one described above. Parliaments themselves have professionalised the relations with the media by establishing organisational units responsible for press relations and communication.

In the Estonian Parliament film and video recordings and television and radio broadcasts of sittings may be made and photographs of sittings may be taken with the permission of the President of the Riigikogu (Rules of procedure, Article 59). The Presidium of the Lithuanian Seimas regulates the proper rules of procedure and provides for the broadcasting in line with the agreement concluded with national radio and

[62] Sources of explicit parliamentary rules of procedure provisions: Latvian, art 78; Czech, art 20; Slovakian, art 21; Hungarian Act on Parliament, arts 55(2) and 58(1); Romanian Chamber of Deputies, art 140(4); Romanian Senate, art 117(3); Bulgarian, art 45(3).

television (Article 131). However, the rules of procedure declare the official recordings of Parliament to be available for all media service providers and allow further recordings to be made from the designated gallery. While the rules of procedure of the Polish Sejm makes presence on the gallery conditional upon the Marshal's permission, the presence of the media is not subject to such permission (Article 172(2)–(3)). An interesting rule in the Czech Parliament, which also has its own audiovisual network, is that the plenary session might allow the media representatives to be present during in-camera meetings (Article 56).

The Hungarian Act on Parliament includes detailed rules on media presence; after earlier debates it terminates the exclusivity of the close circuit broadcasting and enshrines principles that provide guarantees (Article 59). Under the terms of the law, for the purpose of broadcasting Parliament's sittings and certain committee meetings, a closed circuit audio-visual system is put in place, which is available to media service providers; it can be followed on-line and its recorded broadcasts should be made available in archives, as well. This broadcast is without prejudice 'to the right of any media service provider to broadcast or record a programme from a place designated by the Speaker in the House of Parliament. The Speaker can only designate a place for the purpose of broadcasting or recording a programme that does not prevent the conditions for free dissemination of information necessary for the formation of democratic public opinion.' The public sittings of the parliamentary committees not broadcast by the closed circuit system may be broadcast or recorded by the media service provider. The technical preparations of the broadcasting and its proceeding must not disturb the sitting of the committee. Under the terms of the Act on Parliament 'The aim of video broadcasting the sittings of the Parliament and of the parliamentary committees shall be to provide impartial, balanced, accurate, and factual information for the viewers about the activity of the Parliament. The television broadcasting shall be in line with the activity of the Parliament, focusing on the actual events and the work of the Parliament, in particular the chair of the sitting, the actual speakers, the presentation of the results of the vote, the floor as a whole, and other events that take place on the floor. The video editing shall be objective and factual, in line with the proceeding of the sitting.' The text would need to be clarified in respect of these requirements: it is not clear whether these requirements apply only to the closed circuit or to private broadcasting as well.

In the Lithuanian Seimas the press office organises the press conference of MPs and the rules of procedure prescribe the obligation to provide at least two press conferences a week for opposition parties (Article 132). According to the Croatian rules of procedure (Article 288), press conferences possess multiple layers on the activities and the results of the Sabor; press conferences can be held based on the decision of the plenary, the Presidium or the Speaker, whereas press conferences on committee meetings can be organised on the basis of the decision taken by the chair of the given committee. In addition, parliamentary groups may also hold press conferences with no limitation.

Internal guarantees of parliamentary debates

We must also tackle the constitutional guarantees of substantive parliamentary debate as such. For the legislative body to be able to exercise its powers, it is indispensable that MPs should have the right to take the floor and provide alternatives. Therefore, the guarantees of parliamentary debates are the time frames provided for contributions, regular sittings and the possibility to submit legislative proposals. The beneficiary of these devices by nature is the so-called opposition.

The democratic nature of the parliamentary debate of public affairs, the agenda (order of the day), is guaranteed by the fact that every political factor, even each individual MP, might take the floor in the plenary and express their opinion. Parliamentary debate, the freedom of expression, is one of the most important contexts of the existence of the opposition because this is the only way they can fulfil their roles. However, the rules of procedure should also serve the efficient functioning of the Parliament by limiting oppositional techniques to postpone or prevent decision-making, ie obstruction. Bringing parliamentary functions in line with one another is one of the most beautiful challenges of constitutional legal regulation of parliaments. The role of parliaments is in transformation: they are no longer the exclusive forum for political debates and the expression of opinions. Hence, Members of Parliament have to make do with the limited time available to them; at the same time, the time guaranteed by the rules of procedure (to be defined and to be of adequate length) guarantees their opportunity to take the floor and make their contribution. By violating MPs' rights guaranteed by the rules of procedure, the democratic decision-making procedure suffers a severe injury, and the validity of legislation also becomes questioned.

> The constitutional requirements of the democratic exercise of power include the efficient functioning of the institutional system (including the Parliament) according to the rule of law and, at the same time, the constitutional protection of the MPs' activities, based on popular sovereignty and which are to be performed in order to serve the public interest. The essence of work in the Parliament includes an in-depth analysis of the issues to be debated and listening to various views. Consequently, exercising powers declared in the Constitution via representatives typically takes place in the legislative process. In this process, the preparation of decisions and the discussion of legislative proposals (representatives' right to speak) are of decisive importance.[63]

Due to the content of political discourse affecting public opinion, the European Court of Human Rights (ECtHR) provided a high level of protection against disciplinary sanctions for the expression of opinions in the assembly hall made by MPs off the orders of the day. The ECtHR condemned the Hungarian Parliament because of a provision of the rules of procedure. In line with this provision, a fine was imposed on MPs of the opposition parties who expressed their opinions by lifting banners and

[63] Constitutional Court decision no 12/2006. (IV. 24.) confirmed by Constitutional Court decision no 164/2011. (XII. 20.).

taking them around the hall. The fine was imposed without justification and the possibility of legal remedy, even though there was no evidence proving the severe violation of parliamentary procedures.[64]

As regards setting the orders of the day of Parliament (and thereby indirectly thematising public discourse), it is generally the responsibility of the Presidium of Parliaments and the Speaker. The political minority is given the right to set the order of the day when they are given the opportunity to put certain issues on the agenda of ordinary sessions and so they might thematise parliamentary debates themselves, or they might determine the whole political discourse. Such opportunities are provided, for example,

– in the Hungarian Parliament[65] where one-fifth of the MPs have the right to initiate a day of political debate, which may not be shorter than 4 hours;
– in the Lithuanian Seimas,[66] by the parliamentary groups of the opposition, which have the right to set the agenda of the day of the afternoon sittings every third Thursday and this proposal for the agenda is not subjected to a vote by the plenary (taking into consideration the principle of proportional representation of the political groups of the Opposition, the Board of the Seimas designates the oppositional parliamentary group responsible for the agenda);
– in the Bulgarian National Assembly[67] each parliamentary group has the right to set one agenda point on the first Wednesday of every month.

Concluding thoughts

The main dimension of the analysis of political discourses, from the perspective of constitutional law, is provided through the freedom of expression. From the nature of the freedom of expression, it follows that its recognition as a fundamental right is only one aspect of constitutional guarantees. It is the state that has the obligation to lay the foundations of the freedom of expression in several cases, as part of its positive obligations relating to the protection of institutions. On the one hand, it has to provide arenas (communication fields) for public opinion and deliberation; on the other hand, in order to ensure the well-established expression of opinion, it must also provide information for the actors involved in communication. States should classify information of public interest, with the exception of a limited number of issues which are to be classified; and it should link the debates imagined as deliberative and taking place in the

[64] *Karácsony and others v Hungary* (App nos 42461/13 and 44357/13). At the same time, this disciplinary provision was declared acceptable by the Hungarian Constitutional Court, see Constitutional Court decision no 3206/2013. (XI.18.).

[65] Parliamentary Resolution 10/2014. (II. 24.), art 86.

[66] Statutes of Seimas, art 97(5).

[67] Rules of procedure, art 49(7).

bodies of people's representation with the publicity given to community argumentation. Institutionalising European standards of fundamental rights brings divided power over the public sphere. On this basis, the regulation by the state, which is also self-restricting, needs to make the following elements pluralistic: access to the possibility of thematising public discourse, access to the platforms where information for citizens can be provided and access to adequate resources. In the legal systems of Central Europe, we observed specific schemes of legal regulation, the questionable practices of which have been evaluated several times in the European context in Strasbourg, Brussels, etc. As a result, we might expect the slow enforcement and implementation of European standards in the still young democracies.

Geoffrey R Stone

Free speech in the twenty-first century:

Ten lessons from the twentieth century

At the turn of the twentieth century, we knew almost nothing about the First Amendment. Although there had been important disputes about free speech over the Sedition Act of 1798, the suppression of abolitionist literature in the early nineteenth century, and during the Civil War, and although both state and federal courts had occasionally wrestled during the nineteenth century with such diverse free speech issues as obscenity and lotteries, for the most part there was no settled understanding about the meaning of the First Amendment.[1]

At the dawn of the twenty-first century, however, we have an astonishingly rich, multi-faceted, and often maddeningly complex free speech jurisprudence. What I will try to do in this essay is to identify the ten judgments that the Supreme Court made during the course of the twentieth century that most fundamentally shaped the overall framework of contemporary First Amendment doctrine.

Understanding the text

The first fundamental judgment we made in the twentieth century is that the First Amendment does not mean what it says. 'Congress', it says, 'shall make no law . . . abridging the freedom of speech, or of the press.' Most obviously, we decided that 'Congress' does not mean Congress. Rather, it means the 'national government', including the executive and judicial branches, despite the express and rather puzzling limitation of the text. Moreover, after the enactment of the Fourteenth Amendment and the advent of the incorporation doctrine, we decided that 'Congress' effectively means the 'government', which includes not only the national government, but all state and local governments, as well.[2]

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[1] See Geoffrey R Stone, *Perilous Times: Free Speech in Wartime* (WW Norton 2004) 15–78 (Sedition Act of 1798); Michael Kent Curtis, *Free Speech: 'The People's Darling Privilege'* (Duke University Press 2000) 105–16 (abolitionist literature); David Rabban, *Free Speech in Its Forgotten Years, 1870–1920* (CUP 1997) (free speech between 1870 and 1920).

[2] See *Gitlow v New York,* 268 US 652 (1925) (application of the First Amendment to the states).

We also decided that the First Amendment does not mean what it *appears* to mean. The text says that the government may not abridge the freedom of speech. At first blush, this appears to suggest that the government may not restrict an individual's freedom to say what he wants, where he wants, how he wants, and when he wants. But Justice Oliver Wendell Holmes decisively put this apparent meaning to rest in *Schenck v United States*[3] with his famous example of a false cry of fire in a crowded theatre. From that moment on, we have acknowledged that although the government may not 'abridge' the freedom of speech, we must define what we mean by the 'freedom of speech' that the government may not abridge. That freedom, in other words, is not self-defining and, indeed, nothing in the text of the First Amendment helps us to decide what it means.[4]

Rejecting absolutism, ad hoc balancing, and a unitary standard

The second fundamental judgment we made in the twentieth century was to reject three strongly-advocated approaches to interpreting the First Amendment. The first of these approaches, championed by Justice Hugo Black, insisted that the First Amendment is an absolute—that is, 'no law' means 'no law'.[5] To make this approach credible in the light of Justice Holmes's false cry of fire, its advocates had to define rather narrowly 'the freedom of speech' that could *never* be abridged. Otherwise, absolute protection would require all sorts of implausible outcomes. Ultimately, we rejected this approach because the broad range of issues posed by the First Amendment proved too varied and too complex to be governed sensibly by a simple absolute protection vs. no protection dichotomy.[6]

We also rejected ad hoc balancing as a general approach to First Amendment interpretation. Under this approach, the task of the Court would be to weigh the benefits of restricting speech against the benefits of protecting speech in each case in order to decide whether the challenged restriction is reasonable. In theory, this approach seems sensible, but in practice it proved unworkable. It turns out to be incredibly difficult to

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[3] *Schenck v United States*, 249 US 47 (1919).

[4] A related conclusion was the judgment that the First Amendment is not limited to the Blackstone conception of prohibiting only previous restraints. See *Schenck v United States* (n 3) 51–52.

[5] See Hugo Black, 'The Bill of Rights' (1960) 35 *NYU Law Review* 865, 874, 879 (arguing that the 'phrase "Congress shall make no law" is composed of plain words, easily understood' and that the language is 'absolute'.) See also Hugo Black, *A Constitutional Faith* (Knopf 1968) 43–63; Hugo Black and Edmond Cahn, 'Justice Black and First Amendment "Absolutes": A Public Interview' (1969) 37 *NYU Law Review* 549; Thomas Emerson, 'Toward a General Theory of the First Amendment' (1963) 72 *Yale Law Journal* 877; *Koningsberg v State Bar of California*, 366 US 36 (1961).

[6] For examples of cases that strained J Black's 'absolutist' approach, see *Adderley v Florida*, 389 US 39 (1966) (J Black rejecting First Amendment right to speak on public property); *Cohen v California*, 403 US 15 (1971) (J Black dissenting from decision holding that state cannot constitutionally prohibit the use of the word 'fuck' in public); *Tinker v Des Moines School District*, 393 US 503 (1969) (J Black dissenting from a decision holding that students have a right to free speech).

identify and assess all of the many factors that should go into this judgment on a case-by-case basis. As a result, its application would produce a highly uncertain, unpredictable and fact-dependent set of outcomes that would leave speakers, police officers, prosecutors, jurors and judges in a state of constant uncertainty. Thus, although this approach arguably sought to ask the right question, it attempted to do so in a manner that proved fatally unpredictable.[7]

The third approach we rejected in the twentieth century was the notion that a single standard of review should govern all First Amendment cases. Whether that standard is set at a high level of justification, such as clear and present danger, strict scrutiny, or necessary to promote a compelling government interest, or at a low level of justification, such as reasonableness or rational basis review, it became readily apparent that a 'one size fits all' standard would not do the trick. Applied in a consistent manner, any single standard would inevitably dictate implausible results, sometimes insufficiently protective of free speech, sometimes insufficiently respectful of competing government interests. The only single approach that could sensibly apply in all cases was ad hoc balancing, but for the reasons already noted, that test was too vague. So, in short, we concluded that there is no unified field theory of the First Amendment—no single test that can apply to all cases.[8]

Now, when I say that these standards would dictate results that would be unacceptably over- or under-protective of free speech, what I am obviously assuming is that there is some set of results that most reasonable people—including the justices of the Supreme Court—would properly regard as clearly 'right' or clearly 'wrong'. And that, of course, assumes that we have some intuitive sense of what the First Amendment sensibly means. What I am suggesting, in other words, is that we built First Amendment doctrine backwards—not from theory to doctrine to results, but from intuited results to doctrine, with only passing attention to theory. This is an important point, for it suggests that First Amendment doctrine as we know it today is largely the product of practical experience rather than philosophical reasoning.

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[7] On ad hoc balancing, see Laurent B Frantz, 'Is the First Amendment Law?' (1963) 51 *California Law Review* 729; Wallace Mendelson, 'On the Meaning of the First Amendment: Absolutes in the Balance' (1962) 50 *California Law Review* 821, 825–26; Laurence H Tribe, *American Constitutional Law* (The Foundation 1978) 583–84; Alexander Bickel, *The Least Dangerous Branch* (Yale University Press 1962) 93–97; Alex Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 *Yale Law Journal* 943.

[8] On definitional balancing and the recognition that a series of separate and distinct rules were necessary for different First Amendment issues, see William Van Alstyne, 'A Graphic Review of the Free Speech Clause' (1982) 70 *California Law Review* 107; Melville B Nimmer, 'The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy' (1968) 56 *California Law Review* 935; Steven Shiffrin, 'Defamatory Non-Media Speech and First Amendment Methodology' (1978) 25 *UCLA Law Review* 915; John Ely, 'Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis' (1975) 88 *Harvard Law Review* 1482; Tribe (n 7) 583–84.

Learning the lessons of experience

This, then, brings me to my third twentieth-century judgment. While we were in the process of rejecting these three proposed approaches to First Amendment interpretation, we learned several practical lessons about the workings of what Professor Thomas Emerson once called 'the system of free expression'—lessons that played a critical role in shaping contemporary First Amendment jurisprudence.[9] Three such lessons, or effects, are especially worthy of note.

First, we learned about the so-called 'chilling effect'. That is, we learned that people are easily deterred from exercising their freedom of speech. This is so because the individual speaker usually gains very little personally from signing a petition, marching in a demonstration, handing out leaflets, or posting on a blog. Put simply, except in the most unusual circumstances, whether any particular individual speaks or not is unlikely to have any appreciable impact on the world. Thus, if the individual knows that he might go to jail for speaking out, he will often forego his right to speak. This makes perfect sense for each individual. But if many individuals make this same decision, then in the words of Professor Alexander Meiklejohn, the net effect will often be to mutilate 'the thinking process of the community'.[10] Recognition of this chilling effect, and of the consequent power of government to use intimidation to silence its critics and to dominate and manipulate public debate, was a critical insight in shaping twentieth-century free speech doctrine.[11]

Second, we learned in the twentieth century about what we might call the 'pretext effect'. That is, we learned that government officials will often defend their restrictions of speech on grounds quite different from their real motivations for the suppression, which will often be to silence their critics and to suppress ideas they do not like. The pretext effect is not unique to the realm of free speech, but it is especially potent in this context, because public officials will often be sorely tempted to silence dissent in order to insulate themselves from criticism and preserve their own authority.

Of course, the very idea of the pretext effect turns on what we mean by legitimate and illegitimate reasons for restricting speech. One thing we decided in the twentieth century is that the First Amendment forbids government officials from suppressing particular ideas because they don't want citizens to accept those ideas in the political process. This principle, which was first clearly stated in the Supreme Court in 1919 in Justice Holmes's dissenting opinion in *Abrams v United States*,[12] is central to

[9] See Thomas Emerson, *The System of Free Expression* (Random House 1970).

[10] Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (Harper Brothers 1948) 24–27.

[11] On the chilling effect, see *Lamont v Postmaster General*, 381 US 301 (1965); *New York Times v Sullivan*, 376 US 254 (1964); *Bartnicki v Vopper*, 532 US 514 (2001) (CJ Rehnquist, dissenting); Paul A Freund, 'The Supreme Court and Civil Liberties' (1950) 4 *Vanderbilt Law Review* 533, 539.

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

contemporary First Amendment doctrine and rests at the very core of the 'pretext' effect's strong suspicion of any government regulation of speech that is consistent with such an impermissible motive.[13]

Third, we learned about what we might call the 'crisis effect'. That is, we learned that in times of crisis, real or imagined, citizens and government officials tend to panic, to grow desperately intolerant, and to rush headlong to suppress speech they can demonise as dangerous, subversive, disloyal, or unpatriotic. Painful experience with this crisis effect, especially during World War I and the Cold War, led us to embrace what Professor Vincent Blasi has aptly termed a 'pathological perspective' in crafting First Amendment doctrine. That is, we structure First Amendment doctrine to anticipate and to guard against the worst of times.[14]

The content-based / content-neutral distinction

This, then, brings me to my fourth observation about what we learned in the twentieth century. Having rejected absolutism, ad hoc balancing, and the quest for a unitary standard of review, we divided First Amendment issues into a series of distinct problems, in the hope of addressing each of them separately with a specific standard that would be relatively predictable and easy to administer, would approximate the results of ad hoc balancing, and would guard against the chilling, pretext and crisis effects.

The critical step in this development was the Court's recognition of the content-based/content-neutral distinction. Until roughly 1970, the Court did not clearly see that laws regulating the content of expression pose a different First Amendment issue than laws regulating expression without regard to content. The Court first articulated this concept in an otherwise uneventful 1970 decision, *Schacht v United States*.[15] In *Schacht,* the Court held unconstitutional a law prohibiting soldiers from wearing their uniforms in theatrical productions if those productions held the military in contempt.

Although conceding that the government could constitutionally prohibit soldiers from wearing their uniforms in all theatrical productions—a regulation that would be content-neutral, the Court nonetheless held it unconstitutional for the government to prohibit soldiers from wearing their uniforms only in productions that mock the military. In effect, the Court held that a content-neutral law that banned more speech was less problematic under the First Amendment than a content-based law that banned less

[13] On the pretext effect and improper motivation, see Elena Kagan, 'Private Speech, Public Purpose: The Role of Government Motive in First Amendment Doctrine' (1996) 63 *University of Chicago Law Review* 415.

[14] On the crisis effect and the pathological perspective, see Vincent Blasi, 'The Pathological Perspective and the First Amendment' (1985) 85 *Columbia Law Review* 449; Stone (n 1) 542–50.

[15] *Schacht v United States*, 398 US 54 (1970).

speech. As the Court put the point, the government cannot constitutionally punish soldiers for wearing their uniforms to protest 'the role of . . . our country in Vietnam' while at the same time allowing them to wear their uniforms to 'praise the war in Vietnam'. Such a distinction, the Court declared, 'cannot survive in a country which has the First Amendment.'[16]

Now, this might seem obvious to us today, but it was not at all obvious at the time. It was, indeed, a pivotal insight, and the Court followed it up two years later in *Police Department of Chicago v Mosley*,[17] in which the Court invalidated a Chicago ordinance prohibiting peaceful picketers, except peaceful labour picketers, from picketing near a school while the school was in session. The Court assumed that a content-neutral ban on all picketing in such circumstances would be constitutional, but as in *Schacht* it invalidated the seemingly less speech-restrictive content-based ban, explaining that because there is an 'equality of status in the field of ideas', the 'government must afford all points of view an equal opportunity to be heard.' The Chicago ordinance, the Court declared, '"slip[s] from . . . neutrality . . . into a concern about content." This is never permitted.' The Court added that, at the very least, such content-based regulations 'must be carefully scrutinized'.[18]

With *Schacht* and *Mosley*, we entered a new era in First Amendment jurisprudence. Ever since those decisions, the first question we must ask about any First Amendment case is whether the challenged regulation is content-based or content-neutral, for the answer to that question dictates the terms of the constitutional inquiry. Some scholars, such as Professors Martin Redish and Barry McDonald, have criticised this distinction as simplistic, wooden, and unduly rigid.[19] Other commentators, including myself, have defended it as a sensible organising principle that enables us to sort First Amendment problems in a way that responds to a host of concerns, including the chilling, pretext and crisis effects.[20]

In brief, the rationale for analysing content-based restrictions differently from content-neutral restrictions, and for being particularly suspicious of them, is that

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16 ibid 58.

17 *Police Department of Chicago v Mosley*, 408 US 92 (1972).

18 ibid 99.

19 See Martin Redish, 'The Content Distinction in First Amendment Analysis' (1981) 34 *Stanford Law Review* 113; Barry McDonald, 'Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression' (2006) 81 *Notre Dame Law Review* 1347. See also Ash Bhagwat, 'Purpose Scrutiny in Constitutional Analysis' (1997) 85 *California Law Review* 297; Wilson R Huhn, 'Assessing the Constitutionality of Laws that are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus' (2004) 79 *Indiana Law Journal* 801.

20 See Geoffrey R Stone, 'Content-Neutral Restrictions' (1987) 54 *University of Chicago Law Review* 46; Geoffrey R Stone, 'Content Regulation and the First Amendment' (1983) 25 *William & Mary Law Review* 189; Geoffrey R Stone, 'Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions' (1978) 46 *University of Chicago Law Review* 81. See also Ely (n 8); Paul Stephan, 'The First Amendment and Content Discrimination' (1982) 68 *Vanderbilt Law Review* 203; Kagan (n 13) 446–63.

content-based restrictions are more likely to skew public debate for or against particular ideas and are more likely to be tainted by a constitutionally impermissible motivation. The Court's recognition of this distinction was the fourth critical step in the evolution of twentieth-century free speech jurisprudence.

A strong presumption against content-based restrictions

The fifth important twentieth-century development relates to the content-based side of this distinction. Recognising that content-based and content-neutral regulations pose different First Amendment problems does not tell us how to evaluate the constitutionality of specific laws that fall on one or the other side of the line.

In *Mosley*, Justice Thurgood Marshall, who authored the Court's opinion, offered several strong statements about the constitutionality of content-based restrictions, noting, for example, that content regulation 'is not permitted', that regulations of speech 'may not be based on content', and that content-based restrictions must be subjected to 'careful scrutiny'. In declaring content-based restrictions at least presumptively unconstitutional, *Schacht* and *Mosley* gave structure to an insight that had stumbled around in First Amendment discourse from its earliest days. Beginning with the writings of Professor Zechariah Chafee[21] and the early dissenting and concurring opinions of Justices Holmes and Brandeis in cases such as *Abrams v United States* and *Whitney v California*,[22] and running through the later dissenting opinions of Justices Black and Douglas in cases such as *Dennis v United States*,[23] a minority view had forcefully argued that at least some types of content-based restrictions should be declared unconstitutional unless the government could prove that the speech created a clear and present danger of grave harm.

But it wasn't until *Brandenburg v Ohio*[24] in 1969 and the *Pentagon Papers* decision[25] in 1971 that the Supreme Court clearly embraced this view. *Schacht* and *Mosley*, which were decided within a year of those decisions, were tied directly to this pivotal shift in First Amendment doctrine.

It is noteworthy that, in declaring content-based restrictions presumptively unconstitutional, *Schacht* and *Mosley* also drew on the Court's Equal Protection Clause jurisprudence, which at the time was better developed than its First Amendment jurisprudence.[26] The Court invoked the Equal Protection Clause because *Schacht* and

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21 See Zechariah Chafee, *Free Speech in the United States* (Harvard University Press 1941).

22 *Abrams v United States* (n 12); *Whitney v California*, 274 US 357 (1927).

23 *Dennis v United States*, 341 US 494 (1951).

24 *Brandenburg v Ohio*, 395 US 444 (1969).

25 *New York Times Co. v United States*, 403 US 713 (1971).

26 See Kenneth Karst, 'Equality as a Central Principle in the First Amendment' (1975) 43 *University of Chicago Law Review* 20; Geoffrey R Stone, 'Kenneth Karst's Equality as a Central Principle in the First Amendment' (2008) 75 *University of Chicago Law Review* 37; Geoffrey R Stone, 'Fora Americana: Speech in Public Places' (1974) *Supreme Court Review* 233, 274–80.

Mosley were different kinds of First Amendment cases than the Court was used to. In the typical First Amendment case, the government prohibits certain speech, such as criticism of the war or the violent overthrow of government, and the defendant argues that the law violates his right to free speech.

Schacht and *Mosley*, however, were, at bottom, equality cases. In each case, the Court conceded that a content-neutral law—prohibiting all soldiers from wearing their uniforms in theatrical productions or prohibiting all protestors from picketing near schools—would be constitutional. The defendants' constitutional claim was therefore not that they had a First Amendment right to wear a uniform in theatrical productions or to picket near schools, but that they had a right to be treated equally with other speakers the government allowed to wear a uniform or picket near schools. In effect, then, the constitutional violation in these cases was one of under-inclusion. That is, the government violated the First Amendment not because it limited Schacht's and Mosley's right to speak, but because it discriminated against them based on the content of their message.

This is significant because it was the inequality issue that enabled the Court to draw the critical insight about content-based restrictions that then shaped its approach to such restrictions more generally. Building upon its Equal Protection Clause jurisprudence, the Court invoked the language of 'strict scrutiny', which, as Professor Gerald Gunther was soon to point out, was 'strict in theory, but fatal in fact'.[27] Indeed, it was for that reason that Justice Marshall could easily conflate the language of strict scrutiny with the language of 'impermissible', for in practical effect by the early 1970s those two phrases had come to mean essentially the same thing. Put differently, the Court seemed to be saying in *Mosley* that content-based regulation in the First Amendment context was analogous to discrimination against African-Americans in the Equal Protection context.

Except in the most extraordinary of circumstances, such laws are, in *Mosley*'s words, 'impermissible'. As Professor Kenneth Karst noted at the time, the Court in these cases recognised for the first time equality as a 'central principle in the First Amendment'.[28] In important respects, this doctrinal development stabilised a central part of First Amendment doctrine. With two significant exceptions, which I will address shortly —low value speech and what I will loosely call 'special circumstances'—the Court has adhered to this doctrine, with the result that it has not upheld a single content-based restriction of speech not involving one of these two exceptions, in half a century.

The key point I want to make about this development is that it was the combination of the early clear and present danger arguments of Holmes and Brandeis with the strict scrutiny element of the Court's Equal Protection jurisprudence that finally enabled the Court to deal effectively with the chilling, pretext and crisis effects. By recognising that

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[27] Gerald Gunter, 'Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection' (1972) 86 *Harvard Law Review* 1, 8.

[28] Karst (n 26).

these dangers are most likely to arise when the government targets speech of a specific content, and by making it almost impossible for the government to justify such laws, the Court went a long way toward solving those critical First Amendment problems.

Low value speech

This brings me to the sixth important twentieth-century development—the concept of low value speech. One obvious problem with a doctrine that presumptively holds all content-based restrictions unconstitutional is that there may be some types of content that do not merit such protection. Some speech might not sufficiently further the values and purposes of the First Amendment to warrant such extraordinary immunity from regulation. In part, this was what Justice Holmes was getting at with his false cry of fire.

The Court first formally recognised this concept in its 1942 decision in *Chaplinsky v New Hampshire*, which declared that 'there are certain well-defined and narrowly limited classes of speech' that 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'[29] Over the years, the Court has characterised several categories of speech as 'low value', including express incitement of unlawful conduct, threats, fighting words, false statements of fact, obscenity, and commercial advertising. Following *Chaplinsky*, the Court has held that because these categories of expression do not further core First Amendment values, they can be restricted without meeting the usual standards of First Amendment review.[30]

Whether this doctrine is justified has been a matter of some controversy, both as to its existence and as to the specific categories of speech that have—and have not—been deemed of 'low' value. Professor Cass Sunstein has suggested that the Court considers four factors in determining whether speech qualifies as 'low value': whether the speech is 'far afield from the central concerns of the First Amendment' (which he defines as 'effective popular control of public affairs'), whether there are important 'non-cognitive aspects' of the speech, whether 'the speaker is seeking to communicate a message,' and whether the speech is in an area in which the 'government is unlikely to be acting for constitutionally impermissible reasons.'[31] I have offered a slightly different four-factor explanation, noting that low value speech does not 'primarily advance political

[29] *Chaplinsky v New Hampshire*, 315 US 568, 571–72 (1942).

[30] See ibid (fighting words); *Gertz v Robert Welch, Inc*., 418 US 323 (1974) (false statements of fact); *Roth v United States*, 354 US 476 (1957) (obscenity); *Virginia State Board of Pharmacy v Virginia Consumer Council*, 425 US 748 (1976) (commercial advertising); *Watts v United States*, 394 US 705 (1969) (threats); *Virginia v Black*, 538 US 343 (2003) (threats); *Gitlow v New York* (n 2) (express incitement).

[31] Cass Sunstein, 'Pornography and the First Amendment' (1986) *Duke Law Journal* 589, 603–604.

discourse', is not defined in terms of 'disfavored ideas or political viewpoints', usually has 'a strong non-cognitive' aspect, and has 'long been regulated without undue harm to the overall system of free expression.'[32]

Although the precise rationale of these categories remains controversial, and although some scholars, such as Professor Thomas Emerson, have attacked the very existence of the doctrine on the ground that it injects the Court 'into value judgments [foreclosed] to it by the basic theory of the First Amendment,'[33] my own view is that the low value doctrine is a sensible and pragmatic compromise that serves a salutary function by operating as a useful safety valve, enabling the Court to deal reasonably with somewhat harmful, but relatively insignificant, speech—without requiring the Court to dilute the protection it properly accords speech at the very heart of the guarantee.

Moreover, two significant developments in the Court's application of the low value doctrine have cabined its impact. First, as noted in my fourth factor, the Court has been quite reluctant to recognise new 'low value' categories that have not been well-established over time. Although this can be criticised as unduly rigid, it constrains what might otherwise be the temptation to manipulate the low value doctrine in ways that would more seriously implicate Emerson's concerns. That is, confining the concept of 'low value' speech to those categories that have been recognised as 'low value' time out of mind lessens the risk that judges will conflate politically unpopular ideas with constitutionally low value speech. (The debate over this question, by the way, has been especially acute in recent decades over the issues of violent expression, hate speech, pornography, and non-newsworthy invasions of privacy.)

The second constructive limitation on the scope of the low value doctrine concerns the degree of protection accorded such speech. Originally, the Court treated 'low value' speech as completely unprotected by the First Amendment. Restrictions of such speech therefore received essentially no First Amendment scrutiny.[34] Since *New York Times v Sullivan* in 1964, however, the Court has increasingly abandoned the idea that regulations of low value speech are immune from First Amendment review. Beginning with *Sullivan*, the Court has recognised that restrictions of even low value speech can pose significant dangers to free expression.

In some instances, illustrated by the false statements of fact at issue in *Sullivan*, low value speech may itself have no First Amendment value, but regulations of such speech may have spillover or chilling effects on speech with important First Amendment value. The threat of liability for false statements of fact, for example, may chill speakers from making even true statements. As the Court recognised in *Sullivan,* regulations of low

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[32] Geoffrey R Stone, 'Sex, Violence, and the First Amendment' (2007) 74 *University of Chicago Law Review* 1857, 1863–64.

[33] Emerson (n 9) 326.

[34] See Harry Kalven, Jr, 'The Metaphysics of the Law of Obscenity' (1960) *Supreme Court Review* 1.

value speech must take such effects into account in order to pass constitutional muster. In other instances, even low value speech may have some First Amendment value. This is illustrated by the Court's 1974 decision in *Virginia Pharmacy*, which held that although commercial advertising may be of only low First Amendment value, it nonetheless serves a useful informational purpose and must therefore be accorded significant if not full First Amendment protection.

Using these two considerations, the Court over the past half-century has engaged in what Professor Melville Nimmer has usefully described as a process of categorical balancing with respect to these low value categories, attempting to fine-tune the degree of constitutional protection accorded each category based upon its relative First Amendment value and the risk of chilling valuable expression.[35]

Content-based restrictions in special circumstances

The seventh important twentieth-century development also involves content-based regulation, but relates to what I earlier described as the 'special circumstances' exception to the strong constitutional presumption against content-based regulation. The key problem here is that, even apart from low value speech, an almost absolute presumption against content regulation often turns out to be too speech-protective. There are some circumstances, in other words, in which such a presumption would demand too great a sacrifice of competing government interests without sufficiently serving important First Amendment values.

Alas, there is a long list of such 'special circumstances', ranging from regulations of speech by government employees, to regulations of speech on public property, to regulations of speech by students, soldiers, and prisoners, to regulations of the government's own speech, to regulations that compel individuals to disclose information to the government.[36] In theory, of course, it would be possible to apply the strict presumption against content-based regulation in all of these situations, but this would sometimes produce unwise and even foolish results. Consider a high school mathematics teacher who asserts a First Amendment right to preach Marxist doctrine instead of the Pythagorean Theorem in her mathematics classroom. Or an IRS employee who claims a First Amendment right to post confidential tax returns on the Internet. Or a taxpayer who claims that the government cannot constitutionally create a library or museum

[35] Nimmer (n 8) 942–43.

[36] See eg *Pickering v Board of Education*, 391 US 563 (1968) (public employees); *Perry Educators' Association v Perry Local Educators' Association,* 460 US 37 (1983) (public property); *Tinker v Des Moines School District* (n 6) (students); *Parker v Levy*, 417 US 733 (1974) (soldiers); *Jones v North Carolina Prisoners' Union*, 433 US 119 (1977) (prisoners); *Rust v Sullivan*, 500 US 173 (1991) (government speech); *Gibson v Florida Legislative Investigating Committee*, 372 US 539 (1963) (compelled disclosure).

dedicated only to science or American history. Or a witness who claims that a congressional committee cannot constitutionally investigate alleged corruption in Iraq without also investigating the use of steroids by athletes.

All of these examples regulate speech on the basis of content, none involves low value speech, and none poses the sort of clear and imminent danger of grave harm that might otherwise be sufficient to justify a content-based restriction of speech. Must we, then, hold all of these regulations unconstitutional? Examples like these caused the Court to rethink the scope of the strong presumption against content-based restrictions. More specifically, they prompted the Court to rethink two facets of that doctrine.

First, they caused the Court to recognise that not all content-based restrictions are equally threatening to core First Amendment values. On closer inspection, the Court came to realise that regulations of viewpoint are much more dangerous to fundamental First Amendment values than other regulations of content, such as regulations of the subject matter of expression or of the use of profanity or of the use of certain images. Indeed, for many of the same reasons that content-based restrictions were seen as different from and more threatening than content-neutral restrictions, so too were viewpoint-based restrictions seen as different from and more threatening than other forms of content-based restrictions. That is, they are more likely to distort public debate in a politically-biased manner and they are more likely to be motivated by hostility to particular points of view. To return to the Equal Protection analogy on which the content-based/content-neutral distinction was initially founded, one might say that it is really viewpoint-based restrictions that are analogous to laws that discriminate against African-Americans, whereas other types of content-based restrictions more sensibly warrant something akin to an intermediate level of concern.[37]

Although this insight has real force, and although viewpoint-based restrictions are indeed the most problematic form of content-based regulation, the question remains, how much should we make of this insight? One possibility would be to revisit the understanding that flowed from *Schacht* and *Mosley*—that content regulation is presumptively unconstitutional—and to limit that presumption only to viewpoint-based restrictions. That might seem sensible in theory, but as the Court quickly came to recognise the line between viewpoint and other forms of content regulation is often distressingly elusive. In cases like *RAV*,[38] *Rosenberger*, and *Lamb's Chapel*,[39] for example, the Court discovered that in many instances this distinction is far from clear. Does a university policy refusing to subsidise student religious publications regulate content or viewpoint? Does a law prohibiting fighting words only if they are based on

[37] For illustrative decisions recognising this distinction, see *Board of Education, Island Trees Union Free School District v Pico*, 457 US 853 (1982); *Rosenberger v Rector and Visitors of University of Virginia*, 515 US 819 (1995); *Perry Educators' Association v Perry Local Educators' Association* (n 36); *National Endowment for the Arts v Finley*, 524 US 569 (1998); *FCC v Pacifica Foundation*, 438 US 726 (1978); *Bethel School District No 403 v Fraser*, 478 US 675 (1985); *Morse v Frederick*, 127 SCt 2618 (2007).

[38] *RAV v City of St Paul*, 505 US 377 (1992).

[39] *Lamb's Chapel v Moriches Union Free School District*, 508 US 384 (1993).

race regulate content or viewpoint? Does a law prohibiting sexually explicit images on the Internet regulate content or viewpoint? There is no simple answer to these questions.

Thus, to attach great significance to the line between content and viewpoint could generate precisely the sort of uncertainty, ambiguity and confusion that the strict presumption against content regulation was designed to prevent. But to ignore the distinction and to treat all viewpoint and content restrictions alike would require either a dilution of the strict presumption against viewpoint-based restrictions or a large sacrifice of competing and legitimate government interests, as illustrated by the mathematics teacher, public library and congressional witness hypotheticals.

To resolve this dilemma, the Court has essentially split the difference in a rather creative way. In dealing with regulations of speech in general public discourse, the Court has adhered to the strong presumption against all content regulation. But in dealing with what I have termed 'special circumstances', the Court has recognised a distinction between viewpoint and content. Thus, a public library can constitutionally choose to collect books only about American history, but cannot constitutionally choose to exclude books because they criticise the Vietnam War. A government grants programme can constitutionally fund research only about the environment, but cannot constitutionally refuse to fund research because it substantiates global warming. And a public university can constitutionally allow students to post notices on a university bulletin board only if they relate to the curriculum, but cannot constitutionally exclude notices because they criticise the university administration.

Now, I do not want to suggest that this area of First Amendment law is in any way simple, straight-forward or transparent. To the contrary, it is filled with deep ambiguities and complexities. The general proposition, though, is clear. It is that in these special circumstances, when the government is not regulating general public discourse, it can constitutionally regulate content as long as it does so reasonably and in a viewpoint-neutral manner.

For the record, let me identify several facets of continuing complexity in the scope and application of this doctrine. First, as I have already noted, the line between content and viewpoint is often unclear. Although most cases are easy to classify, the marginal cases are genuinely hard.[40] Second, the boundaries of what I have called 'special circumstances' are far from clear, the doctrine is in a state of flux, and some of the sub-categories that make up the core of the doctrine, such as the distinction between non-public forums and limited public forums, are also unclear. Third, and not surprisingly, what constitutes 'reasonable' regulation is often a source of confusion. *Morse v Frederick*, for example, the recent 'Bong Hits for Jesus' decision, illustrates the difficulty of defining 'reasonable'. Fourth, although the prohibition of viewpoint discrimination remains extremely strong even in the context of these 'special

[40] The issue of religious expression has been especially difficult in this regard. See *Rosenberger v Rector and Visitors of University of Virginia* (n 37); *Lamb's Chapel v Moriches Union Free School District* (n 39).

circumstances', it is not absolute. Most notably, as the Court held in *Rust v Sullivan*, when the government itself speaks it can constitutionally insist that its agents convey a point of view the government is legally entitled to communicate. So, for example, if the government wants to discourage abortion or encourage energy conservation, it can constitutionally retain private individuals and agencies to communicate this message on its behalf.

Even acknowledging these myriad and often vexing complexities, the Court's doctrine in this respect is generally sound. The world is a complicated place, and the realist must recognise that constitutional doctrine can never achieve both perfect results and perfect clarity. The challenge is to reach the right result when the right result is most important, while at the same time having reasonably clear and predictable rules that otherwise reach the 'right' result most of the time.

In the realm of content-based regulation, the Court has achieved these conflicting goals reasonably well. In the situation that matters most—the freedom of individuals to express their ideas, beliefs and convictions in public debate without fear of government censorship, existing doctrine has come a long way towards making that aspiration a reality. At the same time, the Court has not pushed the principle of free speech so far that it has either alienated the American people from their own Constitution by demanding absurd results or paralysed the government's capacity to fulfil its most basic responsibilities. This is no small achievement.

Content-neutral restrictions

The eighth major development of twentieth century free speech jurisprudence concerns the other side of the content-based/content neutral divide. Why do we care about laws that do not regulate the content of speech? Consider three laws. The first prohibits anyone from criticising an ongoing war. The second prohibits anyone from criticising the war within one hundred and fifty feet of a military recruiting centre. The third prohibits any billboard in a residential area.

The first law is a classic viewpoint-based restriction that forbids anyone to advocate a specific point of view. Such a law profoundly distorts public debate and was very likely enacted at least in part because of the constitutionally impermissible desire to silence dissent and to manipulate political discourse—although the government would no doubt defend it on other grounds. Such a law directly implicates the most fundamental reasons for protecting free speech and under any credible theory of the First Amendment must be at least presumptively unconstitutional.

The second law is what we might call a 'modest' viewpoint-based restriction. One might sensibly argue that, as compared with the first law, the second is much less troubling. It leaves open broad opportunities for speakers to convey an anti-war message and is therefore much less likely seriously to distort public debate. Nonetheless, the Court clearly decided in the twentieth century to treat this viewpoint-based law like the first one. That is, the Court is unwilling to engage in fine-tuned inquiries into the extent

to which particular viewpoint-based laws actually distort public discourse. In part this is because it is very difficult to assess the actual distorting effects of particular viewpoint-based restrictions, especially when there may be many of them, and in part it is because even modest viewpoint-based laws pose a high risk of constitutionally impermissible motivation. Thus, although one could imagine a regime in which the Court would attempt to assess the distorting effect and the risk of impermissible motivation of every viewpoint-based restriction on a case-by-case basis, the Court has wisely opted for a clear, straightforward, and difficult to evade standard that renders all such laws presumptively invalid.

The third law, prohibiting all billboards in residential areas, does not regulate the content of speech at all. One might therefore argue that it has nothing to do with the First Amendment. One might insist, in other words, that the First Amendment is about censorship and that censorship is about regulating content. Although this is a theoretically plausible approach, the Court has rightly rejected it. But that poses further puzzles, for if content-neutral laws can violate the First Amendment, we need to know how and why they threaten First Amendment values.

To begin, it is important to note that content-neutral laws come in many shapes and sizes. They include, for example, laws prohibiting anyone from publishing a newspaper, handing out leaflets in a public park, scattering leaflets from a helicopter, spending money to elect political candidates, discriminating on the basis of sexual orientation, appearing naked in public, or knowingly destroying a driver's licence. Some of these laws have a severe impact on the opportunities for free expression, whereas others have only a trivial impact. Clearly, a content-neutral law that has a severe impact on the opportunities for free expression should be more likely to be unconstitutional than a content-neutral law that has only a minor impact, and not surprisingly that turns out to be a central concern in assessing the constitutionality of such laws. A robust system of free expression assumes that individuals have ample opportunities to express their views, and content-neutral laws that significantly limit those opportunities should be more closely scrutinised for that reason.

But there are also other reasons why we might be concerned with content-neutral laws, for not only do they limit the opportunities for free speech, but they sometimes do so in a way that has content-differential effects. For example, a law restricting leafleting in public parks will have more of an effect on some types of speakers and on some types of messages than on others. Even though such laws may be content-neutral on their face, they may distort public discourse in a non-neutral manner. Indeed, in some instances the government may enact a content-neutral law in order to achieve a content-differential effect. Consider, for example, laws that have recently been enacted to limit protests near funerals. Although these laws are usually neutral on their face, they were clearly driven in large part by a desire to suppress a particular group of speakers who have engaged in highly offensive protests at the funerals of soldiers.

So, there are several reasons why even content-neutral laws may trouble us. In dealing with such laws, the Court has generally adopted a form of ad hoc balancing, in which it considers many possible factors, including the restrictive impact of the law,

the ability of speakers to shift to other means of expression, the substantiality of the state's interest, the ability of the state to achieve its interest in a less speech-restrictive manner, whether the speech involves the use of private property, whether the speech involves the use of government property, whether the means of expression has traditionally been allowed, whether the regulation has a disparate impact on certain points of view, whether there is a serious risk of impermissible motivation, and whether the law is a direct or incidental restriction of speech. The eighth major development, then, is that content-neutral restrictions of speech are presumptively analysed with a form of ad hoc balancing.

A good example of ad hoc balancing in this context is *Buckley v Valeo*,[41] in which the Court employed such balancing in the realm of campaign finance regulation to uphold contribution limits as relatively modest content-neutral restrictions of free expression but to invalidate expenditure limitations as much more restrictive limitations of free speech. Additional examples would include *City of Ladue v Gilleo*,[42] which invalidated an ordinance prohibiting homeowners from displaying political signs on their property in order to minimise 'visual clutter', and *Martin v City of Struthers*,[43] which invalidated a law prohibiting individuals from 'ring[ing] the door bell' on any homeowner for the purpose of distributing handbills. In both decisions, the Court indicated that some measure of regulation would be permissible (eg limiting the size of the signs or the hours of the handbill distribution), but that a flat ban on these activities violated the First Amendment.

Now, if the Court were really to take all the factors I listed above into account in every case involving a content-neutral restriction, the law in this area would be a complete muddle. That is the nature of ad hoc balancing. To avoid this state of affairs, the Court, as in the content-based context, has therefore attempted to carve out a few specific and recurring categories of content-neutral problems for which it has articulated more clearly-defined rules of decision. I will offer two significant examples.[44]

Public forum doctrine

The first of these examples, which represents the ninth major development in twentieth-century free speech doctrine, involves the public forum problem. The central question here is whether an individual has a First Amendment right to speak on government property over the objections of the government. To begin with, suppose Mary, who

[41] *Buckley v Valeo*, 424 US 1 (1976).

[42] *City of Ladue v Gilleo*, 512 US 43 (1994).

[43] *Martin v City of Struthers*, 319 US 141 (1943).

[44] Despite the effort to carve out some clear rules, there remains a large residual area in the realm of content-neutral regulations in which the Court employs ad hoc balancing. See eg *Buckley v Valeo* (n 41); *City of Ladue v Gilleo* (n 42); *NAACP v Button*, 371 US 415 (1963); *Martin v City of Struthers* (n 43); *Bartnicki v Vopper* (n 11); *Talley v California*, 362 US 60 (1960).

lives on the forty-fourth floor of an apartment building, puts a sign on Joe's front lawn, saying 'Mary Supports Obama', claiming that her speech is protected by the First Amendment. Joe objects to this invasion of his property. Joe will prevail, for two reasons: Joe's private property rights trump Mary's desire to commandeer his property and, in any event, Joe is not the government, so there is no relevant state action to bring Mary's First Amendment rights into play.

Now suppose Mary wants to put her sign not on Joe's front lawn, but on the lawn in front of city hall. The government, like Joe, objects. Here, of course, there is state action, so the First Amendment comes into play. Moreover, Mary maintains that the First Amendment should be understood as guaranteeing her a reasonable opportunity for effective free expression, and putting her sign on the lawn in front of city hall seems reasonable to her. The government responds that it, no less than a private owner of property, has the authority to control the use of its property, and that as long as it acts in a content-neutral manner, and does not discriminate among would-be speakers, it should be free to prohibit Mary's sign.

When this issue first arose in the nineteenth century, Justice Oliver Wendell Holmes, then a justice on the Supreme Judicial Court of Massachusetts, took the view that the government has the same authority as a private individual to exclude those who want to use its property for speech purposes.[45] The Supreme Court, however, has embraced a more nuanced approach. In dealing with this question, the Court has divided public property into essentially two categories. As the Court noted in its 1939 decision in *Hague v CIO*,[46] some public property, most notably parks, streets, and sidewalks, have been dedicated 'time out of mind' for the purposes of 'assembly, communicating thoughts between citizens, and discussing public questions.'[47] The Court reasoned that, wherever the title to such property might rest, the traditional dedication of such property to speech purposes created what Professor Harry Kalven termed a sort of 'First Amendment easement'.[48] Following this line of reasoning, the Court over time developed the principle that in such traditional 'public forums' the government may reasonably regulate expressive activities 'in the interest of all', but may not 'in the guise of regulation' restrict those activities unreasonably.[49]

Under this approach, the Court has generally protected the right of individuals to demonstrate, leaflet, parade, speak, and congregate for expressive purposes in public parks, streets, and sidewalks, subject to reasonable regulation. Thus, a content-neutral prohibition of leafleting on the lawn in front of city hall would be unconstitutional, but a content-neutral law restricting the use of loudspeakers in a public park near a hospital

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[45] See *Commonwealth v David*, 162 Mass 510, 39 NE 113 (1895), aff'd sub nom *Davis v Massachusetts*, 167 US 43 (1897).

[46] *Hague v CIO,* 307 US 496 (1939).

[47] ibid 515.

[48] See Harry Kalven, Jr, 'The Concept of the Public Forum: *Cox v Louisiana*' (1965) *Supreme Court Review* 1.

[49] *Hague v CIO* (n 46) 516.

would be upheld as reasonable. For the most part, this approach has worked reasonably well for these traditional public forums, though serious questions have recently arisen about the way in which public authorities have sometimes limited public demonstrations to so-called 'Free Speech Zones'.[50]

But even if this approach generally works well for traditional public forums—that is, streets, parks, and sidewalks—it still leaves untouched the vast majority of public property. What about a speaker's desire to hand out leaflets in a welfare office, to post signs on the outside of a public building or on the inside of a public bus, to use the government's loudspeakers or printing presses, or to enter a prison, school, military base, or public hospital to speak with inmates, teachers, soldiers, patients, and staff?

Three different approaches have been put forth within the Court on this question. One approach, suggested by Justice Black in *Adderley v Florida* in 1966, insisted that the government, 'no less than a private owner of property',[51] has the authority to limit the use of its property to the purposes to which it has been dedicated. In other words, as long as the government acts neutrally, it has absolute authority to exclude expression from non-public forum public property.

The second approach, advanced most forcefully by Justices William Brennan and Thurgood Marshall in the *Grayned* case in 1972, insisted that the 'crucial question' in every case should be 'whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.'[52] In effect, this approach invites a form of open-ended balancing to determine whether the challenged content-neutral restriction is constitutional.[53]

The third approach, which has carried the day, holds that the government can constitutionally prohibit expressive activity in non-public forum public property as long as the restriction is content-neutral and reasonable. Although 'reasonable' might be understood to imply balancing, the Court has consistently applied this standard in such a way that 'reasonable' means 'not irrational', and the Court has never invalidated any content-neutral restriction under this standard.[54]

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[50] For illustrative decisions, see *Schneider v State*, 308 US 147 (1939); *United States v Grace*, 461 US 171 (1983); *Grayned v Rockford*, 408 US 104 (1972); *Frisby v Schultz,* 487 US 474 (1988); *Madsen v Women's Health Center, Inc.*, 512 US 753 (1994); *Schenck v Pro-Choice Network of Western New York*, 519 US 357 (1997); *Hill v Colorado*, 530 US 703 (2000). On free speech zones, see Nick Suplina, 'The Troubling Mix of First Amendment Law, Political Demonstrations, and Terrorism' (2005) 73 *George Washington Law Review* 395; Timothy Zick, 'Speech and Spatial Tactics' (2006) 84 *Texas Law Review* 581.

[51] *Adderley v Florida* (n 6) 47.

[52] *Grayned v Rockford* (n 50) 116.

[53] See Stone 1974 (n 26) 251–52.

[54] See eg *Greer v Spock*, 424 US 828 (1976) (military base); *Heffron v International Society for Krishna Consciousness*, 452 US 640 (1981) (state fair); *US Postal Service v Council of Greenburgh Civic Associations*, 453 US 114 (1981) (letter boxes); *Members of the City Council of Los Angeles v Taxpayers for Vincent*, 466 US 789 (1984) (public utility poles); but see *International Society for Krishna Consciousness v Lee*, 505, 672 (1992) (invalidating ban on distribution of literature in airport terminals because an airport terminal is a 'public forum').

The result, then, is that there is effectively no First Amendment right to use non-public forum public property for speech purposes, as long as the government acts in a content-neutral manner. Whether this is good or bad is a matter of some debate. The argument against this position, reflected in the Brennan-Marshall approach, is that the First Amendment should be construed to require the government to bend over backwards to accommodate free speech, and that giving the administrators of government property broad discretion to exclude expressive activity will inevitably result in a weak and ineffective marketplace of ideas. The prevailing approach maintains that we already have a robust marketplace of ideas, that individuals do not need to use non-public forum public property to communicate their views effectively, and that a more open-ended approach would swamp the courts with an endless array of petty constitutional disputes about where and when individuals can commandeer public property over the objections of government administrators. For what it is worth, my own view is that the Brennan/Marshall position has the better of the argument, although their view has not prevailed.

It may be useful at this point to offer a simple illustration of the intersection of content-neutral balancing with the Court's approach to content-regulation. Consider, for example, laws designed to improve the marketplace of ideas. Here are three decisions that seem inconsistent but that are readily explained by the interaction of these doctrines. In *Miami Herald Publishing Co. v Tornillo*,[55] the Court considered a state law requiring newspapers to give political candidates an opportunity to reply to attacks. In *Red Lion Broadcasting Co. v FCC*,[56] the Court considered the Fairness Doctrine, which (among other things) required broadcasters to give political candidates who had been attacked on air an opportunity to respond. And in *PruneYard Shopping Center v Robins*,[57] the Court considered a state law requiring privately-owned shopping centres to allow individuals to distribute leaflets on the grounds of their shopping malls. In each instance, the newspaper, broadcaster and shopping centre owner maintained that the law violated the First Amendment by compelling it to associate with speech with which it disagreed.

In *PruneYard*, the Court upheld the shopping centre regulation because it was content-neutral and reasonable. In *Tornillo*, the Court invalidated the right-of-reply statute because it was a content-based regulation not involving any 'special circumstances'. Unlike the law in *PruneYard,* which was content-neutral, the law in *Tornillo* was content-based because it kicked-in only in response to the newspaper's own speech. In *Red Lion*, the Court upheld the fairness doctrine because it was a reasonable, viewpoint-neutral regulation of content on non-public forum public property—that is, the airwaves. *Tornillo* was different from *Red Lion* because it regulated expression by a private speaker on private property, whereas *Red Lion* regulated expression by a private speaker on publicly-owned property. It is analogous to the distinction between *City of Ladue v Gilleo,* which invalidated a prohibition of

[55] *Miami Herald Publishing Co. v Tornillo*, 418 US 241 (1974).
[56] *Red Lion Broadcasting Co. v FCC*, 395 US 367 (1969).
[57] *PruneYard Shopping Center v Robins,* 447 US 74 (1980).

political signs on private property, and *Members of the City Council of Los Angeles v Taxpayers for Vincent*, which upheld a prohibition of political signs on publicly-owned public utility poles.

Incidental impact

This brings me to my tenth and final observation about what we learned in the twentieth century. This observation also concerns a judgment about a sub-problem in the realm of content-neutral restrictions. Here, we are concerned with laws that have an incidental rather than a direct effect on free expression. Illustrations of direct regulation of speech are laws restricting the location of billboards, limiting campaign contributions and expenditures, prohibiting speeches on military bases, and forbidding the posting of signs on public utility poles. Such laws directly and specifically regulate speech.

Illustrations of laws having only an incidental effect on speech are laws prohibiting open fires in public places, as applied to an individual who burns a flag in public; forbidding urinating in public, as applied to an individual who urinates on a military recruiting centre to convey his opposition to the war; requiring witnesses to testify before grand juries, as applied to a reporter who wants to shield her confidential sources; and demanding that we pay taxes, as applied to a citizen who claims that the payment of taxes limits his ability to support his favoured political candidates.

As we have seen, content-neutral laws that directly regulate expression are generally subjected to a form of ad hoc balancing. Laws that have only an incidental effect on free speech, however, are treated as presumptively constitutional. The Court first established this principle in *United States v O'Brien*[58] in 1968, in which the Court upheld a conviction for knowingly destroying a draft card, even though the defendant clearly committed the crime in order to express his opposition to the Vietnam War. Although the Court implied that a form of balancing was appropriate in such cases, as in the non-public forum cases the Court in fact gave great deference to the government.

The logic of this position is that, as compared with laws that directly regulate speech, laws that have only an incidental effect on speech are both less likely to be tainted by impermissible motivations and less likely to have a significant limiting or distorting effect on free expression. Moreover, because every law can conceivably have an incidental effect on someone's speech, a doctrine that required courts to evaluate every such claim would open the door to endless litigation and encourage all sorts of fraudulent claims. For example, if Tom is stopped for speeding, he could claim that he was speeding to protest the speed limit laws.[59]

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[58] *United States v O'Brien*, 391 US 367 (1968).

[59] On incidental restrictions, see Michael Dorf, 'Incidental Burdens on Fundamental Rights' (1996) 109 *Harvard Law Review* 1175; Jeb Jubenfeld, 'The First Amendment's Purpose' (2001) 53 *Stanford Law Review* 767, 769; Kagan (n 13) 494–508; Stone 1987 (n 20) 114.

This doctrine has a broad impact, especially on claims of the press to special First Amendment protection. For example, reporters might argue that in order to gather newsworthy information they should be exempt from laws of otherwise general application that prohibit wiretapping, burglary, trespass, and bribery. Invoking the incidental effects doctrine, the Court, in cases like *Branzburg v Hayes*,[60] has generally rejected such claims.

In at least a few instances, however, the Court has held incidental effects unconstitutional as applied when the incidental effect of the law was seen by the Court as particularly severe. *NAACP v Alabama*,[61] *Brown v Socialist Workers '74 Campaign Committee*,[62] and *Boy Scouts v Dale*[63] illustrate such decisions. In general, however, the Court has erected a strong presumption that laws having a mere incidental effect on speech are not unconstitutional.

Conclusion

With these ten judgments, the Supreme Court has shaped most of our contemporary First Amendment jurisprudence. Given that these principles were adopted by many different justices, with widely varying perspectives, over many decades, it is not surprising that there are inconsistencies, ambiguities, conundrums, and perplexities in the doctrine. On the other hand, by the end of the twentieth century the Court, in my view, had for the most part built a sensible and reasonably effective set of principles for sorting First Amendment issues and for reaching reasonably sound and predictable outcomes.

Although I have my differences with some of these doctrines, on the whole I applaud the Court for exercising common sense, staying focused on the most fundamental values of the First Amendment, learning from its own mistakes and experience, seeking to articulate a set of relatively simple rules—even if they are sometimes both over and under protective of speech—and refusing to let the perfect be the enemy of the good. And now, with that, we can turn to the twenty-first century.

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60 *Branzburg v Hayes*, 408 US 665 (1972).
61 *NAACP v Alabama*, 357 US 449 (1958).
62 *Brown v Socialist Workers '74 Campaign Committee*, 459 US 87 (1982).
63 *Boy Scouts v Dale*, 530 US 640 (2000).

2. Regulation of the new media

Balázs Bartóki-Gönczy

Question marks over the transforming digital media system

Erosion of legal concepts and the role of public media in the digital era[*]

Introduction

The Internet is inducing changes in nearly all areas of our lives, including content and media consumption. Obviously it also affects the currently existing media system that, without exaggeration, is undergoing revolutionary changes. What make the use of the adjective 'revolutionary' justified are the following trends: the changing content distribution ecosystem, the expected decrease in the role of traditional media in the democratic public sphere and the transformation of the ways content is consumed. This phenomenon obviously has numerous aspects that cannot be covered exhaustively within the framework of this paper. Following the short description of the main processes influencing the media system and the market overview of and trends in over-the-top (OTT) content services, two issues, selected as a result of subjective analysis, will be analysed in more depth.

First, I will outline the problem of the legal system lagging behind market processes in an increasing number of cases—occasionally the new types of services stretch existing legislative concepts. As a consequence, similar services might be subject to different regulatory burdens, which have market-distorting effects. In this regard I consequently argue for the need to apply the technology neutrality principle, set as the basic principle of the regulation of EU telecommunications in 2002, to the changed market environment, ie the service rather than the method of provision of that service should be the focus. In connection with on-demand media services, I will address the issue that the 'editorial responsibility' criterion poses increasingly serious interpretation difficulties, not only for the authorities with jurisdiction in the area but also for service providers.

As a second topic, I will discuss the place of public service media in the changed media system, by evaluating whether state intervention remains legitimate but with changed grounds for intervention, ie the needs not satisfied by the market are different from those of a couple of years earlier. Furthermore, public media have not only reflected on the questions of 'what and why' but also the question of 'how' since, in the era of media services built on interaction, and with on-demand content appearing on every medium, innovation is of key importance in market acquisition.

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[*] This article is partially based on the Hungarian National Media and Infocommunications Authority's public consultation document on Over-the-top services, see <http://hunmedialaw.org/essays/>.

Main processes affecting the media system

In the context of mass media, it can be stated without doubt that they had a significant effect on the evolution of society in the twentieth century. Mass media have not strengthened interaction between people (point-to-point communication) but they have strengthened the wide distribution of individual views (point-to-multipoint communication). The printed press was already characterised by this type of unidirectional communication; however, the appearance of video and audio content resulted in even greater convincing power and the greater influencing capability of media content. The opinion forming capability of the media and as such, its role in the operation of democracy is perceived and known by all. A straightforward consequence of this is the structure of the current media regulatory platform, which provides for sufficient guarantees to prevent abuse of this power by anybody (eg regulation of media concentration), to ensure that certain public interest content reaches the viewer in all cases (eg must-carry regulation), and that viewers receive balanced and diverse information. These classic tools of media regulation restrict, to a certain degree, the freedom of expression and the property rights of the media; however, this restriction is justified by the public opinion forming power of the media, which justifies their being surrounded by guarantees in the protection of the public interest. This influencing power, of course, increases in parallel to the audience potential.

In the dawn of television broadcasting, when there was only one public service TV station and then a couple of commercial TV channels available to households, the audience—and the attention—was spread amongst a few actors, thus increasing the influencing power of those in charge of individual media. Back then, the bottlenecks in the transmission infrastructure meant a serious market access constraint for media services. Media services wishing to appear on the terrestrial transmission platform had to win frequency usage rights through tenders; and the evolving analogue cable networks could only provide limited access, compared to the current supply, for linear media services. Due to technological progress, the bottlenecks in the transmission system have gradually disappeared, mainly thanks to the development of individual technologies (digitalisation),[1] and the appearance of alternative broadcasting infrastructures (eg IPTV). By now, consumers are able to access several hundred media services and this obviously exceeds the reception capacities of the average viewer. Hence, the emphasis has slowly switched from resource and transmission capacity bottlenecks to a new kind of bottleneck, namely the limitations of the viewers' attention.

[1] Terrestrial broadcasting and the digitalisation of cable and satellite broadcasting multiplied the content volume that can be transmitted.

In other words, while the media services used to compete for transmission capacity, now they compete for the attention of viewers.[2] Nevertheless, it is important to note that entry barriers to the broadcasting market continue to exist, particularly the high entry cost and the embedded costs.

This is the *status quo*. What might the future bring? We can state, even without prophetic skills, that we face a revolution in TV broadcasting, more precisely in content consumption and communication and a material transformation of the supply. Indeed the demand for and the start of this process can already be perceived today. And this is generated, similarly to many other areas, by the Internet. The greatest change, however, will not be brought by the increase of accessible TV channels and media service providers that become available via the Internet. If this were the only change, it would simply be the continuation of the process already started in the nineties, when digital broadcasting infrastructures suitable for much greater volumes of content (channels) appeared. What warrant the use of the adjective 'revolutionary' are the following trends: (i) the expected decrease in the role of 'traditional' media in democratic public life; (ii) a drastic change in the way content is consumed, and (iii) the changing content distribution ecosystem. These are, of course, processes affecting each other, the essence of which can be summarised as follows.

Mobility and flexibility are basic expectations regarding the latest infocommunication technologies and these criteria play an increasingly important role in the way we consume content. While earlier we consumed exclusively linear (real time) media services, where—to put it simply—the media service provider decided when and what we watch and listen to, now on-demand media services, where the control is basically in the hands of the viewer in terms of when and where to watch the content on offer, are increasingly spreading. In the long term, this process may diminish the role of individual media services in democratic discussion: on the one hand, the consumer does not face content that they do not want to. This trend could be observed earlier, as a result of the capacity increase, allowing there to be separate TV channels for individual (political) 'opinion communities'. On the grounds of the abundant selection of channels, it is already possible that the viewer avoids advertisements and watches, for example, only films. This trend however can be further strengthened in an on-demand media environment, where the viewer is even less exposed to the media service providers: the viewer can decide on the place and time of the content consumption and the content to be accessed. On the other hand, the viewers will never be completely free from exposure, in my opinion, since service providers broadcasting on-demand services will start to develop and use algorithms offering the next content on the basis of the viewer's habits and preferences that are, provided they are accepted by the viewer, actually edited into a linear timeline.

[2] The competition for the attention of the viewers of course existed earlier; however, the limited number of media service providers that had been granted access to the limited transmission capacity could be almost certain of getting the attention of the viewers, in view of the low number of competitors.

As regards the means of content consumption, until recently audiovisual content was nearly exclusively consumed on TV sets, and radio media services on radio sets. The concept of these sets slowly losing its relevance. It can be predicted that the only difference between smart devices connected to the Internet (smart phone, tablet, phablet, laptop, smart TV) will be the screen size—this can be viewed as a culmination of the convergence started in the eighties. In the United States of America, for example, time used for browsing and content consumption on mobile phones (177 minutes per day on average) has already exceeded the time spent in front of the TV (168 minutes per day on average).[3] Content is already accessible on any device, anywhere and anytime, provided we have the appropriate Internet connection. It can be foreseen that every device will run only a single operating system with an application, only part of which can be linked to media content. In practice, the subscriber's package or the content from the media service provider will be only 'an app', alongside the widgets (social sites, video sharing platforms, weather reports, etc.) we are already used to. As we have already become accustomed to for operating systems running on smartphones.

Finally, the most significant change in the ecosystem of digital content distribution is that the earlier 'closed fort' or 'walled garden model' has been replaced by an open model, where the content and transmission services are sharply separable, what is more, are designed to be separate. The system so far was characterised by the fact that the content provider could reach the consumer via the service provider transmitting the signal through its network. The broadcaster therefore exercised control on the media services it allowed access to via its network and the signal was transmitted using a closed and managed network to the end user. This bottleneck will no longer exist with the subscriber's ability to access the services of media providers and independent content directly on the Internet, via their Internet access. These service providers, made available online outside the closed system of the broadcaster, are called OTT service providers.

The OTT content services market

What is the definition of OTT services?

Although there is no generally accepted and codified definition of OTT services, we can state in any case that the term refers to the way of and technology for providing content / services. Services provided this way can most accurately be referred to as 'services provided in an OTT way'. For the sake of simplicity, however, I will refer to them uniformly as 'OTT services' or 'provision of OTT services'. Generally speaking, one

[3] <http://www.flurry.com/blog/flurry-insights/mobile-television-we-interrupt-broadcast-again?mkt_tok=3RkMMJWWfF9wsRonua3OZKXonjHpfsX67O4tX6SxlMI%2F0ER3fOvrPUfGjI4ATsFmI%2BSLDwEYGJlv6SgFQrDHMbRiyLgMWRc%3D#.VGykDzQ3k7W>.

can state that services where the service provider providing services via the Internet is not responsible for the transmission of the signal to the end user are called OTT services: the user accesses the OTT services via the 'open Internet'. The OTT service provider, furthermore, is a service provider separated from the Internet service provider, ie it has no contractual relationship with it. OTT services have two main groups: (i) voice[4] and message[5] services, and (ii) content services (audio and audiovisual).

The mobile telecommunications market is fundamentally affected by OTT service providers providing voice and message services, since mobile service providers also provide—in addition to Internet access service—voice and message (SMS) services, and what is more, a significant part of their revenues come from those services. More precisely, mobile service providers don't look kindly upon the emergence of new services on the Internet that, using their network capacity, attack the positions they hold in the voice and SMS markets. Further tensions are created by the fact that these OTT services do not carry out signal transmission and so are not considered electronic communication services, and it implies that the regulatory burden on mobile service providers' voice and SMS services is much higher than that of the OTT service provider providing the (presumably) substitute services. As such, the emergence of the question of whether these service providers should be subjected to regulation at all and, if so, in what way is no coincidence. There have already been attempts to do so, with rather limited success. The regulatory issues of OTT voice and message services will be key elements to the upcoming electronic communications regulatory framework. It is not mere chance that both the European Commission and the Body of European Regulators for Electronic Communications (BEREC) have started an in-depth analysis of this issue.

With regard to the future of the media system, the other group of OTT services —OTT content services—is relevant; within this category audio[6] and audio visual[7] OTT services can be distinguished.

Outlook

The spread of OTT content services is continuous. The reason for their popularity is basically that the viewer can watch the content anytime, anywhere and on any device (multi-screen). This is the mobility expected by the younger generations—they are less and less willing to put up with the ties of the traditional TV-linked media world.[8]

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4 Eg, Skype.

5 Eg WhatsApp, Viber, Facebook Messenger.

6 Eg Deezer, iTunes, Spotify.

7 Eg Netflix, Hulu, MTVA FIFA EB/VB, Fuso, ITT / OTT TV.

8 The spread of OTT content services is assisted by the fact (and *vice versa*) that TV sets enabling connection to the Internet and the consumption of online content spread quickly. TV sets connected to the Internet (Connected or Smart TVs) enable the presentation of media content available on the Internet in family living rooms, directly competing with the media services available through the traditional broadcasting platforms.

The flagship of OTT content service provision is, without doubt, the American Netflix, which became the leading movie streaming service provider in the USA and is currently present in a total of 41 countries. The company that started as a DVD delivery service in 1997 launched its video-on-demand service in 2007 and now it has 33.4 million subscribers in the US, and nearly 11 million subscribers outside it. Netflix, similarly to other content providers providing OTT services, expands more easily than a traditional cable service provider since it does not need to set up an infrastructure. In Europe it currently provides its services in the United Kingdom and in Scandinavia, and in the Netherlands, France, and Germany. It is expanding continuously: next year it plans to launch its on-demand media services in Germany, Austria, Belgium and Switzerland. Its headquarters is in each case Luxemburg.

It is worth noting that the provision of OTT content services is not always a success story. We can refer to the example of Central Media Europe (CME) that launched its OTT video service, Voyo, in 2009, investing 40 million dollars in two years. The outcome, however, was disappointing, since by the end of 2013 the number of subscribers to the service was only 128,000, causing an inevitably huge loss to CME.[9]

Beyond the classic OTT actors, companies traditionally successful in the information technology market (eg Apple, Google, Microsoft, Intel) are also trying to establish themselves, with more or less success, in the content service market; this fits well into the convergence process, where companies at different levels of the market value chain try to extend their activities to more and more levels. This trend is not surprising in view of the fact that analysts already call the era ahead of us the 'Golden Age of television'. Nevertheless, major IT companies failed to achieve breakthrough results in this new market. In October 2010, Google launched Google TV, as a software platform, accessible via the hardware of big device manufacturers (LG, Sony, Toshiba). The service failed to bring breakthrough success and finally, in October 2013, it was renamed Android TV, which carries the promise of a great change in the TV industry.[10]

Although Apple Box, offered by Apple, had sold 13 million copies by the end of 2013,[11] this cannot be considered a breakthrough success, considering the results Apple achieved with its other products. The OnCue cloud service launched by Intel Media in 2011 performed even worse and by late 2013 it had already been terminated. Microsoft's Mediaroom service was similarly unsuccessful and was sold to Ericsson. According to the Informa analysts,[12] the underlying reasons for market entry barriers can be:

– In the TV industry content producers play a key role, since those offering more valuable content to subscribers can be successful. This explains, in part, the success of Netflix and HBO, which not only have sufficient capital to purchase premium

[9] Presentation of István Litvay on the MKSZ trade day, 4 June 2014.

[10] <http://www.android.com/tv/>.

[11] Informa Telecoms and Media, 'TV disruption: Why Google, Apple et al haven't made their mark… yet' (2014) 4.

[12] ibid, 3.

content but also produce content themselves (Game of Thrones, Orange County, House of Cards, etc.). Content producers have a long-standing contractual relationship with traditional broadcasters and it is not easy to convince them to replace these lucrative relationships with IT companies, in particular since it is a new emerging market.
– Digital content distribution is an area where big IT companies have no experience in relative terms (eg operation of conditional access systems, EPG, etc.), thus to reach the economies-of-scale level of operation takes time.
– Most consumers are cautious about new technologies. Most TV viewers are accustomed to access TV content via the classical broadcasting platforms and it takes time for a new technology or a new market player to establish itself in this market.
– Finally, amongst others, difficulties in relations with content producers, limited experience in digital content distribution and the general consumer cautiousness about new players and technologies.

A threat or an opportunity?

With the emergence of OTT services such as Netflix in the US, the most serious fear of traditional broadcasters is that some of their subscribers will terminate the service and switch to OTT video service (cord cutting) or to a cheaper subscription since the OTT video service used in parallel satisfies their needs (cord shaving). The latest forecasts, however, fail to underpin this fear. In the Analysys Mason forecasts, by 2018 in the 'primary pay TV services' market[13] in Eastern and Central Europe, only 1 per cent of the TV viewer households will use OTT services exclusively, and 99 per cent of viewers will continue to use the services of a classical broadcaster, probably supplemented by an OTT media service.[14] This proportion is not expected to be much higher in Western Europe (3 per cent).[15] This forecast is underpinned by several factors. First, infrastructure-based competition is quite fierce in the broadcasting market, leading to wide choice and competitive prices. For example, in the US—where OTT services are highly popular—due to the deregulation[16] of the market a duopolistic market structure has been established, with very high subscription fees. On the other hand, in our region the uptake of smart or 'smartified' TV sets enabling access to OTT content over the Internet is expected to be slower. Third, market capture of OTT service providers is

[13] Analysys Mason differentiates between primary and secondary TV services. Primary TV services are the ones used by the subscriber via the TV set located in the family living room. Secondary subscriptions are the services used for the other TV sets owned by the household (eg bedroom, holiday home, etc.).

[14] Analysys Mason, 'Pay-TV and OTT video services in Central and Eastern Europe: Forecasts and Analysis 2013–2018' (September 2013).

[15] ibid.

[16] See also Bartóki-Gönczy Balázs, 'Attempts at the Regulation of Network Neutrality in the United States and in the European Union: The Route Towards the "Two-speed" Internet' András Koltay (ed), *Media Freedom and Regulation in the New Media World* (Wolters Kluwer 2014.)

rather hindered (with regard to the first TV sets) by the fact that so-called bundled services (sold as a package) are widespread, since a subscriber is less likely to terminate a pay TV service if its contractual relationship with the traditional broadcaster covers telephone and Internet (or possibly mobile phone) services. Finally, the 'average consumer' is traditionally reluctant to switch to new technologies and to a service from a new market player and abandon its 'reliable' and known service provider and technology.

However, all this does not mean that OTT video services will have no significant effect on the TV market in the near future. Namely, according to the cited analysis by Analysys Mason, nearly half of households (in Central and Eastern Europe: 42 per cent, Western Europe: 51 per cent) will use OTT video services as a secondary subscription service.[17] This is partly explained by the fact that while the service was accessible on several TV sets with one subscription for analogue cable services, in the digital broadcasting market each additional TV set attracts additional costs for the additional set-top-boxes. Therefore, parallel to the progressive retreat of analogue cable services, subscribers are very likely to switch to OTT video services since, in their case no 'loyalty period' need be agreed to as part of the contractual terms.[18]

More and more traditional broadcasters have realised that they will be unable to stop the penetration of OTT content services in the long term and so they are adapting to the environment. This may be achieved by the launch of their own OTT services (see major domestic service providers)[19] or by entering into partnerships with an OTT content provider. By September 2014 Netflix had concluded cooperation agreements with 12 telecommunications service providers[20] worldwide, under which the OTT service provider will be available via the digital set-top-box from the broadcaster.[21] These agreements are beneficial for the broadcasters since their services will be more valuable and beneficial for the OTT service provider, as they obtain a valuable subscriber base and presumably are able to provide their services with better quality.[22]

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[17] See n 14 for the definition of a secondary subscription service.

[18] National Media and Infocommunications Authority, 'The Effect of Over-the-Top Content Services on the Media Platform' (2014) 15–16.

[19] Several arguments might support this: at first, it creates competition to the other OTT services, by trying to tie down its subscribers and, secondarily, it can strengthen the competition in the broadcasting market since it can appear with its services in a household covered by the competitor broadcaster, and finally it can reach households with no subscription at all. The British BSkyB, for example, launched its Now TV online service in the summer of 2012, with the aim of competing with the American giant Netflix and, on the other hand, it targeted those 13 million Brits that currently have no TV subscription. A similar service was already launched by Viasat in 2007 under the name of Viaplay, available in Scandinavia and in Russia. The success of the above two services lies mainly in the fact that they have a serious premium content portfolio in the broadcasting market that they can use effectively for their own benefit. For broadcasters with no premium content another market capture strategy might be the offer of thematic content. For example the Finnish Elisa launched its EpicTV service with a wide range of extreme sport content.

[20] Known arrangements in Europe: Virgin Media (United Kingdom), Com Hem (Sweden), Waoo (Denmark), Belgacom (Belgium), Bouygues, Orange, SFR (France), Deutsche Telekom (Germany).

[21] Ovum, *Digital Media Newsletter* (1 October 2014) 22–29.

[22] Another important issue is whether Netflix is prioritised by the partner Internet access service provider.

New service types, new interpretation challenges

OTT-transmitted services aggregating linear media services

Certain OTT content providers, in addition to the directory of on-demand movies and series, also provide live streaming media services. In this service-model, the OTT service provider—similarly to the traditional broadcaster—agrees with the linear audio-visual media service providers (TV channels) on which TV channels will be included in its programme packages. This activity is called content aggregation. This service is essentially different from the activity of a traditional broadcaster, classified as an electronic communications service provider, in that the OTT service provider will not be responsible for the transmission of the signal and for sending it to the digital set-top-box of the viewer. Namely, in the traditional business model the broadcaster not only selects channels (and as such, influences content access as a bottleneck), but it ensures itself that the signal flow multiplexed into a single digital signal is transmitted to the consumer, either via its own or via hired capacity.[23] This is the key difference, which causes great difficulties in the Hungarian legal system in the field of classifying such types of OTT content services, since the content aggregation and sales activity carried out independently by the OTT content provider cannot be tallied with the definition of a media service or programme distribution, as in Hungarian electronic communications law[24] the electronic communications service is an immanent element of the definition of a programme distribution service.[25]

It is important to note though that, in deciding whether a certain service is classified as an electronic communications service or not, the relevant factor is not whether the service provider has an electronic communications network but who bears the civil law

[23] Here one should keep satellite telecommunications in mind, where the satellite itself is not operated by the service provider contracted with the consumer, but the capacity (transponders) is hired from a specialised wholesale service provider. This service is materially distinct from OTT-like services in that, for satellite programme distribution, the subscriber is exclusively contracted with the broadcaster, who itself ensures the availability of the transmission capacity, while for OTT content distribution this must be done by the consumer entering into a subscriber contract for 'transmission'—electronic communications service (providing Internet access) with a service provider.

[24] Law C of 2013 on electronic communications (ECL).

[25] Under s 188(77) of the ECL, programme distribution activity is an electronic communications service via any 'transmission system' under s 188(5/a) of the ECL, during which the analogue or digital broadcasting signals generated by the media service provider are transmitted from the media service provider to the subscriber's or the user's receiving device, irrespective of the transmission system and technology used. Programme distribution is in particular programme transmission, satellite broadcasting, broadcasting via a hybrid fibre-optic / coax cable transmission system, and in addition to this, transmission of a programme via an Internet Protocol via a transmission system where the nature or the terms and conditions for the service are identical to that of broadcasting and where this replaces broadcasting implemented in other ways. Broadcasting, where the subscriber can access it for a separate subscription fee or for a fee sold in a bundle with other electronic communications services, is also considered to be programme distribution. Transmission of signals via a transmission system suitable for connecting fewer than ten receivers is not considered as programme distribution.

liability towards the subscriber for the transmission of the signal.[26] In this context, the Court of The European Union highlighted in the *UPC Dth v NMHH* case[27] that 'the fact that the transmission of signals is by means of an infrastructure that does not belong to UPC is of no relevance to the classification of the nature of the service. All that matters in that regard is that UPC is responsible *vis-à-vis* the end-users for transmission of the signal which ensures that they are supplied with the service to which they have subscribed.'[28] The Court justified it by the reasoning that

> Any other interpretation would considerably reduce the scope of the New Regulatory Framework (NRF), undermine the effectiveness of its provisions and therefore compromise the achievement of the objectives pursued by that framework. Since the purpose of the NRF, as is apparent from recital 5 in the preamble to Directive 2009/140, is to establish a genuine internal market for electronic communications, in which those communications are ultimately to be governed by competition law only, the exclusion of the activities of an undertaking such as UPC from its scope, on the pretext that it is not the owner of the satellite infrastructure which enables signals to be transmitted, would deprive the NRF of much of its meaning.[29]

Consequently, a service is not qualified as an electronic communications service because the service provider *de facto* carries out the signal transmission via its own infrastructure but because it bears liability towards the end user (under a contract) for the signal transmission. However, a classic so-called 'pure' OTT content provider assumes no liability whatsoever for the quality of the Internet access, therefore it cannot be classified as an electronic communications service.

The situation is further confused where a classic electronic communications service provider starts to transmit its programme package consisting of linear media services via its own network. The question in this case is who can be considered to be liable for the transmission of the signal, even when it assumes no liability for the signal quality, since the signal reaches the viewer via the open Internet (the access to which is otherwise provided by that service provider)? Moreover, in the future it is very likely that more and more classic electronic communications service providers with their own network will emerge in the OTT market, where they provide services not only to the subscribers to their network but also to subscribers using the network of other Internet access service providers. In my opinion, a situation where the service provider would be considered as the broadcaster would be unsustainable for subscribers who otherwise

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[26] For programme distribution carried out by using a satellite system eg the broadcaster is not the owner and operator of the satellite system used for the transmission of the signal; it is operated by a third party service provider that carries out the *de facto* signal transmission.

[27] Judgment of the Court of the European Union on the request for a preliminary ruling under Article 267 of the TFEU from the Fővárosi Törvényszék (Hungary), made by decision of 27 September 2012, received at the Court on 22 October 2012, in the proceedings between *UPC DTH Sàrl and the Vice-President of the National Media and Infocommunications Authority* (C-475/12).

[28] ibid [43].

[29] ibid [44].

use the Internet access service provided by it, while being a 'simple' OTT service provider for other subscribers, without being subject to the additional legislative obligations of a broadcaster.

In connection with this issue, it is worth recalling the debate currently going on in the US. Overseas OTT TV service providers wish their service to be classified as a 'multichannel video programming distribution' (MPVD) service, ie the overseas equivalent of programme distribution activity, because they can access the 'must-have' content that competing 'classic' broadcasters have access to under the law. The Federal Communications Commission (FCC) supports this proposal. Its Chairman, Tom Wheeler, stated in a post on 28 October 2014:[30] 'A key component of rules that spur competition is assuring the FCC's rules are technology-neutral. That's why the definition of an MVPD should turn on the services that a provider offers, not on how those services reach viewers. Twenty-first century consumers shouldn't be shackled to rules that only recognize twentieth century technology.'

In agreement with Tom Wheeler, I also believe that identical services must be subject to identical rules, irrespective of the technology applied and the transmission methodology. This is one of the basic conditions for market competition, in the communications terminology, a 'level playing field'. This is not new in the European Union either, as electronic communications services have been regulated on the basis of technology neutrality since 2002 through the reformation of the regulation that had thus far been separated by technology. I believe that the time has arrived to adapt this already recognised approach to the technical progress of the past 13 years. This, in any case, will require modifications to the definition of an electronic communications service, which requires an EU-level decision since it was laid down in a Framework Directive. Nevertheless, so far the institutions responsible for EU legislation have shown no indication of putting the 'extension' of this definition on the agenda.

On-demand media services and the essence of editorial activity

OTT content services do not feature to a great extent in the transmission of linear media content but rather—in the spirit of our era—in making on-demand media content available (see for example Netflix, Fuso). *Prima facie*, the classification of such a service does not seem problematic; in practice all of its elements correspond to the criteria laid down in the AMS Directive:[31]

[30] Tom Wheeler, 'Tech Transitions, Video, and the Future' <http://www.fcc.gov/blog/tech-transitions-video-and-future>.

[31] 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 (codified version), OJ L 95.

(i) the relevant service is an economic service pursued independently and as a business—regularly, for profit and subject to taking economic risks, and in this context the complimentary nature of the service is irrelevant; at the same time, services not competing with traditional media services are excluded from this definition;

(ii) the primary aim of the service is the provision of programmes, in order to inform, entertain or educate, to the general public, thus services aiming at the exclusively private purpose exchange of information and liaison are not covered by this definition;

(iii) a service is accessible by the public via an electronic communications network;

(iv) a media service provider assumes editorial responsibility for the service, and this activity includes both programming and cataloguing the programmes;

(v) as part of the service, a programme offer compiled by the media service provider is accessible, from which the user can access individual programmes on the basis of individual request, at the time chosen by the user.

As such, the most important conjunctive element of the definition is the assumption of 'editorial responsibility', more precisely the activity of the 'selection' of the content made available. However, the Directive fails to clarify what 'selection' means, although there are several practical cases when this question cannot be answered clearly.

The first case occurs when, typically, a minor service provider offering OTT (or even classic) on-demand media content, gets into a weaker negotiating position in the negotiations with big film studios when it is unable to choose from the content offered by the film studio (cherry picking); in effect the film studio determines which 'movie and series package' will be provided for a certain amount, even specifying the periods when individual films and series can be made available in the offer. As such, the service provider related to the consumer might argue that its service is not a media service, since it exercises no actual editorial responsibility over its offer, ie it is actually specified by the big film studios. Though it is clear that this argument is somewhat substantiated, since the decision making freedom of the service provider is not unlimited, in my opinion, however, it would be dangerous to decide who is a media service provider just on the basis of the strength of its negotiating position with the upstream rights holders in the value chain. Consequently, in my opinion, such services should be classified as on-demand media services.

The other phenomenon where deeper interpretation of the 'editorial responsibility' becomes necessary is for services where the content made available is decided by an algorithm, which can even be personalised. An increasing number of services appear on the Internet, where the essence of the service is that from the—practically—unlimited volume of content an algorithm compiles the offer. In this case it is not the service provider who determines, under editorial responsibility, what content is to be made available; what is more, in most cases it offers the content from another—usually complementary—on-demand media service provider. The business rationale for it is given by the fact that, in the ocean of online content, there is an increasing demand for services that provide a 'one stop shop' for everything (see Google). In this case, for example, it is rather problematic to expect the service provider to ensure that the

algorithm complies with the programming quotas provided for in the media law. These problems indicate—similarly to the above—how our legal concepts erode in the face of market and technical progress.

The place and role of public service media within the new media

In this evolving media environment an important and interesting question arises, of how the public service media are able to be present (and further exist) in an innovative manner in this new and evolving media system, and whether fine-tuning in their mission needs to be made, and if so, how. In my opinion, the legitimacy of public media is still present, however, their purpose is completely different from before. State intervention, more precisely its direct participation, had to target the elimination of a gap not covered by the market. What is considered to be a gap justifying state intervention changes over time and as a response to market and technical progress thus, in my opinion, the strategy of the public media must be aligned to this, otherwise we may find ourselves in a situation where taxpayers will rightly ask what their taxes are being spent on.

In the second half of the twentieth century, at the dawn of TV broadcasting, probably the most important role of public media was informing the public,[32] since no other audio visual information channels (commercial TV stations) were present. But now public media are only one type of information source amongst the myriad of other linear and on-demand media services. This argument, therefore, cannot be considered legitimate. Another classic justification for public media is that they are not for profit and so they can select programmes, the essential purpose of which is not to facilitate the sale of valuable advertising spots but the distribution of culture and natural sciences, and not necessarily for profitable content and opinions. However, the emerging masses of information, history and cultural thematic channels, as well as social websites and online communications tools, can in practice close this gap that so far the state has endeavoured to close through public service channels.[33] Finally, a frequently quoted reason for spending public funds on public media is that mother tongue minority and religious programmes can only appear there. This was indeed an important tool for minorities living in Hungary to maintain cultural and emotional links with the 'homeland'; however, in the Internet era there are more efficient ways of maintaining this cultural and emotional link, since anyone can access, for example, the online available content from Slovakian television channels. Thus, taking as our starting point that legitimacy is given to public media because of scarce information resources or the lack of content facilitating public education or the requirement to serve certain groups of the society is, in my opinion, the wrong way.

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[32] Here obviously I do not mean the socialist 'public media' but European public media in general.

[33] European Audiovisual Observatory, 'To have or not to have Must-Carry Rules' *Iris Special* (2005) 2; Peggy Valcke, 'The Future of Must-Carry: From Must-Carry to a Concept of Universal Service in the Info-Communications Sector' European Audiovisual Observatory, ibid 31–32.

Nevertheless, I also believe that it is wrong to conclude that public media should not necessarily be maintained in the currently evolving new media system. I agree with those who believe that public media must become the primary forum for social dialogue and social publicity.[34] On the basis of the above objectives, their legitimacy can indeed be contested; however, a new gap will be created that may further justify state participation, and this is the lack of domestic pluralism, which is particularly appreciated in a system where the viewer must collect information from 'millions' of locations to get a comprehensive view of the surrounding world. The objective of external pluralism is, in the Internet era, automatically met since, although the homogeneity of major commercial channels cannot be questioned, on the basis of the available content offer there is no actual content that one could not access. However, it is not enough to reach the objectives of external pluralism in an era when we can choose from an unlimited volume of content, since the viewer is unable to process this volume of information. Despite the availability of all the information required to be fully informed, it is an impossible task to synthesise it. On-demand and even linear media services are —necessarily—thematic, ie they try to cover only a niche market; nobody endeavours to create a truly plural programming structure that would in itself meet the needs of a citizen interested in public matters, culture, sport, and other areas of life. And all this with valuable content, in an authoritative manner. In my opinion, this is the gap, the bridging of which could be the task of public media in the imminent future.

The definition of the objective, however, is not sufficient in itself to create successful public media on a media platform where fierce fights for the attention of the viewer are constant. For the attention of viewers who expect that the content is available anywhere, anytime and on any platform. As a consequence, the focus should not only be put on 'what' but also on 'how'. I will therefore now review the European public service media provider strategies that are being used in an attempt to meet the challenges of this new media system.

According to a paper by the European Commission published in July 2014[35] currently 494 on-demand media services are provided by public bodies; the majority of them are public media service providers operating in the relevant Member State, although there are also cultural institutions, universities and archive managers amongst them. In terms of the business model, one can establish that service is not complimentary everywhere; in several Member States the public service media service provider requests consideration for it. The content service provided by the public service media provider has been a long-standing debated issue, in which Member States represent different approaches.[36] In France, for example, public service media can charge a

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[34] Mérték Médiaelemző Műhely, 'Mit várunk a médiaszabályozástól?' 7 <http://mertek.eu/sites/default/files/events/mertek_nyilvanossag.pdf>.

[35] European Commission, 'On Demand Audiovisual Markets in the European Union' (July 2014) <http://www.epra.org/news_items/over-3-000-on-demand-audiovisual-media-services-now-on-offer-in-the-eu>.

[36] See Susanne Nikoltchev (ed), 'The New Public Service Remit' *IRIS plus* 2009-6 (cited by European Commission, On Demand Audiovisual Markets in the European Union).

consideration for their services; in Germany however, it is forbidden to charge subscription fees or advertisement-based revenue for catch-up TV services in the public service media. In the United Kingdom, the public service Channel 4 can charge a subscription fee for its on-demand media services; however, the BBC iPlayer service can be accessed free of charge.[37] Nevertheless it is worth mentioning that, for on-demand services produced using public funds that compete with commercial media service providers, the competition law of the European Union must be kept in mind, more precisely to the Communication issued by the European Commission in this regard.

In the European Union, all public service media service providers[38] operate their own website, providing access to their content in on-demand form. There are however huge differences between service providers in term of the volumes of on-demand content on offer. It is worth highlighting that access to most services is not restricted in geographical terms, with the exception of content provided by the service provider for a subscription fee. The umbrella organization for Hungarian public service media (MTVA) has introduced accessibility restrictions only for the on-demand content provided by M3.

The above cited report by the European Commission also notes that the number of European public service media service providers maintaining an extensive archive media store (other than latest content and programme guides) is much lower. They include the Estonian,[39] the Spanish,[40] the Irish,[41] the British,[42] and, in my opinion, the Hungarian public service media service providers.[43] In France, the archive public service programme possibilities are made available by the Institut national de l'audioviusel (Ina), offering pay and complementary services, and it operates 14 YouTube and DailyMotion channels. The service is available through the services of cable and IPTV service providers, and even applications from iTunes. In Belgium, the public service media provider of the Walloon region (RTBF) outsourced this activity to a private law company (SONUMA);[44] in Romania, the TVR public service media service provider operates dedicated YouTube channels. Finally it must be noted that the majority of public service media service providers also make content available via apps which can be downloaded from iTunes Store, Google Play Store, and more recently from Windows Store. Several service providers have also developed applications for smart TVs.[45]

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37 European Commission (n 35) 203.
38 With the exception of the Greek HPRT.
39 <http://arhiiv.err.ee/>.
40 <http://www.rtve.es/television>.
41 <http://www.rte.ie/tv/>.
42 <http://www.bbc.com/tv>.
43 <http://www.mediaklikk.hu/>.
44 <http://www.sonuma.be/>.
45 European Commission (n 35) 206.

Hungarian state television is at the forefront of Internet content services. Just think of the very successful 'FIFA WC/EC' app downloadable to mobile devices via which all matches of the World Cup and the European Cup could be watched on a mobile device. In May 2014, the 'médiaklikk' service was launched as a new service, enabling the real time and on-demand view of public service TV content. The HbbTV app should also be mentioned, which enables interactive services to be linked to linear content.

Nevertheless, so far, these OTT services are accessible separately, one-by-one. In my opinion, in future it will be essential to be present in the menu of the Internet connected TV set, in the AppStore offered by the operating system provider (eg iTunes Store, Google Play Store, Windows Store, etc.) with a uniform application allowing access to all online accessible content of the media service provider via an online EPG (eg movies, news, football apps, etc.). Indeed, filling the service with attractive content is an important issue.

Finally, the issue of arrangements with the operating system providers of smart 'platforms' may also be relevant. In view of the abundant content available via TVs connected to the Internet, easy access to the content by the viewer is also important for the content provider. This can be influenced by the service provider with editorial responsibility above the app environment (platform service provider): they might prefer certain content while deprioritising 'hide' content, even accessible public interest content, from the viewer, creating the impression that the relevant content is no longer available. As it was put by the European Commission, filter and personalisation functions cannot only determine the accessible content but can also affect the consumer's choices, by providing a primary location to certain content or by terminating it, by restricting the adaptation options in the menus or by disabling certain apps. All this can influence the media offer actually accessible to the viewer, providing space for various opinions.[46]

These OP systems (such as menus in smart TVs) are currently not subject either to the actual electronic communication regulatory framework or to media regulation. The European Parliament sought to propose a solution to address this issue by proposing in the Kammarevert report, published in June 2013, that the existing must-carry rules should be supplemented with a so-called must-be-found rule.[47] The Kammarevert Report calls upon the European Commission to regulate the 'hybrid'[48] television platforms.[49] In the European Parliament's view, it must be examined whether and how those content providers can be granted an appropriately privileged status with regard to findability on 'first-screen' devices, such as TV sets with a connection to the Internet, to

[46] European Commission Green Paper Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values (24 April 2013) COM/2013/0231 final, 15–16.

[47] European Parliament Committee on Culture and Education, Draft Report on Connected TV (31 January 2013) 2012/2300 (INI), Explanatory Statement 2.

[48] Hybrid, since it combines the offer of classic programme distribution channels with the online content offer.

[49] Resolution of the European Parliament of 4 July 2013 on Connected TV, para 26.

which the Member States assign a public broadcasting remit or which help to promote objectives in the public interest, such as ensuring media pluralism and cultural diversity, or which undertake to carry out duties which maintain the quality and independence of reporting and promote diversity of opinion.'[50]

Conclusion

The digital media system transforms and 'customises' the media system that was so far characterised by 'mass media'. As a consequence, the question is raised whether the twentieth-century media regulatory tools are suitable to respond to the challenges of the twenty-first-century media market, or if they need to be deleted or reviewed or whether new regulatory tools should be launched. The driver of media system transformation, similarly to many other areas, is the Internet, which transforms the media market value chain, accelerates convergence, and transforms media consumption habits.

The so-called OTT content services are increasingly spreading, already not only overseas but also in Europe, posing a challenge to traditional, vertically integrated broadcasters, and the Internet service providers that are meant to provide appropriate band width. The initial hostile voices are slowly being replaced by opinions urging cooperation between OTT and telecom service providers. One of the reasons for this is the fact that, according to the forecasts, these two types of services will become more and more in a complementary rather than substitution relationship with each other; and OTT services are not expected to ruin the traditional broadcasting market. An even more important reason for a conciliatory spirit is however that an increasing number of classic telecom service providers realise that they will be unable to halt the wheels of history and to stop technical progress and so they are trying to take the lead with their own OTT services or to agree with a similarly interested OTT service provider, by utilising synergies.

Nevertheless, it is safe to assume that regulation must find answers to an increasing number of market inefficiencies that are not addressed in the current legislation. One of them is the emergence of numerous new services that stretch the current legislative framework, which was written for a basically offline world. An example of this is media aggregating and selling OTT linear media services, which, in my view, cannot be classified as programme distribution activities although, in their essence, the two services can substitute for each other. The legislative differences to which identical services are subject are not only violating the interests of subscribers but also market competition, the basic principle of which is the establishment of a level playing field, ie to ensure that identical services are subject to identical rules, irrespective of the technology and transmission method used. Otherwise, this is not new in the European

[50] ibid, 20.

Union; since 2002, electronic communications services have been regulated on the basis of technological neutrality by reforming regulation that was so far separated by technology. I believe that the time has arrived to adapt this already recognised approach to the technical progress of the past 13 years.

The accelerating erosion of and need for the (re)interpretation of legal concepts can be seen in the concept of editorial responsibility, a key element in the definition of media service. It is unclear, for example, who is considered to be an editor where the offer is not determined by a decision made in an 'editorial meeting' but by an algorithm collecting the offers of other online accessible media service providers and making them available in a single location (even in a customised manner), or where the service provider has little say in the composition of the actual offer due to its negotiating position *vis-à-vis* big film studios.

Finally, the objectives and market gaps justifying the operation of public media in the changed environment raise an increasingly important question. In my opinion, the market gaps ensuring legitimacy for public media are slowly disappearing but new ones have emerged. If we keep the starting point that the legitimacy of public media is given by scarce information resources or the lack of content facilitating public education or the requirement to serve certain groups of society, this is, in my opinion, the wrong way since they are not real issues in the Internet era. However, in the currently available thematic content ocean that increasingly comprises on-demand content, it is becoming increasingly difficult to find a resource that satisfies the internal pluralism that enables the viewer to pick the content necessary to obtain diverse information (which is nearly impossible). This may be the task that public media should face: to cut people out of the 'information bubble' in which more and more of them find themselves. However, today, answering the 'what and why' question is not sufficient in itself. A special emphasis must be put also on the question of 'how', ie proprietary apps must be launched on every possible platform, to adapt to the latest methods of content distribution and sales.

Ian Cram

Against civility? Arguments for protecting 'bad taste', disrespectful, and anonymous online speakers

> (T)he criminal law in this area, almost entirely enacted before the invention of social media, is generally appropriate for the prosecution of offences committed using the social media . . . there are aspects of the current statute law which might appropriately be adjusted and certain gaps which might be filled. We are not however persuaded that it is necessary to create a new set of offences specifically for acts committed using the social media and other information technology.
> House of Lords Select Committee on Communications (2014-15) 1st Report of Session 2014-15 *Social media and criminal offences* (The Stationery Office, HL Paper 57) Paragraph 94

> (The) right to criticize either by temperate reasoning, or by immoderate and indecent invective . . . is normally the privilege of the individual in countries dependent upon the free expression of opinion as the ultimate source of authority . . . Political agitation, by the passions it arouses or the convictions it engenders, may in fact stimulate men to the violation of law. Detestation of existing policies is easily transformed into forcible resistance of the authority which puts them in execution, and it would be folly to disregard the causal relation between the two. Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government. The distinction is not a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom . . . If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation.
> Learned Hand J *Masses Publishing v Patten* 244 F 535, 539-540 (SDNY, 1917)

Introduction

The modern electronic era has opened up exciting possibilities for citizen journalists. The dissolving distinction between 'speakers' and 'audience' has created a diversified sphere of public commentators, unconstrained by the editorial dictates of established media organisations' corporate interests. The opportunities afforded by new technologies to non-professional producers of content allow for the airing of matters ignored or discarded by established media outlets. As such, an exciting era of newly-democratised political discourse appears within reach as opportunities arise for ordinary citizens to become active participants in deliberative and decision-making fora that have hitherto been the preserve of a political elite. Little wonder then that technological advance has prompted a revival of interest in republican political theory and the virtuous citizen.

Modern republicans seek inclusive, respectful and empathetic discourse among political equals. Through meaningful, reciprocal and respectful interactions with fellow citizens, deliberative democrats hope to confer greater legitimacy upon decision-making structures and outcomes.

Republican aspirations to move towards structures of decision-making that better reflect these overarching commitments (and their evaluation of existing channels of debate and deliberation by the same criteria) provide an intriguing lens through which to view the application of domestic free speech laws to expression on social media platforms. The resort to penal laws to regulate uncivil, discourteous, emotive expression would suggest at any rate an overlap with the precepts of republican-style deliberation. My purpose in this paper is to explore some issues that arise from the emphasis upon civilised, respectful deliberation. I analyse controls upon uncivil, offensive, abusive and anonymous online speech in domestic criminal law, drawing at times upon comparative (especially US) and domestic civil law materials for illustrative purposes. My main argument is that, aside from pre-dating the era of speech on social media, the criminal law continues to be used to signal state endorsement of civility norms in public discourse. Domestic law's vague demand that a speaker not insult or offend or distress another, let alone abuse or threaten them, has cleansed public discourse to the point where the ability of speakers holding minority viewpoints to challenge dominant elite and orthodox opinions has been substantially impaired.[1] If it is enquired from where do these imprecise standards of polite and respectful interchange emanate, a moment's thought will reveal that these must as a matter of logic, reflect culturally dominant values. Who gets to participate in the formation of these values? Again, rationally, the answer must be located among the most powerful groups or elites within any given society—including politicians, mainstream media organisations and the business community including multi-national corporations. The broader observation made by McCormick that the current indirect nature of ordinary citizens' participation in electoral politics 'opens up an expansive space within which political elites exercise dangerous discretion and into which socio-economic elites intervene unimpeded into politics'[2] may without too much difficulty be said to apply to the law's prescriptions concerning acceptable and unacceptable styles of discourse about politics and other matters. 'Civility' norms generated under circumstances of elite domination can thus be a means of consolidating already dominant groups' positions in organisations and

[1] Some scholars working in the field of deliberative democracy see a division between work that focuses upon institutional structures within which deliberation can occur and work that considers issues relating to communicative dynamics between speakers and audience. See eg the valuable overview set out by Sandra M Gustafson, *Imaging Deliberative Democracy in the Early American Republic* (University of Chicago Press 2011) ch 1. The approach that I have taken sees the issues of institutional structure and communicative dynamics as heavily interlinked. Formal punishment via criminal sanction of certain uncivil forms of expression necessarily both implicates state institutions and regulates communicative dynamics.

[2] John P McCormick, *Machiavellian Democracy* (CUP 2012) 17.

society more broadly.[3] The use of legal methods to enforce civility will therefore necessarily be hegemonic and lies in tension with self-governing democracies' principled insistence upon freedom to dissent. Learned Hand's notion of 'immoderate or indecent invective' alludes to the legal necessity of dissent that is the right of all of us as agents to equal participation (equal from state constraints) in the governance of our community. This equal right to participation is derived from our right to be treated with equal respect and worth by the state. As Weinstein remarks, the forfeiture of our freedom to participate on account of the fact that a majority of our fellow citizens deem the views we hold (or wish to hear) to be grossly offensive is wholly violative of this core freedom.[4] Viewed thus, Noam Chomsky's denunciation of Jeane Kirkpatrick, the US Ambassador to the UN as the 'chief sadist in residence of the Reagan administration' or, somewhat closer to home and more contemporaneously, Russell Brand's attack on Nigel Farage as a 'pound shop Enoch Powell'[5] are the sorts of uncivil speech that are worthy of the strongest constitutional protection. Citing the Chomsky example, Norman Finkelstein defends this criticism as an incivility aimed at 'those wielding power and privilege'.[6]

At a more theoretical level, Iris Marion Young's work on inclusion and democracy develops the idea of 'internal exclusion' that operates in democratic societies to privilege certain forms of expression and exclude others in ways that undermine the goal of a polity in which all citizens have an equal opportunity to influence the outcome of political debate.[7] She distinguishes her position from that of Jürgen Habermas whose theory of discourse ethics values rational speech (or 'communicative action') and denigrates forms of rhetoric (or styles of expression). Habermas argues that a deliberative democracy should favour rational speech acts—those that seek agreement among the audience via universalisable arguments that are dispassionate, neutral, logical and evidence-based.[8] Rhetoric for Habermas is manipulative and non-evidence based, consisting in an appeal to the emotional sides of our natures. Young points out the respective privileging and exclusionary effects of these ascriptions. She doubts that the 'ideal' that Habermas defends and privileges is truly neutral, dispassionate and

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[3] See eg in the context of higher education, Tracey O Patton, 'In the Guise of Civility: The Complicitious Maintenance of Inferential Forms of Sexism and Racism in Higher Education' (2004) 27 *Womens' Studies in Communication* 60.

[4] Weinstein is thus rightly critical of former Labour Prime Minister Gordon Brown's reaction to the acquittal of two leading BNP officials on incitement to racial hatred charges in November 2006 when Brown called for the 'rooting out' of BNP views by 'whatever we can do' on the basis that the views offended mainstream opinion. Cited in James Weinstein, 'Extreme Speech, Public Order, and Democracy: Lessons from *The Masses*' in Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (OUP 2009) 29.

[5] BBC *Question Time*, 11 December 2014.

[6] Norman Finkelstein, 'On Civility and Academia' <http://kingsreview.co.uk/magazine/blog/2014/10/13/on-civility-and-academia/#_edn16>.

[7] Iris M Young, *Inclusion and Democracy* (OUP 2000) ch 2.

[8] Jürgen Habermas, *The Theory of Communicative Action* (Beacon Press 1984); James F Bohman, 'Emancipation and Rhetoric: The Perlocutions and Illocutions of the Social Critic' (1988) 21 *Philosophy and Rhetoric* 185.

universal, arguing instead that it carries rhetorical nuances of its own which social conventions make less visible. She notes how politicians, academics and policy advisers are often adept at

> adopting a stance of controlled and measured expression of the neutral facts that commands authority just because it claims to be impartial and dispassionate, transcending the dirty world of interest and passion. Against this stance . . . more explicitly situated, imaginative, inflected forms of political communication are often dismissed as less worthy of attention.[9]

Drawing upon the example of Reverend Jesse Jackson's two campaigns for the Democratic Party's nomination in the 1980s, Young notes that Jackson's campaigning *style* was often the subject of critical commentary in which he would be described as a 'flamboyant preacher', deflecting focus away from the content of his speeches that, in fact, raised serious social questions. Commenting upon the failure of Rev Jackson's substantive content to secure recognition on equal terms with his more dispassionate opponents, Young reminds us that all the candidates' expressive acts were embodied in their own styles and rhetoric. 'No discourse lacks emotional tone; "dispassionate" discourses carry an emotional tone of calm and distance.'[10] Humorous, mocking, deadpan, grave styles of communication whether in spoken words or displayed in banners, street signs and theatre plays all contribute to the core of any political communication. Young persuasively concludes that it is easy to have a harmonious and expeditious system of decision-making where

> dominant voices do not take seriously those opinions . . . they regard as extreme, dangerous to their interests, or overly contentious, Demonstrations and protest, the use of emotionally charged language and symbols, publicly ridiculing or mocking exclusive or dismissive behaviour of others, are sometimes appropriate and effective ways of getting attention for issues of legitimate public concern, but which would not otherwise not be likely to get a hearing, either because they threaten powerful interests or because they particularly concern a marginalised or minority group.[11]

The version of deliberative democracy founded in appeals to mutual respect and reciprocity—the latter entailing shared standards to rational, dispassionate discourse and of the sort envisioned by Habermas and others such as Sunstein,[12] and Guttmann and Thompson[13]—is confessedly aspirational. The latter for example concede that the characteristics demanded of citizen deliberators do not occur spontaneously among the populace. Instead, society must openly signal the value it attaches to empathetic, rational, discursive, and self-reflective decision-making and ensure that appropriate

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[9] Young (n 7) 63–64.

[10] ibid 65.

[11] ibid 67.

[12] Cass R Sunstein, 'Beyond the Republican Revival' (1988) 97 *Yale Law Journal* 1539.

[13] Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Harvard University Press 1996) and see for commentary by a range of respondents Stephen Macedo (ed), *Deliberative Politics: Essays on Democracy and Disagreement* (OUP 1999).

educational resources are dedicated to the development of the requisite skills. There is however a fundamental objection to be made against the reciprocity and mutual respect pre-conditions set out by the defenders of civil discourse about politics. Why should notions of reciprocity and mutual respect themselves be immune from active, engaged deliberation among the people? Might it not be possible for non-elites to decide to eschew standards of discourse that are set by, and privilege elite groups, thereby articulating their grievances in their own terms without fearing exclusion from the arena of discourse and, worse still, criminal punishment?

Constitutional impoverishment—regulated citizen speech in the domestic sphere

Ours has not been the robust and caustic public sphere of the First Amendment with its fundamental premise of general distrust of governmental motives for seeking to interfere with the content of speech or the manner in which the speaker chooses to address his or her audience.[14] The Human Rights Act 1998 *could* have heralded the moment when a more principled account of expressive freedom came to be upheld by the UK courts. It might have served juris-generatively to constitutionalise discussion about the value of free expression in our democracy. The reality has proved different as shown, for example, by the inadequacies of Justice Eady's treatment of anonymous bloggers in *Author of a Blog v Times Newspapers* on this score.[15] Suffice to say for present purposes that his unwillingness to appreciate the constitutional function played by citizen journalists in the democratic life of our polity is a notable setback for the cause of anonymous contributions to public discourse that requires revisiting. Aside from the revelation of criminal activities of a journalist working for the Murdoch-owned newspaper, *The Times'* role in 'outing' an anonymous political blogger constitutes moreover a dubious Article 10 ECHR victory for 'the press'. Anonymous speakers can of course be more emboldened and uncivil in their exchanges with others than their identified counterparts and perhaps it was away from the terrain of discourteous speech that J Eady hoped to steer public discourse. Aside from analysing

[14] The First Amendment has not always been interpreted in this speech-protective manner. Hardly litigated in the years immediately after incorporation into the Bill of Rights, the latter part of the nineteenth and early twentieth centuries witnessed the federal courts taking a relaxed view of Congressional laws restricting speech, see David M Rabban, *Free Speech in its Forgotten Years 1870–1920* (CUP 1999). Two main reasons can be adduced to explain this pattern. First, the dominant Blackstonian account of First Amendment protection; namely that all that the Constitution denied the state was the power to impose prior restraints, not post-publication sanction. Second, that until cases such as *Gitlow v New York,* 268 US 652 (1925), the Supreme Court in Washington DC was able in cases including *Patterson v Colorado*, 205 US 454 (1907)—one of Oliver Wendell Holmes early speech-penalising opinions—to sidestep states' restrictions on speech by claiming a lack of jurisdiction to review local laws. In addition, J Hand's opinion quoted at the beginning of this discussion was overturned by the 2nd Circuit Court of Appeals, 246 F 24 (2nd Cir 1917).

[15] *Author of a Blog v Times Newspapers*, [2009] EWHC 1358.

this particular missed opportunity to invigorate democratic deliberation, this discussion will relate how, notwithstanding the undoubted interpretative power available to the courts under Section 3 of the Act to 'read-down' the speech-repressive aspects of the Public Order Act 1986 or the Malicious Communications Act 1988, it has scarcely been exercised. Instead of giving an emboldened account of speech intended as a contribution to debate, domestic courts have on the whole signally failed to mark out a zone of protected discourse immunised from hostile majoritarian sentiment.[16] The abrasive speaker may have been recently liberated by the long overdue removal of 'insulting' expression from the clutch of criminal offences created by the Public Order Act 1986,[17] but he or she must still tread carefully around surviving notions of abusive, grossly offensive, indecent and even false speech that causes distress to avoid other forms of criminal liability under discrete though overlapping statutory provisions that apply to online communications. The impoverishment of speech protection at the local level has been paralleled by aspects of the European Court of Human Rights' jurisprudence which has been especially receptive to claims of religious groups to be protected from offensive expression. The legacy of offence-shielding and abuse-deterring enshrined in pre-Human Rights Act era case law will be shown below to have been carried over into the epoch of citizen journalism and applied without seeming difficulty to the network of electronic communications. The focus of the rest of the discussion is centred upon criminal law controls as they have been applied to speakers on social media platforms. In the absence of a modern, purposively-created statute, English law muddles through in the main with overlapping, vaguely-articulated pre-social media era laws. The resulting discretion conferred on prosecutors when deciding which offence to charge might plausibly be seen to stack matters against the interests of speakers. Some degree of clarity and consistency in prosecutorial practice has resulted however from the issuing of guidance to regional CPS offices by the Director of Public Prosecutions.[18] These are returned to below. For the avoidance of doubt, I should make clear that my focus is on expressive activity that is relevant to the republican goal of informed self-government. Although the exact ambit of this type of speech is understandably contested, it is reasonable to suggest that there are certain categories of speech that fall in the main to be excluded from the genre including mundane everyday conversations between individuals relating to their private lives, celebrity gossip and product advertisement.[19] On the other hand, it does catch criticism of British military action

[16] See A Geddis, 'Free Speech Martyrs or Unreasonable Threats to Social Peace? "Insulting" Expression and Section 5 of the Public Order Act 1986' ((2004) *Public Law* 853) for a valuable analysis of the Public Order Act jurisprudence. For a comparative analysis with US law see Weinstein (n 4).

[17] Since February 2014 see Crime and Courts Act 2013, s 57 and SI 2013/2981.

[18] <http://www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media/index.html>.

[19] It is however possible to imagine scenarios in which speech under each of these headings would contain elements that did relate to topics of wider public interest as say where a speaker reveals an addiction problem and recounts the assistance (or lack of assistance) provided by public health services.

in the Middle East, support for the introduction of sharia law and publication of cartoons which represent the Prophet Mohammed as well as speech that links Islamic fundamentalism to brutal attacks on ordinary members of the public.

Context

At the time of writing, some 1.2 billion people regularly use Facebook; 255 million regularly use Twitter of which 15 million are in the United Kingdom. There are approximately 500 million tweets made each day. Many online speakers are permitted to adopt pseudonyms that conceal their real identities and are indeed encouraged to do so by social media websites upon registration.[20] This represents in part an entirely understandable effort to claw back some privacy protection from the vast amount of data mining of speakers' personal information that occurs online. Yet, the ease with which apparently anonymous posting can occur has led some to call for greater identification of online speakers, especially in cases where the speech is considered to consist of cyber-bullying; trolling, revenge-porn, breaching anonymity of persons (eg witnesses / complainants in sexual offence cases) or harassment. In the UK, the experience of Kate and Gerry McCann whose daughter Madeleine went missing during a family holiday in Portugal is cited as one example of sustained online abuse perpetrated by anonymous users of Twitter and Facebook. In October 2014, *The Guardian* reported that members of the public had handed to the police a 'dossier' containing more than 80 pages of posts, tweets, and forum messages.[21] The problems posed by abusive, indecent, menacing, and humiliating expressive activity online have generated much media comment both here in the UK and further afield. The outpouring of crude invective and threatening posts, tweets, etc. would seem by some accounts to be a relatively commonplace and, at times, a co-ordinated occurrence aimed at well-known targets in worlds of politics, entertainment, and sport as well less high profile individuals. The House of Lords Select Committee on Communications noted in July 2014 the ease with which persons might now make such communications but recognised at the same time that, well before the modern era, a small minority of persons had since the earliest communicative activity expressed themselves to others in terms that the rest of us would have found highly objectionable. Where once a crude verbal outburst at the pub or the football stadium would have been considered to have lacked a degree of permanence (other than perhaps in the minds of those that were physically present at the time), the equivalent effusion online all too easily assumes a permanent form (even including those situations where the speaker quickly acts to withdraw his or her

[20] L Rogal, 'Anonymity in Social Media' (2013) 7 *Phoenix Law Review* 61, 62; S Qasir, 'Anonymity in Cyberspace*:* Judicial and Legislative Regulations' (2013) 81 *Fordham Law Review* 3651.

[21] *The Guardian*, 2 October 2014 <http://www.theguardian.com/uk-news/2014/oct/02/abuse-dossier-kate-gerry-mccann-police-madeleine>.

remarks)[22] and is disseminated to an audience that may not have been contemplated by the speaker. Especially troubling is the new phenomenon of 'revenge porn' where, usually after an intimate relationship has ended, one of the parties distributes without the consent of the other sexually explicit images of the latter in an attempt to humiliate this person and in clear and obvious violation of a privacy entitlement.[23] Some commentators locate a source of current difficulties in the fact that speakers believe (albeit often erroneously) that they enjoy complete anonymity online and post comments of a nature that they would not consider making public if their true identities were disclosed. Speakers are free to create new online identities and personas as they please without ever having to disclosing their true identities to their readers. Others point to more general cultural changes (or perhaps more accurately a decline) in communication etiquette arising out of the shift away from the civilising constraints of face to face exchanges where social conventions and politeness (at least among strangers) tend as a general rule to inhibit cruder speech forms.[24] The culture of 'flaming' thus refers to an established form of electronic interaction that evinces a lack of respect for other speakers and is deliberately antagonistic towards other online speakers. This culture is facilitated by the technical ease with which digital citizens can instantaneously register their disgust, offence or sharp disagreement with a previous speaker or recent event and lends itself to ill-considered and robust or unrefined forms of speech of a sort that would be less frequent in non-electronic contexts where social conventions concerning interpersonal relations make expression of direct hostility or abuse less likely.[25]

The reality of these interactions is then far removed from the ideal of respectful contributions to public discourse intended as contributions to a discussion about the common good or a community-norm mediated notion of civilised exchange between rational individuals described at the beginning of this contribution. And yet, as Gates has shown, the civil speaker demanded respectively in versions of republican accounts of self-government can deliver in the most polite and educated terms a put-down that can be so much more devastating to its target than a crude epithet mouthed by a poorly-educated, uncivil counterpart.[26] In his example of two sets of remarks directed at a black freshman at Stanford University, Gates' first speaker says

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[22] I am referring here to the practice of photosnapping a tweet or post via say a smartphone in the moments before it is taken down.

[23] See now Criminal Justice and Courts Act 2015, s 33.

[24] See <http://www.nytimes.com/2007/02/20/health/psychology/20essa.html?_r=0>.

[25] Even under the most speech protective jurisdiction in western liberal democracies, face to face abuse did not enjoy constitutional protection. In *Chaplinsky v New Hampshire*, 315 US 568 (1942) the denunciation of a police marshall as a 'God-damned racketeer' and 'fascist' was deemed to constitute 'fighting words' and outwith any 'essential part' of the exposition of ideas. My own view is that, as plainly political speech, Chaplinsky's words though crude could be thought to be worthy of some constitutional protection and, where unlikely to have caused an imminent and serious risk to the peace, ought to have escaped punishment. I remain unconvinced that all such face to face abuse is automatically beyond constitutional protection, regardless of context.

[26] Henry L Gates, Jr, 'Let Them talk' (1993) 37 *New Republic* 45.

> LeVon, if you find yourself struggling in your classes here, you should realise it isn't your fault. It's simply that you're the beneficiary of a disruptive policy of affirmative action that places underqualified, underprepared and often undertalented black students in demanding educational environments like this one. The policy's egalitarian aims may be well-intentioned, but given the fact that aptitude tests place African-Americans almost a standard deviation below the mean, even controlling for socio-economic disparities, they are profoundly misguided. The truth is, you probably don't belong here, and your college experience will be a long down-hill slide.

In the second set of remarks the speaker simply says: 'Out of my face jungle bunny.'

At first glance, the first statement has the appearance of a sympathetic and reasoned argument when in truth it is racist and witheringly cruel. Well-intentioned codes of campus and workplace ethics are however likely to clamp down on the second statement only. Now imagine both set of remarks to be expressed in an online forum such as Facebook and it again seems clear that only the latter statement would come to the attention of the authorities. This privileging of the more articulate, socially skilled speaker should recall Young's earlier critique of internal exclusion and the privileging of the 'dispassionate, reasonable, evidence-based' speaker.

Robert Post's reading of the First Amendment allows the state to censor from public discourse speech if it is 'considered or experienced as coercive or invasive or otherwise a violation of one's identity or freedom.'[27] Thus the person who utters the second set of remarks can, on this view, be penalised by the criminal law where, as will normally be the case, a majority of community members perceive their sense of identity (as non-racists) and standards of civility to be under assault. The drawing of civility standards from the sensibilities of the majority in any given community has the effect of ceding the boundaries of permitted speech to dominant forms of social interaction that elites are well-placed to shape for their own self-interested ends. It is much less clear however that the first set of remarks would fall foul of dominant community civility norms and so must, on Post's account, escape sanction.

The social media platform Twitter states that, aside from rules on acceptable use (including no direct threats specific of violence against persons, targeted harassment, and the use of obscene or pornographic images in profile/header photos or user backgrounds, disclosure of private information), each user is responsible for the content they provide, and that the company does 'not actively monitor and will not censor user content'.[28] Twitter relies in part upon its 'community' of users to report instances of abuse to its 'trust and safety' teams. When online expression 'tips into criminal activity', it claims to have a separate process for dealing with the police.[29] Of course the sheer

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[27] Robert Post, 'The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and *Hustler Magazine v Falwell*' (1990) 103 *Harvard Law Review* 601, 642.

[28] <https://support.Twitter.com/articles/18311-the-Twitter-rules>.

[29] Sinéad McSweeney's oral evidence (Director of Public Policy for Twitter in Europe, Middle East, and Africa) in House of Lords Select Committee on Communications (2014-15), '1st Report of Session 2014-15. Social media and criminal offences' (HL Paper No 37) 25–37.

volume of such communications means that only a small proportion of these communications are ever likely to be prosecuted. Facebook too relies upon 'community' standards (or more accurately Facebook's version of what constitutes acceptable or unacceptable use) that prohibit users from engaging *inter alia* in harassment or bullying. Compared to Twitter however, Facebook users have greater control over the community of 'friends' that they interact with and via privacy settings can block unwanted contact with hostile persons and prevent such persons from seeing a posting. Users can report instances of abusive comment or harassment to Facebook. The company claims that its 'Report or resolve' policy successfully encourages users to request others to remove certain posts (eg a photograph of the user).[30]

Rowbottom has proposed that law enforcement agencies ought to adopt a more forgiving attitude to speakers he labels as 'low-level'—that is speakers in the digitally-equivalent position of those conversations held in informal settings such as the dinner table, on the phone or at the pub where typically there is little forethought about the risks of harm created by the speech and whose content is usually spontaneous and is intended for an immediately proximate and usually small audience.[31] 'Low level' expression is contrasted with 'high level' expression which can found on the mass media and is produced by professionally-trained broadcasters and journalists after background research and intended for mass consumption. This type of speech is usually carefully prepared and researched with the added support of 'in house' or readily accessible legal advice. Of course, this dichotomy is less clear-cut in the real world where the opinions of viewers or readers are increasingly sought for example to fill commentary sections on, *inter alia,* news websites that respond to professionally produced pieces of journalism. Rowbottom's categorisation is intended to supplement rather than challenge the existing, orthodox distinction between higher value (political expression) and its lower value counterparts (commercial, artistic and obscene expression). Thus, any given communication will fall on a point on two intersecting continuums represented by (a) the high to low value spectrum and (b) the high to low level spectrum. Four categories of expression might thus be stated as (i) high value / high level; (ii) high value / low level; (iii) low value / high level; (iv) low value / low level. The first two types naturally attract the strongest degree of protection on account of their content. Here though, one might expect some greater leeway for high value / low level speech that is not the product of a professionally trained journalist and which

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[30] Simon Milner's oral evidence (Policy Director for Facebook in Europe, Middle East and Africa) in House of Lords (n 29) 25–37.

[31] Jacob Rowbottom, 'To Rant, Vent, and Converse: Protecting Low Level Digital Speech' (2012) 71 *Cambridge Law Journal* 355, 371. The corollary of which is a less forgiving attitude to professionally-produced and researched mass media content—a stance that might be considered implicit in the notion of 'duties and responsibilities' in Article 10(2) of the Convention even if the text does not confine 'duties and responsibilities' to the mass media. See *Erdogdu & Ince v Turkey*, (2002) 34 EHRR 50 noting the special significance attached by the court to the idea of journalists' responsibilities in times of tension and conflict and also *Bladet Tromsø & Stensaas v Norway*, (2000) 29 EHRR 125.

has not benefitted from in-house lawyering and yet is intended as a contribution to political debate. In defamation cases eg the application of a 'responsible journalism' standard to amateurs who blog on political topics would seem to raise serious concerns about the chilling effect on other citizen journalists and potentially deprive public discourse of whole swathes of non-professionally produced comment and opinion for fear of a legal action. Here, the censoring tendencies of social media platform providers and Internet service providers are likely to lead to the excising of tendentious material as a precaution once these organisations are put on notice. This represents a serious problem for contentious and unpopular speech forms.

A major purpose of Rowbottom's article though is to make the case for *some* measure of constitutional or legal protection for type (iv) low value / low level expression which recognises at the same time the need to prevent or limit certain harms caused by the expression. A significant portion of[32] digital speech fits within the low value / low level category proposed by Rowbottom. Certainly, in cases which have attracted the interest of police and prosecutors in the UK, low value, low level expression features prominently as the reported instances of threats of violence, harassment, bullying, and so called 'revenge porn' discussed below make clear. As was made clear earlier, the focus of the present discussion is somewhat different, being concerned with digital speech that is relevant to participation in democratic self-government (that is on Rowbottom's typology of high value / low level expression). Nonetheless, the exact point on the high value to low value continuum may be difficult to discern and it is not clear how Rowbottom proposes to draw distinctions in this regard. Consider for example the deeply misogynist, death and rape threat tweets sent by several Twitter account holders to women who were campaigning to have Jane Austen's image printed on the English ten pound note. These comments resulted in jail sentences for the speakers for sending 'menacing messages' via a public communications system contrary to Section 127 of the Communications Act 2003. It is entirely understandable that there should be little or no sympathy for these speakers.[33] Their respective messages caused significant distress to the victims. At the same time, and uncomfortable though it may be to confront, it is not far-fetched to speculate that the vile communications sent by these defendants may well have contained a crude political message, namely an implicit criticism of the perceived 'political correctness' at play when a public body—the Bank of England—signals the worth of a female literary figure. As such, there was perhaps at least some component of political expression at

[32] There is a significant amount of professionally created and produced material also to be found on social media of high value content (current affairs and political topics more generally) as well as much that can be construed to be low value, non-political content (celebrity gossip, fashion, sport).

[33] Cases of (i) Peter Nunn who in September 2014 was sentenced to 18 weeks imprisonment for sending menacing tweets that threatened a female Labour MP with rape <http://www.bbc.co.uk/news/uk-england-29411031>, and (ii) Isabel Sorley (12 weeks) and John Nimmo (8 weeks) who were convicted in respect of tweets sent to Caroline Criado-Perez in January 2014 <http://www.theguardian.com/uk-news/2014/jan/24/two-jailed-Twitter-abuse-feminist-campaigner>.

play here that has not been present in the cases where a threat of violence *simpliciter* is made to another. It follows that a reading-down of the Section 127 of the Communications Act 2003 under the Human Rights Act may have been in order at least to carve out a breathing space for intemperate and crudely-phrased invective disseminated rashly at the click of a mouse where (i) no real threat of harm was perceived by the target or, alternatively and more controversially still, (ii) where such a threat of harm was perceived, but the defendant did not, on the facts, pose a credible threat to the target's safety. Without knowing more about the actual circumstances surrounding each of the 'menacing' tweets in the above cases, it is difficult to know whether a narrowed-down reading along the above lines would have sufficed to avoid a criminal penalty. A clearer case is that of Chambers (discussed below) where the criticism of the closure of a public airport is without doubt expression on a matter of public importance and, on its face, capable of attracting some 'reading-down' protection under the Human Rights Act. [34]

Outside the category of direct threats are statements that express hateful / offensive thoughts on topics of political controversy that also pose questions about where on the spectrum of high to low value speech they should sit. Take for example Azher Ahmed's Facebook post in which he responded to the news of the deaths of six British soldiers in Afghanistan:

> People gassin about the deaths of Soldiers! What about the innocent families who have been brutally killed… . The women who have been raped . . . The children who have been sliced up . . . ! Your enemy's were the Taliban not innocent harmful familys. All soldiers should DIE & go to HELL! THE LOWLIFE FOKKING SCUM! gotta problem go cry at your soldiers grave & wish him hell because thats where he is going.[35]

At the time of his arrest, a Yorkshire police spokesperson was quoted as saying, 'He didn't make his point very well and that is why he has landed himself in bother.'[36] Ahmed was convicted in October 2012 of making 'grossly offensive' comments contrary to Section 127 of the Communications Act 2003 and sentenced to 240 hours community service. It is suggested in some media reports that a jail sentence was avoided because he removed his post quickly and tried to apologise for the hurt caused to the grieving families of murdered British soldiers.[37] Imagine however if the defendant had written a more eloquent post in which he expressed his 'disquiet at the hypocrisy of persons who grieved at the deaths British soldiers but showed little or no regard for

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[34] *Chambers v DPP* [2012] EWHC 2157

[35] <http://www.theguardian.com/commentisfree/libertycentral/2012/mar/15/azhar-ahmed-treason-army-facebook-comments>.

[36] <Ibid.

[37] <http://www.independent.co.uk/voices/comment/azhar-ahmed-a-tasteless-facebook-update-and-more-evidence-of-britains-terrifying-new-censorship-8204212.html>.

the undoubtedly deep personal traumas and losses of innocent families caught up in conflicts that were not of their making.' As the quoted remarks of the police spokesperson make clear, it is the tone of (and lack of sophistication in) Ahmed's words—in short—his incivility that results in him coming to the attention of the police in the first place. Had he opted for or been able to opt for a more sophisticated choice of words, a criminal prosecution may not have occurred at all. For comparative purposes, it is interesting to note that the non-imminent nature of a threat of violence or disorder in US law can serve to bring the threatening speech under the protective ambit of the First Amendment where the content of the speech is plainly political as in *Hess v Indiana* where the statement 'We'll take the fucking streets later' was made during anti-Vietnam war protests in Bloomington on the campus of Indiana University.[38] The value in protecting speech of the sort encountered in *Hess* will be explored in more detail below. For present purposes though it can be seen that Hess' unsophisticated use of language did not result in the withdrawal of constitutional protection. Indeed, it is constitutionally appropriate to recognise the speaker's choice to use words with a powerful emotive force, the better to hit home with his or her message.[39]

The constitutional value of anonymous online speech: The United States' and the United Kingdom's attitudes contrasted

It was noted above that anonymous speech is said to encourage an unhealthy tendency towards aggressive, uncivil expression and that a more rational and considered exchange of opinion is possible where citizens know in advance that their true identities attach to communicative acts. Initially however, there is a practical issue about how easy it is to remain anonymous online. A number of sites do in fact require participants to register some identifying information even though the identity under which a person appears publicly to post comments is very obviously a pseudonym. The question in such cases concerns how easy it is to invent a false identity for *registration purposes*. Website hosts and ISPs have also co-operated with the police and the courts in passing on the registration details of those accused of breaches of the criminal and civil law.

[38] *Hess v Indiana*, 414 US 105 (1973). See for the origins of the protection in *Hess* the landmark ruling in *Brandenburg v Ohio*, 395 US 444 (1969).

[39] See thus the words of J Harlan giving the opinion of the Court in *Cohen v California*, 403 US 15, 26 (1971). 'In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.'

The available empirical evidence on 'trolling', 'cyberbullying', and other forms of aggressive or menacing forms of online expression does not point unambiguously to the conclusion that anonymity promotes greater levels of uncivil discourse.[40] A study published in 2005 by Davis in the United States found that robustly-worded personal attacks were just as likely to be made by persons who had not anonymised themselves as by those using false identities.[41] Well before the era of electronic communications, a survey of student data subjects showed contrastingly that anti-social speech among group members is more likely when members speak under conditions of anonymity.[42] The bigger picture may be, as Robert Putnam argued in *Bowling Alone*, that for some time now (and pre-dating the Internet era) lives in western liberal democracies have been characterised by a sense of increasing disconnectedness from families, neighbours, campaign groups, and social structures that previously brought people into actual, as opposed to virtual, communities.[43] On this view, rather than being a cause of anti-social speech, anonymous electronic communications are best seen as offering merely the latest means through which we can express our disconnectedness from others.

The First Amendment's qualified though generally protective stance towards those who engage in anti-social expression from behind a cloak of anonymity consciously refers back to the pre-independence era when the opponents of British colonial rule published their grievances in pamphlet form. In 1960 the Supreme Court in *Talley v California* reviewed the conviction of a petitioner under a Los Angeles city ordinance that forbade the distribution of any leaflet

> in any place under any circumstance, which does not have printed on the cover, or face thereof, the name and address of (a) the person who printed, wrote, compiled or manufactured the same; (b) the person who caused the same to be distributed.[44]

At the time, a number of state legislatures had passed laws requiring disclosure of names and addresses of authors, publishers and distributors. The petitioner's leaflet sought to persuade members of the public to boycott named businesses that were said to be refusing equal employment opportunities to non-whites. Justice Black for the Court noted the 'most constructive' purposes for which anonymity had been used in pre-revolutionary America.[45] The enforcement of English press licensing laws requiring the identification of printers, authors and distributors was intended to quell the circulation

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[40] Toni M Massaro and Robin Stryker, 'Freedom of Speech, Liberal Democracy, and Emerging Evidence on Civility and Effective Democratic Engagement' (2012) 54 *Arizona Law Review* 375, 419–20.

[41] Richard Davis, *Politics Online: Blogs, Chatrooms, and Discussion Groups in American Democracy* (Routledge 2005).

[42] Eugene W Mathes and Thomas A Guest, 'Anonymity and Group Social Behaviour' (1976) 100(2) *Journal of Social Psychology* 257.

[43] Robert D Putnam, *Bowling Alone: The Collapse and Revival of American Community* (Simon & Schuster 2000).

[44] *Talley v California,* 362 US 60 (1960).

[45] ibid.

of anti-government literature.[46] In the post-colonial era, federalists[47] and anti-federalists[48] routinely published their contributions to political debate under the cover of anonymity. The terms of the Los Angeles ordinance had ranged well beyond false advertising and fraudulent communications to capture political speech forms such as the petitioner's leaflet. Thus, even if the law had been devised with the aim of suppressing a narrower class of speech, its wording criminalised some constitutionally protected speech and was, as a consequence, facially overbroad.[49]

Beyond political speech, the Court in *Talley* recognised that anonymously produced works have advanced human culture. A point endorsed more recently in passing by the Court in *McIntyre v Ohio Elections Commission* noting that classic works of literature from Voltaire to George Eliot and Mark Twain to name but a few had emerged from pseudonymised pens.[50] Whilst a requirement of disclosure might assist audience members to make some overall assessment of the quality and significance of the work, the Court in *McIntyre* considered that the public interest in having anonymous works of literature enter the public domain far outweighed the rival public interest in requiring disclosure of identity as a condition of being published. Indeed, it noted that the quality of evaluation might be improved when the identity of the author remained hidden, citing the 'pervasive' practice of blind grading law students' papers which eliminated any bias resulting from knowledge of the students' identities The converse position of requiring disclosure amounted to the imposition by law of a rule concerning the content of a publication and, as such, was constitutionally invalid outside the most compelling circumstances.

McIntyre itself concerned the political speech of a petitioner who had been fined by the state of Ohio's Elections Commission for failing, contrary to state election law, to disclose her identity as the author of a leaflet. She had written and published a leaflet opposing a proposal to levy a new school tax that was to be decided by a referendum. Although the Commission claimed that the statutory disclosure requirement was needed to prevent fraudulent and libellous statements as well as providing the electorate relevant information, a majority of the Supreme Court found that the burden placed upon political speech was not narrowly tailored to advance compelling state interests. The objective of providing referendum voters with more information upon which to evaluate the contributions of speakers could not, in the case of speakers who were

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[46] ibid 64–65. Black cites the example of the *Letters of Junius* published in 1770 which complains in the following terms about the hated tea tax 'What is it then, but an odious, unprofitable exertion of a speculative right, and fixing a badge of slavery upon the Americans, without service to their masters?' Isaac Kimber and Edward Kimber (eds), (1770) 39 *The London Magazine, or, Gentleman's Monthly Intelligencer* 299.

[47] See eg *The Federalist Papers* which were published under the pseudonym 'Publius'. The *Papers* were written by a multi-author combination comprising Alexander Hamilton, John Jay, and James Madison who each penned discrete papers.

[48] 'Cato', 'Centinel', and 'Brutus' were variously adopted by leading pamphleteers in the anti-federal movement and later thought to be respectively George Clinton, Samuel Bryan, and Robert Yates.

[49] See also the concurrence of Harlan J at *Talley v California* (n 44) 66–67.

[50] *McIntyre v Ohio Elections Commission*, 514 US 334 (1995).

hitherto unknown by their audience, be enhanced by the identification requirement. Moreover, the width of the ordinance's terms extended beyond its purported other aim of preventing fraudulent and libellous speech at election time,—which the Court did concede assumed greater importance during an election campaign—catching non-libellous, non-misleading leaflets distributed months in advance of any election or referendum by persons such as Mrs McIntyre who were not candidates or party supporters. Ohio had failed to show that its legitimate interest in curbing certain abuses of anonymous election speech justified the sweeping prohibition on anonymous contributors to political debate. As Stevens J concluded in his opinion, 'One would be hard pressed to think of a better example of the pitfalls of Ohio's blunderbuss approach than the facts of the case before us.'[51]

The application of *Talley* and *McIntyre* to online speakers has yet to be determined by the Supreme Court but US Court of Appeals for the Ninth Circuit declared in 2010 that anonymous speakers engaging in commercial expression enjoy less protection under the First Amendment than their anonymous political speech counterparts. In *re Anonymous Online Speakers* a long-running and acrimonious business dispute between a cosmetics and nutrition products distributor (Quixtar) and a business training company (Team) reached the Court of Appeals in Nevada when the distributor sought discovery from an employee of Team of the names of five fellow employees who had allegedly made defamatory online comments about Quixtar.[52] Although the Court of Appeals followed *McIntyre*'s admonition not to qualify the level of protection for speech merely on account of the fact that it employed the latest technology,[53] the speech was treated as commercial expression and, accordingly, entitled to a lesser degree of constitutional protection. The appropriate test for discovery in a civil action involved balancing the value of anonymous speech against the 'great potential for irresponsible, malicious and harmful communication', drawing on the specific circumstances surrounding the speech to contextualise the balancing exercise. On the facts of the case, this balancing exercise supported discovery of some of the TEAM employee names.[54] In other scenarios where a potential plaintiff subpoenas an ISP or website administrator to obtain disclosure of an anonymous poster's registration details or IP address or both, there are two related anxieties from a free speech perspective; first that anonymous speakers are denied an opportunity at this stage of proceedings to contest any move to have their identities passed over to potential plaintiffs; and, second, that corporate entities and other powerful plaintiffs will use the procedure to obtain details of posters' identities not so

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[51] ibid.

[52] *Anonymous Online Speakers v US District Court for the District of Nevada*, 611 F3d 653 (2010) No 09-71265, 12 July 2010, <http://cdn.ca9.uscourts.gov/datastore/opinions/2010/07/12/09-71265.pdf>.

[53] *McIntyre* follows *Reno v ACLU,* 521 US 844, 870 (1997) on this point.

[54] For analysis, see Mallory Allen, 'Ninth Circuit Unmasks Anonymous Internet Users and Lowers the Bar on Disclosure of Online Speakers' (2011) 7 *Washington Journal of Law, Technology, and Arts* 75; Musetta Durkee, 'The Truth Can Catch the Lie: The Flawed Understanding of Online Speech in *In Re Anonymous Online Speakers*' (2011) 26(1) *Berkeley Technology Law Journal* 773.

much with a view to using legal processes to secure compensation for damaged reputations, but more strategically with a view to silencing their critics (what are known in the US as 'SLAPP suits' or strategic law suits against public participation).[55]

Domestically, a disappointing failure to acknowledge the democracy-enhancing function played by the anonymous citizen journalist is evident in a civil law context from J Eady's refusal to grant an injunction that would have prevented *The Times* newspaper from 'outing' the identity of an anonymous blogger and serving police officer in *Author of a Blog v Times Newspapers*.[56] Ironically, the failure occurred in a ruling which upheld media freedom to publish information. Justice Eady's under-theorised, apparently pro-media freedom ruling offers an extremely short-sighted gain to Article 10 freedoms that will prove damaging in the longer term to political bloggers, democratic self-government and control of elites. The chilling role played here by Murdoch-owned newspapers in undermining the cause of active, informed self-government is additionally worthy of close scrutiny.[57] On a final preliminary point, it is worth noting that, unknown to Eady J at the time but later revealed during the Leveson Inquiry, the newspaper had in fact discovered the identity of the blogger through a reporter gaining unlawful access to the blogger's Gmail account.[58] At the time of the application for an injunction however, lawyers for *The Times* erroneously (though innocently) asserted that the blogger's identity was discovered through piecing together documents already in the public domain. The blogger at the centre of the litigation was 'Nightjack'. The blog provided its readers with an insider's account of modern policing, detailing a gritty account of the daily lot of an officer, far removed from the glossy fictional dramas beloved of television producers. Some blogs were openly critical of politicians.[59] The blog won the Orwell prize for online political writing in 2009.

The basis of J Eady's refusal to grant an injunction can now be set down: The applicant for an injunction needed to show that he or she had a reasonable expectation of privacy under Article 8 of the European Convention in relation to the information

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[55] Sophia Qasir, 'Anonymity in Cyberspace: Judicial and Legislative Regulations' (2013) 81 *Fordham Law Review* 3651, 3673–79.

[56] *Author of a Blog v Times Newspapers*, [2009] EWHC 1358.

[57] See in this vein the critical article of Jean Seaton, 'NightJack Blog: How the *Times* Silenced the Voice of Valuable Frontline Reporter' <http://www.theguardian.com/media/organgrinder/2009/jun/17/nightjack-blog-times-silenced> in which she argues that *The Times* actions have undermined the cause of informed control over public office holders.

[58] The reporter gaining access—Patrick Foster—was later dismissed from *The Times* and subsequently accepted a caution from police in respect of an alleged breach of s 1 of the Computer Misuse Act 1990. The blogger Richard Horton accepted damages of 42,500 pounds and a public apology from the Murdoch-owned newspaper in 2012, <http://www.theguardian.com/media/2012/oct/08/nightjack-blogger-payout-times-publishery.

[59] Here is Nightjack describing one of his cases 'Lee takes his watch and wallet as trophies. Stamps on Mike's head more for the sake of completeness than anything. I mean, that's just what you do, you stamp the head when they are down. Everyone does that. It's soft not to.' Cited in Sam Jones, 'A fair cop: Policeman's "perfect" blog wins Orwell prize' *The Guardian*, 24 April 2009 <http://www.theguardian.com/books/2009/apr/24/orwell-prize-jack-night-winner-blog>.

that the defendant wished to publish (stage 1) and, assuming the applicant could satisfy stage 1, that there was no countervailing public interest in freedom of expression to override that reasonable expectation of privacy (stage 2). At stage 1, Eady noted that the cases in which a reasonable expectation of privacy had so far been recognised by the courts had involved information concerning sexual relationships, physical and mental health, financial affairs or domestic and family arrangements.[60] There had not been a case when an anonymous blogger had sought to invoke Article 8 to prevent his or her identity being revealed to the public. True enough, but then perhaps the judge failed here to reflect that legal disputes involving bloggers in 2009 had rarely troubled the courts at all before this time and so the likelihood of a precedent recognising an Article 8 basis for anonymous blogging would have been correspondingly low. There was of course nothing to prevent the judge from extending Article 8 protection for the first time to cover the anonymous blogger so it is important to parse Eady's opinion more closely to see why he believed this move was a non-starter. Considerable weight was placed on an earlier High Court decision in *Mahmood v Galloway and another* where an undercover investigative reporter for a Sunday newspaper failed to prevent publication of two photographs of himself on a website.[61] One of the photographs was taken whilst the reporter was at work for the newspaper and was held not to give rise to any privacy claim.[62] The other was a passport photograph which was taken for the purpose of work. This too lacked the necessary element of privacy inherent in a family photograph intended for home viewing only.[63] It followed that neither image engaged Article 8 for the purposes of stage 1 of the application for an injunction. As the photographs of the undercover reporter lacked the necessary element of private information, so too did the name of the blogger. Concluding that 'blogging is essentially a public rather than a private activity.'[64] Justice Eady ruled that the application had failed to establish a reasonable expectation of privacy and must therefore be dismissed.

Had Eady felt it necessary to examine the stage 2 balance—'privacy versus countervailing public interest in allowing publication of the blogger's name', he indicated that *The Times* would have succeeded on this point also. The purpose behind the application to prevent *The Times* revealing his identity to the world at large was to protect the blogger from disciplinary measures being taken by his employers (immediate superior officers had been told by *The Times* of the identity of the blog's author) and from causing difficulties in his working relationships with fellow officers. However Eady held that it was not part of the Court's function to prevent more senior police officers *or* the public from learning about this officer's conduct. Indeed, the public's ability to assess the worth of the blogger's contributions to public debate would be

60 *Author of a Blog* (n 56) [9].
61 *Mahmood v Galloway and another*, [2006] EWHC 1286.
62 ibid [20].
63 ibid [18].
64 *Author of a Blog* (n 56) [11].

enhanced by knowledge of the identity of the blogger.[65] The latter claim however really does not stand up to any serious scrutiny. Readers of the anonymous blog knew already that it was authored by an unnamed service police officer. So it is not clear how Eady believed that *The Times* outing of the author as serving police officer X (as opposed to serving police officer Y) would have assisted public evaluation of the blog's worth. To the vast majority of the blog's audience, knowledge that the blog was written by officer X or officer Y has at best a negligible impact upon assessments of its value.[66]

It was open to the court at stage 1 to consider that, as the blogger had by an act of his own choosing, opted to keep his identity hidden from his readers, this autonomous act was sufficient in itself to found a reasonable expectation of privacy. He had known that his blog would contain embarrassing information and that his employers would have wanted to prevent public disclosure of this material and so the maintenance of anonymity would have assumed critical importance. If privacy has a core meaning, it is surely located in the freedom of an individual to control what information concerning themselves is revealed to others and a belief that this choice reflects the autonomous will of the speaker. Within the framework of English law, this exercise of autonomous will should only be overridden at stage 2 where there are compelling public interest reasons to do so. Even then, if the concern is to stop future flows of police intelligence into the public domain, this countervailing interest could have been satisfied by *limited* identification of the blogger to his or her employers as opposed to the wholly public unmasking by a national newspaper. Eady's unreceptiveness to the general democracy-enhancing value of anonymous blogs is all too apparent in the straightforward manner in which he asserts the public's interest in learning the blogger's identity as a means of evaluating the worth of his or her contribution. The judge's disregard or unawareness of relevant counter arguments of the sort that were considered in *McIntyre* is an omission that a higher court will hopefully have an opportunity to address in the near future.

There is another way of thinking about *Author of a Blog* in a way that points up the valuable freedom of expression interests that would have been served paradoxically by the issuing of an injunction. Imagine counterfactually that the information in *Nightjack* had been supplied by the blogger to a national newspaper, say *The Guardian,* and had appeared exclusively on that newspaper's website stimulating an online discussion of modern policing methods and the attitudes of officers towards the communities they serve. Let it then be assumed that police authorities in Lancashire had brought an action under Section 10 of the Contempt of Court Act 1981 against *The Guardian* to compel disclosure of the identity of the newspaper's source. At the outset, the statutory presumption in favour of non-disclosure would have placed an onus on the police to establish that the disclosure was 'necessary' in the interests of justice or the prevention of crime or disorder. If it is conceded for the sake of argument that discovery of the

[65] ibid [28]–[29].

[66] See for support and other pertinent criticisms of the ruling of J Eady, Eric Barendt, 'Bad News for Bloggers' (2009) 2 *Journal of Media Law & Practice* 141.

source would have enabled the police authorities to take disciplinary action against the employee and that no other practical steps were available to discover the source's identity,[67] the outcome of this legal dispute would have turned on a range of matters such as the pro-secrecy factors

> whether the police authority had failed to seek an injunction to prevent *The Guardian* publishing further material from its source;[68] where the information revealed matters of legitimate public interests including the mismanagement of public resources, improper (eg sexist / racist / homophobic) attitudes on the part of police officers towards sections of the community; the longer term gains for the flow of information into the public domain that would accompany a refusal to order disclosure; the absence of a venal motive on the part of the blogger[69]

as weighed against the pro-disclosure features of the case

> likelihood of further leaks of confidential police information; negative effect on police morale, presence of improper motives on the part of the source, lack of public interest in the quality of the information disclosed by *The Guardian*.

After *X Ltd v Morgan-Grampian*, disclosure would only be ordered if the court was satisfied that disclosure in the interests of justice was of 'such preponderating importance' as to overwhelm the statutory presumption in favour of non-disclosure.[70] As can be seen, the Section 10 Contempt of Court Act route flags up for serious consideration a range of pro-anonymity, pro-informed self-government considerations that were not in play in *The Author of a Blog*. Fortunately, Section 10's protective ambit is not confined to the source contacts of professional journalists. This reasoning shows the position of the anonymous blogger to be stronger when the blog is published by a third party. *Nightjack's* problem was that he published directly to the public without using an intermediary. This feature of domestic law in itself reveals a further reason for dissatisfaction with the High Court's reasoning in *The Author of a Blog*. A more compelling analysis of the blogger's privacy interests would have understood how they encompassed a powerful autonomy-based freedom of expression argument[71] and conversely would have realised that *The Times*' stance actually chilled freedom of expression rather than somehow advancing it as J Eady appeared to believe.

In the UK it has been clear for some time that speakers who communicate via social media platforms such as *Twitter* and *Facebook* and breach the criminal law can in fact find that their true identities are passed on to the police by social media platforms.

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67 *Express Newspapers Ltd v John*, [2000] 3 All ER 257.

68 *Goodwin v UK*, (1996) 22 EHRR 123.

69 *Interbrew SA v Financial Times Ltd*, [2002] EWCA Civ 274.

70 *X Ltd v Morgan-Grampian*, [1991] 1 AC 1.

71 Consider in this regard the Supreme Court's stance in *McIntyre* that 'an author's decision to remain anonymous, like other decisions concerning additions or omissions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.' *McIntyre* (n 50) 342.

These companies' own monitoring of user-generated content is primarily guided by internal policies on acceptable use and by the staffing resource that is dedicated to eradicating unacceptable use. Thus Twitter has rules against threats of violence, and harassment. In evidence to the House of Lords Select Committee inquiry into social media and criminal offence, the Californian-based social media platform stated that it cooperates with the police from any jurisdiction where it is alleged that an offence has been committed. The Select Committee did query the consistency of Twitter on this point in its subsequent report, noting the lengthy courtroom battle between the French authorities and Twitter in which the latter had resisted disclosure of materials relating to the posting of anti-semitic tweets.[72] Furthermore, as the House of Lords Select Committee noted, whilst internal policies may vary from provider to provider, they are driven ultimately by company (shareholder) values and the market rather than compliance with the law or a principled commitment to users' privacy or freedom of expression interests.[73]

Domestic criminal laws affecting online expression

Online expression has thrown up a variety of problematic forms of expression that for ease of classification may be subdivided roughly into the following, sometimes overlapping categories:

- credible threats of violence against a person or damage to property;
- communications that are grossly offensive, indecent, obscene, or false;
- 'revenge porn'—where sexually explicit or intimate images of a person are sent or published to others without the consent of the person with the purpose of humiliating or distressing him or her;
- incitement to hatred on the basis of race, religion, gender, sexual orientation;
- communications that constitute harassment of an individual;
- breaching an anonymity order or a statutory ban on identification (eg in rape or serious sexual assault cases).

In what follows I will focus upon aspects of indecent, insulting, and menacing communications.[74] The particular issues that arise in relation to revenge porn are not considered in any detail on account firstly of the (at best) very tangential connection to political communication and, secondly, the clear and virtually unassailable

[72] House of Lords (n 29) para 58; <http://www.theguardian.com/technology/2013/html/jul/12/Twitter-data-french-antisemtic-tweets>.

[73] House of Lords (n 29) para 83.

[74] I should stress that this section does not offer a comprehensive account of the criminal law in this area.

countervailing victim interest in privacy.[75] The breaching of anonymity orders also engages strong privacy claims as well as societal interests in the effective prosecution of serious sexual assault charges that are not explored further here.

An indication of the penal law framework and the somewhat opaque application of pre-Internet and pre-social media statutory offences to specific problematic expression types is provided below. Existing ECHR and HRA jurisprudence would lead one to expect that expression with a political content would receive from the domestic courts a greater degree of protection (either by a narrowed reading of the scope of offence or by a more expansive reading of the defences available to an accused person) than its non-political equivalents. 'Political' expression may include (but ought not to be seen as restricted to) instances where someone is campaigning for a cause (such as amending abortion laws) or expresses hostility towards a politician on account of the latter's views.[76] The analysis in this section of materials develops my overall claim by suggesting that domestic courts' failure to pay sufficient attention to the political nature of offensive, abusive and menacing online communications diminishes the scope for a self-governing democracy. The basis of a more attractive approach to these problematic expression types is found in Learned Hand's opinion in *The Masses* where immoderate and indecent invective is seen as a constitutional privilege of the individual in a democratic society that is forfeit only upon proof of directly inciting others to act violently and, following *Brandenburg v Ohio,* where a violent act is likely to result imminently. The requirement of imminence should not be understood as preventing criminal conviction in all circumstances of social media speech—although it would intentionally insulate a broad range of online political invective and abuse, including some that has, when made offline, been considered (even under the First Amendment) to fall outside the ambit of constitutional protection. Take thus the example of face to face abuse and the ruling of the US Supreme Court in *Chaplinsky v New Hampshire*. Had a modern-day Mr Chaplinsky taken to Twitter to denounce the City Marshal as a 'god-damned racketeer' and 'a damned fascist' on the Marshal's public Twitter page, a stronger argument could be made for treating this expression as *prima facie* entitled to *some* level of constitutional protection. At the same time, circumstances can be imagined in which the element of 'imminency' in the stringent *Brandenburg v Ohio* test might be satisfied in relation to online speech. Consider eg a tweet that is sent by a demonstrator to fellow demonstrators and followers urging criminal damage to a nearby property or the assault of those police officers or others *in situ*. In other cases involving abusive communications entirely devoid of political content, there would seem to be little basis for safeguarding this type of speech where the predominant function of constitutional protection is to promote active forms of self-government.

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[75] This has now been made the subject of a separate criminal offence, see Criminal Justice and Courts Act 2015, s 33 (Disclosing private sexual photographs with intent to cause distress).

[76] Note however that the category of person falling within the definition of 'public figure' is considerably wider under the First Amendment than Article 10 of the Convention with the consequence that the speakers in the US enjoy greater freedom to disclose information and comment about a range of persons in the public domain than exists for their European equivalents.

For conduct falling under (i), (ii), and (iii) above

Malicious Communications Act 1988, Section 1

The original purpose of the 1988 Act (which predates the era of mass electronic communications) was to curb so-called 'poison pen' letters—it is an offence to send

> a (communication) which is indecent or grossly offensive; a threat; or information which is false and known or believed to be false by the sender (if his purpose is that) it should cause distress or anxiety to the recipient or any other person to whom he intends that it or its contents or nature should be communicated.

The meaning of 'indecent or grossly offensive' was considered in an offline setting in *Connolly v DPP* where the defendant sent pictures of aborted 21 week-old foetuses to pharmacists who stocked the 'morning-after' pill.[77] The defendant was a Christian and sought to change the recipients' views about the morality of abortion. The photographs were deemed by a jury to be 'grossly offensive' in their ordinary meaning. The defendant's communication undoubtedly fell into the category of political speech. However, even after reading down Section 1 of the 1988 Act so as to give an Article 10 ECHR-compliant reading of the statute, the defendant was found guilty of the Section 1 offence. The critical fact here was that the photos had been sent to employees of the store, as opposed to those who had the authority within the relevant businesses to decide what medicines to stock. Had the defendant sent the photos to a body in a position to influence public debate (such as a newspaper or its website) it is suggested that her Article 10 claim would surely have been stronger. By way of comment, the suggestion that the level of managerial responsibility enjoyed by recipients should be a factor in determining the degree of immunity enjoyed by political speech from the reach of the criminal law is not without its problems. For one thing, it presupposes a clear demarcation between recipients' interests in the speech as employees on the one hand and concerned citizens on the other. The presumption that the employees receive the communication exclusively in their capacity as employees and not voters or concerned citizens (or both) is open to question. After all, the defendant's efforts may have persuaded employees to join local anti-abortion (or possibly pro-choice) campaigners or more generally take a public stance on abortion matters. A republican-centred approach to inculcating the virtue of political activism might thus baulk at the idea of criminal punishment for this sort of activity. An equally fundamental objection to the line of reasoning in *Connolly* doubts that the causing of offence (gross or otherwise) is an adequate basis for imposing criminal restrictions on political expression. As has been noted previously by other commentators, limiting permitted expression to that which others do not find insulting curtails all sorts of communications that are valuable to both speakers and audiences.[78] Greenawalt for example maintains that, outside of very

[77] *Connolly v DPP*, [2007] EWHC 237.

[78] See Weinstein (n 4). For a judicial defence of freedom to speak offensively, see LJ Sedley in *Redmond-Bate v DPP*, [1999] EWHC Admin 733.

narrow settings such as the workplace[79] and proceedings in court, the onus should fall on people who are easily offended to take themselves away from environments where insult and offence is likely to occur.[80] To uphold on the contrary generally applicable criminal and civil sanction for offensive expression means letting some of the most sensitive members of the community set the boundaries for protected expression—a state of affairs which may be predicted to diminish radically the range and manner of individual contributions to societal discourse.

Other convictions under the 1988 Act have included (i) in February 2012 a 29 year old Sunderland AFC supporter for posting comments about Newcastle United football club on Twitter in which he referred to them as 'Coon Army';[81] (ii) in *R v Byrne*[82] where texts sent by the defendant to the mobile phone of the son of a woman who had ended a relationship with the defendant rambled thus 'Tell your mother been passed enough times today big wood in garden blue 306 time for revenge mate, sorry' and 'Wait for the bang sweet dreams', and (iii) Matthew Woods who was jailed for 12 weeks for posting explicit comments and jokes on his Facebook page about a missing 5 year old girl who was later found murdered. His defence lawyer said his client was drunk at the time.[83] Only the first of this trio raises a potential political speech claim (the demerits of ethnic minority footballers) that might merit a closer look at the imposition of criminal liability.

Communications Act 2003, Section 127

This is one of the first statutes that sets out expressly to regulate online speech via the criminal law although it too was enacted prior to the advent of social media platforms such as Facebook and Twitter. This fact has not hindered the successful deployment of Section 127 against users of social media platforms. It is an offence under this section to send 'by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character'. Having noted earlier the cogency of objections to the criminalisation of offensive expression, my intention in this brief section of materials is to limit my review of the application of Section 127 to 'menacing' communications to gain a sense of how this term is understood by domestic courts.[84]

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[79] Although Connolly was convicted of an offence which on its facts concerned communication at the workplace, liability under the 1988 Act is not confined to this narrow setting.

[80] Kent Greenawalt, *Fighting Words: Individuals, Communities and Liberties of Speech* (Princeton University Press 1995) 58–59.

[81] <http://www.theguardian.com/uk/2012/feb/06/sunderland-fan-guilty-racist-tweets>.

[82] *R v Byrne*, [2011] EWCA 3230.

[83] <http://www.bbc.co.uk/news/uk-england-lancashire-19869710> (8 October 2012).

[84] I do not for example discuss the case of Jake Newsome who in June 2014 was convicted and imprisoned for six weeks for making a grossly offensive post on Facebook concerning the murder of a schoolteacher in Leeds <http://www.theguardian.com/law/2014/jun/13/jail-someone-for-being-offensive-Twitter-facebook>.

The *cause célèbre* here is of course *Chambers v DPP* in which the defendant tweeted the following exasperated response on discovering that Robin Hood Airport was closed and that, consequently, he would be unable to meet his girlfriend.[85] 'Crap! Robin Hood Airport is closed. You've got a week and a bit to get your shit together otherwise I am blowing the airport sky high!' Chambers was convicted in Doncaster Magistrates Court and subsequently in the Crown Court before the High Court quashed his conviction. Chambers' message was considered by the High Court not to be 'menacing' in the sense of conveying a serious threat to his Twitter followers. Leaving to one side the issue of valuable public resources being misused by the CPS and implicitly endorsed by the Crown Court, the sensible reversal of the lower courts' decisions unfortunately tells us little about the reaction of the courts when faced with a more obviously 'menacing' message on a matter of undoubted public interest. Since *Chambers* other cases have begun to fill this void. As might be expected, domestic law is quite unforgiving to such threats, denying them the breathing space of the kind enjoyed in First Amendment jurisprudence under the *Brandenburg v Ohio* test.[86] For example in June 2011, Darryl O'Donnell, a Northern Ireland man, was convicted for posting messages on Facebook that called Gregory Campbell MP a 'scumbag' after the MP had criticised the costs of the Saville Inquiry into the killing of 14 persons by British soldiers at a civil rights march in Derry in 1972. The defendant's post had stated that the MP should 'get a bullet in the head'. He argued unsuccessfully that this was a throwaway remark not intended to cause harm. Evidence was presented in court that the MP was genuinely distressed at the comment.[87] In December 2010, Kalum Dyson, a 21 year old Huddersfield man who set up a Facebook group entitled 'Pakis die' and posted a message saying 'Help me shoot all the Pakis' was convicted under Section 127 and sentenced to twelve months' community service to include 150 hours voluntary work and a 30 day curfew.[88] Finally, in September 2014 another man, Peter Nunn, was convicted for sending menacing messages to Stella Creasey, a Labour MP who was campaigning for the new £10 note to carry the image of Jane Austen. He retweeted another person's threatening message which had been sent to the MP: 'You better watch your back, I'm going to rape your arse at 8pm and put the video all over.' The following day he sent more tweets all of which he believed wrongly were communicated under the cover of anonymity. These included 'Best way to rape a witch, try and drown her

[85] *Chambers v DPP*, [2012] EWHC 2157.

[86] On the other hand, private speech by A to B in which A threatens B with physical harm would seem to lack any plausible claim to constitutional protection.

[87] <http://www.bbc.co.uk/news/uk-northern-ireland-13880036>.

[88] <http://www.examiner.co.uk/news/west-yorkshire-news/brighouse-facebook-racist-kalum-dyson-4984913>. He could also have faced a charge under Part 3 of the Public Order Act 1986 of incitement to racial hatred.

first then just when she's gagging for air that's when you enter.' The court received evidence from the victim that she had feared for her own safety after learning of the defendant's threats. Nunn was jailed for 18 weeks.[89]

In two of the above cases (*O'Donnell* and *Nunn*), another named person has been put in direct fear of extreme physical violence and, despite an underlying political component to the threat, it is difficult to conceive why either defendant's remarks might have engaged constitutional protection for freedom of speech. After all, each identified a specific target, and made a threat of extreme violence that put their respective victims in a state of considerable distress and fear. It is not known whether either defendant posed a credible threat of such violence and it can be argued that this factor may be relevant to a determination of the type of sentence imposed by the court. Where however a threat is expressed in vague or remote terms (as in the Facebook post of Kalum Dyson where a whole racial group is mentioned) the case for giving *some* weight to broader free speech interests in political expression is strengthened. *Brandenburg* itself concerned a speech in which a speaker at a Ku Klux Klan gathering had declared 'Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel' and, at another point in the meeting, 'The Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken.' The US Supreme Court was able to set aside the defendant's conviction under state law on the basis that the First Amendment did not allow the government to proscribe advocacy of the use of force 'except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'[90]

What is attractive about the Supreme Court's ruling in *Brandenburg* is its recognition of a spectrum spanning lawful to unlawful advocacy of illegal conduct. At one end —and undeserving of constitutional protection under a principled commitment to freedom of speech—is the direct incitement to another to commit an unlawful act imminently. Here any societal or individual interest in the political speech component of the incitement is deemed overridden by a stronger, countervailing interest of the victim—in not being assaulted or simply being put in fear of being assaulted—and a societal interest in signalling the unacceptability of threats of imminent violence. Speech lying outside this point of the spectrum is likely however to have a stronger political component in which the speaker's dissatisfaction with the present state of

[89] In cases where the speaker communicates on more than one occasion, there is an argument for treating this type of conduct as a serious form of harassment, whereby a person is put in fear of violence, under s 4 of the Protection of Harassment Act 1997. Note that there must be a sufficiently proximate connection in time between the separate pieces of conduct for these to amount to a 'course of conduct' (*Lau v DPP*, [2000] 1 FLR 799). Moreover, the Act does not apply to the situation where 100 persons each tweet (or re-tweet another's tweet) on a single occasion something that is alleged to cause harassment to the target since no one person engages in a course of conduct. 'Harassment' is left undefined in the 1997 Act.

[90] *Brandenburg v Ohio* (n 38) 447.

society and its perceived injustices are evident. In such instances the speaker intends to contribute to public discourse and is motivated by a wish to persuade others. The speaker's words may in fact cause anxiety and apprehension among members of the target group, nonetheless the absence from domestic criminal law of a requirement to show an imminent threat of violence makes a penal response potentially very corrosive of dissenting, unpopular and, usually, crudely expressed opinion. Where the trigger for criminal liability is set in vague terms and at a low threshold, as occurs in the UK, by reference to 'threatening or abusive' speech which creates a 'likelihood of causing harassment, alarm or distress to persons' within hearing or sight of a speaker, the exclusionary effects of the criminal standard are plain. The width of the prohibition in domestic law is underscored by the twin facts that (i) the defendant need not be shown to have intended to cause harassment, alarm or distress[91], and (ii) no one among the intended target group need be shown to have been caused harassment, alarm or distress. The same holds true for prohibitions upon expression that is likely to stir up racial and religious hatred, as well as hatred on grounds of sexual orientation. Take thus the Divisional Court's upholding of BNP organiser Mark Norwood's conviction in 2003 under Section 5 of the Public Order Act 1986 for placing in his flat window a poster carrying the messages 'Islam out of Britain' and 'Protect the British People'.[92] One police officer gave evidence that in his view the poster was 'in bad taste and inflammatory' whilst a colleague testified that the poster could induce distress and 'racial feeling'. The prosecution did not need to produce evidence that anyone had actually been caused distress or that 'racial' hatred had in fact been stirred up against Muslims. The District Judge ruled that the poster was both abusive and insulting to Muslims, a finding that was upheld by the Queen's Bench in its conclusion that the poster went beyond the bounds of 'legitimate protest'. *Norwood*'s online equivalent is *R v Sheppard*[93] where material was posted on a website making derogatory remarks about black and Jewish persons. Another section of these materials entitled 'Tales of the Holohoax' stated that the Holocaust was 'one of many Jewish lies'. The website was hosted in the US but sent from England and available to persons here. The defendants were convicted of publishing racially inflammatory material and imprisoned for three years and ten months. The inhibiting effect of rulings such as *Norwood* on relatively unsophisticated contributions to political discourse is beyond doubt. More generally, adherence to civility standards in the criminal law may be said to reflect the absence of distrust in the motives of government for discriminating between communicative acts according to content. The adverse consequences of having domestic political debate cleansed by elite-generated norms should be a source of concern to anyone who is

[91] An awareness on the defendant's part (subjectively determined) of such consequences is sufficient to create liability, see *DPP v Clarke*, (1991) 94 Cr App R 359.

[92] *Norwood v DPP*, [2003] EWHC 1564 (Admin) and see the analysis by Weinstein (n 4).

[93] *R v Sheppard*, [2010] EWCA 65.

committed to robust deliberation in the public sphere. Consider by contrast the eloquent and preferable First Amendment response in *Cantwell v Connecticut*.

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbour. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, (and) to vilification . . . But the people of this nation have ordained in the light of history, that, in spite of the probability of excess and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy. The essential characteristic of these liberties is, that under their shield many types of life, character, opinion, and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and many creeds.[94]

Domestic Prosecution Practice after *Chambers:* Guidelines June 2013

Following the *Chambers* case and others, concerns were expressed that prosecutors in regional offices across England and Wales were reacting inconsistently (and sometimes excessively) when deciding whether to prosecute under the 1988 and 2003 Acts for online expression. Subsequently the Director of Public Prosecutions issued guidance to prosecutors to ensure greater consistency.[95] The Guidelines state that prosecutions will be brought when prosecutors are satisfied that the communication in question is

> more than shocking, disturbing, satirical, iconoclastic or rude or the expression of unpopular opinion or unfashionable opinion or banter/humour even if distasteful/painful to some.
> If a tweet / post is grossly offensive, the suspect may avoid prosecution if he / she has expressed genuine remorse; swift and effective action has been taken to remove the grossly offensive material; the communication was not intended for a wide audience or did not include the target / victim of the communication.
> However where there is a credible threat of violence to persons / property or the communication targets an individual and may constitute harassment—then the Crown Prosecution Service will prosecute these robustly.

There is nothing greatly surprising in these Guidelines. Even if the DPP had considered that the criminal law impinged too readily on controversial and crudely-expressed online speech, the Director's functions in this instance are confined to providing clarification to CPS staff as to how they structure the use of their existing

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[94] *Cantwell v Connecticut*, 310 US 296, 310 (1940). In truth however, and as Heinze rightly points out, this fine rhetoric from the Court did not match the actuality of oppressed non-white citizens' lack of personal freedoms, including a lack of free speech, in many US states in the 1940s, see Eric Heinze, 'Wild West Cowboys versus Cheese-Eating Surrender Monkeys: Some Problems in Comparative Approaches to Hate Speech' in Hare–Weinstein (n 4) 200–201.

[95] <http://www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media/index.html>.

statutory discretion. To give them their due, the Guidelines may help avoid another *Chambers*-style incident by occasionally curbing the prosecutorial instincts of overzealous regional CPS staff. They do not significantly diminish the speech-unfriendly realities of a legislative landscape created well before the advent of social media.

Conclusion

> With regard to what is commonly meant by intemperate discussion, namely invective, sarcasm, personality, and the like, the denunciation of these weapons would deserve more sympathy if it were ever proposed to interdict them equally to both sides; but it is only desired to restrain the employment of them against the prevailing opinion; against the unprevailing, they may not only be used without general disapproval, but will be likely to obtain for him who uses them the praise of honest zeal and righteous indignation.
> JS Mill, *On Liberty*[96]

Deliberative democrats aspire to mutually-respectful, self-reflective, and empathic forms of political discussion among politically equal citizens. Whether this aspiration can be realised in a manner that is liberated from the self-interested definitions of 'civilised expression' handed down by political elites and deprived of the buttressing force of the criminal law remains to be seen. In the meantime, the foregoing quote from John Stuart Mill captures the societal power relations inherent in the condemnation or approval of uncivil expression. Mill has observed the discriminatory responses towards invective that are manifest among dominant viewpoints. Mill understood that uncivil speech which targets prevailing, orthodox opinion is routinely denounced (including with the force of law) by power holders who themselves have determined what the boundaries of 'polite' speech are.[97] The emphasis placed by proponents of deliberative democracy such as Gutmann and Thompson upon the ideals of reciprocity and mutual respect privileges power holders, elite and highly educated groups in public discourse. There is no evidence to suggest that these entry conditions facilitate, let alone maximise, the public political activity of marginalised groups. More likely, the ability of such groups to develop cohesion and gain confidence in the arena of politics is undermined. As Simon notes, the demand that is made for civility can be experienced as oppressive and presumptuous. It ignores the plurality of persons and groups.[98]

The sorts of abusive comment and unpleasant invective that are found in online communications are often said to constitute 'low level' speech. This is to differentiate such expression from the more sophisticated and considered commentary associated

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[96] John S Mill, *On Liberty* (Watts & Co 1941) 65.

[97] Conversely, intemperate outpourings that lambast unpopular viewpoints gain plaudits for the speaker from the same source.

[98] William H Simon, 'Three Limitations of Deliberative Democracy' in Macedo (n 13) 51.

with professional broadcasters and journalists. In the era of electronic communications, we are all potential speakers and the ease (and haste) with which we may post online our instant reactions to events may have much wider repercussions than originally intended. The task of a liberal legal system is to draw appropriate boundary lines that facilitate vigorous and sometimes ill-tempered or poorly-humoured debate on matters of societal importance on the one hand, whilst discouraging personal, menacing or vindictive attacks on private persons on the other. As the *Chambers* case shows, the courts do not always get things right at the first time of asking. The quote taken from the House of Lords Select Committee on Communications at the very beginning of this discussion indicates that there is little official appetite for a principled examination of how social media might contribute to a more vibrant democracy. Instead, the present *ad hoc* accommodation looks set to continue.

Anthony L Fargo

ISP liability in the United States and Europe: Finding middle ground in an ocean of possibilities

Introduction

In March 2015, the *New York Times* reported that universities throughout the United States were struggling to deal with offensive, defamatory, and intimidating messages posted to Yik Yak, a social media application that allows users to send and receive posts, or 'yaks,' within a 1.5 square-mile radius of their location.[1] The messages are anonymous and many are harmless, but some have contained threats of violence or cruel comments aimed at students and teachers. The article noted that school officials were virtually powerless to stop students from using Yik Yak because it could be accessed on their cellular phones' networks even if the schools blocked it on their Wi-Fi networks. The founders of the application, or 'app,' expressed concern about the misuse and said they were exploring ways to limit harmful or offensive posts while maintaining their promise to protect users' anonymity absent a clear safety threat.[2]

The apparent helplessness of authorities and those targeted by defamatory or intimidating posts on Yik Yak to do anything about the posts is symptomatic of a larger issue with the still-developing law of the Internet in the United States. Under US law, there is a constitutionally based right to communicate anonymously.[3] Additionally, the US Congress approved legislation in 1996 that gives interactive computer service providers such as Yik Yak, blog hosts, and other sites that allow readers to upload comments virtual immunity from civil liability for the actions of their users.[4] The protections for anonymity and service providers combine to make it difficult for someone defamed by the user of an app or website to unmask the alleged tortfeasor's identity and take action, absent a court order to the service provider to identify the user. Such orders can be difficult to obtain if a court is not convinced that a plaintiff has a good chance of prevailing in a lawsuit.[5]

In Europe, however, a 2013 decision by the European Court of Human Rights upheld by the Grand Chamber in 2015 presents a different situation. A person who has been

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1 Jonathan Mahler, 'Who Spewed That Abuse? Yik Yak Isn't Telling' *New York Times*, 9 March 2015. A1.

2 ibid.

3 See eg *McIntyre v Ohio Elections Commission*, 514 US 334 (1995).

4 47 USC, s 230 (Lexis-Nexis 2014).

5 See Jason A Martin et al, 'Anonymous Speakers and Confidential Sources: Using Shield Laws When They Overlap Online' (2011) 16 *Communication Law & Policy* 89.

defamed by an anonymous comment on an interactive website may be able to sue the website operator instead of attempting to unmask the person who posted the comment.[6] This solution, however, puts website owners in the position of either having to disallow anonymous comments, which would deprive some users of the ability to comment on controversial issues if they feared their comments would bring them serious consequences, or monitor perhaps thousands of comments daily to prevent potentially defamatory ones from being seen.

Both the US and European approaches have advantages and pitfalls. The US approach allows for greater freedom of expression for persons who, prior to the Internet and its ability to hide identities, would have remained silent rather than risk unfortunate consequences for joining in on public debates. But the US approach also means that persons defamed by irresponsible anonymous commenters have little legal recourse to salvage their reputations. Also, the amount of invective spewed on American websites may inhibit some people from participating in debates on important issues for fear of arousing scorn and ridicule from other users. The European approach suggested in *Delfi AS v Estonia* makes it easier for the defamed to gain legal satisfaction for their reputational wounds, but it also places a high burden on Internet site hosts. The burden would, arguably, lead most site hosts to disable comment functions, curtailing freedom of expression and also robbing the sites of one of the most valuable functions of the Internet—the interactivity between sites and users and between the users themselves.

Because the Internet is, by its nature, a global medium, it will eventually be untenable to have two or more widely divergent legal regimes on how best to support robust freedom of expression and protect individual reputations simultaneously. There is no organic standard that would dictate a solution to this conflict of laws, so any solution that eventually presents itself will be a matter of policy choices. What should those choices be?

This paper will explore that question by first describing how US law in regard to the liability of interactive service providers has evolved since the early 1990s, when the question of whether ISPs were 'publishers' of all content they hosted first arose. Included in this section will be a discussion of how courts in the United States have attempted to fashion a procedure for determining when ISPs must unmask their anonymous users. The discussion will focus on the relatively narrow issue of defamation actions, which comprise the most contested area of developing Internet law. Next, this paper will examine European law's approach to balancing the rights of ISPs and those potentially harmed by their users, focusing primarily on the European Court of Human Rights' decision in *Delfi* and its potential consequences. The paper will conclude with a discussion of potential policy solutions to the tension between the US and European approaches to the problem of defamatory Internet speech and ISP liability. The paper

[6] *Delfi AS v Estonia* (App no 64569/09, 10 October 2013), affirmed by Grand Chamber (16 June 2015).

will stop short of proposing a comprehensive policy solution to the issues raised and instead will offer choices whose attractiveness could vary depending upon further advances in technology and law.

The United States and ISP liability

To understand the United States' approach to liability of ISPs for the actions of their users, it helps first to examine the constitutional protection for anonymous expression and the background of the decision by the US Congress to provide immunity to ISPs for actions outside their direct control.

The First Amendment to the United States Constitution protects five freedoms: religion, speech, press, assembly, and petition.[7] The Supreme Court of the United States ruled nearly 100 years ago that the Fourteenth Amendment, which guarantees equal protection of rights to residents of each state,[8] limits each state's actions in regard to First Amendment freedoms to the same extent as the Constitution limits the federal government.[9] So, for example, when the state of Minnesota passed a law barring the publication of newspapers determined to be 'public nuisances' because of their sensational and potentially defamatory content, the Supreme Court struck down the law as violating the First Amendment right to freedom of the press by asserting its authority under the Fourteenth Amendment to rule on the legitimacy of state laws.[10]

The US Supreme Court has determined that government limitations on anonymity implicate three of the five freedoms protected by the First Amendment: the right to assemble freely and the rights to freedom of speech and of the press. The issue first arose in 1958, when the Court overturned a contempt citation against the National Association for the Advancement of Colored People (NAACP) after the organisation refused to reveal its membership list to the state of Alabama during a legal proceeding challenging its right to do business in the state. The Court determined that forcing the NAACP to publish its membership list during the heated debate over civil rights of African-Americans in the Southern United States would likely force many members to resign, interfering with their rights to assembly and to due process.[11] The Court went on to thwart similar government attempts to force the NAACP to release its membership

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7 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.' US Constitution, First Amendment.

8 'No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.' US Constitution, Fourteenth Amendment, s 1.

9 *Gitlow v New York*, 268 US 652 (1925).

10 *Near v Minnesota*, 283 US 697 (1931).

11 *NAACP v Alabama ex rel Patterson*, 357 US 449 (1958).

rolls to officials in Arkansas,[12] Louisiana,[13] and Florida.[14] The Court's rulings on anonymity as an ancillary component of the right to assemble were not entirely consistent during the civil rights and Cold War eras, however. For example, the court generally struck down government attempts to force people to identify organisations to which they belonged as a condition of employment in schools or in the legal profession.[15] However, the Court upheld contempt citations against individuals who refused to testify about their alleged membership in the Communist Party to Congressional committees.[16]

More robust has been the Supreme Court's tying of anonymity to the rights of freedom of speech and of the press (collectively, freedom of expression). In 1960, two years after the NAACP case that directly tied a right to anonymous membership to the First Amendment, the Court struck down a city ordinance in Los Angeles, California, on free expression grounds. In *Talley v California*,[17] the Court ruled in favour of a man who violated the law when he distributed unsigned handbills urging residents to boycott businesses that discriminated against racial minorities. The Court stated that such laws against unsigned handbills would limit the ability of citizens to engage in debates about controversial public policy issues.[18] Thirty-five years later, the Court also struck down an election law in Ohio that barred the distribution of unsigned documents commenting on ballot issues before elections. In *McIntyre v Ohio Elections Commission*,[19] the Court argued that the anonymous handbills distributed by an Ohio woman opposed to a local school-funding ballot issue represented the 'essence of First Amendment expression.'[20] In a concurring opinion in the *McIntyre* case, Justice Clarence Thomas argued that the First Amendment was designed specifically to protect anonymous publishing, based on his reading of the history of anonymous publishing throughout US history.[21] In 2002, the Court also struck down a town statute that would have required groups or persons wishing to distribute religious tracts or other materials door-to-door to first register with town officials. In *Watchtower Bible and Tract Society v Village of Stratton*,[22] the Court recognised the importance of the town's interests in protecting residents from crime and invasions of privacy but found those interests did not justify a law that would curtail unpopular groups from engaging in constitutionally protected speech activities.[23]

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12 *Bates v City of Little Rock*, 361 US 516 (1960).

13 *Louisiana ex rel Gremillion v NAACP,* 366 US 293 (1961).

14 *Gibson v Florida Legislative Investigation Commission*, 372 US 539 (1963).

15 *Baird v State Bar of Arizona*, 401 US 1 (1971); *DeGregory v Attorney General of New Hampshire*, 383 US 825 (1966); *Shelton v Tucker*, 364 US 479 (1960); *Sweezy v New Hampshire*, 354 US 234 (1957).

16 *Braden v United States*, 365 US 431 (1961); *Wilkinson v United States*, 365 US 399 (1961); *Barenblatt v United States*, 360 US 109 (1959).

17 *Talley v California*, 362 US 60 (1960).

18 ibid 65–66.

19 *McIntyre v Ohio Elections Commission*, 514 US 334 (1995).

20 ibid 347.

21 ibid 367–369 (J Thomas, concurring).

22 *Watchtower Bible and Tract Society v Village of Stratton,* 536 US 150 (2002).

23 ibid 167.

The Supreme Court has not directly confronted the issue of a right to express oneself anonymously on the Internet. Nor has the Court stated that the right to express oneself anonymously is an absolute prohibition on government requirements to identify oneself. In 2010, the Court upheld a law that requires the sponsors of television and radio advertising related to electoral candidates and issues to identify themselves verbally in the ads.[24] The Court the next year also declined, despite a strenuous dissent from Justice Samuel Alito, to hear an appeal in a case challenging a state requirement that petitions seeking to have issues placed on the ballot be treated as publically accessible records, including the signatures on those petitions.[25]

The closest the US Supreme Court has come to addressing the right to publish anonymously online came in *Reno v ACLU* in 1997.[26] The decision, which struck down a law criminalising 'indecent' speech on the Internet, lauded the Internet's unique potential to contribute to democratic discussion and decision-making by removing barriers to citizen participation in self-government.[27] Because it has said that anonymity also removes such barriers, the Court arguably would see anonymity on the Internet as a value-added proposition in regard to political speech.

When or if the Court is confronted with a case testing the boundaries of protection for anonymous online speech against government restrictions, it also will be aided in its deliberations by the knowledge that Congress has, indirectly, protected anonymous Internet expression through legislation.

The law at the heart of the *Reno v ACLU* decision mentioned above, the Communications Decency Act (CDA), was not struck down in its entirety. One part of the act, known as CDA Section 230 and codified in Title 47 of United States Code, largely immunises interactive computer service providers from liability for communications not traceable to their own actions. The findings section of the act states that the expanding market of interactive services represented 'an extraordinary advance in the availability of educational and information resources' to US citizens.[28] Congress also found that '[t]he Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.'[29] Congress also noted that computer services had 'flourished' to citizens' benefit 'with a minimum of government regulation.'[30] In its policy section, the act stated that it was US policy to promote the 'continued development' and 'vibrant and competitive free market' in interactive

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24 *Citizens United v Federal Election Commission*, 558 US 310, 367 (2010).

25 *Doe v Reed*, 132 SCt 449 (2011).

26 *Reno v ACLU*, 521 US 844 (1997).

27 ibid 870.

28 Protection for Private Blocking and Screening of Offensive Material, 47 USC s 230 (a)(1) (Lexis-Nexis 2014).

29 ibid s 230(a)(3).

30 ibid s 230 (a)(5).

computer services 'unfettered by Federal or State regulation.'[31] The act goes on to state that '[n]o provider or user of an interactive computer server shall be treated as the publisher or speaker of any information provided by another information content provider.'[32] Also, the act states that providers of interactive services are immune from civil liability for '[a]ny action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.'[33] The act defines 'interactive computer service' as 'any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server,' including a service that provides Internet access or access to 'services offered by libraries or educational institutions.'[34] 'Information content provider' is defined as 'any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.'[35]

A few observations about Section 230 are appropriate at this point. First, as should be obvious by its inclusion in the Communications Decency Act, Section 230 was primarily designed to allow interactive computer service providers to attempt to block sexually explicit material without facing liability for failing to do so adequately. Part of the policy section of the act alludes to this purpose by stating that a policy of the United States was 'to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material.'[36] This is why the act states that a service provider cannot be considered a 'publisher or speaker' of information provided by other parties and cannot be held liable for the failure of any actions taken 'in good faith' to block objectionable material.

Second, the context of the time in which the act was adopted suggests that the courts have been correct to interpret the act as having a broader meaning than protecting attempts to block obscene or indecent material. In 1991, a federal judge in the state of New York ruled that an Internet Service Provider (ISP) could not be considered the 'publisher' of material posted on an online bulletin board it hosted but did not contribute to in any material way.[37] But a few years later, a state court judge in New York found an ISP responsible as the publisher for similar user-generated material that allegedly defamed a corporation.[38] The report of a conference committee that reconciled

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[31] ibid ss 230 (b)(1)–(2).
[32] ibid s 230 (c)(1).
[33] ibid s 230 (c)(2)(A).
[34] ibid s 230 (f)(2).
[35] ibid s 230 (f)(3).
[36] ibid s 230 (b)(4).
[37] *Cubby, Inc v Compuserve Inc.,* 776 F Supp 135 (SDNY 1991).
[38] *Stratton Oakmont, Inc. v Prodigy Services Corporation*, No 31063/94, 1995 NY Misc LEXIS 229 (NY Sup Ct May 26, 1995).

differences in House and Senate versions of the bill containing Section 230 said it was specifically designed to overrule the latter court opinion.[39] The broad language in Section (c)(1) of the act absolving ISPs[40] of responsibility for almost any content provided by others[41] has been seen, in light of the committee report, as a reaction to the conflict in the court decisions and the potentially catastrophic consequences for Internet development of holding ISPs responsible as publishers for all content available through their servers.

Section 230 does not immunise the persons who post information on websites from liability for their actions, but because many people choose to communicate without identifying themselves by their real names, holding them responsible for their words poses a practical problem. Simply put, one cannot sue, and recover damages from, an apparition. ISPs are often bound by terms of service or more informal business considerations to protect the privacy of their users/customers.[42] Therefore, since the passage of Section 230, federal and state courts in the United States have been attempting to find a way to balance the competing interests at play when anonymous speech defames or otherwise violates civil or criminal law.

Given the exceptions in Section 230, it is not surprising that American courts have generally required ISPs to identify their users through account information or at least their Internet Protocol (IP) numbers when copyright infringement or criminal activity is alleged. A New York federal judge in 2004 established a test for determining when ISPs must disclose the identities of users in copyright-infringement cases. In *Sony Music Entertainment Inc. v Does 1-40*,[43] the court stated that users of peer-to-peer (P2P) file-sharing networks were not taking part in 'true expression' and could be unmasked if

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[39] House Conf Rep 104-458, 104th Cong 2d Sess (1996) 194.

[40] Section 230 does not mention 'Internet Service Providers' specifically, but courts interpreting the law have consistently used that term or its abbreviation, ISP, to refer to any interactive computer service provider, including a website or social media application.

[41] The act states that nothing in s 230 should be interpreted as limiting federal criminal statutes, intellectual property laws, state laws consistent with the provisions of s 230, or the Electronic Communications Privacy Act of 1986. 47 USC, s 230(e) (Lexis-Nexis 2014).

[42] Terms of service or terms of use generally appear on computer screens when people use a site for the first time, register to use it, or when they attempt to post a comment. There is considerable debate in legal circles about how effective they are in protecting the rights of both users and site owners, but they generally are considered legally binding if a site user clicks on a box to acknowledge agreeing to the terms. For a small sample of articles addressing the strengths and weaknesses of terms of service, see Woodrow Hartzog, 'Website Design As Contract' (2011) 60 *American University Law Review* 1635 (arguing that design and feature elements of websites can defeat the guarantees in terms of use and privacy agreements); Michael L Rustad and Thomas H Koenig, 'Wolves of the World Wide Web: Reforming Social Networks' Contracting Practices' (2014) 49 *Wake Forest Law Review* 1431 (based on a study of terms of use, determining that they are generally unfair and imbalanced in favour of site owners and calls for clearer terms and the adoption of universal minimum standards for the agreements); Amy K Sanders and Patrick C File, 'Giving Users a Plain Deal: Contract-Related Media Liability for Unmasking Anonymous Commenters' (2011) 16 *Communication Law & Policy* 197 (noting that news organisation terms of use promise to protect users' anonymity and privacy but also give the organisations legal cover if they voluntarily unmask their users).

[43] *Sony Music Entertainment Inc. v Does 1-40,* 326 F Supp 2d 556 (SDNY 2004).

Sony could make out a prima facie infringement case; identify as specifically as possible the alleged infringers; show there was no alternative way to identify the alleged infringers; and establish the importance of the information sought to its copyright claims, while also requiring the court to weigh the users' expectations of privacy.[44] Other courts have followed the New York court in requiring similar tests and ruling for plaintiffs in copyright-infringement cases.[45] American courts have also been willing to allow anonymous users to be unmasked in cases in which the users have been accused of threatening or harassing other persons online[46] or have been engaged in commercial speech,[47] which generally gets less First Amendment protection than political or other 'high-value' speech.[48]

This leaves a widely contested area in which courts must balance the rights of plaintiffs against the rights of anonymous online speakers engaged in speech about political, social, or at least newsworthy issues. ISPs are often caught in the middle of the controversies through subpoenas for user identity information even while they generally escape direct liability.

Federal and state courts have developed a number of tests to determine when ISPs must identify anonymous users in defamation cases involving speech that, at least arguably, deals with matters of public concern. The most widely adopted test in the state courts was developed in a 2001 case in New Jersey involving comments posted on an online bulletin board focused on the business dealings of a company called Dendrite International. The New Jersey Superior Court Appellate Division, in ruling against a request for a subpoena to the ISP Yahoo! for the identity of a commenter whom Dendrite alleged posted false and defamatory information about the company's profitability, determined that courts should:

(1) Require plaintiffs to notify anonymous message posters, through the sites on which they posted the allegedly defamatory material, that the plaintiff was seeking to unmask them.

(2) Require plaintiffs to identify the specific statements that they believed were defamatory.

(3) Require plaintiffs to produce prima facie evidence supporting all of their causes of actions. And

(4) balance the need to identify the commenter against the rights of the commenter to speak anonymously.[49]

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[44] ibid 564–567.

[45] See Martin et al (n 5) 102–103 (discussing cases in which courts have protected the identities of speakers engaged in 'low-value' speech to a lesser degree than other speakers).

[46] See eg *Freedman v America Online, Inc.,* 412 F Supp 2d 174 (DConn 2005).

[47] *In re Anonymous Online Speakers*, 611 F3d 653 (9th Cir 2010).

[48] See *Virginia Board of Pharmacy v Virginia Citizens Consumer Council*, 425 US 748 (1976).

[49] *Dendrite International v Doe*, 775 A 2d 756, 760-61 (NJ Super Ct App Div 2001).

Because defamation law in the United States remains largely within the province of state jurisdiction, federal courts have tended to follow the lead of state courts in defamation cases, which usually reach the federal courts when they involve parties from different states. In addition to the *Dendrite* standard or variations of it, state and federal courts also have adopted 'good-faith' tests that are more friendly to defamation plaintiffs;[50] tests that require plaintiffs to show their claims could survive a motion to dismiss them;[51] tests applying standard discovery and civil procedure rules rather than First Amendment law;[52] and tests applying standard defamation law to Internet expression.[53]

In Virginia, the only state that establishes its test for balancing anonymity and reputation rights in a statute,[54] the state Supreme Court in 2015 declined to rule on whether the statute adequately protects speakers. The Virginia Court of Appeals ruled in 2014 that Yelp, a website that allows users to post anonymous reviews of businesses, must identify seven users who posted negative reviews of a carpet-cleaning company on its site.[55] The company claimed that the seven reviewers' comments did not match up with customer records and therefore were probably posted solely to hurt its reputation through false and defamatory statements.[56] The court determined that the company had complied with the requirements of the Virginia statute, which required, among other things, that the company make a showing in good faith that it had been a victim of tortious conduct.[57] The Virginia Supreme Court, in agreeing to hear an appeal from the appellate ruling, noted that Yelp argued, among other things, that the ruling and the statute did not adequately protect the First Amendment rights of speakers.[58]

In April 2015, the Virginia Supreme Court reversed the Court of Appeals decision on procedural grounds, finding that the trial court had no jurisdiction over Yelp's records because they were stored in California.[59] The court thus avoided the First Amendment question and concerns that a decision in favour of Hadeed would encourage other states to adopt legislation less protective of speakers than court-created standards such as the one in *Dendrite*.

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50 See eg *Doe v 2TheMart.com, Inc.,* 140 F Supp 2d 1088 (WD Wash 2001).

51 See eg *SPX Corp. v Doe*, 253 F Supp 2d 974 (ND Ohio 2003).

52 See eg *Maxon v Ottawa Publishing Co.*, 402 Ill App 3d 704 (Ill App Ct 1 June 2010).

53 See eg *In re Richard L Baxter*, Misc No 01-00026-M, 2001 US Dist LEXIS 26001 (WD La 19 December 2001). For a more expansive discussion of the different standards used in US jurisdictions to determine when anonymous speakers must be unmasked, see Jason A Martin and Anthony L Fargo, 'Anonymity as a Legal Right: Where and Why It Matters' (2015) 16 *North Carolina Journal of Law and Technology* 311, 339–47.

54 Va Code s 8.01-407.1 (Lexis-Nexis 2015).

55 *Yelp, Inc. v Hadeed Carpet Cleaning, Inc.,* 752 SE 2d 554 (Va App Ct 2014).

56 ibid 558.

57 ibid 563, quoting Va Code s 8.01-407.1 (A)(1)(a) (Lexis-Nexis 2015).

58 *Yelp Inc. v Hadeed Carpet Cleaning*, No 140242, 2014 Va LEXIS 84 (Va 29 May 2014).

59 *Yelp Inc. v Hadeed Carpet Cleaning*, 770 SE 2d 440 (Va 2015).

Even if the Virginia Supreme Court had ruled against Yelp, however, it should be noted that the decision would not have held Yelp liable for defamation damages. ISPs like Yelp are generally intermediaries in such cases under all of the standards US courts use to determine when anonymous speakers must be unmasked. While ISPs often exert efforts to protect users' identities, and thus incur legal costs and face contempt-of-court fines for disobeying court orders to comply with subpoenas,[60] they are rarely held responsible for the defamatory statements posted by users.

This is not to suggest that ISPs are never held responsible for the content of their sites in the United States. In a 2008 decision, the US Court of Appeals for the Ninth Circuit held that a roommate-matching service could be held liable for violating federal and state anti-discrimination laws. In *Fair Housing Council of San Fernando Valley v Roommates.com, Inc.*,[61] the court noted that roommates.com required persons to answer questions about their sex, sexual orientation, and parenthood status before they could use the service. The site also required that users state their preferences for roommates using the same criteria and allowed them to add other comments.[62] Federal and state laws prohibit discrimination based on sex, sexual orientation, and parenthood status in housing ads, and the court said that roommates.com could not claim Section 230 immunity for the questions it asked because it required them to be answered before a person could use its service and therefore was an 'information content provider' instead of a neutral intermediary to communication.[63] However, the court determined that roommates.com was not responsible for comments posted by users, some of them allegedly discriminatory, because the site did not direct what users should post.[64]

To a reader from outside of the United States, the degree of solicitude that legislatures and courts show toward anonymous speakers who engage in allegedly defamatory dialogue may seem strange. On the contrary, it is largely in line with a long tradition in American law of limiting as much as possible the government's ability to define what is or is not appropriate expression. Philosopher Alexander Meiklejohn might have summed up the American attitude best in the 1940s when he wrote that in a self-governing system, authorities should avoid limiting the expression of any viewpoint that potential voters could use to inform themselves before choosing representatives of their will.[65] Meiklejohn's work is cited in the concurring opinion of *New York Times v Sullivan*,[66] the seminal United States Supreme Court decision in 1964 that barred states from enforcing defamation laws against publishers whose work unintentionally contained defamatory falsehoods about public officials. The Court stated that its opinion was consistent with a national history of 'uninhibited, robust, and wide-open' discussion

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[60] See eg *Yelp* (n 55) 558 (noting that the trial court had fined Yelp 500 dollars for refusing to obey the subpoena and ordered Yelp to pay Hadeed 1,000 dollars in attorney's fees).

[61] *Fair Housing Council of San Fernando Valley v Roommates.com, Inc.,* 521 F 3d 1157 (9th Cir 2008).

[62] ibid 1161.

[63] ibid 1164.

[64] ibid 1174–75.

[65] Alexander Meiklejohn, *Free Speech and Its Relationship to Self-Government* (Harper 1948).

[66] *New York Times v Sullivan*, 376 US 254, 297 (1964) n 6 (J Black, concurring).

of public issues, which it said would inevitably sometimes include false statements of fact that must be protected from liability in order not to 'chill' expression at the core of the First Amendment's mission.[67]

The Court's concern about allowing authorities too much leeway in deciding what is or is not orthodox in regard to free expression has led to a number of controversial opinions in recent years. For example, the Court has held that government bodies cannot bar the expression of hate speech[68] unless the speech act in question, such as burning a cross in an African-American family's yard, clearly constituted a threat against identifiable persons.[69] The Court also disallowed a federal law that barred the sale of video recordings of animal cruelty, even though the cruel acts themselves were illegal.[70] Most recently, the Court also struck down a federal law that criminalised the claiming of military honours that one had not earned absent a showing that the liar had profited materially from the lies.[71]

The solicitude toward anonymous Internet defamers can also be explained in part by the rise of lawsuits in recent decades that were not intended to recover damages but to silence criticism. The so-called Strategic Lawsuits Against Public Participation (SLAPP) lawsuits have most often been filed by corporations against critics of their business practices to intimidate them, and others like them, into silence.[72] In the Internet context, such suits could be used to unmask disgruntled employees, competitors, or customers so that they could be punished in other ways, such as dismissal from jobs or cancellations of business deals or loyalty rewards. About half of the US states have laws designed to discourage such lawsuits through various sanctions against plaintiffs.

Similar concerns about meritless lawsuits led Congress in 2010 to pass a law known as the SPEECH Act.[73] The law directs American judges to refuse to enforce foreign libel judgments from countries that do not share the same attitudes toward free speech that the United States holds. The act was passed in response to a phenomenon called 'libel tourism,' in which American authors and publishers found themselves facing lawsuits in the United Kingdom and other jurisdictions more 'friendly' to libel plaintiffs than the United States.[74]

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67 ibid 270.

68 *RAV v St Paul*, 505 US 377 (1992).

69 *Virginia v Black*, 538 US 343 (2003).

70 *United States v Stevens*, 559 US 460 (2010).

71 *United States v Alvarez*, 132 SCt 2537 (2012).

72 For a recent discussion of anti-SLAPP statutes and how they have been interpreted in federal and state courts, see Colin Quinlan, 'Note: Erie and the First Amendment: State Anti-SLAPP Laws in Federal Court After Shady Grove' (2014) 114 *Columbia Law Review* 367.

73 Securing the Protection of our Enduring and Established Constitutional Heritage Act, 111 Pub L 223, 124 Stat 2380 (2010), codified at 28 USC ss 4101–4105 (Lexis-Nexis 2014).

74 For discussions of libel tourism and the SPEECH Act, see David A Anderson, 'Transnational Libel' (2012) 53 *Virginia Journal of International Law* 71; Andrew R Klein, 'Does the World Still Need United States Tort Law? Did It Ever? Some Thoughts on "Libel Tourism"' (2011) 38 *Pepperdine Law Review* 375; Mark D Rosen, 'The SPEECH Act's Unfortunate Parochialism: Of Libel Tourism and Legitimate Pluralism' (2012) 53 *Virginia Journal of International Law* 99.

The SPEECH Act and the American attitude it reflects about the degree to which free expression must be protected in a democratic society may make it hard to find a middle ground with Europe in regard to the liability of multinational ISPs for defamatory speech posted by third parties. It may be possible, however, that the United States and Europe are not as far apart as it would appear.

Europe and ISP liability

Comparing law in the United States and Europe is to some extent an attempt to reconcile the proverbial apples and oranges. The United States is one federal system comprised of fifty states that retain a degree of sovereignty, but the state and the federal governments are all subject to limitations in the US Constitution. The countries comprising the European Union are each sovereign nations within their borders with their own laws, while the EU has limited power over its member states.

Examining the law regarding each nation in the EU would be a daunting task and is beyond the scope of this paper. Instead, the paper will focus on the common ground among EU member nations memorialised in the European Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe directives, and interpretations of those documents by the European Court of Human Rights (ECtHR). Similar provisions in other multi-jurisdictional agreements also will be noted for context.

The European Convention states that citizens of member nations have a right to freedom of expression.[75] Article 10 states that '[t]his right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.'[76] Section 2 of Article 10 states that the freedoms mentioned in Section 1 are 'subject to such formalities, conditions, restrictions, or penalties as are prescribed by law and are necessary in a democratic society.'[77] The Section goes on to list interests that could lead to restrictions on free expression, such as national security concerns, the need to protect public safety and prevent crime, to protect health or morals, 'for the protection of the reputation or rights of others,' to prevent confidences from being violated, or to maintain 'the authority and impartiality of the judiciary.'[78] Unlike the US Constitution, the Convention also specifically states that citizens have a right to privacy in regard to their private lives, homes, family, and correspondence, which can only be interfered with for similar reasons as the freedom of expression.[79]

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[75] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms art 10 (4 November 1950) <http://www.echr.coe.int/documents/convention_ENG.pdf>.

[76] ibid s 1.

[77] ibid s 2.

[78] ibid.

[79] ibid art 8.

Similarly, the United Nations' Universal Declaration of Human Rights also states that each person 'has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers.'[80] The Declaration also includes a strong statement in support of privacy and reputation: 'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation.'[81]

The American Convention on Human Rights, a treaty agreed upon by most Central and South American nations, also has provisions to protect rights of privacy and expression[82] as well as a 'right of reply' for anyone damaged by 'inaccurate or offensive statements . . . by a legally regulated medium of communication.'[83] The privacy provision protects the right to have one's 'honor respected and . . . dignity recognised' and states that no one should be subject to 'unlawful attacks on his honor or reputation.'[84] The free-expression provision protects the right to 'seek, receive, and impart information and ideas of all kinds, regardless of frontiers' in any medium, but says the right can be limited to protect the 'rights or reputations or others' and to protect national security, order, and health.[85] An unusual passage makes it illegal to advocate for war or violence against 'any person or group of persons on any grounds including those of race, color, religion, language, or national origin.'[86] The African Union's African (Banjul) Charter of Human and Peoples' Rights does not specifically mention a right to individual privacy but does guarantee rights to receive information and express opinions.[87] The Association of Southeast Asian Nations (ASEAN) in 2012 adopted a declaration of rights similar to the others that states that '[e]very person has the right to freedom of opinion and expression, including freedom to hold opinions without interference and to seek, receive and impart information' through any medium.[88] The declaration also says that citizens of the member nations have a right to privacy 'including personal data' and the right to be free from 'attacks upon that person's honour and reputation.'[89]

None of the various international and regional treaties and conventions specifically mentions the Internet or a right to communicate anonymously. However, in 2011 the

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[80] Universal Declaration of Human Rights art 19, GA Res 217 (III) A, UN Doc A/RES/217(III) (10 December 1948).

[81] ibid art 12.

[82] Organization of American States, American Convention on Human Rights ch II, arts 11, 13 (22 November 1969) <http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm>.

[83] ibid ch II, art 14.

[84] ibid ch II, art 11, ss 1–2.

[85] ibid ch II, art 13, ss 1–2.

[86] ibid ch II, art 13, s 5.

[87] African Union, African (Banjul) Charter on Human and Peoples' Rights, arts 9–11, OAU Doc CAB/LEG/67/3 rev 5 (27 June 1981) <http://www.au.int/en/content/african-charter-human-and-peoples-rights>.

[88] ASEAN Human Rights Declaration, art 23 (19 November 2012) <http://www.asean.org/news/asean-statement-communiques/item/asean-human-rights-declaration>.

[89] ibid art 21.

United Nations Special Rapporteur on the Promotion of the Right to Freedom of Opinion and Expression issued a report calling for recognition of a right to use the Internet.[90] Frank LaRue, the special rapporteur, argued that the Internet's interactive nature should make it subject to fewer restrictions than other media rather than more restrictions.[91] LaRue also counselled against holding ISPs legally responsible for user comments because of the chilling effect liability could have on free expression by forcing ISPs to act either as censors or informants on their users.[92] He urged nations to protect the ability of citizens to express themselves anonymously online, calling anonymity a privacy interest that was essential to the free flow of information.[93] One legal scholar has suggested, in endorsing LaRue's comments, that an international version of Section 230 might be appropriate to balance the right to free expression with legitimate security concerns in unstable nations.[94]

As Article 8 in the European Convention suggests, European nations tend to protect privacy to a greater extent than the United States. The tension between the protection for privacy and reputational rights addressed in Article 8 and the protection of free expression in Article 10 has arisen in few ECtHR cases so far involving Internet communication. One such case is instructive in regard to ISP liability. In 2008, the ECtHR determined that Finland had failed to adequately protect the privacy rights of a boy who was the victim of a prank by an anonymous person or persons who posted a fake profile on a dating site indicating that the boy was gay.[95] Finland courts thwarted the boy's attempt to identify the pranksters and bring legal action by noting that nothing in Finnish law allowed the government to force ISPs to identify their users.[96] The ECtHR ruled that Finland's failure to allow the boy or authorities to identify his tormentor was a violation of the boy's Article 8 rights because it failed to protect his privacy.[97]

Europe does not have a Section 230, but the closest equivalent may be a Council of Europe directive from 2000 on electronic commerce, or e-commerce for short. The directive instructs member nations of the EU to protect from liability 'information society service' providers that are 'mere conduits' for users' information.[98] The directive also provides for protection from liability for service providers that do not initiate transmissions; do not 'select the receiver of the transmission'; and do not 'select or

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[90] Frank LaRue, 'Report of the Special Rapporteur on the Promotion of the Right to Freedom of Opinion and Expression' UN Human Rights Council, 17th Session, UN Doc A/HRC/17/27 (16 May 2011).

[91] ibid [23]–[27].

[92] ibid [38]–[43].

[93] ibid [53]–[55], [84].

[94] Molly Land, 'Toward an International Law of the Internet' (2013) 54 *Harvard International Law Journal* 393.

[95] *KU v Finland* (App no 2872/02, 13 November 2008).

[96] ibid [11]–[12].

[97] ibid [49]–[50].

[98] Council Directive 2000/31, art 12, 2000 OJ (L178) 12 (EC).

modify the information contained in the transmission'.[99] Liability limits also apply to services that cache or host material they do not create or change.[100] Service providers also are not required to monitor information they store or transmit,[101] but the directive states that nations may require service providers to report any illegal actions that come to their attention and 'information enabling the identification of recipients of their service with whom they have storage agreements.'[102]

While the 2000 e-commerce directive appears to have some elements in common with Section 230 in the United States, it does not contain the 'safe harbor' provisions in the US law that allow service providers to maintain immunity even if they actively attempt to monitor and block offensive content.[103] The directive also seems to draw a sharper line than Section 230 between mere conduits of information, who are immunised from liability, and content providers, who apparently are not similarly immunised.

The tensions between Articles 8 and 10 of the Convention and the limits of the 2000 e-commerce directive were central to the ECtHR's 2013 decision in *Delfi AS v Estonia*.[104] Because of the potential significant impact of that decision on any attempt to reconcile American and European law on the subject of ISP liability for user activity, it is worth a thorough description.

Delfi is a news site in Estonia that published as many as 330 news articles a day and served as one of the leading Internet news sources in Estonia.[105] The site allowed readers to add comments to stories without editing, and the site received about 10,000 comments a day, most published under fake names.[106] The site had several methods for flagging potentially libellous or offensive statements, including allowing readers to mark comments as inappropriate, which would lead to their removal; automatically deleting comments that contained certain obscene words; and taking down comments brought to its attention by persons who were defamed.[107] *Delfi* also posted rules for those leaving comments, noting that the comments did not reflect its opinions and that authors of comments were liable for them.[108] Nevertheless, *Delfi* reportedly had a reputation for publishing defamatory and degrading comments.[109]

In 2006, Delfi published an article stating that a ferry company known as SLK had destroyed a planned ice road over the frozen sea between the mainland and several large islands. Such roads connect the mainland to the islands in winter, as do the SLK

99 ibid art 12 ss 1(a)–(c).
100 ibid arts 13–14, 2000 OJ (L178) 13.
101 ibid art 15.
102 ibid art 15, s 2.
103 (n 33).
104 *Delfi AS v Estonia* (App no 64569/09, 10 October 2013).
105 ibid [7].
106 ibid [8].
107 ibid [9].
108 ibid [10].
109 ibid [11].

ferry boats.[110] About twenty of the 185 comments that readers attached to the story were allegedly defamatory or threatening in reference to 'L,' who was the sole or majority stockholder of SLK.[111] About six weeks after the article and the comments appeared on Delfi's site, L through his attorneys demanded that Delfi remove the twenty comments and pay L 32,000 euros in damages. Delfi immediately removed the comments from the site but refused to pay damages to L.[112]

L then filed a defamation lawsuit against Delfi in a county court, but the court dismissed the lawsuit, finding that Estonia's law based on the European Council's e-commerce directive precluded holding Delfi responsible as a 'publisher' of the comments because its role in publishing the comments was more 'mechanical and passive' than its journalistic activities in reporting news.[113] However, an appellate court reversed that decision, and the county court subsequently found that Delfi was responsible for the defamatory comments about L because its attempts to block or delete offensive comments were inadequate. While the court found that the story that spurred the comments was balanced, the comments damaged L's reputation and dignity and were not justified. The court awarded L 320 euros, or one-hundredth what he sought originally.[114]

Delfi's appeals to the Tallinn Court of Appeal and the Supreme Court of Estonia failed, with the Supreme Court agreeing with the lower courts that Delfi was a provider of content services in regard to the comments instead of a neutral information society service provider. The court also noted that the number of comments received helped determine Delfi's advertising rates based on visitor traffic. The court also found it significant that Delfi could choose to remove comments but users could not change or delete comments, meaning Delfi had greater control over the comments than readers.[115]

The Supreme Court also said that both Delfi and the authors of the comments could be considered publishers, but Delfi's economic interests made it more similar to a publisher of printed news.[116] The court also said that Delfi had a legal obligation to avoid causing damage and 'must have been aware' of the unlawful comments posted on the ice road story yet failed to remove them. Therefore, the lower court was correct to find it liable for damages to L.[117]

Delfi brought its case to the ECtHR alleging that the rulings of the Estonian courts violated Article 10 of the Convention by infringing upon its freedom of expression.[118]

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110 ibid [12].
111 ibid [13].
112 ibid [14]–[16].
113 ibid [17]–[19].
114 ibid [20]–[23].
115 ibid [27].
116 ibid [28].
117 ibid [29].
118 ibid [46].

Delfi argued that the decisions in Estonia had forced it to change its business model and begin to monitor all comments posted, up to 10,000 per day.[119] Delfi also argued that its take-down policy and the ability of injured parties to sue the authors of comments sufficiently protected the plaintiff's right to reputation.[120] The company also disputed the findings of the Supreme Court that it had played an 'active role' in presenting the comments and raised concerns that holding it responsible for the comments because it had measures in place to prevent or remove posts would put it at a disadvantage against sites that took no actions to monitor comments.[121]

The government of Estonia countered that the law clearly established that a media company was liable for whatever it published, and the liability could not be escaped through a disclaimer such as Delfi's.[122] The government also said that it was not sufficient or justified for Delfi to put the responsibility on injured parties to police the comments because information spread so quickly on the Internet and it would be nearly impossible for an ordinary person to exert any control over online information before damage was done.[123] It also would be difficult for an injured party to identify the writers of the comments and would also be excessive for the government to require identification of all commenters, so the most appropriate party on whom to place legal responsibility was the company. The government had not prescribed how Delfi should protect the rights of persons identified in comments, so its interference with Delfi's business operations was minimal.[124] The government reiterated that Delfi was not a mere passive host of comments and had taken steps to control comments in the past, meaning it was aware of its potential liability for them.[125] Further, the comments in this case had not attacked the ferry-boat company but one of its board members, so they had not aided Delfi in exercising its 'public watchdog' role as a member of the press and had not stimulated 'any reasonable public discussion.'[126] Finally, the government also argued that the small sum that Delfi was ordered to pay L 'had not had a "chilling effect" on the freedom of expression.'[127]

In ruling that Delfi's rights under Article 10 had not been violated by the decisions of the Estonian courts, the ECtHR determined that the government had a 'legitimate aim' in protecting the reputation and rights of L. It also found that the fact that authors of comments could be held liable for their actions did not mean that Delfi was not liable. The question, the opinion said, was whether the restriction on Delfi's Article 10 rights was 'necessary in a democratic society.'[128]

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119 ibid [52].
120 ibid [55].
121 ibid [56]–[57].
122 ibid [60].
123 ibid [63].
124 ibid [64].
125 ibid [65].
126 ibid [66].
127 ibid [67].
128 ibid [77].

The court then reviewed its previous case law on questions of when restrictions on freedom of expression are necessary and the principles underlying those decisions. The court reiterated its belief that the press plays an 'essential function in a democratic society' and that, within boundaries to protect reputations and confidential information, the press has a duty 'to impart . . . information and ideas on all matters of public interest.' The court also said that press freedom 'also covers possible recourse to a degree of exaggeration, or even provocation.' Criticism of others has greater freedom when it relates to politicians or governments than when it is aimed at private citizens.[129]

Protection of reputation is among the rights protected under Article 8 of the Convention, the court said,[130] and the rights protected under Article 8 (privacy) and Article 10 (freedom of expression) 'deserve equal respect.'[131] When Article 8 and Article 10 rights are being balanced against each other, the court said the balancing process should include several elements:

> [C]ontribution to a debate of general interest, how well known the person concerned is, the subject of the report, the prior conduct of the person concerned, the method of obtaining the information and its veracity, the content, form and consequences of the publication, and the severity of the sanction imposed.[132]

Applying the precedent and principles to the *Delfi* case, the court noted that both Delfi and Estonia agreed that the comments posted were defamatory but disagreed about whether holding Delfi responsible for them was an improper interference with its Article 10 rights.[133] The court noted that the article Delfi published concerned a matter of public concern and was balanced. However, given that the article dealt with a controversial issue, the court said that Delfi should have realised that the article was likely to attract vitriolic comments, especially when a greater-than-average number of comments were posted. The company could have been expected, the court said, to 'exercise a degree of caution' to avoid being held liable for harming someone's reputation.[134]

Turning to the question of whether Delfi's various mechanisms for detecting and removing offensive or defamatory comments were adequate to the task, the court noted that Delfi 'cannot be said to have wholly neglected its duty to avoid causing harm' to others. The court noted that Delfi published a disclaimer prohibiting the posting of inappropriate comments; had an automatic system for deleting comments containing 'vulgar' words; and had a notice-and-take-down system allowing any user of the site to identify a potentially inappropriate comment.[135]

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[129] Ibid [79].
[130] ibid [80].
[131] ibid [82].
[132] ibid [83].
[133] ibid [84].
[134] ibid [86].
[135] ibid [87].

However, the court found the automatic filtering system was easy to circumvent, judging from the comments relevant to this case. Also, while the notice-and-take-down system was easy for anyone to use, the allegedly defamed person, L, wrote a letter to Delfi instead of using the system, and 'this was his own choice.' While Delfi took the comments down immediately, they had been up for six weeks before Delfi received the letter and acted.[136]

The court agreed with the Estonian courts that making reader comments accessible to the public was part of Delfi's professional activity and the numbers of readers and comments helped determine its advertising revenue. Delfi was in a better position than L or anyone else similarly situated to know what articles were being published and whether they were likely to attract defamatory or offensive comments. Delfi was also in a better position than anyone else to take 'measures to prevent defamatory comments from being made public.' Thus, the court said, Delfi 'exercised a substantial degree of control over the comments published on its portal even if it did not make as much use as it could have done of the full extent of the control at its disposal.'[137]

The court also dismissed Delfi's argument that L could have taken action against the persons who posted the defamatory comments instead of the company. It would be exceedingly difficult for an offended party to identify the posters of anonymous comments, the court said, and shifting the liability burden to commenters (and the burden of identifying them to the offended party) would be 'disproportionate.' The court said 'it was the applicant company's choice to allow comments by non-registered users, and that by doing so it must be considered to have assumed a certain responsibility for these comments.'[138]

The court also said that it was 'mindful . . . of the importance of the wishes of Internet users not to disclose their identity in exercising their freedom of expression.' However, the court found that the nature of the Internet, particularly the fact that information posted there 'will remain public and circulate forever', called for 'caution'. The sheer volume of information on the Internet made it difficult to find and remove defamatory comments, the court found, for news portals but more so for injured persons 'who would be less likely to possess resources for continual monitoring of the Internet.'[139]

Finally, the court determined that two factors mitigated against the interference with Delfi's right to freedom of expression. First, while Estonian courts had held Delfi liable for the comments, they had not prescribed any specific measures Delfi should take to better protect the rights of third parties, leaving that choice to Delfi.[140] Second, the court noted that Delfi was only ordered to pay L 320 euros in damages which, considering

136 ibid [87]–[88].
137 ibid [89].
138 ibid [91].
139 ibid [92].
140 ibid [90].

its status as a leading professional news portal, 'can by no means be considered disproportionate to the breach established by the domestic courts' of Delfi's Article 10 rights.[141]

In summary, the European Court of Human Rights in the *Delfi* case determined that it was not a violation of the Article 10 rights of Delfi AS to hold it legally responsible for damages caused by anonymous comments posted on its web portal. The court noted the measures that Delfi took to block or respond to defamatory comments posted by its users but found them inadequate. Curiously, the court did not attach much importance to the fact that L, who was the subject of the defamatory comments, waited six weeks to demand that they be taken down and then did so in a letter instead of using the site's own notice-and-take-down system. The court attached greater importance to the fact that Delfi, as a professional news organisation, should have known the story about L's company would attract negative comments and acted to remove or block them more aggressively. The court also noted that the story to which the comments were later added dealt with a matter of public concern and the importance of anonymous speech to facilitating the exercise of Article 10 rights, but neither factor seemed to carry much weight. The court also found that the Estonian courts' decision not to order Delfi to take specific measures to better protect others and the relatively small amount of the damage award mitigated any interference with Delfi's Article 10 rights.

The ECtHR took the relatively unusual step of agreeing to have the case heard by the Grand Chamber,[142] which, for American readers, is the equivalent of a federal appellate court agreeing to hear a case *en banc* after a three-judge panel has decided it. The Grand Chamber upheld the earlier ruling in June 2015.

Can Section 230 and *Delfi* be reconciled?

The US courts' interpretation of Section 230 and the ECtHR decision in the Delfi case seem to be at opposite ends of the spectrum in considering the options available to allow robust freedom of expression on the Internet while protecting the rights of those legitimately damaged by some of that expression. Because the Internet is a global medium of communication, it is inevitable that these different conceptions of ISP liability for defamatory comments posted by users will collide at some point. It is important, therefore, to think about how to reconcile the different approaches in Europe and the United States.

Both Section 230 and the *Delfi* decision have their share of critics. In the United States, commentators have noted that much of the anonymous expression published

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[141] ibid [93].

[142] Grand Chamber Hearing on Internet Portal's Liability for Offensive Comments Posted by Its Readers, [2014] ECHR 204 (9 July 2014) (press release announcing Grand Chamber would hear appeal on 9 July 2014).

on the Internet falls far short of the high-minded debates on political and social issues that Alexander Meiklejohn might have envisioned. Legal scholar Saul Levmore, for example, has compared the Internet to a toilet wall where anonymity may protect puerile and juvenile commenters better than if they had scribbled graffiti on a physical space.[143] Other critics have suggested that the protection for anonymity online may limit the Internet's future development as an engine for innovation by driving away those offended by the free-wheeling and crude nature of discourse the medium encourages and the law protects.[144]

Various suggestions have been offered on how to better protect reputations and other interests on the Internet, many focusing on Section 230 and court interpretations of it. Suggestions have included having courts adopt a balancing test to determine when ISPs should lose their immunity to encourage more self-regulation;[145] the adoption of a balancing test to discourage 're-posters' of libellous material;[146] Congressional revision of Section 230 to better balance First Amendment interests and individual rights to redress injuries;[147] revising the law to allow websites to be held liable for knowingly allowing the sexual exploitation of children;[148] using a judicial totality-of-circumstances approach to decide when sites that induce or encourage tortious behaviour should lose immunity;[149] and amending the law to make the penalties clearer for individuals who post offensive content on social networking sites.[150]

A recent decision by the US Court of Appeals for the Sixth Circuit demonstrates the potentially troubling lengths to which Section 230 immunity can be carried. In *Jones v Dirty World Entertainment Recordings LLC*,[151] a cheerleader for the Cincinnati Bengals professional football team, who was also a high school teacher, sued the operators of a gossip site, TheDirty.com, for libel, invasion of privacy, and intentional infliction of

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143 Saul Levmore, 'The Internet's Anonymity Problem' in Saul Levmore and Martha C Nussbaum (eds), *The Offensive Internet: Speech, Privacy and Reputation* (CUP 2010) 53.

144 See eg Bryan H Choi, 'The Anonymous Internet' (2003) 72 *Maryland Law Review* 501, 501–502.

145 Miree A Kim, 'Narrowing the Definition of an Interactive Service Provider under Section 230 of the Communications Decency Act' (2003) *Boston College Intellectual Property & Technology Forum* 33102.

146 Stephanie Blumstein, 'Note: The New Immunity in Cyberspace: The Expanded Reach of the Communications Decency Act to the Libelous "Re-Poster"' (2003) 9 *Boston University Journal of Science and Technology Law* 407.

147 Robert D Richards, 'Sex, Lies, and the Internet: Balancing First Amendment Interests, Reputational Harm, and Privacy in the Age of Blogs and Social Networking Sites' (2009) 8 *First Amendment Law Review* 176.

148 Katy Noeth, 'Note: The Never-Ending Limits of Section 230: Extending ISP Liability to the Sexual Exploitation of Children' (2008–2009) 61 *Federal Communications Law Journal* 765.

149 Ali G Zieglowsky, 'Note. Immoral Immunity: Using a Totality of the Circumstances Approach to Narrow the Scope of Section 230 of the Communications Decency Act' (2010) 61 *Hastings Law Journal* 1307.

150 Joshua N Azriel, 'Social Networking as a Communications Weapon to Harm Victims: Facebook, Myspace, and Twitter Demonstrate a Need to Amend Section 230 of the Communications Decency Act' (2009) 26 *John Marshall Journal of Computer & Information Law* 415.

151 *Jones v Dirty World Entertainment Recordings LLC*, 755 F 3d 398 (6th Cir 2014).

emotional distress.[152] The lawsuit was in response to comments posted on the site that alleged that she was sexually promiscuous with football players, likely had various sexually transmitted diseases, and was unattractive.[153] Although the operator of the website acknowledged that he chose which comments would appear on the site and commented upon them,[154] the court held that these actions did not 'materially contribute' to the defamatory nature of the comments and upheld the site's immunity under Section 230.[155] Despite the criticisms, there is no pending legislation in Congress to amend Section 230.

Criticisms of *Delfi* have focused on the potentially troubling consequences it could pose for ISPs in the EU member states. The most detailed examination of the ECtHR decision to date faulted the court for failing to recognise how significantly the decisions of the Estonian courts would force Delfi to alter its business practices to avoid future litigation.[156] The article, published in a law journal in the UK, also said the ECtHR failed to adequately consider the degree to which the injured party, L, was responsible for at least some of the injuries by failing to notify Delfi sooner about the defamatory comments instead of waiting several weeks.[157] The court also did not adequately explain why it assumed that Delfi was the publisher of the comments and therefore liable for them.[158] The court also failed to take adequate notice of the fact that the story and the comments on Delfi's site dealt with a matter of public concern, which was especially surprising in light of its statements that reputation is protected by Article 8 of the Convention to the extent that it interferes with private life.[159]

Another critic has faulted the ECtHR for failing to recognise that the issues raised by the *Delfi* case were novel, instead relying on standards developed during the print media era. This conceptual approach failed to make use of the court's well-developed 'European consensus' doctrine for new controversies, instead suggesting that there was 'no novel question to answer.'[160] The court also failed to take into consideration how the time element plays out differently with Internet information providers than with print and other legacy media, leaving little time for reflection and reasoned decisions on what to publish.[161] The greatest weakness of the *Delfi* decision, however, was

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[152] ibid 402.
[153] ibid 403–404.
[154] ibid 401.
[155] ibid [415]–[416].
[156] Neville Cox, '*Delfi AS v Estonia:* The Liability of Secondary Internet Publishers for Violation of Reputational Rights under the European Convention on Human Rights' (2014) 77 *Modern Law Review* 619, 621.
[157] ibid 622.
[158] ibid 623.
[159] ibid 625–26.
[160] Mart Susi, 'International Decision: *Delfi AS v Estonia'* (2014) 108 *American Journal of International Law* 295, 301.
[161] ibid.

the court's failure to suggest how governments should protect privacy in the Internet context, except to suggest 'that the Internet may require its own policies.'[162]

One way to resolve the conflict between Section 230 and *Delfi* (now that the ECtHR Grand Chamber has upheld the Chamber decision) is suggested by the *Modern Law Review* article discussed above. Noting that the *Delfi* decision would conflict with UK law on the subject of ISP liability, the article quotes from relevant sections of the UK's Defamation Act of 2013, which substantially altered libel law.[163] Section 5 of the Defamation Act pertains to website operators and takes a position closer to the US approach than *Delfi*. Section 5 states that it is a defence in a defamation action for a website operator to show that it did not post the offending statement on a website.[164] However, the defence is defeated if it is not possible to identify the party that posted the statement or if the injured party notified the operator about the statement and the operator did not respond to the notice.[165] A notice must state the name of the claimant; identify the statement complained of and why it is defamatory; specify where on the website the statement was posted; and contain other information required by the Secretary of State in regulations designed to implement the Act.[166] The defence could also be defeated if it was shown that the website operator acted with 'malice' in some way in regard to the posting,[167] but not if the website operator moderates the posted statements.[168]

While the UK Defamation Act still falls short of the protection afforded to website operators by Section 230 in the United States, it is considerably more protective than *Delfi.* US courts and legislators are unlikely to go this far in any changes they may make to Section 230 or its interpretation, but an adoption of a UK-like conception of ISP protection in the EU would lessen conflicts between US and EU law.

Another solution to the problem could be to allow media self-regulation to run its course. Already, many news organisations have revised their policies on reader comments because of litigation fears and concerns that their core values are not well-served by allowing unchecked anonymous comments to push the envelope on acceptable speech beyond limits placed on printed content. A study by the World Association of Newspapers and News Publishers (WAN-IFRA) in 2013 found that there was widespread disagreement about whether to moderate comments before or after they were published; about 11 percent of all comments were deleted for various reasons; newspapers often were not aware of the legal requirements and responsibilities for comments; and there was division about whether to require real-name registration or

162 ibid 302.
163 Cox (n 156) 627–28.
164 Defamation Act 2013, ch 26, s 5(2).
165 ibid s 5(3).
166 ibid s 5(6).
167 ibid s 5(11).
168 ibid s 5(12).

allow anonymity.[169] WAN-IFRA, based on its interviews with news organisation officials, recommended a series of best practices for handling comments, including:
– publishing guidelines for commenters;
– hiring a community manager to keep on top of conversations;
– encouraging journalists to participate in online conversations;
– highlighting the most valuable comments;
– giving feedback and educating readers;
– seeking legal advice and sharing it with staff.[170]

Determining the best way to take advantage of the interactive features of the Internet while protecting news organisations' values and legality is still a work in progress, and it could be best to allow websites to continue to experiment with finding best practices instead of imposing heavier liability. However, the disadvantage of this approach is that sites such as TheDirty.com and Yik Yak that rely on gossip and instant (often offensive) commentary would have little incentive, as opposed to news organisations and other sites with more 'serious' profiles, to adopt better practices without some compulsion from the law.

The 'best practices' discussion suggests another possible solution. Websites that have adopted moderation methods for online comments, installed filtering software, rewarded 'good' comments while deleting 'bad' ones as soon as practicable, and/or taken other steps to improve the quality of discourse should have a greater degree of immunity from defamation liability than sites that do little or nothing. This is close to what Section 230 attempts to do with its 'safe harbour' for protecting sites that make good-faith efforts to monitor user-generated content but fall short. However, instead of a 'one size fits all' approach that has led to all websites that have interactive features being treated as ISPs, this approach would lead to a tiered approach in which liability immunity would differ depending upon the service's activity level. A service that merely provided the technical means for people to communicate but did not host or monitor user content (i.e., an e-mail server) would face no liability for user content. Sites that invited and moderated or otherwise attempted to edit user-generated content would have immunity if they made good-faith efforts to restrict defamatory and illegal content and did not induce or cause the illegality of content. Sites that encouraged or invited users to post defamatory or illegal content and did not attempt to control it would have no default immunity without a showing that they were unable to control user traffic.

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[169] 'Online Comment Moderation: Emerging Best Practices' World Association of Newspapers and News Publishers (2013) 7 <http://www.wan-afra.org/reports/2013/10/04/online-comment-moderation>.

[170] ibid 61–64.

Conclusion

There is no perfect solution to reconciling the approaches taken to deal with anonymous, defamatory, user-generated online expression. Section 230 arguably goes too far, if judged on an international stage rather than solely in accordance with US free-expression standards, to protect defamatory and hateful speech. The European Court of Human Rights' decision in *Delfi* arguably goes too far in the other direction by holding a news portal that had several safeguards in place to control defamatory speech legally liable for not being able to adequately police 10,000 reader comments a day.

At the moment, it could be argued that this paper is chasing a solution for a non-existent problem. While there has been no major dispute between US and EU authorities over defamatory commentary posted online, the rapidity with which 'libel tourism' arose and led to the SPEECH Act in the United States and, to some extent, changes in defamation law in the UK demonstrates how quickly the situation could change. The challenge to preventing or solving such a conflict of laws will be to find a way to respect the rights of individuals to communicate broadly and, at times, anonymously on issues that animate them, to protect Internet services from undue liability, and respect the rights of those who are personally defamed or otherwise injured by online commentary. If the relatively brief history of the Internet and attempts to regulate it is an accurate guide, it will not be simple. But it will happen. The question is how.

Péter Nádori

Anonymous mass speech on the Internet and the balancing of fundamental rights

The judgment of the European Court of Human Rights and the decision of the Hungarian Constitutional Court on intermediary liability for anonymous comments

Introduction

Courts concerned with the application of fundamental rights—constitutional and human rights courts—often have to confront societal dilemmas which the legislative and executive branches cannot or do not want to tackle without guidance, or where for some reason they can only offer controversial solutions. Online user-generated content is the focus of heated public debate in every country of the world where the Internet is accessible at all. It is now a truism in journalism and academia to say that 'the Internet' has failed to meet the initial idealistic-utopian expectations attached to it. The dreams about mass access to communications that can potentially reach masses turned into nightmares for many: Instead of the flourishing of deliberative democracy they see the terror of 'trolls'. (Though it must be noted that arguments about the harmful impact of mass public communications often conflate different phenomena that can, in fact, be easily differentiated in terms of their nature and seriousness: in rhetorical terms, anybody who simply contradicts somebody else on the Internet or uses some vulgar expressions can be a troll, as well as those who spread false information or whose targeted aggression makes other people's lives miserable.) Negative phenomena, perceived or real, notwithstanding, it is undeniable the Internet has made it possible for an increasing number of people to take a stand on issues of concern, to express their ideas and sentiments in a way which can reach more people than ever before. It is the Internet that makes it possible for one section of the masses to tell other sections of the masses how repulsive they think their ideas and sentiments made public are.[1]

Individuals and society turn to the law for clarification, standards and solutions. Some advocate a much more effective enforcement of reputational and personality rights, others expect a dismantling of barriers to freedom of speech through legislation and court decisions. Some hope that at least the structure and elements of the problem

[1] For a multi-perspective analysis see Lincoln Dahlberg, 'Computer-Mediated Communication and The Public Sphere: A Critical Analysis' (2001) 7(1) *Journal of Computer-Mediated Communication*.

might be better defined by judges and legislators. A focal point of the topic in several legal systems is the liability of actors positioned in between those directly exercising their freedom of speech (the authors of various communications) and the victims of real or perceived reputational violations. Opinions on the ideal spread of liability that would serve the ideal balance between the freedom of expression and the protection of personality rights differ greatly (no wonder, as the parameters and criteria of such a balance are strongly debated themselves), and it is also debated how the extant legislation is applicable to these actors in various jurisdictions.

Below I will analyse and compare a judgment of the European Court of Human Rights (ECtHR) delivered in 2013 and a decision of the Hungarian Constitutional Court handed down in 2014. Both cases focused on the legal liability to be assumed by the operator of a web-based publication where users' comments were published without any prior moderation, and which were found defamatory by ordinary civil courts. As the outlook of fundamental rights courts is not constrained by the text of extant statutes and their *raison d'être* is to work according to the basic values of civilisation, those considered to be of moral origin, these decisions—in the context defined by the nature of the two proceedings and the circumstances determined by the concrete cases—could provide some guidance concerning the above mentioned balance of societal values determined in terms of fundamental rights.

On 17 September 2013 the seven-member Chamber of the First Section of the ECtHR discussed the application of Delfi AS, the publisher of a popular Estonian Internet portal, itself called Delfi.[2] In local proceedings Delfi was ordered to pay non-pecuniary damages to a businessman who claimed he had been defamed by certain user comments affixed to an article published on the portal. According to the application submitted by Delfi, this breached the freedom of expression guarantee of Article 10 of the European Convention on Human Rights. The Strasbourg Chamber, in its judgment made public on 10 October, unanimously rejected the claim.

The Hungarian Constitutional Court adopted a decision at its full plenary session on 27 May 2014 with respect to the constitutional complaint submitted by the Association of Hungarian Content Providers (Magyarországi Tartalomszolgáltatók Egyesülete, MTE).[3] Ordinary courts of the first and second instance, then the Curia in its review procedure, declared that the applicant violated the right to good reputation of a company with two user comments that appeared on the blog of the association. The applicant requested the decisions to be rendered null and void on the grounds that they are not in line with the guarantees of freedom of expression and the freedom of the press enshrined in the Fundamental Law of Hungary (Articles IX(1) and (2)). The Constitutional Court rejected the application with a concurring and a dissenting opinion.

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[2] *Delfi AS v Estonia* (App no 64569/09, judgment of 10 October 2013). Delfi's appeal was rejected by the Grand Chamber of the ECtHR, judgment of 16 June 2015.

[3] Decision of the Constitutional Court no 19/2014. (V. 30.)

Comparison of the cases

The two cases shared several key characteristics. The question to be addressed by the courts in both was whether the right to the freedom of expression is disproportionately restricted by the obligation of a legal person engaged in some kind of online publication to assume legal liability for unmoderated user comments attached to content actively published by it. Neither Delfi nor MTE applied prior moderation (ie the incoming comments were displayed on the public site without human supervision and interference), and in both cases commenters were identified only by their pseudonyms on the public site. At Delfi, according to the summary of the Strasbourg Chamber, it was not even mandatory for commenters to provide an electronic address; the platform utilized by MTE, Blog.hu, required registration with a functioning e-mail address, and commenting was allowed only for registered users.

Delfi took several measures in its effort to filter potentially problematic comments. The system automatically deleted comments containing certain obscene words. The portal provided the opportunity for users to report offensive comments and those marked as such were 'immediately' taken down. Delfi also invited those feeling their personality rights being violated by comments to directly notify the portal, and comments flagged in this way were also taken down. Similar institutional precautionary measures were not in place on the MTE blog, but the electronic and postal address of the association were obviously displayed, while, as an alternative, users offended by comments had the opportunity to turn to the operator of the blog platform as well.

The operators of the websites removed the criticised comments in both cases as soon as they were informed of their problematic nature. In the ordinary court proceedings, both defendants based their defence on the local piece of legislation transposing Directive 2000/31/EC of the European Parliament and the Council on electronic commerce. Pursuant to the legislation, so-called hosting service providers cannot be held liable for third-party content made available through them, if they play only a passive, technical role in its publishing and, upon being informed of objections, they immediately take measures to take down the content concerned. The Estonian courts rejected this line of defence, and classified the portal as the publisher of comments. In the Hungarian proceedings the court of first instance considered user comments to be equivalent to readers' letters from a legal point of view (to wit, also content under editorial supervision). The court of second instance qualified comments as so-called private communications and as such no exemption from legal liability was granted. The Curia affirmed this interpretation.

In both cases it was the conduct or practices of a corporation, *vis-à-vis* those affected by its activities, that was perceived as unethical and abusive by commenters; some of their anger was targeted at the leader of the given company. In the Estonian case, the plaintiff was the private individual pilloried in the comments; in the Hungarian case it was the company itself. The judgments passed by the ordinary courts in both cases established the violation of personality rights and the liability of the defendant.

Delfi was also obliged to pay non-pecuniary damages, however, the amount of the fine was rather low. In the Hungarian case, the court did not apply any sanction beyond establishing the fact of violation (a precondition of other sanctions in defamation cases under Hungarian law).

The most important difference between the two cases is that Delfi is a news portal with a high number of daily visits, where the offending comments were linked to an article published by a professional journalist, while MTE is a non-governmental organisation (an industry association), operating its own blog on a platform accessible to anybody. It follows from this that the Strasbourg Chamber offered little orientation in regard of its more general views on intermediary liability and online freedom of expression. Due to the nature of the examined case and the attributes of the reasoning, the decision of the Hungarian Constitutional Court is more suitable to serve as a guideline in cases with different actual circumstances.

The *Delfi* case

The applicant, Delfi AS, was one of the leading online content providers in the Baltic region. On 24 January 2006 an article entitled 'SLK destroyed planned ice road' appeared amongst the Estonian news published on Delfi's portal. Saaremaa Laevakompanii (SLK) is a corporation providing public ferry transport services; ice roads can be used in winter to access some Estonian islands from the mainland over the frozen Baltic Sea. The article was about the fact that SLK had modified the route of one of its ferries so that commuters could not use one of the ice roads at the expected time. In two days, 185 comments were added to the article; many criticised the SLK measure (mostly because using the ice road is cheaper than using the ferry to travel to the same island). Some of the comments were targeted personally at Mr. L, a businessman behind SLK. Some sample comments:

- Go ahead, guys, [L] into oven!;
- They bath in money anyways thanks to that monopoly and State subsidies and now started to fear that cars may drive to the islands for a couple of days without anything filling their purses. Burn in your own ship, sick Jew!;
- What are you whining, kill this bastard once. In the future the other ones . . . will know what they will risk, even they will only have one little life.;
- I pee into the [L's] ear and then I also shit onto his head. :)

One-and-a-half months after the publication of the article, L's lawyers requested Delfi to remove twenty comments and claimed damages. Delfi removed the comments from the portal that same day. At the same time, they also informed L that they rejected the claim for damages, L eventually brought a civil suit against the portal's publishing company.

In the proceedings, Delfi's legal representatives asked for the dismissal of the claim on the basis of the local Information Society Services Act,[4] based on the aforementioned EU Directive. They were referring to the provisions on the qualified exemption of the intermediary service provider from liability. The county court, in its decision on 25 June 2007, accepted the argument and dismissed L's claim. The court found that the comment section could be distinguished from the portal's area of editorial content and the portal exercised only 'mechanical and passive' control over it.

According to the Strasbourg Chamber's summary, the Tallinn Court of Appeal in its decision on 27 October, allowed L's appeal, considering 'that the County Court had erred in finding that the applicant company's responsibility was excluded under the Information Society Services Act. The County Court's judgment was quashed and the case referred back to the first-instance court for new consideration' ([22]). When re-examining the case, the Harju County Court applied the Obligations Act (Võlaõigusseadus, part of the Estonian Civil Code made up of several statutes). This time, the court held that, even though Delfi operated tools and measures to filter and flag offensive comments, and showed a readiness to delete flagged user content, this was insufficient as it did not guarantee adequate protection of personality rights. The court this time found that Delfi was to be considered the publisher of the comments, and that some of the comments were vulgar, defamatory, humiliating and impaired L's honour, dignity and reputation. The court concluded that freedom of expression did not extend to the protection of the comments concerned and obliged Delfi to pay 5,000 Estonian crowns in non-pecuniary damages (one percentage of the amount demanded in the original claim addressed to the portal).

The Tallinn Court of Appeal upheld the County Court's judgment on 16 December 2008. 'It emphasised that the applicant company had not been required to exercise preliminary control over comments posted on its news portal. However, having chosen not to do so, it should have created some other effective system which would have ensured rapid removal of unlawful comments from the portal. The Court of Appeal considered that the measures taken by the applicant company were insufficient and that it was contrary to the principle of good faith to place the burden of monitoring [in the notice-and-takedown system] the comments on their potential victims' ([24]). The Court of Appeal found that Delfi's role could not be qualified as passive as defined by the liability-exemption provisions of the Information Society Services Act, since the portal actively invited users to add comments to its articles.

Delfi appealed to the Estonian Supreme Court, which dismissed the appeal and upheld the Court of Appeal's judgment in substance on 10 June 2009, although it partly modified its reasoning. The Supreme Court explained in detail the difference between an information society service provider and a content provider. According to this reasoning, the Directive on Electronic Commerce provides exemption from legal

[4] Information Society Services Act (Infoühiskonna teenuse seadus, RT I 2004, 29, 191).

liability for content placed by a third party for those providers which have neither knowledge of the stored information, nor access to it. While the comments were not written by the staff of the portal, the portal still had control over the comment environment, meaning that the host provider's exemption could not be justified. The rules of commenting were laid down by Delfi and, upon the violation of those rules, certain comments were removed, whereas the authors and readers of the comments concerned did not have the opportunity to remove or edit their own comments after publication; they could at most flag obscene texts. In the interpretation of the court, this means that it was the portal who decided which comments got published. According to the Supreme Court, the real authors of the comments and the portal were to be considered equally as publishers of the comments, and the plaintiff had the choice to decide, supported by Estonian case law, whether he brings the suit against those writing the comments or against the portal. The court stressed that displaying comments contributed to the number of user visits to the portal, increasing advertising revenues, meaning that Delfi had an economic interest in generating them. The assessment of this interest, compared by the court to that of print media companies, contributed to the classification of Delfi as the publisher of the comments. According to the Supreme Court, Delfi 'should have prevented clearly unlawful comments from being published' ([29]). The court held that the portal could also be blamed for not removing the comments on its own initiative, although it had to be aware of their clearly unlawful nature.

The *MTE* case

On 25 February 2010, MTE published a statement titled 'Further unethical business practices on the Internet' on its blog, in which the association condemned the two web-based listings sites, Ingatlandepo.com and Ingatlanbazar.com, operated by a Seychelles-registered corporation called Experient Entertainment. The association found issue with the fact that the sites offered space for real estate classifieds at no expense for a fixed time but, after the expiration of this period, started invoicing advertisers who unwittingly provided their data upon registration. MTE's criticism also focused on the fact that clients could not remove or cancel their listings easily or, in many cases, at all.

Subsequently, the legal representative of Experient brought a suit to the Budapest Capital Regional Court, claiming that MTE's statement itself and some user comments added to it on various sites violated the corporation's personality rights. The defendants in the case were MTE as first defendant, Index.hu Zrt. as third defendant (the popular portal published MTE's statement on one of its editorial blogs, Tékozló Homár), and Zöld Újság Zrt. as co-defendant (for covering the issue on its Vg.hu website). The offending three comments were linked to the publications of the first and third defendants.

In its decision handed down on 31 March 2011, the court of first instance allowed the claim with respect to three comments, otherwise dismissed it. According to the

court, the comments violating the right to the protection of good reputation were the following (the first two appeared on the MTE blog and the third on Tékozló Homár):

- two crappy property sites;
- Sándor B's sneaky, rubbish, rip-off company;
- such people should shit hedgehogs and spend all their revenues on the grave of their mothers until they croak.

The decision did not contain any other sanction beyond establishing the violation of rights; this was what Experient had asked the court to do in its claim. The first and third defendants were obliged to pay 5,000 forints each to the plaintiff in costs and expenses, whereas the plaintiff was obliged to pay the co-defendant, which fully won the case, 20,000 forints in costs and expenses.

In the proceedings, the joint legal representative of the first and third defendants unsuccessfully invoked the Hungarian statute based on the European Union e-commerce directive (Ektv.),[5] according to which intermediary service providers—host providers among them—are exempt from liability for third-party content if they follow the notice-and-takedown procedure. The defendants argued that they should be classified as hosting providers and thus, because the comments were removed as soon as they were informed of the objections to them, they carried no further legal liability for them. According to the statement of reasons for the decision, 'the court did not concur with this legal argumentation because the comments were, in effect, to be considered the same way as users' letters relating to original communications, classified as editorial content.' According to the court, the above cited three comments went beyond the permitted boundaries of freedom of expression, being 'unwarrantedly offensive, degrading, and humiliating'.

The plaintiff and the two defendants against whom the judgment was given appealed against the decision. On 27 October 2011, the Budapest Capital Regional Court of Appeal upheld the decision but partly modified its reasoning. It accepted that comments could not be treated as readers' letters because 'the publication of readers' letters is preceded by a prior selection and decision by the editors, whereas with comments no such decisions are taken.' However, it held that comments qualify as so-called private communications, pursuant to Section 1(4) of the Ektv., which do not fall under the material scope of the Act, meaning the conditional exemption of the intermediary (hosting) service provider could not be upheld. According to the statement of reasons, the question of liability was to be governed by the then effective 'old' Civil Code, Sections 78(1) and (2), and it could be established that the defendants 'provided space for the undisputedly severely humiliating and degrading comments regarding the plaintiff, [thus] they destroyed its good reputation by spreading defamation' as defined

[5] Act on Certain Issues of Electronic Commerce Activities and Information Society Services (2001. évi CVIII. törvény az elektronikus kereskedelmi szolgáltatások, valamint az információs társadalommal összefüggő szolgáltatások egyes kérdéseiről).

by the Civil Code. According to the Court of Appeal, the fact that the defendants removed the comments was not relevant from the point of view of establishing wrongdoing; it was relevant only with respect to 'enforcing a potential claim for damages with respect to exemption from imputability.'

The first and third defendants requested a review from the Curia which, in its decision dated 13 June 2012, upheld the effective provisions of the Court of Appeal decision. The statement of reasons was in line with that issued by the court of second instance but there was a certain degree of shift in emphasis, inasmuch as the Curia, in addition to considering comments to be of a private nature, did not find the Ektv. exemption enforceable because the 'defendants on the portal operated by them provided an opportunity for making blog posts [*sic!*].' The Curia referred to the decision no Pfv. IV.20.796/2009/6. of the Supreme Court,[6] according to which 'if the defendants provide an opportunity on their Internet website to add various comments, they must realistically expect some of the comments to be unlawful.' (Though a critique of the Curia's decision is beyond the scope of this study, it is still worth noting that in the case cited, according to the facts explored by the court of second instance, the offending comment was actively published by the editor of the website; it did not appear in a comment environment, but amongst the articles of the website, which made it similar to traditional readers' letters indeed.) MTE submitted the constitutional complaint after the Curia's decision (later applying to the ECtHR as well). Index.hu Zrt. did not join MTE and so, strictly speaking, the complaint only covered the decisions insofar as they concerned MTE and the first two comments cited above.

The *Delfi* judgment: the reasoning of the ECtHR

Defining the fundamental right affected by the restriction

In its ruling, the Strasbourg Chamber established that the parties disagreed as to the role of the portal in the case. According to the government, Delfi had to be considered as the publisher (discloser) of comments; the portal debated this, pointing out that the comments had been published by a third party and Delfi should be classified as an intermediary (host) provider in their respect. The Chamber stated that it did not have to take sides in this issue in order to assess the application, because there was no dispute regarding the fact that local decisions interfered with the portal's right to freedom of expression guaranteed by Article 10 of the European Convention of Human Rights. The Chamber, invoking Article 10(2), declared that for such an interference not to breach the Convention, it must be lawful ('prescribed by law'), implemented in order to achieve one of the legitimate aims listed in the paragraph, and 'necessary in a democratic society'.

[6] The highest judicial authority of the Hungarian ordinary court system, the Curia—not to be confused with the Constitutional Court—had been called the Supreme Court until 1 January 2012.

The Chamber's assessment of the lawfulness of interference

The Chamber examined the parties' positions in the context of lawfulness and foreseeability as regards the applicability of the Information Society Services Act by local courts. In accordance with ECtHR case law, the Chamber reiterated that it was 'primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. The Court's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention' ([74]).

The Chamber, on the whole, found it acceptable that the local decisions were based on the Civil Code. 'The fact that in the present case publication of articles and comments on an Internet portal was also found to amount to journalistic activity and the administrator of the portal as an entrepreneur was deemed to be a publisher can be seen, in the Court's view, as application of the existing tort law to a novel area related to new technologies.' The Chamber stated that in the light of this and the relevant local case law Delfi had the opportunity to weigh up the risks of its conduct. The Court accordingly found that the interference was prescribed by law within the meaning of Article 10(2) of the Convention ([75]–[76]).

Closer inspection reveals, however, that the local decisions the Strasbourg judgment refers to as relevant local case law did not concern defendants invoking the exemption of intermediary service providers. One of the Estonian Supreme Court cases referred to in Paragraph 38 originated with a statement published in the media by one company about another.[7] The other one is even less similar to *Delfi*: in this, the managing director of a company brought a lawsuit against a debt-recovery firm because the latter produced billboards advertising his personal data and the fact that his company had unpaid debts.[8] Moreover, this decision was handed down at the end of 2010, some years after the *Delfi* case had commenced. The cases referred to in Paragraph 39 concerned print articles: These were civil suits with not just the authors of articles and the subjects of interviews as defendants, but the publishers of the publications as well. As such, the reasoning of the Strasbourg court seems to be rather tautological: The invoked legal cases in which the authors were not, or not solely, held liable are relevant once it is accepted that the relationship between the portal and its commenters is equivalent to the relationship between an author and a publisher. However, this is exactly what the court wanted to substantiate by invoking these cases ([75]).

It can also be argued that the first Estonian court decision—which accepted the intermediary defence—demonstrated, in itself, that the legal standing of user comments was far from clear in Estonia at the pertinent time. The fact that in its rules of

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[7] *Merck Sharp & Dohme Inc. v Pfizer HCP*, 3-2-1-95-05. See Halliki Harro-Loit and Urmas Loit, *Does Media Policy Promote Media Freedom and Independence? The Case of Estonia* (University of Tartu 2011) 25.

[8] *Valeri Buseli v CKE Inkasso*, 3-2-1-67-10. See Merike Tamm, 'Riigikohus Tühistas Võlgnikule Häbiposti Panemise Eest Määratud Valuraha' *Postimees*, 4 January 2011, <http://www.postimees.ee/366733/riigikohus-tuhistas-volgnikule-habiposti-panemise-eest-maaratud-valuraha>.

commenting Delfi cautioned its users by referring back to earlier proceedings brought against authors of comments also points in this direction. Both factors indicate that the legal interpretation of Delfi was not unfounded and *ad hoc*, but Strasbourg failed to take this into consideration. Estonian legal history shows that 'the liability of media organs for readers' comments was debated in public for the first time' in the ice road case.[9] In the light of the above, it is not far-fetched to posit that Delfi might have had a *bona fide* assumption that it could benefit from the intermediary exemption; the conduct of the company (see the notice-and-takedown system and further measures) substantiates this.

The Chamber's assessment of the legitimacy of the aim

As regards the aim of the restriction, the Chamber briefly established that it was legitimate because it served one of the aims allowed by Article 10(2), ie the protection of others' good reputation. The Chamber added that 'the fact that the actual authors were also in principle liable does not remove the legitimate aim of holding the applicant company liable for any damage to the reputation and rights of others' ([77]).

The Chamber did not specifically explain why it highlighted author liability in the context of the legitimate aim. Theoretically, the permissibility of the protection of good reputation is obviously not affected by from whom the good reputation has to be protected; as such, were the Chamber to assess the problem of the legitimate aim only in general terms, irrespective of the concrete case, it would have been enough to rely only on the first statement. However, as the Chamber extended the legitimacy assessment to include the circumstances of the concrete case as well, further questions could also have been assessed in this context.

For example, the comments triggering the case could have been analysed from the perspective of whether they indeed damaged the good reputation of L, and if so, to what extent and whether, by doing so, they provided a good basis for the local decisions. In previous defamation-related cases—some of them referred to in the *Delfi* judgment—Strasbourg chambers often closely scrutinised the contentious communications and readily based decisions on evaluating the concrete statements and their context. A similar approach here therefore would have been far from being unusual.

In the closing paragraph, highlighting the most essential factors, the judgment gave prominence to the 'insulting and threatening' nature of comments ([94]). Regardless, the judgment would have been made more convincing by the Chamber if it had demonstrated, when assessing the legitimacy of the aim, which comments infringed the right of L to good reputation, how and to what extent. It would have been instructive to learn, for example, the Chamber's views on the comment that simply called L a 'rascal'—though, it must be noted, in Russian and punctuated by three exclamation marks ([14]).

[9] Harro-Loit and Loit (n 7) 28.

It was treated as a given by the Chamber that the damage to L's good reputation through the comments violated Article 8 (the right to respect for private and family life) of the Convention. It's worth stressing that this would not have been a necessary precondition to hold the interference legitimate, as Article 10(2) itself renders the restriction of freedom of expression permissible in order to protect good reputation. Obviously, a breach of Article 8 might justify a more significant restriction; at the same time, the evocation of Article 8 brings about serious consequences as well, as states *may* interfere on the basis of Article 10(2), whereas, at least theoretically, they are *obliged to* interfere if it is to defend Article 8 rights. The decision in this respect seems circular in its reasoning again: The Chamber delivered this judgment, so it can be inferred that one or more of the comments were found to attain the threshold of seriousness of an insult and / or threat required by Strasbourg case law to engage Article 8 rights.[10] The seriousness standard was mentioned by the Chamber in Paragraph 80, but no analysis was carried out in this respect.

The Chamber's assessment of the restriction's necessity in a democratic society

The Chamber, not having found the local decisions in breach of the Convention under the first two criteria, noted that the issue remained whether the interference manifested in these had been 'necessary in a democratic society', or went beyond that ([77]). 'In other words, the question is whether the applicant company's obligation, as established by the domestic judicial authorities, to ensure that comments posted on its Internet portal did not infringe the personality rights of third persons was in accordance with the guarantees set out in Article 10 of the Convention' ([84]).

To resolve the question with a balancing exercise, the Chamber analysed four salient factors ([85]):

a) the context of the comments;
b) the measures applied by the portal to prevent the publication of defamatory comments or to remove them;
c) the liability of the actual authors of the comments as an alternative to the portal's liability;
d) the consequences of the domestic proceedings for the portal.

Ad a) The Chamber noted that the article published on the news portal 'addressed a topic of a certain degree of public interest' and was a balanced piece of journalism. At the same time, the Chamber was of the opinion that Delfi should have been aware that the article might provoke negative reactions and 'there was a higher-than-average risk

[10] See *Karakó v Hungary* (App no 39311/05, judgment of 28 April 2009) [23]; *A v Norway* (App no 28070/06, judgment of 9 April 2009) [64], and *Axel Springer AG v Germany [GC]* (App no 39954/08, judgment of 7 February 2012) [83].

that the negative comments could go beyond the boundaries of acceptable criticism and reach the level of gratuitous insult or hate speech.' According to the Chamber it followed that Delfi was 'expected to exercise a degree of caution in order to avoid being held liable for an infringement of others' reputations' ([86]).

It can be discerned that the Chamber regarded the relationship between the portal and the subject of the comments as an asymmetric one and ascribed high importance to this notion: It was the portal and not L who was aware of the publication of the article and had the opportunity to predict the nature of expected comments ([89]); it was more difficult for the injured party to detect and remove defamatory statements than it was for the portal ([92]). This might be the usual situation when somebody's actions are covered by the media, but the actual circumstances of the *Delfi* case make the assessment unconvincing in this instance. The Strasbourg Chamber recorded itself that a spokesperson of SLK had been quoted in the original article about the ice road, so it must have been obvious that the company had been as aware of the publication of the article as the portal. According to the Chamber, Delfi should have been prepared for the vehement comments added to the article, as it contained information that negatively affected a large number of people. However, according to the facts, SLK itself should have been prepared at least as well for the same scenario.

The above may be contested on the ground that the plaintiff—and the target of the comments—was L personally, not SLK as a company, but this can be refuted based on the approach taken by the Court in other elements of the case. The Chamber did not assess the comments in themselves, but in the context of the characteristics of the article commented upon, the number of visits to the portal, its business activity; even the reputation of Delfi's comments section was given great emphasis by the Court. As such, it seems especially problematic that, with regard to the person affected by the comments, the parallel factors were fully disregarded. According to the judgment, the case was about an injured, solitary private person facing a media company possessing significant material and technological capabilities; the conclusion that the portal did not sufficiently ensure the protection of others' good reputation was based on this setup. In reality, however, the person affected by the comments was a controversial shipping entrepreneur well-known in the public life of the country, who had a significant influence on the life of a large number of people.[11] Mr L had the complete infrastructure of the company—clerks, secretaries, middle managers, communication officers, and lawyers—at his disposal to prepare for the comments and react to them immediately after they were published. Mr L had had a past history of infamy in Estonia, at least as much as the Delfi comments section, and he could very well expect attacks on the Internet in reaction to his orders to have the ice road broken. There are marked instances in the case law

[11] See eg Mikk Salu, 'Why State Dislikes L's Ferries' *Postimees*, 11 September 2013, <http://news.postimees.ee/1827894/why-state-dislikes-leedo-s-ferries>.

when the ECtHR gave much prominence to the fact that the plaintiff in a defamation case had been a public figure and / or that his own actions had contributed to the alleged harm in reputation.[12]

Summarising the relevant principles of the balancing exercise the Chamber mentioned that, according its practice, the defamed person's notoriety and past history was to be taken into account ([83]). This aspect, however, did not appear in the decision at all. Had the Chamber assessed these factors when evaluating the measures applied by Delfi to filter the unlawful comments it could have easily arrived at a different conclusion. It still could have found that the system of the portal would have been insufficient in the case of a private person who had no means or opportunities and became the target of comments independent of his or her own acts, but it is beyond any doubt that Mr L, being aware of the publication of the article and having corporate resources, could have used the system effectively to prevent the comments from being accessible for weeks. This is significant as the fact that the comments were online for a longer period of time was considered to be a key factor by the Chamber ([88]).

The Chamber attached great importance to the fact that the defamatory comments were published on a widely used Internet news portal, implying that this meant a large audience for the comments ([89]). For the argument to be convincing, however, the Chamber should not have considered the number of users having the opportunity to read the comments, but the exact number of those reading them. This is yet another difference between online and print media—whereas, with regard to the latter, in various proceedings courts traditionally refer to the circulation or the number of readers of a given media product, in the online universe much more accurate information can be obtained on the number of readers of a given piece of content. Because, with regard to Delfi's articles, users had to click on a specific link to read the comments, if the Chamber wanted to deal with the actual impact of the communications, it could have done so in a more substantiated manner. The fact that the number of visits to a portal is high does not automatically mean that a certain content element is seen by masses of people.

The majority of the offending comments can clearly be considered as gratuitous insult; however, it does not follow from this that they breached the privacy of Mr L and / or the sanction applied was proportionate to the damage done to his privacy rights granted in Article 8 of the Convention. The balancing exercise would have been more substantiated if the court had examined how realistic the threats in the comments were for the ferry owner Mr L and in some way explained the reasons for classifying the comments, which were indeed full of hatred, as hate speech, a category usually reserved in literature for 'hatred targeted against specific groups of society', as the author of a Hungarian monograph on freedom of speech put it.[13]

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[12] See *Karakó v Hungary* (n 10) [27], and *Axel Springer AG v Germany [GC]* (n 10) [83].

[13] András Koltay, *A szólásszabadság alapvonalai – magyar, angol, amerikai és európai összehasonlításban* (Századvég 2009) 487.

Ad b) Going on to the system put in place by the portal in order to filter unlawful comments, the Court concluded that Delfi could not be said to have wholly neglected its duty to avoid causing harm to third parties' reputations. The Chamber examined two instruments more closely. The judgment concluded that, while there was no reason to doubt its usefulness, the automatic filter based on 'forbidden words' had been relatively easy to circumvent and insufficient for preventing harm being caused to third parties ([87]). The Chamber dealt in much greater detail with the notice-and-takedown system, in particular assessing whether, by putting this measure in place, the portal had 'had fulfilled its duty of diligence[, which] was one of the main points of disagreement between the parties.' The Chamber first noted that, in the actual case, the injured party had not used the notice-and-takedown feature offered by Delfi, but rather 'relied on making his claim in writing and sending it by mail, this was his own choice, and in any event there is no dispute that the defamatory comments were removed by the applicant company without delay after receipt of the notice.' The Chamber emphasised that by that time 'the comments had already been accessible to the public for six weeks' ([88]).

The Chamber noted that the 'domestic courts attached importance in this context to the fact that the publication of the news articles and making public the readers' comments on these articles was part of the applicant company's professional activity. It was interested in the number of readers as well as comments, on which its advertising revenue depended.' The Chamber considered 'this argument pertinent in determining the proportionality of the interference with the applicant company's freedom of expression.' The Chamber stressed that 'the applicant company—and not the person whose reputation could be at stake—was in a position to know about an article to be published, to predict the nature of the possible comments prompted by it and, above all, to take technical or manual measures to prevent defamatory statements from being made public.' Overall, while the Chamber did not state *expressis verbis* that it found the notice-and-takedown system inadequate, it closed the assessment by concluding that the applicant company had 'exercised a substantial degree of control over the comments published on its portal even if it did not make as much use as it could have done of the full extent of the control at its disposal' ([89]).

This stance, however, can be questioned based on a number of reasons. One of them is of a conceptional nature: It is obvious that the standard of due diligence cannot be meaningfully applied if one expects an absolute outcome concerning the fulfilment of the given obligation. However, according to the Estonian decisions, Delfi should have ensured that no unlawful comments appear on its portals at all.

The practical arguments underpinning the portal's liability are not sufficiently convincing, either. The Chamber accepted the standpoint of the Estonian Supreme Court, according to which an essential circumstance substantiating the portal's liability is that the authors of the comments could not remove or modify their comments after publication ([89]). However, in the light of the circumstances of the case, this can be easily refuted: Any commenter could have asked the administrators through the channels provided by the portal to remove their comment, and there is no reason to presume that the administrator would not have done so. A further possibility available

for all commenters was to republish the removed comment in a modified form under the article (which of course also applies to comments removed by administrators due to suspicion of legal violation).

The Strasbourg Chamber found that, since it had been technically / technologically possible for Delfi to monitor all comments, the portal, in effect, had been obliged to do so ([89])—which remarkably echoes a Hungarian decision handed down in a comment-related defamation case in 2010.[14] This approach is partly based on the erroneous assumption that, in other types of intermediary services on the Internet, this is not technically feasible. In reality, apart from rare and special exceptions, hosting service providers, social media services, operators of electronic marketplaces and blog platforms all have the means at their disposal through which they can access, manipulate and / or remove all data uploaded by users. What these service providers actually do or are allowed to do from a legal point of view is of course a different question, but the very existence of the notice-and-takedown procedure enshrined in the Directive proves that the ability to remove data can in no way be the factor which can justify the exclusion of the exemption from liability.

Ad c) The Chamber examined the parties' arguments in the question of whether bringing a claim against the actual authors of the comments would have provided sufficient protection of the personality rights of the injured party. The Chamber attached 'more weight, however, to the Government's counter-argument that for the purposes of bringing a civil claim it was very difficult for an individual to establish the identity of the persons to be sued. Indeed, for purely technical reasons it would appear disproportionate to put the onus of identification of the authors of defamatory comments on the injured person in a case like the present one. Keeping in mind the State's positive obligations under Article 8 that may involve the adoption of measures designed to secure respect for private life in the sphere of the relations of individuals between themselves . . . the Court is not convinced that measures allowing an injured party to bring a claim only against the authors of defamatory comments . . . would have, in the present case, guaranteed effective protection of the injured person's right to private life' ([91]).

The Chamber noted that it was 'mindful of the importance of the wishes of Internet users not to disclose their identity when exercising their freedom of expression,' but stressed that 'the spread and features of the Internet and the possibility . . . that information once made public will remain public and circulate forever, calls for caution.' According to the Chamber, the 'ease of disclosure of information on the Internet and the substantial amount of information there means that it is a difficult task to detect defamatory statements and remove them. The Court recognises that this is so for an Internet news portal operator, as in the present case, but this is an even more onerous task for a potentially injured person, who would be less likely to possess

[14] Budapest-Capital Regional Court of Appeal 2.Pf.21.890/2009/3.

the means for continual monitoring of the Internet.' Referring to earlier ECtHR jurisprudence, the Chamber also emphasised that 'shifting the defamed person's risk to obtain redress for defamation proceedings to the media company, usually in a better financial position than the defamer, was not as such a disproportionate interference with the media company's right to freedom of expression' ([92]).

In the given legal context, the assessment of the Chamber that it would have been impossible, or at least supremely difficult to bring suit against the real authors of the comments is fully appropriate. On the other hand, it must be noted that to consider this a problem one would have to accept that the damage done by online trolling cannot be adequately compensated for by removing the offensive comments or with a correction/apology published by the portal (the latter was not raised in the *Delfi* case). It is also worth remembering that a person who becomes the target of genuinely extreme online threats growing into harassment can rely on the protection of criminal law in nearly all legal systems; in such a situation—despite the difficulties in finding the evidence to prove the link between IP addresses and the identity of offenders—authorities have a large number of tools at their disposal to prosecute the offenders and even more tools to put an end to attacks. (As it is discussed below, Paczolay J in his concurring opinion ([77]) drew attention to this factor in the context of the Hungarian Constitutional Court decision.) As discussed above, it is also highly debatable in the actual context of the *Delfi* case that Mr L should have been regarded as being as powerless in the face of the verbal storm emanating from commenters as he had been.

Remarkably, the Strasbourg Chamber gave the impression that had Delfi in some way authenticated users in a way that would have given access to their real-world identity, the portal could have been exempted from legal liability. In the last paragraph of the judgment, summarising the case, the fact that Delfi failed to ensure a realistic possibility that the authors of the comments could be held liable was listed as one of the most important reasons for rejecting the application ([94]). This is in sharp contradiction of the principle of joint and several liability grounding the Estonian proceedings, according to which in defamation cases it is the injured party who may take the decision on who to bring the civil suit against—the author, the publisher, or both—and with the ECtHR's own practice cited in the decision, according to which media companies can be held liable instead of authors of defamatory communications because the companies have the financial means to pay the damages ([92]).

Ad d) According to the Chamber, the fact that the domestic courts 'did not make any orders to the applicant company as to how the latter should ensure the protection of third parties' rights, leaving the choice to the applicant company' was an important factor reducing the severity of the interference with freedom of expression ([90]). The Chamber evaluated the amount of the non-pecuniary damages in the Estonian proceedings and came to the conclusion that the sum, equivalent to 320 euros, 'taking into account that the applicant company was a professional operator of one of the largest Internet news portals in Estonia, can by no means be considered disproportionate to the breach established by the domestic courts' ([93]).

Clearly, the compensation to be paid did not shake Delfi's financial standing and so the Chamber's evaluation that it was practically negligible seems very difficult to contest at first sight. It can be argued, however, that should the legal costs and expenses be added to the sum of the compensation then the picture gets rather darker from the perspective of the portal. It is even darker if one considers the possible expenses and costs incurred by further legal actions or the costs of monitoring thousands of comments every day (which, of course, does not provide any safeguard against lawsuits). Of course, the Chamber could still have found the interference proportionate whilst taking these factors into account, but equating the burdens imposed on the portal simply to the 5,000 crowns paid in damages seems to be unnecessarily tunnel-visioned.

The Strasbourg Chamber, just as the Estonian courts, paid lip service to the notion that it would be impermissible to legally prescribe Internet portals to inspect all user-generated content. But one would be hard pressed to discern the Chamber's ideas regarding the possible alternative for Delfi to the pre-publication monitoring of all comments if the portal wished to uphold the possibility for readers to add comments anonymously. The only guidance is the reference that the article on the ice road implied 'higher than average risk' as regards the possibility of extreme comments. However, this is still very difficult to interpret as suggesting that if the defamatory comments had been added to a 'risk-free' article (which is something that happens very often all over the world every day), the Chamber would have found the same sanction disproportionate.

The *MTE* judgment: the reasoning of the Constitutional Court

Evaluating the structure of liability

The Constitutional Court noted that in the case 'the main question is liability for the content of comments' ([27]). According to the legal interpretation of the Constitutional Court stated in the decision, 'online services are mostly regulated by the Ektv.' ([29]), thus, 'as a preliminary question of assessing freedom of expression online' ([28]), it described the relevant provisions of the legislation ([29]–[37]). It detailed the nomenclature and definitions of services eligible for conditional exemptions from legal liability provided by the Ektv., and concluded that content providers and exemption-eligible intermediary service providers 'are not necessarily easy to clearly distinguish from one another' ([38]). It went on to explain that 'the (content) provider becomes an intermediary service provider by making it possible for readers to add comments relating to the content produced by itself, so from this respect it also qualifies as a hosting service provider' ([38]). Later it reiterated that, in the case examined, the operator of the website carried out an intermediary service provider's activities by making it possible to post comments ([52]).

It could seem at this point that the Constitutional Court accepted the complainant's argumentation regarding its classification as an intermediary exempt from liability. It is an essential insight that on the Internet the very same (legal) person can be a content or

intermediary service provider in the context of different communications made available on the same site. In the Court's interpretation active content provision was clearly distinguished from offering an opportunity for commenting. The exemption granted by the Ektv. obviously cannot be extended to content generated by the provider itself, whereas comments made possible by an intermediary—if it adheres to the requirements of the notice-and-takedown procedure—are by definition covered by it. 'The liability of the intermediary service provider is limited in the context of this activity,' stated the Constitutional Court firmly and unambiguously in the context of comments ([38]). In the next paragraph, however, using identical terminology—'content made accessible'—the Court rather surprisingly concluded that 'the intermediary service provider shall be considered as a service provider and shall be accountable as such, because, according to the general rule, the service provider can be held liable for information provided by it' ([39]).

With due respect to the Constitutional Court, this argumentation cannot be considered anything else but an error in elementary logic. If there are exceptions to a general rule, those exceptions show precisely the circumstances under which the general rule shall not be applicable—otherwise exceptions would be absolutely unnecessary to define. Once it is accepted that some service providers shall be considered intermediary service providers in regard of certain communications (comments, in this case), their liability should be governed by the rules regulating the conditional exemption of intermediary service providers from liability.

As discussed above, in the *MTE* case the court of first instance classified comments as editorial content (readers' letters), whereas the court of second instance, then the Curia upholding its decision, concluded that the exemption granted in the Ektv. was not applicable because comments are so-called private communications, not falling under the material scope of the act. The Constitutional Court also took a stand on this question: Overwriting the previous judicial positions, it ascertained that comments, as they are intended to be available for the general public by their authors, eminently cannot be considered as communications of a private nature ([42]). In light of this, it is even more difficult to understand why the Court found that the conditional exemption cannot be applied to them.

It is certainly not the objective or task of the Constitutional Court to explain and elucidate pieces of legislation that are not sufficiently clear in terms of definitions and easily lend themselves to contradicting interpretations. For the Court to be able to decide upon the proportionality or disproportionality of restrictions imposed by the regular courts on the freedom of expression of MTE, it was not required or even necessary to dig deep in the details of Ektv. The ECtHR in its own judgment, as shown above, fully distanced itself from the problem of interpreting the Estonian Information Services Act, though both the applicant and the government attached great importance to it. At the same time—as Stumpf J in his dissenting opinion pointed out ([83])—the interpretation of the Ektv. is crucial: The majority decision concluded that the ordinary court decisions were in line with the Constitution because they had imposed the most lenient possible sanction, the establishment of liability for the violation of law. However,

the application of the conditional exemption granted in the Ektv. would have meant that the removal of the offending comments should have been regarded as the most lenient sanction because, as is acknowledged in the majority decision, this itself is the restriction of the freedom of expression of the website's operator ([59]).

The Court, recapitulating the decision of the Curia, stated that the operator of the Internet site was liable for the comments *as a result of the fact* that the persons having 'primary liability', ie, the authors of the comments, could not be identified [43]. This, however, seems to be a misinterpretation of the position taken by the court of second instance and the Curia: The courts' assumption was not that liability should be assumed by the operator of the website *because* the author could not be identified, whereas, if the author could have been identified, the website would have been exempt from liability. The 'spreading of defamation', invoked by the court of second instance and upheld by the Curia conceptually necessitates the existence of a primary discloser; however, the 'spreader' can be held liable irrespective of the primary discloser's identifiability. One underlying principle of the protection of personality rights in civil law is that the plaintiff is free to decide to bring suit against any or all the actors involved in defamatory communications. The liability is joint and several and the acceptance of liability by one of the actors shall not exempt the others. As discussed, in the *Delfi* case the Strasbourg Chamber also went down this track, giving the impression that Delfi might not have been held liable for defamation if the commenters could have been (easily) identified.

Defining the fundamental right affected by the restriction

The Constitutional Court elaborated in the decision that with regard to the complainant, the restricted fundamental right was not freedom of expression in general, but 'one of its separate and specific types, namely freedom of the press' ([44]). According to the decision, freedom of the press means 'the freedom to communicate opinions to the public', therefore all types of public communication fall under this definition. According to the Court's interpretation here, the subjects of freedom of the press are the means of 'transmitting information' ([54]), and 'all instruments (agents, media)' which serve the purpose of conveying opinion to other people shall be considered press ([55]).

The reading of freedom of the press offered here differs greatly from the stance of the Constitutional Court maintained in earlier decisions. The discrepancy was pointed out by Paczolay J in his concurring opinion ([71]–[73]), and the reception of the decision also attached priority to it.[15] This position is not elaborated in sufficient detail in the decision to make it possible to thoroughly assess the ideas behind it. It can still be noted that the concept is not, as such, one that could not be fitted into a coherent theoretical framework. It can be theorised that the Constitutional Court, in effect, came

[15] András Koltay, Az Alkotmánybíróság határozata az internetes kommentek polgári jogi megítéléséről. (2015) 6(1) *Jogesetek Magyarázata*, 14.

to the same conclusion as the United States Supreme Court in its seminal / infamous Citizens United judgment of 2010.[16] The Supreme Court therein held that the institutional (professional) press is not entitled to additional constitutional rights (privileges) beyond those that can be exercised by any other person exercising freedom of expression. According to one interpretation the Supreme Court, with this decision, returned to the 'original, traditional' approach of the First Amendment of the US Constitution, which, according to this concept, did not treat the press as an industry (institutionalised activity) but as a communication technology and posited that freedom of the press covers in the same way and to the same degree anybody utilising this technology, be it a professional media outlet or an occasional advertiser.[17] The decision of the Hungarian Constitutional Court referred to the freedom of the press as the 'institutional side' ([46]) of the freedom of expression, which can be a little confusing as in US legal literature this category is often applied by those who argue that the press clause of the First Amendment begets additional constitutional rights for the professional press (press-as-institution v press-as-technology), but cannot obscure the similarities to the *Citizens United* approach.

Of course, the *Citizens United* decision and its reading of the press clause received intense criticism, including the charge that the Supreme Court had 'eliminated the freedom of the press'.[18] An analogous notion can be found in Paczolay J's opinion, warning, in the Hungarian constitutional framework, that 'the applicability of the freedom of press to a context outside the conceptual boundaries of the press might lead to unpredictable jurisprudence' ([72]), because 'in certain cases different constitutional standards can be derived from the two rights' ([73]). It would be unfeasible to go into the details and delicacies of these different standards here; let us just point to the fact that Hungarian law and regulation imposes significant additional duties on professional media compared to the freedom of expression of individuals while, at the same time, it confers some additional rights upon it as well. Of course, whether and to what extent these duties and rights *are following from* the rights enshrined in the Fundamental Law or if it only *allows for* their existence is a separate question that, again, is not to be answered here.

On the whole, it seems that the notion of press-as-technology—a significant if unorthodox theoretical innovation in the Hungarian context—is not logically and coherently reflected in the entirety of the decision. References made to previous cases of the Constitutional Court ([57]) concerning the freedom of the press seem to be ill-grounded, because the *MTE* decision interpreted the concept in a way that is different from the one previously iterated by the Court. The same applies to the quote from

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16 *Citizens United v Federal Election Commission*, 08-205, 558 US 310 (2010).

17 Eugene Volokh, 'Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today' (2012) 160 *University of Pennsylvania Law Review* 459.

18 Randall P Bezanson, 'Whither Freedom of the Press?' *SSRN eLibrary*, 2012, 1, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1982616>.

decision 165/2011. (XII. 20.) of the Constitutional Court, which concerned the separation of non-professional types of online communication from media business products aiming 'to inform or entertain the masses', stating that only the latter are covered by the conceptual scope of the freedom of the press ([60]). In the *MTE* decision the Court tried to tackle this contradiction by reverting to one of the concepts of the customary Hungarian legal approach to the press, namely the 'degree of editedness' (used to justify that a given piece of content is to be considered as published by the provider on whose service it appeared, eg when a link to a user post appears on the front page of a news portal). Referring to this concept the Court posited that 'the so-called Web 2.0' elements ('eg Facebook, blogs, etc.') are not edited and 'do not constitute a unity', so they must be exempted from the scope of freedom of the press—a stance in marked contradiction with the logic of the press-as-technology concept ([61]).

As the dissenting opinion of Stumpf J highlighted, parts of the decision are based on a number of misunderstandings. The Court mistakenly assumed that a blog or a Facebook profile is unedited, or it cannot be aimed to serve the purpose of public communication. The Court was also mistaken to suggest that a Facebook profile, let alone a blog, can only be accessible to a certain closed circle of individuals determined by the discloser ([92]). The latter misunderstanding is especially portentous as, with reference to the supposedly restricted (or controllable) accessibility of Web 2.0 communication, the decision excluded them not only from the scope of freedom of the press, but generally from the sphere of freedom of expression, stating that they 'are closer to private communications' and are protected by the privacy guarantees of Article VI of the Fundamental Law ([61]). Notably, examples of such 'private communications' elsewhere in the decision include methods of explicitly non-public communications, such as private letters, telephone conversations and diaries ([42]). Why a letter would not be covered by the right to freedom of expression (as well as privacy rights) is itself an intriguing question, but the suggestion that a blog, even if personal, would not benefit from the protection of speech rights seems particularly peculiar and difficult to justify.[19]

The Court, in a parenthesised remark, stated that 'the Facebook profiles of institutions are exceptions', and must not be considered similar to private communications ([61]). This lends itself to the conclusion that MTE's blog may have been included in the category covered by freedom of the press on these grounds. Even if this is so, the proposition is far from coherent. As seen above, according to the majority of the Court freedom of the press applies generally to the communication of opinions; it is not clear how and on what grounds this can be narrowed down again using criteria culled from the conventional interpretation of freedom of the press, namely, the private or institutional nature of the speaker or discloser.

[19] Koltay (n 15) 14.

Due to these inconsistencies, it is difficult to analyse the impact of the unorthodox interpretation of freedom of the press—which can be considered as 'emptied' or 'filled' according to one's outlook—on the decision itself. From the basics of the concept it would follow that it does not have any significant bearing on the decision because, according to it, freedom of the press means exclusively the general freedom to impart or distribute opinions; Paczolay J, otherwise criticising the concept, proposed the same approach in the actual case ([73]). Trying to make sense of the decision's arguments, one could conclude that had the same comments been published on the blog of a private person instead of an association, the owner of the blog should not have had to share liability with the authors of the comments, considered as bearing 'primary responsibility' for them by the Court. The Constitutional Court's approach here is similar to that of the court of first instance, as it considered the supposedly edited nature of the blog a key factor (justifying the derogation from the general rule applicable to blogs) and, in relation to this, emphasised the institutional character of the operator of the comment environment. Paczolay J in his concurring opinion disagreed not only with the majority's interpretation of freedom of the press in general, but with this differentiation as well, emphasising that, in his view, the blog of the association concerned in the case should not have been considered as a press product as construed by the Fundamental Law and the jurisprudence of the Constitutional Court ([71]).

The constitutionality test

'According to the Constitutional Court, the restriction of the fundamental right can be established,' the decision notes. For such a restriction to be constitutional, it has to comply with the standard enshrined in Article I(3) of the Fundamental Law. The decision refers to the second sentence of the paragraph according to which 'a fundamental right may only be restricted to allow the effective use of another fundamental right or to protect a constitutional value, to the extent absolutely necessary, proportionate to the objective pursued, and with full respect for the essential content of such fundamental right.' The restriction imposed and established should (could), in principle, be assessed on the basis of these four criteria. (It could be argued that the first sentence of the paragraph according to which 'rules pertaining to fundamental rights and obligations shall be stipulated by law' provides the basis for a fifth test, inasmuch as the requirement can be seen as identical or similar to the European Convention of Human Rights' 'prescribed by law' criterion, but the Constitutional Court did not extend the scope of the inquiry to this.) The decision also cited the parameters to be applied when examining the constitutionality of restrictions imposed on fundamental rights from its decision 30/1992. (V. 26.). According to this, a fundamental right can only be restricted if the protection of another fundamental right or constitutional interest cannot be ensured in any other way, if it is proportionate and if it imposes the most lenient restriction necessary in order to attain the aim. A restriction without a pressing need or one which is disproportionate to the aim to be attained cannot qualify as

constitutional ([62]). The test of the *MTE* decision did not fully adhere to the terminology of either the Fundamental Law or the decision of 1992.[20] In it, the following elements can be identified.

Is the aim to be attained by imposing the restriction justified constitutionally?

This can be considered equivalent to the parameter linking the restriction to a fundamental right or a constitutional value. The decision noted that 'the protection of personality rights or the rights of those affected by the communication in general' is such an aim ([63]). This in itself is beyond any dispute; however, it is notable that the statement was not accompanied with a constitutional reference. In fact, the decision left Article II ('Human dignity shall be inviolable', etc.) and / or Article IX(4) ('The right to freedom of speech may not be exercised with the aim of violating the human dignity of others') of the Fundamental Law unmentioned even in its part listing the pieces of legislation taken into account during the deliberations, meaning there is no reference to the concrete constitutional provision that, in the Court's view, provided the basis of the restriction.

The Constitutional Court did not address the fact that the injured party was not a natural person but a legal entity. According to the letter of the Fundamental Law, this does not appear to be a problem as Article I(4) guarantees the constitutional protection provided for natural persons for 'legal entities established by an Act' as well, at least regarding rights 'which by their nature apply not only to man'. It still would have been informative to learn the details of the Court's position on the issue. Is an offshore company entitled to exactly the same kind and extent of reputational protection, enshrined in Article VI(1), as a natural person? How can Article IX(4), prohibiting the violation of *human* dignity, be applied to legal persons? The right to good reputation is considered to be deriving from the 'most fundamental' of rights, that of human dignity, itself linked to the right to life as enshrined in Article II of the Fundamental Law. In a constitutional context, how and to what extent is a life-derived right applicable to legal subjects which 'by nature' are neither alive, nor human beings? In other words, does a company have human dignity, and if so, where is it derived from and, if it has no dignity, can the traditionally and constitutionally (and, in the Civil Code, legally) granted protection be automatically considered just as strong and extensive in its scope as the protection granted to human beings?[21] Given the inherent intricacies of constitutional balancing, one might be tempted to speculate that this is an issue that could have tilted the scale in a different direction.

[20] On the relevant practice of the Constitutional Court, see a thought-provoking publication of László Blutman, 'Az alapjogi teszt a nyelv fogságában' (2012) 67(4) *Jogtudományi Közlöny* 145–156.

[21] On this issue, see Zoltán Csehi, 'A jogi személy a magyar alkotmánybírósági határozatokban' in András Sajó (ed), *Alkotmányosság a magánjogban* (CompLex 2006) 157–163.

It is clear that, according to the Fundamental Law, the reputation of legal persons counts at least as a so-called constitutional value, so in principle it might provide the grounds for the restriction of a fundamental right; however, according to the prevailing approach, 'the level of protection is different in the case of legal persons and other non-human legal subjects because, generally speaking, these are not granted the protection of fundamental rights as the state faces entities established by itself.'[22] A restriction might be disproportionate, therefore unconstitutional, even if its aim is constitutional; this is exactly what the Constitutional Court's balancing exercise is about. When analysing proportionality, it would not have been necessarily unjustified to assess the nature of the person affected by the legal violation.

Is the restrictive instrument suitable for achieving the aim?

While suitability as such is not among the parameters set by the Fundamental Law nor among those derived from the jurisprudence of the Constitutional Court, this is a key part of the decision. It transpires here that in the Court's view the protection of personality rights is effected if the injured person 'obtains redress' for the offence. The Court posited that the restriction in the concrete case was suitable for achieving the desired aim, namely the protection of the personality rights of the person affected by the comments, because such redress in the given circumstances could only be expected from the operator of the site, and not from the authors of the comments ([63]).

The concept of redress is not defined by either the Civil Code effective at the date of the emergence of the case or the new Civil Code in effect from March 2014, but from the nearly identical wording found in these statutes it is clear that it must be understood as some sort of (public) apology. It is also obvious that the establishment of the violation of personality rights by the court cannot be considered, in itself, redress: The previous Civil Code stipulated the conditions under which the legal violation could be established in Article 84(1)a), while court-ordered redress by a statement is covered in 84(1)c); the new Civil Code contains identical provisions in 2:51(1)a) and c).

In the actual case, however, the only sanction imposed by the courts was the establishment of the violation of law. As such, at least according to the formulation of the Civil Code, the Court did not impose the obligation of redress on the actor who was found liable. It may be that—as establishing violation is the precondition of further sanctions—the Court is generally of the opinion that the opportunity for redress should be maintained in similar cases. However, the constitutional complaint obviously related to the particular case, in which there was no redress provided, so the logic described runs off the rails. The decision justified the suitability of the sanction by stating that it is the precondition for another sanction; however, from this it would follow that for suitability, the second sanction ie, redress would also be necessary. If, on the other hand,

[22] Zsuzsanna Árva, *Kommentár Magyarország Alaptörvényéhez* (Wolters Kluwer 2013) 97.

the instrument is suitable for attaining the desired aim without redress, this should be justified in some other way. All this gained further significance with the Court's assessing of proportionality, discussed below.

Is the restriction of the fundamental right proportionate with the aim to be attained?

The Court identified two separate issues regarding the question of proportionality. It examined if 'holding the operator of the site liable for the unlawful communication is proportionate; on the other hand, if the degree of liability, ie the amount of damages or payment of restitution is proportionate' ([63]).

Here the Court referred to 'the prevention or removal of communications violating personality rights' ([64]) as the aim of restricting the fundamental right manifested in the establishment of liability. Whereas one paragraph above redress was identified as the key element in the aim of the restriction, here two, obviously different, functions arose. According to the decision, because 'in the current legislation the liability for moderated comments is the most favourable (most lenient) restriction of the freedom of the press suitable to attain the aim,' the proportionality of the restriction with regard to unmoderated comments is self-explanatory and did not warrant further examination ([65]).

When assessing the proportionality of the restriction reflected in the amount of damages, the Court on the one hand noted that it could be examined on a case by case basis ([66]); on the other hand, it concluded that if 'Internet providers undertaking moderation are held liable for unlawful communications posted on their sites, then the establishment of the violation of law *vis-à-vis* the operators of sites that do not undertake moderation cannot be considered as disproportionate' ([67]).

The first part of the proportionality test reflects the confusion, discussed above, regarding the notions of the press and its right to freedom. The Court relegated MTE's blog, as well as the comments displayed there, into a realm within the confines of a peculiar but not impossible concept of freedom of the press, but one which is markedly different from the Hungarian constitutional tradition. However, here it referred to a previous decision (Constitutional Court Decision 57/2001. (XII. 5.)) that had been based on its well-trodden concept of the press, then stated that the Constitutional Court 'so far has considered the liability of the media organ—and not the author—constitutional in the protection of personality rights' ([65]), thus returning to the interpretation of the court of first instance, which classified comments as editorial content. But the two concepts of the freedom of the press are incompatible. It can be argued that from the point of view of the press-as-technology theory certain communications—such as comments in this case—fall into the realm of the freedom of the press, but it by no means follows from this that the provider operating the comment environment should or could be considered a media organ in terms of the press-as-institution theory—and the relevant regulation based on the latter. As such, reference to the previous decision is in fact irrelevant and misleading. It also goes without saying

that the Constitutional Court can overstep the boundaries of 'current regulation' according to its liking and function and so, from the perspective of proportionality, it is irrelevant whether in a given statutory context a certain sanction is the most lenient or not.

The part of the reasoning linking all this to the liability structure of moderated and unmoderated comments is particularly difficult to follow. The Court noted that 'comments (contributions) have two categories, moderated and unmoderated,' then it added that 'it is of extremely outstanding practical significance' that the comments concerned in this case were not moderated by the operator of the blog, but after this, within the same sentence, went on to discuss the question of identification, ie the already discussed proposition that the liability of the operator is derived from the fact that the real author of the comment cannot be identified ([42]).

In the proportionality test the Court stated that 'moderation does not necessarily lead to exemption from liability' ([64]). Now, it goes without saying that there are no precedents—in Hungary or anywhere else—for anybody suggesting that moderation would exempt the operator of the comment environment from liability. On the contrary, the opposite has been raised, namely that moderation generates and / or contributes to liability as it supposedly heightens the level of 'editedness' of the comments.[23] (The author of this paper, after reading and analysing these sections of the decision several times, cannot throw off the suspicion that the problems of moderation and of identification have somehow become conflated here.) The Constitutional Court posited that the restriction regarding non-moderated comments was proportionate because 'it is not justified to differentiate between moderated and unmoderated comments' ([65]). The idea that all comments—moderated or not—should be treated in the same way legally is certainly an arguable one. However, it is hard to see its bearing on the proportionality test: The restriction, based on MTE's purported liability for unmoderated comments, can be either proportionate or disproportionate in constitutional terms irrespective of concepts regarding the appropriateness of differentiation between the two types of comments.

As regards the 'degree' of liability, had the Constitutional Court simply stated that, as the courts did not impose any sanctions on MTE beyond establishing the fact of the violation of personality rights (presumably taking into account that some of the potential objective consequences,[24] namely the termination of the violation and the removal of the offending situation, had already been effected by the time of the trial in the first instance), the restriction was proportionate, the decision would be absolutely clear on

[23] See Koltay (n 15) 15–17 for details.

[24] Court-imposable sanctions under the Civil Code in defamation cases are classified as objective sanctions (applicable irrespective of the plaintiff's culpability), such as the establishment of violation, removal of the offending situation and redress by public statement; and as subjective sanctions (applicable according to the plaintiff's culpability and conduct), such as damages.

this issue. Paczolay J, in his concurring opinion, proposed this approach, writing that 'in order to ensure the effective protection of personality rights, it is necessary to be able to establish the objective legal consequences of violating the personality rights by the operator of the website,' but suggesting that the operator should only be exposed to legal consequences based on culpability if it did not remove the offending comments after receiving the complaint ([77]).

Instead, the Court, in effect, reiterated the reasoning found in the first part of the proportionality test, which is definitely problematic, and established the proportionality of the sanction not by constitutional, fundamental rights standards, but on the basis that the complainant recognised that operators of comment environments can be held liable for moderated comments. The flaw of this reasoning was pointed out by Stumpf J in his dissenting opinion: 'It is not sufficiently well-considered to use a statement (or simply a situation not in dispute) given by the complainant on the liability for moderated comments as the underpinning of the proportionality test and to draw a decisive conclusion from this without the Constitutional Court subjecting the issue to a separate and systematic necessity-proportionality test' ([84]).

So the Constitutional Court established that it is acceptable that the operators of unmoderated comment environments are held liable for defamatory comments the same way as the operators of moderated comment environments. Unfortunately, the case was about an altogether different question: does the operator's liability ensure the proper balance between freedom of expression and the protection of personality rights? From the other perspective, is the removal of defamatory comments, even without the court establishing the operator's liability, an appropriate and sufficient sanction for the violations of rights manifested in comments? Of course, the Constitutional Court would have been free to decide the case by going into details and, for example, evaluating the actual comments, or to choose a more general, abstract approach. However, it is definitely problematic that the Court failed to conduct a meaningful constitutional assessment (assessment from the perspective of fundamental rights) at all.

Comparison of the decisions

The role of information society regulations

As discussed, both courts were reluctant to declare that ordinary courts should have applied the local pieces of legislation based on the EU Directive in general and the conditional liability-exemption stipulated in them in particular. The ECtHR noted that it is not its task to explain local legislation; the same is dictated by the jurisprudential framework of the Hungarian constitutional complaint. The aim of the so-called genuine constitutional complaint—relevant here—is to remedy individual injuries (with a special scope that conforms to the Constitutional Court's status of being separate from the ordinary court system), and linked to that, the interpretation of given pieces of

legislation for ordinary courts—but exclusively from the perspective of and in order to ensure the 'constitutional conformity' of the application of the given piece of legislation in future practice.[25]

In spite of this, the legal positions of litigating parties submitted to the ordinary courts in these cases left their marks on the decisions of the ECtHR and the Constitutional Court. The ECtHR went into detail on how and to what extent the applicant portal contributed to the publication of the offending comments and how it controlled or could have controlled them in practice, examining the matter according to the criteria stipulated in the Directive. Surprisingly, the Constitutional Court first noted that 'essentially' the provisions of the Ektv. should be applicable to comments, then, on the grounds of two, equally dubious, arguments (the main rule overwrites the exception, all public communications shall be considered as press), it overwrote this. The surprise is partly due to the fact that all this was entirely unnecessary, as the Constitutional Court approaches genuine constitutional complaints from the perspective of the outcome and not from the perspective of legislation. (Undoubtedly, Paragraph 20 of the decision, dealing with the admissibility of the complaint, refers to Sections 26–27 of Act CLI of 2011 on the Constitutional Court, but the complaint, in accord with the nature of the case, is based only on Section 27, regulating complaints 'against judicial decisions contrary to the Fundamental Law', and not on Section 26, making complaints possible due to 'the application of a legal regulation contrary to the Fundamental Law'. The decision itself does not deal with the constitutionality of the legislation concerned.)

What is even more striking is that the courts in both cases ignored how the complainants' conduct in the cases—including their actions relating to the comments and their strategies and arguments in the lawsuits—had been influenced by the assumption that they were covered by the protection granted by the Directive. Both decisions omitted the inspection of the content of the offending comments on the grounds that the complainants did not dispute their unlawfulness. It becomes clear, however, if we examine the positions of Delfi and MTE in the respective lawsuits that this in fact did not mean that they acknowledged the unlawfulness of the comments; it only meant that in order to be eligible for the conditional exemption, which they supposed to be applicable, they followed the rules of the notice-and-take-down procedure. It is an essential feature of the procedure that the operator does not and shall not analyse the content of the comments complained about, and having received the objection it removes them without any further consideration. If the operator fails to do so, the exemption becomes void.

As discussed, the Constitutional Court, in its proportionality test, compared the liability distribution in regard of moderated comments to that of unmoderated ones and attached great importance to the fact that MTE, in the ordinary court proceedings, emphasised that the comment environment on its blog had not been moderated.

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[25] Péter Paczolay, 'Az Alkotmánybíróság hatásköreiről egy év elteltével' (2013) 4(1) *Alkotmánybírósági Szemle* 72.

However, this, again, is the consequence of an intended compliance with the Ektv. as the act makes the exemption from liability conditional on the intermediary service provider not having control over the communications concerned and having no prior knowledge of their content. (This construction, by the way, is not created by the EU Directive; in several different legal systems exemptions from liability for the violation of personality rights are granted on a similar basis and under similar conditions for printing companies, book and media distributors and others considered to be passive, technical actors in producing and distributing content.) In this way, as a matter of fact, MTE's conduct, meant to be law-abiding, gave reason for the rejection of the complaint. The Strasbourg judgment shows a similar pattern. The Chamber, following the lines of the Estonian Supreme Court, found that the measures taken by Delfi in order to be in compliance with the criterion contained in the EU Directive Article 14(1)b) and the Estonian Information Society Services Act (the service provider shall remove unlawful content as soon as it learns about it) substantiated the portal's active role, thus its liability.

Both courts took the 'undisputedly unlawful' nature of comments as a given, neither of them considering it as a redeeming value that the offending comments were related to issues obviously of public interest, and so one may argue that they had been part of the democratic discourse—even if they did not substantially contribute to the public debate in either the usual or the ideal sense of the expression. The ECtHR, as discussed, even considered the public interest in the subject matter of the original article as a sort of aggravating circumstance, and it would have expected more due diligence from the portal because of it. The Constitutional Court did not even touch on this aspect of the case. This is rather unfortunate, because it would have been interesting to find out whether it agreed with the ordinary courts who had placed the incriminated communications outside of the—in principle—rather broad spectrum of protected speech on matters of public interest, a spectrum that—again, in principle—extends to emotional and provocative wording irrespective of value or truth.

The characteristics of anonymous mass speech

The ECtHR Chamber attached quite an importance to some characteristics that distinguish online comments from other forms of communication, while it declined to take some other characteristics into account at all. The Chamber found it essential that, in civil proceedings, the real authors of comments are difficult to identify and stressed the fact that once content is put on the Internet, it will stay there for a long time ([91]–[92]). At the same time, it did not take into account the fact that comments do not exist in a vacuum; users have prior knowledge and value attributions attached to particular comment environments, shaping how they treat and evaluate information published there. The 'bad reputation' of the comment environment of Delfi ([76]) has significance in this sense as well: If it is well-known in the country that low-quality, rude comments

are posted there by unidentifiable authors, then why would anybody take them seriously, why would those comments damage anybody's good reputation, especially if the comments do not contain factual allegations, just insults and swearing?

In the light of this it becomes clear that it is far from self-evident that, from a legal perspective, online comments should be treated as carrying the same weight as classic written communications, and that, in order to ensure proportionate reparation, a responsible entity assuming liability and being able to pay damages needs to be identified. In Britain, Eady J in a 2008 decision claimed that defamatory content in forum comments should be treated as *slander* (oral defamation), not as *libel* (written defamation).[26] Libel in Britain is only actionable if the injured party can prove actual financial damage—meaning that insults shouted at someone have no legal consequences. Paczolay J, in his concurring opinion attached to the Constitutional Court decision (in which the majority ignored this issue), recommended the same approach ([77]).

The horizon of balancing

The Constitutional Court hardly paid any attention to the circumstances and context of the concrete case; this was included as a point of criticism in the concurring opinion ([74]). The ECtHR went into detail analysing certain circumstances, to which it attached great importance during its deliberations. In spite of this, it can be argued that the level of abstraction of the two decisions is more or less identical: Neither court found it necessary to compare the degree of restriction in the given case to the weight of the legal violation, though the nature of the proceedings would have allowed for such an approach. Needless to say, the restriction could also have been measured on a scale of 'severity'; the non-pecuniary damages, the amount of the restitution, eminently express it. The courts examined the liability or the lack thereof of the operator, disregarding the actual content of the offending comments.

This might indicate that the courts did not wish to dodge the fundamental question manifested in the cases, which obviously was the acceptability of the operators' being liable for user comments. (Of course, the courts could have provided general guidelines as regards the general fundamental right, even if they dealt with the content of the comments.) From this aspect it becomes clear that one salient factor was missing from the evaluation criteria, namely the structural impact of the examined restrictions on online freedom of expression and public discourse, should they become customary in a legal system. Obviously, one possible response to the question is that the operator's liability serves to strike the right balance between rights, but the impact of the sanction applied could still have been productively balanced with the aim pursued.

[26] *Smith v ADVFN*, [2008] EWHC 1797 (QB).

According to Paczolay J, holding operators responsible in this manner might lead to the diminution and eventual disappearance of commenting opportunities, which, in his judgment, would be harmful to the whole system of freedom of expression ([75]). Remarkably, in the majority decision of the Constitutional Court, the dangers threatening freedom of expression are also mentioned when discussing the restriction manifested in the ordinary courts' decisions; it notes that it 'increases the maintenance costs of the portal, which makes its functioning more difficult and in an extreme case might lead to its termination' ([59]). This factor, however, was not taken into account when assessing the constitutionality of the restriction. In light of the passage quoted above this is stunning, as it shows that the Court did not only expect commenting opportunities to become fewer in number, but also expected certain types of services to be terminated and their operators to disappear completely from the public sphere.

From its argumentation it seems that the Strasbourg Chamber accepted the position of the government and did not support Delfi as regards its claim according to which due to the local sanction the portal had to amend its business model. It may be that an exaggerated statement was disadvantageous for Delfi; perhaps it prevented the Chamber from assessing what use of Delfi's resources would serve the promotion of the Convention's values in the most efficient way. The resources the portal dedicates to monitoring comments obviously cannot be dedicated to writing balanced articles on relevant issues. The liability for comments imposed on the portal brings about the impoverishment of the content offered, the impoverishment of public discourse. For the operators, another resource-saving opportunity to prevent liability for comments is to suspend or, with regard to 'risky' topics, not to provide, the opportunity for commenting. The undermining of opportunities for freedom of expression is also immediate and obvious in such an instance.

The restrictive sanctions

The Constitutional Court did not provide clear guidance as regards its views on a restrictive sanction that would have been serving its general purpose (the protection of personality rights) with minimal encroachment on the right to free expression. In principle, this is not problematic as certain types of sanctions can be used to achieve a greater or lesser restriction (eg damages of a small amount obviously mean a different level of restriction than a huge sum). Also, a given type of sanction might be necessary in the context of a certain legal violation which could be considered as one going beyond constitutional boundaries in other cases. It is still possible to distinguish between the different types of sanctions—which, as the decision puts it, can themselves be considered as possible, subordinate aims of the restriction—according to their character and the weight of their consequences. As discussed above, the Court emphasised 'redress' as such an aim; however, in other places, the prevention and removal of unlawful comments were mentioned as equally important aims of the restriction, while the concept of damages also arose in the decision. Obviously, if the

removal of unlawful comments is considered as the sanction fulfilling the desired purpose while imposing the minimum necessary restriction, the establishment of liability and the imposition of damages should fail the test of necessity and proportionality.

The dissenting opinion attached to the Constitutional Court's decision expressed this standpoint, referring to Paragraph 64 of the decision: 'The majority decision fails to substantiate why it does not consider the so-called notice-and-takedown procedure as the minimum necessary restriction which is suitable for serving the aim pursued—if the alternative purpose of the restriction is the removal of the comment which is in violation of personality rights' ([83]). Stumpf J posited that the removal of defamatory comments should be regarded as the most lenient sanction—as opposed to the establishment of the liability of the operator—even if one disregards the Ektv. He cited a 2013 civil court decision in a defamation case concerning user comments, pointing out that the only prerequisite for this is to regard the spreading of information as something that presumes 'active and conscious conduct, meaning that the consciousness of the entity violating the law should encompass the unlawful expression of opinion and should communicate its content to the public deliberately.'[27] According to this position, the operator should not be regarded as the communicator / publisher / spreader of a certain defamatory comment as long as it is not informed about its offending nature.

In the Estonian decisions, the concept of prevention carried great weight. Whereas in the Hungarian proceedings the objective nature of the violation of a personality right played a central role, in the Estonian proceedings it was the standards of expected diligence; as discussed above, according to the local decisions, Delfi would have met the standard of due diligence if the offending comments had been filtered out before they appeared on the portal. The Strasbourg Chamber identified with the positions of the Estonian judgments in several respects: According to the local courts the portal should have been obliged to *prevent* all damage to good reputation ([90] and [94]). This, in fact, substantiates the decision, as in this respect the sufficient degree of diligence can only be the filtering of all offensive comments before they are published. Each offensive comment—in theory, if we accept that moderators are in perfect harmony with justice—can logically only be identified if each and every comment is monitored. It is completely coherent with the rejection of the exemption from liability but it highlights that the claim, according to which the local decisions did not force the portal to monitor every comment, is not well-founded—and that, significantly, contradicts the Chamber's assessment of the sanction.

The Hungarian ordinary court decisions did not deal with the question of due or expected diligence and did not formulate similar expectations concerning the defendants. Irrespective of this, a legal consequence that forces the party against whom the decision was taken to do something it would not have done by itself is generally of a preventive nature, because it can deter them and indirectly everybody else from

[27] Pécs Court of Appeal Pf.VI.20.776/2012/5.

committing similar acts. The Hungarian decisions serve this function by establishing liability, which can provide the basis for imposing damages / payment of restitution. If the operator of the portal wishes to pursue law-abiding conduct, it cannot do anything else but monitor all comments, hoping to identify those which would be deemed as unlawful in eventual court proceedings. The Constitutional Court was in agreement with this.

Summary

The courts in both cases took the stand that the structures of liability crystallised under the conditions of ninetieth and twentieth century mass media—structures that, unsurprisingly, are constantly changing and disputed themselves—can and, moreover, shall be applicable to the intermediary actors of online communication without any substantive modification. The ECtHR Chamber attached great importance to Delfi's being a media business, and the Hungarian Constitutional Court classified MTE's blog as press / media. The ECtHR did not take an explicit stance on the question of whether the portal should be considered as the publisher of the comments, but indicated that it found such an approach—taken by the local courts—acceptable. The circumstances stressed as essential by the Chamber also outlined a publisher's type of liability (business interest, many users, resources of the portal), presuming an omnipotent editor / publisher / gatekeeper, to be held unconditionally liable for published material. The Constitutional Court extended the omnipotent editor model beyond professional media to NGO and corporate websites, public Facebook pages, etc. The Court based the separation of 'Web 2.0' 'private purpose' Internet content on such uncertain grounds that it hardly provided guidelines regarding, for example, the classification of a website dealing with political issues, operated by a private person and accessible to anybody.

Reviewing the judgments of ordinary courts from a fundamental / human rights perspective, the ECtHR and the Hungarian Constitutional Court usually have considerable wiggle room to offer more general guidance, to be leaned on by courts in future cases, or to hand down decisions with a more narrow focus on the actual cases. In this respect, the judgment of the ECtHR, at least on the face of it, seems to be rather restricted; it does not provide indication as to whether a similar restriction on another type of intermediary actor, or one relating to a different article on the portal would have been acceptable. Similarly, there's no indication of an amount of damages that the Chamber would have considered as being in breach of the Convention. At first glance the judgment has no relevance outside Estonia, as it did not formulate any obligation for the government. At the same time, the Chamber, referring to Article 8 of the Convention and its own jurisprudence, emphasised that the positive obligation undertaken by contracting states might extend to include provisions ensuring the protection of privacy (now encompassing reputation) in the relations between citizens ([91]). Hence, it is plausible that if the Chamber should deal with a case which, on the basis of Article 8 of the Convention, contested a local judgment accepting the

exemption provided by the law on electronic commerce, or a local judgment rejecting the operator's liability for any other reason, the ECtHR would consider that it is in breach of the convention because the state did not take care to prevent unlawful comments in a way and degree similar to that manifested in *Delfi*.

The decision of the Constitutional Court, as demonstrated above, provides even less guidance as to where to find the right balance of conflicting rights; the only certainty is that the contested sanctions fit into the constitutional framework. The concurring opinion made an attempt to draw more visible demarcation lines, suggesting that any kind of pecuniary liability imposed on the operator would have made the courts' decisions unconstitutional. In future lawsuits, the majority decision, as well as Paczolay J's concept, will in all events play an important role and will be referred to with a strong emphasis.

In the concrete cases, as we have seen, the balance might have been tilted had some elements carried different weights in the eyes of the courts. If the ECtHR Chamber had not interpreted the relationship between the portal and Mr L as it did, had not considered the injured party as a defenceless individual and accordingly had not regarded the portal's leaving the comments accessible for a longer time as a kind of aggravating circumstance, it could have considered the filtering and complaint system maintained by Delfi as an appropriate tool of prevention, thus it could have concluded that the local judgment was in breach of the Convention. If the Constitutional Court had been more consistent in considering only the most lenient instrument of restriction as constitutional, and had considered the removal of the offending comments as compliant with this, it could have come to the conclusion that the establishment of liability is already in breach of the Fundamental Law. It was close, but the *status quo* remained.

This paper has made efforts to prove that the assessments made by the ECtHR Chamber and the Constitutional Court may come in for a lot of criticism, primarily from the perspective of the context and weight they attached to the wider issues of freedom of expression and the specificities of online communication. It is inevitable that, within the omnipotent (and omni-liable) editor model, moderators are due to become overly cautious; they might remove comments that would be deemed as permissible by courts. In this model the operator's purpose is not to uphold the opportunity of civilised debate, but to minimise the legal risks. The liability for comments imposed on portals—and other operators of open online forums—will indirectly but immediately bring about the impoverishment of the offered content, the impoverishment of the public sphere. This is a true 'chilling effect', curtailing freedom of expression while cultivating a system that free speech advocates are wont to label outsourced censorship.[28] Unfortunately, the notice-and-takedown model endorsed by Paczolay and Stumpf Js itself has a similar effect, although it undoubtedly imposes much less burden on the operators of the portals.

[28] Article 19, *Internet Intermediaries: Dilemma of Liability* (Article 19 2013).

There is a further problem with the model of the omnipotent gatekeeper: it doesn't work. For proof, it is enough to take a closer look at Internet discussions in countries, such as Hungary, where it is the prevailing model in jurisprudence. If users—no matter whether they make a substantive contribution to democratic public debate or extreme defamation—experience that their comments are not published on a given service, they will go elsewhere. It can be argued that this should not make a responsible society give up the attempt to protect those of its citizens whose rights were violated and therefore it must persist in playing whack-a-mole with the trolls. It is also true, however, that a responsible society might have more ambitious goals, not giving up the hope of genuine prevention, even if that would necessitate a change in the mindset of individuals and society at large—also, some new insights into the relationship of reputation and speech rights in the age of largely anonymous, masses-to-masses communication. In the decisions discussed, the courts were not able to provide guidance and momentum to further such a progress.

Russell L Weaver

The Internet and democracy

Speech technology has evolved dramatically over the centuries.[1] Before Johannes Gutenberg developed the printing press in the fifteenth century,[2] much communication was oral or handwritten, and information moved slowly and laboriously from place to place,[3] usually at the same speed at which people could move.[4] The printing press revolutionised communication by making it possible to create and mass distribute multiple copies of written works.[5] Although the printed copies that resulted from Gutenberg's invention did not move any more quickly than their handwritten predecessors, the printing press allowed printers to create and distribute multiple copies of their works, and thereby to disseminate their ideas around the world.[6] The Gutenberg press, which allowed ideas to take root and flourish, ultimately transformed the world.[7]

Although the printing press remained the dominant method of mass communication for several centuries,[8] the next major breakthrough in communications technology was precipitated by the harnessing of electrical impulses in the nineteenth century. The development of electricity led to a series of communications breakthroughs, including the development of the telephone and the telegraph.[9] Prior to the telegraph, it could take as long as two weeks to send information across the United States, and the process involved both rail and horse carriages (the famed 'Pony Express' relay system required ten days to send a message from St. Joseph, Missouri, to San Francisco, California).

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1 See David Crowley and Paul Heyer (eds), *Communication in History: Technology, Culture, Society* (5th edn, Allyn and Bacon 2007); Irving Fang, *A History of Mass Communication: Six Information Revolutions* (Focal 1997); Charles T Meadow, *Making Connections: Communication Through the Ages* (Scarecrow 2002); Russell L Weaver, *From Gutenberg to the Internet: Free Speech, Advancing Technology, and the Implications for Democracy* (Carolina Academic Press 2013); Russell L Weaver, *Understanding the First Amendment* (5th edn, LexisNexis 2014) 261–76.

2 Crowley–Heyer (n 1) 82.

3 ibid 118.

4 Weaver 2013 (n 1) xi.

5 Fang (n 1) 40.

6 ibid.

7 ibid 49.

8 Henry W Brands, *The First American: The Life and Times of Benjamin Franklin* (Anchor 2000) 20.

9 Crowley–Heyer (n 1) 118.

With the telegraph, it became possible to transmit that same message thousands of miles in a matter of seconds.[10] In other words, for the first time, communications began to move at a pace that was much faster than people could move. Electricity also led to the development of the telephone, and ultimately to even more advanced forms of communication, including broadcast communication (radio, television), and cable and satellite technologies.[11] With these inventions, it became possible to communicate both audio and video around the world in a matter of seconds, and for hundreds of millions of people to hear or view such information almost simultaneously.[12]

In modern times, the Internet has further revolutionized communication.[13] Coupled with such devices as 'smart phones', the Internet has made it possible for individuals to convey information to distant parts of the globe with the tap of a finger The Internet is revolutionary because it has enabled ordinary people to engage in mass communication. As will be discussed more fully below, prior technologies were of limited value to most people because they were dominated by a handful of individuals (or companies) who were able to control access to those technologies. Although ordinary people could receive information via these technologies, they had little capacity to use those same means to give information except by and with the consent of those who owned and controlled those technologies. The Internet dramatically altered the calculus by giving ordinary people the ability to communicate on a grand scale, and the consequences for modern society have been enormous.

This article does several things. First, it suggests how prior communications technologies (prior to the Internet) were controlled by 'gatekeepers' who could limit the use of those technologies. Second, the article suggests that the Internet has created the possibility for direct citizen communication, less influenced by the 'gatekeepers', thereby spawning a new communications revolution that has the potential to dramatically reshape societies and the role of the citizenry in society and governance.

'The gatekeepers of communication' and the Internet

As noted, as new technologies were developed over the centuries, it became possible to communicate with ever larger groups of people over increasingly long distances, and to do so in relatively shorter periods of time. The transition from handwritten texts to the printing press on through to modern methods of communication involved a radical and dramatic reshaping of communication.

The 'dark side' of the communications revolution is that, at each step of the way, there have been so-called 'gatekeepers' who have been able to limit and control the ability of ordinary people to access these new technologies. Gatekeepers included

[10] James W Carey, 'Time, Space, and the Telegraph' in Crowley–Heyer (n 1) 119.
[11] Crowley–Heyer (n 1) 204.
[12] Weaver 2013 (n 1) xv–xvi.
[13] ibid.

governmental officials, who exercised regulatory authority over new technologies, as well as private monopolists who exercised market control over particular communications technologies.[14] In some instances, the gatekeepers were necessitated by the nature of the technologies they controlled. For example, because of the nature of broadcast technology (a limited number of airwaves), only so many people could broadcast at any one time, and those who were able to obtain licenses could make decisions about who could utilize the technology that they owned or controlled. Although no one individual or corporation has been able to exert monopolistic control over all communications technologies for long periods of time, in part because technology has advanced too quickly for that to happen,[15] there have always been individuals (or groups of individuals) or companies in 'gatekeeper' positions who were able to limit or control the ability of average people to use communications technologies to advance their own ideas or political agendas. Only recently have the gatekeepers begun to loosen their grip on power.

Early Gatekeepers. Prior to the invention of the printing press, ordinary people had limited ability to disseminate their ideas, or engage in political discourse.[16] Roman and Greek citizens, and their medieval counterparts throughout Europe, could orally communicate with each other, and could communicate with larger audiences by giving speeches.[17] Indeed, during medieval times, much information was communicated orally by 'itinerant monks, soldiers, peddlers, couriers, and the pardoners who traveled from town to town selling absolution from sin'.[18] Although writings have existed since ancient times, writing has generally been the province of the religious and the elite for many centuries. In part, this was due to the fact that the elite was literate while most other people were not.[19] In addition, before Gutenberg, written works were created by hand, a process that was extremely slow,[20] and only a small number of people (usually monks)[21] could devote the time needed to create books.[22] Since monks usually wrote in

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14 Ruth Schwartz Cohen, 'The Social Shape of Electronics' in Crowley–Heyer (n 1) 311–19.

15 ibid 311–12, 318.

16 Adrienne J Marsh, 'Fair Use and New Technology: The Appropriate Standards to Apply' (1984) 5 *Cardozo Law Review* 635, 635 n 1; Richard J Zecchino, 'Could the Framers Ever Have Imagined? A Discussion on the First Amendment and the Internet' (1999) *Law Review of Michigan State University Detroit College of Law* 981, 983.

17 David J Pfeffer, 'Depriving America of Evolving Its Own Standards of Decency? An Analysis of the Use of Foreign Law in Eighth Amendment Jurisprudence and Its Effect on Democracy' (2007) 51 *St Louis University Law Journal* 855, 865.

18 Fang (n 1) 19.

19 ibid 20.

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

21 Fang (n 1) 7, 20, and 24.

22 See Jay H Perlman and Lawrence T Greenberg, 'The Internet Reformation: Gutenberg and Martin Luther on Wall Street' (2000) 4 *Wall Street Lawyer* 9.

Latin and created religious texts, their works were not widely accessible to (or accessed by) the masses.[23] Even though universities eventually began producing books, their initial works were handwritten as well.[24] It could take years to create a single book, and many decades to create even a modest number of books.[25] Although universities began producing written works in the thirteenth century, the writers of these university documents were generally scribes rather than creators of original content, and ordinary people saw little improvement in their ability to mass communicate.[26] During this period, the absence of books, and difficulties in communication were less critical because many people were illiterate.[27] Despite the slowness of the process, handwritten works remained the norm in Europe for many centuries.

The Printing Press and Gatekeepers. Although Gutenberg's invention of movable type was a revolutionary advance in communications technology,[28] the printing press was accompanied by new forms of gatekeepers. The genius of Gutenberg's invention lay in the creation of movable type that allowed printers to quickly compose pages for the printing of books, newspapers, fliers, pamphlets and other documents, in their own languages rather than just in Latin, and to make multiple copies of the pages that they created.[29] As multiple copies were created, they could be more broadly distributed. Even though Gutenberg himself went bankrupt, and even though it took decades for press owners to profit from the device,[30] the Gutenberg printing press is regarded as 'the major cultural / technological transformation in the history of the West', and 'marked the transition between the end of the Middle Ages and the dawn of the modern era'.[31]

The printing press was revolutionary because it extended the possibilities for mass communication well beyond the monks, governmental officials and universities that had previously created written works,[32] and gave private individuals the chance to own the means of communication. Because of its utility, the printing press quickly spread from Germany to other cities and countries, and had a profound impact on society.[33] By 1499, some 2,500 European cities had printing presses, and the total number of books had risen to approximately fifteen million.[34] In addition, the press led to a shift

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[23] Fang (n 1) 22–25; Lasso (n 20) 4 n 2.
[24] Fang (n 1) 24–25.
[25] Yu (n 20).
[26] ibid 9–10.
[27] Fang (n 1) 20.
[28] ibid 64–65.
[29] Lasso (n 20) 4 n 2.
[30] Robert Pinsky, 'Start the Presses: A Revisionist History of the First 150 Years of the Age of Print' *The New York Times Book Review*, 15 August 2010. 15.
[31] Crowley–Heyer (n 1) 82.
[32] Zecchino (n 16) 983.
[33] Yu (n 20) 11.
[34] See Joseph Karl 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.

in focus away from primarily religious books to books addressing a variety of subjects.[35] However, the transition was slow. Shortly after the creation of the printing press, most books were primarily religious, but there soon emerged new types of text on science and philosophy that 'would soon become a major aspect of the printing industry'.[36]

The printing press had a profound impact on society, altering its very fabric, by 'encourag[ing] literacy', 'broaden[ing] knowledge',[37] and 'creating a space in which new forms of expression could flourish'.[38] Some argue that Gutenberg's invention led to the Renaissance, the Scientific Revolution, and the Protestant Reformation.[39] The dominance of the Roman Catholic Church over medieval society was undermined, not only through oral communication, but through the medium of the press, as Martin Luther's handwritten theses were translated into German, reproduced, and widely circulated.[40]

The newspaper did not exist as an 'institution' until the sixteenth century,[41] but the presses of that time were still using Gutenberg's movable type.[42] Slowly, as ideas began to be recorded in book or newspaper form, and to be circulated, they had a profound impact on political thought and the broader social fabric. The printing press played a role in helping to bring about the American Revolution by permitting the reproduction and dissemination of the writings of Europeans, including *Cato's Letters*,[43] as well as the thoughts of political philosophers such as John Locke,[44] Thomas Paine,[45] and Baron de Montesquieu.[46] Albeit slowly, these philosophical texts made their way to the American colonies, and influenced the leading political thinkers.[47] Enlightenment

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35 Crowley–Heyer (n 1) 83.

36 ibid.

37 Fang (n 1) 46.

38 Crowley–Heyer (n 1) 82.

39 Lasso (n 20) 4 n 2 ('The 17th century became known as "the century of genius" in large part due to the explosion of creativity and new ideas fueled by printing.'); George Paul and Jason Baron, 'Information Inflation: Can the Legal System Adapt?' (2007) 13 *Richmond Journal of Law & Technology* 1, 8.

40 Harvey J Graff, 'Early Modern Languages' in Crowley–Heyer (n 1) 106.

41 John B Thompson, 'The Trade in News' in Crowley–Heyer (n 1) 114.

42 Brands (n 8) 20.

43 Michael Kent Curtis, 'St George Tucker and the Legacy of Slavery' (2006) 47 *William & Mary Law Review* 1157, 1206; Dan Friedman, 'Tracing the Lineage, Textual and Conceptual Similarities in the Revolutionary-War Era State Declarations of Rights of Virginia, Maryland and Delaware' (2002) 33 *Rutgers Law Journal* 929.

44 David Konig, 'Thomas Jefferson's Armed Citizenry and the Republican Militia' (2008) 1 *Albany Government Law Review* 250, 262.

45 Allen Edward 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.

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

47 Fang (n 1) 49.

principles are reflected in the U.S. Declaration of Independence,[48] which implicitly rejects the concept of the 'Divine Right' of kings and explicitly recognizes that the proper basis for government is the 'consent of the governed'. Finally, Montesquieu's ideas regarding the need for 'separation of powers' were incorporated into the US Constitution.[49] In addition, the printing press provided revolutionaries with a way to communicate with each other,[50] and was used during the American Revolution to create and mass distribute copies of the Declaration of Independence, and the Federalist Papers.[51] The printing press also played a role in the French Revolution.

At the time of the American Revolution, literacy rates remained relatively low and did not improve much until the Industrial Revolution.[52] As a result, written communication remained the domain of the higher classes,[53] Nevertheless, the views of Enlightenment thinkers were digested by some of America's leading intellectuals (eg Jefferson, Madison, and Franklin) and provided the foundation for the nation's founding documents. Even though most ordinary people communicated orally, and written communication was primarily the domain of the higher classes,[54] the printing press had a significant impact on society and politics even among the illiterate during the Revolution. Although print runs for newspapers were often quite low, many newspapers were read by more than one person, and were also read to groups of people in communal settings like taverns.[55] 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.[56]

Nevertheless, the printing press was not readily available to the masses as a means for communicating their own ideas. Those few who were fortunate enough to own printing presses or newspapers could readily harness the technology to communicate their ideas to their fellow citizens or to criticize government.[57] However, the newspaper business was expensive to enter, requiring specialized printing equipment, and market forces could limit an individual's ability to operate profitably.[58] Moreover, many governments took steps to license and limit the number of presses that were available.

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[48] See US Declaration of Independence (4 July 1776).

[49] See US Constitution, arts I, II, and III.

[50] Fang (n 1) 51.

[51] See Philip J Weider, 'The Ghost of Telecommunications Past' (2005) 103 *Michigan Law Review* 1671, 1675.

[52] See Nicholas Wade, 'In Dusty Archives: A Theory of Affluence' *The New York Times*, 7 August 2007. F1, reviewing Gregory Clark, *A Farewell to Alms: A Brief Economic History of the World* (Princeton University Press 2008); Geoffrey Nunberg, 'Reading, Writing and Thinking' *The New York Times*, 13 December 1981. A3.

[53] Fang (n 1) 19.

[54] ibid.

[55] ibid 115.

[56] ibid 47.

[57] Brands (n 8) 168, 182–84.

[58] ibid 41, 88.

At one point, the British Crown placed a numerical limit on the total number of presses that could exist, and sought to restrain the content of printing through licensing schemes.[59] In the American colonies, governmental officials sometimes used censors to regulate the content of newspapers prior to publication.[60]

Those who did not own printing presses had limited options available to them for accessing print technology, or for communicating their ideas and perspectives. Commonly, the ordinary person's ability to communicate his ideas was subject to the whims of the 'gatekeepers' of print technology—the owners and operators of printing presses. During the twentieth and twenty-first centuries, prominent families controlled the newspaper business in many US cities, just as a relative handful of media giants do today.[61] As a result, ordinary individuals could publish their ideas in traditional newspapers only with the consent of those who controlled those papers. Although non-owners could pay printing press owners to print their ideas (assuming that licensing restrictions did not prevent the publication), many could not afford the cost.[62] Moreover, even if they could somehow pay the printing costs, it was expensive and difficult to distribute printed copies.[63] Newspapers provided a much more efficient method of communication, because of their established distribution networks, but ordinary people could publish in newspapers only with the consent of the owners / operators.

As a result, even though the press revolutionized speech technology, the elite (eg governmental officials, newspapers, universities and the rich who owned and controlled presses) were the primary beneficiaries of the new technology, and were the ones who could use the printing press to disseminate their ideas. Those who did not own presses could try to persuade those who did to publish their ideas (eg by writing op-ed pieces or persuasive articles). However, the editors (and reporters) of newspapers served as 'gatekeepers' in the sense that they could decide whether or not to publish the ideas of others, and could reject ideas that they did not like. The net effect was that ordinary individuals did not have assured access to the print medium for dissemination of their ideas. If the gatekeepers of the print media refused a publication request, and the speaker could not afford to pay a printer to publish them, the speaker was left with only more primitive methods of communication (eg oral and handwritten methods).

The Telegraph. The next major advance in speech technology, the development of the telegraph, was of limited utility to the average person because of monopolistic

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

[60] Brands (n 8) 31.

[61] Joseph Epstein, 'Dynasts of the Daily Press' *The New York Times*, 16 October 2011. BR1, reviewing Megan McKinney, *The Magnificent Medills: America's Royal Family of Journalism During a Century of Turbulent Splendor* (Harper 2011); Laurence Zuckerman, 'Questions Abound As Media Influence Grows for a Handful' *The New York Times*, 13 January 2000. C6.

[62] Marsh (n 16) 635.

[63] See Markenzy Lapointe, 'Universal Service and the Digital Revolution: Beyond the Telecommunications Act of 1996' (1999) 25 *Rutgers Computer & Technology Law Journal* 61, 80.

ownership,[64] as well as the fact that it required literacy and a knowledge of the Morse Code.[65] As a result, its use was limited to governments and business, as well as to newspapers who used the device to transmit and receive news and content.[66] Because the cost was relatively high, even newspapers were forced to economize in the use of their telegraphic communications, and few private individuals (except the wealthy) could use the telegraph as a routine or ordinary means of communication.[67]

Telephones. The telephone was a major communications development because it provided direct access between two people. An individual need only pick up a phone and dial a number in order to be connected to another person. As a result, political campaigns could use the phone to reach out to potential voters, and try to encourage or persuade them to support their candidates. In the early days, the phone's utility as a political device was limited by monopolistic pricing,[68] which meant that not everyone could afford to own a phone, and it was difficult to connect with more than one (or a small number of people) at a time. There was some effort at mass communication (eg videoconferencing).[69] Moreover, once telephones became more widely available, they could be integrated into political campaigns as a way of reaching people from a distance. However, telephones were still of relatively limited value compared to modern methods of communication.

Fax Machines. The fax machine was a significant advance because such machines made it possible to transmit documents or political position papers over phone lines to more distant locations in a matter of seconds.[70] However, it was extremely difficult and time consuming (not to mention expensive, especially if long-distance calls were involved) to communicate with a large number of people.

CB Radios. Citizens' band radios allowed a form of mass communication.[71] However, the efficacy of that technology was limited by the fact that only a small percentage of the population owned the technology to receive CB communications, and communications possibilities were geographically limited.

Radio and Television. Radio and television technology, indeed broadcast technology generally, was revolutionary in terms of its speech potential. For the first time, the spoken word and pictures could be transmitted very quickly over very long distances,

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64 Fang (n 1) 79–80.
65 Crowley–Heyer (n 1) 119.
66 ibid.
67 Tom Standage, 'Telegraphy: The Victorian Internet' in Crowley–Heyer (n 1) 132.
68 Claude S Fischer, 'The Telephone Takes Command' in Crowley–Heyer (n 1) 144–48.
69 Stephen Kern, 'Wireless World' in Crowley–Heyer (n 1) 207–209.
70 Fang (n 1) 226.
71 ibid 151.

and could be used to reach large audiences simultaneously. However, because of the limited number of airwaves (and the possibility for interference if more than one broadcaster tried to use the same airwave), as well as the significant expense needed to acquire, establish and operate a radio station, few individuals could obtain broadcast licenses.[72] Those who did hold licenses effectively became gatekeepers of the technology for those who did not. As with newspapers, radio broadcasters had the authority to decide what would (and, more importantly, would not) be aired.

In virtually every country, government has exercised significant control over television broadcasting.[73] In some countries, television broadcasting is either government-owned or government-controlled. In the US, by contrast, television stations are usually controlled by private individuals rather than the government.[74] In the US, radio and television broadcasters exercise a public privilege to broadcast with fairly broad authority to control what is broadcast on their stations.[75] For a while, the Federal Communications Commission regulated the content and coverage of broadcasting through the so-called 'Fairness Doctrine'. Basically, this doctrine (which has now been revoked although some are attempting to revive it) required broadcasters to provide fair and balanced coverage of issues. A related concept (the political attack rule) required broadcasters to provide response time to those that they attacked politically. Even though the Fairness Doctrine and the political attack rule imposed content-based restrictions on speech, the United States Supreme Court upheld those restrictions in *Red Lion Broadcasting Co. v FCC*. Although the Fairness Doctrine required broadcasters to provide fair coverage, it did not mandate that they provide media access to anyone who wanted it. The broadcaster was free to decide for itself how to provide fair coverage. The bottom line is that, although ordinary individuals have the right to listen to the broadcasts provided by the owners of television stations, they have not historically had the right to broadcast their own content or ideas over the airwaves except with the permission or consent of the owners of television stations.

The net effect was that a non licensee's ability to access the air waves in the US was subject to the whims of those who held the licenses. A non licensee could create an op-ed piece, or might even try to offer an advertisement, but the holder of the radio or television license was not required to broadcast either of them.[76] Although some broadcasters allowed (and allow) private individuals to air op-ed pieces, just as some newspapers publish op-eds or letters to the editor, the broadcaster's editor or producer always retained discretion about whether to air individual op-eds. As a result, neither radio nor television provided the average individual with an affordable and assured method of mass communication. As before the invention of the printing press,

72 *Red Lion Broadcasting Co. v FCC*, 395 US 367 (1969).
73 Fang (n 1) 90.
74 ibid 158.
75 William Boddy, 'Television Begins' in Crowley–Heyer (n 1) 244.
76 *Columbia Broadcasting System, Inc. v Democratic National Committee*, 412 US 94 (1973).

individuals could give speeches, and could draft arguments and position papers, but could not readily or easily harness the communications potential of radio and television to communicate political and social ideas.

Cable and Satellite Communication. Cable television,[77] and satellite radio and television, similarly expanded the ability to communicate, sometimes increasing station availability dramatically, and also expanding the number of perspectives available in the information marketplace.[78] Moreover, cable television managed to garner an increasingly large market share, approaching 50 percent,[79] although that market percentage may now be in decline as more and more individuals resort to the Internet. Moreover, as with prior technologies, cable and satellite communications technologies did not necessarily expand the average individual's ability to access the media or participate in freedom of expression. Increasingly, cable television has been dominated and controlled by large corporations, and many of these corporations own multiple types of media.[80] Even though some cable companies have established local access channels,[81] thereby providing ordinary people with some access to this new medium, the overwhelming majority of the hundreds of cable and satellite channels were (and remain) controlled by media conglomerates.

In the final analysis, even though speech technology dramatically improved between the fifteenth and twentieth centuries, the ability of ordinary people to communicate on a broad scale did not improve nearly as much. With limited exceptions, most mass communications technologies were accompanied by gatekeepers who exercised control over those technologies, who decided who could access those technologies, and (in some instances) what they could say. As a result, mass communication remained the purview of the rich and the powerful, as well as of government, but not of the common man.

The Internet revolution

At the end of the twentieth century, communications technology took a decidedly more democratic direction. Although the traditional forms of communication—eg newspapers, radio, television—continued to exist, and to have a significant impact on society, new technologies began to emerge that would dramatically reshape society, and that would give ordinary people much greater access to communications technologies, and many

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[77] *Turner Broadcasting System, Inc. v FCC*, 512 US 622 (1994).

[78] Cohen (n 14) 313.

[79] Brian Stelter, 'Cable Networks Trying to Build on Their Gains in Ratings' *The New York Times*, 26 May 2008. C5.

[80] Fang (n 1) 203–204.

[81] John J O'Connor, 'How Much Access Have We to Public Access Television?' *The New York Times*, 3 June 1973. 17, s 2.

more possibilities for mass communication. The distinguishing feature of modern technologies is that they are cheap, affordable, and easily accessible by ordinary people.

As with prior advances in communication, the modern revolution is being driven by technological innovation, including two late twentieth-century inventions: personal computers (PCs) and the Internet.[82] These developments have been supplemented by the invention of handheld devices, so-called 'smart phones', that allow individuals to surf the Web, send and receive text messages, as well as other forms of instant communication (eg Twitter). Because of these developments, gatekeepers play a much less prominent role in modern communication. Of course, the old gatekeepers continue to exert influence over some types of technology, and although new gatekeepers are trying to take their place, ordinary people possess more, and dramatically enhanced, communications possibilities than ever before.

Early computers were quite large machines that filled entire rooms, and were used almost solely by large corporations and governmental entities.[83] By the 1970s, computers became much more accessible with the invention of so-called 'personal computers' (PCs) that allowed individuals to use computers in their homes and businesses.[84] When coupled with printers the price of which had dropped dramatically, the PC enabled ordinary people to create high quality documents with exceedingly high quality graphics, and to print the documents that they had created.[85] In addition, individuals could create multiple copies, and could effectively engage in 'desktop publishing'.[86]

The Internet complemented the personal computer by providing ordinary individuals with the means for distributing documents that they had created on their PCs, without having to create and distribute printed documents, and thereby allowed the 'masses' to engage in mass communication.[87] While the Internet originated in the US as ARPANET, the system rapidly went worldwide as other nations connected their information systems to the network.[88] Those connections eventually developed into the World Wide Web.[89] Thus, the Internet dramatically expanded communications possibilities for ordinary individuals. Via the Internet, ordinary people could bypass traditional methods of communication, and distribute content themselves directly to their readers. Indeed, individuals could instantaneously disseminate their ideas all over the world through the

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[82] Anick Jesdanun, 'Internet at 40: Midlife Crisis? Barriers Threaten Openness, Growth' *The Courier-Journal*, 6 September 2009). D5.

[83] Crowley–Heyer (n 1) 298; John Markoff, 'Business Technology: Improving a Computer Network's Efficiency' *The New York Times*, 29 March 1989. D7.

[84] Stuart Kauffman, 'Re-Imagining Society: Are We Trapped by Old Ideas?' National Public Radio, Cosmos and Culture, 1 November 2010.

[85] Fang (n 1) 196.

[86] ibid 195–96.

[87] Crowley–Heyer (n 1) 298.

[88] ibid 323.

[89] ibid 325–27.

click of a computer mouse. Not only could individuals send e-mails and create websites, they could also communicate through websites, chat rooms, list servers, blogs, text messages, and other methods.

PCs and the Internet enabled ordinary individuals to largely avoid the traditional gatekeepers of mass communication.[90] Unlike the telephone, an e-mail can be distributed to a very large group of people in far-flung places, and the communication can take place instantaneously. PCs and the Internet also differ from other forms of mass communication because the barriers to access are extremely low. One can access the Internet simply by purchasing a personal computer and obtaining an Internet connection, and both a PC and an Internet connection can be obtained relatively cheaply. Those who lack the means to buy a computer can gain inexpensive (or, sometimes, free) access through a cyber café, through a library or a university, or through a 'smart phone'. Indeed, a number of businesses offer free Internet connections as a way of encouraging business. The end result is that millions upon millions of people now regularly engage in speech and communication through the medium of the Internet.

The PC and the Internet have been supplemented by a plethora of new technologies that help facilitate Internet communication, and that have made PCs and e-mail relatively old school. Indeed, new technologies seem to emerge almost daily so that an individual is no longer required to own a PC in order to access the Internet.[91] Handheld devices allow individuals to connect to the Internet even though they are away from their PCs, and they can use those devices to send e-mails and text messages, access Facebook pages, and do other things. Market penetration for the various handheld devices (including mobile phones and 'smart phones') now includes 96 percent of young people in the US.[92] Although each Twitter communication involves only a maximum of 140 characters, nearly 20 million people signed up now in order to use the service (20 million of which are really active), producing more than 100 million tweets a day,[93] and two billion tweets per month. In a 24-hour news cycle, in which electronic media can disseminate information quickly, Twitter is even faster, and Tweets can be used by reporters to solicit information from possible sources.[94] By mid-2010, Facebook had more than 500 million users worldwide.[95]

Blogs are becoming commonplace, and the blogosphere 'is very open and democratic. For very little money, anyone can start a blog and post their thoughts on

[90] Crowley–Heyer (n 1) 298.

[91] 'Handheld Devices: Most Popular' *The New York Times*, 23 November 2010.

[92] Steve Inskeep, 'Survey: 96 Percent of Young Adults Own Cellphones' National Public Radio, Morning Edition, 18 October 2010.

[93] Bob Garfield, 'Evan Williams' National Public Radio, On the Media, 26 November 2010.

[94] Bob Garfield, 'The Point of Twitter' National Public Radio, On the Media, 26 November 2010.

[95] Bob Garfield, 'The Facebook Effect' National Public Radio, On the Media, 20 August 2010.

the Web.'[96] E-mail has supplemented, if not been eclipsed by, text messaging which has exploded in recent years. In addition, social networking sites have been developed, including MySpace and Facebook, which allow the creation of 'friend' networks, and allow easy communication with virtual 'friends'. Oral and visual communications have been enhanced by Skype which allows individuals to make phone calls and convey video over the Internet.[97] Skype is even available now through handheld devices.[98] In China, where Facebook and Twitter are banned, alternate social networking systems have developed, including renren.com, which has more than 160 million registered users, and Kaixin001.com, which has more than 93 million users.[99]

The Internet has also transformed radio communications. Because broadcast radio has historically operated over the air waves, and because there were a limited number of frequencies, governments have historically required a license in order to broadcast, and they limited the number of broadcast licenses. The Internet has altered that equation by allowing radio stations to broadcast over the Internet.[100] No longer limited by the number of broadcast bands, a seemingly limitless number of Internet radios can develop.

As the foregoing discussion suggests, the Internet is extraordinarily democratic in the sense that individuals are free to write about the issues (or things) that move them,[101] and to transmit their ideas to a wide range of other people, without having to invest in expensive devices like printing presses or radio and television stations. In addition, ordinary people are no longer forced to go through the traditional gatekeepers of communication, or the societal norms or personal preferences imposed and enforced by those gatekeepers. Someone who wishes to publish something can simply do so, and then can quickly and easily transmit it around the world, or display it on the Web for all to see. As a result, ordinary individuals are beginning to communicate directly with each other on a scale that has never been seen before, and the result has been a free speech revolution that has affected not only the US, but the entire world. In the broad sweep of history, freedom of speech has never been as possible for ordinary people as it is today.

Inevitably, the Internet and computers (broadly defined to include handheld devices) have altered the political process. In the past, ordinary people have always been able to participate in the political process by distributing campaign literature, going door-to-door making political pitches, or by sponsoring or attending campaign rallies or gatherings. But, in order to communicate to the masses, ordinary people were usually

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96 Micah Sifry, 'The Gatekeepers are Gone' National Public Radio, Soap Box, 21 August 2008.

97 Verne G Kopytoff, 'To Match Profit With Popularity, Skype Looks to New Markets' *The New York Times*, Business Day, 22 December 2010. B1.

98 ibid B2.

99 Mark Lee, 'Chinese Social Sites Fill Facebook's Void' *International Herald Tribune*, 10 February 2011. 14.

100 Fang (n 1) 151.

101 *Reno v American Civil Liberties Union*, 521 US 844 (1997).

forced to go through gatekeepers. Through the Internet, ordinary people can now engage in politics from the comfort of their homes, and can reach thousands if not millions of other people. As one commentator noted, 'What we are finally seeing . . . is a realization of that ideal that Adams and Jefferson and Paine and before him Voltaire and Plato had[—]that ideal of having everybody have a shot at participating in this discussion.'[102]

The result is that political communication is no longer the sole purview of the rich and powerful, but is now also available to the masses. Indeed, at times, Internet communications by ordinary individuals prompt and stimulate media coverage of issues. For example, early videos of anti-government protests in Tunisia were provided by individuals over the Internet using images captured on their mobile phones. The images led to unrest in other parts of Tunisia and encouraged the media to begin covering the story. Afterwards, some media companies began monitoring Web postings, even though those communications were directed at other individuals using the Internet rather than at media companies, and sites like Bambuser provide a method for ordinary individuals to stream online and view video posts.[103]

Conclusion

The development of PCs, handheld devices, and the Internet, has the potential to dramatically reshape both society and the political process. Freedom of expression is a necessary and essential building block for a democratic system of government,[104] and is critical to the effective functioning of the political process.[105] The Internet and associated technologies (eg PCs and handheld devices) have dramatically expanded the ability of the people to engage in direct communication among themselves, as well as to engage in political dialogue and critique,[106] and it has the potential to profoundly reshape society and the democratic process. For one thing, the Internet allows individuals with

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[102] Liane Hansen and Davar Iran Ardalan, 'Looking at the Future of "E-Politics"' National Public Radio, 29 June 2008.

[103] Jennifer Preston and Brian Stelter, 'Cellphone Cameras Become World's Eyes and Ears on Protests Across the Middle East' *The New York Times*, 19 February 2011. A11.

[104] Edwin Baker, 'Scope of the First Amendment Freedom of Speech' (1978) 25 *UCLA Law Review* 964; Robert H Bork, 'Neutral Principles and Some First Amendment Problems' (1971) 47 *Indiana Law Journal* 1; Thomas I 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 (n 1) 10–13; Brands (n 8) 115 ('when truth and error have fair play, the former is always an overmatch for the latter').

[105] ibid; Russell L Weaver et al, *The First Amendment: Cases, Problems, and Materials* (4th edn, LexisNexis 2014) 3–11.

[106] Anthony Kuhn, 'In Malaysia, Web's Popularity Breaks a Grip on Power' National Public Radio, All Things Considered, 22 November 2010.

common interests, including common political interests, to locate each other more easily and communicate directly among themselves.[107] This potential for communication will only be enhanced as technology continues to advance.[108] In the process, the Internet has given ordinary individuals a fuller opportunity to participate directly in, and influence, the political process[109] through parody and satire[110] and the organization of mass protests.[111] No longer are individuals forced to channel their communicative messages through the filter of newspaper editors, or radio and television producers.[112]

Since this is a short article, I will not give examples of how the Internet is reshaping the political process, but will refer the reader to my book for a more in-depth treatment of that issue.[113] Suffice it to say that the Internet is reshaping political communication all over the world. Of course, some worry that the rise of the Internet has led to a decline of the traditional media. Large newspapers have historically played a 'watchdog' role in society by investigating and challenging the government.[114] The difficulty is that newspapers are able to conduct investigations because they maintain paid staff who can devote time and effort to investigative journalism. As advertising revenue has declined, some newspapers no longer have sufficient resources to support strong international or investigative reporting.[115] As the traditional media continue to decline, and more news organizations move online, there is a risk that investigative journalism will decline still further. However, as I detail in my recent book, the traditional media are being supplemented (and, perhaps, replaced) by online publishers, including online newspapers, investigative units and leak organizations such as WikiLeaks.[116]

Of course, if the Internet is going to achieve its potential to reshape the democratic and political processes, it must remain free and accessible. There are both private and governmental threats to Internet openness. Undoubtedly, there will be threats from government. In the grand sweep of history, as new forms of speech technology have been developed, they have usually been accompanied by governmental efforts to restrict or control their use.[117] In the Internet era, some governments have aggressively attempted to regulate, control and limit this new technology. Private entities may pose

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107 Fang (n 1) 225.

108 Jessica Mintz, 'The Future is Closer Than You Think' *The Courier-Journal*, 27 December 2009. D5.

109 Lapointe (n 63) 87.

110 Matt Frassica, 'Twicky Tweets: Twitter Parodies Bring Online Laughs for Followers' *The Courier-Journal*, 21 November 2010. E1.

111 David Carr, 'Digitally, Location is Where It's At' *The New York Times*, 22 March 2010. B1.

112 Dan Klepal, 'Abramson Faces Rising Criticism Amid Budget Cuts' *The Courier-Journal*, 18 January 2009. A8.

113 Weaver 2013 (n 1).

114 Fang (n 1) 56.

115 Michael Moran, 'No Such Thing as Free News' National Public Radio, 21 April 2009.

116 Weaver 2013 (n 1).

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

an even greater threat to free expression today.[118] Since the First Amendment to the US Constitution generally limits only governmental action, and not private action (unless it is conducted in a way that creates 'state action'), that amendment provides little recourse against these private institutions.[119] An emerging issue in the US is whether large cable companies can find a way to become the new gatekeepers to the Internet.[120] If that happens, cable companies may be able to exercise gatekeeper control, and prevent the Internet from achieving its democratic potential.

[118] Laura Sydell, 'Corporations Are Drawn Into WikiLeaks Controversy' National Public Radio, Morning Edition, 13 December 2010.

[119] Weaver 2013 (n 1).

[120] Brian Stelter, 'The TV-Internet Nuptials: Distributors Ponder Their Roles in a Time of Transition' *The New York Times*, 10 January 2011. B1.

3. Media freedom and the right to gather news

David Goldberg

Journalism, drones, and law

Introduction

Drones, dronalism, and the right to use drones to gather news

Using drones (remotely piloted aircraft) for the purpose of journalism and newsgathering—hereafter referred to as 'dronalism'[1]—was first comprehensively treated in 'Remotely Piloted Aircraft Systems and Journalism: Opportunities and Challenges of Drones in News Gathering', a report published by the University of Oxford's Reuters Institute for the Study of Journalism (hereafter, the Reuters Report).[2] This application is unlike any of the other myriad civilian, commercial drone applications which are emerging, almost daily.[3] It is unique because it engages a fundamental human right, generally, the right to freedom of expression and, specifically, its various component rights, eg the right of the public to receive information and ideas; the right to undertake activities for the purpose of newsgathering; and the right to access communications technologies. Although all 'unmanned systems [sic] are being used as tools to gather information,'[4] dronalism is *intended* for the purpose of direct or indirect

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[1] <http://richardjonesjournalist.com/tag/dronalism/>; for a systematic and overall review and analysis of legal etc. issues, see Donna A Dulo (ed), *Unmanned Aircraft in the National Airspace: Critical Issues, Technology, and the Law* (American Bar Association 2015).

[2] David Goldberg – Mark Corcoran – Robert Picard (Reuters Report), 'Remotely Piloted Aircraft Systems and Journalism: Opportunities and Challenges of Drones in News Gathering' (Reuters Institute for the study of Journalism, 2013) <http://reutersinstitute.politics.ox.ac.uk/sites/default/files/Remotely%20Piloted%20Aircraft%20and%20Journalism.pdf>. See also Nabiha Syed – Michael Berry, 'Journo-Drones: A Flight over the Legal Landscape' <http://www.lskslaw.com/documents/CL_Jun14_v30n4_SyedBerry.pdf>. Two American developments in 2011 were catalysts for the Reuters work: the setting up of the Drone Journalism Lab, <http://www.dronejournalismlab.org/> and the Professional Society of Drone Journalists, <http://www.dronejournalism.org/>. London's Frontline Club (for journalists) ran an event in November 2013, 'Drone Journalism: The Future of Newsgathering' <http://www.frontlineclub.com/drone-journalism-the-future-of-news-gathering>; in February 2014, the present author (co) organised a conference at the Southwestern Law School (Los Angeles) 'Using Drones in the News and Entertainment Industries: The Legal and Regulatory Issues' <http://videolibrary.swlaw.edu/drones/>.

[3] See eg 'One Man and His Drone: Meet Shep, the Flying "Sheepdog"' <http://www.telegraph.co.uk/men/the-filter/virals/11503611/One-man-and-his-drone-meet-Shep-the-flying-sheepdog.html>; see also 'Top 10 Drone Startups' <http://www.lightreading.com/drones/top-10-drone-startups/d/d-id/714873>. The United Arab Emirates has launched a 'Drones for Good' competition—with a one million dollar prize—see <http://www.dronesforgood.ae/en/about>; see also 'Humanitarian UAV Mission to Vanuatu in Response to Cyclone Pam' <http://irevolution.net/2015/03/29/pictures-uav-mission-cyclone-pam/>.

[4] See, AUVSI's Unmanned Systems Magazine – March 2015. http://www.auvsi.org/resourcesold/resources/viewdocument/?DocumentKey=31c45516-4daf-4f2a-baf3-0eeecdb35527.

communication of images to the public. It is, therefore, of special concern when drone use is categorically prohibited. A blanket, general restriction would *a fortiori* include newsgathering. For example, at the time of writing, India is mulling its regulatory regime for drones. *The Times of India* reported that

> The government said . . . that the aviation regulator is in the process of developing an interim operations guideline for civil use of drones or unmanned aircraft systems (UAS). Minister of state for civil aviation Mahesh Sharma told the Lok Sabha during question hour that the Directorate General of Civil Aviation (DGCA) is in the process of developing an interim operations guideline for civil use of UAS. 'Till such regulations are issued, *no non government agency, organization or an individual will launch a UAS in Indian civil airspace for any purpose whatsoever*,' the minister said in a written reply.[5] (Emphasis added.)

Even issuing permissions or licences on an *ad hoc* basis, pursuant to an individual petition or request to undertake paid for dronalism work, is also problematic. For example, in mid-2014, the American Federal Aviation Agency announced it would consider requests from 'seven aerial photo and video production companies [that] have asked for regulatory exemptions that would allow the film and television industry to use unmanned aircraft systems (UAS) with FAA approval for the first time (Federal Aviation Administration, 2014).'[6] Commenting, Timothy Ravich notes (mainly in connection with film companies): 'In any event, while this is a step in the right direction —rewarding credentialed, safety-conscience 'drone' users—this seems out of sorts with the First Amendment guarantee of free speech. Isn't a movie a form of expression… . *Will the FAA exempt certain movie studios and not others*?'[7] (Emphasis added.)

If the regulator either does—or perhaps more significantly does not—permit or grant a licence for such deployment, questions arise: has it explicitly conducted the necessary balancing exercise, weighing freedom of expression considerations, eg is any ban 'necessary in a democratic society', in coming to its determination?[8] How transparent and accountable is the decision making process? Is there consistency amongst the agency's decisions? And, crucially, is there an independent, appeal process from an agency decision? Just as media lawyers will have to get used to understanding this new

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[5] <http://timesofindia.indiatimes.com/india/DGCA-developing-guideline-for-civil-use-of-drones-Govt/articleshow/46586949.cms>; see also R Swaminathan, 'Drones & India: Exploring Policy and Regulatory Challenges Posed by Civilian Unmanned Aerial Vehicles' (Observer Research Foundation 2015) <http://bit.ly/1IHMZ6c>.

[6] Federal Aviation Administration, 'Seven Companies Petition to Fly Unmanned Aircraft Before Rulemaking is Complete' <http://www.faa.gov/news/press_releases/news_story.cfm?newsId=16294>, the number has climbed recently to nearly 100 facilitated by a 'Summary Grant' procedure. For a listing and analysis (as at the time of writing) of the exemptions granted under s 333 of the 2012 FAA Modernization and Reform Act, see <http://dronecenter.bard.edu/the-drone-exemptions/>; <http://www.uasmagazine.com/articles/1050/faa-approves-massive-round-of-uas-exemptions>.

[7] Timothy Ravich, 'And the Drone Goes to...' <http://droninglawyer.com/2014/06/03/and-the-drone-goes-to/>.

[8] As with many licensing processes, a permission-granting procedure is *capable* of being abused—here to effect a kind of indirect censorship.

(for them) field of law so will aviation regulators have to understand what is involved in their decisions and decision-making process where the public interest in the 'public's right to know' interest is involved.

Terminology

The word 'drone' has now become part of the *lingua franca*, at least in English.[9] The history of how the word migrated from being used by apiarists to such flying objects is recounted by Steve Zaloga in a letter to *Defense News*:

> Drone is one of the oldest official designations for remotely controlled aircraft in the American military lexicon. In 1935, when the chief of naval operations Adm. William Standley, visited Britain, he was given a demonstration of the Royal Navy's new DH 82B Queen Bee remotely controlled aircraft that was used for anti-aircraft gunnery practice. On his return, Standley assigned an office, Cmdr. Delmer Fahrney at the Radion Division of the Naval Research Laboratory, to develop a similar system for US Navy gunnery training. Fahrney adopted the name drone to refer to these aircraft in homage to the Queen Bee. Drone became the official US Navy designation for target drones for many decades.[10]

However, henceforth in this chapter, the phrase 'remotely piloted aircraft' (RPA) will be substituted for the word 'drone'. It is technically precise and reflects the 'Glossary' in the March 2015 International Civil Aviation Organisation's (ICAO) *Manual on Remotely Piloted Aircraft Systems*, which does not contain an entry for the word 'drone'.[11] An RPA is defined as 'an unmanned aircraft which is piloted from a remote pilot station.'[12]

Using the terminology of 'remotely piloted aircraft' instead of 'drone', ie piloting a vehicle from a distance compared with there being a human pilot physically on board, also pays homage to a little-known historical fact: remotely piloted vehicles owe their technology to Serbian American Nikola Tesla.[13] He patented the 'teleautomaton', albeit

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[9] See eg <http://www.oxforddictionaries.com/definition/english/drone>. Note however that the meaning in the context of this chapter is fairly low down the list. In Scotland, a 'drone' is a term for a bit of a bagpipe, see <http://en.wikipedia.org/wiki/Drone_(music)>.

[10] Quoted in Ben Zimmer, 'How "Drone" got off the ground' <http://www.visualthesaurus.com/cm/wordroutes/how-drone-got-off-the-ground/>.

[11] See <http://www.dronezine.it/wp-content/uploads/2015/03/10019_cons_en-Secured-1.pdf>. But SARPs (ICAO Standards and Recommended Practices) will not be adopted till 2018. For an overview of the ICAO's involvement in this area since 2005, see 'ICAO Develops the Global Regulatory Framework for UAS' <http://mycoordinates.org/%E2%80%9Cicao-develops-the-global-regulatory-framework-for-uas%E2%80%9D/>.

[12] It was earlier defined as 'An Aircraft Where the Flying Pilot Is Not on Board the Aircraft' ICAO, Unmanned Aircraft Systems, Cir 328 AN/190 2011, <http://www.icao.int/Meetings/UAS/Documents/Circular%20328_en.pdf>.

[13] His name is mainly known as the name of Belgrade's international airport, see <http://www.beg.aero/en/home>.

with reference to a boat, thus underscoring the point that unmanned, remote control is applicable to surface and sea vehicles (surface and underwater) as well as aerial vehicles. Tesla presented his invention at Madison Square Garden's first electrical Exhibition in September 1898.[14] Thus, there are three elements:

– the vehicle is 'unmanned'—in that there is no human being/pilot on board;
– the vehicle is an aircraft, and
– the aircraft is not autonomous, but is being flown by a human being albeit from a remote location.

So, although often *described* as 'unmanned' (simply because there is no human being on board), the *system*, including the RPA, is not literally 'unmanned'. There is a human operator, the 'pilot-in-command' operating and (hopefully) controlling/monitoring it, and, ideally, in conjunction with an observer too. Additionally, there might be a third human being involved, operating the payload, eg video camera or data sensors. In most such situations, the RPA is part of a human-machine *system*, or Remotely Piloted Aircraft System (RPAS) defined in the ICAO *Manual*'s Glossary as: 'A remotely piloted aircraft, its associated remote pilot station(s), the required command and control links and any other components as specified in the type design.'[15]

Apart from definitional matters, these elements are significant from a legal liability perspective: RPAs *will* crash into other RPAs or manned aircraft or fall to the ground due to loss of the GPS, or battery loss/outage, or software malfunction. The Reuters report noted:

> Media users need to address the issue of precisely who is liable (and for what) when an RPAS is deployed. Essentially, the rules for this kind of aircraft vehicle need to embrace a system in which the owner of the aircraft, the RPAS operator, and the pilot in command are differentiated. Practically, this entails that liability for damages caused by a UAV falling to the ground is placed on the operator who sets up the system.[16]

The legal issue will be which party or parties can be sued as having allegedly caused the death(s) or damage. 'Most undesired outcomes usually do not occur because of a

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[14] Sun Sachs, 'How Tesla's 1898 Patent Changed the World' <http://teleautomaton.com/post/1373803033/how-teslas-1898-patent-changed-the-world>. On a rainy September day in 1898 Nikola Tesla presented at Madison Square Garden's first Electrical Exhibition a new invention that he called a 'teleautomaton'. The invention was the first ever radio controlled device in the form of a miniature boat. He had two devices, one that could be remote controlled above water and another that had a hidden loop antenna and could be controlled under water. See also Austin Weber, 'Nikola Tesla: Father of Unmanned Vehicle Technology' <http://www.assemblymag.com/articles/87689-nikola-tesla-father-of-unmanned-vehicle-technology>; Tesla Memorial Society of New York; Nikola Tesla Museum; and for the patent, method of and apparatus for controlling mechanism of moving vessels or vehicles, see <http://www.google.com/patents/US613809>.

[15] ICAO (n 11).

[16] Reuters Report (n 2) 24.

single event, but rather from a series of events and actions involving equipment malfunctions and/or human factors.'[17] Significantly, the chain of legal liability may also extend beyond the RPAS. As Donna Dulo notes:

> The network / communications centric aspect of the drone [sic] makes it highly susceptible to information assurance and computer security exploits. It also exposes the aircraft to hostile takeover by malicious third parties creating safety and national security concerns . . . [eg] GPS spoofing, signal jamming, embedded systems attacks, wireless systems exploits as well as issues of malware in both the ground station and in the aircraft . . . [and] malicious third party takeovers.[18]

However, it is the data gathering capacity (video, audio, thermal, hazmat, etc) of the RPA that makes it a useful platform; without, it is simply a toy for the leisure market or the hobbyist:

> RPAs . . . being essentially sensor-carrying aerial devices, are used to collect data. The data may come in many different forms, from still images and video of visual light, to multi- and hyper-spectral imaging that reveals the chemical nature of the world. The data collected by RPAS typically is processed by a computer or network of computers, which may take minutes, hours, or days, depending on the amount of the data and the complexity of computer tasking. The result of this processing can be any number of data products: information-dense maps, three-dimensional models, aerial video and photography, among other items. Thus, the processing and distribution is administered by persons, and is outside the scope of RPAS regulations.[19]

Almost all dronalism deploys a small, ie under 7kg, remotely-controlled quod—or hexa/octo-copter with an on-board camera attached.[20] Without that type of payload as a minimum the RPA is simply a 'flying donkey' and quite useless.

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[17] See European Commission, 'Study on the Third-Party Liability and Insurance Requirements of Remotely Piloted Aircraft Systems (RPAS)' Final Report <http://ec.europa.eu/DocsRoom/documents/7661>; Peter W Merlin, *Crash Course: Lessons Learned from Accidents Involving Remotely Piloted and Autonomous Aircraft* (NASA 2013) <http://www.nasa.gov/pdf/732725main_crash_course-ebook.pdf>; military RPAs crashes can be reviewed at <http://dronewars.net/drone-crash-database/>.

[18] See ch 9 ('Security Implications of Drone Use: Technology and the Law') of Dulo (n 1); it should be noted that this issue also affects manned aircraft, see 'FAA Needs a More Comprehensive Approach to Address Cybersecurity As Agency Transitions to NextGen' <http://www.gao.gov/products/GAO-15-370>: 'Modern aircraft are increasingly connected to the Internet. This interconnectedness can potentially provide unauthorized remote access to aircraft avionics systems.'

[19] See PSDJ Evidence to House of Lords Inquiry, RPA 0032 <http://www.scribd.com/doc/242974459/PSDJ-Response-to-House-of-Lords-Inquiry-on-RPAS#scribd>; a tweak to the word dronalism is 'sensor journalism' see Fergus Pitt (ed), 'Sensors and Journalism' <http://towcenter.org/wp-content/uploads/2014/05/Tow-Center-Sensors-and-Journalism.pdf>.

[20] See '"Hexacopter" Drone Flying Camera' BBC News <https://www.youtube.com/watch?v=ZTWHP80hei0>.

Dronalism and aircraft

Crucially, from a legal and regulatory perspective, an RPA is an *aircraft*, falling within the ICAO definition of an aircraft: 'Any machine that can derive support in the atmosphere from the reactions of the air other than the reactions of the air against the Earth's surface.'[21] When deployed for the purpose of dronalism, understanding that RPAs are 'aircraft' produces a novel situation. Most dronalism most of the time uses a camera for its payload. Thomas Hannen, one of the BBC's certificated pilots, has said: 'We are not using it [sic] as a drone. That is completely the wrong terminology to use to describe it. We see it as a flying camera.'[22]

Whilst analogising an RPA used for dronalism to a camera—albeit in this context an aerial one—is useful, the legal situation of a photojournalist with her feet on the ground is not the same as the (photo)journalist deploying an RPA in one crucial regard.[23] Whatever laws or regulations may or may not apply to the former, aviation or air law applies only to the activities of the latter. However, the journalist concerned may not perceive that she is deploying—for legal purposes—an aircraft. One of the novel implications of RPAs being 'aircraft' is that the space a journalist may wish to deploy an RPA 'in' is—*airspace*. Broadly speaking, most airspace is controlled and there are standard classifications.[24] In addition, segments of airspace may be affected by permanent or temporary orders issued by the aviation regulator restricting—including banning—overflight in that defined zone.[25] For example, the UK's first prosecution involved an infringement of a highly specific restriction: flying over a nuclear installation: Regulation 3(2) of the Air Navigation (Restriction of Flying)(Nuclear Installations) Regulations 2007.[26] Sporting and other types of events are now regularly

[21] ICAO (n 11).

[22] Thomas Hannen, 'Global Video Unit' BBC World Service <http://www.wired.co.uk/news/archive/2014-02/12/bbc-drone-journalism/viewgallery/ytKr2kdtZOFW0>; the pace of technological development is staggering, see eg '3D Robotics Introduces Solo, the World's First Smart Drone' <http://www.benzinga.com/pressreleases/15/04/m5407194/3d-robotics-introduces-solo-the-worlds-first-smart-drone-pre-orders-acc#ixzz3XSfTyrRJ>.

[23] In 2008, the UK Government was asked 'What plans they have for reviewing the rules on street photography.' Replying for the Government, Lord Bassam of Brighton stated: 'My Lords, the freedom of the press and media is one of the bedrocks of democracy in this country. Although police officers have the discretion to ask people not to take photographs for public safety or security reasons*, the taking of photographs in a public place is not subject to any rules or statute*. There are no legal restrictions on photography in a public place and no presumption of privacy for individuals in a public place. There are no current plans to review this policy' (emphasis added) Photography: Public Places <http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/80716-0001.htm>.

[24] See, for the UK, Airspace Structure, CAA <https://www.caa.co.uk/default.aspx?catid=2392>; see also Mary-Ann Russon, 'Drone No-Fly Zones in the UK Explained: Where in Britain Can You Pilot a UAV?' <http://www.ibtimes.co.uk/drone-no-fly-zones-uk-explained-where-britain-can-you-pilot-uav-1496386>.

[25] See 'Drone Photos from Around the World That May Not Be Legal to Shoot Anymore' <http://petapixel.com/2015/04/10/drone-photos-from-around-the-world-that-may-not-be-legal-to-shoot-anymore/>.

[26] See Appendix.

subject to specific bans, as was the case with the 2014 Commonwealth Games and the (UK portion) of the Tour de France;[27] the same is true in other jurisdictions, for example, as happened recently in Singapore, at the funeral of Lee Kwan Yew and the Singapore F1 road race:

> Unmanned aircraft will not be allowed to fly in certain areas when the Formula 1 Singapore Airlines Singapore Grand Prix takes place later this week. The Civil Aviation Authority of Singapore (CAAS) said on Tuesday that this is to ensure that they do not get in the way of low-level helicopter flights that are conducting aerial filming during the race. Unmanned aircraft may pose a danger to the helicopter as well as people and property on the ground, said CAAS.[28]

Restrictions may be instituted by non-aviation regulators as well. Recently, in the UK, Royal Parks have become, it seems, out-of-bounds for RPAs: 'Pilots were told in notices posted in parks they would be breaking rules if they fly the craft because "model aircraft" are not allowed… . Notices seen in the parks read: "The flying of drones or model aircraft in the park is prohibited. By order of the Secretary of State."'[29] However, concern has been expressed that the proper formalities to approve issue of the notice may not have been done;[30] another point is that Royal Parks seem to be relying on a section of the Regulation concerned with 'model' aircraft—whereas dronalism deployment is a civilian, commercial activity. Interestingly, a new technological fix to solve the problem of unwelcome or undesirable overflying has emerged, namely, 'geo-fencing'.[31] In the context of avoiding certain air spaces, eg around airports, DJI's RPAs, for example, can be programmed with so-called 'geo-fence' software that provides satellite GPS guidance to steer the RPA away from a danger zone: 'No Fly Zone' Technology. This creates a curious technological and sovereignty precedent. The initiative will effectively give (as it happens in this example) a Chinese company (manufacturer of the Phantom) indirect control over the movement of unmanned aircraft

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[27] See, for the Commonwealth Games, <https://www.gov.uk/government/speeches/glasgow-2014-commonwealth-games-airspace-restrictions> and for the Tour de France, <http://www.dhpc.org.uk/news/tour-de-france-restricted-airspace>.

[28] For the funeral, see <http://www.channelnewsasia.com/news/singapore/no-flying-of-drones-near/1750224.html>; for the F1 race, see <http://news.asiaone.com/news/singapore/restrictions-flying-unmanned-aircraft-during-f1-race#sthash.qoNX1Aa5.dpuf>.

[29] See eg <http://www.standard.co.uk/news/london/drones-banned-from-royal-parks-amid-fears-over-impact-on-wildlife-and-visitor-safety-10095538.html>; the regulation is not a standard one being issued under the Royal Parks and Other Open Spaces Regulations 1977, <http://www.legislation.gov.uk/uksi/1997/1639/regulation/3/made>; it has been reported that Historic Scotland has also drawn up regulations prohibiting overflying RPAs, see <http://thetim.es/1z8jdyR>.

[30] Simon Phippard, Bird and Bird, personal e-mail to the author.

[31] See <http://www.ibtimes.co.uk/drones-evidence-committee-technology-regulate-civilian-unmanned-aerial-vehicles-1472017>; the section on Geofencing in Civilian Use of Drones in the EU, <http://www.publications.parliament.uk/pa/ld201415/ldselect/ldeucom/122/122.pdf>; 'High-Tech "Fence" will Ban Drones from Airports: Unmanned Aircraft to be Programmed so They Physically can't Fly Near High Profile Targets' <http://www.dailymail.co.uk/news/article-3016509/High-tech-fence-ban-drones-airports-Unmanned-aircraft-programmed-physically-t-fly-near-high-profile-targets.html#ixzz3VnMNC4MQ>.

in the skies of dozens of nations. While DJI says its initiative is solely motivated by safety, there are concerns that drone flying restrictions could be easily exploited for political censorship.[32] Thus, dronalism as an exemplar of photojournalism requires

– knowledge of the existence of flight restrictions;
– knowledge of where to access the knowledge, and
– a sense of what if any arguments may be made to oppose any specific restriction, in exactly the same way as with any other reporting restriction challenge.

Knowledge of where to access the information is complex to say the least: in reply to a freedom of information request in 2008, the CAA responded:

> Permanent restrictions of airspace are promulgated through the Permanent Air Navigation (Restriction of Flying) Regulations detailed in Section 5 of the Air Navigation Order (ANO) 2005 (As Amended). The ANO is in the public domain and available from the CAA website as Civil Aviation Publication (CAP) 393—The Air Navigation Order (www.caa.co.uk/docs/33/cap393.pdf); Temporary airspace restrictions such as those established in the event of an incident or major event are promulgated to the aviation community via NATS' Aeronautical Information Service website. Again, this information is within the public domain and can be accessed through the following URL, http://www.nats-uk.ead-it.com/public/index.php.html.
> From this webpage, select the link entitled 'Aeronautical Information Circulars'. Current data concerning temporary restrictions is shown as the link: Mauve (M)—UK Airspace Restrictions imposed in accordance with the Temporary Restriction of Flying Regulations' (http://www.nats-uk.ead-t.com/public/index.php%3Foption=com_content&task=blogcategory&id=162&Itemid=59.html).[33]

Of course, currently, media organisations and media lawyers engage with a range of media regulators and laws, either *lex specialis* media law or the general law. For example, there are laws protecting the reputation of subjects of media reporting; states jealously guard their national security by punishing disclosure of official secrets; the revenue of the media is affected by advertising rules; broadcasting is subject to being granted a national regulator's licence; and community standards are upheld by laws criminalising obscene speech, etc. But, one regulator and legal regime that tends to be far removed from the consciousness of media companies, citizen journalists and their

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[32] DJI's No Fly Zone system creates a curious technological and sovereignty precedent. The initiative will effectively give a Chinese company indirect control over the movement of unmanned aircraft in Australian airspace—and in the skies of dozens of other nations. While DJI says its initiative is solely motivated by safety, there are concerns that drone flying restrictions could be easily exploited for other purposes, see eg 'Chinese Manufacturer Programs Phantom Drones with No-Fly Zones to Protect Australian Airports' <http://www.abc.net.au/news/2014-04-14/chinese-made-drones-programmed-with-no-fly-zones/5388356>.

[33] < <https://www.google.hu/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CCcQFjAC&url=https%3A%2F%2Fwww.whatdotheyknow.com%2Frequest%2F998%2Fresponse%2F1890%2Fattach%2F3%2F20080709ReplyLetter.doc&ei=pgY2VZ_3B8OgyAPX34KADw&usg=AFQjCNGVW_wMzDqNKXcUU3ykPxU3IeUh_w&bvm=bv.91071109,d.bGQ&cad=rja>; see also the Appendix for a listing of arrests and prosecutions in the UK.

advisers, is the national aviation regulator and air law whether national, regional, or international. This is set to change. The safety dividend, small size, portability and low cost of RPAs means that media companies and citizen journalists will themselves own and operate the vehicles directly. Such users will not only be more aware of the rules and regulations governing such activities, they will *have* to be so because they will be directly legally liable when things go wrong—as they inevitably will do. Generally speaking, currently, most aerial work is contracted out to third parties, typically companies using conventional, manned helicopters. Indeed, a significant milestone in the development of *aerial* photojournalism was the invention of the 'news copter'. In 1958, American John Silva, the 'father of helicopter journalism':

> converted a small helicopter into the first airborne virtual television studio. The KTLA 'Telecopter,' as it was called by the Los Angeles station where Mr Silva was the chief engineer, became the basic tool of live television traffic reporting, disaster coverage and that most famous glued-to-the-tube moment in the modern era of celebrity-gawking, the 1994 broadcast of O. J. Simpson leading a motorcade of pursuers on Los Angeles freeways after his former wife and a friend of hers were killed (Pool, 2012).[34]

Reactions to the deployment of helicopters in the Los Angeles area were analogous to the current reaction to RPAs:

> Lots of homeowners and a few orchestra conductors (who've walked off the Hollywood Bowl stage in protest) are tired of the noisy company of tourist, paparazzo, news, and police helicopters, their jet engines roaring and blades thwacking the night air . . . The imagery of a circling bird is appropriate. When a police helicopter works a crime scene, it follows a tight orbit, generally at three or four hundred feet for better observation, aided at night by million-candlepower searchlights. The lights, the engine noise, and the staccato of rotor blades biting into the air can feel menacing to anyone on the ground, law-abiding or not (Waldie, 2013).[35]

Thus, to the bodies of law that make up 'media law' should now be added air law and to the regulators that impinge on the activities of the media should now be added aviation regulators, which could be national, regional or international.

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[34] Bob Pool, 'John D Silva dies at 92; introduced news helicopter' <http://articles.latimes.com/2012/dec/07/local/la-me-john-silva-20121207>.

[35] D J Waldie, 'A Short History of the Intrusive Helicopter' <http://blogs.kcrw.com/whichwayla/2013/09/a-short-history-of-the-intrusive-helicopter>; <http://en.wikipedia.org/wiki/Telecopter>. The ACLU does think there is a difference between helicopters and drones, see J Stanley, 'We Already Have Police Helicopters, So What's the Big Deal Over Drones?' <https://www.aclu.org/blog/technology-and-liberty-criminal-law-reform/we-already-have-police-helicopters-so-whats-big-deal>. The issue of helicopter noise in the LA area is still a very live matter: see <http://lahelicopternoise.org/>.

RPAs, dronalism, and law: Selected legal issues[36]

Despite the journalistic focus of the Reuters Report, it acknowledges that, first and foremost, the media user of an RPA is operating an *aircraft*. Therefore, she or he must respect the rules of the air—and other aircraft in the national airspace: 'A fundamental concern over journalistic uses of RPAS is that major news events would produce a plethora of media drones, contesting for airspace with RPAS of emergency services and piloted aircraft. This would endanger not only the drones, but people in piloted aircraft and on the ground should collisions or other accidents occur.'[37] Further, the Report highlighted that for news executives, and, it should also be added, equally for citizen journalists: 'the regulatory aspects of civil aviation are central because those operating RPAS will have to comply with air regulations. If unmanned aerial vehicles are operated by journalists or others in news organisations they will need to be familiar with primary regulations to ensure . . . legal operation.'[38] To underscore this point, it is pertinent to note that the Singapore Legislature has begun (at the time of writing) consideration of a law to regulate RPAs' deployment, entitled, 'Unmanned Aircraft (Public Safety and Security) Bill (2015)'.[39]

The Reuters Report highlights many salient legal and other issues, *inter alia*:

- media use of RPAS will be considered 'aerial work purposes', therefore regulatory permission to fly will be legally required for media users in many countries;
- the principal aviation regulatory goal is *safety* and this will be balanced against the goal of RPAS deployment for media purposes;
- the fundamental regulations of aircraft airworthiness, pilot competency, and flight and radio operations apply to remotely piloted vehicles;
- the size and weight of the unmanned aircraft will determine which regulatory regimes apply;
- uses of aerial vehicles will create conflicts with law enforcement and emergency services—these are not new conflicts as they have previously existed for media helicopters and live broadcasts, but they are likely to produce new challenges that will require additional police – news media coordination.

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[36] On 8 October 2009, a symposium sponsored by John D Odegard School of Aerospace Studies & *North Dakota Law Review* was held <http://web.law.und.edu/News/f09/UAV09-Symposium.php>, resulting in 'Complying and Flying: Legal and Technical Issues Relating to the Operation of Unmanned Aerial Systems' (2009) 85(3) *North Dakota Law Review*.

[37] Reuters Report (n 2) 33; see, also 'EU Rules for the Safe Provision of Drone Services Need to be Developed Now' Riga Declaration on Remotely Piloted Aircraft (Drones) 'Framing The Future Of Aviation' (6 March 2015) <http://ec.europa.eu/transport/modes/air/news/doc/2015-03-06-drones/2015-03-06-riga-declaration-drones.pdf>; 'Drones Fly Over Final Four Crowds Downtown, Cause Security Concerns' <http://fox59.com/2015/04/07/drones-fly-over-final-four-crowds-causing-a-security-concern/>.

[38] Reuters Report (n 2) 20; how should this fact best enter the consciousness of RPA operators?

[39] See <http://www.parliament.gov.sg/sites/default/files/Unmanned%20Aircraft%20(Public%20Safety%20and%20Security)%20Bill%2013-2015.pdf>; <http://www.straitstimes.com/news/singapore/transport/story/parliament-new-regulations-drones-and-unmanned-aircraft-june-20150413>.

– use of RPAS will extend existing and create additional privacy issues for journalists that will require careful consideration of their uses lest they produce loss of journalistic credibility amongst the public;
– even if news organisations do not operate their own vehicles, they will increasingly be offered images from second parties and will need to consider ethical implications related to the conditions under which they were obtained by those parties;
– use of RPAS raises some issues of journalistic safety, especially when deployed in war zones.

Dronalism and the right to gather news

This chapter asserts and affirms the connection between deploying RPAs for the purpose of dronalism and the right of the public to receive information and ideas and the right to access communications technologies. Not surprisingly, the most robust advocacy for the right to use RPAs for this purpose can be found in the set of arguments originating in the USA and contained in the *amici* brief in the name of eighteen newspaper and magazine publishers, broadcast and cable television companies, wire services, website operators and non-profit journalists' associations presented in support of RPA operator Raphael Pirker. The Federal Aviation Agency was appealing a decision made by a National Transportation Safety Board Administrative Law judge in Pirker's favour.[40] At first instance, Piker, an aerial RPA photographer/operator, was fined 10,000 dollars for flying a camera-equipped model aircraft around the University of Virginia, which had commissioned him to take aerial footage of the campus using his quadcopter.[41] He successfully challenged the fine before an administrative law judge, who ruled that the FAA's stringent regulation of commercial drones was unenforceable because the agency had failed to adopt it through appropriate procedures.[42] The *amici* coalition argued that the judge's ruling was correct. They also contended that, because newsgathering is protected by the First Amendment, the federal government should not consider journalism to be a commercial use of the technology. Furthermore, they made a case for including the media in policy discussions that accompany the drafting of future

[40] See 'Brief of News Media *Amici* in Support of Respondent Raphael Pirker' <http://www.hklaw.com/files/Uploads/Documents/CaseBriefs/MediaLaw/Drones.pdf>; earlier, the US Congressional Research Service (CRS) published a report, 'Integration of Drones into Domestic Airspace: Selected Legal Issues', which contains a section entitled 'First Amendment and Newsgathering Activities'. Having considered other interests (eg privacy), the CRS counsels giving proper regard to: the public's countervailing concern in securing the free flow of information that inevitably feeds the 'free trade of ideas' <http://fas.org/sgp/crs/natsec/R42940.pdf>.

[41] <http://www.personal-drones.net/trappy-and-the-faa-fine-for-flying-over-the-university-of-virginia/>.

[42] <http://www.kramerlevin.com/files/upload/PirkerDecision.pdf>.

government UAS-related regulations.[43] The brief expresses the opinion that the FAA had applied (through ad hoc administrative actions rather than through properly promulgated rules) an unnecessarily overbroad and inadequately based policy restricting the use of unmanned aircraft for 'business purposes' in which it included—improperly in the *amici*'s opinion—the First Amendment protected activities of gathering and disseminating news and information. This has resulted in 'an impermissible chilling effect on the First Amendment newsgathering rights of journalists.'[44] The brief argues that using drones for dronalism is not conducting a business, but rather a protected First Amendment activity. Regarding the FAA's general ban on 'business' uses by RPAs, it states:

> The FAA's position is untenable as it rests on a fundamental misunderstanding about journalism. News gathering is not a 'business purpose': It is a First Amendment right. Indeed, contrary to the FAA's complete shutdown of an entirely new means to gather the news, the remainder of the federal government, in legislation, regulation and adjudication, has recognized that, in the eyes of the law, journalism is not like other businesses. The government in a myriad of measures has long accommodated the bedrock First Amendment principle that 'without some protection for seeking out the news, freedom of the press could be eviscerated' (*Branzburg v Hayes*, 408 US 665, 702 (1972)).[45]

In conclusion: what primarily differentiates dronalism from any other RPA application is that it engages the rights to freedom of expression, speech and the press, and specific elements thereof.[46] Thus, any ban must take into account and weigh in the balance this countervailing consideration of principle. This is not, in the present author's opinion, about justifying 'speaker's right(s)', but rather, the right(s) of the reader / viewer / audience to receive video or data information. The core right also engages the threshold right, namely, the right to access and use any communications technology as a condition precedent for newsgathering without which the right to receive information and ideas is meaningless. Just because drone journalism is neither a military nor state nor recreational use of an RPA, it is simply wrong to claim it is a commercial or 'business' use of an RPA. It is a conceptual confusion to conflate them. Deploying an RPA for the purpose of drone journalism prima facie engages the (human) right to

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[43] <http://www.hklaw.com/casestudies/Out-in-Front-on-Drone-Litigation/>. The FAA went on to win its appeal but the parties agreed a settlement to avoid further litigation, without constituting 'an admission of any of the allegations in the case or an admission of any regulatory violation' <http://www.team-blacksheep.com/docs/pirker-faa-settlement.pdf>.

[44] Brief (n 40) 6.

[45] ibid 7–8.

[46] See also Margot Kaminski, 'Up in the Air: The Free-Speech Problems Raised by Regulating Drones' <http://www.slate.com/articles/technology/future_tense/2014/11/faa_s_attempts_to_regulate_drones_could_have_first_amendment_problems.html>; Avery E Holton – Sean Lawson – Cynthia Love, 'Unmanned Aerial Vehicles: Opportunities, Barriers, and the Future of "drone journalism"' *Journalism Practice* (6 December 2014) <http://www.tandfonline.com/doi/abs/10.1080/17512786.2014.980596#.VIWgjk3KHmg>.

freedom of expression or constitutional right to free speech and, in particular, the right to pursue activities precedent to facilitating people's right to receive ideas and information. As has been said:

> a complete ban misunderstands journalism as a purely commercial activity rather than a constitutionally-protected right to gather and disseminate news, covered in the First Amendment . . . This overly broad policy [sic], implemented through a patchwork of regulatory and policy statements and an ad hoc cease-and-desist enforcement process, has an impermissible chilling effect on the First Amendment newsgathering rights of journalists (Cruz, 2014).[47]

Right to access a communications technology

The key claim of the chapter requires understanding that, as the CRS Report notes, what is protected is not only *forms* of speech or content, but also: 'conduct that is "necessary for, or integrally tied to, acts of expression" . . . other conduct that is not expressive in itself, but is "necessary to accord full meaning and substance to those guarantees."'[48] RPAs deployed with payloads such as electro-optic cameras to relay video data directly or indirectly to the public should be understood as 'communications technologies'.[49] The RPA is simply, as noted, the 'donkey' or platform facilitating the carriage of a camera (or other sensors)[50] which records and/or relays images to a ground receiver/station or live streams them. In another situation, Robin Elizabeth Herr has identified:

> a potential model to prevent undemocratic interferences of uses of communication technology such as Internet and mobile [sic] . . . based on the case law of the European Court of Human Rights . . . . *Khurshid Mustafa and Tarzibachi v Sweden* supports the adoption of that [sic] technology without unjustified restriction by the state or private individuals...no matter what type of communication technology is used, there exists a general right of access to all forms of information.[51]

She concludes: 'Human rights scrutiny is a necessary component of any effort to ensure that communication technology can be effectively adopted and used.'[52]

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[47] Diego Cruz, 'Journalism in the Americas' <https://knightcenter.utexas.edu/blog/00-15587-us-media-defend-drone-journalism-federal-government-arguing-freedom-press>.

[48] Brief (n 40).

[49] RPAs are an instance of what has been called ENG (electronic news gathering), see Jane McGrath, 'What Is Electronic News Gathering?' <http://people.howstuffworks.com/electronic-news-gathering.htm>.

[50] Alyssa Mesich, 'How Sensor Reporting Helps Journalists Find Data Where None Exist' <http://ijnet.org/blog/how-sensor-reporting-helps-journalists-find-data-where-none-exist>.

[51] Robin E Herr, 'Can Human Rights Law Support Access to Communication Technology?' (2013) 22(1) *Information and Communications Technology Law* 1–13. Herr, it must be emphasised, does *not* deal with RPAs in the article, there being, as yet, no specific jurisprudence involving such vehicles.

[52] ibid.

Privacy and data protection

Many, if not most, non-technical discussions about RPAs—and also in the context of dronalism—focus intensively on the topic of 'privacy' and/or the RPA operator's *putative* engagement with data protection rules.[53] The general issue of privacy is addressed in the Reuters Report and it is acknowledged that there are not only strictly legal concerns:

> Use of RPAS will extend existing and create additional privacy issues for journalists that will require careful consideration of their uses lest they produce loss of journalistic credibility amongst the public . . . issues for journalists to consider . . . go beyond the legal issues of privacy invasion. These involve ethical concerns related to the building and maintenance of trust between the public and news organisations and the credibility of journalism . . . Some journalists are concerned that using RPAs may place them on the wrong side of the privacy / surveillance debate—especially if the state employs them and unethical journalists or photographers use them in ways to which the public objects. This, it is feared, could lead to the perception that journalists are part of the surveillance state and harm the credibility of journalism and news organisations.[54]

The UK Information Commissioner's CCTV Code of Practice has even introduced the notion of 'collateral intrusion': the unnecessary and inadvertent recording of individuals and where recording is inappropriately continuous.[55] Further, operators should 'ensure that the whole system is compliant', ie consider matters connected with data processing *in toto*, such as deploying a device with restricted vision; encrypting data; safe storage of captured data; restricting access to it; not retaining it overly long and having a safe system of disposal in place. Fairly processing data requires consideration, the Code states, of issues of transparency and publicity of operation.

The overflight aspect of RPAs deployment, eg over backyards, gardens, or rooftops is not at all novel in principle. Ever since aerial balloons were invented, the possibility of being able to see into people's premises has been possible.[56] Contemporary helicopters can carry photographic equipment of enormous power and can hover even

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[53] 'Privacy' is itself a notoriously slippery concept: J Posner has recently voiced the opinion that 'Much of what passes for the name of privacy is really just trying to conceal the disreputable parts of your conduct. Privacy is mainly about trying to improve your social and business opportunities by concealing the sorts of bad activities that would cause other people not to want to deal with you.' <https://firstlook.org/theintercept/2014/12/08/bad-shameful-dirty-secrets-u-s-judge-richard-posner-hiding-demand-know/>; see also 'Domestic Drones and Privacy: a Primer' (Congressional Research Service Report) <http://fas.org/sgp/crs/misc/R43965.pdf and http://fas.org/blogs/secrecy/2015/04/domestic-drones/>.

[54] Reuters Report (n 2) 7, 32.

[55] See, 'In the Picture: A Data Protection Code of Practice for Surveillance Cameras and Personal Information' <https://ico.org.uk/media/for-organisations/documents/1542/cctv-code-of-practice.pdf>; its example is: 'a business may purchase UAS to monitor inaccessible areas, such as a roof to check for damage. Its use should be limited to that specific function and recording should not occur when flying over other areas that may capture images of individuals.'

[56] Of historical interest is the achievement in 1906 of aerial photography of the devastation wrought by the San Francisco fire, see <http://robroy.dyndns.info/lawrence/landscape.html>.

up to a kilometre away from the subject and still capture recognisable images. More recently, there have been the problems encountered by Google's land-based and satellite-imagery mapping operations which have raised concerns that images of persons not in a public space or engaged in news-worthy activities might be captured.[57] So, any *specific or particular* focus on RPAs has to be especially justified, particularly any RPA-specific laws. Baroness O'Cathain, the Chair of the House of Lords Inquiry and report into 'Civilian Use of Drones in the EU',[58] recently stated:

> feedback from the public has so far been more concerned with privacy and data protection, rather than with the imminent danger of being hit by a falling drone. *However, after deliberation, the committee decided existing laws into data protection and privacy in the UK are sufficient to cover the operation of UAVs by both civilian and commercial users* . . . The police didn't think that it would be required. We're relying on people's common sense about this. The privacy law says that you can't go up and peep into people's windows, so what applies to people on foot equally applies to drones as it's the same law . . . Above all, we want things to be flexible. If it's a new technology and we're pushing the boundaries on this, the last thing we want to do is overwhelm people with regulations and tell them that they can't do this and that (emphasis added).[59]

Two positions are maintained in this chapter: (a) whatever may be the merits or otherwise of the general pro-privacy or data protection points noted above, the general arguments do not engage the relevant and appropriate limitations in the context of dronalism and (b) any legitimating argument(s) for deploying RPAs is not, in the author's opinion, intended to extend to 'paparazzism' (eg photographing the Duchess of Cambridge topless)[60] and is only intended to embrace responsible journalism. Indeed, currently, there is little *evidence* of current widespread use by the paparazzi of RPAs:

> To date there's very little evidence that paparazzi in Australia, the United States, or the UK have taken to this new technology with any great enthusiasm, but the potential exists. Typical multi —rotors cannot efficiently lift the big heavy lenses that most paparazzi prefer for 'stand—off' shots, and if a drone can get close enough to a suitable target, the noise generated might remove the elements of discretion and surprise. The development of quieter drones and better digital photography may remove that element however. Isolated paparazzo use of RPAS is occurring,

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[57] See <http://en.wikipedia.org/wiki/Google_Street_View_privacy_concerns#References>; the privacy implications of 'drones' have been discussed in several US Congressional hearings over the past two years, yielding these published hearing volumes: House Transportation and Infrastructure Committee, 'US Unmanned Aircraft Systems: Integration, Oversight, and Competitiveness' (10 December 2014); House Judiciary Committee, 'Eyes in the Sky: The Domestic Use of Unmanned Aerial Systems' (17 May 2013); Senate Judiciary Committee, 'The Future of Drones in America: Law Enforcement and Privacy Considerations' (20 March 2013).

[58] See <http://www.publications.parliament.uk/pa/ld201415/ldselect/ldeucom/122/12202.htm>.

[59] <http://www.ibtimes.co.uk/house-lords-recommends-imposing-strict-restrictions-drone-flights-uk-1490518>.

[60] <http://www.bbc.co.uk/news/uk-19604535>; the progress of the criminal suit against French magazine *Closer* for invasion of privacy is not known to the author.

> however, and was featured in a 2010 documentary *Sharks of the French Riviera*, which recorded their exploits in tracking Paris Hilton and other American celebrities at the Cannes Film Festival and along the beach resorts of southern France.[61]

The dronalistic use was well captured by the International Working Group on Data Protection in Telecommunications' *Working Paper on Privacy and Aerial Surveillance* which states '(a) the use of aerial surveillance should be limited to specific purposes (eg searching for missing persons, border surveillance, legitimate private purposes such as access to information by journalists).'[62]

The notion of and a defence of 'responsible journalism' has recently been floated by the Australian Law Reform Commission (ALRC):

> Surveillance *will sometimes be necessary and justified* when conducted in the course of responsible journalistic activities . . . . Media and journalistic activities offer significant public benefit, and these activities may at times justify the use of surveillance devices without the notice or consent of the individuals placed under surveillance . . . a defence of responsible journalism should be suitably constrained. The defence should not, for example, allow unrestricted freedom to carry out surveillance in circumstances which are not journalistic in nature, where the public interest in a matter is trivial, or where the matter is merely of interest to the public or for the purposes of gossip (emphasis added).[63]

Actually, the defence requires two distinct aspects: 'Consideration should be given to providing distinct responsible journalism defences for the distinct offences of, first, the installation or use of a surveillance device, and second, the communication of information obtained through surveillance.'[64] But, the dronalism issue is not whether someone's putative right to respect for their privacy may have been infringed. The question is: in certain, specific circumstances *is it a defensible infringement*, ie does it come within the scope of a legal defence or exemption? The ALRC states:

> some legitimate uses of surveillance devices by journalists may place journalists at risk of committing an offence under existing surveillance device laws. Responsible journalism is an important public interest and should be protected. Journalists and media organisations should not be placed at risk of committing a criminal offence in carrying out legitimate journalistic activities. *The ALRC has therefore proposed a 'responsible journalism' defence to surveillance device laws*. This defence should be confined to responsible journalism involving the investigation of matters of public concern and importance, such as the exposure of corruption [emphasis added].[65]

This chapter asserts the legitimacy of the deployment of RPAs in the pursuit of dronalism, in which context any protection for privacy interests must be balanced

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61 Reuter's Report (n 2) 31.

62 <http://www.datenschutz-berlin.de/attachments/996/675.47.25.pdf?1385047665>.

63 See 'Serious Invasions of Privacy in the Digital Era' (ALRC Report 123), ch 14, <https://www.alrc.gov.au/publications/14-surveillance-devices/responsible-journalism-and-public-interest>.

64 ibid.

65 ibid.

against the public interest in freedom of expression and the right to receive information and ideas. Whilst there may indeed be an infringement of X's privacy *it may well be justifiable on the balance of interests*. As the Professional Society of Drone Journalists has stated:

> regulators must consider deeply whether certain privacy-minded regulations would unjustifiably interfere with the duty of the press to inform the public through their use of RPAS to capture and disseminate knowledge about critical events, or to uncover malfeasance and injustice. RPAS, even at this early stage in development, have already proven effective in uncovering contamination of public waterways, revealing the impacts of natural and man-made disasters, and providing documentation of important political movements. Overly burdensome regulations not only would hamper the ability for journalists to report on these issues, but also would restrict the public from receiving vital information . . . Therefore, it would behoove [sic] the [European] Commission to consider an additional priority to the ones mentioned: the right for the press and public to have fair and complementary access to the sky.[66]

In its response to the House of Lord's Inquiry Report,[67] the UK Government accepted that 'journalists should be able to reveal a wrongdoing', but it added: 'Journalists often push barriers and go further than that', and, there is a risk that 'paparazzi' could use RPAS to intrude on an individual's privacy. A consultation with the public should therefore include a discussion about how to get the 'balance right between the need to reveal wrongdoing while at the same time ensuring that people have the right to privacy in their own gardens or houses' (n 251).

The Government's response is, in the author's opinion, problematic: the elision of journalism and paparazzism is a standard move and is avoided by the approach taken in this chapter. The Lord's Conclusions, at Paragraph 194 of their Report, suggest that 'While journalists can use RPAS to enhance the reporting of important events, they can also be used to invade people's privacy [and that] . . . UK media regulators should initiate a public consultation on the appropriate use of RPAS by the media, with a view

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[66] 'Written Evidence to the House of Lords Inquiry' <http://www.scribd.com/doc/242974459/PSDJ-Response-to-House-of-Lords-Inquiry-on-RPAS#scribd>; the examples cited are accessible at <http://www.dronejournalism.org/news/2014/5/plants-blood-dumping-uncovered-by-drone-photos-will-go-without-felony-charges>; <http://www.dronejournalism.org/news/2014/2/flooding-in-south-western-britain-captured-by-low-flying-drone>. See also the recent extension of privacy law in California, Assembly Bill No 1256, which fails to explicitly contain a First Amendment newsgathering exception *on the face of the law*, <http://bit.ly/1Ov3ZwQ>. Concern was expressed in a letter by the National Press Photographers Association, see <http://blogs.nppa.org/advocacy/files/2013/04/AB-1256-1356-Oppose-Letter-04-22-13.pdf>: 'We believe the creation of a civil cause of action for the "constructive invasion of privacy" is overly broad and vague and imposes greater civil penalties upon otherwise protected forms of speech and expression . . . We are also concerned that remedies for invasion of privacy and trespass are already properly addressed by current California statutes and that statutory and punitive damages will further chill free speech and create uncertainty about liability . . . Additionally, the definition of "commercial purposes" *fails to distinguish those acts done for valid newsgathering purposes* and in fact penalizes publishers and broadcasters along with visual journalists and members of the public with a camera.' (Emphasis added.)

[67] <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/417464/drones-9054-web.pdf>.

to providing clear guidance.' This is doubly problematic, suffering from (a) a failure to appreciate that the so-called invasion of privacy may *in casu* be justifiable, and (b) the second Conclusion suffers from the inherent implausibility of organising any such public discussion with any degree of credibility: how on earth would any 'clear guidance' on the 'appropriateness' of RPAs use by the media emerge through such a process?

Insofar as there is a concern that (some) RPAs could be tiny or silent enough to facilitate unnoticed video or audio capture, the 2015 majority judgement of the European Court of Human Right (ECtHR) in *Haldimann and Others v Switzerland* is of significance for the legitimate practice of covert, responsible journalism.[68] The case concerned an examination of the use of hidden cameras by journalists. The person being filmed was targeted as a representative of a particular profession, rather than in a personal capacity. The purpose of the journalistic activity was to expose malpractices in the insurance sector—a clear matter, the Court opined, of public interest. The ECtHR found that the journalists' criminal conviction by the domestic courts and an order to pay a number of small fines violated their right to freedom of expression as guaranteed by Article 10 of the European Convention of Human Rights. As usual, the facts *in casu* are crucial: the case was decided based on particular elements and it is not clear whether the ECtHR would support the use of hidden cameras if there were alternative methods to obtain the information. But, the case continues the line of reasoning set out in *Axel Springer*[69] that while 'a private individual unknown to the public may claim particular protection of his or her right to private life, the same is not true for public figures'. In *Haldimann*, the ECtHR found the infringement of the broker's privacy justified, even though he was not a public figure: 'Since his face and voice had been disguised and the documentary focused not on him as an individual, but intended to criticise insurance practices, the interference had not been serious enough to override the public interest.'[70]

Apart from resisting the conflation of 'responsible journalism' and 'paparazzism', this chapter urges that the salient issue is not the capture of personal information—but, as the English Court of Appeal has recently decided—it is the *misuse of private information* which is the real issue, and justifies that being re-characterised as a separate,

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[68] *Haldimann and Others v Switzerland* (App no 21830/09); the third-party intervener submission, <http://www.mediadefence.org/sites/default/files/files/Haldimann%20v%20Switzerland_MLDI%20intervention.PDF>; the now-defunct UK Press Complaints Commission asserted a 'right to subterfuge' see Press Complaints Commission, 'PCC Report On Subterfuge And Newsgathering' (2007) <http://www.pcc.org.uk/assets/218/PCC_subterfuge_report.pdf>; the PCC has been replaced by IPSO.

[69] *Axel Springer v Germany* (App no 39954/08); in *Haldimann and Others* (n 68), the Court revisited the six criteria which it had established in order to weigh freedom of expression against the right to private life: contributing to a debate of general interest, ascertaining how well-known the person being reported on is and the subject of the report or documentary, that person's prior conduct, the method of obtaining the information, the veracity, content, form and repercussions of the report or documentary, and the penalty imposed.

[70] See 'ECtHR Vindicates Hidden Camera's Role in Watchdog Journalism' <http://www.mediadefence.org/blog/ecthr-vindicates-hidden-camera%E2%80%99s-role-watchdog-journalism#.VSPmGU3Qfmg>.

independent common law tort.[71] Finally, the English case of *Bernstein of Leigh v Skyviews & General Ltd* is worth citing.[72] The case is also about the tort of trespass: Lord Bernstein claimed that Skyviews[73] (a company specialising in aerial photographs of properties) wrongfully entered his airspace to take an aerial photo of his house. He said it was taken without his consent and was a gross invasion of his privacy. He demanded that the prints and negative should be handed over to him or destroyed. Skyviews admitted they took the photo, but said they did not go into Bernstein's airspace, they took it while over adjoining property and also said that if they did fly over his land, they had implied permission to do so as no landowner has rights to an unlimited height (Bernstein relying on the now outdated maxim, *Cuius est solum, eius est usque ad coelum et ad inferos*). Mr. Justice Griffiths held that Skyview's aircraft did not infringe any rights of Bernstein's airspace, which could only extend to what was ordinarily enjoyable and usable—thus, there was no trespass. However, the judge also said:

> At the same time, however, the present judgment should not be understood as deciding that in no circumstances could a successful action be brought against an aerial photographer to restrain his activities. The judgment was far from saying that if a plaintiff was subjected to the harassment of constant surveillance of his house from the air, accompanied by the photographing of his every activity, the courts would not regard such a monstrous invasion of his privacy as an actionable nuisance for which they would give relief.[74]

So, the stated criteria for a finding of invasion of privacy should be: 'harassment of constant surveillance' 'accompanied by the photographing of his every activity'. This, it is submitted should severely limit the applicability of the ICO's notion of intrusion of privacy by RPAs: in the first place, no legitimate RPA operator seeking to make a living using RPAs has the slightest intention or interest in intentional surveillance and any collateral intrusion is just that—inadvertent and completely irrelevant to the data sought by the purpose of the overflight, usually for industrial or agricultural reasons. If there is capturing of personal data this is invariably with the subject's consent, who is the commissioner, eg a wedding photo.[75]

In sum, there are a number of problems with the claim that the deployment of an RPA is *inherently* or *essentially* problematic because it *might* constitute an intrusion on civil liberties, namely, a threat to privacy; or generally that it constitutes a 'spy in

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[71] 27 March 2015, the England and Wales Court of Appeal (EWCA) handed down a historic judgment in *Google Inc. v Vidal-Hall & Others*, [2015] EWCA Civ 311.

[72] *Bernstein of Leigh v Skyviews & General Ltd*, [1978] 1 QB 479.

[73] <http://www.skyviewsarchives.co.uk/>.

[74] ibid.

[75] As the ECtHR stated in *Axel Springer* (n 69): the right to protection of reputation is a right which is protected by Article 8 as part of the right to respect for private life. In order for Article 8 to come into play, however, an attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life.

the sky'.[76] A specific problem with drone journalism using, eg a nano- or micro-RPA, is alleged to be that the subjects of investigation might not realise that they are being surveilled in a RPA-specific manner, owing to the smallness of the RPAs and/or other technical capacities, eg silence, mobility, and endurance. This has recently been asserted in the Hong Kong Office of the Privacy Commissioner for Personal Data's Guidance as making the use of certain types of RPAs especially problematic:

> drones can be far more privacy intrusive than CCTV in view of their unique attributes: Being small, portable, mobile and cheap, they can track an individual's activities more persistently over time and in places that are not expected while covering a wider area; They are a relatively covert form of surveillance as they are mobile and in practical terms, it is difficult for the public to know who the operators are; and when equipped with a full range of advanced surveillance technologies such as telephoto lens and infrared sensors, they would acquire sophisticated abilities such as capturing data from distances and through objects, and with a fine level of detail. To eliminate or reduce the harmful effects of these highly privacy intrusive features, users of drones should be particularly mindful of the need to respect people's privacy.[77]

But, almost as if in a throwaway afterthought, the section concludes: 'The intrusion on privacy can only be justified *if it is proportional to the benefit to be derived*' (emphasis added), thus acknowledging what is the key claim of this section that there are uses of RPAs which may infringe privacy but can be justified in so doing.

In the context of pursuing responsible journalism, when deploying RPAs, any right to respect for private and family life should give way to the public interest in the public's right to be informed. In any case, no general privacy-protecting regulation could be useful as it will inevitably be overbroad and general, basing regulations on hypothetical or imaginary 'threats' or 'harms'. Indeed, much of the RPAs discourse contesting their deployment is fuelled by the so-called precautionary principle.[78] This approach simply ignores or discounts those who do not think RPAs do constitute (much of) a threat. One might ask, who is the 'we' who objects? There are significant socio-economic discontinuities between the discourse communities. For instance, low rental and less well-off communities welcome the protection that low-flying RPAs could afford to stem the incidence of petty crime and vandalism (widely acknowledged to be of real moment and concern to the victim, often elderly). If there is a 'problem' it is not RPAs *per se* or even the nature or technical capacity of the payload, but only if there is any intentional, systematic *misuse* of personal information or data constituting 'serious' invasions of privacy. Any accidental, incidental or inadvertent acquisition of personal data quickly disposed of (it would just clutter up an operator's system) cannot seriously

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[76] See <http://www.pf.uni-lj.si/media/final.programme.spy.in.the.sky.copy.pdf>.

[77] See 'Guidance on CCTV Surveillance and Use of Drones' <www.pcpd.org.hk/english/resources_centre/publications/files/GN_CCTV_Drones_e.pdf>. Most RPAs are nothing like that depicted in the Guidance, being normally quite visible and rather noisy!

[78] See Adam Thierer, 'The Precautionary Principle in Information Technology Debates' <http://techliberation.com/2011/04/04/the-precautionary-principle-in-information-technology-debates/>.

be said to give rise to any intrusion of privacy concern. Finally, prioritising privacy is a soft and easy concern and does not in principle raise any issues not already covered in general and human rights law or in the context of manned aircraft. Privacy freaks get freaked out about everything's potential for infringing 'privacy', not just RPAs.[79] More seriously, such an obsessional focus loftily ignores the grown-up, serious issues involved in deployment of RPAs, namely, how to safely integrate them into national non-segregated airspace; certification; airworthiness, pilot training, Sense and Avoid, spectrum allocation, command and control processes, security of data links, liability, and third-party insurance.[80] Even subterfuge *is* justifiable, albeit 'only when there are grounds in the public interest for using it. Undercover investigative work has an honourable tradition and plays a vital role in exposing wrongdoing. It is part of an open society. But it risks being devalued if its use cannot be justified in the public interest.'[81] But what the privacy and anti-subterfuge lobby needs to understand is—it can be justifiable.

Third-party images

As the Reuters Report notes,

> News organisations will increasingly be offered photographs and video from private sources, raising questions about the authenticity and context of materials provided by other UAV operators, as well as the ethics of obtaining images in ways in which journalists might not otherwise participate . . . The use of RPAS sometimes violates flight regulations, may constitute trespass, might be the result of privacy invasion, or conflict with other ethical concerns, so journalists need to be aware of and consider these in choices whether to use aerial images from other parties.

Robert Picard, a co-author stated that journalists [and media organisations]

> are increasingly offered images from third parties and this is going to create a lot of ethical issues, because we need to think about the conditions under which those visual images were obtained. Were they obtained by violating laws? Were they obtained by breaking expectations of privacy?[82]

Is the media organisation using such images implicated in any liability, which may be a complex mix of the legal and the ethical: 'In Australia, if UAV images offered to the media are gathered illegally, CASA has indicated that the agency will investigate the drone operator, not the broadcaster or media outlet.' However, this may not be the case in all jurisdictions. An example arose in the UK:

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79 Please see fn. 53.

80 'Privacy vs UAS' <http://www.uasmagazine.com/articles/1054/privacy-vs-uas>.

81 See Press Complaints Commission (n 68) para 6.1.

82 <http://www.frontlineclub.com/exploring-new-technology-with-drone-journalism/>.

> a photographer from Lancashire [accepted] a caution for using a UAV for commercial gain without permission. *The photographer had sold footage of a school fire taken from his quadcopter to media organisations*, even though he did not have authority from the CAA to operate the device commercially. Anyone using unmanned aircraft for 'aerial work' requires a 'permission' from the CAA to ensure safety standards are being adhered to and the operator is fully covered by indemnity insurance' (emphasis added)[83]

Recently, the FAA has issued new guidance regarding 'Aviation-Related Videos or Other Electronic Media on the Internet.' It notes that

> There are an escalating number of videos or other electronic media posted to the Internet which depict aviation-related activities. Some of these posted videos may depict operations that are contrary to 14 CFR, statute, or safe operating practices . . . UAS videos, in particular, are increasingly appearing on the Internet

Crucially, any enforcement proceedings or action should proceed against the RPA operator and '[aviation safety] inspectors *have no authority to direct or suggest that electronic media posted on the Internet must be removed*' (emphasis added).[84]

Endnote

Even if RPAs are legally permitted to fly for the purpose of drone journalism—whether on an ad-hoc, case-by-case basis or in virtue of a general or sectoral permission, opposition, concerns and challenges are continually expressed in the name of 'civil liberties', most usually the so-called 'right to privacy'. It should be noted that the paradigmatic tone is—more often than not—of the fear-mongering and 'what if' variety, eg

> the next privacy *scandal* in waiting is the story of drones. Not military drones, but increasingly widespread use of drones for agriculture, disaster areas and emergencies, archaeology, forestry and property management, among others . . . Drones are banned in London and can't be used below a certain height in residential areas. But how many uses could there be for a small, silent, fast, remote-controlled drone? *How long before* the first sunbathing politician is snapped on holiday? If the public is banned from a venue, or refused access to private land, or if a property is under siege from journalists, *how long before* a drone is used for high-quality aerial video?[85] (Emphasis added.)

Yet, at best, the interests asserted by this antagonistic lobby are simply *competing* or *conflicting* interests. Competing values or interests are just that—competing. The UK

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[83] <http://www.caa.co.uk/application.aspx?appid=7&mode=detail&nid=2348>.

[84] <https://www.faa.gov/documentLibrary/media/Notice/N_8900.292.pdf>.

[85] See, Jemima Kiss, 'Worried About Your Privacy? Wait till the Drones Start Stalking You' <http://www.theguardian.com/technology/2014/feb/09/privacy-concerns-google-streetview-facebook-drones>.

House of Lords (now the UK Supreme Court) identified the correct approach when rights compete, eg the right to gather information to facilitate the public's right to receive information on the one hand and a right to respect for another right, *in casu*, someone's private and family life on the other:

> First, neither . . . has *as such* precedence over the other. Secondly, where the values . . . are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each.[86]

Thus, in any given fact pattern or situation it can be accepted that there may well be an infringement of X's privacy. But, *in casu*, it may be *justifiable* because the appropriate balancing exercise should in that circumstance give pre-eminence to the right to, eg the public interest in freedom of expression (meaning, the public's right to receive information on a topic or debate of general public significance). Simply asserting that some activity constitutes an infringement of privacy is not *per se* a conclusive, knock-down argument, but the beginning of a complex exercise weighing competing interests and values. What needs to be foregrounded in the tension between pro-privacy restrictionists and pro-dronalism RPAs deployers is the relevance of the exemption, or defence, for activities in pursuit of newsgathering in the interest of an informed public.[87]

The key claim of this chapter is that the fundamental demands of freedom of expression in a democratic society, and in particular the public's right to receive information, entail that the default position warrants the use of RPAs as 'flying cameras' in the pursuit of dronalism.[88] Any restriction(s) can only be exceptional: for a proper, legitimate aim pursued through a very narrowly and precisely crafted exception, for a pressing social need and necessary in a democratic society.[89] Such is the fundamental role of a free and responsible press in a democratic society that any challenge not only to publishing information but also to the *exercise of the means to realise such*

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[86] *Re S (a Child),* [2003] EWCA Civ 963.

[87] In 1759, Peter Forsskal wrote: 'Finally, it is also an important right in a free society to be freely allowed to contribute to society's well-being. However, if that is to occur, it must be possible for society's state of affairs to become known to everyone, and it must be possible for everyone to speak his mind freely about it.' *Thoughts on Civil Liberty*, para 21.

[88] See eg 'For Local TV News, There is Revolution in the Air' <https://www.minnpost.com/media/2015/04/local-tv-news-theres-revolution-air>; 'Experts Shed Light on Innovations in Newsrooms and Drone Journalism' <http://bit.ly/1HztE5w>.

[89] *Pedro Rivera v Brian Foley, Edward Yergeau, and Hartford Police Department*, No 3:14-cv-00196 (VLB); 'No Drone Surveillance of Crime Scene (Even From 150 Feet Above), Police Say' <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/30/no-drone-surveillance-of-crime-scene-even-from-150-feet-above-police-say/>; see also <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/04/10/n-y-court-legal-to-surreptitiously-photograph-people-in-their-homes-and-sell-those-photos/>; English context: 'Police Force Accepts PCSO Was Wrong to Stop Journalist Photographing Accident Scene' <http://www.pressgazette.co.uk/content/police-force-accepts-pcso-was-wrong-stop-journalist-photographing-accident-scene?utm_medium=email&utm_campaign=2015-03-31&utm_source=Press+Gazette+-+Daily>.

publication must necessarily overcome a very high—and judicially tested—threshold, including the question of whether the substance of restrictions on flying in certain airspaces and the process of their adoption are lawful, legitimate and proportionate.

Also, with respect to data protection, the UK Information Commissioner's Office informed the Inquiry conducted by the House of Lords into 'Civilian Use of Drones in the EU'[90] that Section 32 of the (current) UK Data Protection Act contained an exemption for responsible journalism, so that '[i]f RPAS are being used to investigate matters of serious public concern and to comply with the data protection law would stand in the way of that, there is an exemption.' (n 248). In that spirit, English lawyer Peter Lee has suggested that:

> The authorities should consider recommending a data protection and airspace permission exemption for rapid response RPAS journalism similar to the exemption for journalism, art and literature to protect freedom of expression incorporated in the UK by s 32 of the Data Protection Act 1998. If this particular developing area of rapid response journalism by RPAS is ignored then irresponsible, amateur cameramen will, in all likelihood, attempt to take footage anyway and try to sell it to news agencies. This will result in significant risk of physical accidents and privacy concerns.[91]

The big picture, however, is that aviation regulators will have to understand and come to terms with the fact that their decisions—in this context, who, if anyone, is permitted to fly and under what conditions to carry out responsible journalism—will eventually be met by a challenge using human rights law and jurisprudence concerning freedom of expression. Conversely, when media companies, citizen journalists (and content producers) deploy RPAs, the new tool in the newsgathering toolbox, in particular for the professional media lawyer, becomes aviation regulation and law; and when aviation authorities regulate media organisations or journalists (including citizen journalists), the new tool in their tool box is media law and the principles underpinning it.

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[90] Civilian Use of Drones in the EU Report (n 58); concern has been expressed whether the exemption contained in the forthcoming GDPR will be sufficiently robust, see, <http://www.ifj.org/fileadmin/images/EFJ/EFJ_documents/Press_Freedom/20141104_press_publishers_and_journalists_comments_on_DAPIX_text_24_Oct_2014.pdf>; 'Afraid of Data Protection? Become a Journalist' <http://www.scl.org/site.aspx?i=ed41698>. The general tenor of the Government's response is that it seems to oppose lots of RPAS-specific measures, especially outside aeronautical regulation as well as also taking a pro light touch regarding aeronautical regulations, see <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/417464/drones-9054-web.pdf>, all of which is consistent with its current 'cut red tape' message (but the prospect of a change of government looms at the time of writing).

[91] See <http://dronelaw.blogspot.co.uk/2015/03/the-recalcitrant-reports-from-lords.html>; 'Afraid of Data Protection? Become a Journalist' (n 90).

Air law is poised to become the new area of expertise for media lawyers and they will need to become used to and adept at dealing with aviation regulators, nationally, regionally, and globally requiring understanding an unfamiliar culture—which should certainly be respected but also challenged where appropriate.

Appendix: UK arrests and prosecutions[92]

Robert Knowles, 46, was found to have flown his homemade aircraft into restricted airspace over a nuclear submarine facility. He also flew his drone, which was equipped with a video camera, too close to a vehicle bridge in an illegal manoeuvre. He was charged with: (1) Flying a small unmanned surveillance aircraft within 50 meters of a structure (Article 167 of the Air Navigation Order 2009) and (2) Flying over a nuclear installation (Regulation 3(2) of the Air Navigation (Restriction of Flying)(Nuclear Installations) Regulations 2007). He was fined £800 at Furness and District Magistrate Court following the prosecution by the UK Civil Aviation Authority (CAA), who said the case raised important safety issues concerning recreational flying of unmanned aircraft. The CAA was also awarded costs of £3,500.[93]

A man who flew a small unmanned aircraft over Alton Towers, endangering the safety of the theme park's customers, was found guilty of two separate charges at Stafford Magistrates Court. The court heard Mark Spencer, 34, had flown his quadcopter device over a number of rides at the Staffordshire attraction on 9 November 2013, bringing it within close proximity to people as he filmed the course of the flight using an onboard camera. The video was subsequently posted on YouTube. He was charged with (1) Not maintaining direct, unaided visual contact with a small unmanned aircraft Articles 166(3) and 241(6), Air Navigation Order 2009 and (2) Flying a small unmanned surveillance aircraft over or within 150 metres of any congested area Articles 167(1), 167(2)(a) and 241(6), Air Navigation Order 2009. Magistrates fined Mr Spencer £150 for each offence (£300 total) and ordered him to pay a contribution towards the CAA's costs of £250.[94]

Eddie Mitchell, 49, a freelance photojournalist was arrested while flying a camera-equipped drone taking images relating to a fatal fire. He was held on suspicion of a breach of the peace and later freed without charge after more than five hours in police

[92] See also 'Drones and the Law' <http://www.copterdrones.co.uk/Articles.asp?ID=255>.

[93] See n 83; see also Benjamyn Ian Scott, 'The First UK Conviction for the Illegal Use of an Unmanned Aircraft and How It can Help Improve Regulation Within the EU' <http://www.lslex.com/bin/The_Aviation__Space_Journal_Year_XIV_no_1_January_March_2015.pdf>.

[94] <http://www.caa.co.uk/application.aspx?catid=14&pagetype=65&appid=7&mode=detail&nid=2364>.

custody. His aircraft was, however, held in the possession of the police. A controversial aspect of the incident was that the police officers attempted to wrest the operating equipment and land the aircraft themselves.[95]

A 42-year-old man from Nottingham has, today, Tuesday, 15 September 2015, been convicted of illegally flying drones over buildings and congested areas. Nigel Wilson, 42 (02.11.1972), of Rockingham Grove, Bingham, Nottingham, pleaded guilty to a total of seven offences contrary to sections 166 and 167 of the Air Navigation Order 2009, having already pleaded guilty to two offences at a previous hearing on 7 May. He was sentenced to pay a fine of £1,800 and to pay £600 in costs. A Criminal Behaviour Order was also issued, with conditions that he is not allowed to purchase, own or fly any drones nor assist any other person in using drones for the next two years. Wilson illegally flew his unmanned 'drone' aircraft over various football stadia across England and buildings in central London, where he either had no direct sight of the craft, flew the craft over congested areas, or where the craft was flying within 50 metres of the buildings - all offences under the Air Navigation Order, 2009. This is believed to be the first police and Crown Prosecution Service (CPS) led successful prosecution of its kind in the UK.[96]

Finally, outwith the UK, it should be noted that the Dutch Journalists Association and a photojournalist are challenging the Dutch rules on drones in the Hague District Court, arguing that they are discriminatory against commercial operators such as media. At the time of writing, this action is ongoing.[97]

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[95] <http://www.theguardian.com/world/2014/dec/31/photojournalist-police-arrest-drone-complaints; http://www.theguardian.com/uk-news/2014/dec/31/drone-photojournalist-arrested-gatwick-aiport-near>.

[96] http://news.met.police.uk/news/man-convicted-of-drone-offences-129339

[97] http://www.telegraaf.nl/tv/nieuws/binnenland/23923075/__Rara_welke_drone_is_strafbaar___.html

Dirk Voorhoof

Freedom of journalistic newsgathering, access to information, and protection of whistle-blowers under Article 10 ECHR and the standards of the Council of Europe

Introduction[1]

Some 33 years ago, the Council of Europe's Declaration on Freedom of Expression and Information emphasised a firm attachment to the principles of freedom of expression and information 'as a basic element of democratic and pluralist society'. This Declaration, adopted on 29 April 1982, in particular referred to Article 10 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) focusing on the 'protection of the right of everyone, regardless of frontiers, to express himself, to seek and receive information and ideas, whatever their source, as well as to impart them under the conditions set out in Article 10 of the European Convention on Human Rights'. The Recommendation also emphasised that in the field of information and mass media one of the objectives is 'the pursuit of an open information policy, including access to information, in order to enhance the individual's understanding of, and his ability to discuss freely political, social, economic, and cultural matters.' One year earlier, on 25 November 1981 the Committee of Ministers of the Council of Europe had already, more explicitly,—but without referring to Article 10 of the Convention— recommended the Member States to recognise in their jurisdictions a right for everyone to 'obtain, on request, information held by the public authorities, other than legislative bodies and judicial authorities'.[2]

Although the 1981 Recommendation and the 1982 Declaration referred to the right 'to seek' information and to '[have] access to information' and a right 'to have access to public documents', it must be observed that the text of Article 10 ECHR, guaranteeing the right to freedom of expression, itself did not and still does not refer to such a right.[3]

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[1] This chapter is the reproduction of a chapter for a publication by the Council of Europe, see: *Journalism at risk* (Strasbourg, Council of Europe, 2015, ISBN 978-92-871-8120-6).

[2] Committee of Ministers, Recommendation R(1981)19 on the Access to Information Held by Public Authorities, 25 November 1981, <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=600652&SecMode=1&DocId=673752&Usage=2>.

[3] See in contrast art 19 of the UN Covenant on Civil and Political Rights (ICCPR), requiring States to guarantee the right to freedom of expression, including the right *to seek,* receive, and impart information and ideas regardless of frontiers. The right to seek and receive information and ideas embraces 'a right of access to information held by public bodies': Human Rights Committee, General Comment no 34 CCPR/C/GC/34 on Freedom of Opinion and Expression (Article 19 ICCPR), 12 September 2011.

The text of the 1982 Declaration and other policy documents elaborated by the Council of Europe illustrate however the importance and the need to include or incorporate within the right to freedom of expression also the right to seek information and the right of access to public documents. It has been emphasised and reiterated that transparency is essential in a democratic society and that wide access to information on issues of general interest allows the public to have an adequate view of and to form a critical opinion on the state of the society in which they live.[4] In its case law since 1979 the European Court of Human Rights has recognised, reiterated and emphasised 'the right of the public to be properly informed' on matters of interest for society.[5]

In its Recommendation of 21 February 2002 the Committee of Ministers of the Council of Europe went one step further. It not only confirmed the principle that Member States should guarantee the right of everyone to have access, on request, to official documents held by public authorities. According to the 2002 Recommendation access to information also included a pro-active approach by the public authorities to make information of public interest more easily accessible. Indeed it was stated that Member States should also consider it a duty of a public authority 'at its own initiative and where appropriate to take the necessary measures to make public information which it holds when the provision of such information is in the interest of promoting the transparency of public administration and efficiency within administrations or will encourage informed participation by the public in matters of public interest.'[6]

The European Court of Human Rights however has been very reluctant to recognise a right of access to information, and especially a right of access to documents held by the authorities and to make such a right enforceable under Article 10 of the Convention. It is only few years ago that the Strasbourg Court started, hesitantly, to modify its approach and to include, to some extent, a right of access to public documents, related to the right to express and receive information and ideas. Especially since its judgments in the cases of *TASZ v Hungary* and *Kenedi v Hungary* in 2009, the European Court's case law has started to recognise and develop *a right of access to public documents under the scope of Article 10 of the European Convention*.[7] Simultaneously in 2009 the

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[4] Helen Darbishire, 'A Right Emerges: The History of the Right of Access to Information and its Link with Freedom of Expression' in Péter Molnár (ed), *Free Speech and Censorship Around the Globe* (CEU 2015) 167–185; see also Wouter Hins and Dirk Voorhoof, 'Access to State-Held Information as a Fundamental Right under the European Convention on Human Rights' (2007) 3(1) *European Constitutional Law Review* 114–126.

[5] *Sunday Times v UK (No 1)* (App no 6538/74, 26 April 1979) and more recently *Morice v France* (App no 29369/10, ECtHR Grand Chamber 23 April 2015) [150]–[153] and *Erla Hlynsdóttir v Iceland (No 3)* (App no 54145/10, 2 June 2015) [62], in which the Court reiterated: 'Not only does the press have the task of imparting . . . information and ideas' on all matters of public interest, 'but the public also has a right to receive them.'

[6] Committee of Ministers (n 2) and Committee of Ministers, Recommendation Rec(2002)2 on Access to Information, 21 February 2002, <https://wcd.coe.int/ViewDoc.jsp?id=262135&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>.

[7] *Társaság a Szabadságjogokért v Hungary* (App no 37374/05) and *Kenedi v Hungary* (App no 31475/05).

European Convention on Access to Official Documents was promulgated, in turn referring to the Council of Europe Recommendations of 1981 and 2002 and to Article 10 of the Convention. The 2009 European Convention on Access to Official Documents states that 'Each Party shall guarantee the right of everyone, without discrimination on any ground, to have access, on request, to official documents held by public authorities. Each Party shall take the necessary measures in its domestic law to give effect to the provisions for access to official documents set out in this Convention.'[8]

The recognition by the European Court of Human Rights under Article 10 of the Convention of a right of access to documents held by public authorities implies that no longer the national states and their administrative bodies and judicial authorities alone can determine the scope and practical implementation of their national laws guaranteeing a right of access to public documents, as the practical and effective guaranteeing of this right is now also under the scrutiny of the Strasbourg Court. Even without the 2009 Convention on Access to Official Documents coming into force, Article 10 ECHR and the case law of the European Court form a legally binding framework for the application of the right of access to public documents in the Member States of the Council of Europe. Any interference with the right of access to public documents must be justified as being necessary in a democratic society from the scope of Article 10 Paragraph 2 of the Convention, eventually in combination with Article 6 (right to fair trial) and Article 13 (right to effective remedy) of the Convention. In recent case law the Court has emphasised that 'in cases where the applicant was an individual journalist and human rights defender, it has held that the gathering of information is an essential preparatory step in journalism and is an inherent, protected part of press freedom.' And the Court reiterates that obstacles created in order to hinder access to information which is of public interest may discourage those working in the media, or related fields, from pursuing such matters. As a result, they may no longer be able to play their vital role as 'public watchdogs' and their ability 'to provide accurate and reliable information may be adversely affected'.[9]

This broadening of the scope of application of the right to freedom of expression and information goes hand in hand with another development in the European Court's case law. The Strasbourg Court indeed has contributed to gradually guaranteeing more transparency in society on matters of public interest, by also *protecting under Article 10 of the Convention the rights of whistle-blowers*, disclosing or leaking certain information

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[8] European Convention on Access to Official Documents, 18 June 2009, CETS no 205, art 2, <www.conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=205&CM=8&DF=24/09/2012&CL=ENG>. This Convention however is still not in force: Only six Member States have ratified the Convention (Bosnia & Herzegovina, Hungary, Lithuania, Montenegro, Norway, and Sweden), while ten ratifications are needed for the Convention's entry into force. For an analysis of developments in national law of the right to information, see Sandra Coliver, 'The Right to Information and the Expanding Scope of Bodies Covered by National Laws since 1989' in Molnár (n 4) 187–210.

[9] *Guseva v Bulgaria* (App no 6987/07, 17 February 2015) [37]; see also *Shapovalov v Ukraine* (App no 45835/05, 31 July 2012) [68] and *Dammann v Switzerland* (App no 7755/01, 25 April 2006) [52].

to the media. The right to freedom of expression by whistle-blowers has been recognised and effectively guaranteed by the European Court in its case law of the last few years, especially since the Court's Grand Chamber judgment in *Guja v Moldova* in 2008.[10] This approach towards additional guarantees for whistle-blowers' protections is also reflected in the Council of Europe Recommendation Rec(2014)7 on the protection of whistle-blowers. The Recommendation refers to whistle-blowers as 'individuals who report or disclose information on threats or harm to the public interest ("whistle-blowers") [and] can contribute to strengthening transparency and democratic accountability.'[11] Therefore, whistle-blowers can invoke their right to freedom of expression when disclosing information to the media. The Parliamentary Assembly of the Council of Europe in a Resolution of 23 June 2015 has stressed the importance of the case law of the European Court of Human Rights in upholding the freedom of speech and protection of whistle-blowers. Therefore the Parliamentary Assembly calls for an agreement 'on a binding legal instrument (convention) on whistle-blower protection on the basis of the Committee of Ministers Recommendation CM/Rec(2014)7, taking into account recent developments.'[12]

The direct protection of whistle-blowers under Article 10 of the Convention is complementary to the European Court's firm and elaborated case law on *protection of journalistic sources*, guaranteeing a high level of protection of persons who acted as (confidential) sources of journalists. The right of journalists to protect their sources in many cases is cited precisely to protect the leaking of information by whistle-blowers, as illustrated in the European Court's case law in *Goodwin v the United Kingdom, Roemen and Schmit v Luxembourg, Voskuil v the Netherlands, Tillack v Belgium, Financial Times Ltd v the United Kingdom* and *Nagla v Latvia*.[13]

In the following chapter, both developments, the recognition of a right of access to public documents and the right of civil servants and employees in the private sectors as whistle-blowers and journalists' sources, will be placed in the legal framework of the Council of Europe and the dynamics of interpretation of the European Convention

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[10] *Guja v Moldova* (App no 14277/04, ECtHR Grand Chamber 12 February 2008).

[11] Committee of Ministers, Recommendation CM/Rec(2014)7 on the protection of whistle-blowers, 30 April 2014, <https://wcd.coe.int/ViewDoc.jsp?id=2188855&Site=CM>.

[12] The Resolution emphasises the need to guarantee whistle-blower protection also for employees of national security or intelligence services and of private firms working in this field and to grant asylum in any Member State of the Council of Europe to whistle-blowers whose disclosures are in line with the Council of Europe standards. In the same Resolution of 23 June 2015 the Parliamentary Assembly requested the United States of America 'to allow Mr Edward Snowden to return without fear of criminal prosecution under conditions that would not allow him to raise the public interest defence.'

[13] *Goodwin v UK* (App no 17488/90, ECtHR Grand Chamber 27 March 1996); *Roemen and Schmit v Luxembourg* (App no 51772/99, 23 February 2003); *Voskuil v The Netherlands* (App no 64752/01, 22 November 2007); *Tillack v Belgium* (App no 20477/05, 27 November 2007); *Financial Times Ltd and Others v UK* (App no 821/03, 15 December 2009), and *Nagla v Latvia* (App no 73469/10, 16 July 2013).

on Human Rights. The developments and characteristics, as well as the limitations of these rights will be illustrated by references to landmark judgments delivered by the Strasbourg Court, applying Article 10 of the Convention in concrete circumstances, as well as by referring to relevant policy documents of the Parliamentary Assembly and the Committee of Ministers of the Council of Europe. The application of both 'extensions' of the protection of Article 10 ECHR is especially relevant in support of investigative and independent journalism and for *media* and non-governmental organisations, playing their role as *public watchdogs in transparent and sustainable democratic societies*. A striking and important characteristic of the expanding scope of Article 10 ECHR is that both the right of access to public documents and the protection of whistle-blowers are applicable and enforceable in the field of national security and intelligence, fields which traditionally, under national law, were excluded from transparency because of the priority, absolute or rigid, given to secrecy and confidentiality in these domains.

Article 10 of the European Convention on Human Rights

The right to freedom of expression and information is actually guaranteed by Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms in all 47 Member States of the Council of Europe, from Norway to Cyprus, from Iceland to Azerbaijan and from Portugal to Russia. The development towards a better protection of this right in (most of) the Council of Europe Member States has undoubtedly been influenced by the dynamic application of Article 10 of the Convention by the European Court of Human Rights (ECtHR).

Article 10 of the European Convention reads as follows:—

> 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.
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of 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.

Article 10(1) ECHR stipulates the principle of the right to freedom of expression and information, while Article 10(2) ECHR, by referring to 'duties and responsibilities' that go together with the exercise of this freedom, opens the possibility for public authorities to interfere with this freedom by way of formalities, conditions, restrictions, and even penalties. Article 10(2) at the same time however substantially reduces the possibility of interferences with the right to express, receive, and impart information and ideas. Interferences by public authorities are only allowed under the strict

conditions that any restriction or sanction must be 'prescribed by law',[14] must have a 'legitimate aim' and finally and most decisively, must be 'necessary in a democratic society'.

The case law of the ECtHR shows how the Court's rulings have helped to create an added value for the protection of freedom of expression, journalistic freedom, freedom of the media and public debate in the Member States of the European Convention. In nearly 600 cases the ECtHR found violations of the right to freedom of expression and information as guaranteed by Article 10 ECHR, hence developing a higher level of protection compared to that in the defendant national states' jurisdictions. The European Court's jurisprudence has clearly reduced the possibilities of interferences with the rights of freedom of expression and information, by emphasising the characteristics of a democratic society in terms of tolerance, broadmindedness, pluralism, and especially the importance of participation in public debate, including the protection of expressions, ideas and information that 'shock, offend, or disturb'.

The Court's case law gave recognition to *the pre-eminent function of the media and journalism in a state governed by the rule of law,* regularly emphasising that the media play a vital role of 'public watchdog' in a democracy, as 'purveyor of information'. However, various laws and regulations still restrict freedom of expression, newsgathering and media content. The aim of such restrictions is to protect the national states' interests (protection of state security and public order), the protection of morals, the protection of reputation or privacy or more generally 'the rights of others', the protection of confidentiality of information, or the authority and impartiality of the judiciary. Other legal provisions are protecting personal data, or prohibiting and punishing 'hate speech' that incites to violence, racism, xenophobia, hatred or discrimination. Also broadcasting law, audiovisual media services regulations and legal provisions on advertising or other forms of 'commercial speech' contain restrictions on freedom of expression or on media content.[15] On several occasions the ECtHR has reiterated that Article 10 does not guarantee wholly unrestricted freedom of expression to the press, even with respect to coverage of matters of serious public concern: 'While enjoying the protection afforded by the Convention, journalists must, when exercising their duties, abide by the principles of responsible journalism, namely to act in good faith, provide accurate and reliable information, objectively reflect the opinions of those involved in a public debate, and refrain from pure sensationalism.'[16] This also means

[14] In only a few cases the Court came to the conclusion that the condition 'prescribed by law', which includes foreseeability, precision, and publicity or accessibility and which implies a minimum degree of protection against arbitrariness, was not fulfilled, such as eg in *Ahmet Yildirim v Turkey* (App no 3111/10, 18 December 2012); *Youth Initiative for Human Rights v Serbia* (App no 48135/06, 25 June 2013), and *Guseva v Bulgaria* (n 9).

[15] For an overview and analysis, see Commissioner for Human Rights, Human Rights in a Changing Media Landscape (CoE 2011) and Josep Casadevall – Egbert Myjer – Michael O'Boyle – Anna Austin (eds), *Freedom of Expression: Essays in Honour of Nicolos Bratza* (Wolf 2012).

[16] *Armellini and Others v Austria* (App no 14134/07, 15 April 2015) [41].

that media applying the standards of *journalistic ethics* or journalists acting in consonance with the principles of 'responsible journalism' are strongly protected by Article 10 of the Convention.[17] It does not imply however that a journalist must act in compliance with norms of good journalistic practice in all circumstances in order to be shielded by Article 10 ECHR. In some cases the Court was of the opinion that, although it would have been 'advisable' for a newspaper and its journalists to have obtained comments beforehand from a person that was criticised in the newspaper for being involved in fraud and improper use of public funding, 'the mere fact that it had not done so is not sufficient to hold that the interference with the applicant company's right to freedom of expression was justified.'[18]

National states can no longer decide on the limits of freedom of media and journalists

Until a few decades ago, the limits and restrictions of freedom of expression were determined by national states, ultimately scrutinised by their own domestic judicial authorities, without any further external control. This situation, this 'paradigm' has significantly changed in Europe, due to the achievement of the European Convention of Human Rights and the enforcement machinery in which the European Court of Human Rights plays a crucial role.[19]

Since the judgment in the case of *Sunday Times v the United Kingdom (No 1)*[20] in 1979 it has become clear that Article 10 ECHR is effectively reducing the national sovereignty and the scope of national limitations restricting the right to freedom of expression and information. On many occasions the European Court has established a higher level of protection for journalistic reporting on matters of public interest, also recognising 'the right of the public to be properly informed' about matters of interest for society. Over the years an abundant case law of the ECtHR has made clear that national law prohibiting, restricting or sanctioning expressions or information as forms of public communication may only be applied if the interference by the authorities is prescribed by law in a sufficiently precise way, is non-arbitrarily applied, is justified by

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[17] *Flux and Samson v Moldova* (App no 28700/03, 23 October 2007); *Timpul Info-Magazin and Anghel v Moldova* (App no 42864/05, 27 November 2007), and *Standard Verlags GmbH v Austria (No 3)* (App no 34702/07, 10 January 2012).

[18] *Krone Verlag GmbH & Co v Austria (No 5)* (App no 9605/03, 14 November 2008); see also *Standard Verlags GmbH v Austria (No 3)* (App no 34702/07, 10 January 2012).

[19] See also David J Harris – Michael.O'Boyle – Edward P Bates – Carla M Buckley, *Law of the European Convention on Human Rights* (OUP 2009).

[20] *Sunday Times v UK (No 1)* (n 5). A few years before, in its first judgment on freedom of expression (*Handyside v UK*, App no 5493/72, 7 December 1976), the Court firmly emphasised the importance of freedom of expression in a democratic society, but *in casu* found no breach of Article 10 of the Convention, as the protection of minors was considered to justify the interference by public authorities against the 'Little Red Schoolbook' and its publisher, Mr Handyside.

a legitimate aim and most importantly is to be considered 'necessary in a democratic society'. The Court also stated on several occasions that the Convention, as a 'living instrument' is intended 'to guarantee not rights that are theoretical and illusory, but rights that are practical and effective.'[21]

With the *Sunday Times* case as a starting point in 1979, many European countries have been found in violation with Article 10 after journalists, editors, publishers, broadcasting organisations, academics, politicians, artists, activists or non-governmental organisations applied to the ECtHR as a victim of an illegitimate, unjustifiable or disproportionate interference in their freedom of expression. As a consequence of this case law by the Strasbourg Court and due to the binding character of the Convention, the Member States are under a duty to modify and improve their standards of protection of freedom of expression in order to comply with their obligations under the European Convention (Article 1). This approach particularly affects the level of protection of journalistic reporting, political debate and discussion on matters of public interest, pushing back some traditional limitations of freedom of expression in many countries, limitations which can no longer be considered as justified in a democratic society. In more recent years the ECtHR has also guaranteed access to public documents under Article 10 ECHR and, on several occasions, it found that sanctions of whistle-blowers for disclosing information of public interest to the media violated their right to freedom of expression and information (see below).

At the same time the European Court is also an important actor in preserving press freedom against new initiatives or attempts restraining that freedom. The Court's case law reveals opposition against introducing new limitations or imposing additional obligations that risk neglecting the *important role of critical and independent media in a democratic society*. A pertinent illustration is the judgment of the ECtHR in the case *Mosley v the United Kingdom* in 2011. The European Court decided that the right of privacy guaranteed by Article 8 ECHR does not require the media to give prior notice of intended publications to those who feature in them.[22] In another case, *Węgrzynowski and Smolczewski v Poland,* the Court delivered an interesting judgment regarding a request for the removal of an online newspaper article. The case concerned the complaint by two lawyers that a newspaper article damaging to their reputation—which the Polish courts, in previous libel proceedings, had found to be based on insufficient information and in breach of their rights—remained accessible to the public on the newspaper's website. The ECtHR is of the opinion that the newspaper was not obliged to completely remove from its Internet archive the article at issue. It accepts that the State complied with its obligation to strike a balance between the rights guaranteed by Article 10 and, on the other hand, Article 8 ECHR. The Court is of the opinion that the removal of the online article for the sake of the applicant's reputation in the

[21] See eg *Centro Europa 7 S.R.L. and Di Stefano v Italy* (App no 38433/09, ECtHR Grand Chamber 7 June 2012).

[22] *Mosley v UK* (App no 48009/08, 10 May 2011).

circumstances of the present case would have been disproportionate under Article 10 of the Convention, as a rectification or an additional comment on the website would have been a sufficient and adequate remedy.[23]

The ECtHR has also reinforced *the right of individuals to access the Internet*, in a judgment against wholesale blocking of online content. In its judgment, the Court asserted that the Internet has now become one of the principal means of exercising the right to freedom of expression and information. The Court clarified that a restriction on access to a source of information is only compatible with the Convention if a strict legal framework, containing such guarantees, is in place. The judgment further makes clear that the domestic courts should have had regard to the fact that such a measure would render large amounts of information inaccessible, thus directly affecting the rights of Internet users and having a significant collateral effect on their right of access to the Internet.[24]

It is important to notice that, according to the Strasbourg Court's case law, national authorities should not only abstain from interferences in freedom of expression and press freedom that are not necessary in a democratic society. The state also has *positive obligations to protect the right of freedom of expression* against interferences by private persons or corporate organisations. In a case against Sweden the Court made clear that although its task is not to settle disputes of a purely private nature, 'it cannot remain passive where a national court's interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice appears unreasonable, arbitrary, discriminatory or, more broadly, inconsistent with the principles underlying the Convention.'[25] The Court has also emphasised that 'in addition to the primary negative undertaking of a State to abstain from interferences in Convention guarantees, there may be positive obligations inherent in such guarantees. The responsibility of a State may then be engaged as a result of not

[23] *Węgrzynowski and Smolczewski v Poland* (App no 33846/07, 16 July 2013). Cf *Google Spain v AEPD and Mario Costeja González* (C 131/12, CJEU Grand Chamber 13 May 2013).

[24] *Ahmet Yildirim v Turkey* (n 14). Also in *Delfi AS v Estonia* (App no 64569/09, 10 October 2013) the Court dealt with an important issue of freedom of expression on the Internet, more precisely on the (limited) liability of the provider of an online news portal regarding defamatory and insulting comments posted by users. In this case, holding the publisher of the online newspaper responsible for defamatory content posted by users did not amount to a violation of art 10. This approach was confirmed in the Grand Chamber judgment of 16 June 2015. While the Court acknowledges 'that important benefits can be derived from the Internet in the exercise of freedom of expression, it is also mindful that liability for defamatory or other types of unlawful speech must, in principle, be retained and constitute an effective remedy for violations of personality rights' [110]. For a critical comment, see Dirk Voorhoof, 'Delfi AS v Estonia: Grand Chamber Confirms Liability of Online News Portal for Offensive Comments Posted by its Readers' *Strasbourg Observers Blog* (18 June 2015), <http://strasbourgobservers.com/2015/06/18/delfi-as-v-estonia-grand-chamber-confirms-liability-of-online-news-portal-for-offensive-comments-posted-by-its-readers/#more-2891>.

[25] *Khurshid Mustafa and Tarzibachi v Sweden* (App no 23883/06, 16 December 2008).

observing its obligations.'[26] In the case of *Özgür Gündem v Turkey* the ECtHR developed this approach by claiming that 'genuine, effective exercise of freedom of expression does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals.' After a campaign that involved killings, disappearances, injuries, prosecutions, seizures, and confiscation, the newspaper *Özgür Gündem* had ceased publication. According to the European Court, the Turkish authorities had failed to comply with their positive obligation to protect the newspaper and its journalists in the exercise of their freedom of expression.[27]

The European Court has also applied the positive obligations-doctrine in other cases, in application of other Convention provisions, such as in cases of assassinations of journalists that amounted not only to a violation of Article 10, but also to a violation of the right of life (Article 2) or of the prohibition of torture or inhuman or degrading treatment (Article 3), in combination with the right to an effective remedy (Article 13).[28] In a recent case related to a *violent attack on a journalist,* the European Court reiterated that States, under their positive obligations of the Convention, are required to create a favourable environment for participation in public debate by all the persons concerned, enabling them to express their opinions and ideas without fear. Because of failures to carry out an effective investigation, the European Court found that the criminal investigation of the journalist's claim of ill-treatment was ineffective and that accordingly there had been a violation of Article 3 (prohibition of torture, or inhuman or degrading treatment) of the Convention under its procedural limb. In this case, a journalist had been the victim of a violent attack by two men, only few hours after publishing an article in a newspaper in which he accused a senior military officer of corruption and illegal activities. The journalist was hit several times with a hard blunt object and he was also punched by his aggressors. The attack took place just in front of the newspaper's office. Although formally a criminal investigation was started in connection to the attack on the journalist, no further steps were taken in order to identify the perpetrators. Relying on Article 3 of the European Convention, the journalist argued that State agents had been behind the attack on him and that the domestic authorities had failed to carry out an effective investigation in respect of his ill-treatment. The ECtHR found numerous shortcomings in the investigation carried out by the domestic

[26] *Fuentes Bobo v Spain* (App no 39293/98, 29 February 2000); *Özgür Gündem v Turkey* (App no 23144/93, 16 March 2000); *VGT Verein gegen Tierfabriken v Switzerland* (App no 24699/94, 28 June 2001); *VGT Verein gegen Tierfabriken v Switzerland (No 2)* (App no 32772/02, ECtHR Grand Chamber 30 June 2009), and *Wojtas-Kaleta v Poland* (App no 20436/02, 16 July 2009); see also *Appleby and Others v UK* (App no 44306/98, 6 May 2003).

[27] *Özgür Gündem v Turkey* (n 26).

[28] *Gongadze v Ukraine* (App no 34056/02, 8 November 2005); see also *Dink v Turkey* (App nos 2668/07, 6102/08, 30079/08, 7072/09, and 7124/09, 14 September 2010).

authorities, enabling the Court to conclude that the investigation of the journalist's claim of ill-treatment was ineffective and that Article 3 ECHR, under its procedural limb, had been violated.[29]

Media, journalists, NGOs, and civil society as 'public watchdog'

The European Court has made clear that in a democratic society, in addition to the press, *non-governmental organisations (NGOs), campaign groups or organisations with a message outside the mainstream* must be able to carry on their activities effectively and be able to rely on a high level of freedom of expression, as there is 'a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment.'[30] In a democratic society public authorities are to be exposed to *permanent scrutiny by citizens* and everyone has to be able to draw the public's attention to situations that they consider unlawful.[31]

Particular attention is paid to the public interest involved in the *disclosure of information*, contributing to debate on matters of public interest:

> In a democratic system the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion. The interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence.[32]

In such circumstances a journalist should not be prosecuted or sanctioned because of breach of confidentiality or the use of illegally obtained documents.[33] The Court has

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[29] *Uzeyir Jafarov v Azerbaijan* (App no 542014/08, 29 January 2015).

[30] *Steel and Others v UK* (App no 24838/94, 23 September 1998). See also *Hertel v Switzerland* (App no 25181/94, 25 August 1998); *VGT Verein gegen Tierfabriken v Switzerland* (n 26); *VGT Verein gegen Tierfabriken v Switzerland (No 2)* (n 26); *Vides Aizsardzības Klubs v Latvia* (App no 57829/00, 27 May 2004) and *Mamère v France* (App no 12697/03, 7 November 2006). See also *Open Door and Dublin Well Women v Ireland* (App nos 14234/88 and 14235/88, 29 October 1992); *Hashman and Harrup v UK* (App no 25594/94, ECtHR Grand Chamber 25 November 1999); *Çetin and Şakar v Turkey* (App no 57103/00, 20 September 2007); *Women on Waves v Portugal* (App no 31276/05, 3 February 2009); *Hyde Park and Others v Moldova (Nos 5–6)* (App nos 6991/08 and 15084/08, 14 September 2010); *Schwabe and MG v Germany* (App nos 8080/08 and 8577/08, 1 December 2011); *Tatár and Fáber v Hungary* (App nos 26005/08 and 26160/08, 12 June 2012); *Kudrevičius and Others v Lithuania* (App no 3753/05, 26 November 2013, referred to Grand Chamber), and *Taranenko v Russia* (App no 19554/05, 15 May 2014).

[31] *Vides Aizsardzības Klubs v Latvia* (n 30); see also *Tatár and Fáber v Hungary* (n 30).

[32] *Guja v Moldova* (n 10) and *Bucur and Toma v Romania* (App no 40238/02, 8 January 2013); see also *Morice v France* (n 5).

[33] *Fressoz and Roire v France* (App no 29183/95, ECtHR Grand Chamber 21 January 1999); *Dammann v Switzerland* (n 9); *Dupuis and Others v France* (App no 1914/02, 7 June 2007); *Peev v Bulgaria* (App no 64209/01, 26 July 2007), and *Guja v Moldova* (n 10); see also *Radio Twist v Slovakia* (App no 62202/00, 19 December 2006) and *Pinto Coelho v Portugal* (App no 28439/08, 28 June 2011).

accepted that the interest in protecting the publication of information originating from a source which obtained and retransmitted the information unlawfully may in certain circumstances outweigh those of an individual or an entity, private or public, in maintaining the confidentiality of the information. A newspaper that has published illegally-gathered emails between two public figures, directly related to a public discussion on a matter of serious public concern, can be shielded by Article 10 ECHR against claims based on the right of privacy as protected under Article 8 ECHR.[34]

In a case concerning the conviction of four journalists for having recorded and broadcast an interview using *hidden cameras*, the European Court found that the Swiss authorities had violated the journalists' rights protected under Article 10 ECHR. The Court emphasised that the use of hidden cameras by the journalists was aimed at providing public information on a subject of general interest, whereby the person filmed was targeted not in any personal capacity but as a professional broker. The Court found that the interference with the private life of the broker had not been serious enough to override the public interest in information on denouncing malpractice in the field of insurance brokerage.[35]

In its Grand Chamber judgment in *Stoll v Switzerland*, the Court confirmed that press freedom assumes even greater importance in circumstances in which State activities and decisions escape democratic or judicial scrutiny on account of their confidential or secret nature. The conviction of a journalist for *disclosing information* considered to be confidential or secret may discourage those working in the media from informing the public on matters of public interest. As a result the press may no longer be able to play its vital role as 'public watchdog' and the ability of the press to provide accurate and reliable information may be adversely affected.[36] In cases in which journalists have reported about confidential information in a sensationalist way[37] or in which the revealed documents did not concretely or effectively contribute to public

[34] *Jonina Benediktsdóttir v Iceland* (App no 38079/06, judgment of 16 June 2009); see also *Fressoz and Roire v France* (App no 62202/00, 19 December 2006) and *Radio Twist v Slovakia* (n 33).

[35] *Haldimann and Others v Switzerland* (App no 21830/09, 24 February 2015). Compare with *Tierbefreier E.V. v Germany* (App no 45192/09, 16 January 2014). In this case the European Court took into consideration that an injunction against the use by an animal rights organisation of footage secretly taken by a journalist was no violation of art 10 ECHR, as the injunction did not include the use for journalistic purposes by the media, but only the unfair use by the animal rights organisation of including the footage in a film *Poisoning for Profit* on its website, which accused a firm that the legal regulations on the treatment of animals had been disregarded. The Court observed that the domestic courts had carefully examined whether granting the injunction in question would violate the applicant association's right to freedom of expression, fully acknowledging the impact of the right to freedom of expression in a debate on matters of public interest. The Court pointed out that there was no evidence however that the accusations made in the film *Poisoning for Profit*, according to which the company systematically flouted the law, were correct.

[36] *Stoll v Switzerland* (App no 69698/01, ECtHR Grand Chamber 10 December 2007); see also *Goodwin v UK* (n 13) and *Fressoz and Roire v France* (n 33).

[37] *Stoll v Switzerland* (n 36); see also *Armellini and Others v Austria* (n 16) [41].

debate or only concerned information about the private life of the persons concerned,[38] the Court has accepted (proportionate) interferences in their freedom of expression.

In cases where journalists or media could not provide *reliable or relevant evidence* for their (serious) allegations, insinuations or accusations, the Court accepted convictions and (proportionate) sanctions imposed by the national authorities as not being in breach with Article 10 of the Convention.[39] The requirement that a journalist needs to prove that the allegations made in an article are 'substantially true' on the balance of probabilities, constitutes a justified restriction on the right to freedom of expression under Article 10(2) ECRH.[40] In some cases the obvious lack of evidence of published allegations made the Court even decide on the (manifest) inadmissibility of a complaint under Article 10 of the Convention.[41] On the other hand, the Court has also considered that, as part of their role as a 'public watchdog', the media's reporting on '"stories" or "rumours"—emanating from persons other than an applicant—or "public opinion"' is to be protected.[42] The Court on several occasions accepted that value judgments, allegations or statements only had 'a slim factual basis' or that it was

[38] *Leempoel and S.A. Ciné Revue v Belgium* (App no 64772/01, 9 November 2006) and *Marin v Romania* (App no 30699/02, 3 February 2009); see also *De Diego Nafria v Spain* (App no 46833/99, 14 March 2002) and *Cumpănă and Mazăre v Romania* (App no 33348/96, ECtHR Grand Chamber 17 December 2004). See also *Ruusunen v Finland* (App no 73579/10, 14 January 2014) and *Ojala and Etukeno Oy v Finland* (App no 69939/10, 14 January 2014).

[39] *Prager and Oberschlick v Austria* (App no 15974/90, 26 April 1995); *McVicar v UK* (App no 46311/99, 7 May 2002); *Perna v Italy* (App no 48898/99, ECtHR Grand Chamber 6 May 2003); *Radio France v France* (App no 53984/00, 30 March 2004); *Chauvy v France* (App no 64915/01, 29 June 2004); *Pedersen and Baadsgaard v Denmark* (App no 49017/99, 17 December 2004); *Rumyana Ivanova v Bulgaria* (App no 36207/03, 14 February 2008); *Alithia Publishing Company Ltd & Constantinides v Cyprus* (App no 17550/03, 22 May 2008); *Backes v Luxembourg* (App no 24261/05, 8 July 2008); *Flux v Moldova (No 6)* (App no 22824/04, 29 July 2008); *Cuc Pascu v Romania* (App no 36157/02, 6 September 2008); *Petrina v Romania* (App no 78060/01, 14 October 2008); *Brunet-Lecomte and Others v France* (App no 42117/04, 5 February 2009); *Kania and Kittel v Poland* (App no 35105/04, 21 June 2011); *Ziembiński v Poland* (App no 46712/06, 24 July 2012); *Růžový panter, o.s. v Czech Republic* (App no 20240/08, 2 February 2012); *Novaya Gazeta and Borodyanskiy v Russia* (App no 14087/08, 28 March 2013); *Lavric v Romania* (App no 22231/05, 14 January 2014); *Salumäki v Finland* (App no 23605/09, 29 April 2014), and *Armellini and Others v Austria* (n 16). In some cases the Court found no violation of art 10, while it accepted that the applicant had not been guaranteed a fair trial and that there had been a violation of art 6(1) of the Convention, see eg *Constantinescu v Romania* (App no 28871/95, 27 June 2000) and *Mihaiu v Romania* (App no 42512/02, 4 November 2008).

[40] *McVicar v UK* (n 39) and *Pedersen and Baadsgaard v Denmark* (n 39).

[41] See eg *László Keller v Hungary* (App no 33352/02, judgment of 4 April 2006); *Corneliu Vadim Tudor v Romania* (App nos 6928/04 and 6929/04, judgment of 15 June 2006); *Falter Zeitschriften GmbH v Austria* (App no 3540/04, judgment 8 February 2007); *Tomasz Wolek, Rafal Kasprów and Jacek Lęski v Poland* (App no 20953/06, judgment of 21 October 2008), and *Vittorio Sgarbi v Italy* (App no 37115/06, judgment of 21 October 2008). See also *Verdens Gang and Kari Aarsted Aase v Norway* (App no 45710/99, judgment of 16 October 2001); *Gaudio v Italy* (App no 43525/98, judgment of 21 February 2002); *Dunca and SC Nord Vest Press SRL v Romania* (App no 9283/05, judgment of 20 November 2012), and *Ciuvică v Romania* (App no 29672/05, 15 January 2013).

[42] See eg *Thorgeir Thorgeirson v Iceland* (App no 13778/88, 25 June 1992) and *Cihan Özturk v Turkey* (App no 17095/03, 9 June 2009).

sufficient that there was 'no proof the description of events given in the articles was totally untrue,' or that the 'opinions were based on facts which have not been shown to be untrue.'[43] Value judgments and criticism can be based on 'unconfirmed allegations or rumours'.[44] The Court does not accept the reasoning of domestic courts that allegations of serious misconduct levelled against individuals or public persons should first have been proven in criminal proceedings.[45] In the *Kasabova* case the Court clarified that 'while a final conviction in principle amounts to incontrovertible proof that a person has committed a criminal offence, to circumscribe in such a way the manner of proving allegations of criminal conduct in the context of a libel case is plainly unreasonable, even if account must be taken, as required by Article 6(2), of that person's presumed innocence.'[46] Describing an act or the behaviour of a politician as 'illegal' is to be considered as expressing a personal legal opinion amounting to a value judgment of which the accuracy cannot be required to be proven.[47]

Defamation laws and proceedings cannot be justified if their purpose or effect is to prevent legitimate criticism of public officials or *the exposure of official wrongdoing or corruption.* A right to sue in defamation for the reputation of officials could easily be abused and might prevent free and open debate on matters of public interest or scrutiny of the spending of public money.[48] Especially in cases where *information is published on alleged corruption, fraud or illegal activities* in which politicians, civil servants or public institutions are involved, journalists, publishers, media and NGOs can count on the highest standards of protection of freedom of expression. The Court has emphasised that 'in a democratic state governed by the rule of law the use of improper methods by public authority is precisely the kind of issue about which the public has the right to be informed.'[49] The Court expressed the opinion that 'the press is one of the means by which politicians and public opinion can verify that public money is spent according to the principles of accounting and not used to enrich certain individuals.'[50]

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[43] See eg *Nilsen and Johnsen v Norway* (App no 23118/93, 25 November 1999); *Dalban v Romania* (App no 28114/95, 28 September 1999); *Dichand and Others v Austria* (App no 29271/95, 26 February 2002), and *Flux and Samson v Moldova* (n 17).

[44] *Timpul Info-Magazin and Anghel v Moldova* (n 17); see also *Cihan Özturk v Turkey* (n 42). The Court in this case however also considered that 'there was a sufficient factual basis for the applicant to make a critical analysis of the situation and to raise questions about the restoration project, since the authorities had already brought criminal proceedings against the applicant for breach of duty.'

[45] See *Nilsen and Johnsen v Norway* (n 43); *Flux v Moldova (No 6)* (n 39); *Folea v Romania* (App no 34434/02, 14 October 2008); *Dyundin v Russia* (App no 37406/03, 14 October 2008); *Godlevskiy v Russia* (App no 14888/03, 23 October 2008), and *Kydonis v Greece* (App no 24444/07, 2 April 2009). Compare with *Constantinescu v Romania* (n 39) and *Petrina v Romania* (n 39); see also *Brosa v Germany* (App no 5709/09, 17 April 2014) and *Erla Hlynsdóttir v Iceland (No 3)* (n 5).

[46] *Kasabova v Bulgaria* (App no 22385/03, 19 April 2011).

[47] *Vides Aizsardzības Klubs v Latvia* (n 30). See also *Selistö v Finland* (App no 56767/00, 16 November 2004); *Karhuvaara and Iltalehti v Finland* (App no 53678/00, 16 November 2004), and *Brosa v Germany* (n 45).

[48] *Cihan Özturk v Turkey* (n 42).

[49] *Voskuil v The Netherlands* (n 13).

[50] *Krone Verlag GmbH & Co v Austria (No 5)* (n 18).

In some cases the European Court compelled the government of the defendant state to take *concrete and urgent measures* in order to have the applicants' freedom of expression and information immediately respected or restored, for example in *Fattulayev v Azerbaijan* (order of immediate release from prison of journalist convicted for defamation of public authorities) or in *Youth Initiative for Human Rights v Serbia* (ordering that the Intelligence Agency of Serbia should provide the applicant NGO with the information requested).[51]

Interferences by public authorities by means of prosecution or other judicial measures with regard to the *journalist's research and investigative or newsgathering activities* call for the most scrupulous examination from the perspective of Article 10 of the Convention.[52] In a case actually pending, the Grand Chamber of the European Court has been requested to decide on the question whether a Finnish press photographer's arrest and conviction for disobeying the police while covering a demonstration that turned violent, did or did not breach the journalist's freedom of expression under Article 10 ECHR. The applicant in this case, Mr Pentikäinen, is a photographer and journalist, who was taking photographs of a large demonstration in Helsinki. The event turned into a riot and the police decided to seal off the demonstration area. Denying a police order, a group of around 20 people remained in the demonstration area, including Pentikäinen, who assumed the order to leave the area only applied to the demonstrators and not to him, doing his work as a journalist. He also tried to make clear to the police that he was a representative of the media, referring to his press badge. A short time later the police arrested the demonstrators, including Pentikäinen. He was detained for more than 17 hours and a short time later the public prosecutor brought charges against him. The Finnish courts found the journalist guilty of disobeying the police, but they did not impose any penalty on him, holding that his offence was excusable. In Strasbourg Pentikäinen complained that his rights under Article 10 ECHR had been violated by his *arrest and conviction,* as he had been *prevented from doing his job as a journalist, while gathering news of public interest*. The European Court recognised that Pentikäinen as a newspaper photographer and journalist had been confronted with an interference in his right to freedom of expression. However, as the interference was prescribed by law, pursued several legitimate aims (the protection of public safety and the prevention of disorder and crime) and was to be considered necessary in a democratic society, there was no violation of his right under Article 10 of the Convention. The Court also considered that the fact that the applicant was a journalist did not give him a greater

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[51] *Fattulayev v Azerbaijan* (App no 40984/07, 22 April 2000) and *Youth Initiative for Human Rights v Serbia* (n 14).

[52] See *De Haes and Gijsels v Belgium* (App no 19983/92, 24 February 1997); *Fressoz and Roire v France* (n 33); *Bladet Tromsø and Stensaas v Norway* (App no 21980/93, ECtHR Grand Chamber 20 May 1999); *Du Roy and Malaurie v France* (App no 34000/96, 3 October 2000); *Thoma v Luxembourg* (App no 38432/97, 29 March 2001); *Colombani and Others v France* (App no 51279/99, 25 June 2002); *Vides Aizsardzības Klubs v Latvia* (n 30); *Radio Twist v Slovakia* (n 33); *Ukrainian Media Group v Ukraine* (App no 72713/01, 29 March 2005), and *Dupuis and Others v France* (n 33); see also *Nagla v Latvia* (n 13).

right to stay at the scene than the other people and that the conduct sanctioned by the criminal conviction was not his journalistic activity as such, but his refusal to comply with a police order at the very end of the demonstration, when the latter was judged by the police to have become a riot. The ECtHR concluded therefore, by five votes to two, that the Finnish courts had struck a fair balance between the competing interests at stake and accordingly came to the conclusion that there had been no violation of Article 10. Pentikäinen requested a referral to the Grand Chamber. His claim was supported by the Finnish Union of Journalists, the International Federation of Journalists and the European Federation of Journalists, arguing that the Court's finding risked undermining press freedom and the rights of journalists covering issues of importance for society. On 2 June 2014 the panel decided to refer this case to the Grand Chamber. The hearing took place on 17 December 2014. The final judgment is expected in the second half of 2015.[53] The Grand Chamber judgment in *Pentikäinen v Finland* will undoubtedly have an impact on future applications of the right of newsgathering by journalists in zones of conflict, demonstrations or violent uproar, with armed forces or police being involved. Upholding the finding of a non-violation of Article 10 ECHR in this case is likely to create a 'chilling effect' on press freedom.

Towards a right of access to official documents

An important development further expanding the journalists' right to freedom of expression and information is reflected in the European Court's case law related to *access to public documents*. For a long time, the Court refused to apply Article 10 in cases of denial of access to public documents.[54] In the cases *Leander v Sweden*, *Gaskin v United Kingdom* and *Guerra and others v Italy,* the Court pointed out 'that freedom to receive information . . . basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him. That freedom cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion.'[55] In *Roche v the United Kingdom* in 2005, the Grand Chamber referred to the Leander, Gaskin and Guerra judgments and saw no reason 'not to apply this established jurisprudence'.[56]

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[53] *Pentikäinen v Finland* (App no 11882/10, 4 February 2014). See Dirk Voorhoof, 'Finnish Journalist's Arrest, Detention, Prosecution, and Conviction for Disobeying a Police Order During a Demonstration does not Violate Article 10' *Strasbourg Observers Blog* (24 March 2014), <http://strasbourgobservers.com/2014/03/24/finnish-journalists-arrest-detention-prosecution-and-conviction-for-disobeying-a-police-order-during-a-demonstration-does-not-violate-article-10/>.

[54] The Court got onto a new track in *Sdruženi Jihočeské Matky v Czech Republic* (App no 19101/03, judgment of 10 July 2006). See also Hins and Voorhoof (n 4) 114–126.

[55] *Leander v Sweden* (App no 9248/81, 26 March 1987) [74]; *Gaskin v UK* (App no 10454/93, 7 July 1989) [52], and *Guerra and others v Italy* (App no 14967/89, 9 February 1998) [53].

[56] *Roche v UK* (App no 32555/96, ECtHR Grand Chamber 19 October 2005) [172]–[173].

This approach by the Strasbourg Court contrasted sharply with the interpretation of the Inter-American Court of Human Rights in its 19 September 2006 judgment in the case of *Claude Reyes and others v Chile*. The Inter-American Court unanimously found a violation of the right of freedom of expression guaranteed by Article 13 of the American Convention on Human Rights, stating that this right 'protects the rights of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention.' Interestingly, the Inter-American Court stressed the connection between the right of access to information held by the State and democracy.[57] The approach of the ECtHR in denying a right of access to public documents under Article 10 ECHR also contrasted with the *Recommendation Rec(2002)2 on access to information* emphasising the need to include or incorporate within the right to freedom of expression also the right to seek information and the right of access to public documents.[58]

However, in a 2007 judgment the ECtHR expressed its opinion that 'particularly strong reasons must be provided for any measure affecting this role of the press and limiting access to information which the public has the right to receive,'[59] implicitly recognising at least a right of access to information. In the spring of 2009 the Court delivered two important judgments in which it recognised, to some extent, the right of access to official documents. The Court made it clear that when public bodies hold information that is needed for public debate, the refusal to provide documents in this matter to those who are requesting access is a violation of the right to freedom of expression and information as guaranteed under Article 10 ECHR. In *TASZ v Hungary* the Court's judgment mentioned the 'censorial power of an information monopoly' when public bodies refuse to release information needed by the media or civil society organisations to perform their 'watchdog' function. It also considered that the State had an obligation not to impede the flow of information sought by a journalist or an interested citizen. The Court referred to its consistent case law in which it has recognised that the public has a right to receive information of general interest and that the most careful scrutiny on the part of the Court is called for when the measures taken by the national authority are capable of discouraging the participation of the press, one of society's 'watchdogs', in the public debate on matters of legitimate public concern, even when those measures merely make access to information more cumbersome. The Court emphasised once more that the function of the press, including the creation of forums for public debate, is not limited to the media or professional journalists. Indeed,

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[57] *Claude Reyes and others v Chile* (Inter-American Court of Human Rights 19 September 2006), <http://www.corteidh.or.cr>. It should be noted that, in contrast with art 10 ECHR and similar to art 19 ICCPR, the right guaranteed by art 13 of the American Convention on Human Rights (ACHR) also includes the freedom 'to seek' information and ideas, apart from the right to impart and receive information and ideas.

[58] Committee of Ministers, Recommendation Rec(2002)2 on access to information, 21 February 2002, <https://wcd.coe.int/ViewDoc.jsp?id=262135&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>.

[59] *Timpul Info-Magazin and Anghel v Moldova* (n 17).

in the present case, the preparation of the forum of public debate was conducted by a nongovernmental organisation. The ECtHR recognised civil society's important contribution to the discussion of public affairs and qualified the applicant association, which is involved in human rights litigation, as a social 'watchdog'. In these circumstances the applicant's activities warranted Convention protection similar to that afforded to the press. Furthermore, given the applicant's intention to impart the requested information to the public, thereby contributing to the public debate concerning legislation on drug-related offences, its right to impart information was clearly impaired.[60]

In *Kenedi v Hungary* the European Court held unanimously that there had been a violation of the Convention, on account of the excessively long proceedings—over ten years—with which Mr. Kenedi sought to gain and enforce his access to documents concerning the Hungarian secret services. The Court also reiterated that 'access to original documentary sources for legitimate historical research was an essential element of the exercise of the applicant's right to freedom of expression.' The Court noted that Kenedi had obtained a court judgment granting him access to the documents in question, following which the domestic courts had repeatedly found in his favour in the ensuing enforcement proceedings. The administrative authorities had persistently resisted their obligation to comply with the domestic judgment, thus hindering Kenedi's access to documents he needed to write his study. The Court concluded that the authorities had acted arbitrarily and in defiance of domestic law and it held, therefore, that the authorities had misused their powers by delaying Kenedi's exercise of his right to freedom of expression, in violation of Article 10.[61] In the Grand Chamber judgment in *Gillberg v Sweden*, the ECtHR recognised that the requestors of the information in the form of scientific data had a right of access to that information which was protected by Article 10 and which would contribute 'to the free exchange of opinions and ideas and to the efficient and correct administration of public affairs.'[62]

More recently the European Court has reiterated in *Youth Initiative for Human Rights v Serbia*, that 'the gathering of information is an essential preparatory step in journalism and is an inherent, protected part of press freedom' and that 'obstacles created in order to hinder access to information which is of public interest may discourage those working in the media or related fields from pursuing such matters. As a result, they may no longer be able to play their vital role as 'public watchdogs', and their ability 'to provide accurate and reliable information may be adversely

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[60] *TASZ v Hungary* (n 7).

[61] *Kenedi v Hungary* (n 7). The Court came to the conclusion that in this case art 13 (effective remedy) had also been violated since the Hungarian system did not provide for an effective way of remedying the violation of the freedom of expression in this situation. The Court found that the procedure available in Hungary at the time and designed to remedy the violation of Kenedi's art 10 rights had been proven ineffective. There had, therefore, been a violation of Article 13 read in conjunction with art 10 of the Convention.

[62] *Gillberg v Sweden* (App no 41723/06, ECtHR Grand Chamber 3 April 2012).

affected'. Referring to *TASZ v Hungary*, the European Court stated explicitly 'that the notion of "freedom to receive information" embraces a right of access to information.' The Court is of the opinion that as the applicant NGO, Youth Initiative for Human Rights, was obviously involved in the legitimate gathering of information of public interest with the intention of imparting that information to the public and thereby contributing to the public debate, there has been an interference with its right to freedom of expression. The applicant NGO requested the intelligence agency of Serbia to provide it with some factual information concerning the use of electronic surveillance measures by that agency. The agency refused the request, relying thereby on the statutory provision applicable to secret information. Youth Initiative for Human Rights complained in Strasbourg about the refusal to have access to the requested information held by the intelligence agency, notwithstanding a final and binding decision of the Information Commissioner in its favour. The ECtHR finds that the restrictions imposed by the Serbian intelligence agency, resulting in a refusal to give access to public documents, did not meet the criterion as being prescribed by law. The Court is of the opinion that the 'obstinate reluctance of the intelligence agency of Serbia to comply with the order of the Information Commissioner' was in defiance of domestic law and tantamount to arbitrariness, and that accordingly there has been a violation of Article 10 of the Convention. The Court ordered the Serbian State to ensure that, within three months, the intelligence agency of Serbia provides the applicant NGO with the information requested.[63]

The Court's recognition of the applicability of the right to freedom of expression and information in matters of access to official documents is undoubtedly an important new development which further expands the scope of application of Article 10 ECHR.[64] This approach is also fully in line with General Comment No 34 of the UN Human Rights Committee that provides that Article 19 of the International Covenant on Civil and Political Rights 'embraces a right of access to information held by public bodies'.[65]

Also in more recent case law the ECtHR has been shown to create an extra layer for effectively guaranteeing a right of access to public documents, especially when the applicant is involved in the legitimate gathering of information of public interest with the aim of contributing to public debate.[66] The Court showed a similar approach in

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[63] *Youth Initiative for Human Rights v Serbia* (n 14).

[64] See also Päivi Tiilikka, 'Access to Information as a Human Right in the Case Law of the European Court of Human Rights' (2013) 5 *Journal of Media Law* 79–103 and the European Convention on Access to Official Documents (18 June 2009) CETS no 205, <http://www.conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=205&CM=8&DF=24/09/2012&CL=ENG>.

[65] Human Rights Committee, General Comment no 34 CCPR/C/GC/34 on Freedom of Opinion and Expression (Article 19 ICCPR) (12 September 2011) no 18. The General Comment also stipulates that 'to give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States should make every effort to ensure easy, prompt, effective, and practical access to such information' (no 19).

[66] *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v Austria* (App no 39534/07, 28 November 2013) and *Guseva v Bulgaria* (n 9).

Roşiianu v Romania, reiterating that collecting information and guaranteeing access to documents held by public authorities is a crucial right for journalists in order to be able to report on matters of public interest, helping to implement the right of the public to be properly informed on such matters. The Court's judgment clarifies that efficient enforcement mechanisms are necessary in order to make the right of access to public documents under Article 10 practical and effective for journalistic purpose. The Court cannot accept arbitrary restrictions on the right of access to public documents, as such restrictions may become a form of indirect censorship. Gathering information is indeed an essential preparatory step in journalism and is an inherent, protected part of press freedom. Given that the journalist's intention had been to communicate the information in question to the public and thereby to contribute to the public debate on good public governance, his right to impart information had clearly been impaired. The Court also observed that the complexity of the requested information and the considerable work in order to select or compile the requested documents had been referred to solely to explain the impossibility of providing that information rapidly, but could not be a sufficient or pertinent argument to refuse access to the requested documents.[67] In a judgment of 17 February 2015, in the case of *Guseva v Bulgaria*, the Court held that 'the gathering of information with a view to its subsequent provision to the public can be said to fall within the applicant's freedom of expression as guaranteed by Article 10 of the Convention.' And: 'by not providing the information which the applicant had sought, the mayor interfered in the preparatory stage of the process of informing the public by creating an administrative obstacle . . . The applicant's right to impart information was, therefore, impaired.'[68] In this case the Court came to the conclusion that the Bulgarian law provided no clear time-frame for enforcement of the right of access to public documents and the question was left to the good will of the administrative body responsible for the implementation of the judgment ordering communication of the requested documents. The Court found that such a lack of clear time-frame for enforcement created unpredictability as to the likely time of enforcement, which, in the event, never materialised. Therefore, the applicable domestic legislation lacked the requisite foreseeability capable of meeting the Court's test under Article 10 Paragraph 2 of the Convention.

Some decisions by the Court however still keep creating doubts about the scope and future developments with regard to the right of access to documents held by public authorities. In a recent decision, delivered by a Committee of three judges no violation of Article 10 ECHR was found with regard to the refusal of the applicant's request to a municipal administration to provide a list of payments made from the municipal budget to political parties, parliamentary groups and political foundations in the years 2000, 2001, and 2002. He also requested information on payments made to political parties by holding companies owned by the city.[69] The Court noted that the applicant was involved

[67] *Roşiianu v Romania* (App no 27329/06, 24 June 2014).
[68] *Guseva v Bulgaria* (n 9).
[69] *Friedrich Weber v Germany* (App no 70287/11, judgment of 6 January 2015).

in gathering of information of public interest and assumed the aim of imparting it to the public. In this matter, the Court did not consider it necessary to decide whether the applicant qualified as a member of the press or if his work could be considered similar to that of an NGO when it comes to information gathering. The decision referred to the Court's judgment in *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v Austria* of 28 November 2013, in which it 'assumed a right of access to information in a case where authorities had not published relevant information of considerable public interest in an electronic data base or in any other form.' The Court however continued by reiterating its former case law (*Leander v Sweden* 1987 and *Guerra v Italy* 1998) that 'in the specific context of access to information, the Court has held that the right to receive information basically prohibits a Government from preventing a person from receiving information that others wished or were willing to impart . . . It has also held that the right to receive information cannot be construed as imposing on a State positive obligations to collect and disseminate information of its own motion . . . Therefore, the Court does not consider that a general obligation on the State to provide information in a specific form can be inferred from its case-law under Article 10, particularly when, as in the present case, a considerable amount of work is involved'.

The decision focuses on the difference with *TASZ v Hungary,* as in that case 'the Court had regard to the fact that the information sought was "ready and available" and did not necessitate the collection of any data by the Government.' On the basis of ambiguous reasoning the ECtHR came to the conclusion in *Friedrich Weber v Germany* that 'in the present case, regardless of his possible status as member of the press, there has been no interference with the applicant's right to receive and to impart information as enshrined in Article 10 § 1 of the Convention.'[70]

However, on the basis of the judgments in the cases of *TASZ v Hungary, Kenedi v Hungary, Gillberg v Sweden, Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v Austria, Youth Initiative for Human Rights v Serbia, Roşiianu v Romania*, and *Guseva v Bulgaria* it can be concluded that Article 10 ECHR does protect the right of access to public documents, where the information is held by public authorities under an information monopoly, when it is in the public interest that the information sought be disclosed and when the requestor is acting in the role of a public watchdog. As the Court has stated 'freedom to receive information embraces a right of access to information'. This right, as has been demonstrated in *Youth Initiative for Human Rights v Serbia,* can also include the right to have access to documents of an intelligence agency and its surveillance activities. The ECtHR can even order the authorities of a Member State's intelligence agency to provide a journalist or NGO with the information requested.[71]

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[70] See also *Shapovalov v Ukraine* (n 9).

[71] *Youth Initiative for Human Rights v Serbia* (n 14).

Protection of whistle-blowers

The European Court of Human Rights has added another crucial element in order to stimulate transparency and to ensure that the media can play their role as public watchdog in a democratic society, reporting on matters of public interest. After having developed a high level of protection of journalistic sources, in order to keep the journalists' sources' identity confidential, the Court has also started to protect whistle-blowers directly on the basis of Article 10 ECHR, protecting whistle-blowers' right to freedom of expression. In essence whistle-blowing refers to those who expose misconduct, or fraud, corruption, mismanagement of alleged dishonest or illegal activity within a company, an administration or a private or public organisation. Whistle-blowers report integrity violations, thereby also very often criticising employers, companies or management teams. In most cases they (also) breach a duty of confidence or an obligation of secrecy, especially when integrity violations are reported to journalists or to the media.

Protection of whistle-blowing and the right of journalists to protect their sources

The protection of journalistic sources is an *indirect way* to shield whistle-blowers against prosecution or retaliation for having disclosed information to journalists or media in cases where public interest is at stake, such as corruption, fraud or illegal activities.

According to the Court:

> protection of journalistic sources is one of the basic conditions for press freedom, as recognised and reflected in various international instruments including the Committee of Ministers Recommendation . . . Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.[72]

Only with respect to strict substantial and procedural guarantees can interferences with the right to protection of journalists' sources be justified. The European Court can only accept a disclosure order in order to meet an 'overriding requirement in the public

[72] *Goodwin v UK* (n 13).

interest', such as for instance preventing or investigating major crime or acts of (racist) violence, protecting the right to life or preventing minors from being sexually abused and hence subjected to inhuman or degrading treatment.[73]

On several occasions, the European Court was of the opinion that searches of media offices, or in the home and place of work of journalists amounted to a violation of Article 10 of the Convention, disrespecting the subsidiarity or the proportionality principle in cases of protection of journalistic sources.[74] The case law of the European Court shows indeed that in several cases the right of journalists to protect their sources prevented the whistle-blower's employer,—be it in the public sector or in the private sector—from having access to the identity of the employee who allegedly disclosed confidential information of public interest to a journalist. In the cases of *Goodwin v the United Kingdom* and *The Financial Times v the United Kingdom* the Court found that the attempt to reveal the identity of the journalist's source who leaked corporate information was to be considered a breach of Article 10 of the Convention. Also searches and confiscations in the news room or in the journalist's private house, with the aim of identifying an alleged leaking civil servant or employee, such as in *Roemen and Schmit v Luxembourg, Tillack v Belgium*, and *Nagla v Latvia,* were finally considered as violations of Article 10 of the Convention.

Protection of whistle-blowing and the right to freedom of expression

Over and above this indirect protection of whistle-blowers through the recognition and application of the journalist's right to source protection, the European Court in recent case law has added substantial protection to whistle-blowers in *a direct way*. Indeed while in most European countries there is no solid or effective protection of whistle-

[73] *Nordisk Film & TV A/S v Denmark* (App no 40485/02, judgment of 8 December 2005) and *Šečič v Croatia* (App no 40116/02, 31 May 2007); see also *Stichting Ostade Blade v The Netherlands* (App no 8406/06, 27 May 2014). In this last decision the Court found no violation of art 10 ECHR, considering that the search and confiscation of computers and other editorial materials and data were justified as the judicial authorities were trying to identify the perpetrator of a series of bomb attacks and that they had good reason to believe that the confiscated material at a magazine newsroom could help their investigation.

[74] *Roemen and Schmit v Luxembourg* (n 13); *Ernst and Others v Belgium* (App no 33400/96, 15 July 2003); *Voskuil v The Netherlands* (n 13); *Tillack v Belgium* (n 13); *Financial Times Ltd and Others v UK* (n 13); *Sanoma Uitgevers BV v The Netherlands* (App no 38224/03, ECtHR Grand Chamber 14 September 2010); *Martin and Others v France* (App no 30002/08, 12 April 2012); *Ressiot and Others v France* (App nos 15054/07 and 15066/07, 28 June 2012); *Telegraaf Media Nederland Landelijke Media N.V. and Others v The Netherlands* (App no 39315/06, 22 November 2012); *Saint-Paul Luxembourg S.A. v Luxembourg* (App no 26419/10, 18 April 2013), and *Nagla v Latvia* (n 13). See also Committee of Ministers of the Council of Europe, Recommendation R(2000)7 on the Right of Journalists not to Disclose their Sources of Information (8 March 2000), <http://www.coe.int/t/dghl/standardsetting/media/>; Parliamentary Assembly of the Council of Europe, Recommendation 1950 (2011) on the Protection of Journalists' Sources (25 January 2011), <http://assembly.coe.int/mainf.asp?Link=/documents/adoptedtext/ta11/erec1950.htm>.

blowers,[75] the ECtHR has tried to remedy this situation by securing whistle-blowers protection under Article 10 ECHR. In its judgment in *Guja v Moldova* the Grand Chamber of the ECtHR considered the dismissal of a civil servant who had leaked information, more specifically, a letter to the press, to be an unlawful restriction of the right to freedom of expression.[76] Also in more recent cases the Court has found violations of Article 10 in cases where whistle-blowers had experienced interference with their right to freedom of expression, including the disclosure of confidential information to the media.

The Guja*-case: Six criteria for whistle-blowing*[77]

In Moldova two politicians, the Deputy Speaker of Parliament and the Deputy Minister of Internal Affairs had sent a letter to the Prosecutor-General urging him to drop all charges in a criminal investigation against four policemen. Guja, the head of the press department of the Prosecutors General's Office sent a copy of this correspondence to a newspaper, revealing a clear example of political pressure on the judiciary. The letters were the basis for an article in which the two politicians were accused of interference with an ongoing criminal investigation. It soon became clear that Guja had leaked the letters to the press, and as a result a disciplinary procedure was started. Guja informed the Prosecutor General that he had leaked because of his belief that such action could help to oppose the unlawful pressure. Despite his noble intentions he was dismissed.

This case concerned a very specific situation, namely the exercise of the freedom of expression in relation to a case of political corruption. In its judgment the Court took account of the UN treaties ratified by Moldova and the Treaties of the Council of Europe that protect persons (including employees) who expose corruption. It is also interesting that ILO Convention No 158 was quoted in this respect. Article 5 of this convention stipulates that 'c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent authorities' is no valid reason for the termination of a contract.

Taking into account the fact that Guja was a civil servant, the principles put forward by the ECtHR in other judgments related to the right of freedom of expression of civil servants were, *mutatis mutandis,* applicable in this case. The Court does differentiate

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[75] Council of Europe, CDCJ (2012)9FIN; Paul Stephenson and Michael Levi, 'The Protection of Whistleblowers: A Study on the Feasibility of a Legal Instrument for the Protection of Whistleblowers' (2012) <http://www.coe.int/t/DGHL/STANDARDSETTING/CDcj/Whistleblowers/CDCJ%20(2012)9E_Final.pdf>. It is recommended in this study that States should 'put in place, or improve, national laws on the protection of workers against retaliation in circumstances where they make a disclosure of information, whose disclosure is in the public interest, which comes to their attention through their work.'

[76] *Guja v Moldova* (n 10).

[77] For a commentary see Valérie Junod, 'La liberté d'expression du *whistleblower*' (2009) *Revue trimestrielle de droits de l'homme* 227–260 and Dirk Voorhoof and Tessa Gombeer, 'Klokkenluiden bij politie en justitie is uitoefening van expressievrijheid' (2008) *Vigiles, Tijdschrift voor politierech t/ Revue du droit de police* 245–259.

somewhat because this was a case of whistle-blowing. Most importantly, the Court noted that 'a civil servant, in the course of his work, may become aware of in-house information, including secret information, whose divulgation or publication corresponds to a strong public interest.'[78]

The Court's Grand Chamber hence recognises that in certain circumstances exposure of wrongdoings has to be protected. This is the case, for instance, when the civil servant is the only one or one of the few persons who is aware of what happens in the workplace and he or she is the one best placed to reveal this.[79] However, with a view to the duty of discretion, the employee's superiors should be the first ones to be informed of this. Making the information public or imparting it to the press is only permitted as an *ultimum remedium*.[80] Therefore in *Guja v Moldova* it was necessary to examine whether or not the information could have been communicated in another way in order to reveal and remedy the wrongdoing at issue. The Court imposed the condition that an internal duty to report also has to be an effective mechanism to remedy the wrongdoing that one wants to uncover: 'In assessing whether the restriction on freedom of expression was proportionate, therefore, the Court must take into account whether there was available to the applicant any other effective means of remedying the wrongdoing which he intended to uncover.'

In addition to this condition (1), there are some more factors to take into account:[81] (2) a public interest must be at issue; (3) the information that has been leaked must be authentic and accurate; (4) the damage the information can produce and the public interest will have to be weighed up; (5) good faith must be the basis of the motives for uncovering the information; (6) and the sanction imposed must be proportionate. Having regard to each of these criteria and factors the Court concluded that Guja's dismissal amounted to a violation of his right to freedom of expression and especially his right to impart information.

The Court phrased its conclusion as follows:

> Being mindful of the importance of the right to freedom of expression on matters of general interest, of the right of civil servants and other employees to report illegal conduct and wrongdoing at their place of work, the duties and responsibilities of employees towards their employers and the right of employers to manage their staff, and having weighed up the other different interests involved in the present case, the Court comes to the conclusion that the interference with the applicant's right to freedom of expression, in particular his right to impart information, was not 'necessary in a democratic society'. Accordingly, there has been a violation of Article 10 of the Convention.[82]

78 *Guja v Moldova* (n 10).
79 See also *Marchenko v Ukraine* (App no 4063/04, 19 February 2009) [46].
80 *Guja v Moldova* (n 10) [73].
81 ibid [74]–[78].
82 ibid [97].

Other whistle-blower cases in which the ECtHR found violations of Article 10 ECHR

Since the *Guja* judgment whistle-blowing by civil servants, government officials and even by magistrates and employees of military intelligence agencies is effectively protected pursuant to Article 10 ECHR. The judgment in *Kayasu v Turkey* concerned the disciplinary sanction and criminal conviction of a prosecutor who, as a citizen, had presented a petition to the Public Prosecutor's Office of the State Security Court in which he accused two former high-ranking military officers of involvement in a military coup. The prosecutor had also leaked the text of the petition to the media, which subsequently reported on this. The Turkish authorities considered the text of the petition contrary to the professional duties of the prosecutor, discrediting the state institutions in an insulting way and damaging the reputation of high-ranking military officials. The European Court however pointed out that '*le discours litigieux servait fondamentalement à démontrer un dysfonctionnement du régime démocratique*.' Given the gravity of the sanctions, the Court concluded that the interference with the right to freedom of expression of Kayasu was a violation of Article 10 ECHR.[83]

Kudeshkina v Russia also concerned a form of whistle-blowing.[84] In 2005 Olga Borisovna Kudeshkina lodged a complaint with the European Court in Strasbourg regarding her dismissal as a judge. After having served as a judge at the Moscow City Court for over 18 years she was dismissed from her post by a disciplinary council because of a number of statements she had made in the media. In public and in the media the judge had declared that she had been taken off a case concerning a large-scale affair of corruption and financial fraud. She made these statements in a period in which her mandate as a judge had been suspended, at her own request, because she was a candidate for the parliamentary elections. In several interviews in the context of this campaign she had referred to manipulations and interventions by high-ranking officials, business people, and politicians, who systematically put judges of the Moscow Court under pressure. In her campaign she advocated a thorough judicial reform with a view to a better performing and more independent judiciary. However, Kudeshkina was not elected for the Duma. Shortly after her reinstatement as a judge she was fired. The ECtHR held the view that Kudeshkina's dismissal because of these public statements was a violation of Article 10 ECHR, for this guarantees everyone, including civil servants and magistrates, the right to freedom of expression. The judgment clarifies that the claim of a breach of professional confidentiality and dissemination of false information as a justification for the judge's dismissal in this case is not convincing. On the contrary, Kudeshkina did not publicise concrete information about criminal proceedings in progress, and that the court's chairwoman had removed her from an important case that was not under discussion. The ECtHR also held that Kudeshkina's

[83] *Kayasu v Turkey* (App nos 64119/00 and 76292/01, 13 November 2008).
[84] *Kudeshkina v Russia* (App no 29492/05, 26 February 2009) [99].

allegations could not be considered as personal, unfounded attacks on some judges or on the magistracy, but as relevant and fair comments on a matter of major public interest.

The Court pointed out:

> that the applicant made the public criticism with regard to a highly sensitive matter, notably the conduct of various officials dealing with a large-scale corruption case in which she was sitting as a judge. Indeed, her interviews referred to a disconcerting state of affairs, and alleged that instances of pressure on judges were commonplace and that this problem had to be treated seriously if the judicial system was to maintain its independence and enjoy public confidence. There is no doubt that, in so doing, she raised a very important matter of public interest, which should be open to free debate in a democratic society. Her decision to make this information public was based on her personal experience and was taken only after she had been prevented from participating in the trial in her official capacity.[85]

Although one could take some exception to the fierceness with which Kudeshkina had phrased her points of view, the Court held the view that her well-founded criticism contributed to an important societal debate: 'However, even if the applicant allowed herself a certain degree of exaggeration and generalisation, characteristic of the pre-election agitation, her statements were not entirely devoid of any factual grounds . . . and therefore were not to be regarded as a gratuitous personal attack but as a fair comment on a matter of great public importance.'[86] Furthermore, the Court considered the dismissal of a judge with a track record of 18 years to be a disproportionate sanction, the more so because it would no doubt make other magistrates shrink from expressing critical comments on the functioning of the judiciary and on justice policy in the future. Once again the Court pointed at the 'chilling effect', as a result of which one may no longer dare to make a public statement for fear of punishment. It emphasised that such a 'chilling effect' is detrimental to democracy and that Kudeshkina certainly had the right to raise public awareness for the matters she pointed out.

The ECtHR's message is clear: (Russian) magistrates who contribute to the public debate, in the media, about manipulation of the judiciary should be supported instead of being punished with dismissal. Unfortunately, even after this supportive judgment by the European Court, the Russian authorities refused to reopen the proceedings concerning Kudeshkina's dismissal from the judiciary. Hence despite the Court's finding that the Russian authorities had been in violation of the applicant's right to freedom of expression guaranteed by Article 10 of the Convention, the case of Kudeshkina illustrates the difficult way to have the jurisprudence of the European Court on the protection of whistle-blowers effectively applied in some of the Convention's Member States.[87]

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[85] ibid [94].

[86] ibid [95].

[87] ibid and *Olga Borisovna Kudeshkina v Russia (No 2)* (App no 2827/11, judgment of 12 March 2015). Under art 46 para 2 ECHR, the Committee of Ministers is vested with the powers to supervise the execution

Other judgments show that the aim of the Court's case law is to stimulate the disclosure or reporting of (serious) wrongdoings or offences, especially in situations in which only one or a few persons or employees are informed.[88] In *Marchenko v Ukraine*, as in *Guja v Moldova,* the Court emphasised that 'the signalling of illegal conduct or wrongdoing in the public sector must be protected, in particular as only a small group of persons was aware of what was happening.'[89] Also in *Frankovicz v Poland* the Court found a violation of Article 10 ECHR, this time following a disciplinary sanction of a doctor who in a medical report for a patient had made negative remarks about the treatment and care of the patient in a certain hospital.[90] The Court added that the report was not a gratuitous personal attack on colleagues, but a report based on medical data regarding the medical treatment of a patient by another doctor, thus indicating that the report was related to a public concern. In these circumstances the disciplinary sanction of a reprimand because of the content of the contested report was not necessary in a democratic society and was to be considered as violating the doctor's right to freedom of expression. In the case of *Sosinowska v Poland* the Court observed in a similar way that the reprimand imposed on a doctor by a Medical Court amounted to a violation of her right to freedom of expression. The Court found that the domestic authorities had failed to recognise that Sosinowska had been defending a socially justified interest, as she had produced a critical assessment, from a medical point of view, concerning issues of public interest.[91]

In *Bucur and Toma v Romania* the Court considered that the general interest in the disclosure of information to the media revealing illegal activities within the Romanian Intelligence Services (RIS) was so important in a democratic society that it prevailed over the interest in maintaining public confidence in that institution. Applying the six *Guja*-criteria, the Court was not convinced that a formal complaint to a Parliamentary Commission would have been an effective means of tackling the irregularities within RIS. It also observed that the information about the illegal telecommunication surveillance of journalists, politicians and business men that had been disclosed to the press affected the democratic foundations of the State. Hence it concerned very important issues for the political debate in a democratic society, in which public opinion had a legitimate interest.

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of the Court's judgments and evaluate the measures taken by respondent States. It is for the Committee of Ministers to assess, in the light of the above principles of international law and the information provided by the respondent State, whether the latter has complied in good faith with its obligation to restore as far as possible the situation existing before the breach. While the respondent State in principle remains free to choose the means by which it will comply with this obligation, it is also for the Committee of Ministers to assess whether the means chosen are compatible with the conclusions set out in the Court's judgment 26 February 2009, [95]. With regard in particular to the reopening of proceedings, the Court does not have jurisdiction to order such measures.

88 *Juppala v Finland* (App no 18620/03, 2 December 2008) and *Marchenko v Ukraine* (n 79).

89 *Marchenko v Ukraine* (n 79) [46].

90 *Frankovicz v Poland* (App no 53025/99, 16 December 2008) [51].

91 *Sosinowska v Poland* (App no 10247/09, 18 October 2011).

The fact that the data and information at issue were classified as 'ultra-secret' was not a sufficient reason to interfere with the whistle-blower's right in this case and the measures taken against Constantin Bucur also risked bringing about a chilling effect. The conviction of Bucur for the disclosure of information to the media about the illegal activities of RIS was considered as a violation of Article 10 ECHR.[92] In its judgment the Court also relied on Resolution 1729(2010) of the Parliamentary Assembly of the Council of Europe on protecting whistle-blowers.

Also *whistle-blowers in the private sector* can invoke their right to freedom of expression, in case of whistle-blowing on alleged unlawful conduct of the employer. In the case of *Heinisch v Germany*, the ECtHR applied, *mutatis mutandis,* the *Guja* rules.[93] The Court stated:

> While such duty of loyalty may be more pronounced in the event of civil servants and employees in the public sector as compared to employees in private-law employment relationships, the Court finds that it doubtlessly also constitutes a feature of the latter category of employment. It therefore shares the Government's view that the principles and criteria established in the Court's case law with a view to weighing an employee's right to freedom of expression by signalling illegal conduct or wrongdoing on the part of his or her employer against the latter's right to protection of its reputation and commercial interests also apply in the case at hand. The nature and extent of loyalty owed by an employee in a particular case has an impact on the weighing of the employee's rights and the conflicting interests of the employer.[94]

Other judgments of the ECtHR also clearly reflect the high level of protection of the right to freedom of expression of persons taking part in public debate, relying on information from their professional environment, such as in *Wojtas-Kaleta v Poland*[95] and *Rubins v Latvia*.[96] This approach is also found the Court's Grand Chamber judgment in the case *Morice v France*.[97] The ECtHR finds that the applicant lawyer, Morice, had expressed value judgments in the newspaper *Le Monde* with a sufficient factual basis and that his remarks concerning a matter of public interest, had not exceeded the limits of the right to freedom of expression.

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[92] *Bucur and Toma v Romania* (n 32) [111]–[112]. Notice that in some other cases the ECtHR showed more respect for secret, classified military information: *Pasko v Russia* (App no 69519/01, 22 October 2009) [86]–[87]. In *Pasko v Russia* the ECtHR failed to apply the *Guja*-criteria, while the information at issue concerned serious environmental issues, related to nuclear pollution.

[93] At the time of the *Guja* judgment it was not completely certain whether those principles would also apply to employees in the private sector, see Junod (n 77) 240 ff.

[94] *Heinisch v Germany* (App no 28274/08, 21 July 2011) [64].

[95] *Wojtas-Kaleta v Poland* (n 26).

[96] *Rubins v Latvia* (App no 79040/12, 13 January 2015). This judgment is another example of a disproportionate interference with the right to freedom of expression of an employee, in this case of a university professor expressing sharp criticism of the employer's policy and management. The Court stated that the employee's dismissal in this case 'was liable to have a serious chilling effect on other employees of the University and to discourage them from raising criticism' and that such a severe sanction, which such consequences, in the light of the case of as a whole, was difficult to justify in a democratic society.

[97] *Morice v France* (n 5).

According to the Court, 'a lawyer should be able to draw the public's attention to potential shortcomings in the justice system; the judiciary may benefit from constructive criticism.' The Grand Chamber also considers that the respect for the authority of the judiciary cannot justify an unlimited restriction on the right to freedom of expression. Although the defence of a client by his lawyer must be conducted not in the media, but in the courts of competent jurisdiction, involving the use of any available remedies, the Grand Chamber accepts that there might be 'very specific circumstances' justifying 'a lawyer making public statements in the media, such as in the case at issue.'

In its judgment in the case of *Matúz v Hungary* the European Court again firmly emphasised the importance of whistle-blower protection, *in casu* for a journalist who alarmed public opinion about censorship within the public broadcasting organisation in Hungary. The Court also confirmed the severe character of a dismissal or immediate termination of employment in a case of (legitimate) whistle-blowing on a matter of public interest.[98]

The Court referred to and applied again the six *Guja*-criteria. The Court emphasised that the content of the book essentially concerned a matter of public interest and it confirmed that it was not in dispute that the documents published by Gábor Matúz were authentic and that his comments had a factual basis. It considered that, having regard to the role played by journalists in society and to their responsibilities to contribute to and encourage public debate, the obligation of discretion and confidentiality constraints could be said to apply with equal force to journalists, given that it was in the nature of their functions to impart information and ideas. The Court also noted that the journalist had referred to confidential documents with no other intention than to corroborate his arguments on censorship, and that there was no appearance of any gratuitous personal attack, either. Furthermore, the decision to make the impugned information and documents public was based on the experience that neither his complaint to the president of the television company nor letters to the board had prompted any response. Hence the Court 'is satisfied that the publication of the book took place only after the applicant had felt prevented from remedying the perceived interference with his journalistic work within the television company itself—that is, for want of any effective alternative channel.' Finally, the Court observed that the domestic courts found that the mere fact that Matúz had published the book was sufficient to conclude that he had acted to his employer's detriment, while also finding that he had breached his contractual obligations. Hence, the domestic courts paid no heed to the journalist's argument that he had been exercising his freedom of expression in the public interest. Moreover, the Supreme Court's judgment explicitly stated that the subject matter of the case was limited to an employment dispute and did not concern the applicant's fundamental rights. Such an approach shows neglect of the right of freedom of expression by the Hungarian domestic courts who did not even examine whether and how the subject matter of Matúz's book and the context of its publication could have affected the

[98] *Matúz v Hungary* (App no 73571/10, 21 October 2014).

permissible scope of restriction on his freedom of expression. The Court also noted that 'a rather severe sanction was imposed on the applicant', namely the termination of his employment with immediate effect. The Court concluded that the interference with the applicant's right to freedom of expression was not 'necessary in a democratic society'.

The Court concluded:

> Being mindful of the importance of the right to freedom of expression on matters of general interest, of the applicant's professional obligations and responsibilities as a journalist on the one hand, and of the duties and responsibilities of employees towards their employers on the other, and having weighed the different interests involved in the case, the Court concludes that the interference with the applicant's right to freedom of expression was not 'necessary in a democratic society'.

Accordingly, the Court unanimously found that there had been a violation of Article 10 of the Convention.[99] The Court's judgment in *Matúz v Hungary* undoubtedly contributes to further raising awareness about the lack of protection of whistle-blowers in many states in Europe. At the same time the Court's case law has elaborated a framework for whistle-blowing protection based on the right to freedom of expression, under a clear set of criteria:

1) Was it not possible for the employee or civil servant to call on his employer, department head or any other authority to disclose the wrongdoings and to remedy these?
2) Does the information relate to serious malpractice or a socially relevant issue?
3) Was the leaked information authentic, reliable and accurate?
4) What harm has been caused to the employer by leaking and making public internal, confidential documents?
5) What motivated the whistle-blower?
6) What kind of sanction was the whistle-blower subjected to and what are the consequences thereof?

Whistle-blowing and the policy of the Council of Europe

In line with the Court's case law applying Article 10 in cases of whistle-blowing the Parliamentary Assembly of the Council of Europe has highlighted the importance of whistle-blowing. Resolution 1729/2010 says:

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[99] See also Dirk Voorhoof, 'Whistleblower Protection for Journalist Who Alarmed Public Opinion about Censorship on TV' *Strasbourg Observers Blog* (25 November 2014), <http://strasbourgobservers.com/2014/11/25/whistleblower-protection-for-journalist-who-alarmed-public-opinion-about-censorship-on-tv/#more-2698>. See also the Recommendation on the Protection of Whistleblowers, Committee of Ministers of the Council of Europe (30 April 2014), <https://wcd.coe.int/ViewDoc.jsp?id=2188855&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383> and <http://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec(2014)7E.pdf>.

> The Parliamentary Assembly recognises the importance of whistle-blowers—concerned individuals who sound an alarm in order to stop wrongdoings that place fellow human beings at risk—as their actions provide an opportunity to strengthen accountability and bolster the fight against corruption and mismanagement, both in the public and private sectors. Potential whistle-blowers are often discouraged by the fear of reprisals, or the lack of follow-up given to their warnings, to the detriment of the public interest in effective management and the accountability of public affairs and private business. [100]

The Resolution insists on protective mechanisms for whistle-blowers in accordance with a number of basic principles as developed in the case law of the ECtHR. The Resolution aims at '*comprehensive legislation*', with a wide scope of application for protected whistle-blowing[101], and this for civil servants as well as for employees in the private sector.[102] A strong legal foundation for whistle-blowers is insisted upon, *inter alia*, in labour law, in order to prevent unjustified dismissal or other forms of retaliation in the domain of employment. More specifically the Resolution is very insistent that the legislation 'should codify relevant issues in the following areas of law: . . . employment law—in particular protection against unfair dismissals and other forms of employment-related retaliation.' In a Recommendation of 2010 the Member States are invited to guarantee the protection of whistle-blowers and to develop mechanisms to protect them (more) appropriately.[103]

In a statement of 7 December 2011 the Committee of Ministers of the Council of Europe called for better legal protection of whistle-blowing, including whistle-blowing through online media and new digital platforms. The Committee of Ministers pointed out that

> people, notably civil society representatives, whistle-blowers, and human rights defenders, increasingly rely on social networks, blogging websites and other means of mass communication in aggregate to access and exchange information, publish content, interact, communicate and associate with each other. These platforms are becoming an integral part of the new media ecosystem. Although privately operated, they are a significant part of the public sphere through facilitating debate on issues of public interest; in some cases, they can fulfil, similar to traditional media, the role of a social 'watchdog' and have demonstrated their usefulness in bringing positive real-life change.[104]

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[100] PACE Resolution 1729 (2010) on the Protection of 'Whistle-Blowers', <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta10/ERES1729.htm>.

[101] '6.1.1. The definition of protected disclosures shall include all bona fide warnings against various types of unlawful acts, including all serious human rights violations which affect or threaten the life, health, liberty, and any other legitimate interests of individuals as subjects of public administration or taxpayers, or as shareholders, employees or customers of private companies' ibid.

[102] '6.1.2. The legislation should therefore cover both public and private sector whistle-blowers, including members of the armed forces and special services' ibid.

[103] PACE Recommendation 1916 (2010) on the Protection of 'Whistle-Blowers' (29 April 2010), <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc09/EDOC12006.htm>.

[104] Declaration of the Committee of Ministers on the Protection of Freedom of Expression and Freedom of Assembly and Association with Regard to Privately Operated Internet Platforms and Online Service Providers (7 December 2011), <https://wcd.coe.int/ViewDoc.jsp?id=1883671&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>.

Therefore, the Committee of Ministers urges that action be taken with a view to effective protection of whistle-blowers pursuant to Articles 10 and 11 ECHR. In the meantime, the jurisprudence by the ECtHR applying Article 10 in protecting whistle-blowers has contributed in an impressive way to the actual protection of individuals who in the context of their work-based relationship report or disclose information on threats or harm to the public interest, contributing to strengthening transparency and democratic accountability. On many occasions in the last few months, such as eg the media coverage of Lux-Leaks and Swiss-leaks, the crucial importance of whistle-blowers for informing the media about important matters of public interest has been demonstrated.

That is also the message of the Committee of Ministers' Recommendation CM/Rec(2014)7 on the protection of whistle-blowers. The Recommendation of 2014 reaffirms that 'freedom of expression and the right to seek and receive information are fundamental for the functioning of a genuine democracy.' It also recognises 'that individuals who report or disclose information on threats or harm to the public interest ("whistle-blowers") can contribute to strengthening transparency and democratic accountability' and it refers explicitly to the right of freedom of expression and information guaranteed by Article 10 ECHR. It recommends that Member States should have in place: 'a normative, institutional and judicial framework to protect individuals who, in the context of their work-based relationship, report or disclose information on threats or harm to the public interest.'[105]

In order to fulfil this mission, the Recommendation suggests that the national framework in the Member States should foster an environment that encourages reporting or disclosure in an open manner and individuals should feel safe to freely raise public interest concerns. It further advocates that 'clear channels should be put in place for public interest reporting and disclosures and recourse to them should be facilitated through appropriate measures.' The channels for reporting and disclosures comprise:

- reports within an organisation or enterprise (including to persons designated to receive reports in confidence);
- reports to relevant public regulatory bodies, law enforcement agencies, and supervisory bodies;
- disclosures to the public, for example to a journalist or a member of parliament.

It is important to notice that whistle-blowers should also be able to invoke legal protection and be able to rely on their right to freedom of expression under Article 10 in cases where they bring information under the public eye, including by disclosing confidential information to media or journalists.[106]

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[105] Committee of Ministers, Recommendation CM/Rec(2014)7 on the Protection of Whistle-Blowers (30 April 2014) <https://wcd.coe.int/ViewDoc.jsp?id=2188855&Site=CM>.

[106] Notice that actually this protection is not guaranteed in the EU Guidelines on Whistle-blowing; see Amalie Bang, 'Recent Developments in Whistle-blower Protection in Europe' *European Yearbook on Human Rights* 2015, 343–353.

It is obvious that the European Court's case law has not only created important protection for whistle-blowing based on the right to freedom of expression. The Strasbourg jurisprudence has also contributed to raising awareness about the lack of protection of whistle-blowers in many states in Europe. Recommendation CM/Rec(2014)7 of 30 April 2014, which requests that the Member States take action to stimulate, facilitate and protect whistle-blowing, is aiming to implement at the national level a higher threshold of protection of public interest whistle-blowing, in line with the European Court's case law.[107] The Parliamentary Assembly of the Council of Europe, in a Resolution of 23 June 2015, has stressed the importance of the case law of the European Court of Human Rights upholding the freedom of speech and protection of whistle-blowers, and has therefore called for an agreement 'on a binding legal instrument (convention) on whistle-blower protection on the basis of the Committee of Ministers Recommendation CM/Rec(2014)7, taking into account recent developments.'[108] The Resolution also emphasises the need to guarantee whistle-blower protection for employees of national security or intelligence services and of private firms working in this field, referring to the public interest involved with mass surveillance by security and intelligence services. As the Court stated in *Bucur and Toma v Romania*, the general interest in the disclosure of information to the media revealing illegal activities within the Romanian Intelligence Services (RIS) was so important in a democratic society that it prevailed over the interest in maintaining public confidence in that institution: information about the illegal telecommunication surveillance of journalists, politicians, and businessmen that had been disclosed to the press affected the democratic foundations of the State.[109]

[107] Committee of Ministers (n 105).

[108] PACE, Resolution 2060(2015) Improving the protection of whistle-blowers (23 June 2015) <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=21931>.

[109] *Bucur and Toma v Romania* (n 32) [111]–[112].

Judith Bannister

Freedom of information in Australia and the role of the media

Introduction

Freedom of information (FOI) is a statutory right of access to government-held information. FOI is a tool that can be used by the media to compel disclosure of information from reluctant government sources. In that sense FOI is rather different to many of the other media freedoms discussed in this book. Rather than a freedom from regulation, or a freedom to communicate and publish, FOI concerns an enforceable right of access to information. The media uses FOI to obtain and publish otherwise undisclosed stories about the exercise of public power. It can be a very effective tool at times, but as this chapter will discuss journalists often struggle with government agencies to enforce the right of access.

This chapter will discuss freedom of information from an Australian perspective. The statutory right[1] was first introduced in Australia at a federal level over 30 years ago[2] followed in time by the states and territories.[3] Journalists have been outspoken critics of the FOI process throughout that time. Common complaints concern unwarranted reliance by agencies upon exemptions, as well as delays in decision making, and significant costs.[4]

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[1] This chapter discusses modern statute based FOI. Freedom of information has a long history tracing its origins to Scandinavia: Stephen Lamble, 'Freedom of Information, a Finnish Clergyman's Gift to Democracy' (2002) 97 *Freedom of Information Review* 2. See also David Goldberg, 'Catha edulis Forsk' and Freedom of Information: A Short Note on an Early FoI Pioneer' (2003) 106 *Freedom of Information Review* 68. The broader concept of government transparency has more diverse origins, see Burkart Holzner and Leslie Holzner, *Transparency in Global Change: The Vanguard of the Open Society* (University of Pittsburgh Press 2006) ch 2, 'The rise of transparency: Some historical turning points'.

[2] Freedom of Information Act 1982 (Cth). Also the State of Victoria: Freedom of Information Act 1982 (Vic).

[3] Freedom of Information Act 1989 (NSW) (now: Government Information (Public Access) Act 2009); Freedom of Information Act 1989 (ACT); Freedom of Information Act 1991 (SA); Freedom of Information Act 1991 (Tas) (now: Right to Information Act 2009 (Tas)); Freedom of Information Act 1992 (Qld) (now: Right to Information Act 2009 (Qld)); Freedom of Information 1992 (WA). Finally the Northern Territory in 2002: Information Act (NT).

[4] For a summary of longstanding media concerns about barriers to the effective use of FOI see Irene Moss, 'Report of the Independent Audit of the State of Free Speech in Australia' (31 October 2007) 102–103. See also: Moira Paterson, 'The media and access to government-held information in a democracy' (2008) 8 *Oxford University Commonwealth Law Journal* 3.

Media use of FOI

From the perspective of political theory and administrative law, freedom of information facilitates government accountability[5] and the media is an agent in that process.[6] The democratic objective is an informed electorate. Whilst holding power to account may be only one motivation amongst many for journalists, as the estate external to established power structures[7] the media plays an important role in open government.[8]

The actual usage of FOI by media applicants is difficult to ascertain. Journalists often identify FOI as a source of information in a story when the process has been successful,[9] or complain about secrecy when the process has failed,[10] but working backwards from the published stories does not give a clear picture of the level of use. All Australian state, territory, and federal government agencies are required to report FOI statistics for annual reporting. These annual reports, and the underlying datasets,[11] can provide useful information for accountability purposes about response times, disclosure rates, costs, and so forth. However, not all jurisdictions keep detailed statistics on categories of applicants. The Commonwealth, for example, simply distinguishes between applicants seeking personal information and those seeking other

[5] Judith Bannister, Gabrielle Appleby, Anna Olijnyk, *Government Accountability; Australian Administrative Law* (CUP 2014) chapter 6. FOI is founded upon the principles of accountability through 'open government': Australian Law Reform Commission and Administrative Review Council, 'Open Government: A Review of the Federal Freedom of Information Act 1982' Report No 77 (ALRC) and Report No 40 (ARC) (1995) 11.

[6] Relatively few individuals seek access to information concerning the accountability of government, and so rely upon the media. The public sees FOI disclosure through a media filter: Robert Hazell, Ben Worthy, Mark Glover, *The Impact of the Freedom of Information Act on Central Government in the UK; Does FOI Work?* (Palgrave Macmillan 2010) 223, 254.

[7] Julianne Schultz, *Reviving the Fourth Estate: Democracy, Accountability and the Media* (CUP 1998) 48.

[8] Johan Lidberg, '"Keeping the Bastards Honest": The Promise and Practice of Freedom of Information Legislation' PhD Thesis (Murdoch University 2006) 12. <http://researchrepository.murdoch.edu.au/157/>.

[9] With the commonly used phrase: 'obtained under FOI'. See eg Lainie Anderson, 'How We can Give Our Students the Flying Start They Deserve' *The Advertiser*, 22 March 2015, 63; Sean Parnell, 'Bulk-Billing Rates Highest in Labor Electorates' *The Australian,* 9 October 2014, 6; Amos Aikman, 'Haze Over Tiwi Land Deal' *The Australian*, 23 October 2014, 11; Patrick Lion, 'Sports Losing Confidence in Anti-Drug Body' *The Advertiser*, 30 December 2013, 23.

[10] Some recent examples include: Sharri Markson, 'What's the Big Secret? Aunty Turns Down Requests to Tot Up its Capital Employees' *The Australian*, 27 October 2014, 23; Chris Vedelago, 'Stonnington Refuses to Reveal Property Hit List' *Sunday Age*, 5 October 2014, 13; Karen Collier, 'Authority will not Release Financial Modelling' *Herald Sun*, 8 April 2013, 4; Julia Medew, 'Ambulance Victoria Won't Release Data on Cardiac Arrests' *The Age*, 21 September 2014; Sean Parnell, 'Secrecy the Watchword as FOI Laws Get Short Shrift' *The Australian*, 9 May 2014, 32; Miles Kemp, 'Top Secret Council Won't Reveal Parking Fine Parameters' *The Advertiser*, 10 December 2013, 8.

[11] The datasets are publicly available at a Federal level from 2011 onwards: <https://data.gov.au/dataset/freedom-of-information-statistics>.

information.[12] In the 2013–14 Victorian annual report the media was incorporated into the broader category of non-personal requests,[13] although the percentage of media requests had been documented separately in earlier years.[14]

In New South Wales and South Australia where agencies are required to report on types of applicants only 2 per cent of applications were identified as arising from the media in the 2013–14 annual reports.[15] At first glance this might suggest that the media is a minor user of the FOI system, but when considering FOI statistics it is always important to keep in mind that the dominant FOI user group in Australia is individuals who are seeking access to their personal records.[16] One of the objects of FOI is to enable individuals to have access to information about them held by government.[17] This access to personal information is the least controversial of the FOI disclosures and access is more likely to be granted.[18] Whilst applications for personal information dominate the FOI workloads, public accountability of government in a democracy is a concomitant object of FOI and it is that process in which the media plays an important role.

A more detailed analysis can show that the media has a far greater impact in some key areas than the raw numbers of applications might at first suggest. For example, the New South Wales annual report for 2013–14 shows the media and members of parliament as the largest applicant group for information held by Ministers.[19] The media can have a significant impact with FOI applications by asking difficult questions at senior levels of government and then publishing the results. It is widespread publication of the results of FOI applications about high level policy and decision making that

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[12] Office of the Australian Information Commissioner (OAIC), 'Annual Report for 2013–14' 130.

[13] Victoria. Freedom of Information Commissioner, 'Annual Report 2013–14' 47.

[14] See Victoria. Department of Justice, 'Annual Report by the Minister Responsible for the Freedom of Information Act 1982, 2011–12' 10.

[15] New South Wales Information and Privacy Commission, 'Report on the operation of the Government Information (Public Access) Act 2009, 2013–14' 32. State Records of South Australia, 'Freedom of Information Act 1991. Annual Report 2013–14' 12.

[16] See the following 2013–14 annual reports for the percentage of applications seeking personal information: Commonwealth 79.7% Office of the Australian Information Commissioner (OAIC) Annual Report for 2013–14, 130; Victoria 66.6 per cent Freedom of Information Commissioner, Annual Report 2013–14, 47; South Australia 58 per cent State Records of South Australia, Freedom of Information Act 1991: Annual Report 2013–14, 12; New South Wales 58.87 per cent New South Wales Information and Privacy Commission, Report on the operation of the Government Information (Public Access) Act 2009: 2013–2014, 40; see also Western Australia. Office of the Information Commissioner, Annual Report 2013/2014, 24.

[17] For an early discussion of objects of the Federal statute see Australia. Commonwealth Attorney-General, 'Freedom of Information Act 1982: Annual Report for the Period December 1982 – June 1983' (Parliamentary Paper No 328 1983) xi.

[18] See table 9.5 to compare figures on refusals of requests: Office of the Australian Information Commissioner, 'Freedom of Information Act 1982 Annual Report 2013–2014' 133.

[19] New South Wales Information and Privacy Commission, 'Report on the operation of the Government Information (Public Access) Act 2009: 2013–2014' 39.

establishes the media as an important participant in open government, and can make media FOI applications so troubling for executive governments.[20] However journalists complain that the system often does not meet the open government objectives.[21]

A tradition of official secrecy

Applicants seeking access to sensitive policy have long criticised the FOI process.[22] Almost from its inception, FOI in the various Australian jurisdictions was criticised for failing to meet its proclaimed ideals of ensuring open and accountable government. Journalists, in particular, complained of an enduring culture of secrecy,[23] a culture that has a long history.

Secrecy was once the norm. Australian public administration inherited a culture of secrecy[24] from England that was reinforced by official secrets legislation,[25] and was combined with a system in which 'government "owned" official information'.[26] This secrecy was sometimes justified as being an essential feature of our Westminster system of responsible government[27] with parliament as the central institution of accountability. Ministers are answerable for the actions of their departments through parliament to the electorate. In turn, government departments are answerable to their ministers. Traditionally, ministerial responsibility meant that public servants remained neutral 'anonymous and invisible',[28] and their advice secret. If one were to adopt a strict approach to this chain of command, direct access by the media and the public to official

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[20] In his 2014 annual report the Western Australian Information Commissioner warned against agencies briefing Ministers on FOI applications. Ministers and their offices are separate agencies under the Australian statutes and FOI applications made to government departments and other agencies are decided by the CEOs. The practice of briefing Ministers concerning FOI release of documents that may attract public and media attention was raised as a matter of concern by the Information Commissioner because it 'could lead to the perception, whether justified or not, that the Minister is being given an opportunity to influence the decision making process': Western Australia. Office of the Information Commissioner, 'Annual Report 2013–2014' 20.

[21] Lidberg (n 8) 213–14.

[22] See Moira Paterson, *Freedom of Information and Privacy in Australia* (Lexis Nexis Butterworths 2005) 499.

[23] Australia's Right to Know Coalition, 'Report of the Independent Audit into the State of Free Speech in Australia' (Chair Irene Moss, 2007) 138.

[24] Enid Campbell, 'Public Access to Government Documents' (1967) 41 *The Australian Law Journal* 73, 73. See also DGT Williams, 'Official Secrecy in England' (1968) 3 *Federal Law Review* 20.

[25] The history of secrecy in Australian public administration was discussed by Justice Kirby in *Osland v Secretary, Department of Justice* (2008) 234 CLR 275, 301–303.

[26] ibid 302.

[27] Justice Susan Kenny, 'Secrecy Provisions: Policy and Practice' (2011) *Federal Judicial Scholarship* 10. Opponents of freedom of information argued that Australia's Westminster system of government was a fundamental obstacle. See Royal Commission on Australian Government Administration, Report (AGPS 1976) 350.

[28] Colin Seymour-Ure 'Great Britain' in Itzhak Galnoor (ed), *Government Secrecy in Democracies* (New York University Press 1977) 159.

documents could be said to undermine that relationship between ministers and their departments. However, in modern democracies ministerial responsibility is but one form of accountability amongst many. Government departments now provide information directly to parliament, to a range of investigatory bodies, and publish to the world at large. When official secrecy is justified today it must be on the basis of a specific public interest that outweighs the public interest in disclosure. Anonymity of the public service in the Westminster system is no longer the default position, but it was a strong tradition that has taken a long time to change.[29]

Caution about public disclosure of information is an understandable default position. Although a social media generation with instant access to Twitter might seem quick to disclose every thought or whim publicly, the decision to publish has traditionally been one taken after some deliberation. The right to publish, to determine when and how a work is made available to the public, is one of the rights exclusively controlled by authors under copyright law,[30] and equity grants protection to secrets under the law of confidential information.[31] However, the Australian High Court has held that claims to control confidential information by executive government are to be treated very differently to the personal interests of private citizens. Governments are supposed to act in the public interest and so 'when equity protects government information it will look at the matter through different spectacles.'[32]

> It may be a sufficient detriment to the citizen that disclosure of information relating to his affairs will expose his actions to public discussion and criticism. But it can scarcely be a relevant detriment to the government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize government action.[33]

Disclosure of government information ought to be the default position, unless that disclosure would be detrimental to the public interest. However, a strong tradition of official secrecy and natural caution about the implications of disclosure work against routine publication of government information. The prudent approach to disclosure for

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[29] In his book *Secrecy and Openness: The Federal Government from Menzies to Whitlam and Beyond* (Melbourne University Press 2000) 7, Greg Terrill reminds us that 'modern governments are much better at explaining their thinking than those of the 1970s or earlier.' For a history of the origins of Australian government secrecy and the introduction of freedom of information, see also Greg Terrill, 'The Rise and Decline of Freedom of Information in Australia' in Andrew McDonald and Greg Terrill (eds), *Open Government: Freedom of Information and Privacy* (Macmillan 1998) 89.

[30] Copyright Act 1968 (Cth) s 31(1)(a)(ii). Australian law maintains crown copyright for works created under the direction or control, or first published by, governments. See Andrew Stewart et al, *Intellectual Property in Australia* (5th edn, LexisNexis 2014) [7.10].

[31] For a discussion of confidential information under Australian law, ibid part II.

[32] See *Commonwealth of Australia v John Fairfax & Sons Limited*, (1980) 147 CLR 39, 51; a case involving an attempt to publish a book of leaked government documents.

[33] ibid 52. The Commonwealth Government did obtain High Court injunctions on the grounds of Crown copyright in that case.

those who have control over information sources is to be cautious, whereas democratic principles of open government require publication unless disclosure would damage the public interest.

On a practical level, it is information sources and those who hold records who have initial control. Government agencies collect, create and store information, ensure security, and know how to find relevant documents. This places the agencies in a position of control that must be countermanded by legal obligations to disclose, or a culture shift that favours disclosure, or both. FOI access to government documents compels publication when the authors and custodians of those documents would prefer to maintain secrecy. Granting this right of access was a radical shift in public administration in Australia. There are numerous exemptions to FOI access but these are based upon the principle that disclosure of some information would be contrary to the public interest. The fact that departmental staff or ministers would rather not have certain information disclosed, or that it causes them embarrassment, ought to be irrelevant.[34] This transition to open government through freedom of information law has been described by the Hon Michael Kirby, former Justice of the Australian High Court, as 'nothing short of revolutionary'.[35]

FOI—a statutory right of access

Freedom of information was introduced in Australia at a Federal level in 1982 after long deliberation,[36] and following major reforms in administrative law that updated judicial review of administrative decision making,[37] introduced the Ombudsman,[38] and merits review by the Administrative Appeals Tribunal.[39] Following on from those reforms the records of government departments and agencies were opened up to public scrutiny. Those Federal reforms were followed in the States and Territories over the next couple of decades.[40] These were the 'first generation' of FOI laws. Some of those jurisdictions have reformed their laws in recent years introducing a 'second generation' of statutes, which will be discussed below.

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[34] The Commonwealth, New South Wales, Queensland, and Northern Territory FOI Acts expressly state that the risk of embarrassment to the government, or misinterpretation of the information by the applicant, are not relevant considerations when deciding whether disclosure of a document would be contrary to the public interest: Freedom of Information Act 1982 (Cth) s 11B(4); Government Information (Public Access) Act 2009 (NSW) s 15; Right to Information Act 2009 (Qld) sch 4 Part 1; Information Act (NT) s 50. See also Right to Information Act 2009 (Tas) sch 2.

[35] *Osland v Secretary* (n 25) 303.

[36] Terrill 2000 (n 29).

[37] Administrative Decisions (Judicial Review) Act 1977 (Cth).

[38] Ombudsman Act 1976 (Cth).

[39] Administrative Appeals Tribunal Act 1975 (Cth).

[40] Freedom of Information Act 1989 (NSW) (Now: Government Information (Public Access) Act 2009 (NSW)); Freedom of Information Act 1989 (ACT); Freedom of Information Act 1991 (SA); Freedom of Information Act 1991 (Tas) (Now: Right to Information Act 2009 (Tas)); Freedom of Information Act 1992 (Qld) (Now: Right to Information Act 2009 (Qld)); Freedom of Information 1992 (WA). Finally the Northern Territory in 2002: Information Act (NT).

Although referred to as freedom of 'information', all the Australian statutory schemes confine access to documents or records. For information to be accessed it must have been recorded. Of course, in modern bureaucracies a great deal of information is recorded. Nevertheless, it is worth noting that some information is ephemeral, and information that was, for instance, communicated in conversations or meetings is not available unless a record was kept. Documents include information stored electronically and in other media. Access may be given in various forms: by allowing the applicant to inspect a document or view or hear an audio-visual article, or by providing a paper or electronic copy.[41]

Documents subject to freedom of information are unpublished documents[42] held by an agency or Minister, or in their possession or control.[43] This includes both documents produced within agencies, and also documents that have been received. Documents created by non-government entities and held by agencies may be subject to disclosure.[44] It is important to note at the outset that the freedom of information statutes do not prevent disclosure of information outside of these procedures. Agencies are free, indeed encouraged, to disclose information,[45] even if it may be exempt material under the FOI statutes.

Documents are made available by state, territory and federal governments[46] under FOI either through proactive publication or upon request. These have been described as 'push' and 'pull' models.[47] Information that must be routinely proactively published without the need to apply discloses how government works:[48] the functions of agencies, how they are organised and may be contacted. Information must also be published about the substantive rules and policies of general application adopted by government agencies, and how those rules and policies are interpreted and administered. This ongoing disclosure informs the public about the workings of government.[49]

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[41] See eg Freedom of Information Act 1982 (Cth) s 17, 20; Freedom of Information Act 1991 (SA) s 22; Freedom of Information 1992 (WA) s 27.

[42] The FOI application process cannot be used to obtain documents that are otherwise open to public access or available for purchase. See eg Freedom of Information Act 1982 (Cth) s 12.

[43] Some of the statutes expressly state that possession or control includes documents that the agency is entitled to access, see eg Freedom of Information 1992 (WA) Glossary s 4. See also *Beesley v Australian Federal Police*, (2001) 111 FCR 1.

[44] Freedom of Information Act 1982 (Cth) s 4; Freedom of Information 1992 (WA) Glossary, s 4.

[45] See eg Freedom of Information Act 1982 (Cth) 3A Objects; Freedom of Information Act 1982 (Vic) s 16.

[46] Freedom of Information Act 1982 (Cth); Freedom of Information Act 1982 (Vic); Government Information (Public Access) Act 2009 (NSW); Freedom of Information Act 1989 (ACT); Freedom of Information Act 1991 (SA); Right to Information Act 2009 (Tas); Right to Information Act 2009 (Qld); Freedom of Information 1992 (WA); Information Act (NT).

[47] See Paterson (n 22) 498. Alternatively, 'passive' access on demand or 'active' dissemination: Organisation for Economic Co-operation and Development (OECD), 'Citizens as Partners; Information, Consultation, and Public Participation in Policy-Making' (2001) 12 <http://www.oecd-ilibrary.org/governance/citizens-as-partners_9789264195561-en>.

[48] See eg Freedom of Information Act 1982 (Cth) part II.

[49] The consequence of failure to publish this information is that members of the public are not to be subjected to any prejudice that could have been avoided if the information had been available: Freedom of Information Act 1982 (Cth) s 10.

Operating alongside this ongoing obligation to publish is the public's right to access specific government records upon request.[50] Australian freedom of information legislation grants every person a legally enforceable right to access unpublished[51] documents in the possession of government agencies and official documents of ministers, unless they are exempt documents.[52] There is no standing test; any person may apply.

Freedom of information does not apply to all government information. There are lists of exempt agencies in both the State and Commonwealth legislation; bodies and offices such as the Auditor-General, security agencies, police integrity and anti-corruption commissions, government legal offices, and many others may be exempt.[53] For those agencies that are covered, some of the documents they hold are exempt.[54]

In all state, territory and federal jurisdictions there are some documents that will not be disclosed in the public interest. Traditionally a series of exemptions is listed. These include, for example, exemptions for Cabinet documents, law enforcement, national security, legal professional privilege, personal privacy, commercial information, trade secrets and so forth. Some of those exemptions will include a public interest test whereby disclosure may still be required unless that would be contrary to the public interest. For other categories parliament will determine that everything within the relevant category will be exempt. Most jurisdictions adopt a list of exemptions of one kind or another, but they can operate quite differently for similar categories. Exemptions are often expressed in terms of the damage or harm that might result from disclosure. [55]

Whilst agencies may rely upon an exemption to refuse access, there is no requirement that these documents be kept secret and nothing in the freedom of information Acts is intended to prevent or discourage disclosure of information by agencies and ministers.[56] Access may be granted to documents that have been edited to conceal exempt parts if it is reasonably practicable to do so. Applicants must be informed of the editing.

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[50] See eg Freedom of Information Act 1982 (Cth) part III.

[51] There is no right to access under the FOI process documents that are open to public access or available for purchase.

[52] Freedom of Information Act 1982 (Cth) s 11; Freedom of Information Act 1989 (ACT) s 10; Government Information (Public Access) Act 2009 (NSW) s 9; Information Act (NT) s 15; Right to Information Act 2009 (Qld) s 23; Freedom of Information Act 1991 (SA) s 12; Right to Information Act 2009 (Tas) s 7; Freedom of Information Act 1982 (Vic) s 13; Freedom of Information 1992 (WA) s 10.

[53] See eg Freedom of Information Act 1991 (SA) sch 2 exempt agencies; Right to Information Act 2009 (Qld). Sch 2 Entities to which this Act does not apply.

[54] See eg Freedom of Information Act 1982 (Cth) part IV.

[55] What is required is judgment on the part of the decision maker about whether the expectation of harm that is claimed is reasonably based: *Attorney-General's Department v Cockcroft*, (1986) 10 FCR 180, 190; *Searle Australia Pty Ltd v Public Interest Advocacy Centre*, (1992) 36 FCR 111, 122 – 123; *Apache Northwest Pty Ltd v Department of Mines and Petroleum*, [2012] WASCA 167 [60].

[56] Freedom of Information Act 1982 (Cth) s 3A; Freedom of Information Act 1989 (ACT) s 13; Government Information (Public Access) Act 2009 (NSW) s 10; Information Act (NT) s 10(2); Right to Information Act 2009 (Qld) s 4; Freedom of Information Act 1991 (SA) s 3(3); Right to Information Act 2009 (Tas) s 12; Freedom of Information Act 1982 (Vic) s 16(2); Freedom of Information 1992 (WA) s 3(3).

FOI reforms

Over the decades the experiences of regular FOI applicants, including media applicants, have been of delays, excessive costs, and routine reliance upon broadly worded exemptions.[57] The practical application of FOI did not meet the original ideals and the 'first generation' laws were widely criticised for failing to meet their democratic objectives.[58] Only five years after commencement of the Commonwealth Act the Senate Standing Committee on Legal and Constitutional Affairs reported complaints about the 'attitude' of government agencies towards disclosure.[59] In 1995 the Australian Law Reform Commission and Administrative Review Council recommended reform of the Commonwealth Act to ensure a pro-disclosure approach to interpretation of the provisions[60] and there have been numerous reviews across Australia's other FOI jurisdictions that have also proposed reforms since then.[61]

Reforms in Queensland,[62] New South Wales,[63] Tasmania,[64] and at the Commonwealth[65] level have tried to improve the system in those jurisdictions. There is now a wide variety of systems across Australia. South Australia,[66] Western Australia,[67] Victoria,[68] and the Australian Capital Territory[69] have retained their original statutes that

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[57] Queensland FOI Independent Review Panel, 'The Right to Information: Reviewing Queensland's Freedom of Information Act' (2008) 299–300;

[58] Sir Anthony Mason described the implementation of freedom of information as a 'substantial disappointment': Anthony Mason, 'The 30th Anniversary: A Judicial Perspective' (2007) 58 *Admin Review* 13, 14.

[59] Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, 'Freedom of Information Act 1982: Report on the Operation and Administration of the Freedom of Information Legislation' (1987) 12.

[60] Australian Law Reform Commission and Administrative Review Council, 'Open Government: A Review of the Federal Freedom of Information Act 1982' Report No 77 (ALRC) and Report No 40 (ARC) (1995) 29–30.

[61] For some examples see FOI Independent Review Panel, 'The Right to Information: Reviewing Queensland's Freedom of Information Act' (2008); New South Wales Ombudsman, 'Opening up Government: Review of the Freedom of Information Act 1989' (2009); Tasmania. Department of Justice, 'Strengthening Trust in Government—Everyone's Right to Know: Review of the Freedom of Information Act 1991' (2009).

[62] Right to Information Act 2009 (Qld).

[63] Government Information (Public Access) Act 2009 (NSW).

[64] Right to Information Act 2009 (Tas).

[65] A major revision of the old statute: Freedom of Information Act 1982 (Cth).

[66] Freedom of Information Act 1991 (SA).

[67] Freedom of Information Act 1992 (WA).

[68] Freedom of Information Act 1982 (Vic).

[69] Freedom of Information Act 1989 (ACT).

have operated in essentially the same way for the last 20 to 30 years, with some reforms.[70] The Northern Territory did not pass its first freedom of information legislation until 2002 and so is somewhere in between.[71]

There are significant differences between those jurisdictions that maintain their original statutes, and those that have introduced reforms. Australia's 'second generation' FOI laws[72] have introduced a range of reforms to address what was perceived as an entrenched culture of secrecy within executive governments. Some of the reforms have broadened the range of information that must be proactively published[73] to include documents to which agencies routinely give access in response to FOI requests (other than personal and business information) without waiting for an application.[74] Agencies are also required to publish documents on the internet (other than personal and business)[75] that have been released to individual applicants in response to FOI applications, or at a minimum information about documents that have been released.[76] These are called disclosure logs.[77] FOI disclosure logs make information available to the public without the need to go through the FOI process. From the public's perspective, disclosure logs can provide context and more detail than media reports alone, although the media can still play a part in drawing public attention to the data. Publishing documents that have been released pursuant to an FOI request can cause some problems for journalists if their investigative work is pre-empted.[78] Journalists have argued that

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[70] For example, the introduction of an Information Commissioner in Victoria. Also removal of ministerial certificates in South Australia: Freedom of Information (Miscellaneous) Amendment Act 2004 (SA). Conclusive certificates were once a part of the freedom of information landscape across Australia, but they have been abolished in a number of jurisdictions. The certificates were generally signed by ministers or heads of departments and established, without the need for further proof, that a document contained exempt material, or that disclosure was contrary to the public interest.

[71] Information Act (NT).

[72] Freedom of Information Act 1982 (Cth) (amended 2010); Right to Information Act 2009 (Qld); Government Information (Public Access) Act 2009 (NSW); Right to Information Act 2009 (Tas).

[73] See (n 48).

[74] Freedom of Information Act 1982 (Cth) s 8(2)(g). See also Queensland where experiencing a high demand for certain information is a factor in determining proactive disclosure under the Guidelines: Office of the Information Commissioner Queensland, 'Interpreting the Legislation: Right to Information Act 2009 Proactive Disclosure and Publication Schemes' 4. While the South Australian legislation has not been reformed, there has been a move toward proactive disclosure with: South Australia. Premier and Cabinet 'Proactive Disclosure of Regularly Requested Information Policy' Circular 35 (PC035) 2013.

[75] Not all applications are published, personal information requests are excluded, and in New South Wales there is some discretion only to publish what the government agency considers may be of interest to the public: Government Information (Public Access) Act 2009 (NSW) s 25.

[76] Freedom of Information Act 1982 (Cth) s 11C; Right to Information Act 2009 (Qld) ss 78–78B; Government Information (Public Access) Act 2009 (NSW) ss 25–26.

[77] For examples of disclosure logs, see <http://www.treasury.gov.au/Access-to-Information/Disclosure Log>; <http://www.health.gov.au/internet/main/publishing.nsf/Content/foi-disc-log>; <http://www.ag.gov.au/rightsandprotections/foi/pages/freedomofinformationdisclosurelog.aspx>.

[78] Sophie Morris, 'Freedom to Beat those Scoops' *Australian Financial Review*, 31 May 2008, 7. Office of the Australian Information Commissioner, 'FOI Disclosure Logs Discussion Paper' (March 2011) 15.

there should be a delay of at least a few days before documents that they have invested time and money in disclosing are published to the world at large.[79]

Proactive disclosure now publishes some of the information journalists once fought to disclose.[80] For example, politicians' and public servants' expenses claims have been a staple of media FOI applications for many years. Commonwealth figures for parliamentarians' entitlements have been published online since 2009.[81] The level of detail in the proactive reporting will determine the extent to which specific applications are replaced. A single figure for travel expenses does not provide the kind of detail available when itemised accounts are disclosed. Routine disclosure of detailed information can avoid the 'gotcha'[82] element of media interest in this data.[83] However, lavish spending will inevitably attract media attention.[84]

As discussed above, a range of material is exempt from disclosure. One of the major areas of difference across the various Australian jurisdictions is the approaches adopted to characterising exempt material and the way the public interest is assessed. The approach originally adopted, and still used in most jurisdictions, is to list categories of exempt material. New South Wales and Queensland have now introduced different approaches focusing greater attention upon the public interest elements, and the Commonwealth and Tasmania also have new provisions that have strengthened the assessment of the public interest. The purpose has been to introduce a presumption in favour of disclosure: that the information will be disclosed unless disclosure would be contrary to the public interest. Nevertheless, the reformed Acts still specify some information that parliament considers it would be contrary to the public interest to disclose.[85]

The most recent FOI reforms propose a partial return to old ways at the Commonwealth level. At the time of writing this chapter the Commonwealth FOI

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[79] Office of the Australian Information Commissioner (n 78). The agency must publish within 10 days: Freedom of Information Act 1982 (Cth) s 11C(6).

[80] The South Australian State Records annual report has suggested that a reduction in media applications may be due to agencies publishing regularly requested Information: State Records of South Australia, 'Freedom of Information Act 1991: Annual Report 2013–14' 12.

[81] Commonwealth. Department of Finance and Deregulation, Parliamentarians Entitlements <http://www.finance.gov.au/publications/parliamentarians-reporting>. There had been biannual reporting to Parliament before the online reporting commenced.

[82] 'Do Public Servants Deserve Coffee?' *Canberra Times*, 12 January 2015.

[83] ibid. Hazell et al in a United Kingdom study have argued that media focus on FOI applications that highlight the negative—misuse of expenses, inefficiency, and failures—diminish public trust in Government: Robert Hazell, Ben Worthy, Mark Glover, *The Impact of the Freedom of Information Act on Central Government in the UK: Does FOI Work?* (Palgrave Macmillan 2010) 254.

[84] The latest travel expenses controversy in Australia surrounding the former House of Representatives Speaker Bronwyn Bishop erupted when the media identified a helicopter charter in 6 monthly figures released by the Department of Finance: http://www.finance.gov.au/sites/default/files/P35_BISHOP_Bronwyn.pdf; Paul Osborne, 'Speaker Charters chopper for Liberal event' *The Australian,* 15 July 2015.

[85] Right to Information Act 2009 (Qld) sch 3; Government Information (Public Access) Act 2009 (NSW) sch 1.

statute was undergoing amendment to the system of review of access decisions with the abolition of the Office of the Australian Information Commissioner that had been established by the 2010 reforms.

Review mechanisms and the role of Information Commissioners

The decision whether or not to disclose information under FOI is at first instance made by the government agency that holds the documents. To be fully accountable freedom of information access decisions must be subject to external review. The statutory schemes include internal review procedures[86] and external independent merits review. The procedures and review bodies vary throughout the jurisdictions.[87]

If a decision about access is made within an agency by someone other than a minister or principal officer, the first step for a dissatisfied applicant is usually internal review within the agency that holds the documents. Internal review can correct errors, but when there is little prospect of a different outcome it can sometimes delay progress to an external review.[88]

In the 2010 reforms to the Commonwealth Act[89] internal review was made optional: an applicant could choose to proceed straight to external review by the Australian Information Commissioner. At the time of writing the Commonwealth was attempting to abolish the Information Commissioner and return external merits review of FOI decisions to the Administrative Appeals Tribunal.[90] As part of that process internal reviews would become a mandatory step in the review process once again.

If an applicant is dissatisfied with an agency's decision to refuse access, at first instance or on internal review, a full review on the merits by a decision maker external to the agency is required. External merits review bodies for FOI decisions vary among the Australian jurisdictions. Reviews may be undertaken by an ombudsman,[91] a tribunal,[92]

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[86] See eg Freedom of Information Act 1991 (SA) s 29.

[87] As administrative decisions, there is also potential for judicial review at the various levels: *Shergold v Tanner* (2002) 209 CLR 126.

[88] New South Wales Ombudsman, 'Opening up Government: Review of the Freedom of Information Act 1989' (2009) 92.

[89] Freedom of Information Amendment (Reform) Act 2010 (Cth).

[90] James Popple, 'The OAIC FOI Experiment' (2014) 78 *Australian Institute of Administrative Law Forum* 31.

[91] In South Australia <http://www.ombudsman.sa.gov.au/freedom-of-information/request-a-review/> and Tasmania <http://www.ombudsman.tas.gov.au/right_to_information>.

[92] Commonwealth Administrative Appeals Tribunal <http://www.aat.gov.au>; ACT Civil and Administrative Tribunal <http://www.acat.act.gov.au/>; New South Wales Civil and Administrative Tribunal <http://www.ncat.nsw.gov.au>; Victorian Civil and Administrative Tribunal <http://www.vcat.vic.gov.au/>; South Australian Civil and Administrative Tribunal (forthcoming – at the time of writing FOI jurisdiction had not been transferred to SACAT) <http://www.sacat.sa.gov.au/about-sacat >.

or an information commissioner.[93] The external review bodies engage in merits review and can substitute their own decisions[94] on whether an exemption applies to a document, including any public interest test that applies to the relevant category.

In most jurisdictions, external merits review is undertaken by an information commissioner: Victoria, Queensland, New South Wales, Western Australia, and Northern Territory all have information commissioners, while the Commonwealth is in the process of disbanding the Office. The commissioners review access decisions and also offer guidance to agencies on compliance and procedures. The Commonwealth, New South Wales, Victoria, and Queensland statutes also incorporate tribunal reviews.[95] Tasmania and South Australia have merits review by the Ombudsman,[96]and in South Australia merits review of access decisions is also undertaken by the District Court.[97]

These review bodies exercise the powers of the original decision maker and can generally substitute their own decision about release of documents for that of the agency or minister. However, there is one significant difference between the powers of the original decision maker and those of the review body. Government agencies that hold the documents have the discretion to release them, even though they are exempt under the legislative provisions. The review bodies do not have that discretion. If a review body finds that a document falls within an exempt category and, where appropriate, the public interest is against disclosure, there is no discretion to release the document.[98]

For many of these jurisdictions there is a two-tiered system of external merits review after the initial internal review. Queensland has a single tier of external merits review

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[93] Commonwealth Australian Information Commissioner <http://www.oaic.gov.au/>; Office of the Information Commissioner Queensland <https://www.oic.qld.gov.au/>; New South Wales Information and Privacy Commission <http://www.ipc.nsw.gov.au/gipa-reviews>; Freedom of Information Commissioner Victoria <http://www.foicommissioner.vic.gov.au/>; Office of the Information Commissioner Western Australia <http://www.foi.wa.gov.au/dnn/home.aspx>; Northern Territory Office of the Information Commissioner <http://www.infocomm.nt.gov.au>.

[94] Cf the New South Wales Information Commissioner who makes non-binding recommendations to the agency: Government Information (Public Access) Act 2009 (NSW) ss 92–93.

[95] Freedom of Information Act 1982 (Cth) part VIIA; Government Information (Public Access) Act 2009 (NSW); Freedom of Information Act 1982 (Vic) part VI, div 3; Right to Information Act 2009 (Qld) ch 3, part 11.

[96] Freedom of Information Act 1991 (SA) part 5, div 1; Right to Information Act 2009 (Tas) s 44.

[97] Freedom of Information Act 1991 (SA) part 5, div 2. A new Tribunal has been established in South Australia, but at the time of writing jurisdiction for freedom of information cases had not been granted to it: South Australian Civil and Administrative Tribunal Act 2013 (SA).

[98] See eg Freedom of Information Act 1982 (Cth) s 58(2); Freedom of Information Act 1991 (SA) s 39(12). In Victoria, the Tribunal has a public interest override that is unique in Australian FOI legislation and that grants it greater power: Freedom of Information Act 1982 (Vic) s 50(4). See discussion in *Osland v Secretary* (n 25) 288. In Victoria the Tribunal has the same powers as the original decision maker, including the power to decide that access should be granted to an exempt document, except in relation to documents exempt under ss 28 (cabinet documents), 29A (documents affecting national security), 31(3) (a document created by the Bureau of Criminal Intelligence and Intelligence and Covert Support Department of the police force of Victoria), and 33 (personal privacy).

with review of decisions of the Queensland Office of the Information Commissioner to the Queensland Civil and Administrative Tribunal being confined to questions of law.[99]

At the heart of the debate over external merits review is the fundamental question: who should decide when official secrecy is in the public interest? There are differing views on whether the best merits review body is a generalist tribunal or a specialist in the form of an information commissioner. This is currently being debated at the Commonwealth level with plans to abolish the Information Commissioner and return review to the Administrative Appeals Tribunal. Established in 2010 by the Commonwealth government the Office of the Australian Information Commissioner (OAIC)[100] had been in operation for only 4 years when funding was withdrawn in the 2014 budget and a Bill was introduced to abolish the Office.[101] At the time of writing this chapter the Bill was still before the Senate.

Some journalists working with FOI have favoured this reform; there had been significant delays with OAIC reviews that were particularly problematic for media applicants with deadlines. The Senate review of the proposed legislation noted:

> Australia's Right to Know, a coalition of major media organisations, argued that from its members' perspective, the right to appeal directly to the AAT was a positive move, as OAIC review had proven far too lengthy and its non-adversarial model also had the potential to deny natural justice to applicants.[102]

However, as a dissenting Senate report noted,[103] the media representatives acknowledged that the Information Commissioner role might need to be retained for the benefit of other applications, while allowing direct AAT review.[104] The information commissioners also undertake other important tasks that influence agency compliance with FOI obligations beyond review of specific disclosure decisions.

Rethinking official information and culture change

It was once thought that official secrecy was essential for effective administration and that bureaucrats were entitled to exercise control over the records they generated. FOI challenged that position and in recent years there has been a reconceptualisation of

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[99] See also Information Act (NT) s 129.

[100] See discussion in Popple (n 90).

[101] Freedom of Information Amendment (New Arrangements) Bill 2014 (Cth).

[102] Australia. Senate, Legal and Constitutional Affairs Legislation Committee, 'Freedom of Information Amendment (New Arrangements) Bill 2014' Report (2014) [2.4]. Citing Michael McKinnon, Committee Hansard (10 November 2014) 17; Australia's Right to Know, Submission 24, 1.

[103] Australia. Senate, Legal and Constitutional Affairs Legislation Committee (n 101) Dissenting Report by Labor Senators (2014) [1.8].

[104] Citing McKinnon (n 102) 20.

what has come to be called 'public sector information' (PSI).[105] The very nomenclature has changed from 'official information' controlled under crown copyright,[106] to 'public sector information' that is an openly licensed national resource.[107] Australian governments are moving toward the use of Creative Commons licences,[108] a 'counter-copyright'[109] movement that provides open licensing of copyright protected works on the Internet that has followed in the footsteps of the open source movement for computer software. The major impact of this new approach to public sector information has been cultural with a gradual move toward a pro-disclosure culture.[110] Of course, if the public has legal rights to access information, and the Executive has legal obligations to supply it, then development of a pro-disclosure culture is more likely to be successful.

Information commissioners can play an important role in changing the culture of government agencies and encouraging disclosure by taking on the role of FOI advocates. The Commonwealth was slow to appoint an information commissioner; a combined report of the Australian Law Reform Commission and Administrative Review Council in 1996 recommended that the Commonwealth establish a statutory office of Information Commissioner to oversee the administration of the FOI Act that had been in operation since 1982.[111]

> The Review considers that many of the shortcomings in the current operation and effectiveness of the Act can be attributed to this lack of a constant, independent monitor of and advocate for FOI.[112]

The ALRC and ARC concluded that an independent FOI advocate was required 'to monitor and improve the administration of the FOI Act and to provide assistance, advice and education to applicants and agencies about how to use, interpret and administer the

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[105] Government 2.0 Taskforce, 'Engage; Getting on with Government 2.0' (2009); Office of the Australian Information Commissioner, 'Principles on Open Public Sector Information: Principles on Review and Development of Principles' (2011).

[106] For a discussion of Crown copyright see Stewart (n 30) [7.10].

[107] Australia. Freedom of Information 1982 (Cth) s 3(3): 'The Parliament also intends, by these objects, to increase recognition that information held by the Government is to be managed for public purposes, and is a national resource.'

[108] Commonwealth Attorney-General's Department, 'Guidelines on Licensing Public Sector Information for Australian Government Agencies' (2011) 1; Office of the Australian Information Commissioner, 'Principles on Open Public Sector Information: Principles on Review and Development of Principles' (2011) 45. See discussion in Judith Bannister, 'Open Government: From Crown Copyright to the Creative Commons and Culture Change' (2011) 34 *University of New South Wales Law Journal* 1080.

[109] Although, by licensing, it stays within lawful boundaries and operates on a traditional copyright model. See discussion in Susan Corbett, 'Creative Commons Licences, the Copyright Regime, and the Online Community: Is there a Fatal Disconnect?' (2011) 74 *Modern Law Review* 503.

[110] Australian Information Commissioner, 'Open Public Sector Information: From Principles to Practice. Report on Agency Implementation of the Principles on Open Public Sector Information' (2013) 36.

[111] Australian Law Reform Commission and Administrative Review Council, 'Open Government: A Review of the Federal Freedom of Information Act 1982' Report No 77 (ALRC) and Report No 40 (ARC) (1995).

[112] ibid 61–62.

Act.'[113] If the position of Information Commissioner is abolished at the Commonwealth level, as currently proposed,[114] this oversight and advocacy role will be lost along with the specialised merits review. While tribunal reviews may satisfy some media applicants, a backwards step in the oversight of FOI is likely to be detrimental for all applicants.

Conclusion

FOI is a useful tool for journalists and, in turn, journalists play a part in the democratic movement towards open government. Australia has over 30 years experience with the FOI process, with a number of different systems having evolved in the various jurisdictions within the federation. With a long tradition of official secrecy it has been a slow transition toward greater openness. A major cultural shift is required to truly recognise government information as a publicly owned and open resource. Greater proactive disclosure through routine internet publication might seem to have diminished the role of the media, but it is the hard cases—the information that has to be fought for—that are often the most important to disclose and the media still has an important part to play in that process.

[113] ibid 5. It should be noted that the Open Government report did not recommend that the statutory office of FOI Commissioner include merits review powers, ibid 174.

[114] See (n 101).

Kevin W Saunders

A comparative view of media coverage of criminal trials

There is a phenomenon in television coverage in the United States that would seem quite strange to those familiar with the intersection of media law and criminal procedure in other jurisdictions. This strangeness would be particularly striking for those versed in other legal systems in which, like the US, guilt in a criminal trial is determined by nonprofessional jurors. The phenomenon is the extensive coverage, for what clearly seems to be entertainment purposes, of criminal cases, both before and during trial.

Perhaps the best-known, although certainly not the only, presenter of such entertainment is Nancy Grace. Her programme is carried week nights, in prime time, on the Headline News cable network, available throughout the US. The programme is devoted to legal commentary and, with so much time to fill, tends toward regular and extensive coverage of a limited number of cases. Two examples are her coverage of the Duke lacrosse team rape case and the Casey Anthony murder.

The Duke case involved charges brought against several members of the university's lacrosse team over the alleged rape of an exotic dancer hired to perform at a party. The charges turned out to be unfounded; they were eventually dropped and the prosecutor was disciplined for having withheld evidence and for prejudicial statements to the media.[1] While the defendants avoided conviction, their reputations, for at least a considerable period, were harmed, the lacrosse team's season was suspended, and the coach was pressured into resignation.

In terms of press coverage, the media storm was widespread.[2] The racial difference between the African-American dancer and the white defendants and the class differences in this town and gown tale made a compelling story. Even as respected an outlet as the *New York Times* published over 100 pieces.[3] But reaching a likely larger audience, nightly in their own homes, was the commentary of Nancy Grace. She, like most of the rest of the media, assumed the defendants were guilty. In one broadcast she played on

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[1] See Stuart Taylor Jr and KC Johnson, 'Guilty in the Duke Case' *The Washington Post*, 7 September 2007. The guilt in the title is that of the prosecutor.

[2] A discussion of the media coverage, with focus on the failings of the media, can be found in the archives of the *American Journalism Review*. See Rachel Smolkin, 'Justice Delayed' *American Journalism Review* (August / September 2007) <ajrarchive.org/Article.asp?id= 4379>.

[3] ibid.

her depiction of the defendants as rich and privileged athletes and proclaimed, presumably before the season was cancelled, 'I'm so glad they didn't miss a lacrosse game over a little thing like gang rape!'[4]

A second example of Nancy Grace's coverage of a criminal case, the one for which she may be best known, was a roughly three year diet of daily coverage of the death of a young Florida girl, Caylee Anthony, and the investigation and trial of her mother, Casey Anthony. There was, again, an assumption of guilt. When the jury found the mother not guilty, Nancy Grace's response was:

> I absolutely cannot believe Caylee's death has gone unavenged . . . . Now I know, it is our duty as American citizens to respect the jury system . . . . But I know one thing, as the defense sits by and has their champagne toast after the not guilty verdict, somewhere out there the devil is dancing tonight.[5]

Casey Anthony may or may not have killed her daughter, but the verdict clearly did not fit the script developed throughout the Casey Anthony episodes of what has been described as 'her act'.[6]

While these examples of media coverage of criminal investigations and trials may seem odd, they are perfectly legal under United States law. In what may reasonably be seen as a conflict between the free expression rights of the media and the rights of criminal defendants to a fair trial, the position of the United States Supreme Court has seemingly been that free expression must prevail. Other jurisdictions have been willing to limit media rights in order to assure a fair trial. After a discussion of United States law, the law of a number of other jurisdictions will be examined. That will be followed by a discussion of arguments for and against limitations on the media.

The United States

Given the seemingly absolute language of the First Amendment's speech and press causes, 'Congress shall make no law . . . abridging the freedom of speech, or the press', and the recognition that the prohibition extends to the entire federal government and, through the Fourteenth Amendment's Due Process Clause, to the states,[7] this favouring of media rights might not be surprising. While no constitutional right in the United

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[4] ibid.

[5] Mary Elizabeth Williams, 'Nancy Grace Knows More than a "Kooky Jury"' Salon, 6 July 2011 <www.salon.com/2011/07/06/nancy_grace_caylee_anthony_verdict/>.

[6] See David Zurawik, 'Are Nancy-Grace-Led Media as Vile as Casey Anthony Lawyer Claims?' *The Baltimore Sun*, 5 July 2011. 'Grace has been a one-woman, all-supreme, TV, judge-and-jury for a long time now. It's her act, and it seems as if she couldn't care less where the facts lie or how her judgments of guilt affect suspects' lives.' <articles.baltimoresun.com/2011-07-05/news/bal-casey-anthony-defense-attorney-nancy-grace-blasts-tv-talking-heads-in-verdict-wake-20110705_1_hin-casey-anthony-nancy-grace>.

[7] See *Gitlow v New York*, 268 US 652, 666 (1925).

States is actually absolute, constitutional infringements must be justified under a rather stringent test. They may stand only if they are narrowly tailored to a compelling governmental interest.[8]

The major United States Supreme Court case examining this conflict is *Nebraska Press Association v Stuart*.[9] There, both the trial judge and the Nebraska Supreme Court saw their primary duty as being the protection of criminal defendants by assuring that any convictions are based solely on evidence admitted at trial. The charges against the defendant included the murder of six members of a family and sexual assault, crimes that occurred in a town with a population of approximately 850 people. As might be expected, there was intensive news coverage, not only at the local level but throughout the state and nation. Concerned about the defendant's rights to a fair trial, the prosecuting and defence counsel joined forces to request restrictions on the press.

The trial court issued an order prohibiting the release of any testimony given or any evidence submitted. The court also ordered the press to comply with the Nebraska Bar-Press Guidelines, which took the position that it was inappropriate to report on confessions, express opinions with regard to guilt, comment on evidence not presented to the jury, or otherwise make statements that may influence the trial's outcome.[10]

After a preliminary hearing, which was open to the public but subject to the order, the Press Association requested that the court vacate the restrictive order. Instead, the trial court entered a new order, which would apply until the jury was seated. The new order barred reporting on:

> (1) the existence or contents of a confession . . . to law enforcement officers, which had been introduced in open court at arraignment; (2) the fact that or nature of statements [the defendant] had made to other persons; (3) the contents of a note he had written the night of the crime; (4) certain aspects of the medical testimony at the preliminary hearing; and (5) the identity of the victims of the alleged sexual assault and the nature of the assault.[11]

The new order continued to incorporate the Nebraska Bar-Press Guidelines.

On appeal, the Nebraska Supreme Court modified the order to provide what it saw as a better balance between fair trial rights and freedom of the press. The Nebraska Supreme Court's order prohibited only the reporting of

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[8] It is true that there are certain exceptions to the sorts of expression protected by the First Amendment. For example, obscene materials and fighting words have never been considered protected. See eg *Roth v United States*, 354 US 476 (1957); *Chaplinsky v New Hampshire*, 315 US 568 (1942). More recently, child pornography was held to lack such protection. See *Ferber v New York*, 458 US 747 (1982). There are also cases holding that expression that raises a clear and present danger of imminent lawless action is unprotected. See eg *Brandenburg v Ohio*, 395 US 444 (1969). This 'clear and present danger' test could, however, be seen as a special form of strict scrutiny, with the compelling governmental interest being preventing serious illegal action and imminence indicating that there was not time for a response other than banning the speech.

[9] *Nebraska Press Association v Stuart*, 427 US 539 (1976).

[10] ibid 542 n 1.

[11] ibid 543–44.

> (a) the existence and nature of any confessions or admissions made by the defendant to law enforcement officers, (b) any confessions or admissions made to any third parties, except to members of the press, and (c) other facts 'strongly implicative' of the accused.[12]

When the case reached the United States Supreme Court, the Court did recognise that 'when the case is a "sensational" one tensions develop between the right of the accused to trial by an impartial jury and the rights guaranteed others by the First Amendment.'[13] But, the Court concluded that even pervasive pretrial publicity does not inevitably result in an unfair trial.

> The capacity of the jury eventually impaneled to decide the case fairly is influenced by the tone and extent of the publicity, which is in part, and often in large part, shaped by what attorneys, police, and other officials do to precipitate news coverage. The trial judge has a major responsibility. What the judge says about a case . . . is likely to appear in newspapers and broadcasts. More important, the measures the judge takes or fails to take to mitigate the effects of pretrial publicity may well determine whether the defendant receives a trial consistent with the requirements of due process.[14]

While the Court seemed reluctant to chastise the judge or the attorneys for having acted responsibly and out of legitimate concern over a fair trial, it said that the First Amendment provided 'special protection against orders that prohibit the publication or broadcast of particular information or commentary orders that impose a "previous" or "prior" restraint on speech.'[15]

> [P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights… . If it can be said that the threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' at least for the time… . Truthful reports of public judicial proceedings have been afforded special protection against subsequent punishment. For the same reasons the protection against prior restraint should have particular force as applied to reporting of criminal proceedings.[16]

The First Amendment required an examination of the nature and extent of the news coverage and, importantly, whether there were any other measures that could have mitigated any negative effects. Furthermore, the restraining order would have to have been seen as capable of preventing the harm, so as not to be an unnecessary restriction on First Amendment freedoms. While accepting the possibility that pervasive publicity could have impaired a fair trial, the Court found little evidence that other measures, short of a violation of the First Amendment, could not have eliminated, or at least limited, that impact. The Court suggested, among those other measures, a change of

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12 ibid 545.
13 ibid 551.
14 ibid 554–55.
15 ibid 556.
16 ibid 559.

venue, postponement until publicity had died down, questioning potential jurors as to whether or not they had already formed an opinion, and strong instructions to the jury to decide the case based only on the evidence presented in court.[17] The Court provided an additional suggestion that the jury be sequestered but recognised that does not protect against pretrial publicity.[18]

The Court also questioned whether the restrictions would actually have served any purpose. The crime had occurred in a rather small community, where news would spread without any media coverage, and the spread of rumours might be even more damaging than the, presumably, accurate news reporting provided by the media.[19] Furthermore, the Court was particularly concerned over the application of any ban to the reporting of what had occurred in a preliminary hearing that had been open to the public. This conflicted with the principle that the press must have the freedom to report on what occurs in the courtroom.[20]

While the Court did not find the restrictions justified, it did not conclude that there could never be such a justification, saying 'we need not rule out the possibility of showing the kind of threat to fair trial rights that would possess the requisite degree of certainty to justify restraint. This Court has frequently denied that First Amendment rights are absolute and has consistently rejected the proposition that a prior restraint can never be employed.'[21] Despite this equivocation, it seems that the First Amendment

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[17] See ibid 563–64. With regard to a change of venue, Nebraska law allowed only a change to an adjacent county, and those counties had been exposed to the same level of pretrial publicity. The Court said that state laws that restrict venue may need to yield to the Constitution's requirement of a fair trial. See ibid 563 n 7.

[18] ibid 64. Sequestration may raise other concerns. It is inconvenient for jurors, and it has been suggested that it may lead to a bias against the defendant: '[S]equestration has been thought to produce an anti-defendant bias in the jury, which would be too high a price to pay for the privacy given the jurors.' Ryan Brett Bell and Paula Odysseos, 'Sex, Drugs, and Court TV? How America's Increasing Interest in Trial Publicity Impacts Our Lawyers and the Legal System' (2002) 15 *Georgetown Journal of Legal Ethics* 653, 667, citing James P Levine, 'The Impact of Sequestration on Juries,' (1996) 79 *Judicature* 266. Alternatively, it was suggested that sequestration in the Casey Anthony case may have contributed to acquittal. Jean Casarez of *In Session* is quoted as suggesting that the *CSI* effect, the jury's unwillingness to sift through circumstantial evidence when crimes are so clearly solved using scientific evidence on such crime shows, combined with sequestration, played a role. 'The jury in the Casey Anthony case was sequestered for so many weeks . . . it is the opinion of some that the jurors were just tired when it got to the point of deliberations. They may have been motivated to get home, not motivated to look at every piece of detailed evidence. If they had meticulously gone through everything in this circumstantial case there could have been a conviction.' Graham Winch, 'The Casey Anthony Effect' 5 July 2012, quoting Jean Casarez <www.hlntv.com/article/2012/07/03/casey-anthony-effect>.

[19] See *Nebraska Press Association v Stuart* (n 9) 567.

[20] ibid 568. The Court noted that the trial court would not have known that it could have closed the preliminary hearing, until the Nebraska Supreme Court so construed state law. The implication is that closing the hearing would have resolved this problem, since the statements would not have been made in an open hearing. The United States Supreme Court would later address the legitimacy of closing a preliminary hearing. See n 22.

[21] ibid 569–70.

rights are at least close to absolute and, given the Court's suggested alternatives, it is highly unlikely that restraints on publication will stand up to First Amendment scrutiny.[22]

Before leaving the analysis of United States law, it should be noted that the Supreme Court has recognised that extensive coverage can lead to a violation of the right to a fair trial. In *Sheppard v Maxwell*[23] there was sufficiently pervasive and prejudicial publicity that, coupled with the failure of the trial judge to take any protective measures, the defendant failed to receive a fair trial. The Court said:

> Sheppard was not granted a change of venue . . . nor was his jury sequestered… . [T]he Sheppard jurors were subjected to newspaper, radio and television coverage of the trial while not taking part in the proceedings. They were allowed to go their separate ways outside of the courtroom, without adequate directions not to read or listen to anything concerning the case… . Moreover, the jurors were thrust into the role of celebrities by the judge's failure to insulate them from reporters and photographers… . [They were] exposed . . . to expressions of opinion from both cranks and friends.[24]

The judge failed to regulate the conduct of reporters inside the courtroom and failed to protect witnesses. The Court also criticised the prosecutor.

> The prosecution repeatedly made evidence available to the news media which was never offered in the trial. Much of the 'evidence' disseminated in this fashion was clearly inadmissible. The exclusion of such evidence in court is rendered meaningless, when news media make it available to the public.[25]

While the Court found a violation of fair trial rights, the criticism of the judge and prosecutor, and the suggestion here and in the later cases of alternatives to restraining orders, leaves intact the conclusion that such orders are very unlikely to stand.

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[22] There are post-*Nebraska Press* cases that extend the analysis. *Richmond Newspapers, Inc. v Virginia*, 448 US 555 (1980), grew out of a trial court's order closing a trial to the public and the press, in the wake of three mistrials, the last of which was the result of jurors receiving information not presented at trial. The Supreme Court held that criminal trials must be open. *Press-Enterprise Co. v Superior Court,* 478 US 1 (1986) extended this requirement of openness to preliminary hearings, unless there was a specific finding that the closing was essential to preserve the right to a fair trial. A limitation on this requirement of openness is provided by *Gannett Co. v DePasquale*, 443 US 368 (1979), where the Supreme Court held that the constitutional right to a public trial, as provided by the Sixth Amendment, did not extend to pretrial hearings on the suppression of evidence. Jury knowledge of evidence that has been suppressed would be particularly damaging.

[23] *Sheppard v Maxwell*, 384 US 333 (1966).

[24] ibid 352–53.

[25] ibid 360.

Canada

The Canadian Charter of Rights and Freedoms also contains a provision protecting the freedom of expression. Section 2 provides 'Everyone has the following fundamental freedoms . . . (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.' Unlike the United States Constitution, however, the Charter explicitly provides for a balancing of all the Charter's rights and freedoms against other values. Section 1 provides: 'The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'

The Supreme Court of Canada, in *Regina v Oakes*,[26] provided a test to be applied when there is a restriction on expression. The Court, in a later case, explained the *Oakes* test.

> [It] must first be established that the impugned state action has an objective of pressing and substantial concern in a free and democratic society… . The second feature of the *Oakes* test involves assessing the proportionality between the objective and the impugned measure. The inquiry as to proportionality attempts to guide the balancing of individual and group interests protected in s 1, and in *Oakes* was broken down into the following three segments:
> First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question… . Third, there must be proportionality between the *effects* of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of 'sufficient importance'.[27]

Since the Canadian Charter allows for a balancing, restrictions would seem generally to be more easily justified. In particular, it would seem likely that press restrictions to protect the fair trial rights of criminal defendants could be justified. However, the Canadian Court's treatment of the issue and the Court's requirement of the same alternatives as established in *Nebraska Press* call that conclusion into question. At a second level of 'however', the procedural requirements for the appeal of a trial court's limits on the press may, indeed, allow Canadian trial courts more latitude.

The Canadian Supreme Court's case on this issue is *Dagenais v Canadian Broadcasting Corp.*[28] Four members of the Catholic order the Christian Brothers faced charges of physical and sexual abuse of young boys at the school at which they taught. The trial of one of the defendants, Dagenais, had begun in early December of 1992.

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[26] *Regina v Oakes*, [1986] 1 SCR 103.
[27] *Regina v Keegstra*, 1 CR (4th) 129 (1990) quoting *Regina v Oakes* (n 26) 101.
[28] *Dagenais v Canadian Broadcasting Corp.*, [1994] 3 SCR 835.

A second defendant, Monette, was scheduled for trial in February, and a judge had already been assigned. The remaining defendants, Radford and Dugas, were to be tried later and there had not been any assignment of trial judges in their cases.

The media issue was the advertisement by the Canadian Broadcasting Corporation of a miniseries titled 'The Boys of St Vincent'. It was scheduled for showing in two two-hour blocks on Sunday and Monday, 6 and 7 December. The miniseries was not a purported account of the acts of the defendants. It was, instead, a fictional account of sexual and physical abuse of children at a Catholic institution. The Dagenais jury was scheduled to be charged on December 7, and the defence, out of concern over the potential impact of the broadcast, asked the trial judge to charge the jury earlier, before the broadcast, or to sequester the jury. The judge refused the requests but did order the jury not to watch.

The defendants then applied to another judge, Justice Gotlib, of the Ontario Court of Justice, for relief. That judge issued a restraining order prohibiting the Canadian Broadcasting Corporation from broadcasting 'The Boys of St. Vincent' or publishing any information related to the broadcast, until all four trials were concluded. On appeal to the Ontario Court of Appeal, the order was modified slightly. The general prohibition on broadcast was limited to a prohibition on broadcast in Ontario or on one English language station in Montréal. It was also made clear that the ban would extend until the end of all four trials but not through any appeals.

The CBC appealed the modified order to the Supreme Court of Canada. The Court said that the adoption of the Charter had changed the common law rule in this area. Under the common law any ban had to be justified by a real and substantial risk of interference with the defendant's right to a fair trial.[29] While that rule provided some protection for the media, since it would not allow restraints based on speculation, the Charter could be seen as requiring more. On that issue, Justice Lamer, writing for a majority of six justices, said:

> The pre-*Charter* common-law rule governing publication bans emphasized the right to a fair trial over the free expression interests of those affected by the ban. In my view, the balance this rule strikes is inconsistent with principles of the *Charter* . . . . It would be inappropriate for the courts to continue to apply a common law rule that automatically favoured the rights protected by s 11 (*d*) [fair trial rights of criminal defendants] over those protected by s 2(*b*). A hierarchical approach to rights, which places some over others must be avoided, both when interpreting the *Charter* and when developing the common law. When the protected rights of two individuals come into conflict, as can occur in the case of publication bans, *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights.[30]

[29] ibid [72].
[30] ibid [75].

The Court specifically rejected the 'clash model' of United States law, saying that that model was more suited to the United States, since the United States Constitution has no equivalent to Section 1 of the Charter.[31]

The Court concluded that it had to adapt the common-law rule to assure the proportionality of any ban to its effect on the freedom of expression. The Court said: 'A publication ban should only be ordered when: (a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.'[32]

Applying the rule to the case proved easy. The Court said that it did not need to balance salutary effects against deleterious impact, because there were reasonable alternative measures to the bar. It is here that the similarity of *Daganais* to *Nebraska Press* is found. The *Daganais* Court listed the alternatives it had in mind.

> Possibilities that readily come to mind . . . include adjourning trials, changing venues, sequestering jurors, allowing challenges for cause and voir dires during jury selection, and providing strong judicial direction to the jury. Sequestration and judicial direction were available for the Dagenais jury. Apart from sequestration, all of the other effective alternatives to bans are available for the other three accused.[33]

The Court also used the opportunity to explain further the proportionality requirement of the *Oakes* test. More than a theoretical balancing is required; the courts must consider the actual salutary effect of a ban. 'I would . . . rephrase the third part of the *Oakes* test as follows: there must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, *and there must be a proportionality between the deleterious and salutary effects of the measures*.'[34] The courts must consider the efficacy of any ban, and modern communication may limit that efficacy.[35]

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[31] ibid [85].

[32] ibid [77] (emphasis removed).

[33] ibid [83].

[34] ibid [99] (emphasis in original).

[35] Eric Easton suggests that Chief Justice Lamer might have had in mind a publication ban issued in a contemporaneous Ontario murder trial. See Eric B Easton, 'Sovereign Indignity? Values, Borders, and the Internet: A Case Study' (1998) 21 *Seattle University Law Review* 441, 511. Paul Bernardo and Karla Homolka were being prosecuted for the murder of two teenage girls. Homolka pleaded guilty to two charges of manslaughter and Bernardo faced two charges of first-degree murder and a significant number of other charges. Concerned that the details of Homolka's plea would impair Bernardo's right to a fair trial, the judge barred the publication of most information growing out of Homolka's trial and closed her trial to all but accredited Canadian journalists. ibid 444.

The order proved difficult to enforce. When a US television programme was scheduled to air that would present information from the trial, Ontario's attorney general did threaten prosecution of any Canadian cable systems carrying the programme. See ibid 479–80. But, that would not prevent those within the broadcast range of US televisions stations or those who owned satellite dishes from having access. Canadian police

The application of the modified *Oakes* balancing may have been relatively easy in this case. The broadcast involved purely fictional events. While it might have led to greater public concern over abuse in Catholic institutions, it did not address the guilt of the particular defendants. The Court recognised the distinction, saying:

> More problematic is the situation in which there is a period of sustained pre-trial publicity concerning matters that will be the subject of the trial. In such circumstances, the effect of instructions is considerably lessened. Impressions may be created in the minds of the jury that cannot be consciously dispelled. The jury may at the end of the day be unable to separate the evidence in court from information that was implanted by a steady stream of publicity.[36]

This last quoted language suggests a potential difference between the United States and Canada, but there is also a procedural aspect of the ruling in *Dagenais* that may lead to even greater differences in actual application. The Court discussed jurisdiction to obtain a ban on publication or to hear appeals from a trial judge's ruling. If either the Crown or the accused seeks a ban, the trial judge should hear the motion, assuming the judge has been appointed; if no judge has been appointed, a judge in the court at the same level should rule.[37] If the media want to challenge a restraint issued by a provincial court, the media should apply for certiorari to a Superior Court judge. Denial of certiorari may be appealed to the Court of Appeal, and if that appeal is dismissed, the media may apply to the Supreme Court of Canada for leave to appeal.[38] If the ban is issued by a provincial Superior Court, the media may seek leave to appeal to the Supreme Court of Canada.[39]

In the case before the Court, Dagenais and Monette should have applied to the trial judges that had already been appointed.[40] If the motions had been denied, the only available appeal would have been an appeal of any conviction, at the end of the trial.[41] Justice Gotlib lacked jurisdiction to hear the motions of those defendants.[42] The other two defendants, for whom judges had not been assigned, correctly applied to a Superior

checked the trucks of the distributors of US newspapers, although individual Canadians were allowed to bring single copies of the US papers with coverage back into Canada. See ibid 483. University computer systems did block references to the trial, see ibid 485, but other Internet access remained available.

36 *Dagenais* (n 28) [92].

37 ibid [54]. The Court added that, if it is not clear at what level the case will be tried, the motion should be made before a Superior Court judge. The Court also recognised a potential problem under the collateral attack rule, when the application is ruled on by a judge other than the judge eventually named to conduct the trial. Any appeal over the outcome of the trial could not, under that rule, include an attack on the ruling of the other judge. The Court said that in this situation the rule should be relaxed. ibid [55]–[56].

38 ibid [58].

39 ibid [59].

40 ibid [62]–[63].

41 ibid.

42 ibid [66].

Court judge, and Justice Gotlib had jurisdiction to hear their motions.[43] Had their motions been denied, they too would only have been able to appeal any conviction.[44] Because the publication bans were issued, the CBC had to apply directly to the Supreme Court of Canada for leave to appeal.

The practical impact of this jurisdictional regimen would seem likely to be that the rulings of at least Superior Court judges will remain largely intact. If the publication ban is denied, there is no appeal other than an appeal of a conviction. Such an appeal will be after-the-fact. If a publication ban is ordered, the only appellate route for the media is directly to the Supreme Court. *Degenais* involved an order with significant impact on a national media entity, and such an order may be seen as important enough for the Supreme Court to act. But for a trial in a small, remote town, and an order directed only to local media, it remains to be seen how willing the Court will be to grant leave to appeal.[45]

In conclusion, while the *Dagenais* opinion makes the substantive law of the United States and Canadian law regarding publication bans seem quite similar, in practice Canadian law may prove less protective of the press interests and more protective of the right to a fair trial.

New Zealand

New Zealand's constitution has no textual provision protecting expression, but there is statutory protection. Section 14 of the New Zealand Bill of Rights Act of 1990 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.'[46] The strength of this protection is limited by its status as a statute. It lacks the trump card power of a constitutional provision. In fact the Bill of Rights Act, in Section 4, explicitly provides: '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.'[47]

There are, however, two other provisions in the Bill of Rights Act that explain the functioning of the Act. Section 5 provides: 'Subject to section 4, the rights and freedoms

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43 ibid [64], [66].

44 ibid [64].

45 When the media appealed the gag order in the trial of Paul Bernardo (n 35), the Supreme Court refused to hear the challenge. This may be because the order would expire before the court would hear the case, see Easton (n 35) 445, but that just points to the practical difficulties of media appeals.

46 New Zealand Bill of Rights Act 1990, Public Act 1990 No 109 (28 August 1990), para 14 <http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM225513.html>.

47 ibid, para 4.

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.'[48] And, Section 6 provides: '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.'[49]

The primary case from New Zealand addressing the conflict between free expression and the right to a fair trial is *Gisborne Herald Co. v Solicitor-General*.[50] The New Zealand Court of Appeal had to consider a conflict in a case involving publicity over an incident in which a police constable was seriously wounded. The constable was sent to a special hospital unit some 500 miles away from Gisborne. When his wife gave birth that night, she and their infant were sent to that hospital to visit. Media coverage of the events was extensive, and it included the fact that the suspect, who had been arrested and charged, had previous convictions for violent crimes and had, at the time, been on bail.

The *Gisborne Herald* ran a story regarding the constable and his family but focusing primarily on the defendant, the charges he faced elsewhere, his previous convictions, and the fact that he had been on bail, despite the opposition of police to the grant of bail. Certainly the issue of releasing arrestees on bail could be a matter of public concern, but it was not, in fact, then being discussed in the area media. For that reason, the Court concluded that the article did not mention the defendant only incidentally while participating in a current continuing discussion.[51]

The paper was charged with contempt for interfering with the fair administration of justice with regard both to the trial based on the injuries to the constable and also with regard to a trial in Napier where the defendant faced other charges. The Court found, given the distance between the Gisborne and Napier and the lack of circulation of the *Herald* in Napier, that there was no real risk of interference with the Napier trial. The court did set out a rule:

> In the absence of empirical New Zealand data tending to minimize the risk of jury prejudice through knowledge of previous convictions for violence and bail histories, we prefer to follow what the Chief Justice described as the orthodox view: to publish the criminal record of an accused or comment on the previous bad character in any case before trial is a prime example of interference with due administration of justice and, subject to considerations such as time and place, almost invariably is regarded as a serious contempt.[52]

[48] ibid, para 5.
[49] ibid, para 6.
[50] *Gisborne Herald Co. v Solicitor-General*, [1995] 3 NZLR 563.
[51] ibid 566.
[52] ibid 568.

The Court's strong statement set out a category of information the release of which would normally be contempt, even if the distance between the two locations kept it from being contempt in this case.

As to the trial in Gisborne, the Court recognised that the time between the article and the trial may be relevant. The impact of early publicity may fade, as public attention turns to other topics; although later statements may reinforce the impact of the earlier publicity. On the other hand, some stories may be assumed to have lasting impact.

> [T]he content of an early, or late, publication containing prejudicial material about a person charged may ensure that it remains in the public memory and that recollection of the prejudicial material is triggered by later news stories about the victims and the coming trial. Again, the sheer lapse of time may dim memory. But in some cases mud may stick.[53]

The Court seemed to leave trial judges with a great deal of discretion, noting how difficult it is to make an assessment of prejudicial impact, particularly without adequate empirical data.

> In the absence of any statutory prescription or reliable empirical data concerning the dissipation of the prejudicial impact of publication in the New Zealand media to assist decision making, Judges have to rely on their professional expertise and life experience in determining where to draw the line… . [T]he common law of contempt requires the Courts of New Zealand . . . to make those judgments as best they can.[54]

With regard to the *Gisborne Herald* contempt judgment, the Court could not conclude that the lower courts had erred in concluding that there was a real risk the article would be sufficiently prejudicial as to preclude a fair trial.

On a more theoretical level, the Court discussed the general tension between fair trial and free expression. It specifically rejected the Canadian Supreme Court's approach in *Dagenais*. The Court said that the alternative measures suggested in *Dagenais* were not common in New Zealand. Change of venue is infrequent, because of expense and inconvenience for witnesses; challenging jurors for cause is rare, examining prospective jurors as to their views is seen as undesirable; sequestration is not an ordinary practice and has an impact on the lives of jurors; and adjournment until publicity dissipates may violate the right to be tried without delay.[55]

The Court was also sceptical as to any benefits to be found in the Canadian Supreme Court's rejection of the common law and adoption of the rule in *Dagenais*.

> [T]he absence of current empirical data to support a long-standing assumption embedded in public policy is not, in our view, adequate justification for shifting policy ground in favour of another approach which is also deficient in supporting policy data and analysis. The present rule is that,

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53 ibid 569.
54 ibid 570.
55 ibid 575.

> where on the conventional analysis freedom of expression and fair trial rights cannot both be fully assured, it is appropriate in a free and democratic society to temporarily curtail freedom of media expression so as to guarantee a fair trial.[56]

This last statement clearly endorses the position that the right to a fair trial is of greater importance than, at least immediate, free expression. The Court's position seems to be that trial rights must be protected from the outset. Free expression, on the other hand, may be delayed. The press has the right to cover stories and trials, but the right to fair trial may require that at least some of that coverage be postponed.

The United Kingdom

In the United Kingdom, the conflict is addressed by statute. The Contempt of Court Act of 1981 provides for strict liability for interference with a fair trial, providing:

> 1 The strict liability rule.
> In this Act 'the strict liability rule' means the rule of law whereby conduct may be treated as a contempt of court as tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so.
> 2 Limitation of scope of strict liability.
> (1) The strict liability rule applies only in relation to publications, and for this purpose 'publication' includes any speech, writing, programme included in a cable programme service or other communication in whatever form, which is addressed to the public at large or any section of the public.
> (2) The strict liability rule applies only to a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.
> (3) The strict liability rule applies to a publication only if the proceedings in question are active within the meaning of this section at the time of the publication… .
> 3 Defence of innocent publication or distribution.
> (1) A person is not guilty of contempt of court under the strict liability rule as the publisher of any matter to which that rule applies if at the time of publication (having taken all reasonable care) he does not know and has no reason to suspect that relevant proceedings are active.
> (2) A person is not guilty of contempt of court under the strict liability rule as the distributor of a publication containing any such matter if at the time of distribution (having taken all reasonable care) he does not know that it contains such matter and has no reason to suspect that it is likely to do so.
> (3) The burden of proof of any fact tending to establish a defence afforded by this section to any person lies upon that person. . . .
> 4 Contemporary reports of proceedings.
> (1) Subject to this section a person is not guilty of contempt of court under the strict liability rule in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith.
> (2) In any such proceedings the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any

[56] ibid.

> other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose… .
>
> 5 Discussion of public affairs.
>
> A publication made as or as part of a discussion in good faith of public affairs or other matters of general public interest is not to be treated as a contempt of court under the strict liability rule if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion.
>
> . . .
>
> 11 Publication of matters exempted from disclosure in court.
>
> In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld.[57]

The act provides for strict scrutiny in that there is no requirement of intent to interfere with the administration of justice. But, liability is not strict with regard to whether or not there is an active proceeding or, for distributors, whether the publication contains contemptible material. Furthermore, not all mention of ongoing criminal proceedings will constitute contempt. There has to be a substantial risk that the publication will impair the fairness of the trial. While coverage of an actual trial is permitted, the judge may limit the publication of certain material presented at the trial. Furthermore, some comment that may impact the trial is not contemptible; incidental impact on a trial from a general discussion of public affairs is not contempt.

Professor Eric Barendt explains the assumptions behind the United Kingdom's approach: 'English law assumes first, that certain types of publications may cause a serious prejudice to future legal proceedings, and secondly, that it is desirable to deter the press and other branches of the media from publishing material where that risk is particularly acute, despite the impact the law has on press freedom and freedom of speech.'[58]

The Act may be seen as a relaxation of prior contempt law, following a ruling by the European Court of Human Rights in the *Sunday Times* case.[59] *Sunday Times* grew out of a civil negligence action against the manufacturers of thalidomide over infant deformities caused by the pharmaceutical. The newspaper criticised the manufacturer and might reasonably have been seen as pressuring it to settle the case. It seems, however, that there was unlikely to be prejudice, since the impact on the judge hearing the case would be minimal. The European Court of Human Rights found a violation of the free expression protections in Article 10(1) of the European Convention. Although Article 10(2) allows limits on expression in order to protect the authority of the judiciary, that was not seen as applicable.

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[57] Contempt of Court Act 1981, ch 49, as modified by Broadcasting Act 1990, ch 42, SIF 96, s 203(1), Sch 20, para 31(1)(a). The modified version is available at <www.legislation.gov.uk/ukpga/1981/49>.

[58] Eric Barendt, *Freedom of Speech* 323 (2nd edn, OUP 2005).

[59] *Sunday Times v United Kingdom*, [1979] 2 EHRR 245.

Professor Barendt characterises the statute before *Sunday Times* as 'an absolute contempt rule, applicable no matter how remote the risk of prejudice, for the purpose of preventing "a gradual slide toward trial by newspaper or television."'[60] While he says there is 'no strong justification for treating as contempt of court a publication prejudging the issues in a forthcoming *civil* case, where there can be no suggestion the tribunal might be prejudiced by it . . . , [t]here. These arguments do not apply with the same force to criminal cases, particularly those tried by a jury.'[61]

The current Contempt of Court Act was intended to bring English law into compliance with Article 10,[62] and it appears that the European Court would accept the revision, given its requirement of a substantial risk of serious impediment or prejudice to an ongoing criminal case. The European Court examined, in *Worm v Austria*,[63] the conviction of a journalist based on an article highly critical of the defence tactics of a former Vice-Chancellor and Minister of Finance, who was being tried for tax evasion. The Austrian courts found the journalist to have violated section 23 of Austria's Media Act, which provides: 'Anyone who discusses, subsequent to the indictment . . . [and] before the judgment at first instance in criminal proceedings, the probable outcome of those proceedings or the value of evidence in a way capable of influencing the outcome of the proceedings shall be punished by the court.'[64]

The European Court concluded that any violation of Article 10(1) was justified under Article 10(2), as directed at 'maintaining the authority and impartiality of the judiciary.'[65]

> The phrase 'authority of the judiciary' includes, in particular, the notion that the courts are, and are accepted by the public at large as being, the proper forum for the settlement of legal disputes and for the determination of a person's guilt or innocence on criminal charge; further, that the public at large have respect for and confidence in the courts' capacity to fulfil that function.[66]

While recognising that there is no necessary inconsistency between reporting on trials and fair trial rights, the Court said the Austrian court had not restricted the right to inform the public in an objective manner. The article went beyond that; the views presented were 'formulated in such absolute terms that the impression was conveyed to the reader that a criminal court could not possibly do otherwise than convict [the defendant].'[67]

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[60] Barendt (n 58) 322, quoting Lord Cross in the House of Lord's consideration of the case, *Attorney-General v Times Newspapers Ltd*, [1974] AC 273, 323.

[61] ibid 327–28.

[62] There was some movement toward change in the law prior to the decision by the European Court. Stephen J Krause, 'Punishing the Press: Using Contempt of Court to Secure the Right to a Fair Trial' (1996) 76 *Boston University Law Review* 537, 540–41, describes efforts begun in 1974 to revise the Administration of Justice Act of 1960.

[63] *Worm v Austria* (App no 83/1996/702/894, 29 August 1997).

[64] ibid [23].

[65] ibid [39].

[66] ibid [40].

[67] ibid [52].

Conclusion

This analysis has looked at a limited number of countries, but the sample is necessarily smaller than it might be for other issues in comparative free expression. Free expression rights are important in all democracies, but the conflict between expression and the right of criminal defendants to a fair trial comes into play primarily in countries in which criminal charges are heard by a nonprofessional jury. The countries examined all fit into both categories.[68] And the differences they present indicate that the balance between the two interests may be resolved by providing more weight to either, without losing the other.

In favour of free press rights, it would seem clear a practice of secret trials would be anathema to democracy. There must be openness to protect against governmental abuse and the suppression of those critical of the government. Furthermore, the United States Supreme Court has recognised the therapeutic value of trials to the community.[69] Knowing that those who committed criminal acts have been tried and convicted has its importance. The openness of the criminal trial can also help the public accept the acquittal of a person thought to have been guilty of a crime.

These concerns may not be adequately addressed by simply allowing the public to attend a trial. Attendance will provide only limited access. Press coverage allows any therapeutic impact to be more widespread. Furthermore, if there is abuse, it makes that abuse more widely known. It provides a better check on government and greater protection for democracy.

But, what is at issue here is coverage of the trial while the trial is still in progress. It is not clear that such coverage is required in order to prevent abuse or to have its therapeutic impact. Delaying coverage until the end of the trial may delay the therapeutic impact, but it does not deny it. Additionally, any abuse might be presented to the public at the end of the trial. Admittedly, the public's attention may have turned elsewhere, but where there is abuse or a serious need for therapeutic impact, there is likely still to be attention.

Openness of the criminal trial may, at times, also be of benefit to a defendant. Publicity may cause a witness to come forward who could refute the prosecution's case,

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[68] Australia could certainly have been added to the discussion but was omitted over space concerns. Australia's approach is also presented elsewhere, and that approach seems closer to the United Kingdom and New Zealand than to the United States and Canada. Professors Paul Marcus and Vicki Waye find some similarity between the United States and Australia in their commitment to open criminal trials as a check on abuse, but find differences in the acceptability of trial publicity. See Paul Marcus and Mickey Waye, 'Australia and the United States: Two Common Criminal Justice Systems Uncommonly at Odds' (2004) 12 *Tulane Journal of International and Comparative Law* 27. They say: 'Australian courts are inclined to approach the danger of unbridled media power on the basis that prevention is better than cure. The remedial techniques preferred by US courts to redress the actual dangers that may arise when media coverage undermines a defendant's due process rights, such as sequestration and questioning of jurors on the effect of pre-trial publicity, are not generally practiced in Australia where they are seen as an impediment to the efficiency of the trial process.' ibid [83].

[69] See *Richmond Newspapers, Inc. v Virginia*, 448 US 555, 571 (1980).

or it may lead to other exculpatory evidence. That benefit is lost, however, only if there is a mandatory bar on trial coverage. If the defendant is given the option of allowing press coverage, any potential benefits remain available.

Other than for that last factor favouring publicity, the benefits of limitations for the purposes of preserving the right to a fair trial are obvious. The expression of opinions with regard to guilt, or for that matter innocence, may prejudice the jury. This would be particularly so if the press coverage included information on evidence that was being suppressed. A juror may find it difficult to disregard such evidence, even if it is never introduced at trial.

The United States and Canadian Courts have suggested methods that may limit the impact of media publicity. Sequestration works only once a jury has been impanelled. It is also inconvenient to jurors and has the potential to prejudice the jury. A change of venue might provide some benefit, but if publicity is sufficiently widespread, it may not be effective. There is the possibility of postponement, but there is certainly no guarantee that the publicity will not be rekindled as the trial approaches. Postponement may also interfere with any right to a speedy trial, unless a defence request for postponement is seen as a waiver of that right.

Returning to restrictions on the news media, it may be questionable whether or not such restrictions can prove effective. A Canadian case demonstrates the difficulty with restrictions in an area where cross-border news coverage is extensive.[70]

The same criticism has been offered with regard to the approach of the United Kingdom in an era of modern information technology and it has been suggested that England would be well advised to adopt controls on the seating of the jurors.[71] Canada has had at least some success in limiting cross-border publicity in the print and television media, even if there was still some Internet access. It would seem that the United Kingdom should be able to achieve similar success with regard to the more traditional media. As for the Internet, if the law of the United Kingdom were to be interpreted to consider Internet service providers as distributors, the government could notify ISPs that making available certain web sites containing contemptible material would itself constitute contempt. That might require that ISPs block those sites.

In any case, any argument that international sources and the Internet make the protection of fair trial rights impossible overstates what is required for a fair trial. It is not necessary that no one in the jurisdiction should have been affected by any cross-border publicity. What is required is that the court be able to find the required number of jurors who have not been influenced. In spite of any controls, those who are sufficiently interested and sophisticated may well be able to find prejudicial information. But, not everyone will be so interested and sophisticated. That determination of who has, and who has not, been interested enough to have access would, despite any reluctance, seem to require at least limited *voir dire.*

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[70] See n 35.

[71] See Joanna Armstrong Brandwood, 'You Say "Fair Trial" and I Say "Free Press": British and American Approaches to Protecting Defendants' Rights in High Profile Trials' (2000) 75 *New York University Law Review* 1412, 1443–44.

4. Media regulation and press freedom in EU law

Stefanie Pukallus – Jackie Harrison

If media freedom and media pluralism are fundamental values in the European Union why doesn't the European Union do anything to ensure their application?

The non-use of Article 7 of the Treaty on European Union

Freedom of expression, media freedom, and media pluralism

In Europe freedom of expression, of thought and of belief has since Spinoza and John Milton been inextricably linked to freedom of the press and freedom of printing (publishing).[1] For Spinoza the 'best way to conserve the state [is] only by conceding that each individual is entitled both to think what he wishes and say what he thinks.'[2] Whilst Milton believed that it was freedom of expression that generated commonly recognisable truths that bound people together in a way that political suzerainty and ecclesiastical dogma could not. As Hill puts it, Milton 'abandons the attempt at (or pretence of) a one-minded community'[3] believing instead that freedom of expression and tolerance went someway together to establish political and civil harmony. Ultimately, Milton's sense of tolerance and freedom of expression was dependent upon his belief in the liberty of printing. Today in Europe freedom of expression and of printing (now also the dissemination of thought via a variety of media platforms) can be summarised and modernised in the context of this paper as follows. Discourse emanating from the factual mass media can be considered as institutional speech, and as such, it is 'covered by constitutional free speech guarantees'.[4] Accordingly and directly related to Spinoza and Milton's insights, when we use the term freedom of expression we understand it to encompass media freedom.[5]

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[1] Importantly, we are not suggesting that other thinkers around the same period did not have equally important views on freedom of expression and tolerance eg John Locke and Pierre Bayle. Rather the point here is symbolic and concerns European thought and its long held tradition of discussing freedom of expression and its relationship to a free press and the liberty of printing.

[2] Baruch B Spinoza, *Theological-Political Treatise* (ed by Jonathan Israel and Michael Silverthorne, first published 1670, CUP 2007) 11. See also Jonathan Israel, *Radical Enlightenment: Philosophy and the Making of Modernity 1650–1750* (OUP 2001) 266–67; Jonathan Israel, *Enlightenment Contested: Philosophy, Modernity, and the Emancipation of Man 1670–1752* (OUP 2006) 155–61.

[3] Christopher Hill, *Milton and the English Revolution* (Faber and Faber 1997) 153.

[4] Eric Barendt, *Freedom of Speech* (OUP 2005) 417.

[5] This is not the place to discuss the ways that both Spinoza and Milton recognised qualifications to freedom of expression and the press, though both had clear views on the necessity for restraints.

John Stuart Mill was probably the most fervent defender of an extensive version of freedom of expression and of a free and unfettered press. Indeed, entailed in his beliefs concerning social progress, expressive individualism, human flourishing, the value of public discussion (the 'antagonism of opinions'), public duty, representative government and his corresponding fears of mass society, mob rule, oppressive moral rectitude, dull conformity and excessively bureaucratic government, was his insistence on a free press as both a necessary vehicle for democratic vitality and as a corrective to social and intellectual conformity. Without saying as much, but certainly indicating it, it could be said that Mill valued media pluralism as specifically a plurality of diverse and incommensurate views and opinions, a 'free trade of ideas' and 'intellectual competition'[6] stemming from a variety of sources. This Millian passion for a free press[7] also came with an understanding that incumbent upon the press was its civil duty to scrutinise the institution Mill was most suspicious of: government.

Both Mill, and one of the men he most admired, de Tocqueville recognised that the press needed to act with complete freedom if it was to be able to foster a vibrant civil society. More specifically, de Tocqueville[8] saw the press's civil role as analogous to what later became known as the 'Fourth Estate' (a term coined by Edmund Burke according to Thomas Carlyle). Consequently and according to de Tocqueville, 'the sovereignty of the people and the liberty of the press' need to be understood as 'correlative institutions' in much the same way as 'censorship of the press and universal suffrage' need to be understood as 'irreconcilably opposed'.[9] Moreover de Tocqueville[10] somewhat grandiloquently asserted that newspapers were of absolute primary importance for the creation of civil associations and the fostering of civility and that '[t] o suppose that they only serve to protect freedom would be to diminish their importance: they maintain civilization.' As Harrison puts it, the press has a form of civil power: 'where news journalism is independent from control by vested interests it ideally works to the benefit of a vibrant civil society, contributes to both civility and civil identities and needs to be believed in as truth telling and trustworthy, as objective and independent, and judged as having fulfilled its role of defending, promoting and diffusing agreed civil values held by any given civil society. In short, in its ideal civil formulation, news is oriented to citizens and their concerns and has a civilising effect.'[11] Without adopting de Tocqueville's extravagance the European Union also maintains that it too has an unshakeable belief in the value of media pluralism which entails a commitment to media freedom and its corollary the free expression of ideas and views. What exactly this is and means is the subject of the next two sections.

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6 Barendt (n 4).

7 See for example Geraint L Williams, *John Stuart Mill on Politics and Society* (Fontana/Collins 1976) see the essay 'Law of Libel and Liberty of the Press'.

8 Alexis de Tocqueville, *Democracy in America* (first published 1835, Bantam Classic 2000) 210.

9 ibid.

10 ibid 633.

11 Jackie Harrison, *The Civil Power of the News* (forthcoming).

The European Union and media freedom

The EU endorses media freedom and media pluralism legally through Treaty provisions and rhetorically in its political discourse. Whereas the European Parliament has authored multiple reports such as the Mikko Report,[12] the Weber Report[13] and the Migalski Report[14] (amongst others) on the state of media freedom and pluralism within the EU, the European Commission set up two advisory bodies: the High-Level Group in 2011 and the Centre for Media Pluralism and Media Freedom (CMPF). The latter has developed a Media Pluralism Monitor (MPM) used to provide indicators and risk assessment regarding the situation of media pluralism within the EU. Both the European Parliament and the European Commission have commissioned various studies carried out by independent organisations. With regard to competencies, the EU has the power to invoke Article 7 of the Treaty on European Union and to intervene in cases where there is a serious risk that media freedom and pluralism are not respected. And yet, the EU chooses to ignore this possibility and remains largely inactive, as we will show in the following.[15]

The EU conceives of itself as a representative democracy. Article 10 of the TEU reads: 'The functioning of the Union shall be founded on representative democracy'. The EU also has its own form of a bill of rights: the EU Charter of Fundamental Rights which was first annexed to the Treaty of Nice (2000) and became legally binding with the ratification of the Lisbon Treaty in 2009. In other words, the EU Charter acquired EU primary law status or as Article 6 of the TEU puts it: it 'shall have the same legal value as the Treaties'. Article 11 of the Charter of Fundamental Rights legally codifies the right to freedom of expression and the EU's commitment to media pluralism. It reads:

> 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.
> 2. The freedom and pluralism of the media shall be respected.[16]

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[12] European Parliament, 'Concentration and Pluralism in the Media in the European Union' Mikko Report, 2007/2253(INI), A6-0303/2008, 2008.

[13] European Parliament, 'Draft Report on the EU Charter: Standard Settings for Media Freedom across the EU' Weber Report, 2011/2246(INI), 2012.

[14] European Parliament, 'Opinion on the EU Charter: Standard Settings for Media Freedom across the EU' Migalski Report, 2011/2246(INI), 2012.

[15] At the time of publication, a report by the Committee to Protect Journalists (CPJ) suggested that the EU could use Article 7 TEU to sanction member states that fail to uphold standards of media freedom as enshrined in the EU Charter for Fundamental Rights and in Article 2 TEU. See <http://www.euractiv.com/sections/infosociety/journalists-ask-eu-put-place-rule-law-mechanism-318055>.

[16] The EU has attempted to access the European Convention of Human Rights (ECHR). However, the draft accession Treaty was rejected by the European Court of Justice (ECJ) on 18 December 2014 for incompatibility with EU law. Whereas a discussion of the rejection is beyond the scope of this chapter it is nevertheless important to remember that a) the attempt to access the ECHR testifies to the fact that

Whereas the Lisbon Treaty makes the EU Charter, and thereby the safeguard of freedom of expression and media pluralism, a legal obligation for the EU, it does not provide the EU with the extended competencies per se necessary to effectively enforce Article 11 of the Charter of Fundamental Rights. Rather Article 51(2) of the Charter clarifies that the 'Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.' What this means is that the EU remains only competent where EU law is implemented (art 51(1)) as in the case of the Audiovisual Media Services Directive (AVMSD) 'which governs EU-wide coordination of national legislation on all audiovisual media, both traditional TV broadcasts and on-demand services' and which sets out to provide rules to shape technological developments, to create a level playing field for emerging audiovisual media, to preserve cultural diversity, to protect children and consumers, to safeguard media pluralism, to combat racial and religious hatred and to guarantee the independence of national media regulators.[17]

However, and as pointed out by the High-Level Group,[18] there is a possibility to protect freedom of expression and media pluralism within the EU member states when new EU law is not being implemented and that is by invoking Article 7 of the TEU which reads: '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.' As such, the use of art 7 'does remain available as a "last recourse" instrument when a Member State's activities are no longer in compliance with the EU basic values stated in Article 2 of the TEU.'[19]

Consequently, in order for the EU to be able to intervene when there is 'a clear risk of a serious breach' or, to use the High-Level group's words, 'serious and persistent breach' of the right to freedom of expression as well as media freedom and pluralism[20]

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the EU values fundamental rights including freedom of expression and media freedom and b) that an accession to the ECHR would have meant that the ECJ could have applied European Court of Human Rights jurisprudence directly; see Mike Harris, 'Time to Step-Up: The EU and Freedom of Expression' (Index on Censorship 2013).

[17] European Commission, Audiovisual Media Services Directive (2015) <http://ec.europa.eu/digital-agenda/en/audiovisual-media-services-directive-avmsd>.

[18] High-Level Group on Media Freedom and Pluralism, 'A Free and Pluralistic Media to Sustain European Democracy' Report January 2013. Neelie Kroes created the High-Level Group (HLG) in 2011. It was chaired by the former Latvian President Vaira Vīķe-Freiberga. The group's report was published in 2013. For more information on its mandate and the issues it was required to look into please see European Commission, 'High-Level Group on Media Freedom and Pluralism' (2015) <http://ec.europa.eu/digital-agenda/en/high-level-group-media-freedom-and-pluralism>.

[19] ibid 18.

[20] The HLG assumes that art 2 includes media freedom and media pluralism but does not prove it. It simply states that in 'cases where there is clear interference with the democratic function of media, the EU has an obligation to intervene directly with the country in question. *In extremis,* the EU can make use of

Article 2 of the TEU needs to implicitly or explicitly refer to this right. It reads: '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.' Whereas freedom of expression and media freedom/pluralism are not explicitly mentioned they can be understood as being subsumed into this article if we can make the case that the EU understands media freedom as a fundamental right, considers the right to freedom of expression as well as media pluralism as an intrinsic and necessary part of democracy (as Mill and de Tocqueville do) and/or if the EU understands freedom of expression and the free media to contribute to civil society by fostering pluralism, non-discrimination, tolerance, justice and (civil) solidarity (as de Tocqueville, Harrison and Alexander argue). That the EU believes exactly that can be illustrated by various speeches given by both the European Parliament and in particular the European Commission on the value of freedom of expression in a democracy and for civil society.

Indeed, Neelie Kroes, then European Commissioner for Digital Media (2010–14) which included the responsibility for media freedom and pluralism, argues that Europe is 'the birthplace of democracy; a global guardian of fundamental rights' and that if 'Europe is to be anything more than an economic union, it should be as a model and champion of those values.'[21] Accordingly, 'freedom of speech is a fundamental EU value; and the EU has a duty to ensure it is safeguarded . . . for the sake of European values, fundamental freedoms, and the fabric of our democracy.'[22] This view is supported by the European Parliament which argues that 'the right to freedom of expression is a universal human right, which lies at the basis of democracy, and is essential to the realisation of other rights which people around the world strive to obtain, such as development, dignity and the fulfilment of every human being'[23] to which it adds that 'it is closely linked to press and media freedom and pluralism.'[24] In accordance the European Commission states that 'while being a fundamental human right, freedom of expression and media is often precondition for implementation of other rights and freedoms. Deprived of a free media, citizens are denied the right to balanced, factual and reliable information, without exposure to bias and propaganda that in turn is undermining democracy and the effectiveness of institutions.'[25]

Article 7 of the Treaty on European Union (TEU), which allows the Council, acting by qualified majority, to decide to suspend certain rights of a member state found in serious and persistent breach of EU values enshrined in the Treaty.' The High-Level Group (n 18) 18.

[21] Neelie Kroes, 'Safeguarding media freedom and pluralism' (22 March 2013, SPEECH/13/252).

[22] ibid.

[23] 'European Parliament, Freedom of Press and Media in the World' European Parliament Resolution of 13 June 2013 on the Freedom of Press and Media in the World 2011/2081(INI) A.

[24] ibid B.

[25] DG Enlargement, Guidelines for EU Support to Media Freedom and Media Integrity in Enlargement Countries, 2014–2020 (European Commission 2014) <http://ec.europa.eu/enlargement/pdf/press_corner/elarg-guidelines-for-media-freedom-and-integrity_210214.pdf>.

Alternatively expressed, 'media platforms are essential for the exercise of the right to freedom of expression' and an 'independent press, as a collective manifestation of free expression, is one of the key actors in the media landscape, acting as a watchdog of democracy.'[26] In fact, 'when there are tens of millions of voices, values, views, and values [*sic*] waiting to be heard, the job of the government is to listen to them, respect them and represent them: not shut them out.'[27]

In order for the media to fulfil their ideal democratic role the European citizens' right to hear, express and share views needs to be protected as well as the media's right to inform citizens about how they are governed and to enable them to make an informed choice. [28] Only then are the media able to increase civil scrutiny of political processes, demand these processes be transparent and ensure that governments govern in the interest of civil society rather than be guided by the narrow interests of pressure groups.[29] Media pluralism, in turn, will help the media to fulfill its civil role to 'reveal the multifaceted nature of society' and to actively promote 'dialogue and tolerance' as well as civil hospitality and 'mutual cultural understanding'.[30]

In short and as summarised by the European Commission: 'Freedom of expression is a fundamental right and . . . belongs to the values on which the European Union is founded (as referred to in Article 2, the Treaty on European Union).' What this means for our argument is that a breach of media freedom and pluralism in an EU member state can potentially warrant the use of Article 7 of the TEU. Consequently, we disagree with Komorek[31] who argued that EU media freedom is not protected in EU legislation—not even indirectly.

Media freedom and media pluralism in the European Union

In definitional terms media freedom can be understood as being two-fold: first, it is linked to freedom of expression. Freedom of expression should not be absolute and therefore can't stand unqualified. In simple terms, we would say that freedom of expression is best understood negatively as any forms of expression which do not harm individuals and groups or incite hate or harm towards them.[32] Second, by media freedom

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[26] European Parliament (n 23) C.

[27] Neelie Kroes, 'Freedom of Expression is no Laughing Matter' (2 September 2014, SPEECH/14/575).

[28] ibid.

[29] DG Enlargement (n 25).

[30] ibid.

[31] Ewa Komorek, 'The Problem which Refuses to Go Away: Recent Developments in the EU Approach to Media Pluralism' (2014) 19(2) *Communications Law* 40–46.

[32] See Jeremy Waldron, *The Harm in Hate Speech* (HUP 2012). In fact, Whitten-Woodring and Van Belle have noted that 'media freedom has consistently been defined by the factors that limit it rather than by what it actually is' (Jenifer Whitten-Woodring and Douglas A Van Belle, *Historical Guide to World Media Freedom: A Country-by-Country Analysis* (Sage 2014) 7). Consequently, they have attempted to define media freedom 'as the ability to safely criticize government' (ibid 18) following Van Belle's previously

we mean editorial independence from what Alexander calls the non-civil spheres; in particular editorial independence from governmental and economic power, influence and interference. Defined in this way, media freedom 'is a necessary pre-condition for a proper functioning . . . pluralistic media system.'[33] One cannot exist without the other. Media pluralism, in turn, can be defined, following Baker, as a '*democratic distribution principle* for communicative power—a claim that democracy implies as wide as practical a dispersal of power within public discourse.'[34] In other words it is nothing other than a normative appeal to a 'basic standard for democracy'.[35] Overall, media pluralism can be said to have two basic characteristics: first, it is linked to the dispersal and diversity of media ownership. Simply put: the more concentrated media ownership is the less media pluralism there is. Second, it refers to a pluralism of medium, format, content, viewpoint and source and with that 'ubiquitous opportunities to present preferences, views, visions'.[36] Indeed and as Calderaro and Dobreva note, media pluralism needs to take into account both linguistic and cultural specificities. As argued above, Article 2 of the TEU aims to protect both of these values and is breached if media freedom and media pluralism are curtailed.

In order to show that media freedom and media pluralism are both at risk and currently not respected within the EU we will focus on three EU member states—Bulgaria, Greece, and Croatia—and show that we can indeed speak of breaches (rather than simply risks) regarding media freedom and pluralism. We will also show that the EU has remained silent, inactive and has not used its competencies (ie invoking Article 7 of the TEU) to intervene in these three countries with a view to improving their states of media freedom and pluralism.

Spotlight 1: Bulgaria's media landscape[37]

The most serious problems the Bulgarian media have faced since the end of communism stem from unclear ownership and financing of media outlets, strong concentration of media ownership in the hands of powerful local media barons and the amalgamation between state, political, business, media and criminal structures. In fact in 2013, the

established definition. We, however, think that is it indeed possible and preferable to define media freedom negatively because we believe that media freedom has both a political-democratic and a civil function; the latter Whitten-Woodring and Van Belle neglect and therefore they provide a narrow and unconvincing definition of media freedom.

[33] Andrea Calderaro and Alina Dobreva 'Framing and Measuring Media Pluralism and Media Freedom across Social and Political Contexts' in CMPF (ed), *European Union Competencies in Respect of Media Pluralism and Media Freedom* (EUI 2013) 20.

[34] C Edwin Baker, *Media Concentration and Democracy: Why Ownership Matters* (CUP 2007) 7.

[35] ibid.

[36] ibid.

[37] The authors would like to thank Dr Lada Trifonova Price for her help with the section on the Bulgarian media landscape.

German and French ambassadors in Sofia issued an unprecedented joint statement stating that the oligarchic model of governance in Bulgaria is incompatible with its EU membership. They expressed strong concern about the lack of media pluralism in the country and emphasised the urgent need to deal with rampant corruption in public administration.[38] In addition, most of the media are subject to undue political and economic pressure, especially those deemed unsympathetic to the government in power, and strong interference with the work of individual journalists, which leads to widespread self-censorship. Overall, and as the Centre for Media Pluralism and Media Freedom[39] points out media freedom and pluralism in Bulgaria are 'not respected in practice'. Indeed, AEJ Bulgaria conducted a survey among over a hundred journalists and fifteen media owners in 2014 which showed that 'more than half (52 per cent) of the journalists in Bulgaria admit that political pressure is continuously exercised upon their media. More than 30 per cent say that they themselves were pressured by politicians'[40] and that '86.98 per cent of the participants agree that influencing the content of the journalistic materials is a practice in Bulgaria's media sector'—'pressure' was defined for this survey as 'unregulated' and as 'a threat to the physical, financial, and moral integrity of the journalist and media organisation'.

The concentration of media ownership is considered a high risk by the CMPF's media pluralism monitor (MPM). More specifically, and according to CMPF's most recent report on Bulgaria,[41] the four major media owners have a market share of 93.35 per cent in the television sector and market share of 79.7 per cent with regard to daily newspapers. Media ownership further lacks transparency, as there is no legal obligation to publish information on ownership.

Bulgaria's handful of independent media organisations are often under pressure and there are attempts to control their publications by threatening their financial integrity: In January 2015 the Bulgarian Financial Supervision[42] Commission (FSC)—referred to by Reporters without Borders as a 'media cop'[43]—imposed a record fine on one of the independent media groups Economedia, publisher of the online *Dnevnik* and the weekly *Capital*. The fine of nearly 80,000 euros was for publications that the Commission considered 'market manipulation'. The publications investigated irregularities in the Bulgarian financial and banking system and more specifically two construction companies run by one of the most often discussed politicians in the country—Delyan Peevski—an entrepreneur with a notorious reputation and enormous fortune. Together

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[38] Lada Trifonova Price, 'Media Freedom Under Threat in Bulgaria' (2014) 25(3) *British Journalism Review* 50–55.

[39] Centre for Media Pluralism and Media Freedom (CMPF), 'Country Report: Bulgaria' (CMPF/EUI 2014) <http://monitor.cmpf.eui.eu/results-2014/bulgaria/>.

[40] Kosara Belnikova, 'More than Half of the Bulgarian Journalists are Subjected to Political Pressure' (AEJ Bulgaria 8 December 2014) <http://www.aej-bulgaria.org/eng/p.php?post=1993&c=5>.

[41] CMPF (n 39).

[42] Also called the 'Financial Oversight Commission'.

[43] Reporters Without Borders (RWB), 'European Model's Erosion' (RWB 2015) <http://index.rsf.org/#!/themes/european-union-model-erosion>.

with his mother Irena Krasteva, the former chief of the Bulgarian State Lottery, Peevski is in control of the largest media group in Bulgaria, New Bulgarian Media Group (NBMG). NBMG holds a monopoly on the media market with a wide network of print publications and TV channels across the country. He is alleged to have strong links to the mafia and is embroiled in a series of controversies, including corruption scandals and an ultimately unsuccessful bid to become head of the national security agency (DANS) in June 2013.[44] What this case illustrates is how 'powerful media barons' attempt to intimidate and succeed in sanctioning those independent media houses that attempt to fulfil their democratic role to scrutinise power holders and hold them accountable on behalf of Bulgarian civil society. The FSC also fined Economedia 5,000 euros for refusing to disclose its sources and 50,000 euros for another story about a pharmaceutical company. According to a statement issued by Economedia the fine equals three months' worth of salaries for all journalists working for the weekly *Capital* and is higher than the total of fines imposed by the FSC for the whole of 2013.[45]

By attacking their financial integrity the FSC attempts to prevent news corporations from carrying out their investigative role into abuses of power and corruption. In this role, journalists have to be able to protect their sources which may have provided them with essential and sensitive information.[46] Not being able to guarantee such protection means that potential sources might not come forward as they cannot be guaranteed protection which seriously inhibits journalists' ability to undertake the role of 'a democratic watchdog'. In fact, and as pointed out by AEJ Bulgaria, 'Such an attack . . . is threatening to destroy [Bulgaria's] very last instruments for investigation into corruption practices and abuses by journalists' and as such, the fines imposed by the FSC represent 'unprecedented bureaucratic censorship applied on Bulgarian media.'[47]

Corruption in Bulgaria is an intrinsic part of the economic, media and political sphere and correspondingly, we encounter a 'culture of favours' in which those in power try to achieve positive media coverage. As AEJ Bulgaria points out: 'Different companies and PR agencies are often addressing journalists with small amounts of money, little things like fashionable clothes, mobile phones in order to make them

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[44] Matthew Brunwasser, 'After Political Appointment in Bulgaria, Rage Boils Over' *New York Times*, 28 June 2013 <http://www.nytimes.com/2013/06/29/world/europe/after-political-appointment-in-bulgaria-rage-boils-over.html?_r=1>.

[45] 'In an attempt of censorship the FSC imposed a record fine on Capital (In Bulgarian: В опит за цензура КФН наложи рекордна глоба на "Капитал")' 14 January 2015 <http://www.dnevnik.bg/biznes/2015/01/14/2453432_v_opit_za_cenzura_kfn_naloji_rekordna_globa_na_kapital/>.

[46] On the failure to protect sources in Bulgaria see also AEJ, 'The Bulgarian Legal System Does not Provide Enough Safeguards for Protection of Sources of Information' AEJ, 23 February 2015 <http://www.aej-bulgaria.org/eng/p.php?post=2077&c=5>.

[47] See AEJ, 'Unprecedented Bureaucratic Censorship Applied on Bulgarian Media' AEJ, 16 January 2015 <http://www.aej-bulgaria.org/eng/p.php?post=2050>. Interestingly, our assessment, based on the evidence we have gathered, contradicts Whitten-Woodring and Van Belle's (n 32) 98 curious judgment that 'there appears to be little reason to expect that media freedom is vulnerable or under threat' in Bulgaria. Indeed, according to them, 'analysts agree that the [Bulgarian] news media operate freely and are effective as an arena for political debate.'

present the public advertisements as independent information. Chief Editors are paid five, even six digit amounts of money for "good intentions" towards certain people or institutions. Owners got offered even bigger amounts of cash for the positive "general attitude" of the media towards a certain political power. The ultimate record is 5 million leva" says Krum Blagov, Chairman of "Reporter" Foundation.'[48]

These few examples point towards a culture in which media freedom and media pluralism are either breached or seriously threatened and as such, testify to a non-compliance with the values enshrined in Article 2 of the TEU. The EU is duly aware of this situation in Bulgaria. In 2012, when Bulgaria held 80th place on the Reporters without Borders Press Freedom Index, Kroes commented on the Bulgarian media landscape and promised local journalists that she would make it her personal priority to assist Bulgaria in improving the state of its media landscape. However, and despite strong condemnation of the media landscape in Bulgaria by the AEJ, Reporters without Borders, Index on Censorship and other organisations, the EU has remained silent and Kroes's 2012 vow has remained unfulfilled. Now three years later, Bulgaria ranks 106th on the 2015 Press Freedom Index and lags far behind all other EU members.[49]

Spotlight 2: Greece's media landscape

Challenges to media freedom and media pluralism in Greece are myriad. The CMPF MPM report (2014) on Greece identifies that the most pertinent challenges to media freedom and pluralism are media ownership and media concentration, governmental interference with editorial lines, lack of pluralism in terms of types and genres, a lack of the representation of local and regional communities within the media, the inadequate, insufficient and irregular resources for Greece's PSM. Anna Famellou[50] points to 'political opportunism, economic interests, clientelism, media concentration, and censorship' as the greatest current concerns regarding the Greek media landscape.[51]

Since 2009 Greece has slipped down the Press Freedom Index and currently holds 91st place. According to Marilena Katsimi, journalist and general secretary of the Journalists' Union of Athens Daily Newspapers (ESIEA) the economic crisis, austerity measures and fiscal agreements had a detrimental impact on freedom of the media in Greece. She experienced a decline during her time as a journalist at the state-owned public service broadcaster, Elliniki Radiofonía Tileórasi (ERT): from relative freedom to express her views, to be critical of government power and policies, to a reduction in broadcasting time, suspension for criticising government officials and finally the closure

48 Belnikova (n 40).

49 RWB (n 43).

50 She is a member of ESIEMTH which is the journalists' union in Northern Greece and is a member of the European Federation of Journalists.

51 Personal communication, 10 March 2015.

of ERT—a step which she regards as a strategic move 'to manipulate public opinion and exclude any opposition voice'.[52] The shutting down of ERT was indeed suspicious. According to Freedom House, ERT was shut down merely by 'ministerial decree with no parliamentary discussion'. According to Famellou, the shut-down 'called into question various clauses in the Greek constitution, as well as the Treaty of Amsterdam which oversees public service broadcasting in Europe.'[53] More specifically and as Freedom House explains, 'Article 44 of the constitution states that ministerial decrees are to be used in national emergencies and must be approved by the parliament within 40 days. As the decree shutting down ERT was not approved within this deadline, some observers questioned its legality.'[54] The Greek government justified its decision to close ERT by claiming that it had 'low ratings, high expenditure and it was not attractive to advertisers.'[55] Anna Famellou, however, says 'that the government claimed "a haven of waste", in spite of the fact that the public broadcaster was running on a surplus budget, with income derived from license fees and emanated outside the state funds.'[56]

New Hellenic Radio, Television and Internet (NERIT), which was meant to operate more independently from the government and was staffed via a transparent hiring process, was launched in May 2014. However, doubts were cast on the independence of this new public service broadcaster when NERIT's board of directors undermined the organisation's independence, when it hired former employees of the Ministry of Finance and when positions within NERIT were filled without going through the public hiring procedure prescribed by law.[57] Despite officially being referred to as 'PSM' (public service media) and therefore bound by law to serve 'the democratic, social and cultural needs of pluralism'[58] NERIT falls short in this role on at least two accounts: first, it does not need to have its own regional correspondents or to have journalists that come from different geographical areas of Greece. Second, it does not need to cater to minority groups and communities as media legislation is silent on this. Third, NERIT is legally obligated to ensure 100 per cent geographical coverage but has failed to achieve this. CFMP's MPM classified all of these as high-risks to media pluralism.

With regard to political pressure and censorship several points need to be made. First, the government actively interferes in the editorial line of media organisations in an attempt to prevent critical journalism. For example, according to Katsimi, journalists

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[52] See Chrysto Syllas, 'Greece: A Tougher Climate for Press Freedom' Index on Censorship, 24 September 2014 < http://www.indexoncensorship.org/2014/09/greece-press-freedom-christos-syllas-marilena-katsimis/>.

[53] Famellou (n 51).

[54] Freedom House, 'Greece' <https://freedomhouse.org/report/freedom-press/2014/greece#.VRXSnEvqvwI>. On these constitutional questions see also Petros Iosifidis and Irini Katsirea, 'Public Service Broadcasting in Greece in the Era of Austerity' (CMPF/EUI 2014).

[55] Methodi Gerasimov, '"Avrianism": The Definition of the Greek Media Oligarchy' AEJ, 5 January 2015 <http://www.aej-bulgaria.org/eng/p.php?post=2011&c=288>.

[56] This is contrary to Iosifidis–Katsirea (n 54) who endorse the view that ERT did not manage its financial resources efficiently and effectively.

[57] Famellou (n 51). Currently, the Syriza Government has made attempts to possibly reinstate ERT.

[58] CMPF, 'Country Report: Greece' CMPF/EUI 2014 <http://monitor.cmpf.eui.eu/results-2014/greece/>.

working for private media organisations were, when reporting the European elections in May 2014, told 'how to "report" the news and "shape" these stories'—out of fear of unemployment, however there haven't been any formal complaints. Second, journalists who hold information that brings power holders to account risk fines, punishment and imprisonment. One recent example is the case of journalist Kostas Vaxevanis who published the so-called Lagarde list which was a list of names of 2000 Greeks with bank accounts in Switzerland. Amongst these names were relatives of former Prime Minister Yorgos Papandreu. When Vaxevanis published this list in 2012 he was arrested and charged with violation of the right to secrecy of the investors or alternatively expressed, breaking privacy laws. Upon his acquittal, the prosecutor appealed and Vaxevanis had to stand retrial, which ended in another acquittal. The EU was criticised for its silence in this case and the International Press Institute (IPI) and the South East Europe Media Organisation (SEEMO), amongst others, emphasised that the EU can only be a credible actor with regard to media freedom if it manages to protect it within the EU.[59] Equally, the right-wing party Golden Dawn, according to Freedom House, was 'especially active in using legal means to pressure journalists and media outlets. Members of the party filed defamation charges against multiple journalists—including one who had called a party member a "neo-Nazi"—and against a radio station that had aired critical opinions of the group.'[60] Third, the Greek National Broadcasting Council has the power to 'impose draconian fines on media that are critical of government policy in an attempt to censor them'[61]—illustrating to what extent censorship and political influence have become institutionalised in Greece. Fourth, there exists a culture of clientelism in Greece. According to Hallin and Papathanassopoulos, 'Clientelism refers to a pattern of social organization in which access to social resources is controlled by patrons and delivered to clients in exchange for deference and various kinds of support.'[62] With regard to journalism, it 'forces the logic of journalism to merge with other social logics—of party politics and family privilege, for instance' to which Hallin and Papathanassopoulos add that 'it breaks down the horizontal solidarity of journalists' with the result that journalists are hindered in their role to be autonomous from political power and to serve 'a public interest that transcends the interests of particular political parties, owners and social groups.'[63] Clientelism in the Greek media is a long-standing

[59] International Press Institute (IPI), 'Groups Criticize EU's Silence on Case against Greek Journalist Call for Union to Defend Free Speech, Condemn "Unwarranted Harassment and Prosecution"' IPI 26 November 2012 <http://www.freemedia.at/newssview/article/groups-criticize-eus-silence-on-case-against-greek-journalist.html>.

[60] Freedom House (n 54).

[61] European Parliament, 'Parliamentary Questions: Freedom of the Press in Greece' European Parliament, 25 September 2014 <http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2014-007149&format=XML&language=EN>.

[62] Daniel C Hallin and Stylianos Papathanassopoulos, 'Political Clientelism and the Media: Southern Europe and Latin America in Comparative Perspective' (2002) 24(2) *Media, Culture and Society*, 175–95, 184 n.

[63] ibid 189.

concern.[64] According to Famellou, 'the print media sector has traditionally been dominated by a select few business tycoons' and 'when the Greek law 3592/2007 was passed, which officially permitted ownership of multiple television and radio stations, it eliminated every obstacle for the concentration of ownership in broadcasting and resulted in a buying spree among a short list of media owners, resulting in the proliferation of media concentration.' What this means is a challenge, serious threat to and breach of the principles of media freedom, independence and pluralism.

The EU has remained rather silent on these issues and notably the European Commission was heavily criticised. In the case of ERT's shutdown Jean-Paul Philippot, director of the European Broadcasting Union, emphasised that the EU 'cannot remain indifferent' to the latest Greek political drama which, according to unionists, is a 'coup-like move . . . to gag unbiased information.'[65] However, the European Commission has declared that it 'supports the role of television and public radio as an integral part of European democracy' and that it 'does not question the Greek government's mandate to manage the public sector.'[66] It was clarified that '[t]he governance and strategic choices on public service broadcasting lie with member states. This includes the decision of whether to have a public service broadcaster or not.'[67]

Concerning the case of Kostas Vaxevanis, who wrote an open letter to then Commission President Barroso, Hughes wrote that his 'case is ignored in Brussels. When Index and its international partners wrote to European Commission president Barroso, he delegated the reply to a junior official who wrote in a letter to Index this January that the case had been positively resolved but the European Commission would keep a careful watching brief. This dismissive ignorance would be laughable if it wasn't so serious.'[68] What this shows is that the EU was (obviously) aware of the shutdown of ERT as well as the imprisonment of journalist Vaxevanis but chose to remain silent justifying this silence with a lack of competencies to intervene.

These two spotlights on Bulgaria's and Greece's media landscape show that there are effectively breaches of media freedom and pluralism in EU member states. These are not 'one-off' breaches but can indeed be seen as being related to long-standing issues. The probability of such breaches continuing has been evaluated in terms of risk by the CMPF's MPM. The 2014 results have classified Bulgaria as high-risk in 32 per

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[64] Iosifidis–Katsirea (n 54).

[65] Lisa O'Carroll, 'ERT Shutdown: EBU Urges EU Leader to Overturn Greek Government Decision' *The Guardian*, 13 June 2013 <http://www.theguardian.com/media/2013/jun/13/ert-shutdown-ebu-urges-eu-overturn>. See also EBU, 'EBU Demands European Commission Take a Stand for ERT' EBU, 13 June 2013 <http://www3.ebu.ch/contents/news/2013/06/ebu-demands-european-commission.html>.

[66] Cited by Nathalie Vandystadt, 'ERT Shutdown: Commission's Perplexing Reaction' Europolitics, 13 June 2013 <http://europolitics.eis-vt-prod-web01.cyberadm.net/ert-shutdown-commission-s-perplexing-reaction-art352409.html>.

[67] ibid.

[68] Kirsty Hughes, 'World Press Freedom Day: Is the European Union Faltering on Media Freedom?' Index on Censorship, 2 May 2013 <http://www.indexoncensorship.org/2013/05/world-press-freedom-day-the-european-union-faltering-on-media-freedom/>.

cent (and 53 per cent medium risk) and Greece as high-risk in 44 per cent (38 per cent medium risk) in relation to the indicators relating to media pluralism. It is therefore reasonable to say that both countries are in breach of and in non-compliance with the values enshrined in Article 2 of the TEU. This, in turn, gives the EU the possibility to invoke Article 7 in accordance with the legal requirements stated in this bespoke article. Thus far, however, the EU has refrained from using the competencies it is given by Article 7 of the TEU and the question is what this means in terms of the EU's commitment to media freedom and pluralism. As we have shown above, rhetorically the EU advocates the necessity of media freedom and pluralism in a democracy and has emphasised their value for civil society. Yet, it decides to refrain from action.

We would expect the EU, however, to stress the importance of media freedom and pluralism in those countries wishing to join the EU and to act in accordance to EU primary law and the European Commission's political rhetoric. Specifically, Article 49 of the Lisbon Treaty reads: 'Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union.'

Conformity to this article appears to be viewed as important, indeed the Commission declares that 'Freedom of expression is a key indicator of a country's readiness to become part of the EU. It implies a commitment to democracy, good governance and political accountability. Accordingly, no country can join the EU without guaranteeing freedom of expression as a basic human right (Article 49 of the Lisbon Treaty).'[69] Furthermore, as Kroes points out, the EU continues 'to push for freedom of expression in those countries seeking to join the EU.'[70] However, when looking at the state of media freedom and pluralism in Croatia, it appears that in reality, the EU does not push as hard for freedom of expression in acceding EU countries as it likes to claim.

Spotlight 3: Croatia's media landscape

Croatia became the EU's twenty-eighth member state on 1 July 2013. Since the early 1990s it has faced serious repression of media and journalists' rights and experienced various forms of censorship particularly when it comes to reporting on corruption.[71] Censorship has ranged from threats in the form of letters, phone calls, and public insults to physical violence against journalists including murder. Further, journalists have on occasion been denied access to press conferences and events and have been sacked

[69] European Commission, 'European Neighbourhood Policy and Enlargement Negotiations. Freedom of Expression and Media' European Commission, 21 March 2014 <http://ec.europa.eu/enlargement/policy/policy-highlights/media-freedom/index_en.htm>.

[70] Neelie Kroes, 'Defending Media Freedom' (8 May 2012, SPEECH/12/335).

[71] This is also supported by Milana Knezevic, 'Croatia Has More Work to do on Free Expression' Index on Censorship, 1 July 2013 <http://www.indexoncensorship.org/2013/07/croatia-has-more-work-to-do-on-free-expression/>.

from their jobs after controversial pieces were published; news organisations were bugged, editors were dismissed on the orders of state authorities which then appointed new editors, in 2010 the Indigenous Croatian Party of Rights (AHSP) publicly burned a copy of the Serbian independent newspaper *Novosti* and a week later the party burned the Yugoslav flag in order to show their disregard for Serbian media. The newspaper office had to be guarded by the police for over a week. Journalists have also been arrested and questioned, have been accused of publishing confidential information without ever being told which documents the charges related to and which information the police based their investigations on. Since Tuđman's death various 'offshoots' have emerged. These offshoots include several groups of the so-called 'intellectual underworld' which are 'linked with different fractions [sic] in the ruling party . . . local and regional strongmen, convicted and non-convicted war criminals, police ministers . . . *nouveau riche* from the edge or the other side of the law, ordinary criminals . . . They all generally act relatively independently.'[72]

With journalism not being a safe profession, censorship and self-censorship as well as political influence mean that media freedom, independence and pluralism are seriously hampered. The EU knew about these issues before Croatia's accession to the EU, indeed, the Commission's progress reports 2005–2013 continuously point to the following three main challenges to media freedom and pluralism: First, Croatia's libel law; second, undue political pressures on the public service broadcaster Hrvatska Radio Televizija (HRT) and third, crimes against journalists.

The first challenge is addressed in the Progress Reports 2005[73] and 2006.[74] For example, the Progress Report 2005[75] criticises the incomplete decriminalisation of Croatian libel law stating that: 'Since October 2004, four journalists have received suspended prison sentences for libel. The revised libel regime still appears to lead to a certain degree of self-censorship among journalists and could be further improved'. In June 2006 the Croatian 'Parliament approved amendments to the Criminal Code abolishing the sanction of prison sentences for libel.' However, in 2013 and under the EU's watch, new changes to Croatian Criminal Law were made to include the consideration of insults, defamation, and slander as crimes. If a journalist is accused of any of these crimes he or she needs to prove that his or her intention was not to harm the other party's reputation. This means that the burden of proof is placed on the accused. The EU has remained silent on these legal changes.

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[72] Examples taken from Association of Croatian Investigative Journalists (ACIJ), 'White Paper: A Chronicle of Threats and assaults on Journalists in Croatia 1990–2011' ACIJ, March 2011.

[73] European Commission, Croatia Progress Report, SEC(2005) 1424.

[74] European Commission, Croatia Progress Report, SEC(2006) 1385.

[75] ibid 18.

With regard to the second, the Progress Reports of 2005, 2006, 2007,[76] 2008,[77] 2010,[78] and 2011[79] address undue political pressures on and interference with the public service broadcaster HRT in particular and state that these raise concerns for media freedom. For example, the Progress Report 2006 states that the 'concerns expressed in the 2005 Progress Report concerning possibilities for political influence at the local level remain valid. Two cases in particular concerning the political TV shows "Otvoreno" and "Latinica" also highlighted the political pressure being exerted on the public broadcaster HRT, threatening its independence and raising concerns about freedom of expression in Croatia.'[80] This is a continuing problem as the Progress Report 2007 points out: 'the public broadcaster HRT continues to be subject to occasional political pressure, raising concerns about freedom of expression.'[81] Both Progress Reports in 2010 and 2011 emphasise that HRT 'continued to face serious [managerial] difficulties' that had an impact on its functioning. The 2012 Monitoring Report mentions a new law on the public broadcaster adopted in July 2012 which was passed in order to achieve more editorial independence from particularly political authorities. However, this law has not brought about immediate success and accordingly, the Commission stresses that 'continued efforts are needed to ensure the independence of the public service broadcaster and to increase its transparency.'[82]

With regard to the third challenge, the Progress Reports of 2008, 2009,[83] and 2010 address the topic of crimes against journalists. The EU's concern was triggered by the murder of two Croatian journalists in 2008 and prompted it to admit that '[c]ases of physical attacks as well as death threats against journalists have gained in prominence and require more thorough investigations. Journalists working on corruption cases or organised crime are increasingly targeted. There has been limited success in identifying and prosecuting perpetrators.'[84] In 2010 the Commission stresses that all of the above issues 'need to be addressed by the countries [the Western Balkan countries including Croatia] concerned as a matter of urgency'[85] and emphasises that the 'Commission will closely monitor progress in . . . areas such as the legal framework and its compliance with European standards, in particular regarding defamation; the responsibility of authorities to duly sanction all cases of attacks on journalists; the establishment of self-regulatory bodies and their contribution to enhanced professionalism; the role of public service broadcasters in pluralistic democracies.'[86]

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[76] European Commission, Croatia Progress Report, SEC(2007) 1431.
[77] European Commission, Croatia Progress Report, SEC(2008) 2694.
[78] European Commission, Croatia Progress Report, SEC(2010) 1326.
[79] European Commission, Croatia Progress Report, SEC(2011) 1200.
[80] European Commission (n 74) 9.
[81] European Commission (n 77) 11.
[82] European Commission, Commission Staff Working Document. Comprehensive Monitoring Report on Croatia, SWD(2012) 338 final, 7.
[83] European Commission, Croatia Progress Report, SEC(2009) 1333.
[84] European Commission (n 77) 11 .
[85] European Commission, Enlargement Strategy and Main Challenges 2010–2011, COM(2010) 660, 8.
[86] ibid 9.

Interestingly, whereas all of these issues are emphasised 2005-2010, they disappear from then on. Whilst the 2011[87] Progress Report notes *en passant* [the] limited progress in investigating threats against journalists, a Commission report of 2012[88] does not mention the issue of freedom of expression at all and in 2013 the Commission merely notes that the 'investigation and prosecution of cases of intimidation and violence against journalists continued.'[89] When enquiring at the European Commission about the state of media freedom and of the right to freedom of expression in Croatia, it said that 'Croatia is meeting the commitments and requirements arising from the accession negotiations and is in a position to implement the acquis as of accession in the fields of freedom of movement for workers, company law, intellectual property law, financial services, information society and media.'[90] And yet, in October 2013 the European Parliament demanded greater information from the European Commission about what it was planning on doing to promote media freedom and pluralism in Croatia, especially with regard to the public service broadcaster HRT and the appointment of its Director General by the majority in Croatian Parliament—an inquiry which shows that long-standing infringements on media freedom and pluralism have not been resolved.[91]

The example of Croatia shows that the European Commission was aware of its problems regarding media freedom and pluralism. From 2011 onwards—the year the accession treaty was signed—the Commission went remarkably quiet despite the fact that the identified issues had not been resolved. Accordingly, it is fair to argue that even in situations where the EU has the competence to delay a state's accession until it can be seen to respect media freedom and pluralism it may still remain passive. Of course, it is possible to argue that legally speaking Croatia fulfils the accession requirements. Its Constitution establishes that Croatia is a democracy and provides for freedom of the media and pluralism. Censorship is also prohibited.[92] And yet, this ideal constitutionalism is not sufficient as it is, as we have shown, not able to prevent daily attacks on journalists or overcome the lack of respect for media freedom and pluralism. The question is what evaluation criteria the EU adopts: constitutional idealism or engagement with the everyday mess?

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87 European Commission (n 79).

88 European Commission, Communication on the Main Findings of the Comprehensive Monitoring Report on Croatia's state of preparedness for EU membership, COM(2012) 601.

89 European Commission, Monitoring Report on Croatia's Accession Preparations COM(2013) 171, 10.

90 Personal communication, May 2013.

91 European Parliament (2013) Parliamentary Questions. Problem of Media Objectivity: Croatian Radio Television (HRT) European Parliament, 18 October 2013 <http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2013-011929&format=XML&language=EN>. Lina Rusch, *Media Freedom in Croatia, Balkanmedia* (Konrad-Adenauer-Stiftung 2014) <http://www.kas.de/wf/en/71.13596/>.

92 Such ideal constitutionalism appears to be supported by the Centre for Media and Communication Research (CIM) in Zagreb. In the report on the assessment of 'Media Development in Croatia' (2011)—which it carried out for UNESCO—It is quite optimistic about the state of media freedom and pluralism in Croatia. An engagement with day-to-day reality is missing. See Zrinjka Peruško, 'Media Development in Croatia' (UNESCO/CIM 2011).

Conclusion: What does this all mean?

We have shown that the EU considers media freedom and media pluralism to be foundational to a flourishing democracy and essential to the development of civil society. We have equally shown that in contemporary Europe media freedom and pluralism are variously undermined and curtailed and that the values referred to in Article 2 of the TEU are not universally adhered to nor do governments in some member states bother to safeguard them.

Fairly obviously our examples of the state of the media in Greece, Bulgaria and Croatia are historically specific and subject to contingent changes and yet they serve a timeless purpose as they show how the EU overlooks deteriorating circumstances (Greece and Bulgaria) and how severe shortcomings on the freedom of the media and media pluralism front is not a hindrance to successful accession to the EU (Croatia). Two questions will endlessly recur whenever a member state or a candidate country fails to meet the requirements and values enshrined in Article 2 of the TEU (and correspondingly breaches Article 11 of the EU Charter of Fundamental Rights). The first is why does the EU not invoke Article 7 of the TEU, choosing instead not to act upon available evidence of breaches of Article 2 of the TEU, and opting for nothing more than a 'soft approach' consisting of monitoring, commissioning risk-assessments, issuing recommendations and declaring the vital importance of safeguarding media freedom and pluralism for EU democracy? The second question is: why is a candidate country allowed to become a full EU member although it clearly lacks an acceptable European standard of media freedom and pluralism? We can only speculate about answers to the first question. Three possible answers suggest themselves.

The first is of a legal nature and here we return to the long-standing question of competencies. Let us imagine that the EU decided to invoke Article 7 because it acknowledged that a member state was in serious breach of media freedom and pluralism. The question then arises as to what the EU can do. Certainly it could commence an infringement procedure (if Article 7 is a sufficient legal basis) whereby it would need to engage with the member state in a 'structured dialogue'[93] with the aim of resolving the issue. Though this procedure can and most likely would take a long time and, more problematically, would not necessarily lead to desired outcomes—it could end up with the member state paying a fine without actually effectively redressing the infringement itself.

A second possible answer requires that we imagine that the EU finds a basis for effective legal action (perhaps they discover a loophole in the Treaties) enabling them to issue a directive or propose legislation[94] (with the European Parliament having urged

[93] European Commission, Infringement Procedure, European Commission, 9 December 2014 <http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/index_en.htm>.

[94] We also have to imagine that the problem of finding adequate structures and office to undertake oversight of the use of art 7 TEU is solved.

for Commission action in this domain for quite a few years such proposed legislation might actually pass): then we must further speculate as to what this remedy to encourage media freedom might actually consist of. This is where we move away from questions of competencies to questions of the ability to solve the issue. Gibbons quite sensibly asks what is actually meant by 'sufficient pluralism'? What is the 'threshold of sufficiency'? This is, all motivation put aside, 'the trickiest part of pluralism policy'.[95] Another challenge is to decide how much regulation and intervention is needed. Kroes points out that she doesn't 'want to rush to regulation. In some cases regulation can support freedom. But if our aim is to separate the media from governments or parliaments, then the risk is that regulation does exactly the opposite.'[96] What is more, each member state has a different understanding of media freedom and pluralism grounded in terms of the political culture, political systems, media systems, economic development and strength as well as different subsidy systems.[97] This is a difficulty which the Commission itself acknowledges in that improving the level of media freedom and pluralism 'inevitably goes beyond a simple transposition of EU rules: it calls for behavioural and cultural change in politics, judiciary and media.'[98] In other words, and as Kroes points out, 'in order to protect media freedom and independence, you have to be aware of the environment in which the sector operates because there is no objectively perfect system independent of the economic reality. As the ecosystem changes, so do the conditions under which freedom and pluralism flourish or wither.'[99] As such, 'there is no one size fits all approach,'[100] competencies or not.

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[95] Thomas Gibbons, 'What is "Sufficient' Plurality"?' in Steven Barnett and Judith Townend (eds), *Media Power and Plurality: From Hyperlocal to High-Level Policy* (Palgrave Macmillan forthcoming 2015) 29.

[96] Kroes (n 21). Protection of the press from too much regulation was at the heart of the debates following the 2011–12 Leveson Inquiry into the Culture, Practices and Ethics of the Press in the UK. The Leveson Report (November 2012) advocated a new system of self-regulation and amongst other things is an attempt to better protect the press against political interference. Leveson recommended the establishment of a recognition panel to audit the press's self-regulator(s) subject to a set of specific criteria and a series of incentives for membership of the regulator to be enshrined in law. Following a protracted period of dispute and negotiation about the best means to establish a recognition panel, the use of the Royal Charter emerged as a compromise between Leveson's recommendation for statutory underpinning for a new self-regulator and the Leader of the Conservative Party's concern that there should not be a statutory recognition scheme. The Royal Charter was used as a way of turning a collection of individuals into a single legal entity in order to establish the recognition panel. Once the press set up a self-regulator, the self-regulator applies to the panel for recognition and the Chartered Recognition Panel applies its recognition criteria based on the recommendations made in the Leveson Report. Despite the compromises that have been made, the establishment of a Chartered Recognition Panel has attracted criticism from press freedom groups as representing a form of statutory interference in the press and is seen as a 'regulation too far'.

[97] Peter Humphreys, 'Transferable media pluralism policies from Europe' in Barnett–Townend (n 94).

[98] European Commission (n 68).

[99] Kroes (n 69).

[100] Humphreys (n 96) suggests a form of policy transfer as a solution to the problem of the lack of media freedom and pluralism.

A third answer concerns political will and speculation concerning political motivation. It is plausible to suggest that a key element of the political *Zeitgeist* across Europe consists of the sensitivities regarding sovereignty. Naturally enough it is reasonable to further suppose that tinkering with a member state's media system will evoke from some (if not all) member states the charge that the EU is overreaching itself. The context for this accusation has already been set. After all, the Council has emphasised that whilst it would welcome European Commission actions with regard to safeguarding media freedom and pluralism (including the protection and safety of journalists) it does not support any proposals that are of a legislative nature. As such, the European Commission has, to put it bluntly, been warned not to meddle with member states' competencies by widening its own. It is worth mentioning at this point that historically, public communication as well as the media have been domains in which the member states have had strong concerns about giving up any competencies or transferring any sovereignty to the EU level—so much so that the European Commission experienced that interfering with member states' competencies in the area of public communication can have major impacts upon the entire European integration project. The most famous example is the empty chair crisis of the mid-1960s during which France refused to participate in any Community meetings. One of the reasons was that the French President, Charles de Gaulle, was furious about the then European Commission President Walter Hallstein's 'Bundesstaatspolitik'[101] which included a public communication strategy that was developed independently from the member states. The Luxembourg Compromise (1966), which settled the empty chair crisis, included stipulations on the way in which the European Community was to undertake its public communication policy. The Hallstein Commission was blamed for 'meddling' with the member states and for the subsequent paralysis of the European integration project. In short, current political will or lack of it may well be informed by history, and the charge of meddling too serious to risk incurring.

To turn to the second question raised above, that of why candidate countries are allowed to join the EU despite having a lack of media freedom and pluralism. This seems on the face of it to be the most difficult question to understand if we take the EU at its word with regard to its valuation of media freedom and media pluralism. After all, the example of acceding countries such as Croatia only serves to highlight the EU's lack of sincerity with regard to the necessity of media freedom and pluralism. Added to which we might also say that such failure also points to a lack of consistency when it comes to what is acceptable for accession and what is not. To this charge pragmatists and realists may instantly reply by saying that accession is guided by more pressing matters than media freedom and media pluralism. This is, however, a response which lays the EU open to charges of insincerity and inconsistency. The former because it

[101] This means that Hallstein was seen to act as if he was the President of a State.

means that media freedom and media pluralism are governed by other criteria than the criteria espoused in Article 2 of the TEU and the latter because it undermines the very idea of binding arrangements (for example a constitution) whereby all EU member states legally and constitutionally guarantee freedom of the media with the result that a 'constitutional or legal promise' can in practice be reduced to the status of an 'outright fiction'.[102] Combined, the charges of insincerity and inconsistency raise two significant problems for the EU: First, the loss of trust insincerity generates and second, the diminishment of belief in fairness when it comes to the standardised application of articles and by extension EU law,[103] both of which are political costs of inestimable damage which is why 'turning a blind eye' to infringements of a widely advocated belief is not a sound policy.

Finally, perhaps the failure to apply Article 7 of the TEU is a mix of all of the speculative answers given above. However, not having the solutions ready to hand does not mean that the EU should necessarily give up or refrain from any action and solely rely on its soft power. Rather, we would suggest that it should be inventive and creative in findings ways to promote, safeguard and defend the values enshrined in Article 2 of the TEU. Indeed CMPF, according to Komorek,[104] has stated that 'a lack of competence can no longer guide the European Commission's competition practice in the media field' and the idea of inventiveness is not without historical precedence. The officials of the High Authority, the European Commission's precursor, were adept at widely interpreting its competencies and as we have argued elsewhere,[105] the unofficial widening of Article 5 of the Treaty of Paris (1951) justified the Community's public communication policy to be directed at a wide European public rather than at some narrow economic sectors. In the absence of the creative interpretation of competences we are left with an increasingly alarming situation in both EU member states and candidate countries. In fact, what is tolerated by the EU is impunity with regard to violations of freedom of expression, media freedom and media pluralism. The significance of this is that the development of media freedom and media pluralism, defended by the EU as a civil necessity, is not seen by member states and candidate countries as a policy priority and can be freely ignored (with impunity) with the net result that current 'European mechanisms [are] unable to stop [the] erosion of pluralism.'[106]

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[102] Whitten-Woodring and Van Belle (n 32) 8.

[103] We freely acknowledge that the problem of standard application is nothing new and applies to other areas.

[104] Komorek (n 31) 6.

[105] Jackie Harrison and Stefanie Pukallus, 'The European Community's Public Communication Policy 1951–1967' (2015) 24(2) *Contemporary European History*, 233–51. Stefanie Pukallus, 'Representations of European Citizenship Since 1951' (Palgrave Macmillan forthcoming 2016).

[106] RWB (n 43).

Andrej Školkay

Media policy for a new media environment

The approaches of international organisations and the EU towards the regulation of new online media services

Introduction[1]

This chapter provides a comparative study of emerging systems for regulating New Online Media Services (NOMS) at the international level and more specifically at the European Union (EU) level. The focus here is primarily from the perspective of freedom of speech and we consider the respective advantages and disadvantages of different regulatory approaches (statutory regulation, no regulation as well as self- and co-regulation) within this free speech framework. Since by their technological nature NOMS have an international character and reach, international guidelines are likely to play an increasingly important role. Nevertheless, the regulatory guidelines for NOMS in international documents are sometimes absent or patchy and we therefore consider the implicit and explicit suggestions made in policy documents, case law, and legislation in the past that could guide the development of international standards for the new media, as well as more recent proposals relating to the Internet of today. The international organisations we consider in this paper are the Organization for Security and Cooperation in Europe (OSCE), the Council of Europe (CoE), especially its specialised human rights court, the European Court of Human Rights (ECtHR), and the United Nations (UN) Educational, Scientific and Cultural Organization (UNESCO), together with the UN itself. As will be shown, in practice UNESCO has not dealt much with this issue with the position of NOMS being addressed in rather more detail by a special UN rapporteur, while discussion of NOMS by the OSCE has been rather contradictory. As a result, more emphasis is given to the position of certain international bodies, notably the CoE, than others.

In addition to these international organisations, we also focus on the evolving policies of the EU in regulating NOMS. We acknowledge the interest in, and support for, self-regulation and co-regulation within the EU in this field.[2] Several EU directives

[1] The author wishes to thank to Rachael Craufurd Smith and Yolande Stolte (University of Edinburgh, UK) for their invaluable editorial work and Peggy Valcke (KU Leuven, The Netherlands) for her critical comments as well as to an anonymous reviewer. This work was partially supported by the Slovak Research and Development Agency under contract No DO7RP-0022-10. It is also indirect output of the MEDIADEM Project (2010–2013) supported by the European Commission.

[2] See Linda Senden, 'Soft Law, Self-Regulation, and Co-Regulation in European Law: Where do They Meet?' (2005) 9(1) *Electronic Journal of Comparative Law* <http://ejcl.org/91/art91-3.html>; Anna M Darmanin (ed), 'European Self- and Co-Regulation' (18 July 2013) <http://www.eesc.europa.eu/resources/

provide guidelines relating to self-regulation, particularly with regard to advertising, data protection (Directive 95/46), e-commerce (Directive 2000/31) and unfair trading practices (Directive 2005/29). However, as will be shown, similar developments in relation to NOMS have been delayed (primarily due to impracticability as well as contradictory EU expectations with respect to regulation), resulting in a degree of statutory and co-regulation taking hold with respect to NOMS, with the EU ultimately endorsing co-regulation or established functioning regulatory mechanisms in the Audiovisual Media Services Directive (Directive 2010/13 EU, AVMSD). However, ultimately and perhaps for some unexpectedly, it was the Court of Justice of the European Union (CJEU) which intervened decisively in regulating some aspects of NOMS. This is especially striking in contrast to the more usual or at least more likely expected involvement of the European Court of Human Rights (ECtHR) in this area. For this reason, the EU case deserves special attention.

In contrast, the International Telecommunication Union (ITU) deals with online regulation exclusively from the point of view of a consumer or of businesses. The regulatory advice of the ITU seems to be quite extensive but rather general. The two most important pieces of advice seem to be 'to update existing legislation / regulations to make them fit for purpose in a converged regulatory framework' and 'to establish a clear division of responsibilities between the different regulatory authorities concerned'. Respecting content and businesses it recommends 'review[ing] the framework for content regulation,' while at the same time calling for a 'stable legal framework'.[3]

There is currently no single accepted definition of NOMS. For the purpose of this article we have limited ourselves to discussing three key types of NOMS, namely:

a) digital tools for the expression of information and opinion, such as blogs;
b) online content provided by the traditional media, and
c) journalism published in online news portals, which have their own independent editorial structure (online-only news portals).

These NOMS, especially online content provided by traditional media, usually have large online mass audiences as well as, in certain cases—especially blogs—specialist audiences. Blogs are very popular both among creators (citizen-writers) and readers, and are often on the borderline between traditional journalism, the expression of professional opinions, and personal diaries. Thus, together, these NOMS represent the most important components in the quest for online freedom of expression for both journalists and non-journalists (or citizen journalists) in the new media environment.

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docs/auto_coregulation_en--2.pdf>; European Social and Economic Committee, 'Database on Self- and Co-regulation Initiatives' (2014) <http://www.eesc.europa.eu/?i=portal.en.self-and-co-regulation-enter-the-database>.

[3] Rosalind Stevens, 'Regulation and Consumer Protection in a Converging Environment' (March 2013) 28–29 <http://www.itu.int/en/ITU-D/Regulatory-Market/Documents/Regulation%20and%20consumer%20protection.pdf>.

This chapter also briefly considers the development of network-level filtering[4] and monitoring performed by Internet service providers (ISPs), as required in certain fields by certain governments, for example the French (with respect to child pornography) and the British (not required by law but adopted as an '*enforced*' choice under pressure from the Government to allow parental control).[5] Such requirements entail a certain type of media policy—one that is perhaps less known to the public and that usually involves a less transparent form of co-regulation for NOMS. Experience shows that with ISP filtering and monitoring the focus is mostly directed at child abuse images, fighting terrorism and content that infringes copyright laws. There is strong opposition from Internet civil activists against any form of filtering. Even major technology players such as Microsoft have officially opposed this type of content control.[6] Nevertheless, as Darlington notes, 'Sooner or later, in any discussion of Internet regulation, understandably the issue arises of the liability of Internet service providers (ISPs).'[7] This is because the most efficient and practical way to deal with illegal content seems, from the perspective of governments, to be precisely through ISPs. This is despite the fact that this approach, already in use, has certain drawbacks, including legislative ones.[8] Such filtering negatively impacts the development of NOMS and, more worryingly, in the absence of other effective regulatory models, filtering content through ISPs may be abused and extended to regulate content on NOMS, limiting freedom of expression online. There has similarly been much discussion about the role of ISPs at both the judicial and governmental levels within the EU. Thus, according to the cardinal judgment of the CJEU from 2011 in *Scarlet v SABAM,*[9] a general Internet filtering obligation for ISPs is in violation of European law.

In *UPC Telekabel Wien,* the CJEU ruled that an ISP can be required to block access by its customers to a website that infringes copyright.[10] The CJEU underlined that such a court injunction must refer to specific blocking measures and achieve an appropriate

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[4] Content-limited (or filtered) ISPs are ISPs that offer access to only a set portion of Internet content on an opt-in or a mandatory basis. Anyone who subscribes to this type of service is subject to restrictions. The type of filters can be used to implement government, regulatory, or parental control over subscribers. *Wikipedia* <http://en.wikipedia.org/wiki/Content-control_software#Types_of_filtering>.

[5] We acknowledge that the issue of ISP liability deserves fuller exploration and can only touch on a number of key issues here.

[6] Brad Stone, 'AT&T and Other ISP's May Be Getting Ready to Filter' *New York Times* Blogs, 8 January 2008 <http://bits.blogs.nytimes.com/2008/01/08/att-and-other-isps-may-be-getting-ready-to-filter/>.

[7] Roger Darlington, 'Should the Internet Be Regulated?' (2010) <http://www.rogerdarlington.me.uk/regulation.html>.

[8] Yaman Akdeniz, 'Who Watches the Watchmen? The Role of Filtering Software in Internet Content Regulation' in Christian Möller and Arnaud Amouroux (eds), *The Media Freedom Internet Cookbook* (OSCE 2004) 101–21 <http://www.osce.org/fom/13844>.

[9] *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* (Case C-70/10).

[10] Advocate General's Cruz Villalón Opinion in *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH und Wega Filmproduktionsgesellschaft mbH* (Case C-314/12, 27 March 2014).

balance between the opposing interests which are protected by fundamental rights.[11] In fact, the ECtHR has also ruled in *Yıldırım v Turkey*[12] that any measure blocking access to a website had to be part of a particularly strict legal framework ensuring both tight control over the scope of the ban and effective judicial review to prevent possible abuse, because it could have significant effects of 'collateral censorship'. With regard to the balancing of possibly competing interests, such as the 'right to freedom to receive information' and the 'protection of copyright', the domestic authorities were afforded a particularly wide margin of appreciation.

At the legislative level, the EU E-Commerce Directive was under review in 2013, with special attention given to the issue of ISP liability for third party content. Of particular relevance here is the EC's initiative on Notice-and-Action[13] which aims to create greater certainty by providing more detailed rules on removing illegal or harmful content from the Internet.[14] However, after consultations, no further action by the EU seemed to be necessary.[15] Similarly, AVMSD was also under review in early 2015. Perhaps, typically, in addition to extensive consultations, it was the ECtHR ruling—the controversial *Delfi AS v Estonia* case[16]—that deemed unnecessary any further legislative initiative in this area at the level of the European Commission (the *Delfi* case was under review by the Grand Chamber. The Grand Chamber has come to the conclusion in June 2015 that the Estonian courts' finding of liability against Delfi had been a justified and proportionate restriction on the news portal's freedom of expression, in particular because the comments in question had been extreme and had been posted in reaction to an article published by Delfi on its professionally managed news portal run on a commercial basis).

It is clear that the regulatory issues regarding the Internet-based media dealt with in this article continue to evolve rapidly and proper regulatory policies at both national and international levels are critically important for freedom of expression and access to information in the future.

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[11] See also *Tamiz v Google Inc.*, [2013] EWCA Civ 68.

[12] *Ahmet Yıldırım v Turkey* (App no 3111/10, 18 December 2012).

[13] Initiated by the European Commission in January 2012 <http://ec.europa.eu/internal_market/e-commerce/notice-and-action/index_en.htm>.

[14] For criticism on this issue see Monica Horten, 'Notice and Action Directive to Be Blocked as EU Backs Down' (28 July 2013) <http://www.iptegrity.com/index.php/ipred/893-notice-and-action-directive-to-be-blocked-as-eu-backs-down>.

[15] It was announced on 4 February 2014 by Commissioner Barnier in his intervention in the European Parliament <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20140204+ITEM-003+DOC+XML+V0//EN&language=EN> that at this stage the Commission will not propose any legislative or non-legislative instrument on this subject.

[16] *Delfi AS v Estonia* (App no 64569/09, 10 October 2013) referral to the Grand Chamber 17/02/2014.

Defining new online media services

Though there has been considerable discussion of the scope of NOMS in the academic literature and among policy makers,[17] there is currently no single agreed scientific or EU-wide legal definition of NOMS or Internet-based network media in general. Of course, there have been some attempts to define NOMS. Be that as it may, at the time of writing, no EU country has introduced specific or exclusive and effective (in the case of transborder or international disputes) regulation for all NOMS,[18] although as will be discussed further below, some alternative practical or pragmatic country-specific approaches are evolving. The current limited nature of statutory regulation in the field (apart from the AVMSD and E-Commerce Directive, which does not deal specifically with content) is partially a result of the complications surrounding agreeing workable definitions for some NOMS. There still seems to be confusion as to what to include as, or consider to be, new media services, especially which NOMS should be regulated, if any. This discussion is certainly more pronounced at the academic level, although for practical reasons it is becoming a more urgent matter for regulators (including the judiciary) and policy makers as well. At the academic-advisory level, eg Jakubowicz has distinguished three new 'notions' of media.[19] First, he notes that all media are new-media-to-be, which points to the development of online versions of traditional media. Second, he points to media services created by new actors, which include services such as online-only news media. Third, he emphasises the role of citizen journalism or user-generated content, which includes blogs and similar information. All of these are tools for furthering digital freedom of expression and reflect the categories of NOMS indicated in the introduction to this article which we focus on here.

At the international level, in 2011 the CoE developed six criteria, supplemented by a set of indicators, designed to assist policy makers in identifying whether a new communication service amounts to a *media* service or whether it provides only intermediary or auxiliary activities for media services.[20] NOMS should: a) intend to act

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[17] Europe Economics, 'Digital Content Services for Consumers: Assessment of Problems Experienced by Consumers (Lot 1)' Report 4: Final Report (2011) 4: 'digital services have been defined as all digital content which the consumer can access either online or through any other channels such as CD or DVD, and any other services which the consumer can receive online' <http://ec.europa.eu/justice/consumer-marketing/files/empirical_report_final_-_2011-06-15.pdf>. This definition was used also in the 'Digital Content Services for Consumers. Comparative Analysis of the Applicable Legal Frameworks and Suggestions for the Contours of a Model System of Consumer Protection in Relation to Digital Content Services' <http://www.ivir.nl/publicaties/download/777>.

[18] See eg Francisco J Cabrera-Blázquez, 'On-Demand Services: Made in the Likeness of TV' *IRIS plus* 2013-4.

[19] Karol Jakubowicz, 'A New Notion of Media?' Background text for Media and Information Society Division Directorate General of Human Rights and Legal Affairs, Council of Europe (2009) 3 <www.coe.int/t/dghl/standardsetting/media/doc/New_Notion_Media_en.pdf>.

[20] Recommendation CM/Rec(2011)7 of the Committee of Ministers to Member States on a New Notion of Media <https://wcd.coe.int/ViewDoc.jsp?id=1835645>.

as media services; b) pursue those purposes and underlying objectives that characterise the media; c) be subject to editorial control; d) subscribe to professional standards; e) seek outreach and dissemination of their services, and f) act in line with public expectations.

These criteria indicate that there is a close relationship between the concept of the traditional media and that applicable to NOMS. Content is often no longer medium-specific and now flows across multiple media channels. There is thus an increased interdependence among communication systems, with multiple ways of accessing media content and more complex relations between 'top-down corporate media and a bottom-up participatory culture'.[21] Technological lines separating audiovisual and written communication have become blurred.[22] The development of the term NOMS also reflects the commercial potential of new media. Yet there remains a 'mass democratic' aspect of NOMS, providing users with a non-commercial way of creating and distributing content to a mass audience, leading to the 'democratization of communication'.[23]

The importance of NOMS has increased exponentially in the last decade, though their growth is now slowing down.[24] Nevertheless, most experts believe that the time spent consuming online media will exceed that for television broadcasting by 2020.[25] At the same time, coverage of blogs in the traditional news media has changed from a focus 'on the sexy or "hot" aspects of new media technology' to the use of blogs as sources for professional reporting.[26] A call for a more integrated but not necessarily uniform approach to media policy in light of these developments can be seen in the policy paper by Cafaggi et alii.[27]

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[21] Henry Jenkins, *Convergence Culture: Where Old and New Media Collide* (NYUP 2008) 243; David Brewer, 'The Uneasy but Essential Evolution of News' (2012) <http://www.ejc.net/magazine/article/the_uneasy_but_essential_evolution_of_news/>.

[22] Tanja Storsul and Dagny Stuedahl (eds), *Ambivalence Towards Convergence: Digitalization and the Media Age* (Nordicom 2007).

[23] Evgeny Morozov and Clay Shirky, 'Digital Power and its Discontents' Edge conversation (2010) <http://edge.org/3rdculture/morozovshirky10/morozovshirky10_index.html>.

[24] 'The Influence Game: How News is Sourced and Managed Today' in Oriella PR Network, Global Digital Journalism Study (2012) <http://www.oriellaprnetwork.com/sites/default/files/research/Oriella%20Digital%20Journalism%20Study%202012%20Final%20US.pdf>; 'The New Normal for News: Have Global Media Changed Forever?' Oriella PR Network, Global Digital Journalism Study (2013) <http://www.oriellaprnetwork.com/sites/default/files/research/Brands2Life_ODJS_v4.pdf>.

[25] Colin Blackman et al, 'Towards a Future Internet: Interrelation Between Technological, Social, and Economic Trends' Final Report for DG Information Society and Media European Commission DG INFSO Project SMART 2008/0049 (2010) <http://cordis.europa.eu/fp7/ict/fire/docs/tafi-finalreport_en.pdf>.

[26] Marcus Messner and Bruce Garrison, 'Study Shows Some Blogs Affect Traditional News Media Agendas' (2011) 32(3) *Newspaper Research Journal* 114.

[27] Fabrizio Cafaggi et al, 'Policy Recommendations for the European Union and the Council of Europe for Media Freedom and Independence and a Matrix of Media Regulation Across the Mediadem Countries' (2012) 8 <http://www.mediadem.eliamep.gr/wp-content/uploads/2012/11/EU_CoE_matrix.pdf>.

International norms and policy suggestions for the regulation of Internet-based NOMS

Media systems over the last few decades have undergone fundamental changes. Distinct media policies focusing specifically on NOMS are still largely absent. Initially, and naturally so, there was a prevailing tendency to base media policy on past models for regulation and experiences such as self-regulation. Similarly, legislation of relevance to the field, such as freedom of information acts, libel and copyright laws, has not been systematically reviewed and updated to take into account recent changes in the practice of traditional and civic (new) journalism in the majority of EU countries.[28] It is true, however, that some countries are trying to cope with this challenge more seriously (and perhaps more successfully) as will be shown in a number of examples discussed in sections below.

In this report, media policy will be understood as an activity that deals 'with the organisation of media markets and media performance' and, more specifically, 'the policy tools that are employed to shape the media in a way that promotes their role as facilitators of communication through which public discourse is produced.'[29]

The Center for Democracy and Technology (CDT)[30] has suggested that the Internet's power to enable an unlimited flow and exchange of information has increasingly caused governments to attempt to control the Internet through legal and technical means. The 2012 ITU Union meeting in Dubai indeed revealed tensions among governments, public interest organisations and private companies regarding the issue of Internet and NOMS regulation.[31] In short, any regulation of NOMS is inevitably related, directly or indirectly, to controlling the content of the Internet.[32]

Because of the international nature of NOMS, it is important to examine the attempts at regulation undertaken by international bodies and experts critically. The most important international bodies in this regard are the CoE, the UN and its specialised agency UNESCO, and to some extent the OSCE. For political and legal (but also geographical—eg CoE) reasons, the contribution that these bodies have made to the

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[28] Rasmus K Nielsen, 'Ten Years that Shook the Media World: Big Questions and Big Trends in International Media Developments' Reuters Institute for the Study of Journalism (2012) 61–62.

[29] Dia Anagnostou – Evangelia Psychogiopoulou – Anna Kandyla: 'Media Policies and Regulatory Practices in a Selected Set of European Countries, the EU and the Council of Europe: The Case of Greece' (2010) 11 <http://www.mediadem.eliamep.gr/wpcontent/uploads/2010/05/Greece.pdf>.

[30] Center for Democracy and Technology, 'Regardless of Frontiers: The International Right to Freedom of Expression in the Digital Age' (2011) 2 <https://www.cdt.org/files/pdfs/CDT-Regardless_of_Frontiers_v0.5.pdf>.

[31] See eg David Meyer, 'ITU Chief Claims Dubai Meeting "success", Despite Collapse of Talks' ZDNet (14 December 2012) <http://www.zdnet.com/itu-chief-claims-dubai-meeting-success-despite-collapse-of-talks-7000008808/>.

[32] See eg Rod A Beckstrom, 'The Rights of Digital Man' Project Syndicate (12 December 2013) <http://www.project-syndicate.org/commentary/rod-beckstrom-proposes-ways-to-reclaim-control-over-our-online-selves>, who calls for 'diversified stewardship with multiple stakeholders.'

debates over the regulation of NOMS and their standard-setting impact has varied considerably. In some cases, these issues are being tackled within different frameworks or from different perspectives at the same time and within the same international organisation. For example, the UN deals with this issue from business and economic perspectives as well as a human rights one.[33] Of particular interest are the approaches to regulating NOMS being developed by the EU, acting at a regional level with a primary economic focus though growing attention to the human rights dimension.

An international approach is necessary given the cross border nature of the technology and the need for effective co-ordination, supplementing, and guiding action at the national level. For example, the UK-based Institute for Human Rights and Business (IHRB) included among its top ten business and human rights issues for 2015 'Protecting the Right to Privacy and Ending Mass Surveillance of Digital Communications',[34] while in 2014 it was 'Responding to growing pressure on tech companies to respect privacy rights in an age of mass surveillance' (first place),[35] and in 2013 these issues were 'tackling challenges of dual-use Internet-based technologies that may undermine privacy rights and freedom of expression' and 'advancing uptake of the UN Guiding Principles in key enabling sectors including ICT (Information and Communication Technologies)' (third and fourth place respectively).[36] There are also examples of governments and other bodies finding inspiration for their own regulatory systems in transnational guidelines.[37]

Approaches to regulating NOMS at the international level

Clearly, international bodies have rather different remits and points of focus. There is a growing body of international human rights law protecting the right to freedom of expression and related fundamental rights in Europe. However, there is also business law developed by the EU, working within a human rights framework, informed by human rights cases at both domestic and international levels, especially those relating to Article 10 of the European Convention on Human Rights (ECHR) and, now, by the EU's own Charter of Fundamental Rights (the EU Charter) with its guarantee of freedom of expression in Article 11.

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[33] The Human Rights Council approved the Framework on Business & Human Rights in 2008. This includes the corporate responsibility to respect human rights; and greater access by victims to effective remedy, both judicial and non-judicial <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework>.

[34] Institute for Human Rights and Business, 'Top Ten Business and Human Rights Issues 2015' (7 April 2015) <http://www.ihrb.org/Top10/2015.html>.

[35] Institute for Human Rights and Business, 'The 2014 Top Ten List of Business and Human Rights' (10 December 2013) <http://www.ihrb.org/top10/business_human_rights_issues/2014.html>.

[36] Institute for Human Rights and Business, 'The 2013 Top Ten List of Business and Human Rights' (10 December 2012) <http://www.ihrb.org/top10/business_human_rights_issues/2013.html>.

[37] John Ruggie, 'Applications of the UN "Protect, Respect, and Remedy" Framework' (30 June 2011) <http://www.business-humanrights.org/media/documents/applications-of-framework-jun-2011.pdf>.

We now consider how (from a European perspective) key international bodies (the CoE, UNESCO and to some degree also the OSCE) have implicitly or explicitly proposed that NOMS should be regulated. We then go on to consider the special case of the EU. For this purpose, we identify four possible types of regulatory intervention: a) no regulation; b) self-regulation (also called voluntary or private regulation); c) co-regulation, and d) statutory regulation (also referred to as public regulation). These categories are not new but rather reflect the various existing approaches to regulation, especially in the context of the EU,[38] but also in the OSCE context.[39]

It should nevertheless be noted that there are various other ways to characterise regulatory approaches to NOMS. Latzer et alii developed a more sophisticated approach to regulatory intervention which categorises regulatory modes according to their degree of state involvement.[40] First, their model includes s*tate regulation in the narrow sense*, which comprises intervention by the legislature, the executive or the judiciary. Second, there is s*tate regulation in the broad sense*, ie tasks related to national sovereignty, but carried out at arm's length from the executive sovereign. Third, there is *co-regulation*, which operates with an explicit legal basis but does not involve the exercise of national sovereignty. Fourth, there is private but state-supported *self-regulation in the broad sense*, an example being 'Stopline', the Austrian hotline for illegal Internet content. Finally, there is s*elf-regulation in the narrow sense* with no explicit state involvement. However, they also note that regulation takes place on a *continuum* between two poles, and can generally be understood as a combination of state / public and societal/private contributions that are closely interlinked.

Kleinsteuber employs another (rather confusing) distinction between self and co-regulation.[41] If the State and the private regulators co-operate in joint institutions, he calls this co-regulation, while if the regulatory framework is structured by the State but the State is not involved the appropriate term is, according to him, 'regulated self-regulation'. This last term is further divided by Schulz and Held into 'co-regulation', 'intentional self-regulation', or 'audited self-regulation'.[42] Further definitions of self-regulation can be found in Marsden et alii.[43] Some of these definitions of self-regulation

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[38] See Senden (n 2).

[39] Hans J Kleinsteuber, 'The Internet Between Regulation and Governance' in Möller and Amouroux (n 8) 61–75; New Zealand Law Commission, 'The News Media Meets "New Media": Rights, Responsibilities, and Regulation in the Digital Age' (December 2011) <http://ip27.publications.lawcom.govt.nz/chapter+6+-+regulation+of+the+media+%96+a+new+regulator/regulatory+models>.

[40] Michael Latzer et al, 'Institutional Variety in Communications Regulation: Classification Scheme and Empirical Evidence from Austria' (2006) 30 *Telecommunications Policy* 152–70.

[41] Kleinsteuber (n 39) 63.

[42] Christopher T Marsden, 'Co- and Self-Regulation in European Media and Internet Sectors: The Results of Oxford University's Study www.selfregulation.info' in Möller and Amouroux (n 8) 76–100, 86.

[43] Christopher T Marsden et al, 'D4.1. Outline Overviews of Tasks R4.1. R4.4: Regulatory and Governance Methodologies' FP7 288021. The EINS Consortium (2013) 10 <http://www.Internet-science.eu/sites/eins/files/biblio/EINS_D4_1finalF.pdf>, referring in the text to Julia Black, 'Constitutionalising Self-Regulation' (1996) 59(1) *Modern Law Review* 24–59, 55, and Luc Huyse and Stephen Parmentier, 'Decoding Codes: The Dialogue Between Consumers and Suppliers Through Codes of Conduct in the European Community' (1990) 13(3) *Journal of Consumer Policy* 253–72, 260.

seem to resemble co-regulation. Marsden et alii have also recently acknowledged three existing, conflicting, trends in the field of Internet regulation: led directed self-regulation; the reintroduction of state-led regulation; and the development of multi-stakeholder co-regulation.[44] An earlier study[45] identified a five-part typology of Internet regulation based on the multiple political, cultural, social and economic—but, significantly, not legal—contexts: Internationalist, Neo-mercantilist, Culturist, Gateway, and Developmentalist.

There thus remain various conceptual issues in this area that have yet to be clearly resolved, a problem frequently experienced with the regulation of new technologies. As a result, we have adopted a simpler and more traditional model of regulatory approaches for this paper. Among the various international organisations under consideration the CoE has provided particular guidance on freedom of expression issues at the European level. The CoE has continuously called for the freedom of expression and the free circulation of information on the Internet to be affirmed, while at the same time pointing out the need to balance freedom of expression and information with other legitimate rights and interests, such as the right to reputation and to a fair trial and the protection of privacy.[46] It considers that there should be no significant difference from a free speech perspective between a digital and a non-digital environment. Article 10 of the ECHR may be carried on in digital form, with human rights naturally extended to the online environment.[47] Moreover, any measure restraining these principles in the context of law enforcement or the fight against terrorism must comply with international human rights standards. These measures need to be precisely defined, proportionate to the goal pursued and subject to judicial supervision.[48]

The CoE, as a standard-setting organisation for human rights in Europe,[49] adopted in 2001 a convention that specifically aims to enable Member States to exchange texts of domestic regulations and drafts concerned with 'information society services'.[50]

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[44] ibid 9.

[45] Lyombe Eko, 'Many Spiders, One Worldwide Web: Towards a Typology of Internet Regulation' (2001) 6(3) *Communication Law and Policy* 445–84.

[46] For example, Recommendation CM/Rec (2012)4 of the Committee of Ministers to Member States on the Protection of Human Rights with Regard to Social Networking Services (adopted by the Committee of Ministers on 4 April 2012 at the 1139th meeting of the Ministers' Deputies).

[47] 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).

[48] See the COE 1982 'Declaration on Freedom of Expression and Information' (29 April 1982); 'Declaration of the Committee of Ministers on Human Rights and the Rule of Law in the Information Society' (CM (2005) 56 final); CM/Rec (2008) 6 of the Committee of Ministers to Member States on Measures to Promote the Respect for Freedom of Expression and Information with Regard to Internet filters.

[49] Susanne Nikoltchev and Tarlach McGonagle (eds), *Freedom of Expression and the Media: Standard-Setting by the Council of Europe, (II) Parliamentary Assembly* (EAO 2011) <http://www.obs.coe.int/oea_publ/legal/e-book_pace.pdf.eny>.

[50] Convention on Information and Legal Co-operation Concerning Information Society Services (4 October 2001) <http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=180&CM=14&CL=ENG>.

In other words, the CoE attempted to take a coordinating role with regard to legislation relating to NOMS being drafted at the national level. However, the Treaty, even after a decade, has been ratified by only two Member States and the EU. This means that this treaty has not come into force. Thus, the legal cases decided by the ECtHR are potentially more important. Although these focus on the national practices of the state concerned, they serve as guidelines (usually with legislative consequences) for other nations that have ratified the ECHR. Therefore, discussion of the national practices challenged before the ECtHR can provide a useful blueprint and indicator for regulating NOMS. This is even more relevant considering the somehow too optimistic and linear vision of freedom of speech initially outlined by the CoE in the early decade of discussion on the Internet and especially NOMS regulation.

No regulation

The issue of whether NOMS should be regulated is closely related to whether the Internet itself should be subject to regulation. Some experts argue that the Internet should remain unregulated in order to facilitate technological progress since the Internet will almost always respond more quickly and effectively to threats or changes in the virtual landscape than any government can.[51] There has been an interesting recent case (*de facto* a third such regulatory attempt) of failure to pass the Anti-Counterfeiting Trade Agreement (ACTA) which was originally meant to enforce and harmonise intellectual property rights provisions in existing trade agreements within a wider group of countries and with special attention paid to protection of online intellectual property rights.[52] It was an interesting case also politically, since it was the first time that the European Parliament had used its powers under the Lisbon Treaty to reject an international trade agreement.

However, the general trend favours regulation of Internet-based NOMS, if not the Internet itself. This is most visible in practical terms when domestic but also international courts (CJEU, ECtHR) and state authorities act to fill in the gaps in existing regulation[53] or, at the private level, where eg service providers increasingly act to moderate online discussions.[54] As Daly and Farrand put it 'the view of the Internet as being a "Wild West Frontier", un-policed, unregulated, and unregulatable, does not appear to apply to the Internet of 2011.'[55]

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[51] See discussion in Adam Scholl, 'The Problem with Internet Regulation' World Policy Blog (2012) <http://www.worldpolicy.org/blog/2012/09/25/problem-Internet-regulation>.

[52] Luciano Floridi, 'ACTA: The Ethical Analysis of a Failure and its Lessons' ECIPE Occasional Paper 4/2012 <http://www.ecipe.org/media/publication_pdfs/OCC42012.pdf>.

[53] Andrej Školkay and Juan L Manfredi Sánchez, 'New Media Services: Current Trends and Policy Approaches in a Comparative Perspective' (2012) 103–105 <http://www.mediadem.eliamep.gr/wp-content/uploads/2012/09/D3.1.pdf>.

[54] ibid 118.

[55] Angela Daly and Benjamin Farrand, 'The Regulation of New Media in Europe' *SSRN Electronic Journal* 10/2011, 51 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1952052>.

In some Eastern European countries, such as Bulgaria, Estonia and Romania there seems to be especially strong resistance towards any form of regulation of NOMS.[56] These are countries that have also not yet fully developed effective self-regulation or statutory regulation for the traditional media. While in Estonia this can be explained by a strong cultural respect for freedom of expression, the lack of regulation in Bulgaria could possibly reflect the strength of the local hackers' community, as well as a strong presence of defenders of online civil liberties.[57] Yet even in these countries, court judgments provide for some regulation of NOMS,[58] or, as it is in Bulgaria, give some protection to online privacy.[59]

None of the UN/UNESCO, the OSCE, or the CoE suggests refraining entirely from regulating NOMS. Increasingly, self-regulation and even standard statutory regulation are deemed acceptable, if not recommended.[60] For example, between 2000 and 2015, the CoE adopted more than fifteen general or, more often, specific declarations and/or recommendations that tackled the Internet and/or NOMS, including CoE's Internet Governance Strategy 2012–2015.[61]

In contrast, the recommendations made by UNESCO in this field are very general and thus of limited practicality. The UNESCO Recommendation concerning the promotion and use of multilingualism and universal access to cyberspace adopted in 2003 was followed by its First Consolidated Report to the General Conference on the measures taken by Member States for the implementation of the recommendation in 2007.[62] The Consolidated Report indicates that the Recommendation may not reflect world-wide consensus or even interest in this issue. Thus, the Consolidated Report notes that only twenty-three of the 195 members and nine associate members submitted a report which overwhelmingly recognised the need to promote access to the Internet as a service in the public interest. The UNESCO Charter on the Preservation of Digital Heritage (2003) also requests a fair balance between the legitimate rights of creators and other rights holders, thus envisaging scope for copyright protection online, while

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[56] José-Luis González-Esteban et al, 'Self-regulation and the New Challenges in Journalism: Comparative Study Across European Countries' (2011) 66 *Revista Latina de Comunicación Social* 426–53, 443.

[57] Školkay and Manfredi Sánchez (n 53) 96.

[58] ibid 10–104; Halliki Harro-Loit and Urmas Loit, 'Does Media Policy Promote Media Freedom and Independence? The case of Estonia' Case Study Report (2011) 28–29 <http://www.mediadem.eliamep.gr/wp-content/uploads/2012/01/Estonia.pdf>.

[59] Dessislava Velkova and Petko Georgiev, 'Bulgaria' in *Media Sustainability Index 2012. The Development of Sustainable Independent Media in Europe and Eurasia* (IREX 2012) 39–54, 41–43.

[60] Bissera Zankova, 'The New Media System and Freedom of Expression: The CoE Contribution to a New Notion of Media' (2012) 11; Kleinsteuber (n 39) 61.

[61] See <http://www.coe.int/t/informationsociety/default_EN.asp>; <http://www.coe.int/t/dc/files/events/Internet/2010_Fiche_freedom_expression.pdf>; <http://www.coe.int/t/informationsociety/openness/index_en.asp>; <http://www.coe.int/t/informationsociety/access/index_en.asp>; <http://www.coe.int/t/informationsociety/diversity/index_en.asp>.

[62] UNESCO, First Consolidated Report to the General Conference on the Measures Taken by Member States for the Implementation of the Recommendation Concerning the Promotion and Use of Multilingualism and Universal Access to Cyberspace in 2007 (34 C/23, 20 July 2007) <http://unesdoc.unesco.org/images/0015/001519/151952e.pdf>.

UNESCO's 2003 Contribution to the world summit on the information society (Geneva 2003 & Tunis 2005) underlined four principles of which two, universal access to information (in the public domain) and freedom of expression, are clearly important here. Yet it is unclear how useful these principles are for NOMS in practical terms. Finally, UNESCO in its 2004 'Position Statement on Internet Governance' emphasised the importance of safeguarding the openness of the Internet. This was backed by reference to key elements of UNESCO's Constitution and was also linked to the principles underpinning UNESCO's concept of 'Knowledge Societies' and supported by the 2003 Recommendation noted above. Although it rejects *governmental* control, UNESCO leaves some margin for some form of regulation when it demands that 'there must be a precise correlation between new mechanisms and the problems they seek to address.' In summary, UNESCO's approach to freedom of speech and, indirectly at least, towards regulation of NOMS is, at best, vague.

A call for no regulation of NOMS clearly finds no explicit support in international norms and conventions. Nor is no-regulation a practical option given the serious public interest concerns at stake. Ultimately there is no absolute freedom of expression.[63] Most importantly, the absence of any enforceable regulation does not guarantee equilibrium between freedom of speech and other fundamental human rights such as human dignity. With other forms of regulation absent, national and international courts have been forced to intervene. They have begun to create a regulatory framework for NOMS. Judicial engagement with the communications field (by general courts in common law systems and by constitutional courts in continental legal systems) has a well-established history.[64] But when is governmental/parliamentary regulatory effort necessary and when are courts sufficient or at least more efficient as regulators?

The CDT has suggested that human rights courts have found that, if governmental regulation of online content is unlikely to be effective, then state regulation of content has little legitimacy.[65] Thus, while the protection of children from inappropriate content is a legitimate societal aim, the availability of software filters that parents and school authorities can use to protect children makes governmental restrictions less necessary and therefore harder to justify. However, there is no doubt that there are many controversial issues at stake here and extensive reliance on filtering can suppress information that there is a genuine public interest in accessing.[66] Reliance on filtering may thus call for continued (perhaps indirect) state regulation or rather co-regulation, though of a different nature.

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[63] Stanley Fish, *There's No Such Thing as Free Speech, and It's a Good Thing, Too* (OUP 1994); András Koltay, *Freedom of Speech: The Unreachable Mirage* (CompLex 2013).

[64] See eg Edward McWhinney, *Supreme Courts and Judicial Law-Making: Constitutional Tribunals and Constitutional Review* (Martinus 1985).

[65] Center for Democracy and Technology (n 30) 4–5.

[66] Toby Mendel et al, 'Global Survey on Internet Privacy and Freedom of Expression' UNESCO Series on Internet Freedom (2012) 96 <http://www.unesco.org/new/en/communication-and-information/resources/publications-and-communication-materials/publications/full-list/global-survey-on-Internet-privacy-and-freedom-of-expression/>.

Self-regulation

Self-regulation, where professionals monitor their own adherence to professional-ethical norms / standards, is usually the preferred regulatory model for journalists and media companies. Self-regulation is seen both as a privilege and a duty for professions that have a broad social mission (eg doctors, journalists). Affording similar or identical rights and duties to bloggers would thus lead them to be categorised as (citizen) journalist-like professionals, with a duty to respect certain ethical principles. The prevailing forms of self-regulation are through internal codes of conduct and general national ethical guidelines for editors and journalists, usually established by trade and industry organisations.[67] Ethical codes leave more freedom for self-expression with journalists able to decide how to cover a news story in line with their ethical-professional standards. Yet, as explained in detail by Marsden,[68] self-regulation has an ambivalent and uneasy relationship with the fundamental right to freedom of expression. State involvement may prove problematic in the context of dynamic innovative industries rendering self-regulation attractive, nevertheless the social impact of technology and potential drive towards concentration of information could render self-regulation ineffective with insufficient due process.[69] The CoE in its Recommendation on a New Notion of Media calls in Article 90 for 'adequate complaints mechanisms', which should establish 'effective internal media accountability systems underpinned by appropriate professional standards.' However, it also recognises that 'self-regulation may not always be regarded as sufficient.'[70]

For NOMS, a specific form of self-regulation—institutional self-regulation—seems to be the preferred option. Media owners, but also journalistic professional bodies, are opposed to detailed statutory regulation in order to preserve autonomy for journalists and media companies. In reality, however, media owners and editors still place strict internal controls over what NOMS publish. We call this institutional self-regulation. The online behaviour of journalists is therefore still being regulated, reducing their autonomy. Thus one of the top wire agencies, Thomson Reuters, was among the first to prepare guidelines for social media (which significantly overlap with NOMS) in 2010.[71] As a result of these institutional (self-)regulations, many journalists chose to publish their blogs under pseudonyms. This can be seen as a broader phenomenon. A number of Greek journalists, for example, retain their anonymity as bloggers to maintain freedom of expression and their ability to criticise the political establishment or vested interests.[72]

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[67] See eg IFJ Declaration of Principles on the Conduct of Journalists, art 9 <http://ethicnet.uta.fi/international/declaration_of_principles_on_the_conduct_of_journalists>; Principle III of International Principles of Professional Ethics in Journalism <http://ethicnet.uta.fi/international/international_principles_of_professional_ethics_in_journalism>.

[68] Marsden (n 42) 93–94.

[69] Marsden et al (n 43) 7–8.

[70] CM/Rec (2011)7 <https://wcd.coe.int/ViewDoc.jsp?id=1835645>.

[71] Social Media Guidelines <http://thomsonreuters.com/site/social-media-guidelines/>.

[72] Anagnostou–Psychogiopoulou–Kandyla (n 29) 42.

There are several known cases where the publication of blogs has led journalists working in the traditional media to encounter difficulties from their employers. In Slovakia in 2011, a journalist who published a regular blog was subjected to critical questioning by his superiors in the public service media.[73] The BBC imposed an informal ban on its staff tweeting about its 'problems' and two workers were disciplined following inappropriate behaviour on sites such as Twitter and Facebook.[74] Norway also extended press self-regulation to journalists' private online publishing activities.[75]

The problem with self-regulation of NOMS is that there is no transnational body which can serve as a self-regulatory body for journalists and the media at the international or even European level. Given that it has proven challenging to develop effective self-regulatory systems at the national level, this is not surprising. Yet, especially among NOMS, there is an increasing need for ethical regulation. The option of no-regulation is, as noted above, not viable and, at the very least, national courts will be called to intervene in controversial cases. Also, it is not very useful to discuss self-regulation at the international level, as there are currently only some (not always identical) generally proposed ethical principles on which to base such regulation. See, for example, the principles outlined by the Poynter Institute on the web[76] or those developed in the academic literature.[77] Probably the most famous self-regulatory code of conduct for bloggers is that developed by Tim O'Reilly.[78] The origin and history of this code of conduct—as a result of threats made to a blogger—serves to underline once again that no regulation is out of the question in the long-term, while effective self-regulation, taking into account the interests of all parties, is difficult to realise.

The OSCE's 2008 *Media Self-Regulation Guidebook* suggested that self-regulatory mechanisms can be 'extremely' well-suited to address Internet-based media because they tend to be more flexible than statutory tools.[79] However, an earlier conference on 'Freedom of the Media and the Internet' organised by the OSCE resulted in the 'Amsterdam Recommendations,'[80] which seem to support the possibility of statutory regulation of criminal online content, while at the same time denouncing 'all mechanisms for filtering or blocking content.' The preference for statutory regulation in

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[73] Andrej Školkay – Mária Hong – Radoslav Kutaš, 'Does Media Policy Promote Media Freedom and Independence? The Case of Slovakia' (2011) 54 <http://www.mediadem.eliamep.gr/wp-content/uploads/2012/01/Slovakia.pdf>.

[74] EJC Media News, 27 November 2012.

[75] Lara Fielden, 'Regulating the Press. A Comparative Study of Press Councils' Reuters Institute (2012) 10 <https://reutersinstitute.politics.ox.ac.uk/fileadmin/documents/Publications/Working_Papers/Regulating_the_Press.pdf>.

[76] See <www.cyberjournalist.net> and 'Online Journalism Ethics: Guidelines from the Conference' <http://www.poynter.org/uncategorized/80445/online-journalism-ethics-guidelines-from-the-conference/>.

[77] See eg Deborah G Johnson, 'Ethics Online: Shaping Social Behavior Online Takes More than New Laws and Modified Edicts' (1997) 40(1) *Communications of the ACM* 60–65, 65.

[78] <http://en.wikipedia.org/wiki/Blogger%27s_Code_of_Conduct>.

[79] William Gore, 'Self-Regulatory Bodies' in Adeline Hulin and Jon Smith (eds), *The Media Self-Regulation Guidebook: All Questions and Answers* (OSCE 2008).

[80] See OSCE Amsterdam Recommendations (14 June 2003) <http://www.osce.org/fom/41903>.

the criminal field found in other OSCE material could be seen as contradicting the previously mentioned preference for self-regulatory mechanisms: 'Freedom of expression on the Internet must be protected, as elsewhere, by the rule of law rather than relying on self-regulation or codes of conduct.[81] The general principles as set out in the OSCE's 2003 Amsterdam Recommendations are, however, quite clear:

> illegal content must be prosecuted in the country of its origin but all legislative and law enforcement activity must clearly target only illegal content and not the infrastructure of the Internet itself. The global prosecution of criminal content, such as child pornography, must be warranted and also on the Internet all existing laws must be observed. However, the basic principle of freedom of expression must not be confined and there is no need for new legislation.[82]

Additionally, some OSCE's advisors suggested that any legislation which imposes liability on an author or publisher for content wherever it is downloaded is too restrictive for freedom of expression.[83] Again, recent rulings either by CJEU or by ECtHR discussed in this text seem to contradict these recommendations.

Based on our findings and the experience of practitioners and researchers, self-regulation as a regulatory model has certain limitations. The general conditions under which both self-regulation and co-regulation can work well are described by Balleisen and Eisner.[84] These comprise: the depth of concern for reputation among the regulated businesses; the relevance of flexibility in regulatory detail; the existence of sufficient bureaucratic capacity and autonomy on the part of non-governmental regulators; the degree of transparency in the regulatory process; and the seriousness afforded accountability. All these conditions must be met cumulatively, which is challenging. These principles establish a good working tool for assessing the chances of self-regulation operating effectively in a particular professional or cultural environment. González-Esteban et alii claim, in their study on Internet regulation,[85] that mechanisms of self-regulation are valid only when commitments are made public, that the use of self-regulatory tools is not a widespread practice today and that there is a general absence of ethical codes in the online press. Marsden further suggests that adequate resourcing is the key to successful self-regulation in the field.[86]

Although professional journalists usually have a sense of public mission, yet they have often been less willing to enforce their own self-regulatory regimes even in the print sector, and certainly have little bureaucratic capacity for self-regulation of NOMS at national level and no developed structures and resources for international self-regulation of NOMS. Furthermore, very few bloggers claim to support certain principles

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[81] Möller and Amouroux (n 8) 15.

[82] Amsterdam Recommendations (n 79) 266.

[83] Möller and Amouroux (n 8) 15–16.

[84] Fabrizio Cafaggi and Andrea Renda, 'Public and Private Regulation Mapping the Labyrinth' CEPS Working Document (2012) 14 <http://www.ceps.eu/book/public-and-private-regulation-mapping-labyrinth>.

[85] González-Esteban et al (n 56) 16.

[86] Marsden (n 42) 91.

akin to those endorsed by journalists. Only some bloggers endorse (societal) accountability, which is similar to the public service mission of traditional public service media. One of the earliest and most well-known proposals is the already mentioned Blogger's Code of Conduct. Nevertheless, transparency (who the author is) seems to be a more appropriate and correct description of bloggers' (rather weak) approach to accountability[87] than the principle of objectivity, traditionally recognised by professionals working in traditional media. Codes of conduct in the media field may thus need to take into account the different types of NOMS, identified in the introduction above, as well as the objectives of their publishers and the expectations of those who access them. The successful enforcement of self-regulatory regimes in the media field is, however, still questionable outside the editorial office, as failed self-regulatory attempts by the print media have been documented in many countries, probably most notably in the UK. These failures are despite the fact that the CoE paid great attention to media self-regulation as long as two decades ago (eg Resolution 1003 (1993) on the ethics of journalism). Indeed, as in the print sector, self-regulation by NOMS is not always successful.[88] Furthermore, the weaknesses of the self-regulatory model emerge more specifically at the transnational level.[89] An ethical-professional self-regulatory model based on national norms can be difficult to apply to operators in other countries (for legal, cultural and practical reasons) which is becoming increasingly problematic given the current scale and reach of NOMS. It should be noted, however, that the national courts usually do not consider professional-ethical regulations, or at least do not give them preference over (especially internal) legal norms. Yet it is true that the ECtHR has referred to ethical-professional norms of journalists in some of its rulings.[90]

Despite these concerns, the Global Network Initiative (GNI) was launched in 2008 by members of the communications industry in an attempt to ensure softer regulation of the Internet and NOMS.[91] Yet the GNI is a form of *institutional* self-regulation aimed at ICT companies and it is important to mention that the GNI claims that it is founded on internationally recognised human rights laws and standards. The GNI aims to set a global standard for the ICT sector in relation to freedom of expression. However, as mentioned in the UNESCO report,[92] although there have been calls for other Internet

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87 See eg Paul Bradshaw, 'Culture Clash: Journalism's Ideology vs Blog Culture' Online Journalism Blog (2011) <http://onlinejournalismblog.com/2011/03/07/culture-clash-journalisms-ideology-vs-blog-culture/>.

88 Dennis D Hirsch, 'The Law and Policy of Online Privacy: Regulation, Self-Regulation or Co-Regulation?' (2010) <http://works.bepress.com/dennis_hirsch/1>; Fabrizio Cafaggi and Federica Casarosa, 'Private Regulation, Freedom of Expression and Journalism: Towards a European Approach?' EUI Working Papers (2013) 38 <http://www.mediadem.eliamep.gr/wp-content/uploads/2010/05/WP-LAW-2012-20.pdf>.

89 Cafaggi and Renda (84) 7.

90 *Bladet Tromsø and Stensaas v Norway* (App no 21980/93); *Fressoz and Roire v France* [GC], (App no 29183/95) [54], ECHR 1999-I; *Pedersen and Baadsgaard v Denmark* (App no 49017/99) [78], ECHR 2004-XI.

91 See Global Network Initiative <www.globalnetworkinitiative.org>.

92 Mendel et al (n 66) 26.

corporations than those that initially joined (Google, Yahoo, and Microsoft), to participate in the GNI, almost none of these calls have been successful (of ICT companies, only Facebook, LinkedIn and Procera joined as of spring 2015).

What we can see instead (or in addition) is the development of self-regulation at the corporate level, with ICT companies establishing their own terms of access. Given, however, that there has been a growing trend to ask to remove information (defamatory statements, racists' remarks, etc.) from, or to identify users at Google services (Google Transparency Report, 2014), with the majority (64 per cent from July to December 2013) of requests being accepted, it is questionable whether this self-regulatory policy contributes effectively and fairly to freedom of expression and privacy. It is notable that Google has begun to respond to governmental and judicial pressure by publishing regular 'Transparency Reports.' Moreover, according to a 2012 Reporters Without Borders' report, democratic countries continue to yield to the temptation to prioritise security over other concerns. Clearly, self-regulation is not enough, or could lead to duplication if governments or courts intervene anyway.

Intermediary protection from liability has also been eroded[93] or, at least, many governments have increasingly looked to ISPs to regulate cyberspace more effectively.[94] Indeed, the CJEU backed the 'right to be forgotten', allowing individuals to force removal of objectionable links ('inadequate, irrelevant, or no longer relevant') to web articles, in *Google* case[95] in May 2014. This practically means that an Internet search engine operator is responsible for the processing that it carries out of personal data which appear on web pages published by third parties. One should again mention here the *Delfi* case, a ruling by the ECtHR.

Clearly, although encouraged by governments and potentially more flexible and less burdensome than statutory regulation, self-regulatory actions of ISPs commonly lack the procedural fairness and protection of fundamental rights that characterise independent judicial and parliamentary scrutiny.[96] Although it does not apply directly to private actions, the ECtHR concluded in one case that an official reprimand by a professional association qualified as a public action.[97] This raises the question whether a 'self-regulatory' code of conduct adopted by an association of ISPs—sometimes in response to strong encouragement by government—would rise to the level of action covered by the ECHR,[98] thus, effectively, becoming a co-regulatory measure.[99]

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[93] Frank La Rue, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' Frank La Rue to the UN Human Rights Council [A/HRC/14/23] (2011) 11 <http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/a.hrc.17.27_en.pdf>.

[94] Ian Brown, 'Internet Self-Regulation and Fundamental Rights: Index on Censorship' (2010) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1539942>.

[95] *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González* (C-131/12).

[96] Brown (n 94).

[97] *Hempfing v Germany* (App no 14622/89).

[98] Center for Democracy and Technology (n 30) 28–29.

[99] See further Fabrizio Cafaggi – Federica Casarosa – Tony Prosser, 'The Regulatory Quest for Free and Independent Media' Comparative Report (2012) <http://www.mediadem.eliamep.gr/wp-content/uploads/2012/09/D3.2.pdf>.

Yet self-regulation through, for example, ethical councils, for domestic NOMS based on national or local languages, seems to be the ideal solution as it provides the required flexibility (of course, if it functions at all). Ideally, this self-regulation should be based on principles advocated in numerous international documents, especially those published by the CoE and increasingly, also, the EU.[100] These documents (especially rulings of the ECtHR) provide a sufficient body of legal principles to defend freedom of expression in the new media context. The key conditions to be met are speed of action in resolving disputes (which is often problematic) as well as an efficient way to implement (acceptance of) council decisions (which is sometimes problematic). There are, of course, many other issues which question practical and constitutional usefulness of self-regulatory bodies (eg transparency, consultation of interested parties when framing rules, accountability, and compliance with fundamental rights).

One of the few emerging self-regulatory models that applies across media platforms can be found in Finland.[101] There is a long tradition of media self-regulation and nearly all new media outlets have joined the national self-regulatory body for news media so it seems that self-regulation in online regulation is prevailing.[102] However, as discussed above, it remains questionable whether, even under ideal conditions, this provides a workable solution for digital media with a cross-border impact.[103] Some solutions could be based on the development of common criteria and methodologies to assess legitimacy and effectiveness of self-regulation, including the adoption of international guidelines,[104] supplemented by adequate monitoring instruments. This clearly requires a stronger coordination at the European and international levels.[105] Also, in the case of the ISPs, which may well play a key role in any form of truly efficient regulation of NOMS, the better option seems to be the co-regulatory approach, since the current practice of institutional self-regulation described above is not working well (either there are rather restrictive internal self-regulatory rules, often without possibility of appeal, or/and limited interest in participation in global self-regulatory network by ISPs).

It should be mentioned here that an alternative conception of self-regulation exists which can be located somewhere between self-regulation and co-regulation and involves actors other than journalists themselves. Eberwein, Leppik-Bork and Lönnendorker eg believe that there is a 'potential of web-based instruments of media observation that may facilitate the participation of civil society actors in the attempt to

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[100] Recommendation Rec(2001) 8 of the Committee of Ministers to Member States on self-regulation concerning cyber content (self-regulation and user protection against illegal or harmful content on new communications and information services).

[101] Fielden (n 75) 18, 22, 29–30, 38, 112.

[102] Epp Lauk and Heikki Kuutti (2014) 'Ethical Demands and Responsibilities in Online Publishing: The Finnish Experience' in Evangelia Psychogiopoulou (ed), *Media Policies Revisited. The Challenge for Media Freedom and Independence* (Palgrave Macmillan 2014) 234–48.

[103] See more on self-regulation in Cafaggi and Casarosa (n 88).

[104] Marsden (n 42) 93.

[105] Cafaggi et al (n 27) 15–16.

highlight journalistic standards and hold the media to account.'[106] Lievens and Valcke support alternative regulatory instruments with respect to regulation of social media, although they acknowledge emerging concerns, such as 'the potential ineffectiveness of self-regulation to achieve delicate policy goals' and 'the questionable ability of alternative regulatory instruments to offer sufficient guarantees with respect to fundamental rights.'[107] We believe that these self-regulatory approaches will remain alternative ones. They may help to enhance the quality of media content, but they do not on their own offer a sound regulatory policy alternative.

Co-regulation

Marsden (2011) argues that co-regulation is the defining feature of the Internet in Europe.[108] According to a Hans Bredow Institute Report,[109] co-regulation presents a regulatory model where government and industry work together to develop and enforce public goals. Co-regulation thus includes both a state-component and a non-state component. There is a legal basis for the non-state regulatory system in which the state grants discretionary power to its non-state counterpart. In other words, as Marsden et alii put it,[110] it is a regulatory regime involving a complex interaction between general legislation and the actions of a self-regulatory body.

Co-regulation leads to greater inclusiveness and enforceability, which results in greater legitimacy. Co-regulation is a pragmatic response to a situation where regulatory frameworks must quickly adapt and continually be optimised.[111] However, some conditions must be met in order for co-regulation to work well. These include a proper regulatory culture, adequate incentives for industry cooperation, appropriate resources to ensure that the non-state regulatory process results in sufficient protection and intervention where standards are at risk. Finally, a clear legal basis and division of labour must also be guaranteed. However, many of the media co-regulatory systems evaluated by the Hans Bredow Institute lacked sufficient incentives and most lacked transparency.[112]

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[106] Tobias Eberwein – Tanja Leppik-Bork – Julia Lönnendorker, 'Participatory Media Regulation: International Perspectives on the Structural Deficits of Media Self-Regulation and the Potentials of Web-Based Accountability Processes' in Susanne Fengler et al (eds), *Journalists and Media Accountability: An International Study of News People in the Digital Age* (Peter Lang 2013) 135–58, 136.

[107] Eva Lievens and Peggy Valcke, 'Regulatory Trends in a Social Media Context' in Monroe E Price – Stefaan G Verhulst – Libby Morgan (eds), *Routledge Handbook of Media Law* (Routledge 2012) 557–80, 574.

[108] Christopher T Marsden, *Internet Co-Regulation: European Law, Regulatory Governance and Legitimacy in Cyberspace* (CUP 2011)

[109] Hans Bredow Institute, 'Final Report Study on Co-Regulation Measures in the Media Sector' (2006) 4–5 <http://ec.europa.eu/avpolicy/docs/library/studies/coregul/final_rep_en.pdf>.

[110] Marsden et al (n 43) 9.

[111] Marsden (n 42) 76.

[112] Hans Bredow Institute (n 109) 118–21.

In the following section we discuss the suggestions of two major international bodies, the CoE and UNESCO, with respect to the co-regulation of NOMS. The ECtHR, as the primary 'executive' organ of the CoE in the human rights area, has established key European principles regarding freedom of expression and media regulation,[113] and some of these principles can be used directly or by analogy as a blueprint, establishing principles for the co-regulation of NOMS. Although co-regulation seems to be (or seemed to be until 2013 or so) the preferred option for the CoE and, as noted below, also the EU, this option is more developed for ISPs than for NOMS in general. The co-regulatory model for ISPs, entails content filtering mostly based on official guidelines issued by governments.

A 2009 expert study by the CoE suggested that there is growing recognition of the need to develop policy and regulatory frameworks for the new media, both to protect their freedom and to prevent the distribution of illegal and harmful content by NOMS.[114] In particular, co-regulation based on 'a truly multi-stakeholder—and indeed a more democratic—approach' seems to be favoured by Jakubowicz, a CoE expert. However, uncertainty remains about which policy goals and objectives can be achieved through self- and co-regulation and which go beyond the capacity of market players to regulate or co-regulate and therefore require statutory regulation.[115] Yet Jakubowicz also seems to suggest a focus on ISPs and providers of platforms for user-generated content to enact regulation. In his opinion, these may be the only actors in the online communication field that fall under the jurisdiction of a particular country, have effective control over the flow of content, and can be held accountable or liable for violation of the law or human rights standards.[116] Yet the CoE's statements on filtering have advised against unlimited filtering mandates: 'Public authorities should not, through general blocking or filtering measures, deny access by the public to information and other communication on the Internet, regardless of frontiers'[117] and has recommended that filtering by ISPs should therefore only take place if it 'concerns specific and clearly identifiable content, a competent national authority has taken a decision on its illegality and the decision can be reviewed by an independent and impartial tribunal or regulatory body.'[118] We have already mentioned the relevant verdicts of both CJEU and ECtHR in this respect. The CoE has called on Member States to 'create a national institution for the co-operation between the Internet and media industries, civil society organisations and government

[113] For example, Nikoltchev and McGonagle (n 49).

[114] Karol Jakubowicz, 'A New Notion of Media?' Background text for the Media and Information Society Division Directorate General of Human Rights and Legal Affairs, Council of Europe (2009) 3 <www.coe.int/t/dghl/standardsetting/media/doc/New_Notion_Media_en.pdf>.

[115] ibid 37–38.

[116] ibid 38.

[117] Council of Europe Committee of Ministers (26 March 2008), Recommendation on Measures to Promote the Respect for Freedom of Expression and Information with Regard to Internet Filters.

[118] ibid.

in order to develop and implement the regulation of Internet and online media services.'[119] This seems to be another call for co-regulation. Unfortunately, this call also seems to be a bit utopian.

Even before the ECtHR directly addressed the issue of ISPs and platforms for user-generated content in 2011, up until the already mentioned ongoing *Delfi AS v Estonia* case, it also recognised a distinction between those who make certain offensive statements and those who serve as the conduit for that information to the public.[120] Similarly, the CJEU addressed the issue of online archives in its (already mentioned) ruling in *Google* case.

Brown's (2010) argued that one of the key guarantors for online freedom of expression has been the ability of ISPs to provide their users with access to content from across the world. In the USA and many other nations, ISPs are still protected from liability for transmitting web pages from remote sites to their users.[121] However, for some types of content, there may still be liability. One may wonder whether this liability could lead to the long-term problem of ISPs being flooded with (sometimes unjustified) notice-and-action requests.[122] Indeed, on the first day after putting up the online form, Google received 12,000 requests across Europe not to make accessible to Europeans some controversial personal data.[123] This is a clear court's order for censorship of public data by a private company. Indeed, the ruling allows Google to apply a public interest test in deciding whether to remove the search results. However, the CJEU ruling de facto followed or responded to earlier rulings issued by national courts in France and Germany. In these rulings, a German court ordered Google to block search results in Germany linking to photos of a sex party involving former Formula One boss Max Mosley,[124] and a French court[125] had also ruled against Google in the *Mosley* case in late 2013, early 2014.

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[119] Council of Europe Parliamentary Assembly, 'The Promotion of Internet and Online Media Services Appropriate for Minors' (Recommendation 1882, 28 September 2009).

[120] ibid. See also *Flux v Moldova (No 5)* (App No 17343/04, 1 July 2008); *Romanenko and Others v.Russia* (App No 11751/03, 8 October 2009); *Jersild v Denmark* (App no 15890/89, 23 September 1994); *Dyundin v Russia* (App No 37406/03, 14 October 2008); *Thoma v Luxembourg* (App No 38432/97, 29 March 2001).

[121] See 'ECD and DMCA: Similar Approaches but Distinct Executions' (13 October 2010). <http://michaeldizon.wordpress.com/2010/10/13/ecd-and-dmca-similar-approaches-but-distinct-executions/>.

[122] Judit Bayer, 'Liability of Internet Service Providers for Third Party Content: A Comparative Analysis with Policy Recommendations' *Victoria University of Wellington Law Review*, Special Issue (2007)

[123] Google flooded with 'right to be forgotten' requests after EU ruling, 2 June 2014 <http://tech.firstpost.com/news-analysis/google-flooded-with-right-to-be-forgotten-requests-after-eu-ruling-224792.html>.

[124] Google ordered to block orgy photos of ex-Formula One boss Max Mosley, 24 January 2014 <http://gadgets.ndtv.com/Internet/news/google-ordered-to-block-orgy-photos-of-ex-formula-one-boss-max-mosley-475128>.

[125] Google ordered to block sadomasochistic orgy photos of ex-Formula One boss Max Mosley, 7 November 2013 <http://www.abc.net.au/news/2013-11-07/france-google-orgy-photos-formula-one-boss-max-mosley/5075084>.

The CoE calls for multi-stakeholder governance of the Internet,[126] which should enable full and equal participation of all stakeholders from all countries. Therefore, one could believe that by analogy this would apply also to regulation of NOMS, but this is not the case as we will see later in the section on Statutory Regulation. In any case, this call is problematic and has little value in our case. Moreover, it excludes the CoE as a possible regulatory coordinator outside Europe. Also, in contrast, regarding network management decisions, the CoE supports 'procedural safeguards . . . respectful of rule of law requirements, to challenge (these decisions) and, where appropriate, there should be adequate avenues to seek redress.'[127] This indicates rather some form of statutory regulation. Of course, these two texts deal with different issues but nevertheless, they head towards different regulatory solutions of the Internet and / or NOMS.

The UN is a world-wide standard-setting organisation, though not as effective in enforcing its regulations as the CoE. The UN Special Rapporteur, La Rue, has presented the most articulate and relatively liberal approach to the question of the regulation of MOMS out of those expressed by the major international organisations. In effect, the UN calls for co-regulation in relation to access to content (ISPs) under which: intermediaries should only implement restrictions on this right after judicial intervention; the measures taken must be transparent to the user involved, and, where applicable, to the wider public; users should be forewarned before the implementation of restrictive measures; and the impact of restrictions should be minimised and strictly related to the content involved. Finally, there must be effective remedies for affected users, including the possibility of appeal through procedures provided by the intermediary and by a competent judicial authority.[128] La Rue thus encourages corporations to establish clear and unambiguous terms of service in line with international human rights norms and principles, to increase the transparency of and accountability for their activities, and to continuously review the impact of their services and technologies on the right to the freedom of expression of their users, as well as the potential pitfalls involved when they are misused.

Support for a co-regulation model that provides a working basis for cross-media definitions and requirements can also be found in the academic literature. Fielden suggests an inclusive regulatory framework open to emerging digital media,[129] somewhat similar to that which is presently applied in Denmark, a co-regulatory

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[126] Declaration by the Committee of Ministers on Internet Governance Principles (adopted by the Committee of Ministers on 21 September 2011 at the 1121st meeting of the Ministers' Deputies) <http://www.coe.int/t/informationsociety/documents/CM%20Dec%20on%20Internet%20Governance%20Principles_en.pdf>.

[127] 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) <https://wcd.coe.int/ViewDoc.jsp?id=1678287&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>.

[128] La Rue (n 93) 14.

[129] Lara Fielden, *Regulating for Trust in Journalism: Standards Regulation in the Age of Blended Media* (Reuters Institute 2011) 125.

model based on voluntary self-registration of online media.[130] Similarly, a call for a comprehensive system for regulation for all types of media based on 'commercial' and 'legal' incentives can be found in summaries from the Media Regulation Roundtable.[131] Although the author(s) envisage that in their system of media regulation government and politicians should play no role in appointments to the regulatory body or in setting the rules of its operation, they still seemingly envision a weak system of co-regulation. A similar inclination towards a coordinated, transnational version of co-regulation can be found in Cafaggi and Casarosa[132] or Weiser[133] who would also like to include there a public agency oversight. Criticism of self-regulation and statutory regulation and explicit calls for multi-stakeholder participation in Internet regulation, thus, implicitly, for NOMS too, can be found in Marsden et alii.[134] Latzer et alii[135] come to the conclusion, or rather prediction, that as several self-regulatory institutions have been transformed into co-regulatory ones and co-regulation is currently strongly politically encouraged, co-regulation will increase in importance in the future.[136] Be that as it may, and most importantly, it seems that there is no real alternative but enforceable regulation of NOMS. As put by Marsden et alii: 'Without regulation responsive to both the market and the need for constitutional protection of fundamental rights, Internet regulatory measures cannot be self-sustaining.'[137] This means, realistically or pragmatically thinking, following recent rulings by both ECtHR and CJEU, only statutory regulation.

Statutory regulation

Statutory regulation encompasses any type of regulation implemented specifically by statute. According to some experts, eg Clara Iglesias, it may include some self-regulatory practices, depending on the degree of state participation. Statutory regulation is however not the same as state regulation, which includes not only the law but the performance of regulatory activities by government bodies.[138] For the following we will use statutory regulation in a narrow sense: regulation based on common law and / or equity.

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130 Fielden (n 75) 16–17, 36.

131 Hugh Tomlinson (drafted), 'A Proposal for Future Regulation of the Media: A Media Standards Authority' (2012) 3 <https://inforrm.files.wordpress.com/2012/02/proposal-for-msa-final.pdf>.

132 Cafaggi and Casarosa (n 88).

133 Philip J Weiser, 'The Future of Internet Regulation' (2009) 43(2) *UC Davis Law Review* 529–50.

134 Marsden et al (n 43) 6.

135 Michael Latzer et al, 'Institutional Variety in Communications Regulation: Classification Scheme and Empirical Evidence from Austria' (2006) 30(3–4) *Telecommunications Policy* 152–70.

136 See also Rachael Craufurd Smith, 'Net Neutrality: Towards a Co-Regulatory Solution' (2010) 2(2*) Journal of Media Law* 321–25; Christopher T Marsden, *Net Neutrality: Towards a Co-Regulatory Solution* (Bloomsbury 2010).

137 Marsden et al (n 43) 9.

138 Clara Iglesias, 'Varieties of Statutory Regulation' LSE Media Policy Project Blog (28 November 2012) <http://blogs.lse.ac.uk/mediapolicyproject/2012/11/28/varieties-of-statutory-regulation>.

Darlington, who served from 2000 to 2005 as the first independent Chair of the Internet Watch Foundation, a body which combats illegal content on the Internet in the UK, indicates that softer statutory regulation of content may be the key to regulating NOMS, though he seemingly prefers the co-regulatory approach.[139] He notes that simply extending the current regulatory regime for broadcasting to the Internet (as actually suggested by the CoE discussed above) would be both technically impossible and socially unacceptable. Most importantly, in the EU context, there is an important clause that specifies that self-regulation or co-regulation will not be applicable where fundamental rights or important political options are at stake or in situations where the rules must be applied in a uniform fashion in all Member States.[140] This would suggest that NOMS must be regulated, in the EU—if at all—then by statutory regulation. We will discuss this in the section on EU / EC policies.

Also the 2012 Declaration of the Committee of Ministers (of the CoE) on the Desirability of International Standards dealing with Forum Shopping in respect of Defamation, 'Libel Tourism', to Ensure Freedom of Expression[141] calls for an 'inventory' of the Court's case law in respect of defamation as well as stating that

> if there is a lack of clear rules as to the applicable law and indicators for the determination of the personal and subject matter jurisdiction, such rules should be created to enhance legal predictability and certainty, in line with the requirements set out in the case law of the Court (section 12). Finally, clear rules as to the proportionality of damages in defamation cases are highly desirable.

This is a clear call for statutory regulation. As previously mentioned, although the principles stated by the ECtHR are developed in the context of national cases, in effect they establish international Europe-wide standards (case studies, introducing de facto case law even in countries without such a legal tradition) which can therefore set important parameters and principles for future statutory regulation.

The key provision of the ECHR in this regard is Article 10. As far as general principles are concerned, the ECtHR states that the right to receive information under Article 10 'basically prohibits a government from restricting a person from receiving information that others may wish or may be willing to impart to him.'[142] In *Társaság a Szabadságjogokért v Hungary,* the ECtHR expressed concern over situations where the government had an 'information monopoly,' and held that in such cases, where information is 'ready and available,' the government has an obligation 'not to impede

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[139] Roger Darlington, 'How Should We Regulate Content in a Converged World?' (2011) <http://www.rogerdarlington.me.uk/convergence.html>.

[140] See more on the Institutional Context of the European Economic and Social Committee <http://www.eesc.europa.eu/?i=portal.en.self-and-co-regulation-institutional-context#sthash.7iqudIwa.dpuf>.

[141] Declaration of the Committee of Ministers on the Desirability of International Standards Dealing with Forum Shopping in Respect of Defamation, 'Libel Tourism,' to Ensure Freedom of Expression (2012) <https://wcd.coe.int/ViewDoc.jsp?Ref=Decl%2804.07.2012%29&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>.

[142] *Leander v Sweden* (App No 9248/81, 26 March 1987).

the flow of information,' especially where the press's ability to act as a 'public watchdog' is at stake.[143] The ECtHR also noted that the recent trend is 'towards a broader interpretation of the notion of 'freedom to receive information' and thereby towards the recognition of a right of access to information. Perhaps most importantly, in the *Khurshid Mustafa and Tarzibachi v Sweden,* case, the ECtHR argued in favour of a very broad understanding of the right to receive information. The ECtHR confirmed the right of a tenant to receive native-language television via satellite against the wish of the landlord if no other way to receive this was available. The ECtHR noted that this right 'does not extend only to reports of events of public concern, but covers in principle also cultural expressions as well as pure entertainment.'[144] In summary, the ECtHR requires open and free access to information, especially where related to issues of public interest and governmental information, but also in the field of private cultural issues and entertainment.

The interpretation of Article 10 mostly focuses on the concept of the 'margin of appreciation' and the requirement that any state restriction must be 'necessary in a democratic society.' It is well-known that the margin of appreciation is broader in the area of morals than in the area of political discourse.[145] The ECtHR has made it clear that free expression principles apply differently to different types of media and that the nature and extent of permissible restrictions depend on the nature of the medium. In particular, 'the potential impact of the medium concerned is an important factor.'[146] This can be, practically speaking, of course, a challenge. Although NOMS are 'pull media', affording the user greater control, the Internet is accessible almost anywhere and anytime, and messages can be easily disseminated. Thus, for example, Richard Clayton has argued that the lack of filtering by professionals before publication makes defamation far more likely to occur than in traditional media.[147] The CDT argues however that compared to radio, the Internet may be a less immediate, less inflammatory medium.[148]

For the ECtHR, the notion of foreseeability of consequences, which is taken into account when judging the permissibility of limitations on freedom of expression, depends to a considerable degree on the content of the text in issue, the area it is designed to cover, and the number and status of those to whom it is addressed.[149] This would give more freedom to various bloggers (they can claim that they are not like journalists but occasional citizen-writers) but less (in terms of fact-checking) to bloggers who work more like journalists, and even less freedom to online news portals and

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143 *Társaság a Szabadságjogokért v Hungary* (App No 37374/05, 14 July 2009).

144 *Khurshid Mustafa and Tarzibachi v Sweden* (App No 23883/06, 16 December 2008).

145 *Hertel v Switzerland* (App No 25181/94, 25 August 1998).

146 *Jersild v Denmark* (n 120).

147 Richard Clayton, 'Judge and Jury? How "Notice and Take Down" Gives ISPs an Unwanted Role in Applying the Law to the Internet' (26 July 2000) <http://www.cl.cam.ac.uk/~rnc1/Judge_and_Jury.html>.

148 Center for Democracy and Technology (n 30) 23.

149 *Chauvy and Others v France* (App No 64915/01, 29 June 2004).

online versions of traditional media. The CDT has pointed out that the requirement of foreseeability may also have important implications for cases in which lawful content created in one country is prohibited in another.[150] Indeed, there is a relevant court case, the *Perrin v the United Kingdom*, which the ECtHR declared inadmissible. The case concerned conviction for publishing obscene material on a free preview page of a website. The ECtHR explicitly argued that 'the fact that the dissemination of the images in question may have been legal in other States, such as the United States, did not mean that in proscribing such dissemination within its own territory the respondent State had exceeded its margin of appreciation.'[151]

Particularly relevant to NOMS are a number of ECtHR decisions holding that restrictions on publishing content are not 'necessary in a democratic society' if the information is otherwise available.[152] Probably the most relevant case is *Editorial Board of Pravoye Delo and Shtekel v Ukraine*.[153] This mainly concerned the lack of adequate safeguards in Ukrainian law for journalists' use of information obtained from the Internet. Defamation proceedings were brought against a local newspaper and its editor-in-chief following their publication of a letter downloaded from the Internet alleging that senior local officials were corrupt and involved with the leaders of an organised criminal gang. The ECtHR ruled that any sanction must have backing in domestic law, which was not available in this case.

Despite the international nature of the Internet, there is still scope for national regulation of permissible content. In the already mentioned case *Perrin v the United Kingdom*, the applicant, a French national based in the UK, argued that because of the worldwide nature of the Internet, and because the publishing company operated in the USA, it was unreasonable to expect him to foresee each country's legal requirements. The ECtHR, however, noted that the applicant was located in the UK and thus could not argue that UK laws were not reasonably accessible to him.[154]

In summary, the ECtHR considers the impact of a medium and/or the information in question and leaves scope for cultural differences in morality. However, the ECtHR can intervene in the area of morals and the Internet, although based on different a article, for example Article 8. This is documented in the case *KU v Finland.*[155] The case concerned the applicant's complaint that an advertisement of a sexual nature was posted about him on an Internet dating site and that, under Finnish legislation in place at the time, the police and the courts could not require the Internet provider to identify the person who had posted the ad. A case that is particularly relevant for NOMS is *Delfi AS v Estonia.*

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150 Center for Democracy and Technology (n 30) 24.

151 *Perrin v the United Kingdom* (App No 5446/03, 18 October 2005).

152 *The Observer and Guardian v the United Kingdom*, [1992]14 EHRR 153; *The Sunday Times v the United Kingdom (No 2)*, [1992] 14 EHRR 229; *Weber v Switzerland* (App No 11034/84, 22 May 1990); *Éditions Plon v France* (App No 16616/90, 9 February 1995).

153 *Editorial Board of Pravoye Delo and Shtekel v Ukraine* (App No 33014/05, 5 May 2011).

154 *Perrin v the United Kingdom* (n 151).

155 *KU v Finland* (App No 2872/02, 2 December 2008).

This concerned the liability of an Internet news portal for offensive comments that were posted by readers below one of its online news articles. The applicant company complained that being held liable for the comments of its readers breached its right to freedom of expression. The ECtHR held that there had been no violation of Article 10. It found that the finding of liability by the Estonian courts was a justified and proportionate restriction on the portal's right to freedom of expression, in particular, because: the comments were highly offensive; the portal failed to prevent them from becoming public, profited from their existence, but allowed their authors to remain anonymous; and, the fine imposed by the Estonian courts was not excessive. Of particular interest was the ECtHR finding on the issue of the lawfulness of the interference with the applicant company's right to freedom of expression. Though the applicant company had argued that an EU Directive on Electronic Commerce 2 as transposed into Estonian law, had made it exempt from liability, the ECtHR found that it was for national courts to resolve issues of interpretation of domestic law, and therefore did not address the issue under EU law.

It still remains an open question whether a blog or online newspaper has less, or more, impact than traditional media. Especially in relation to foreseeability the ECtHR may face challenging cases soon. A blog can serve as the basis for a story in the traditional media, increasing its impact. The pragmatic approach applied in *Perrin v the UK* (and in earlier cases relating to morality)[156] suggests that the ECtHR will consider national legislation as binding in the area of morality and criminal behaviour. The case-law indicating legal protection for information already published elsewhere, may encourage further strategic leaks in order to protect those wishing to publish controversial information (in traditional media).

The UN calls for equal statutory rights for online publishers, where they operate similar standards to those followed by journalists. Like Darlington and the ECtHR, the UN favours de facto weak statutory regulation of content. However, the UN Special Rapporteur La Rue emphasises that regulations or restrictions which may be deemed legitimate and proportionate for traditional media are not necessarily similarly acceptable in the online environment.[157] He argues, for example, that the types of sanction that are applied to offline defamation may be unnecessary or disproportionate in online media. The availability of software filters that parents and school authorities can use to control access to certain content renders action by the government to restrict access to content on child-protection grounds, less necessary and difficult to justify (with the exception of child pornography) and restrictions should never be applied to: discussion of government policies and political debate; reporting on human rights,

[156] See Christopher Nowlin, 'The Protection of Morals Under the European Convention for the Protection of Human Rights and Fundamental Freedoms' (2000) 24(1) *Human Rights Quarterly* 264–86; Ivana Radačić, 'The Margin of Appreciation: Consensus, Morality, and the Rights of Vulnerable Groups' (2010) 31(1) *Zbornik Pravni Fakultet Rijeci* 599–616.

[157] La Rue (n 93) 8–10.

government activities and corruption in government; engaging in election campaigns, peaceful demonstrations or political activities, including for peace or democracy; and the expression of opinions or dissent, religion or belief, including by persons belonging to minorities or vulnerable groups.[158] In conclusion, in the view both of the UN (UNESCO does not explicitly recommend statutory regulation, except for copyright related issues) and the ECtHR, content regulation must usually be less restrictive with regard to NOMS than for traditional media. As mentioned above the CoE calls for case law and possibly national statutory regulation (if there is none) with respect to international libel and defamation cases. Thus this issue should be solved primarily via the ECtHR. Only pan-European (ECtHR) guidelines (case law) are so far in place for the many countries that have yet to adopt specific national regulation relating to NOMS.

The European Union and regulation of NOMS

The EU, particularly the European Commission (EC) and the European Parliament (EP), has made some progress in its deliberations on regulatory policies applicable to (some) NOMS, typically seeing them as commercial services. Some of the most recent initiatives are noted here. The CJEU has also intervened in this area, at the request of national courts. As mentioned, the 2003 Institutional Agreement on Better Law Making[159] stipulates in Article 17 the conditions under which self- and co-regulatory measures can be taken instead of statutory regulation in the EU. It seems clear that it is impossible to meet these conditions in the case of NOMS. It is questionable whether any EU-wide self- and co-regulation will meet the criteria of representativeness of the parties involved, of added value for the general interest and swift and flexible regulation. Furthermore, as noted, 'These mechanisms will not be applicable where fundamental rights or important political options are at stake.' However, there are precisely fundamental rights here at stake in the case of NOMS. Thus, we can say that alternatives to the EU's regulatory policies for NOMS are fundamentally self-limited. This perhaps explains why the courts must usually intervene, as we will show later. In 2006, the EC initiated a public consultation on 'Content Online,' which resulted in a 2008 policy paper on creative content online.[160] This was followed in 2009–2010 by a 'reflection on a digital single market for creative content online.'[161]

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158 ibid 11–12.

159 Institutional Agreement on Better Law Making <http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/c_321/c_32120031231en00010005.pdf>.

160 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on creative content online in the Single Market COM/2007/0836 <http://www.ipex.eu/IPEXL-WEB/dossier/dossier.do?code=COM&year=2007&number=0836>.

161 Reflection on a Digital Single Market for Creative Content Online <http://ec.europa.eu/avpolicy/other_actions/content_online/index_en.htm>.

As a result of these discussions and earlier approaches indicated in directives such as the E-Commerce Directive 2000/31/EC, in the initial approach of the EC, the country of origin principle is applied ('responsibility lies on the part of the Member State (MS) where the services originate' and 'services should in principle be subject to the law of the MS in which the service provider is established').[162] The exemptions from liability established in Directive 2000/31/EC, relating to e-commerce, cover only cases where the activity of the service provider is limited to the technical process of operating and giving access to a communication network. In order to benefit from a limitation of liability, the provider upon obtaining actual knowledge or awareness of illegal activities must act expeditiously to remove or to disable access to the information concerned. Directive 2000/31/EC requires the removal or disabling of access to be undertaken in line with the principle of freedom of expression and procedures established for this purpose at national level. Yet, importantly, this Directive is not applicable to services supplied by service providers established in a third country.

The AVMS Directive 2010/13/EC[163] also contains provisions dealing specifically with video-on-demand (non-linear) services. These services are directed at the general public and are intended to inform, entertain, and educate under the editorial responsibility of a media service provider. The Directive applies a graduated form of regulation, with different levels of strictness, depending on the medium. The Directive allows, as an exception, a MS to restrict the retransmission of unsuitable on-demand audiovisual content that may not be banned in its country of origin (of a violent or pornographic nature which could offend the sensibilities of minors). The Directive encourages governments to support self-regulation (which is, however, seen as, 'a complement to the legislative and judicial and/or administrative mechanisms') in certain fields (consumer protection.), sometimes combined with government intervention ('co-regulation').[164] The aim is clear: 'Co-regulation should allow for the possibility of State intervention in the event of its objectives not being met.'

Although the Directive retains the country of origin principle, from the perspective of our study it is important to note that this Directive reversed the criteria defining jurisdiction under the old rules in the case of satellite broadcasting (which in many ways is similar to NOMS). When a broadcaster based outside the EU uses a satellite up-link in an EU country, that country has jurisdiction. Only when there is no up-link in the EU, does the EU country whose satellite capacity is used gain jurisdiction.

More recently, the EC adopted the Digital Agenda for Europe (DAE), one of the seven flagship initiatives making up the Europe 2020 Strategy. The EC ran a consultation on 'the open Internet and net neutrality in Europe', which resulted in a Communication

[162] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (Directive on electronic commerce).

[163] Audiovisual Media Services Directive (AVMSD, 2010/13/EU).

[164] ibid s 44.

from the Commission in April 2011.[165] In October 2011, the Industry Committee of the EP unanimously adopted a Resolution on net neutrality.[166] This support for net neutrality is worth highlighting since it seems to be in tension with the more nuanced attempts by the EC to regulate various commercial aspects of online services (which inevitably, at least implicitly, are contrary to the notion of net neutrality). The EU Media Futures Forum Final Report[167] focused on advertising, taxes, copyright, competition, and privacy. As mentioned in the report, players from different sectors, competing in the same converging industries, face regulatory and fiscal asymmetry. Interestingly, although most participants agreed that traditional content industry players and new Internet aggregators/distributors should be treated in an equitable manner, there was no consensus among Forum members on how to align regulations. The EC also ran consultations in the summer of 2013 on the implications for EU rules of the changing media landscape and borderless Internet, in particular on market conditions, interoperability and infrastructure.[168] As mentioned, no new regulations seemed to be necessary. It is clear that the EC / EU has tended to focus on associated aspects of the new media, such as various media literacy initiatives, e-commerce or audiovisual media services, instead of NOMS as a whole. This focus reflects the fundamentals of the European integration process, as the EU is more a political and economic than a cultural project. Nevertheless, there have been some important initiatives, in the past and recently, such as the Communication on Illegal and Harmful Content on the Internet[169] and the Green Paper on the Protection of Minors and Human Dignity in Audiovisual and Information Services[170].[171] As a result of the ongoing regulatory uncertainty with respect to NOMS, with on demand audiovisual media services regulated by the AVMSD, and some aspects of commercial services covered by E-Commerce

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165 European Commission, Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: The Open Internet and Net Neutrality in Europe, COM(2011) 222 final.

166 European Parliament, Resolution of 17 November 2011 on the Open Internet and Net Neutrality in Europe, P7_TA(2011)0511.

167 EU Media Futures Forum, 'Fast-Forward Europe: 8 Solutions to Thrive in the Digital World' Final Report (September 2012) A report for European Commission Vice-President Neelie Kroes to reflect on the future of the media industries from a global perspective <http://ec.europa.eu/digital-agenda/sites/digital-agenda/files/forum_final_report_en.pdf>.

168 Following the assessment of the facts and applicable legislative frameworks and in view of the timing of the initiative it was announced on 4 February 2014 by Commissioner Barnier in his intervention in the European Parliament <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20140204+ITEM-003+DOC+XML+V0//EN&language=EN> that at this stage the Commission will not propose any legislative or non-legislative instrument on this subject.

169 European Commission, Communication on Illegal and Harmful Content on the Internet, Com(96) 487 (16 October 1996).

170 European Commission, Green Paper on the Protection of Minors and Human Dignity in Audiovisual and Information Services (16 October 1996).

171 Green paper on Preparing for a Fully Converged Audiovisual World: Growth, Creation, and Values, COM(2013) 231 final (24 April 2013).

Directives, a number of newer initiatives have emerged. These are illustrated by the Report by the High Level Group on Media Freedom and Pluralism, which noted that

> Currently, the existence of divergences between national rules can lead to distortions in the framework of cross-border media activities, especially in the online world. It would be particularly important to adopt minimum harmonization rules covering cross-border media activities on areas such as libel laws or data protection.[172]

Possible reform of the AVMSD is also envisaged in the coming years to take into account certain aspects of convergence.

It is true that only relatively recently and relatively unexpectedly (since it was traditionally and naturally the ECtHR that dealt with human rights) has the CJEU come to focus more directly on human rights in some of its media rulings and opinions.[173] The most important seems to be that of joined cases C-509/09 and C-161/10.[174] In these cases the CJEU considered, at the request of the French and German courts, the scope of the jurisdiction of national courts to hear disputes concerning infringements of personality rights committed via an Internet site. The German court particularly asked whether EU law, specifically Article 3 of Directive 2000/31/EC, was in the nature of a conflict-of-laws rule which determines the law applicable to non-contractual liability arising from infringements of personality rights occurring by means of a website. The Advocate General of the CJEU suggested that the solution provided in the *Shevill* judgment from 1995[175] 'should be adapted to the circumstances of the present cases, by

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[172] Vaira Vīķe-Freiberga et al, 'A Free and Pluralistic Media to Sustain European Democracy' Report of the High Level Group on Media Freedom and Pluralism (January 2013) 3 <https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/HLG%20Final%20Report.pdf>. Read also the contributions to 'Preparing for a Fully Converged Audiovisual World: Growth, Creation, and Values' <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0231:FIN:EN:PDF>.

[173] Opinion of Advocate General Cruz Villalón (29 March 2011); joined cases C-509/09 and C-161/10, *eDate Advertising GmbH v X* (C-509/09) and *Olivier Martinez and Robert Martinez v Société MGN Ltd* (C-161/10). Jurisdiction in civil and commercial matters—Regulation (EC) No 44/2001—Jurisdiction for 'matters relating to tort, delict or quasi-delict'—Infringement of personality rights allegedly committed by means of the publication of information on the Internet—Article 5(3)—Definition of 'the place where the harmful event occurred or may occur'—Applicability of the judgment of the Court in *Shevill*—Directive 2000/31/EC—Articles 3(1) and 3(2)—Determination of the existence of a conflict-of-laws rule in relation to personality rights, judgment of the Court (Third Chamber) (19 April 2012). In Case C-461/10, Copyright and related rights—Processing of data by Internet—Infringement of an exclusive right—Audio books made available via an FTP server via Internet by an IP address supplied by an Internet service provider—Injunction issued against the Internet service provider ordering it to provide the name and address of the user of the IP address; Opinion of Advocate General Poiares Mudaruo (12 September 2007); *Centro Europa 7 Srl v Ministero delle Comunicazioni e Autorità per le Garanzie nelle Comunicazioni and Direzione Generale Autorizzazioni e Concessioni Ministero delle Comunicazioni* (Case C-380/05) reference for a preliminary ruling from the Consiglio di Stato, Italy.

[174] Joined cases C-509/09 and C-161/10 *eDate Advertising GmbH v X* and *Olivier Martinez and Robert Martinez v MGN Ltd.*

[175] Case C-68/93 *Fiona Shevill and Others v Presse Alliance SA,* [1995] ECR I 415 extended scope of material damages defined in *Handelskwekerij GJ Bier BV v Mines de Potasse d'Alsace SA* (Case 21/76,

proposing an additional connecting factor,[176] based on the location of the 'center of gravity of the dispute' among the rights and interests at issue.'[177] This seems to be a technologically neutral legal solution. It may possibly apply to all types of media. The centre of gravity of the dispute defines the place as the one 'where a court is able to adjudicate on a dispute between freedom of information and the right to one's own image under the most favorable conditions' ([58]). The CJEU accepted these suggestions and also ruled that 'in the event of an alleged infringement of personality rights by means of content placed online on an internet website, the person who considers that his rights have been infringed has the option of bringing an action for liability, in respect of all the damage caused, either before the courts of the MS in which the publisher of that content is established or before the courts of the MS in which the centre of his interests is based. That person may also, instead of an action for liability in respect of all the damage caused, bring his action before the courts of each MS in the territory of which content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the MS of the court seised.'[178]

The CJEU issued a few important verdicts with respect to NOMS in 2014. First, it was related to Directive 2006/24/EC which placed on providers of publicly available electronic communications services or public communications networks a duty to retain for a certain period data relating to a person's private life and to his communications.[179] The Grand Chamber of the CJEU ruled in 2014 that this Directive unjustifiably interfered with fundamental rights. The second verdict was related to interpretation of the conditions for the application of Directive 95/46 on the protection of personal data in relation to the activity of an Internet search engine—the so-called 'right to be "forgotten" (*Google* case). This verdict allows individuals to ask for these data to be erased, with exceptions 'such as the role played by the data subject in public life'. Third, it was the case *UPC Telekabel Wien* which tackled copyright in films which had been made available to the public on a website through an Internet service provider established in Austria. The CJEU set two conditions under which the Internet access provider could avoid paying penalties.

[1976] ECR 1735) to cases of non-material damages. The statement of the law in *Shevill* also enables the clear and accurate identification of 'the place where the harmful event occurred or may occur' for the purposes of determining one or more jurisdictions.

176 In addition to 'the place where the harmful event occurred or may occur'.

177 In *Mines de Potasse d'Alsace* (n 175) the Court held that where the place in which the event which may give rise to liability in tort, delict or quasi-delict occurs and the place where that event results in damage are not identical, the expression 'place where the harmful event occurred' in what is now art 5(3) of Regulation No 44/2001 must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it.

178 Judgment of the Court (Grand Chamber) in joined cases C-509/09 and C-161/10 of 25 October 2011.

179 *Digital Rights Ireland and Seitlinger and Others* (joined cases C-293/12 and C-594/12, EU:C:2014:238).

Thus, fundamentally, there is not only an expansion of the scope of EU broadcasting law and the consolidation of the EU's role in external affairs, as Mac Síthigh argues,[180] but there are also some directives, in addition to AVMSD, which, based on the EU Charter and CJEU rulings, have perhaps unexpectedly, but in fact logically, expanded the EU's engagement with human rights issues into the online field.[181] It is typical that the judiciary replaces the law-maker as regulator, when the law-maker and regulators in general, do not react to technological challenges. Although the CJEU originally dealt more with national courts' competencies *vis-à-vis* the EU Directive than with its content from the perspective of human rights, at the end it was exactly the issue of freedom of speech versus personality rights in the EU context of NOMS that was tackled and resolved. Interestingly, the CJEU also rejected extension of the EU under ECHR in late 2014.[182]

Conclusion

Considerable uncertainty still exists as to the definition and most appropriate form of regulation for NOMS in most EU countries. As a result there is a clear absence of a coherent regulatory policy for NOMS. At the EU level, neither the AVMSD nor the E-Commerce Directive offers plausible or sustainable solutions with respect to NOMS, though moves are underway to bring regulation into line with convergence. International organisations provide some guidance, but the more universal the organisation, the more vague the regulatory principles it offers. A clear example is provided by UNESCO. The majority of international organisations considered in this article explicitly allow some regulation either of the Internet or of NOMS. Yet of these only the CoE (a special case is the EC and CJEU) may have some impact on the future regulation of NOMS in Europe. This impact may be through its conventions (if accepted by a majority of Member States), its guiding recommendations and resolutions (eg regarding the definition of NOMS) or, most importantly, through the ECtHR rulings. It should be mentioned here that some regulatory approaches initially advocated by the international organisations discussed above were utopian, or, at best, unrealistic (for example self-regulation, suggested by OSCE, which works internally only for media institutions).

Meanwhile, and naturally so, general civil and criminal legislation, as well as regulation and court precedents (at least implicitly, in the case of countries that apply the continental legal system) relating to traditional audiovisual and/or printed media,

[180] Mac D Síthigh, 'Death of a Convention: Competition Between the Council of Europe and European Union in the Regulation of Broadcasting' (2013) 5(1*) Journal of Media Law* 133–55.

[181] Following also Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[182] See Court of Justice of the European Union, 'Annual Report 2014' (2015) 1–3, especially s I.1. 'Accession of the European Union to the European Convention on Human Rights'.

are applied to NOMS in most countries. This lack of clarity and coherent policy creates legal uncertainty for NOMS players. The regulation of NOMS seems to depend to a large extent on the self-definition and self-categorisation of the providers and/or actors in question. This may be a problematic approach. For example, the police in Slovakia investigated a famous local independent journalist who was a blogger. The police claimed that he had no right to protect his sources under the Press Law unless he could show a document proving that he was a journalist.[183]

Recent regulatory trends regarding NOMS suggest the following conclusions. Regulation of NOMS largely stems from within media companies themselves, mostly on a voluntary basis since self-regulation is perceived to leave more autonomy to NOMS than statutory-regulation, and self-regulation is therefore adopted by the industry in an attempt to stave off statutory regulation. Media owners, however, tend to be more conservative in regulating NOMS and may be overly keen to prevent potential legal disputes. But hybrid forms of regulation are also emerging. Self-regulation is unlikely to work on an international scale, due to societal and cultural differences, and since co-regulation is only emerging in some countries, more restrictive statutory regulation continues to remain in force at the national level. Moreover, NOMS will likely become subject to more frequent and more precise statutory regulation in the future, but this regulation can be expected to be graduated (as suggested by CoE) and less strict (in line with ECtHR) than that for the traditional media, thus preserving an important forum for freedom of expression.

Courts have been particularly affected by the current uncertainty surrounding the regulation of NOMS. Only in some countries, for example Denmark, have more practical hybrid co-regulatory approaches been developed to balance the rights and duties of NOMS in the new digital environment. In the absence of such swift and efficient attempts elsewhere, although there are also emerging self-regulatory approaches covering NOMS in countries such as Finland, the courts have been required to take the lead in balancing rights and duties for NOMS. Among the most famous and earliest of such cases was the 2008 British case *The Author of a Blog v Times Newspapers Ltd.*[184] However, these approaches have not always been consistent and amongst the various EU countries do not yet provide a clear pan-European regulatory policy for NOMS.

Nevertheless, the two European Courts, the CJEU and ECtHR, have been developing a regulatory framework for NOMS, informed by the right to freedom of expression and

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183 Tom Nicholson, 'Som novinár: Policajtom sa to nepozdáva [I Am a Journalist: The Police Do Not Like It]' SME.sk (2013) <http://nicholson.blog.sme.sk/c/337259/Som-novinar-Policajtom-sa-to-nepozdava.html>. Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media in its article 73 gives wider protection to sources in the online world: 'the protection of sources should extend to the identity of users who make content of public interest available on collective online shared spaces which are designed to facilitate interactive mass communication (or mass communication in aggregate); this includes content-sharing platforms and social networking services.'

184 *The Author of a Blog v Times Newspapers Ltd,* [2009] EWHC 1358.

access to information. While the CJEU has offered some pan-European guidance with respect to which court should hear cases regarding transnational libel and defamation, as well as clarifying the legal responsibility of a website owner/author and Internet access provider; the ECtHR has established some general guidelines (some based on previous rulings with respect to traditional media, but increasingly considering the new media environment) regarding the proper balance to be struck between freedom of speech and other rights and interests, most notably in relation to personality rights.

The initial approach of the CJEU seems to be more technologically neutral. The CJEU also clearly refers to national jurisdiction as a source of law in such cases. The more developed approach of the ECtHR, although also sensitive to local cultural-religious traditions and customs, considers that NOMS should have more freedom than traditional media. More importantly, since in the area of freedom of speech, as in others, it builds on precedent, and may follow the suggestion by the CoE for a graduated approach to regulating NOMS, the ECtHR's rulings may ultimately enhance freedom of speech in culturally more conservative countries (such as Turkey).

There is clearly an urgent need to develop effective and accountable self- and co-regulatory approaches for NOMS at the national level. This, however, realistically speaking, seems to have a future only in those countries where there is respect both for freedom of speech and formal and informal rules, as in Denmark. Therefore, an important regulatory role remains with the ECtHR and national courts as well as national legislators. National courts have to take into account the previous rulings of the ECtHR, while, at the same time, the ECtHR needs to develop even clearer guidelines with respect to NOMS. If not, it is likely that national courts within Europe will start adopting 'hard' approaches to NOMS in areas related to freedom of speech such as libel, defamation, and privacy, similar to those applied to the traditional media. This is especially so given uncertainty as to the possible impact of NOMS. Some courts may conclude that this impact is greater in the case of NOMS, given easy consumer and citizen access and reproduction compared to traditional media, while other courts may consider it to be lower, given the pull factor and small or specialised audiences. Similarly, while some courts may give all legal responsibility to a particular source, and others may consider shared responsibility, there may also be disagreement as to what constitutes journalistic activity.[185] With increasingly international communications markets these disparities can prove confusing and may lead to inconsistent outcomes. There remains therefore considerably more work to be done in clarifying those regulatory principles that apply to NOMS at the international as well as domestic levels. Considering the late 2014 rejection of the CJEU to put the EU under the ECHR umbrella, it remains an open question whether and when, if at all, the CJEU and ECtHR will come into conflict over fundamental rights or with respect to regulation of NOMS.

[185] Recommendation CM/Rec(2011)7 of the Committee of Ministers to Member States on a new notion of media in its art 66 prefers 'apportion responsibility in case of damage'.

5. Defamation and privacy issues

Merris Amos

An unprincipled mess: Party anonymity in legal proceedings in the United Kingdom

Introduction

Over the last ten years in the United Kingdom there has been a significant increase in the willingness of courts and tribunals to grant anonymity to the parties to legal proceedings. In 15 percent of the judgments made by the Supreme Court in 2014, at least one of the parties had been granted anonymity. In 2010, the figure was even higher at 24 percent of all judgments for that year. By contrast in 2006, seven percent of the judgments of the highest court were anonymised and in 2002, it was only two percent.[1] The rise in party anonymity has not gone unnoticed and the Supreme Court itself has observed that its docket can 'read like alphabet soup'.[2] Many media organisations are dissatisfied and maintain that there should be less anonymity in the courts whilst some campaigners and commentators argue that there should be more, particularly for those accused of a crime but not yet charged.[3] The purpose of this chapter is not to take sides in this debate but to attempt to make sense of the present position and identify the main principles consistently applied by the courts when anonymity is requested by a party. Each principle is assessed to determine if its interpretation and application is sufficiently supported by the relevant jurisprudence. Following this assessment, a revised set of principles is suggested and the chapter concludes with a reconsideration, in the light of these revised principles, of a recent anonymity judgment as well as a discussion of how the revised principles might apply to a person accused of a sexual offence, but not yet charged.

The rise, and rise, of party anonymity

Until relatively recently, the general rule was that judicial proceedings were held in public and the parties were named in judgments. Names were also given in newspaper

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[1] These figures concern the judgments of the Judicial Committee of the House of Lords which was replaced by the Supreme Court in October 2009.

[2] Per Lord Rodger in his judgment in *Ahmed v HM Treasury*, [2010] UKSC 1 [1] commenting on the submissions of counsel for the media organisations.

[3] See eg Michael Bohlander, 'Open Justice or Open Season? Should the Media Report the Names of Suspects and Defendants?' (2010) 74 *Journal of Criminal Law* 321; Di Hart, 'What's in a name? The identification of children in trouble with the law' Standing Committee for Youth Justice, 2014.

reports and in the law reports.[4] In 1913, determining an appeal against an order for exclusion of the public and restraint of publication of details in divorce proceedings, the House of Lords confirmed the existence of the common law principle of open justice. In his judgment in this case, the Lord Chancellor, Viscount Haldane, stated as follows:

> But unless it be strictly necessary for the attainment of justice, there can be no power in the court to hear in camera either a matrimonial cause or any other where there is a contest between the parties. He who maintains that by no other means than by such a hearing can justice be done may apply for an unusual procedure. But he must make out his case strictly, and bring it up to the standard which the underlying principle requires… . he must satisfy the court that by nothing short of the exclusion of the public can justice be done. The mere consideration that the evidence is of an unsavoury character is not enough, any more than it would be in a criminal court, and still less is it enough that the parties agree in being reluctant to have their case tried with open doors.[5]

In his concurring judgment Lord Shaw explained the rationale:

> If the judgments . . . were to stand, then an easy way would be open for judges to remove their proceedings from the light and to silence for ever the voice of the critic and hide the knowledge of the truth. Such an impairment of right would be intolerable in a free country, and I do not think that it has any warrant in our law.

At the time, three exceptions to the principle of open justice were possible: in suits affecting wards; in lunacy proceedings; and in those cases where secrecy, such as a trade secret, was the essence of the cause. In the Lord Chancellor's view, whether the present state of the law was satisfactory was a question not for the courts but for the legislature. In 1926 Parliament did intervene by passing the Judicial Proceedings (Regulation of Reports) Act 1926 which restricted the freedom of the press to report any indecent matter the publication of which would be 'calculated to injure public morals'.

Over time, the exceptions to the principle of open justice have continued to grow and today in the courts of the UK there is a plethora of ways in which a party can be granted anonymity. Below the two overarching categories are set out: instances where a party is always granted anonymity (blanket anonymity); and those instances where anonymity is determined on a case by case basis depending on the circumstances of the particular individual (discretionary anonymity). Prior to considering these two categories it is important to note that a court should ensure that it has the legal power to make an order for anonymity before actually doing so although there are examples where both parties have consented and the court has made the order without considering its authority. It is then up to the media to notice and apply to have the order set aside.[6]

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[4] Per Lord Rodger in *Ahmed* (n 2) [22].

[5] *Scott v Scott*, [1913] AC 417.

[6] See eg the anonymity order which was made in *Ahmed* (n 2) with the consent of the Treasury. In its judgment in *Attorney General's Reference (No 3) of 1999*, [2009] UKHL 34, the House of Lords questioned

Furthermore, once an order for anonymity has been made by a lower court, it is a serious matter as it usually stays in place throughout the appellate process 'unless and until it is set aside, either spontaneously on a change of circumstances, or as a result of an application by the press.'[7]

Blanket anonymity

Blanket anonymity, where there is no discretion and anonymity is automatically granted, is limited. Criminal and summary proceedings in youth courts are not open to the public and it is prohibited to reveal the name, address or school of any child or young person concerned in the proceedings.[8] These restrictions do not apply once the child, or young person, reaches the age of 18.[9] Children involved in welfare proceedings are also granted anonymity and it is prohibited to publish any material which is intended or likely to identify such a child.[10] A person who makes an allegation that a sexual offence has been committed has lifelong anonymity, whether the person accused is convicted or not.[11] However, as discussed in the following paragraphs, the 2010 proposals to provide anonymity to those accused of rape were withdrawn in the light of concerted opposition.

Discretionary anonymity—general powers

In relation to the discretionary grant of anonymity, a court may exercise general or specialist powers. The general power is very wide with the Supreme Court recently confirming that courts may grant anonymity to parties via the exercise of a common law power which can develop in response to new circumstances:

where the power to make the anonymity order in the Court of Appeal actually came from. It concluded that regardless of where it came from, the decisive issue was whether setting it aside was compatible with art 8 of the ECHR.

7 *Ahmed* (n 2) [35].

8 Children and Young Persons Act 1933, ss 47 and 49. The award of blanket anonymity was found compatible with the European Convention on Human Rights by the European Court of Human Rights in *B and P v United Kingdom*, (2001) 34 EHRR 529.

9 *R v Cornick*, [2014] EWHC 3623 (QB); *R (JC) v Central Criminal Court*, [2014] EHC 1041 (Admin).

10 Children Act 1989, s 97.

11 Sexual Offences (Amendment) Act 1992, s 1. Complainants were first granted anonymity in 1976 following publication of the Report of the Advisory Group on the Law of Rape (Cmnd 6352, December 1975), which noted the extremely distressing and positively harmful impact of media coverage and the need to further the public interest which demanded that those who perpetrated a crime such as rape were convicted. See further, Clare McGlynn, 'Rape, Defendant Anonymity, and Human Rights: Adopting a Wider Perspective' (2011) *Criminal Law Review* 199, 213.

> The application of the principle of open justice may change in response to changes in society and in the administration of justice. It can also develop having regard to the approach adopted in other common law countries.[12]

The examples given by the court included exercise of the power where it was necessary in the interests of justice such as where there were risks to the safety of a party or a witness.[13] This general common law power has been reinvigorated by the coming into force of the Human Rights Act 1998 (HRA) on 2 October 2000.[14] It has been held that the courts, as public authorities, are obliged by section 6 of the HRA to impose reporting restrictions, and grant anonymity, in order to protect Convention rights.[15] Whilst in 2014 the Supreme Court held that despite this change, the common law principle of open justice remains 'in vigour', it has also appreciated that developments are likely:

> the starting point in this context is the domestic principle of open justice, with its qualifications under both common law and statute. Its application should normally meet the requirements of the Convention, given the extent to which the Convention and our domestic law in this area walk in step, and bearing in mind the capacity of the common law to develop . . . although the Convention and our domestic law give expression to common values, the balance between those values, when they conflict, may not always be struck in the same place under the Convention as it might once have been under our domestic law. In that event, effect must be given to the Convention rights in accordance with the Human Rights Act.[16]

By contrast, in a 2015 judgment, the Court of Appeal held that whenever a court was asked to make an anonymity order, it was necessary to consider carefully whether a derogation from the principle of open justice was strictly necessary. In its view, the approach 'is the same whether the question be viewed through the lens of the common law or that of the European Convention on Human Rights, in particular Articles 6, 8, and 10.'[17]

The Convention rights which have played the most important role in the grant of party anonymity have been Article 2, the right to life, Article 3, freedom from torture and inhuman or degrading treatment or punishment, Article 8, the right to respect for

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[12] *A v BBC*, [2014] UKSC 25 [40].

[13] ibid [38]–[39]. This common law power is also often referred to as the 'inherent jurisdiction' of the court. See for example the reporting restriction orders made pursuant to the inherent jurisdiction of the High Court in *Birmingham City Council v Riaz*, [2014] EWHC 4247 (Fam).

[14] The HRA gives further effect to most of the rights contained in the European Convention on Human Rights (ECHR) and Protocol No 1 to the ECHR. On the HRA generally see Merris Amos, *Human Rights Law Second Edition* (Hart 2014).

[15] *A v BBC* (n 12) [60]; *Re S*, [2004] UKHL 47 [23].

[16] *A v BBC* (n 12) [56]–[57].

[17] *JX MX v Dartford & Gravesham NHS Trust*, [2015] EWCA Civ 96 [17].

private life, and Article 10, freedom of expression. The application of these Convention rights by the courts in this context, and the confusion which has ensued, is discussed in more detail in the following paragraphs.[18]

Discretionary anonymity—specialist powers

The specialist powers to grant anonymity on a discretionary basis are also very wide and only a selection of the most important examples are considered here. In criminal and summary proceedings involving children and young people, there is an additional discretionary power for the court to restrict reporting which may lead to the identification of the child, or young person, such as naming the parent of a child.[19] However, such an order is not automatic and must be necessary and proportionate[20] and can be lifted by the court on an application by the media. It is a contempt of court to publish a judgment in a family court case involving children unless either the judgment has been delivered in public or, where delivered in private, the judge has authorised publication. A condition usually imposed is that the published version protects the anonymity of children and family members. If any party wishes to identify himself or herself, they must seek an order of the court.[21] Similarly, the general rule is that proceedings of the Court of Protection are held in private but the court may make an order authorising the publication of information or a judgment on the condition that the anonymity of parties is protected.[22] Teachers accused by a pupil at their school that they may be guilty of a criminal offence, such as assault or sexual assault, have anonymity but any person may make an application to a magistrates' court for an order dispensing with such restrictions.[23] The Asylum and Immigration Tribunal may make a direction to secure the anonymity of a party or a witness[24] and a Court Martial can grant anonymity to defendants before it.[25]

[18] Where an anonymity order has been made by exercise of a general power, it is supported by section 11 of the Contempt of Court Act 1981 which grants the court the power to give ancillary directions. By contrast, s 4 of the Contempt of Court Act 1981 gives the court the power to order the postponement of any report of the proceedings where necessary for avoiding substantial risk of prejudice to the administration of justice.

[19] Children and Young Persons Act 1933, s 39; see *Re S* (n 15) and Youth Justice and Criminal Evidence Act 1999, ss 45–46.

[20] *R (Y) v Aylesbury Crown Court*, [2012] EWHC 1149 (Admin).

[21] Administration of Justice Act 1960, s 12; Transparency in the Family Courts Publication of Judgments Practice Guidance, January 2014.

[22] The Court of Protection Rules 2007, Rules 90–93.

[23] Education Act 2011, s 13, which inserts a new section 141F into the Education Act 2002.

[24] Asylum and Immigration Tribunal (Procedure) Rules 2005, Rule 45(4)(i).

[25] The Armed Forces (Court Martial) Rules 2009, Rule 153.

No anonymity for defendants or those arrested or accused of a crime

The rise in party anonymity generally has not prompted the extension of blanket anonymity to those who have been accused of a crime, those who have been arrested (but not yet charged), or defendants in sexual offence prosecutions.[26] In recent years, all new proposals for blanket anonymity have failed. In 2002 the Home Affairs Committee report concerning historic allegations of child abuse recommended that persons accused of such abuse should be granted anonymity.[27] This recommendation was rejected by the government which claimed that there was no evidence underpinning a number of the Committee's conclusions.[28] In 2010 the Ministry of Justice published 'Providing Anonymity to those Accused of Rape: An Assessment of the Evidence'[29] but following considerable opposition, the proposal was withdrawn.[30]

Efforts to secure discretionary anonymity for such individuals through the application of human rights law have also failed. For example, in *PNM v Times*[31] the appellant sought to prevent publication of the fact of his arrest on suspicion of committing serious offences against children and associated information which would lead to his identification. He based his claim on the tort of misuse of private information which he argued must be interpreted and applied consistently with Article 8 of the European Convention on Human Rights (ECHR), the right to respect for private life. His principal concern was that if the information was published, he would be regarded as guilty by the public 'even though he had not been charged with, still less prosecuted for any offence.' He also raised the potentially distressing and damaging consequences for his immediate and wider family, including his children.[32] The Court of Appeal held that anonymity should not be continued basing its conclusion on the 'ordinary rule' that the press may report everything that takes place in open court and its observation that 'most members of the public understand the presumption of innocence and are able to distinguish between the position of someone who has been (merely) arrested, someone who has been charged, and someone who has been convicted of a criminal offence.'[33]

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[26] The anonymity for defendants accused of rape introduced by the Sexual Offences (Amendment) Act 1976 was repealed in the Criminal Justice Act 1988.

[27] Home Affairs Committee, 'The Conduct of Investigations into Past Cases of Abuse in Children's Homes Fourth: Report of Session 2001–2002' (2002) [99].

[28] See further, Philip NS Rumney and Rachel N Fenton, 'Rape, Defendant Anonymity and Evidence-Based Policy Making' (2013) 76 *Modern Law Review* 109, 113.

[29] Ministry of Justice, 'Providing Anonymity to those Accused of Rape: An Assessment of the Evidence' Research Series 20/10, November 2010.

[30] See further Rumney–Fenton (n 28) 110; McGlynn (n 11) 200–202.

[31] *PNM v Times*, [2014] EWCA Civ 1132.

[32] ibid [14].

[33] ibid [38]. However, it held that the order should remain in place until the application for leave to appeal to the Supreme Court was determined. See also *R (Press Association) v Cambridge Crown Court*, [2012] EWCA Crim 2434. Efforts of those convicted to obtain anonymity on release also usually fail, unless there is an art 2 or 3 justification, see *R (SF) v Secretary of State for Justice*, [2013] EWCA Civ 1275.

All that exists to protect the anonymity of those accused, or arrested, is the College of Policing Guidance 2013 which provides as follows:

> save in clearly identified circumstances, or where legal restrictions apply, the names or identifying details of those who are arrested or suspected of a crime should not be released by police forces to the press or public. Such circumstances include a threat to life, the prevention or detection of crime or a matter of public interest and confidence.[34]

Nevertheless, as noted above, there remains support to extend anonymity to those arrested, but not charged including from the present Home Secretary Theresa May. This was also a recommendation of the recent Leveson Inquiry into the culture, practices and ethics of the press.[35] In 2015 the House of Commons Home Affairs Committee recommended that anonymity should apply to a person accused of a sexual offence, 'unless and until they are charged with an offence'.[36] It also recommended that the police should not release information on a suspect to the media in an informal, unattributed way and if the name of a suspect is released, 'it has to be limited to exceptional cases, such as for reasons of public safety.'[37] The Government has yet to respond.

The principles applied by courts when considering an award of discretionary anonymity

When exercising judicial discretion to determine whether or not anonymity should be awarded, courts take into account a variety of principles although current practice is far from consistent. Unlike many other balancing acts, where only the interests of the claimant and respondent are at issue, when considering an award of anonymity a court must also take into account the various public interests at stake, in particular, the principle of open justice. However, as discussed below, often certain principles are overlooked or subsumed under a detailed discussion of competing Convention rights such as privacy and freedom of expression. In the following paragraphs, the most important principles at stake where anonymity is claimed are set out, and their application in this context is explained and assessed with a view to determining a set of revised principles.

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[34] The Editor's Code of Practice, enforced by the Independent Press Standards Organisation, recommends at clause 9 that the relatives or friends of a person convicted or accused of a crime 'should not generally be identified without their consent, unless they are genuinely relevant to the story.'

[35] *An Inquiry into the Culture, Practices and Ethics of the Press Report, Vol II*. November 2012, HC 780-II, (The Stationery Office 2012) Part G, ch 4, para 2.39.

[36] House of Commons Home Affairs Committee, 'Police Bail' (The Stationery Office 2015) HC 962, 4–5.

[37] ibid 6.

Open justice

The first principle almost always considered when an order for anonymity is sought, is the principle of open justice. Recently, the Supreme Court confirmed and explained this common law principle:

> It is a general principle of our constitutional law that justice is administered by the courts in public, and is therefore open to public scrutiny. The principle is an aspect of the rule of law in a democracy . . . society depends on the courts to act as guardians of the rule of law . . . Who is to guard the guardians? In a democracy, where the exercise of public authority depends on the consent of the people governed, the answer must lie in the openness of the courts to public scrutiny.[38]

There was considerable discussion of the principle in the Report of the Committee on Super-Injunctions[39] where it is described as a 'fundamental principle of the common law', and a 'sacred part of the constitution of the country'. The authors continue:

> Open justice is thus not only an aspect of freedom of speech: it is also an aspect of the principle that justice is both done and seen to be done, because it is a centrally important way of ensuring that the court fulfils its constitutional duty of ensuring that justice is done. It is in this way that it supports the rule of law in a democratic society.[40]

Similar justifications are given for the guarantee in Article 6 of the ECHR which provides that judgment shall be pronounced publicly 'but the press and public may be excluded' from all or part of the trial in the 'interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.' The ECtHR has observed as follows:

> The public character of proceedings before the judicial bodies referred to in Article 6(1) of the Convention protects litigants against the administration of justice in secret with no public scrutiny. It is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6(1) namely a fair trial, the guarantees of which is one of the fundamental principles of any democratic society, within the meaning of the Convention.[41]

In the criminal justice context, McGlynn has explained that open justice facilitates the proper functioning of the courts and its participants 'ensuring protection of the

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[38] *A v BBC* (n 12) [23]. See also *Re S* (n 15) [30] per Lord Steyn.

[39] 'Super-Injunctions, Anonymised Justice and Open Justice 2011' Report of the Committee on Super-Injunctions <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/super-injunction-report-20052011.pdf>.

[40] ibid 8.

[41] *Fazliyski v Bulgaria* (App no 40908/05, 16 April 2013) [64].

right to a fair trial; boosts public confidence in the courts and reduces the likelihood of vigilantism;' and provides an educative function 'improving public debate relating to criminal and legal matters'. It can also enable publicity regarding suspects and enable 'greater monitoring of the police and prosecuting authorities'.[42] Such justifications apply equally to the civil justice context.

Such is the importance of this principle, that courts often repeat the ratio in *Scott v Scott* that any departure from it must be 'strictly necessary' and only the most extraordinary class of case will suffice.[43] Whilst some have argued that the principle is dated and not designed to cope with the modern media environment,[44] taking into account the justifications for it and its reflection in Article 6 of the ECHR, this is a principle with a long history in the common law which is consistently utilised by courts as the starting point when considering an award of anonymity and a principle which should always be given full consideration.[45] However, difficulties arise when the test for exceptions to the principle is considered. As noted above, originally only exceptions which were strictly necessary, rather than simply 'necessary' were countenanced. 'Strictly necessary' is also the wording utilised in Article 6 although it has been suggested that the test of strict necessity only applies to possible exceptions not mentioned in Article 6 itself. [46]

It is clear that the HRA has muddied the waters and courts are now confused between a test of strict necessity and a test of necessity, encompassing the test of proportionality. This confusion is illustrated by the Report of the Committee on Super-Injunctions where the Committee recommended that: the onus be on the applicant seeking a derogation from the principle of open justice to establish through 'very clear and cogent evidence' that it is strictly necessary; the court subject the application to intense scrutiny before deciding whether to grant or refuse; and the court keep derogations from open justice to the absolute minimum.[47] The tests of strict necessity and proportionality were utilised in the same breath such as follows:

> in certain circumstances strict adherence to the principle [of open justice] would undermine, or frustrate the proper achievement of justice, and thereby undermine the rule of law. Derogations from it can only be made where they are strictly necessary to enable the court to do justice, and are a proportionate means to facilitate the proper administration of justice.[48]

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[42] McGlynn (n 11) 204. See also Adrian Zuckerman, 'Common Law Repelling Super Injunctions, Limiting Anonymity and Banning Trial by Stealth' (2011) *Civil Justice Quarterly* 223, 224.

[43] *In re K (Infants)*, [1965] AC 201, 238–39 per Lord Devlin.

[44] Bohlander (n 3) 336.

[45] The Law Commission in 'Suppressing Names and Evidence Law Commission of New Zealand: Report 109' (October 2009) 7, the principles of open justice and freedom of expression were described as 'rights that go to the very existence and health of our political and legal institutions.'

[46] It has been suggested that the restrictions set out in Article 6 must be a proportionate response to a pressing social need. David Harris et al, *Harris, O'Boyle, and Warbrick Law of the European Convention on Human Rights* (3rd edn, OUP 2014) 434.

[47] Report of the Committee on Super-Injunctions (n 39) 12.

[48] ibid 15.

Later on the same page the Committee states that derogations from open justice can never be matters of routine and 'they can only ever be exceptional and can only be justified on grounds of strict necessity.' Which test is a court to apply? Exceptionality, strict necessity or proportionality? It is suggested that the test should remain one of strict necessity, and that the recommendations of the Committee on Super-Injunctions regarding clear and cogent evidence, and intense scrutiny be put into effect. The rationale for this suggestion is discussed in more detail below.

Freedom of expression

The right to freedom of expression is the second principle almost always considered by a court determining a request for anonymity and it is considered in two different ways. First, as directly linked to the principle of open justice, and second, as a free standing right. In relation to open justice, the Supreme Court has explained the link:

> The connection between the principle of open justice and the reporting of court proceedings is not however merely functional. Since the rationale of the principle is that justice should be open to public scrutiny, and the media are the conduit through which most members of the public receive information about court proceedings, it follows that the principle of open justice is inextricably linked to the freedom of the media to report on court proceedings.[49]

It is clear that the media have an important role in scrutinising the administration of justice and as the conduit of information about particular proceedings which may be of public interest[50] but it is also important to appreciate that in the age of the new media, often the public is able either to access this information for itself or to rely upon the 'citizen journalist' to help out.

Where freedom of expression is considered as a freestanding right protected by Article 10 of the ECHR, an order for anonymity is seen as an interference with this right:

> by making the orders, the courts have interfered with the Article 10 Convention rights of the press to impart information which either is, or normally would be, available to them . . . Equally clearly, the court interferes with the Article 10 rights of the press when it takes a step, such as making an anonymity order, which interferes with their freedom to report proceedings as they themselves would wish. [51]

According to the Supreme Court, stories about particular individuals are 'simply much more attractive to readers than stories about unidentified people' and 'Article 10

[49] *A v BBC* (n 12) [26].
[50] ibid [49].
[51] *Ahmed* (n 2) [35].

protects not only the substance of ideas and information but also the form in which they are conveyed.'[52] The viability of newspapers and magazines has also been taken into account:

> A requirement to report it in some austere, abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on. Ultimately, such an approach could threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive.[53]

The appropriateness of courts considering the survival of particular media outlets when determining whether anonymity should be granted is open to question particularly as such broad brush statements are not supported by anything other than anecdotal evidence. Furthermore, as many have pointed out, there is no absolute right to freedom of expression in this context and it is important that this right is not given a special status which trumps other principles and rights as its application must be tempered by the knowledge that the media can behave very badly indeed. As Bohlander observes, elements of the media are incentivised by 'making money' and feeding the 'salacious appetites of tabloid consumers for being dished the dirt on their fellow citizens.'[54] The recent example concerning Sir Cliff Richard, the police and the BBC demonstrates it is not just the tabloid press at whom accusations can be levelled.[55] In November 2012, the Leveson Report into the culture, practices and ethics of the Press confirmed many of the media's worst excesses.[56] However, in its judgment in *Ahmed*, the Supreme Court held that the possibility of some sectors of the press 'abusing their freedom to report cannot, of itself, be a sufficient reason for curtailing that freedom for all members of the press.' In its view, the Press Complaints Commission (now the Independent Press Standards Organisation) was the appropriate body for dealing with any lapses in behaviour by the press. However, it did not rule out taking this factor into consideration in the balancing process: 'The possibility of abuse is therefore simply one factor to be taken into account when considering whether an anonymity order is a proportionate restriction on press freedom in this situation.'[57]

Finally, the courts have not yet given effect to any positive obligations which could also flow from freedom of expression, as protected by Article 10 of the ECHR, in this context such as an obligation to notify media organisations when an order for anonymity is sought[58] or ensuring the chilling effect of costly legal proceedings is offset by the

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[52] ibid [63].

[53] ibid. See also *Re S* (n 15) [34] per Lord Steyn.

[54] Bohlander (n 3) 323.

[55] See further <http://www.theguardian.com/uk-news/2014/oct/24/cliff-richard-raid-police-south-yorkshire-bbc>.

[56] See (n 36) 6.

[57] *Ahmed* (n 2) [72].

[58] In *A v BBC* (n 12) anonymity was granted on an application for interim suspension of deportation. The media were not notified and there was no media representation at the hearing.

courts themselves ensuring freedom of expression is given rigorous consideration. For example, in its judgment in *AP*[59] the Supreme Court considered the continuation of an anonymity order in control order proceedings although no submissions were invited from the media and the media did not seek to intervene. Whilst the Supreme Court maintained that although all parties favoured the continuation of anonymity, this was not conclusive, it was aware of the absence of submissions from the media: 'The absence of any submissions on behalf of the media means that . . . the Court is not aware of any special circumstance which might point to a particular public interest in publishing a report of the proceedings which identifies AP.'[60]

If the media become aware, subsequently, that an order has been made, an application must be made for it to be set aside. In the view of the Supreme Court, this enables fairness to be secured, but it also noted that an improved procedure may be possible and desirable.[61]

The interest of the public in receiving public interest information

Whilst the media are usually the conduit through which the public receives its information, there is also evidence in the jurisprudence of a more modern approach to the right of access to information and this is the third principle which may, on occasion, be taken into account by a court considering an award of anonymity. With judgments made available online, through social media, blogs and the like, the role of the traditional media in supporting open justice is not as strong as it once was. There is some recognition that the public also has an interest in receiving public interest information directly and that there is a duty to 'impart information and ideas of public interest which the public has a right to receive.'[62]

> the public has a legitimate interest in not being kept in the dark about who are challenging . . . [freezing orders] . . . by lifting the anonymity order . . . the court allows members of the public to receive relevant information about him which they can then use to make connexions between items of information in the public domain which otherwise appear to be unrelated. In this way the true position is revealed and the public can make an informed judgment . . . At present the courts are denying the public information which is relevant to that debate, even though the whole freezing-order system has been created and operated in their name.[63]

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[59] *Secretary of State for the Home Department v AP (No 2)*, [2010] UKSC 26.

[60] ibid [17].

[61] *A v BBC* (n 12) [68].

[62] *Attorney General's Reference (No 3)* (n 6) [26] per Lord Hope. The information of public interest was a programme about the removal of the double jeopardy rule featuring the story of the claimant who had been acquitted of rape. In *A v BBC* (n 12) it was held that the deportation of a foreign sex offender, the length of the proceedings and the cost to the taxpayer was a matter of public interest.

[63] *Ahmed* (n 2) [68]–[69].

However, it has not yet been held that Article 10 of the ECHR also confers a right of access to information. Indeed in a number of judgments the courts have explicitly confirmed that it does not have this effect.[64]

The risk of harm including a breach of Convention rights

The principles of open justice, freedom of expression and the public's interest in receiving information are not absolute. Regardless of whether a test of strict necessity or proportionality is applied, courts considering an award of anonymity also take into account the risk of harm which disclosure of a person's identity may cause to 'the maintenance of an effective judicial process' or to the 'legitimate interests of others'.[65] The former justification has enjoyed a renaissance in recent years with the judgment of the Supreme Court in *A v BBC* which was a challenge to a deportation order where the claimant had been convicted of sexual offences against his step child. The lower courts had concluded that anonymity was necessary as in the absence of anonymity, there was a real risk that A's identity and history as a sex offender would be publicised and that such publicity would expose him to vigilante behaviour in his country of origin, where he was to be deported, contrary to Article 3. The Supreme Court concluded that the publication of A's identity would have subverted the basis of the tribunal's decision to authorise his deportation based on an assessment that there was no real risk of a violation of Article 3 if his identity was not published: 'The publication of A's identity would therefore have frustrated the judicial review proceedings before the court. Indeed, the entire proceedings since at least 2007 would have been rendered largely pointless.'[66] Its conclusion to depart from the principle of open justice was based on the interests of justice, to protect A's safety and to maintain the authority and impartiality of the judiciary.[67]

Harm to the 'legitimate interests of others' is now almost exclusively concerned with the harm which will flow from the possible breach of an individual's Convention rights. The Supreme Court has confirmed that States are obliged by Articles 2 and 3 of the ECHR to have a structure of laws in place which will help to protect people from attacks on their lives or from assaults:

> Therefore, the power of a court to make an anonymity order to protect a witness or party from a threat of violence arising out of its proceedings can be seen as part of that structure. And in an appropriate case, where threats to life or safety are involved, the right of the press to freedom of

64 See eg *Sugar (deceased) v BBC*, [2012] UKSC 4, [2012] 1 WLR 439.
65 *A v BBC* (n 12) [41].
66 ibid [73].
67 ibid [75]–[76].

> expression obviously has to yield: a newspaper does not have the right to publish information at the known potential cost of an individual being killed or maimed. In such a situation the court may make an anonymity order to protect the individual.[68]

In practice, very few anonymity orders are made on this basis.[69] What is now most common, is for an order for anonymity to be based primarily upon Article 8, the right to respect for private life particularly as the scope of Article 8 now encompasses an individual's reputation. For example, it was accepted by the Supreme Court in its judgment in *Ahmed* that identification of each of the appellants would seriously affect his reputation and private life and thereby engage Article 8.[70] Each had been informed that the Treasury had reasonable grounds for suspecting that he was, or might be, a person who facilitated the commission of acts of terrorism and that they had been designated under Article 4 of the Terrorism (United Nations Measures) Order 2006. None had been charged with or convicted of any criminal offence. In *Re S*, the House of Lords held that the Article 8 rights of a child whose mother was on trial for the murder of his brother were engaged.[71] Article 8 can also apply in unexpected ways eg in *Attorney General's Reference No 3 of 1999*[72] the House of Lords held that as the retention of samples of a person's DNA was incompatible with his rights under Article 8, so too was publication of the fact that his retained DNA had been used to link him to the commission of a crime of which he had been acquitted: 'The link that his DNA sample provides to the commission of the rape is personal information. The giving of publicity to the link will inevitably suggest that he is guilty of the offence . . . His reputation, his personality, the umbrella that protects his personal space from intrusion, will just as inevitably be damaged by it.'[73]

Where Article 8 is engaged, making an anonymity order addressed to the press is 'one of the ways that the United Kingdom fulfils its positive obligation under Article 8 of the Convention to secure that other individuals respect an individual's private and family life.'[74] However, Article 8 does not grant an absolute right to respect for private life. Interferences are possible provided these are in accordance with the law and necessary, in a democratic society, for the protection of the rights and freedoms of others. The key Convention right balanced against Article 8 in this context is the right to freedom of expression, as protected by Article 10. As the Supreme Court explained in a recent judgment:

> The balance to be achieved under Article 10, in this context, is therefore between on the one hand protection of public discussion of matters of legitimate interest in a democracy, and on the other

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68 *Ahmed* (n 2) [27]; *A v BBC* (n 12) [49].
69 See eg *Venables v News Group Newspapers*, [2001] 2 WLR 1038.
70 *Ahmed* (n 2) [42].
71 *Re S* (n 15) [27].
72 *Attorney General's Reference (No 3)* (n 6) [26].
73 ibid [22] per Lord Hope.
74 *Ahmed* (n 2) [42].

> protection of the integrity of particular court proceedings or of the administration of justice more generally. If other interests protected under Article 10(2) or under other articles of the Convention, such as Article 8, are also involved, then they must also be taken into account. This approach is consistent with that adopted under our domestic law.[75]

Whilst freedom of expression as protected by Article 10 is important, courts should not overlook the fact that there is nothing in Article 8 to prevent other important principles, such as open justice and the interest of the public in receiving public interest information from also being given effect. This is not akin to a claim where a public figure is seeking to prevent disclosure of an aspect of his or her private life. Other important interests are at stake beyond those of the parties.

Whilst courts are usually anxious to ensure that possible harms are prevented, in its application, this particular principle is riven with difficulties, one of the most serious being the failure of the courts to apply a rigorous standard of proof to allegations of possible harm. The 2011 recommendations of the Committee on Super-Injunctions, that derogations from the principle of open justice be strictly necessary, established through clear and cogent evidence, and subject to intense scrutiny are rarely utilised in practice. For example, what evidence was there in *A v BBC* that the deportee would enjoy a better life in the destination state as a direct result of the award of anonymity in the UK courts? There are a few exceptions where a more rigorous approach has been taken, but these are the exception rather than the norm. In *Ahmed*, the Supreme Court took into account the fact that no evidence was produced to show that the earlier lifting of an anonymity order in relation to one appellant had 'led to any particular social, far less physical, harm to him or to any members of his family.'[76] In *Riaz* the Family Court discharged reporting restriction orders in relation to ten men accused of being involved in the sexual exploitation of a 17-year-old woman concluding that the evidence of harm to the men was speculative: 'There is some risk that some members of the local community or extremists might seek to harm one or more of the respondents. It is for the police to address that risk and to take reasonable steps to ensure public order in accordance with their general duties to their local communities.'[77]

A further problem with the application of this principle is the scope which has been afforded to Article 8, the right to respect for private life. The first question which must be asked when it is sought to protect information, such as a name, utilising Article 8 is whether or not the information is actually private. The Court of Appeal has held in the context of proceedings to challenge a decision of the Financial Services Authority, that once a person had stepped outside of those proceedings 'whether by referring the matter to the Upper Tribunal or by making a claim for judicial review, he brought the matter

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[75] *A v BBC* (n 12) [54]. The so called 'super-injunction' was a direct result of the application of art 8 of the ECHR in this context. See further Zuckerman (n 42).

[76] *Ahmed* (n 2) [14].

[77] ibid [148].

into the public forum where the principle of open justice applies.'[78] It is also possible to argue that where an administrative decision is contested in the courts, as it was in *AP*, privacy has actually been waived.

The extension of the scope of Article 8 to encompass reputation has brought further complications. For example in *Ahmed*, each of the appellants had been informed that the Treasury had reasonable grounds for suspecting that he was, or might be, a person who facilitated the commission of acts of terrorism. They were designated under Article 4 of the Terrorism (United Nations Measures) Order 2006 and subject to freezing orders. Both denied the allegations and maintained that they were of good character. Pursuant to a power in the Order, the Treasury decided that their identity should be treated as confidential. However, it could not explain to the court why it had decided this and subsequently reversed its position. The Supreme Court concluded that as the right to protection of reputation fell within Article 8, publication of the fact that these individuals were subject to these measures was within the scope of Article 8.[79] But is the fact that someone has been subject to what effectively amounts to a civil penalty really an aspect of private life when in most instances anonymity is not afforded to those accused, charged or convicted of crime? As the Tax Court has held in relation to a request for anonymity from a solicitor appealing against penalties:

> While a solicitor's good reputation is important to the solicitor, that that reputation is deserved is an important matter to the public and his professional body. The public has an interest in knowing if a solicitor has been found liable to a deliberate inaccuracy penalty and his professional body has the right to consider whether disciplinary proceedings are appropriate. In these circumstances, it would be inimical to justice for the Tribunal to protect the solicitor's identity.[80]

Furthermore, the extension of Article 8 to the protection of reputation in this context is not in keeping with the jurisprudence of the European Court of Human Rights (ECtHR). The ECtHR has held that a person's reputation forms part of his or her personal identity and psychological integrity and therefore falls within the scope of private life. But in order for Article 8 to come into play, the attack on personal honour and reputation must attain a certain level of gravity and be in a 'manner causing prejudice to personal enjoyment of the right to respect for private life.'[81] Where the impugned statements are statements of fact, which can be proved, rather than value judgments, any attack on reputation is almost always justified. Almost all of the relevant ECtHR jurisprudence concerns attacks on reputation, usually through lies and malicious insinuation, rather than penalties or restrictions based on reasonable suspicion. For example, in *Ion Cârstea v Romania*[82] the complaint was that the domestic courts had

78 *R (Willford) v Financial Services Authority*, [2013] EWCA Civ 674 [9].
79 *Ahmed* (n 2) [42].
80 *Mr B v Revenue & Customs Commissioners*, [2014] UKFTT 256 (TC) [93].
81 *A v Norway* (App no 28070/06, 9 April 2009) [64].
82 *Ion Cârstea v Romania* (App no 20531/06, 28 October 2014).

failed to protect the applicant's reputation following the publication of an article in a local newspaper entitled 'Feature story on sex-blackmail professor' which was illustrated by two photographs showing a man and a woman naked and having sex. In the article it was stated that the applicant was involved in bribery, blackmail, child sex abuse, and sexual advances—he argued that the facts were not true and that with the photographs it had seriously damaged his reputation. The ECtHR held that the application engaged the State's positive obligation arising under Article 8 to ensure effective respect for the applicant's private life, in particular his right to protection of his reputation. A violation of Article 8 was found, the Court concluding that the article and photographs 'seriously prejudiced the applicant's honour and reputation and was harmful to his psychological integrity and private life.'[83]

Other judgments of the ECtHR indicate that rather than accepting that penalties based on reasonable suspicion constitute a sufficient interference with reputation to engage Article 8, it is more appropriate for Article 8 to offer protection to those accused, but not charged or convicted of a crime.[84] Indeed, courts are actually ignoring harms far greater than injury to reputation. Rumney and Fenton have observed that the stigma associated with sex crime is such that 'rape defendants find themselves in a social world in which distinctions between those who are accused and those who are convicted are not necessarily recognised by people who abuse, shun or even kill those suspected of being sex offenders.'[85] The Standing Committee on Youth Justice in a recent report concluded that naming children in trouble with the law, such as those subject to anti-social behaviour orders or those accused of an offence, punishes innocent family members, damages a child's psychological and emotional health, and reduces changes for their rehabilitation: 'being publicly named puts rehabilitation at risk. This could be because of the damaging psychological effects of labelling, or because of rejection by the community, including prospective employers. It may also lead to the withdrawal of family support.'[86]

A far better approach to considering the 'legitimate interests of others' in the grant of anonymity is contained in the 2009 report of the New Zealand Law Commission where it concluded that hardship to the accused should be included as a statutory ground for suppression of name. With respect to the level of hardship required, it concluded that extreme hardship was the appropriate test: 'It makes clear that suppression of the name of the accused should be exceptional. Where extreme hardship to an accused would result, the judge may decide that the harm which would be caused is disproportionate to the public interest in open justice and the freedom to receive information.'[87] In its view,

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[83] *Ion Cârstea v Romania* (n 83) [38]. See also *Jalbă v Romania* (App no 43912/10, 18 February 2014).

[84] *Apostu v Romania* (App no 22765/12, 3 February 2015).

[85] Rumney–Fenton (n 28) 126–27 although this is compared to other offences and the suggestion made that all of those accused of a crime endure some form of stigma.

[86] Hart (n 3) 25.

[87] Law Commission (n 45) 25.

the privacy of a person accused or convicted of a crime should not be a separate statutory ground for name suppression as any relevant privacy interest could be taken into account in considering the question of hardship to the accused.[88]

A revised set of principles

In the light of the above assessment, it is possible to compile a set of revised principles which should be applied where party anonymity is requested, regardless of whether or not the parties have consented to anonymity or not. The starting point must be the principle of open justice. Where exceptions are requested, in accordance with the recommendations of the Committee on Super-Injunctions, the onus must be on the claimant to establish, through clear and cogent evidence, that this is strictly necessary. The court must subject this request to intense scrutiny with the objective of keeping derogations from open justice to the absolute minimum. Freedom of expression is obviously an important right which also must be taken into account both in supporting open justice and as a free-standing right. However, it is important that it is not applied as if it were an absolute right. Assumptions about the media must be supported by evidence and the possibility of bad behaviour given due consideration. Courts should also consider the positive duties imposed in this context and give rigorous consideration to the interests of the media, and freedom of expression, even if the media do not make submissions. It is also important to remember that the public has an interest in receiving public interest information for itself so as to be able to make informed judgments.

Where it is claimed that the disclosure of identity may harm the maintenance of an effective judicial process, or the interests of others, extreme hardship should be the test utilised. Clear and cogent evidence of the extreme hardship must be required and the court should subject this to intense scrutiny. A claim of a possible breach of Convention rights should not be allowed to trump all of the other rights and interests at stake. Courts should also think more carefully about the scope of Article 8 in this context in particular, whether the claimant has waived privacy by bringing the matter before the courts and whether the protection of reputation really outweighs restrictions and penalties based upon reasonable suspicion of wrongdoing.

Re-thinking the conclusion of the Supreme Court in AP

Applying these revised principles to the recent anonymity decision of the Supreme Court in *AP* produces the opposite conclusion to that reached by the court. A control order was imposed on *AP* under the Prevention of Terrorism Act 2005 in 2008. Such

[88] ibid 28.

orders were made where the Secretary of State had reasonable grounds for suspecting the individual was or had been involved in terrorism-related activity.[89] AP brought various legal proceedings to challenge the order and the Supreme Court, in its June 2010 judgment,[90] quashed the residence requirement part of the order which required AP, who was from London, to live 150 miles away. This judgment was academic as the Secretary of State had revoked the control order and decided to deport AP on national security grounds and he was held on bail, pending deportation, on conditions similar to the unrevised control order. AP also challenged this decision before the Special Immigration Appeals Commission (SIAC).

The anonymity order was made at the outset of proceedings in the Administrative Court and before SIAC, and never challenged. This judgment of the Supreme Court concerned whether the anonymity order should cover publication of the 2010 judgment. The Supreme Court concluded that AP's right to respect for his private and family life, and the need to protect him from the risk of violence, justified maintenance of the anonymity order. No submissions were invited from the media and they did not seek to intervene. Both AP and the Secretary of State wished for anonymity to continue.

Applying the revised principles, the starting point is the principle of open justice with the proviso that any exceptions must be strictly necessary and based upon cogent evidence which is subject to intense scrutiny by the court. With respect to freedom of expression, the identity of AP as someone subject to a control order, and then subject to deportation on national security grounds, is a matter of public interest. The use of control orders was extremely controversial and the public is entitled to receive relevant information about the type of person subject to a control order, in particular their background, where they live and what they are suspected of. If all of those subject to control orders were granted anonymity, which it would be possible to do on the grounds suggested by the Supreme Court, it would be impossible to make connections or identify particular patterns of behaviour. The potential for the media to draw unwarranted attention to AP must also be taken into account but balanced against the fact that AP was not the first person to be subject to a control order.[91] Even though the media did not appear at the proceedings, their interests must be taken into account pursuant to the positive duty imposed on the court by Article 10 of the ECHR.

With respect to the risk of harm to AP, there was no clear and cogent evidence that the use of control orders generally would be put in jeopardy by refusing anonymity to controllees. Furthermore, there was no evidence that extreme hardship would result if AP were not granted anonymity. There were no credible threats of violence against him.

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89 *Secretary of State for the Home Department v AP (No 2)* (n 59) s 2.

90 *SSHD v AP*, [2010] UKSC 24.

91 Control orders were made against 52 people during the lifetime of the 2005 Act. See further David Anderson, 'Control Orders in 2011' March 2012, <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228614/9780108511417.pdf>.

Whilst there were reports of community tensions and racist attacks on members of the Muslim community in the town where AP was required to live, there was no evidence that the level of threat was different to that presented by any other place. Furthermore, Article 8 was not breached. On the assumption that Article 8 was even engaged, the lifting of anonymity would reveal a restriction imposed, based on reasonable suspicion, which was necessary, in the interests of national security and for the prevention of crime. It is difficult to see how the removal of anonymity would result in a breach of Article 8 whilst imposing a control order did not. The exception to open justice here was not strictly necessary or based upon cogent evidence subject to intense scrutiny by the court and the anonymity order should have been lifted.

Re-thinking anonymity for those accused of a sex crime but not yet charged

The revised principles can also be applied to those accused of a sex crime but not yet charged.[92] The principle of open justice remains the starting point but given that the person has not yet been charged, its importance in this context is somewhat diminished. What remains is the justification that publicising the name of the accused, in accordance with the principle of open justice, may encourage other victims to come forward although it is important to note that the strength of this assumption has not yet been empirically tested.[93] Freedom of expression remains important but the public interest content of the expression is diminished by the fact that this is an accusation, not a charge. As outlined in the Leveson report, the media have a tendency to behave badly when anyone, particularly a high profile individual, is accused of a sex crime.

However, it is the risk of harm to the person accused which presents the most persuasive argument in favour of anonymity. Many commentators have explained the harm which can flow from particular allegations:

> The stigma attaching to allegations of a sexual nature, particularly those relating to children, make unfounded accusations particularly damaging . . . Operation Yewtree, the ongoing investigation into historic child abuse instigated by the investigation into Jimmy Saville, has also thrown up a number of issues . . . individuals arrested but not yet charged have already been subject to vigilante trials by social media, their reputations forever tarnished by association . . . Even more unjust is the false identification of individuals as being suspects following vague reports of an arrest.[94]

If Article 8 protects a person's reputation from being damaged by the disclosure that they are subject to a control order on reasonable suspicion of being involved in acts of

[92] New Zealand Criminal Procedure Act 2011, s 201 provides that identity is automatically suppressed of those accused, or convicted, in specified sexual cases.

[93] Ministry of Justice (n 29) 34.

[94] Jennifer Agate, 'Anonymity and Exoneration: Balancing Open Justice with Reputation' (2014) 25 *Entertainment Law Review* 4, 6. See also Bohlander (n 3) 321–22.

terrorism, it is difficult to understand why it does not also offer protection to the person whose reputation is irreparably damaged by an accusation that he or she has committed a sex crime. Based upon the revised principles, anonymity for those accused of a sex crime is almost always strictly necessary and supported by clear and cogent evidence.

Conclusion

The principles applied by courts considering a discretionary award of party anonymity are in a mess. In its 2009 report, the New Zealand Law Commission concluded that a number of changes were required to the national law concerning anonymity 'to place greater emphasis on the principle of open justice and to ensure that the grounds on which it may be departed from are transparent, explicit and consistently applied.'[95] It would seem that the law in the UK has reached a comparable position. Subsequently in New Zealand, the broad discretion was reduced and the grounds on which anonymity could be granted were set out in legislation.[96] Almost exactly the same conclusions and recommendations could apply to the UK. However, politicians are wary of upsetting the media with further proposals for blanket anonymity and the prospect of across the board statutory reform codifying the principles to be applied when a discretionary anonymity order is requested is highly unlikely. Utilising the revised set of principles outlined in this chapter would at least ensure that the award of party anonymity becomes far more consistent, predictable, and reflective of the level of potential harm truly caused than might otherwise be the case.

[95] Law Commission (n 45) 8.
[96] ibid 23. See Criminal Procedure Act 2011 (New Zealand), ss 200–204.

John Campbell

Damages for defamation

Introduction

The basis for an award of damages in defamation actions seldom receives much discussion or analysis in Commonwealth courts (for this purpose I include South Africa which, despite its Roman Dutch law taxonomy, draws heavily on the Common Law and shares its adversarial character). In the common law, the basis for damages is obscure and variegated. There are general damages (or damages at large, which both vindicate reputation and provide an amount to assuage wounded feelings and are seen as compensatory), aggravated damages (which are also compensatory, not vindicatory, arising from some extra hurt to the claimant's feelings that are out of the ordinary), exemplary or punitive damages (which punish the defendant for his or her conduct) and, in most jurisdictions, claimants (or plaintiffs) can claim actual economic loss. Only general damages are 'presumed damages', and all except the last suffer from very little guidance as to their quantification. Roman Dutch law is much the same except, in common with Scottish law, it has turned its face against punitive damages. As observed in *Duncan & Neill on Defamation,* damages remain the 'main relief' for defamation and the 'principles governing such awards are therefore of great importance'.[1]

The interest protected by defamation law is reputation, and the wrong that must be remedied by damages is therefore injury to reputation. This does not entail, it will be argued, a claimant's wounded feelings, business losses or consideration of the defendant's conduct. Some of those may be consequences of defamation, but remedies must be sought in different causes of action more appropriate to recovery of such damages.[2] If reputation is vindicated by a damages award, is there any place, for example, for aggravated or exemplary damages?

The issue of general damages (or damages at large) for defamation has lost some of its urgency in the UK in the wake of limitations on what a reasonable figure is[3] and a

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[1] *Duncan and Neill on Defamation* (3rd edn, LexisNexis 2009) 265; or 'the remedy *par excellence* of the common law': Michael Gillooly, *The Law of Defamation in Australia and New Zealand* (Federation Press 1998) 269.

[2] For example, I have argued, before, that business losses have no place in defamation law: 'An Anomaly: Special Damages for Libel' (2011) 3 (2) *Journal of Media Law* 193–197, and this article will draw on those arguments.

[3] *John v MGN Ltd*, [1997] QB 586 (CA) 614; *Cairns v Modi*, [2012] EWCA (Civ) 1382, [25]; *Campbell-James v Guardian Media Group Plc*, [2005] EWHC 893 (QB) [19].

greater consistency in awards. In places like South Africa, defamation damages have never been high[4] and so, similarly, there has been insufficient scrutiny of what purpose damages actually serve. Yet, there remains, in some jurisdictions, upwards pressure on damages awards.[5] In fact outsized awards remain an area of concern, even in courts of first instance in the United States of America.[6] It will be argued, in this article, that claimants are currently compensated for all sorts of injury that really have no place in defamation law. This has the effect of inflating damages, of inconsistency and therefore of encouraging litigation designed to stifle criticism;[7] all of which contribute to the 'chilling' effect of defamation law. Andrew Kenyon summarises the concerns over defamation damages as the high worth given to reputation, unpredictability and inconsistency with other compensatory damages.[8]

This article does not purport to deal with questions such as whether damages are an appropriate remedy for defamation at all, or whether other remedies such as declarations of falsity might better vindicate a defendant's reputation; these are legitimate questions, of course, but this article seeks only to examine the various bases for damages in defamation advanced over time by the courts in order to ascertain what heads of damages are properly and appropriately awarded; and what heads of damages ought to be jettisoned. This will entail some consideration of the multi-faceted and subjective concept of reputation, mainly whether commercial reputation is appropriately protected by the law of defamation in the context of the availability of general damages to trading individuals or entities.

The claimant's advantages in a libel action

In order to appreciate why damages for defamation need to be confined to the proper, and limited, interest protected by defamation law, it is necessary to set out quite how privileged a defamation claimant is, compared to claimants in virtually any other tort. Except in the United States, the action for defamation has features shared by no other tort. Strict liability is one of libel's unusual features.[9] Others are the presumptions of a

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[4] *Mogale & Others v Seima*, 2008 (5) SA 637 (SCA) [18]. So much so as to draw the occasional protest, as in the complaint by Krause J that he was 'strongly of the opinion that in South Africa the courts are far too lenient in awarding damages for the blasting of a man's reputation': *Lyon v Steyn* 1931 TPD 247, 255.

[5] *Dikoko v Mokhatla*, 2007 (1) BCLR 1 (CC) [80].

[6] Mike Steenson, 'Presumed damages in Defamation Law' 2014 40(4) *William Mitchell Law Review* 1492, 1493.

[7] *Goldsmith v Sperrings*, 1977 (1) WLR 478 (CA) (Lord Denning).

[8] Andrew Kenyon, 'Problems with Defamation Damages?' 1998 24(1) *Monash University Law Review* 70–72.

[9] *Cassidy v Daily Mirror*, [1929] 2 KB 331 (CA) 354.

claimant's good reputation,[10] of the falsity (wrongfulness), of the allegations published[11] and of damages.[12] Taken together, all of this means that a publisher is liable in damages where all the elements of the action, bar publication and the meaning of the text published, are presumed. In other words, a claimant is relieved from the burden of pleading and proving any of the usual elements of tort—fault, falsity (wrongfulness), causation and loss.

These extraordinary advantages endowed on a claimant by defamation law mean that courts ought to be particularly vigilant in limiting damages to what is properly the domain of defamation law, and not award damages that are really the domain of a different tort. There is a need, in other words, to confine a defamation claimant's advantages strictly to defamation, and not permit recovery of damages that stray beyond the legitimate interest protected by defamation law, and that would not be so easily recovered in other torts which require claimants to plead and prove fault, falsity, causation and loss.

The interest protected by defamation law

Everywhere in the Commonwealth world and in the US, the interest—and the only interest—protected by the law of defamation is reputation. As Dr Matthew Collins crisply puts it, '[T]he purpose of the law of defamation is to provide a remedy for publications which damage a person's reputation without lawful excuse.'[13]

But what is reputation? Before one knows this, it is not possible to assess whether or not it has been damaged let alone what that damage is worth. In ordinary language, Collins observes that it is simply the 'general opinion or estimate of a person's character' which, for him, is that person's 'distinctive mental or moral qualities';[14] or, put far more widely by Lord Denning, reputation 'is what other people think [the claimant] is.'[15] Neill LJ, in *Berkhoff v Burchill* also saw the concept of reputation as going beyond 'character' to 'all aspects of a person's standing in the community'.[16]

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[10] *Dingle v Associated Newspapers*, [1961] 2 QB 162 (CA) 181; *Carson v John Fairfax & Sons Ltd*, [1993] 178 CLR 44, 101.

[11] *Jameel v Wall Street Journal Europe SPRL (No 2)*, [2001] QB 904 (CA) 915B; *Reynolds v Times Newspapers Ltd*, [2001] 2 AC 127 (HL) 192 F; *Khumalo NO v Holomisa*, 2002 (8) BCLR 771 (CC) 778G; *The Age Co Ltd v Elliott*, [2006] BSCA 168, [28]; *Pressler v Lethbridge*, [1997] 153 BLR (4th) 537, 541.

[12] *Jameel (Yousef) v Dow Jones & Co. Inc.*, [2005] QB 946 (CA) [37].

[13] *Collins on Defamation* (OUP 2014) 120; *Gatley on Libel and Slander* (12th edn, Sweet & Maxwell 2013) 3; Jonathan M Burchell, *The Law of Defamation in South Africa* by (Juta & Co 1985) 1 and 18; Paul Mitchell, *The Making of the Modern Law of Defamation* (Hart 2005) 1.

[14] Collins (n 13) 120 (following the *Shorter Oxford English Dictionary*).

[15] *Plato Films Ltd v Speidel*, [1961] AC 1090 (HL) 1138. In fact, Lord Denning equiparated character with reputation and that is why his definition is broader than that of Collins.

[16] *Berkhoff v Burchill*, [1997] EMLR 139 (CA).

These formulations are not consistent: Collins sees reputation not merely as another's perception of a person, but as limited to the perception of that person's *character*; others see reputation as simply other peoples' perceptions of another person, and not confined to that person's character. This is an important distinction, particularly when commercial reputation is the issue as it will become later in this article.

The next question must be to establish what kind of speech or publication it is that is destructive of 'a person's standing in the community'. For instance, mere vulgar abuse is not defamation[17] in that it is directed to the claimant, and calculated only to insult him or her and to wound his or her feelings; whereas a defamatory publication is directed to third parties and is calculated to reduce the claimant in the eyes of others.[18] Well over 30 years ago, Emeritus Professor Leon Green understood this and articulated it as follows:

> Libel is not an action for personal injury caused by words, but is an action for injury to the *relations a person may have with other persons*. It is important that the difference between a personal injury and an action for injury to a person's relations with other persons be understood and respected. The basic distinction in a libel case as distinguished from a case of personal injury is that the language used to hurt the plaintiff is directed to a third person and not to the plaintiff.[19]

The courts have long since moved away from archaisms such as 'hatred, contempt or ridicule'[20] or 'shun and avoid'.[21] In *Sim v Stretch*, Lord Atkin greatly simplified these old formulations to 'would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally;'[22] and Neill LJ, again in *Berkhoff v Burchill*, characterised a defamation as a publication that 'affects in an adverse manner the attitude of other people'.[23] These formulations have received broad Commonwealth approval.[24] All of this means that, when assessing damages for defamation, it might be expected that courts would assess the claimant's reputation (leaving aside, for the moment, whether reputation is to be limited to character), calculate its diminution and, from that, assess the figure (however difficult) required to restore the claimant's

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[17] *Smith v ADVFN Plc*, [2008] EWHC 1797 (QB) [26].

[18] This is why a case such as *Clynes v O'Connor*, [2011] EWHC 1201 (QB) seems to be wrongly decided: the defendant had 'hurled' insulting epithets at the claimant and, in spite of the absence of any need to vindicate the claimant's reputation, he was awarded damages for injury to feelings.

[19] Leon Green, 'Political Freedom of the Press and the Libel Problem' (1978) 56 *Texas Law Review* 341, 348. This distinction, of some antiquity now, has modern support in Lawrence McNamara, *Reputation and Defamation* (OUP 2007) 21–22.

[20] *Parmiter v Coupland*, (1840) 6 M&W 105 (Ex) 108.

[21] *Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd*, (1934) 50 TLR 581 (CA) 584.

[22] *Sim v Stretch*, [1936] 2 All ER 1237 (HL) 1240.

[23] *Berkhoff v Burchill* (n 16) 151.

[24] In Australia: *Radio 2 UE Sydney (Pty) Ltd v Chesterton*, 238 CLR 460 (HCA) [36] and [60]; in Canada: *Botiuk v Toronto Free Pass Publications Ltd*, [1995] 3 SCR 3 (SCC) [62]; in South Africa: *Smith v Elmore*, 138 TPD 18, 21 and *National Union of Distributive Workers v Cleghorn & Harris Ltd*, 1946 AD 984, 986–987; in New Zealand: *Mount Cook Group v Johnstone Motors*, [1990] 2 NZLR 488, 497.

reputation to what it had been, in other words to vindicate it.[25] But this is not how Commonwealth courts have quantified damages and it is their methods of doing so that need now to be examined.

The common basis of general damages (or damages at large)

The purpose of any award of damages for defamation must be 'to restore the claimant, as far as money can do so, to the position he would have been in if the tort had not been committed;'[26] or, in Michael Gillooly's words, 'the plaintiff is to receive a sum of money sufficient to restore him or her to the position he or she was in before the wrong occurred (to the extent that money can do so).'[27]

The basic purpose of damages in defamation actions, all through the Commonwealth, is often described as being to compensate the claimant (or plaintiff) for the *effects* of the defamation. This is often held to embrace three distinct factors. The first is the vindication of the claimant's reputation, the second is to repair harm to reputation, and the third is to provide consolation for distress.[28] Together, these are known as general damages or damages at large, and 'they cannot be assessed by reference to any mechanical, arithmetical or objective formula'[29] but, after consideration of more subjective factors (such as the nature of the defamatory publication, its reach, its effect on the claimant and the conduct of the defendant) are beyond 'purely objective computation'.[30] To complicate matters these damages are, as set out above, presumed.

The first two factors are really the same, as seems clear from the much-quoted judgment of Windeyer J in the High Court of Australia:

> It seems to me then that, properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages *because* he was injured in his reputation, that is simply because he was publicly defamed. For this reason compensation by damages operates in two ways—as a vindication of the plaintiff to the public, and as a consolation to him for the wrong done.[31]

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[25] Indeed, a very early South African case captures this position. Lawrence J said that 'actions for libel as a class are not to be encouraged and their object should be rather to vindicate the [reputation] than to fill the pocket': *Sauer v Radford and Roper*, 1884 2 HCG 518, 530.

[26] *Duncan & Neill on Defamation* (n 1) 266.

[27] *The Law of Defamation in Australia and New Zealand* (n 1) 269.

[28] *Rantzen v Mirror Group Newspapers (1986) Ltd*, [1994] QB 670 (CA) 696; *John v MGN Limited* (n 3) 607F.

[29] *Gatley On Libel and Slander* (n 13) 335.

[30] *Broome v Cassell & Co Ltd*, [1972] AC 1027 (HL) 1071F. In South Africa, Schreiner J expressed himself in similar, if rather more self-deprecating, terms: 'I have to consider what in a general way the plaintiff has lost, and this is a matter which is largely guesswork', *South African Commercial & Educational Film Services (Pty) Ltd v Morton*, 1937 WLD 88, 93.

[31] *Uren v John Fairfax & Sons (Pty) Ltd*, [1966] HCA 40, [6] of Windeyer J's judgment. Approved in the House of Lords: *Broome v Cassell & Co Ltd* (n 31) 1071D; also cited approvingly in one of the leading texts in South Africa Burchell (n 13) 292.

Windeyer J was clearly right to conflate repair to reputation and vindication—these are simply two ways of saying the same thing and therefore a tautology; but a dangerous and misleading tautology because it suggests that damages should be awarded under three heads, when in fact, as Windeyer J recognised, two of these are the same.

As celebrated as Windeyer J's crisp statement of the law has become, the third sentence seems to be, at least in part, a *non sequitur*. Why, if someone has been defamed, should he or she receive any compensation or 'consolation' over and above the amount judged to repair and vindicate his or her reputation? This is surely a double recovery and, if so, impermissible.

In assessing general damages, it is almost invariably the case in common law countries and in South Africa that the award includes something for hurt and humiliation, in effect a *solatium*.[32] Gatley, emphasising the solatium for distress, puts it thus:

> At the moment therefore the remedy of damages serves the purpose not only of remedying the claimant's distress and loss flowing from the libel, but of 'vindicating' his reputation.[33]

It is difficult to find cases that explicitly acknowledge what proportion of damages is the *solatium* for wounded feelings, but two rather unusual cases suggest that it is unlikely to be trivial. *Youssoupoff v Metro-Goldwyn-Mayer Pictures Limited*[34] was an action where the claimant had been portrayed in a film as having been either ravished or raped by Rasputin. The jury gave her an enormous sum (for those times) in damages. The Court of Appeal characterised the damages as entirely a solatium with no apparent vindicatory component:

> the damages are very large for a lady who lives in Paris, and who has not lost, so far as we know, a single friend and who has not been able to show that her reputation has in any way suffered . . . It is very difficult to put a money value upon the mental pain and suffering that were undergone.[35]

In the United States, the Supreme Court held in the *Firestone* case,[36] which was sent back for re-trial, that courts could award damages for something other than injury to reputation, such as personal humiliation and mental anguish. Here the plaintiff had abandoned her claim for injury to her reputation, and sought damages only for 'personal humiliation, and mental anguish and suffering.'[37]

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[32] *Broome v Cassell & Co Ltd* (n 31) 1125F; *Amalgamated Television Services (Pty) Ltd v Marsden*, [2002] NSWCA 419, 1315; *Mogale & Others v Seima* (n 4) 641 G–J (approving *Esselen v Argus Printing & Publishing Co Ltd & Others*, 1992 (3) SA 764 (T) 771).

[33] *Gatley On Libel and Slander* (n 13) 327.

[34] *Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd* (n 21).

[35] ibid 586.

[36] *Time Inc v Firestone*, 424 US 448 (1976).

[37] ibid 460.

Leon Green, then Professor Emeritus at the University of Texas School of Law, saw *Firestone* as a personal injury (and therefore not a defamation) case. In 1979 he commented on it as follows:

> It is clear that *Time Inc. v Firestone* was not decided as a libel case.[38] Mrs Firestone, in order to have a recovery for personal injury, sought no recovery for libel to her reputation.
> Since an action for defamation is of itself based on defendant's fault and cannot exist without it, plaintiff in pressing her action for 'personal humiliation and mental anguish and suffering' and not for defamation, *translated her action into a personal injury action based on negligence,* as decided in *Gertz*, and was therefore compelled to *show* fault on the part of the defendant. There can be no objection to the judgment of the Supreme Court on this basis of its decision. The case as it developed was an action for personal injuries based on a duty of care in which the element of 'fault' was a requisite. It was not a case of libel in which the injury was to Mrs Firestone's 'relations with other people', but was a personal injury. Recovery for the personal injury cause of action is wholly permissible.
> It is clear in many cases that the hurt suffered is more than an injury in the eyes of third persons . . . The *hurt done to the person in his emotions by the irate defendant and the hurt done him in the eyes of other persons are different.* [39]

In both matters, often characterised as defamation cases, very substantial damages were awarded not to vindicate the respective plaintiffs' reputations, but to assuage their wounded feelings. In *Firestone* at least, the plaintiff litigated much as a plaintiff in any other kind of action, which is why Leon Green characterised it as a personal injury action based on negligence; Princess Youssoupoff, however, had all the advantages of a defamation plaintiff despite not needing to vindicate her reputation. This is the mischief that needs to be eliminated.

Windeyer J's statement, welcome in reducing the types of loss that constitute general damages from three to two, nevertheless left open the prospect of a defamation claimant recovering both an amount to vindicate his or her reputation and a further amount as compensation for hurt feelings or distress. This, too, is a double recovery. The wrong in a defamation action is the defamatory publication made by the defendant because it violates the claimant's right to a clean reputation. A claimant's distress is a consequence of that wrong. To award damages for both the wrong and the result of the wrong is a double recovery because there is only one loss, whether characterised as an infringement of the right to reputation or as distress in consequence of the former.[40]

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[38] Rehnquist J, who wrote the majority judgment, probably would not agree because he found (at 460) that Florida permitted damages for injury other than to reputation in a libel action; but Green's analysis appears unassailable.

[39] Green (n 19) 363–364.

[40] See the revelatory discussion by Eric Descheemaeker, 'A clash of two logics: *Gulati v MGN Ltd* on damages for breach of privacy', <https://inforrm.wordpress.com/2015/06/02a-clash-of-two-logics-Gulati-v-mgn-ltd-on-damages-for-breach-of-privacy-eric-descheemaeker/>. See also *Mosley v News Group Newspapers*, [2008] EWHC 1777 (QB) [216].

As compensation cannot be granted for both the invasion of the right and the loss attributable to distress arising therefrom, damages are better characterised as being for the invasion of the right in the form of injury to reputation. Distress, even in respect of the same publication, can vary from person to person and so introduces inconsistency in the award of damages for the same wrong.

All of this shows a modern trend where, correctly it is submitted, general damages ought only to be awarded as compensation for the wrong of a defamatory publication, or as vindication of reputation. General damages limited in this way ought to have the effect of increasing certainty and reducing the amounts awarded, all of which will reduce the law of defamation's inhibitory effects on the various rights to free expression found all over the Commonwealth.

South African law has long recognised the diminishing role of hurt feelings or distress in the law of defamation. In 1946 Schreiner JA (talking of defamation's deep roots, back into Roman law) said:

> Defamation has lost a good deal of its original character since it is no longer regarded primarily as an insulting incident occurring between the plaintiff and the defendant personally, with publicity only an element of aggravation by reason of the additional pain caused the defendant… . Defamation has come to be limited to the harming of the plaintiff by statements which damage his good name.[41]

This of course presaged Leon Green's insight that defamation is not an action for injury caused by words, but an action for injury to a claimant's relations with others. In this same vein, Brand JA noted more recently that the traditional purpose of an award for damages—being compensation for wounded feelings—had become attenuated to the point where a claimant now does not even have to plead or prove injured feelings, and will be awarded damages 'even in the absence of injured feelings'; and that it is now no defence for a defendant to show that the defamatory publication in question caused no personal distress.[42] And 40 years ago Windeyer J also saw that damages for insult, common in earlier times, have now disappeared.[43]

This is not the position of common law countries such as the UK, Australia and New Zealand, rather of Roman-Dutch law. But Leon Green's insights are the bridge between the two systems, showing that wounded feelings are not the province of defamation law. This approach seems to be consistent with an emerging view of the availability of vindicatory damages more generally in tort, even in the absence of pecuniary loss or distress.[44]

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[41] *Die Spoorbond & Ano v South African Railways; Van Heerden & Others v South African Railways*, 1946 AD 999, 1010.

[42] *Media 24 Ltd & Others v SA Taxi Securitisation (Pty) Ltd,* 2011 (5) SA 329 (SCA) [38].

[43] *Uren v John Fairfax & Sons Pty Ltd* (n 32) [2] of Windeyer J's judgment.

[44] See the lucid discussion in Nicholas J McBride and Roderick Bagshaw, *Tort Law* (Pearson 2012) 820–830.

Aggravated and exemplary (punitive) damages

Aggravated damages and exemplary damages are dealt with together, although aggravated damages are seen as compensation for an enhanced form of general damages and therefore, structurally, fall to be dealt with under that head of damages; while punitive damages are not compensatory at all. But, in reality, they share the same purposes and flaws and this makes it logical to deal with them together. As said by Windeyer J in the High Court of Australia, 'the distinction between aggravated and exemplary damages is not easy to make in defamation, either historically or analytically; and in practice it is very hard to preserve.'[45]

Gray J, in *Collins Stewart Ltd v The Financial Times (No 2)*,[46] set out the rationale for aggravated damages as comprehensively and perceptively as it is possible to do in a concise passage:

> the defining characteristic of an award of aggravated damages is that its function is to provide a claimant with compensation ('solatium') for injury to his or her feelings caused by some conduct on the part of the defendant or for which the defendant is responsible. The concept of injury to feelings runs through the case, whether caused by the high-handed or insulting behaviour of the defendant either before or after publication or by repetition of the libel, or by persistence in a plea of justification or by a failure to apologise. It seems to me that the essence of an award of aggravated damages in libel is not making good damage to the claimant's reputation as such but rather compensating the claimant for the extra injury to his or her feelings.

From this passage, it is clear that the measure of damages that is added to ordinary general damages as aggravated damages, plays no part in the vindication of the claimant's reputation—the amount ordered for general damages has already achieved that—but is further compensation for a more egregious injury to the claimant's feelings than the norm, by the defendant's conduct.

Australian and New Zealand courts offer aggravated damages in precisely the same circumstances as in the UK.[47] In South Africa, courts nowadays do not generally grant aggravated damages, although there is little doubt that certain factors may be taken into account as aggravating factors in the assessment of general damages. These include insisting on the truth of an unfounded imputation (such as persisting in a plea of justification),[48] the defendant's conduct (such as the presence of spite or ill-will),[49] or repetition of the defamatory statement.[50] Substantively, therefore, there is not much difference.

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45 *Uren v John Fairfax & Sons Pty Ltd* (n 32) [3] of Windeyer J's judgment.
46 *Collins Stewart Ltd v The Financial Times (No 2)*, 2005 EWHC 262, [30].
47 *Uren v John Fairfax & Sons (Pty) Ltd* (n 32) [24]; *Siemer v Stiassny*, [2011] 2 NZLR 361, [51]–[54].
48 *Payne v Sheffield*, (1882) 2 EDC 166, 179.
49 *Salzmann v Holmes*, 1914 AD 477, 481; *Pont v Geyser en 'n ander*, 1968 (2) SA 545 (AD) 558 C–E.
50 *Pont v Geyser* (n 50) 558 C–E.

As submitted above, wounded feelings ought not, in principle, to attract damages in defamation actions. Be that as it may, given that the claimant has already been compensated for his or her wounded feelings it is clear, as a matter of logic, that aggravated damages are awarded because of the defendant's conduct and this is a further double recovery.[51] Aggravated damages, therefore, operate to duplicate either compensatory general damages or exemplary damages, for which there is no justification.

Exemplary damages, on the other hand, punish a defendant for the wilful commission of a tort. Quite why anybody should be punished for something that is not a crime, and on the civil standard of proof as opposed to the criminal standard, has never been satisfactorily explained. *Rookes v Barnard*[52] limited punitive damages in the UK, realistically for the purpose of defamation law, to a situation where an untruth is knowingly or recklessly published for economic advantage. They are available in Commonwealth countries such as Canada[53] and New Zealand.[54] They have been abolished by statute in some jurisdictions, for example, New South Wales.[55] In South Africa, although at one time thought to be available,[56] punitive damages have often been confused with aggravated damages,[57] but they have never been popular with judges.[58] It is difficult to fault the criticism made in an early case:

> It is only in the criminal courts that a sentence is passed with the object of deterring the accused, as well as other persons, from in future committing similar offences, but it is no part of the civil court to anticipate what may happen in the future or to punish future conduct.[59]

In modern times, it has become clear that punitive damages for defamation are not permitted in South Africa.[60] Scottish law shares much with South Africa's Roman Dutch law system, and it is therefore no surprise that there, too, judges have firmly declined any punitive component of damages for defamation.[61] Punitive damages are an impermissible, abhorrent and unfair confusion of the purpose of civil law with that of criminal law; and it must be clear that the South African and Scottish courts are

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[51] *Broome v Cassell & Co.* (n 31) 1116C. Some judges recognise the overlap, but are not concerned by it: *Carson v John Fairfax & Sons Ltd* (n 10) 60–61.

[52] *Rookes v Barnard*, 1964 AC 1129 (HL).

[53] *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 (SCC) 199.

[54] *Siemer v Stiassny* (n 48) [57].

[55] *John Fairfax & Sons Ltd v Carson*, (1991) 24 NSWLR 259 (NSWCA) 272G.

[56] *South African Commercial & Educational Film Services (Pty) Ltd v Morton* (n 31) 88, 90.

[57] *Gray v Poutsma & Others*, 1914 TPD 203, 207–209.

[58] One of the very few clear examples of punitive damages in South Africa is *Buthelezi v Poorter*, 1975 (4) SA 608 (W) where the judge said: 'the appropriate way of impressing upon all concerned that attacks of the kind to be found in this case are not lightly made is by awarding substantial damages' (617 E–F).

[59] *Lynch v Agnew*, 1929 TPD 974, 978.

[60] *Media 24 Ltd & Others v SA Taxi Securitisation (Pty) Ltd*, 2011 (5) SA 329 (SCA) [111].

[61] *Stein v Beaverbrook Newspapers Ltd*, 1968 SC 272 (CSIH) 278–279; *Winter v News Scotland Ltd*, 1991 SLT 828 (CSIH) 829I.

completely right to abhor so oppressive a doctrine. The modern existence of guarantees of free speech in instruments such as Constitutions, Bills of Rights and Legislation emphasise the archaic and anachronistic nature of the remedy.

The more intractable problems, pecuniary damages and commercial reputation

The criticisms of the approach to damages set out above relate to perennial problems which have, over time, been reasoned, criticised and re-assessed in most comparable commonwealth jurisdictions.

Of quite a different order are the next two problems in defamation damages—whether pecuniary damages are appropriately awarded at all, and whether commercial reputation (whether of an individual or a corporation) ought to be protected. These issues are seldom considered by Commonwealth courts and, when they are, it is generally merely assumed that pecuniary damages (whether characterised as pure economic loss, pecuniary loss or business losses) may be awarded, and that trading reputations may be so vindicated.

Pecuniary (or special) damages

While Commonwealth jurisdictions did not, until 1964,[62] permit the recovery of pure economic loss even for negligent misstatements, there was no such reticence in awarding damages for pure economic loss for libellous statements. I have written, elsewhere, of this anomaly and argued that, following a recent appellate decision in South Africa, pecuniary damages ought not to be recoverable in a defamation action.[63] I simply summarise the gist of that argument here, as part of the context of my central argument that defamation actions ought to permit damages only as a vindication of the interest protected by defamation law—reputation—and as a precursor to the discussion as to whether or not trading claimants are appropriate beneficiaries of the largesse afforded by defamation law to claimants.

The argument in my earlier article was predicated on a decision of the Supreme Court of Appeal in South Africa that foreclosed the possibility of damages for pecuniary loss in South Africa.[64] The SCA held that liability for pure economic loss ought to arise only in the circumstances of malicious (or injurious) falsehood where the claimant was required to prove both falsity and fault (unlike in defamation law) and it also found that

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62 *Hedley Byrne v Heller*, [1964] AC 465 (HL).

63 See (n 2).

64 *Media 24 Ltd v SA Taxi Securitisation (Pty) Ltd*, [2011] ZASCA 117. This decision was not appealed to the Constitutional Court, presumably because of the lack of any realistic prospect of success.

the duties owed by the defendant for the purpose of defamation law (required in South Africa) were different to the duties owed by the defendant to the claimant for the purpose of recovering pecuniary loss for, say, negligent misstatement (where a duty of care is required both in the UK and South Africa); and it saw no reason why someone claiming pecuniary loss ought to be able to translate its action from negligent or malicious falsehood into a defamation action, thus claiming the extravagant advantages conferred by defamation law. All of this applies as much to individual traders as to corporate entities.

Commercial reputation

Commercial reputation, whether for individuals or for corporate entities, has, until recently, been protected in all commonwealth jurisdictions. An injury to commercial reputation is an imputation 'of carelessness, misconduct, or want of skill . . . in the conduct of business'.[65] Most of the cases concern individual professionals or traders, but apply equally to corporations and it is a libel to impute incompetence or misconduct, whether to an individual trader or professional, or to a corporate entity.[66] The genesis for the latter proposition is *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* where Lord Esher equiparated libel between natural persons and trading corporations in the following terms:

> Then, if the case be one of libel—whether on a person, a firm, or a company—the law is that damages are at large.[67]

Tugendhaft J has recently provided a comprehensive description of what he terms '[B]usiness or professional defamation' in the UK:

> Business or professional defamation also comes in a number of sub-varieties . . . *a)* imputations upon a person, firm or other body who provided goods or services that the goods or services are below a required standard in some respect which is likely to cause adverse consequences to the customer, patient or client . . . ; *b)* imputations upon a person, firm or body which may deter other people from providing any financial support that may be needed, or from accepting employment, or otherwise dealing with them . . .
> [34] In addition to these varieties, there is a distinction between the sub-varieties of business defamation in which: (a) the action is brought by an individual, where damage may include injury to feelings and (b) the action is brought by a corporation, where damage cannot include injury to feelings.[68]

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65 *Griffiths v Benn*, (1911) 27 TLR 346 (CA) 350.
66 *Ming Kee Manufactory v Man Shing Electrical Manufactory*, [1992] 1 HKC 442.
67 *South Hetton Coal Co Ltd v North-Eastern News Association Ltd*, [1894] 1 QB 133 (CA) 139.
68 *Thornton v Telegraph Media Group Ltd*, [2010] EWHC 1414 (QB) [33]–[35].

Tugendhaft J identified two important distinctions between business and personal defamation. First, it is not necessary for a business defamation to make any adverse reflection upon the personal qualities of the claimant, in other words to reflect on his, her or its moral reputation (*character* in a natural person). Second, the article 8 right to reputation is less likely to be relevant in business reputation: [69]

> There is a further reason why cases of business defamation require separate consideration, whether or not there is a separate tort of 'business defamation'. What is at stake in a defamation reflecting on a person's character is now likely to be recognised as engaging that person's rights under article 8. On the other hand, if an alleged defamation engages only a person's professional attributes, then what is at stake is less likely to engage their rights under article 8 but may engage only their commercial or property rights (which are convention rights, if at all, under article 1 of the first protocol).[70]

The High Court of Australia takes the opposite approach. In *Radio 2 UE Sydney (Pty) Ltd v Chesterton*[71] the High Court found that the test for defamation in Australia is simply whether the words are likely to lead an ordinary reasonable person to think the less of the plaintiff, and there is no moral or ethical component to this. The concept of *reputation* in the law of defamation, it held, therefore takes in all aspects of a person's standing in the community. An implication that defames a person in his or her professional or business reputation is simply one that will cause people to think the less of the person in that aspect of his or her reputation.[72]

The Australian decision reflects older values in the law, now overtaken in many common law countries (for example, Canada and the UK) and South Africa by the entrenchment of certain basic rights, whether in a constitution or some other statutory or supra-national instrument. The significance of Tugendhaft J's observation is that, highlighted by the European Convention, the distinction between property and reputation for the purpose of defamation law is now stark: the one is a form of property, the other is an aspect of dignity.

Two relatively recent Commonwealth appellate decisions have re-visited the question as to whether or not a corporation can claim damages in consequence of defamation. As evidence of how difficult this issue has become, both yielded divided courts. In evaluating these cases it must be borne in mind that the question before the courts was not whether *commercial* reputation could be vindicated by way of a defamation action, but whether *trading corporations* could vindicate their reputations by way of *damages* in a defamation action. The first question, of course, is inherent in

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[69] Of the European Convention on Human Rights. This is the article that provides for a right to 'respect' for private and family life.

[70] *Thornton v Telegraph Media Ltd* (n 69) [38].

[71] [2009] HCA 16.

[72] In most Australian states, corporate actions for defamation have been abolished except for defined small corporations whose reputation is inextricably tied up with that of a natural person—see eg s 9 of the New South Wales Defamation Act, 2005. But such statutory interventions are not the common law.

the second, and to that extent the majorities in both courts decided that commercial reputation could be vindicated in a defamation action; by trading corporations as well as by individual traders.

In *Jameel (Mohammed) v Wall Street Journal Europe Sprl*,[73] Lord Bingham (for the majority) articulated the question as being whether or not a corporation 'should be entitled to recover general damages for libel without pleading and proving that the publication complained of has caused it special damage.'[74] As set out above, in the UK the answer to this question had always been in the affirmative. Lord Bingham declined the invitation to change the law by holding the availability of general damages for defamation to a trading corporation not to be in breach of the guarantee of Freedom of Expression in the European Convention of Human Rights, and because a company's good name is of value and a libel may lower its standing in the estimation of the general community. To this he added that libel will not always result in provable loss that could be separately claimed.[75] Lady Hale (with whom Lord Hoffman agreed) followed Tony Weir's insight that a trading corporation is not entitled to damages because it has no feelings that may have been injured and no social relations which may have been impaired.[76] To this, Lord Hoffman added that:

> A commercial company has no soul and its reputation is no more than a commercial asset, something attached to its trading name which brings in customers. I see no reason why the rule which requires proof of damage to commercial assets in other torts, such as malicious falsehood, should not also apply to defamation.[77]

In the South African Supreme Court of Appeal, the majority held that general damages were available to a trading corporation for largely the same reasons as Lord Bingham had in the House of Lords. But Nugent JA, who wrote the minority judgment, struck out, creatively, in a novel direction.[78]

Starting conventionally, he held that a trading corporation does have a protectable interest in its reputation, but then held that it did not follow that this interest could be vindicated by way of general damages as a form of redress.[79] In other words he questioned whether 'damages may be awarded to vindicate that right'.[80] Noting that

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[73] *Jameel (Mohammed) v Wall Street Journal Europe Sprl,* [2006] UKHL 44.

[74] ibid [11]. The issue as to whether special damages must be pleaded and proved as a prerequisite to qualify for an award of *general* damages is peculiar to the common law (and does not exist in Roman-Dutch law), and is illogical. As has been argued above, if special damages have been suffered, they must be recovered by way of one or other of the economic torts (such as a fraudulent or malicious misrepresentation or deceit) and if they are merely to serve as evidence of a diminution of a trading reputation, then they are illogical and impermissible as a double-recovery of the same loss.

[75] ibid [26].

[76] ibid [154].

[77] ibid [91].

[78] *Media 24 Ltd & Others v SA Taxi Securitisation (Pty) Ltd*, 2011 (5) SA 329 (SCA).

[79] ibid 352.

[80] ibid [78].

damages are designed to compensate for loss, he found that the loss in defamation was purely emotional: 'what is compensated for is harm to feelings'.[81] As juristic persons do not experience feelings,[82] Nugent JA reasoned further that he was therefore 'not able to picture any loss that might be sustained by a trading corporation that is defamed—if there is loss at all—that does not sound in property, no matter how indirectly or remotely that loss might be brought about.'[83] And if it is a loss to property, then it could not be recovered with an action for defamation because that would be an action for pecuniary loss. In this, his reasoning is indistinguishable from that of both Lady Hale and Lord Hoffman in the House of Lords. Nugent JA therefore found that it was not possible for a trading corporation to sue for anything other than property and therefore any damages claimed by a trading corporation were special damages claimable only by way of the appropriate economic tort (or delict) as set out by Brandt JA in the SCA majority judgment.

In order to test his proposition, Nugent JA turned to the presumption of damages and found that when the reputation of a person is harmed, the law presumes a loss that is compensable by general damages. The same presumption, applied to a trading corporation, would then presume a different kind of loss which must necessarily be a loss of some form of property.[84] He concluded by stating that:

> I find myself driven to conclude that damages for defamation of a trading corporation, if no actual loss is proved, can only be said to be punitive, for no reason but that the contrary cannot be shown. Even if proof of unquantified property loss were to be shown, the defamer is entitled to complain that he or she is being punished, at least to a degree, because it is not capable of being shown that the damages do not exceed that unquantified loss.[85]

As punitive damages are not part of South African law, this meant that a trading corporation could not vindicate its reputation by way of a damages award, but would require some kind of other relief.

The major logical flaw in this reasoning (as with the House of Lords' minority) was to make human feelings or distress the distinction upon which to hang the argument, as opposed to a juxtaposition between moral reputation and commercial reputation. There are three reasons for this. First, and as set out above, distress is or should no longer be the basis of a defamation action and, in South Africa at least, has for many years been of diminishing importance. Second, the true distinction is between a moral reputation (or character) and a commercial reputation. This must be so because if it were otherwise then, on Nugent JA's reasoning (as with Lord Hoffman in the House of Lords), individual persons could claim damages for their commercial reputations, but not

81 ibid [79].
82 ibid [80].
83 ibid [82].
84 ibid [88].
85 ibid [100].

trading corporations. Why one trading reputation can be vindicated by way of damages, but not another, is nowhere satisfactorily explained. Third, in failing to acknowledge that damages in defamation are also—and always have been—designed to vindicate reputation, these judgments lose sight of what defamation actions are about.

This returns us to the dispute as to what reputation is to be protected. Lord Denning and Neill LJ thought that it was anything that affected the way a person was seen by others, but Matthew Collins argues that it is what other people think of a person's *character*. [86] The relevance of this distinction to commercial reputation is immediately apparent: If Lord Denning and Neill LJ are right, then reputation includes a person's professional or trading reputation; but if Collins is correct, then reputation, at least for the purpose of defamation law, does not include commercial reputation because a person's competence in a trade or profession, or the quality of goods that he or she offers for sale, or the quality of services that he or she offers, does not reflect upon his or her character at all.

Collins is correct in his understanding of reputation for the purpose of defamation law as limited to character. Good reputation in defamation law is presumed, but it is surely obvious that a commercial reputation in the sale of goods or services must be *earned* in the marketplace, and cannot be presumed. It is equally obvious that a commercial reputation is subject to flux, depending on other competing products and services, all of which must be the cause of comparison, comment and criticism from consumers. Goods and services are supplied in a competitive market. An ineluctable aspect of that market is the opinion of consumers as to their merits and de-merits and their merits or de-merits in comparison with other goods and services. This is the province of competition, and competitors are protected against lies by the economic torts in the common law (malicious falsehoods or deceit) and unfair or unlawful competition in Roman-Dutch law (also malicious and negligent falsehoods). Any law going further than this, as defamation law does, interferes with free competitive speech and, most offensively, confers on a claimant the advantages of the presumptions of defamation law in protecting what is, in effect, patrimony or property. Commercial reputation, then, is not the interest protected by the law of defamation and its diminution can therefore not attract damages or any other remedy.

But does this completely non-suit corporations as Nugent JA and Lord Hoffman (in particular) thought it did? Their view rested on the predicate that a corporation, having no feelings to injure, had no action *for damages* in defamation law because it had no reputation beyond what could be seen as its property (ie goodwill) and therefore that could only be vindicated as property in terms of other causes of action.

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[86] This issue is, slightly frustratingly, omitted from Lawrence McNamara's otherwise magisterial work on reputation where he argues that the reputation protected by the law of defamation is a person's moral reputation (consistently with Matthew Collins), but adds that the book does not consider the question of commercial reputation (*Reputation and Defamation* (OUP 2007) 7–8).

This is too reductionist a view. First of all, it is clear that individual professionals and traders—doctors, electricians, etc.—have two reputations: A commercial reputation in their trade or profession and a more general estimate of their characters (as Collins would put it). The latter is not commercial property and is the proper concern of defamation law and any individual, whatever his or her profession or calling, can sue to vindicate this reputation. This is obvious as regards individuals. But do corporations have a similarly bi-polar reputation? Neither Lord Hoffman nor Nugent JA could conceive of any aspect of a corporate entity's reputation that was not goodwill, and therefore property, and so they were of the view that corporate entities could not sue for damages in defamation.

This may be true of many trading corporations, and it may be true much of the time. But it is manifestly not a universal rule that can be converted into a doctrinal ban on corporations seeking to vindicate any non-trading aspect of reputation by way of damages. For instance, at the entrance to Cape Town International Airport there was for some years a large billboard advertising the fact that a multinational mining conglomerate provided free medicines for its employees who were HIV-positive. That would have been seen by millions of tourists and business travellers, both from Cape Town and elsewhere in the world, and engendered the reputation of a concerned and socially responsible employer. But very few (if any) of those millions of viewers would have been customers (who, typically, are national governments, national utilities and other industrial conglomerates; and who, equally typically, trade on price, quality and reliability of delivery only). So the reputation engendered by the advertisement adds nothing to the multinational conglomerate's trading reputation, but does give it a reputation akin to an individual's moral character amongst a community who are not customers and never will be customers.

There can be no doctrinal or conceptual bar to a corporation vindicating such a reputation in an action for damages and, of course, those judges arguing that corporations ought not to be permitted general damages for defamation do so simply because they could not conceive that a trading corporation could have, as it were, a non-trading reputation over and above what can conveniently be called goodwill. But if they are wrong in that predicate, as it is argued they are, then the availability of general damages to a trading corporation in the law of defamation follows logically.

Conclusion

Pulling all of this together, general damages for reputation are an appropriate remedy for the vindication of non-commercial reputation, whether of an individual or of a trading corporation; but a trading reputation and business losses (whether suffered by a natural person or trading corporation) must be recovered elsewhere in torts or delicts that provide protection for property and do not confer the advantages vesting in a defamation plaintiff on anyone seeking to recover proprietal loss. The reason for this, as argued more fully above, is that business losses are not the proper concern of the law

of defamation and must be recovered under torts or delicts that do not confer on the claimant the unusual advantages enjoyed by a defamation claimant; and a trading reputation is also property, equally not the concern of defamation law, and compensable only as a business loss; finally the general damages that are recoverable in a defamation action ought to be limited to the vindication of the right or interest protected by the law of defamation—(non-trading) reputation; which means that there is no place for *solatia* or punishment.

If recoverable damages are limited in this way, the law will be greatly simplified, and easier to apply consistently within each jurisdiction, it will become more predictable and, all in all, will therefore have a less 'chilling' effect on speech. In particular, such an approach will give better effect to the various entrenched rights to Freedom of Expression in the increasing number of countries where it is entrenched.

Anne SY Cheung

Defaming by suggestion: Searching for search engine liability in the autocomplete era

Whilst different jurisdictions have yet to reach consensus on search engines' liability for defamation,[1] Internet giant Google is confronting judges and academics with another challenge: the basis of liability for defamation arising from its Autocomplete function.[2] With Autocomplete, Google no longer merely presents us with snippets, excerpts of relevant webpages originating from third-party websites, after we type in our search queries. Rather, it suggests associated search words and terms to us before we even complete typing the words as originally planned, and before we even press 'Enter'. By constantly altering the query based on each additional keystroke in the search bar, Autocomplete changes the way search queries are generated.[3] In other words, Google anticipates, predicts, or even feeds us ideas, and may redirect our interests in the process of our search attempts. For instance, if one had searched several years ago for Bettina Wulff, the wife of former German President Christian Wulff, terms such as 'escort' and 'prostitute' would automatically have been paired up with her name in the Google search box. One can only imagine the surprise of the unsuspecting reader who had no idea of the rumour that Wulff had once been an escort, let alone the distress of Wulff herself.[4] Although most jurisdictions are reluctant to hold search engines liable for defamation, judges seem to hold different views when it comes to such liability in the case of Autocomplete.[5]

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[1] For the positions of the UK, Australian, New Zealand, and Canadian courts, see Susan Corbett, 'Search Engines and the Automated Process: Is a Search Engine Provider "A Publisher" of Defamatory Material?' (2014) 20 *New Zealand Business Law Review* 200.

[2] The other technology companies that have developed algorithms for providing search suggestions based on input to search fields include Bing, Yahoo! and DuckDuckGo. These techniques are referred to as autosuggest or incremental search.

[3] Seema Ghatnekar, 'Injury by Algorithm: A Look into Google's Liability for Defamatory Autocompleted Search Suggestions' (2012–13) 33 *Loyola of Los Angeles Entertainment Law Review* 171, 178.

[4] Bettina Wulff sued Google for defamation in 2012 for linking her name with 'escort' and 'prostitute', and the lawsuit was settled in 2012. 'Autocomplete-Funktion: Bettina Wulff und Google einigen sich' Spiegel Online, 16 January 2015 <http://www.spiegel.de/netzwelt/web/bettina-wulff-und-google-einigen-sich-aussergerichtlich-a-1013217.html>.

[5] Google was held liable for defamation for its autocomplete function by the Japanese court and the Italian court. Tim Honyak, 'Google Loses Autocomplete Defamation Suit in Japan' CNET, 16 April 2013 <http://www.cnet.com/news/google-loses-autocomplete-defamation-suit-in-japan/>. For a discussion of similar litigation in France (Cour de cassation – Premiere chamber civile, Arret n° 832 du 12 Juillet 2012

In 2014, for example, the Hong Kong Court of First Instance held that a claimant whose name was often paired with 'triad member' in Autocomplete had a good arguable case of defamation to proceed with and dismissed a claim of summary dismissal application made by Google in *Dr Yeung Sau Shing Albert v Google Inc*.[6] Earlier, in 2013, the Federal Court of Germany held Google to be liable for violating a plaintiff's personality rights and reputation for associating his name with 'fraud' and 'Scientology' in an Autocomplete search in *RS v Google*.[7] Are these decisions justified?

Most of us are likely to be hesitant in holding Google liable for defamation based on its search engine results. After all, nearly all of us are indebted to search engines, and our lives would be considerably more difficult without them. Search engines are powerful intermediaries that enable Internet users to identify and locate information from the gigantic volume of data that has flooded cyberspace. The World Wide Web is made up of over 60 trillion individual pages,[8] with more than three billion Internet users, every one of whom is a potential contributor.[9] In the face of such daunting amounts of information, search engines play an indispensable role in identifying the best and most useful information for us. Yet, when search engines not only deliver potentially defamatory search results to us upon request, but actually suggest defamatory ideas to us, a different framework of legal analysis may be called for.

The legal debate over the liability arising from the Autocomplete function captures the empowering and forbidding power of search engines. In examining the legal reasoning behind the Hong Kong case of *Yeung v Google* and the German case of *RS v Google*, and comparing the two, this chapter argues that the orthodox approach to fixing responsibility for defamation, based either on the established English common law notion of publisher or innocent disseminator or the existing categories of passive host, conduit and caching in the relevant European Union Directive, is far from adequate to address the challenges brought about by search engines and their Autocomplete function.[10] Whilst orthodox common law is strict in imposing liability in the case of a person's participation in publication, and is fixated on identifying his or her state of knowledge and extent of control in the defamation action, the European Union approach

(11-20.358), Italy (Tribunale Ordinario di Milano, 24 March 2011, 10847/2011), Aurelia Tamo and Damian George, 'Oblivion, Erasure and Forgetting in the Digital Age' (2014) 5 *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 71.

6 *Dr Yeung Sau Shing Albert v Google Inc.,* HCA 1383/2012 (5 August 2014).

7 *RS v Google* is the author's formulation for easy reference. The official citation of the judgment is BGH, 14.05.2013, VI ZR 269/12. For English version, German Federal Court of Justice, 'Liability of Search Engine Operator for Autocomplete Suggestions that Infringe Rights of Privacy: "Autocomplete" Function,' (2013) 8(10) *Journal of Intellectual Property Law & Practice* 797.

8 'How Search Works' <http://www.google.com/insidesearch/howsearchworks/thestory/>.

9 Internet Usage Statistics, 'The Internet Big Picture: World Internet Users and 2014 Population Stats' <http://www.internetworldstats.com/stats.htm>.

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, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') [2000] OJ L178/1, arts 12–15.

is preoccupied with the over-simplified binary of seeing an intermediary as either an active or passive entity. The legal challenge posed by search engines, however, stems from the fact that they run on artificial intelligence (AI).[11] Autocomplete predictions are automatically generated by an algorithm effectively using more than 200 signals to extrapolate information from the Internet, and then generating likely predictions from each variant of a word.[12] The process takes place automatically, although the design of the algorithm is frequently updated and modified by engineers. In the entire process, Google retains control in generating its search results.[13] The legal issue should be redirected towards examining the possible role played by the algorithm creators in the content or result generated. Thus, this chapter argues that, in its Autocomplete function, Google indeed plays a unique role in contributing to defamatory content. Although the Hong Kong Court has not delivered any definitive answer on the role and liability of Google Inc. in a summary application, the German Court has rightly recognised the novel legal challenge that search engine prediction technology presents and treated search engines as a special intermediary processor. As explained earlier, an Autocomplete suggestion responds to a search query in a unique way with the mere input of each additional stroke and without the user completing his or her query. In this 'search-in-progress',[14] Google is neither entirely active nor entirely passive, but rather interactive. Thus, imposing liability on Google in a defamation action based on its Autocomplete function is justified in a notice-and-takedown regime when a substantive complaint has been made.

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[11] Artificial intelligence refers to the programming and performance of computers used both for problem-solving across a wide range of intellectual, engineering, and operational tasks and as a tool in psychology for modelling mental abilities. It is concerned with the building of computer programmes that perform tasks requiring intelligence when done by humans, including game playing, automated reasoning, machine learning, natural-language understanding, planning, speech understanding and theorem proving. See 'Artificial Intelligence' in John Daintith and Edmund Wright, *A Dictionary of Computing* (6th edn, OUP 2008).

[12] Magazine Monitor, 'Who, What, Why: How Does Google's Autocomplete Censor Predictions?' BBC, 5 February 2015 < http://www.bbc.com/news/blogs-magazine-monitor-31131920>.

[13] The ways that Google can manipulate search results can be seen in a report by the US Federal Trade Commission investigation. Federal Trade Commission, 'Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns In the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search' (3 January 2013) <https://www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc>. For discussion of litigation challenging Google's practices in the US, Tansy Woan, 'Searching for an Answer: Can Google Legally Manipulate Search Engine Results?' (2013) 16 *University of Pennsylvania Journal of Business Law* 294.

[14] Smith argues that a distinction should be drawn between a search-in-progress and a completed search. Google materially contributes in the former but not in the latter. Michael L Smith, 'Search Engine Liability for Autocomplete Defamation: Combating the Power of Suggestion' (2013) *University of Illinois Journal of Law, Technology and Policy* 313, 329.

Search engine and autocomplete as publisher: *Yeung v Google*

In *Yeung v Google*, the plaintiff sued Google Inc. for providing defamatory predictive suggestions through its search engine's Autocomplete and Related Searches features.[15] Whenever users typed Yeung's name (Albert Yeung Sau Shing) into Google in English or Chinese, Google Autocomplete instantaneously and automatically generated a list of search suggestions in a drop-down menu before they clicked on the search button, some of which linked Yeung to the names of specific triad gangs and serious criminal offences. Likewise, when users typed his name into Google's search box, characters or words related to triad societies were generated as outcome / results under a list of Related Searches.[16] The plaintiff is a well-known businessman in Hong Kong and the founder of a company that engages in various business sectors, including entertainment and films, and manages a number of Hong Kong celebrities. Yeung was understandably upset by the Google search results and suggestions, and accordingly made a defamation claim against Google Inc. and sought an injunction to restrain it from publishing and / or participating in the publication of alleged libellous material.[17] More specifically, he demanded that Google remove or prevent defamatory words from appearing or reappearing in any current or future Google searches.[18] As Google Inc. is a US-based company, the plaintiff had to apply for leave to serve the writ of summons out of jurisdiction in the US.[19] It was therefore necessary for Yeung to demonstrate that he had a good arguable case involving a substantive question of fact or law to be tried on the merits of his claim.[20]

Although Justice Marlene Ng of the Hong Kong High Court delivered only a summary judgment, her reasoning was detailed (filling 100 pages) and centred largely on whether Google Inc. should be considered the publisher of the suggestions or predictions that appear in Autocomplete and Related Searches.[21] The defence counsel's major argument was that Google Inc. is not a publisher, as no human input or operation is required in the search process, but is rather a mere passive medium of communication.[22] However, Justice Ng was not convinced, and subsequently ruled that there was a good arguable case for considering Google Inc. as a publisher.

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15 *Yeung v Google*, HCA 1383/2012 [5].

16 ibid [4b]. Google Inc. stopped running the Related Searches feature in 2013. Barry Schwartz, 'Google Pulls Related Searches Filter Due To Lack Of Usage' (2013) <http://searchengineland.com/google-pulls-related-searches-filter-due-to-lack-of-usage-156668>.

17 ibid [9].

18 ibid [6].

19 Under Order 11 rule 1(1)(f) of Rules of High Court, ibid [11].

20 ibid [35].

21 Other issues before the Court included whether there was evidence of publication of the defamatory statement to a genuine third party. Justice Ng concluded that publication to any third party would be established regardless of whether that publication was by the procurement of the plaintiff, ibid [20], [41] and [48].

22 ibid [51].

Search engine liability

In defamation cases 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 defamatory material.[23] Under this strict publication rule, a person would be held liable for publishing a libel 'if by an act of any description, he could be said to have intentionally assisted in the process of conveying the words bearing the defamatory meaning to a third party, regardless of whether he knew that the article in question contained those words.'[24] *Prima facie*, the author, editor, publisher, printer, distributor, or vendor of a newspaper is liable for the material therein.[25]

Having said that, common law allows the defence of innocent dissemination for an individual who is not the first or main publisher of a libellous work but who 'in the ordinary course of business plays a subordinate role in the process of disseminating the impugned article.'[26] Well known examples of those who can make such a defence are the proprietors of libraries (*Vizetelly v Mudie's Select Library Ltd*)[27] and newsvendors (*Emmens v Pottle*).[28] To rely on this defence and to be seen as a secondary publisher or innocent disseminator, the defendant must show (1) that he or she was unaware or innocent of any knowledge of the libel contained in the work disseminated by him or her; (2) that there was nothing in the work or the circumstances under which it came to or was disseminated by him or her that should have led him or her to suppose that it contained a libel, and (3) that such want of knowledge was not due to any negligence on his or her part.[29] The onus of proof is on the defendant.[30] In comparison, a primary publisher is one who knows about or can easily acquire knowledge of the content of the article in question and has a realistic ability to control its publication.[31] The Hong Kong Court refers to these two criteria as the 'knowledge criterion' and the 'control criterion'.[32] The former refers to the fact that a publisher must know or be taken to know 'the gist or substantive content of what is being published', although there may be no realisation that the content is actually defamatory in law.[33] The latter points to the

[23] Alastair Mullis and Richard Parkes (ed), *Gatley on Libel and Slander* (12th edn, Sweet & Maxwell Thomson Reuters 2013), para 6.23.

[24] *Yeung v Google* (n 15) [57], quoting *Oriental Press Group Ltd v Fevaworks Solutions Ltd,* [2013] HKCFA 47 [19].

[25] Mullis and Parkes (n 23).

[26] *Yeung v Google* (n 15) [59].

[27] *Vizetelly v Mudie's Select Library Ltd,* [1900] 2 QB 170.

[28] *Emmens v Pottle*, (1886) 16 QBD 354.

[29] The ratio was established in the *Vizetelly* judgment, referred to in *Fevaworks* (n 24) [27].

[30] *Fevaworks* (n 24).

[31] *Fevaworks* (n 24) [76].

[32] ibid.

[33] *Yeung v Google* (n 15) [74].

publisher's realistic ability and opportunity to prevent and control the publication of defamatory content.[34] The liability of the primary publisher is strict, with no defence available.

Armed with the common law principle of strict publication liability, Justice Ng concluded in *Yeung v Google* that Google Inc. is definitely a publisher. Applying the law to the given facts, it was obvious to Justice Ng that Google Inc. is in the business of disseminating information and had, in this case, participated in the publication and dissemination of the alleged defamatory statement.[35] The company has created and operated automated systems that generate materials in a manner it intends, thereby providing a platform for dissemination, encouragement, facilitation or active participation in publication. If Google Inc. is indeed the publisher of its Autocomplete and Related Searches results, the next legal question is whether the company should be considered the primary or secondary publisher. It is this separate issue that proves precisely the limitation of common law in the face of contemporary technological challenges.

'The' common law

What Justice Ng did in the aforementioned case is apply the strict publication rule under an orthodox understanding of common law to an Internet service provider's (ISP) liability. This approach was first propounded in *Oriental Press Group Ltd v Fevaworks Solutions Ltd* by the Hong Kong Court of Final Appeal.[36] The highest court in Hong Kong ruled that a provider of an online discussion forum is a secondary publisher and must bear legal liability for defamatory remarks posted by third parties, with its responsibilities being imposed from the outset, but that it does have recourse to the defence of innocent dissemination.[37] The actual effect of the judgment is that online discussion forum providers now have to remove any alleged defamatory remarks within a reasonable timeframe upon receiving notification from the complainant.[38] The judgment has been cited as a faithful application of orthodox common law principles of publication.[39] Yet, it should be noted that Hong Kong's position constitutes a departure from a leading case in the area of search engine and Internet intermediary liability in England.

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34 ibid [65], [76].

35 ibid [103].

36 *Fevaworks* (n 24).

37 ibid [12], [103].

38 I have argued that although the legal outcome of the *Fevaworks* case is justified, the legal reasoning is far from satisfactory. Anne SY Cheung, 'Liability of Internet Host Providers in Defamation Actions: From Gatekeepers to Identifiers' in András Koltay (ed), *Media Freedom and Regulation in the New Media World* (Wolters Kluwer 2014).

39 Mullis and Parkes (n 23), para 6.29.

The English case that is of direct relevance to the present debate is *Metropolitan Schools Ltd v Designtechnica Corp.*, the judgment on which was delivered by the English High Court in 2009.[40] The claimant, Metropolitan Schools Ltd, was a provider of adult distance learning courses on the development and design of computer games. The first defendant, Designtechnica Corp., hosted web forums that include threads which the claimant said defamed it by accusing it of running a fraudulent practice. Google UK Ltd was another defendant because it published or caused to be published in its search engine a 'snippet' of information linking Metropolitan Schools to the word 'scam'.[41] The claimant demanded removal of the defamatory statements from the web forums and the Google search engine. The fundamental issue before the English High Court was whether Google as a search engine should be held liable for publication under common law.

Justice David Eady ruled that Google was not a publisher at all. Instead of asking whether there had been any participation in publication by Google, as generally seen in orthodox common law analysis, Justice Eady considered that the starting point should be examination of the 'mental element', that is, the defendant's degree of awareness or at least assumption of general responsibility.[42] It was clear to him that Google does not have any mental capacity or the required knowledge because there is neither human input nor intervention when a search is performed automatically in accordance with a computer programme.[43] Search results are generated, he said, by web-crawling robots designed by Google, which then report text matches in response to a search term.[44] Furthermore, in the case in question, Google could not realistically have prevented the defamatory snippet from appearing in response to a user's request.[45]

Justice Eady's position in *Metropolitan Schools Ltd* was consistent with his earlier ruling in *Bunt v Tilley*[46] in which he did not treat ISPs as publishers of defamatory statements in an online discussion forum. Although one may criticise Justice Eady's ruling as an unwarranted departure from orthodox common law principles on publication and defamation,[47] his interpretation of common law is a response to the technological reality of the Internet age. In fact, he examined the rationale behind common law precedents, and further developed the law in light of contemporary challenges and the legislative developments in other European countries. First, he referred to *Emmens v Pottle*, a case dating back to 1885 that established the defence of innocent dissemination for newsvendors.[48] Justice Eady examined the rationale behind

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40 *Metropolitan Schools Ltd v Designtechnica Corp.,* [2009] EWHC 1765.
41 ibid [18].
42 ibid [49].
43 ibid [50]
44 ibid [53].
45 ibid [51].
46 *Bunt v Tilley*, [2006] EWHC 407.
47 Mullis and Parkes (n 23) para 6.27.
48 *Emmens v Pottle* (n 28), discussed by *Metropolitan* (n 40) [49].

the distinction between a publisher and a disseminator. He then commented that analogies are not always helpful, particularly when the law has to be applied to new and unfamiliar concepts.[49] It was plain to him that, as a search engine is not the author of a defamatory statement, and is thus hardly comparable to a printer or newspaper proprietor, it cannot be considered a primary publisher.[50] Equally, it is not a library. At best, in Justice Eady's view, it can be compared to a compiler of a conventional library catalogue, where conscious effort is involved.[51] However, none of these analogies is entirely suited to the modern search engine. Thus, Justice Eady concluded that a search engine does not fit exactly into the category of disseminator. To a certain extent, it is even more innocent than a disseminator in passing on a defamatory statement. In 2009, there were approximately 39 billion web pages and 1.59 billion Internet users.[52] At the time, Google compiled an index of pages from the web, and its Googlebot's automated and pre-programmed algorithmic search processes then extracted information from that index and found matching webpages to return results that contained or were relevant to the search terms.[53] Justice Eady preferred to characterise a search engine as a 'facilitator' based on its provision of a search service.[54]

Second, Justice Eady perused the positions of various national courts on rulings concerning Google's role in defamation as a search engine under European Union Directive 2000/31/EC (better known as the Electronic Commerce [EC] Directive).[55] He found that none of the countries he considered, including France, Spain, the Netherlands, Portugal, and Switzerland, have held Google to be liable for defamation as a result of its search engine results,[56] with some (Portugal, Hungary, and Romania) ruling that Google is only a 'host'.[57] In the end, Justice Eady fixed no responsibility on Google, and did not consider it to be a publisher either before or after notification of the defamatory statement in question.[58] Google was not held liable for the publication of search results, as there was a lack of knowing involvement in publication and the company had no control over those results. With the benefit of hindsight (which will be explained further in the following section), we now know that the extent of Google's control is much more extensive than Justice Eady envisioned it. If this newfound

[49] *Metropolitan* (n 40) [52].
[50] ibid.
[51] ibid.
[52] ibid [7].
[53] For an understanding of how search engine technology works in Google's PageRank, Autocomplete and search feature, Ghatnekar (n 3).
[54] *Metropolitan* (n 40) [51].
[55] 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). The Directive has been transposed into English law by the Electronic Commerce (the EC Directive) Regulations 2002.
[56] *Metropolitan* (n 40) [98], [106], [107], [109].
[57] ibid [100]–[104]
[58] ibid [123].

awareness of the technical ability of the Google search engine had been factored in, different legal reasoning may have been applied and a different legal conclusion reached. At the very least, it is unlikely that Google would have been considered a totally passive medium of communication.

Nevertheless, Justice Eady's practical approach in examining the role of an Internet intermediary and its relation to publication is laudable. His position in considering the state of knowledge of such an intermediary at the forefront of any debate on publication and defamation was endorsed by the Court of Appeal in *Tamiz v Google* in 2012.[59] The English courts need no longer worry about the common law conundrum on the vexing issue of publication for an Internet intermediary following England's legislative reform in 2013.[60] Unfortunately, the Hong Kong courts and those of other common law jurisdictions, which have been provided with no legislative guidelines in this respect, continue to grapple with this unresolved legal issue.

Adhering to the orthodox common law view of a strict publication rule, the Hong Kong Court of Final Appeal parted from the English approach in *Fevaworks*. It thus follows that Justice Ng of the Hong Kong High Court was bound in *Yeung v Google* by local precedent. In addition to relying on Hong Kong authority, importantly, Justice Ng also relied on the Australian authority of *Trkulja v Google Inc. (No. 5)*,[61] in which Justice David Beach of the Supreme Court of Victoria held that there was sufficient evidence upon which a reasonable jury, if properly directed, could return a verdict for the plaintiff and hold Google to be liable for defamation for its search results under orthodox common law principles. In *Trkulja*, the plaintiff was a music promoter who sued Google Inc. for search engine results that had turned up images and an article concerning his involvement with serious crime in Melbourne and alleging that rivals had hired a hit man to murder him. The jury's verdict was that Google Inc. was a publisher of the defamatory material but was entitled to the defence of innocent dissemination for the period prior to receiving notification from the plaintiff. The company contended that the trial judge had a mistaken view of the law on publication and had wrongly directed the jury.[62]

Justice Beach did not accept Google Inc.'s argument, and further declared that *Metropolitan Schools Ltd* and *Tamiz v Google Inc*. do not represent the common law in Australia.[63] He ruled that Google Inc. could be held liable as a publisher because it operates an Internet search engine, an automated system, precisely as intended and has

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[59] *Tamiz v Google*, [2013] EWCA Civ 68 CA. Google Inc. was sued as an operator of the service of a blogger site in relation of anonymous defamatory comments by others. The Court of Appeal found that Google Inc. had only facilitated the publication of blog posts, which could not be construed as it being a publisher. Differing from Justice Eady, the higher court considered that Google's position would be different once it had received a notice of complaint by the plaintiff, which would render it the publisher.

[60] Section 5 Defamation Act 2013 (UK), see discussion Mullis and Parkes (n 23) paras 6.39 and 6.40.

[61] *Trkulja v Google Inc. (No. 5)*, [2012] VSC 533, discussed in *Yeung v Google* (n 15) [97]–[102].

[62] *Trkulja* (n 61) [15].

[63] ibid [29].

the ability to block identified web pages.[64] For this judge, a search engine is like a newsagent or a library, which might not have the specific intention to publish but does have the relevant intention for the purpose of the law of defamation.[65]

Convincing as that reasoning may have been to Justice Ng of the Hong Kong court, she did not have the benefit of the more recent decision in *Bleyer v Google Inc.*[66] delivered by the Supreme Court of New South Wales in Australia. In *Bleyer*, the plaintiff sued Google Inc. for its search engine results turning up seven items defamatory of him and delivering them to three people. Google Inc. sought an order to permanently stay or summarily dismiss the proceedings as an abuse of process.[67] In addition to the issue of disproportionality between the cost of bringing an action and the interest at stake, Justice Lucy McCallum had to determine the applicable law on defamation for search engines. After reviewing the English authorities in *Metropolitan Schools Ltd* and *Tamiz v Google*, and the Australian in *Trkulja*, Justice McCallum decided to follow the former and to distinguish the case before her from *Trkulja.*[68] She ruled that there was no human input in the application of Google's search engine apart from the creation of the algorithm, and thus that Google could not be held liable as a publisher for results that appeared prior to notification of a complaint.[69] Like Justice Eady, she relied on the landmark authority of *Emmens v Pottle* (the first challenge to the role of a newsvendor in defamation cases) and reiterated that 'for a person to be held responsible there must be knowing involvement in the process of publication of *the relevant words.* It is not enough that a person merely plays a passive instrumental role in the process.'[70] Further, she expressed reservations about viewing Google Inc. as playing the role of secondary publisher, facilitating publication in a manner analogous to a distributor.[71] In Justice McCallum's view, an Internet intermediary does no more than fulfil the role of a passive medium of communication and should not be characterised as a publisher.[72] She distinguished the decision in *Trkulja* from hers in *Bleyer* on the grounds that the former was based on *Urbanchich v Drummoyne Municipal Council*,[73] which concerned the liability of the Urban Transit Authority in failing to remove defamatory posters placed on its bus shelters after receiving notice of the plaintiff's complaint. As a result, Justice McCallum concluded that it was clear that Google Inc. was not liable as a publisher, and ordered the proceedings to be permanently stayed.[74]

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64 ibid [27].
65 ibid [18]–[19].
66 *Bleyer v Google Inc.,* [2014] NSWSC 897.
67 ibid [2].
68 ibid [66], [72], [76].
69 ibid [71], [78].
70 ibid [67].
71 ibid [78].
72 ibid [68].
73 Unreported, Supreme Court of New South Wales, 22 December 1988, discussed in *Bleyer*, ibid [75].
74 *Bleyer*, ibid [95].

Regardless of whether one agrees with Justice Eady's or Justice McCallum's analysis and conclusions, both have applied common sense and fairness to examining the role of an Internet intermediary and its automated search engine system in the context of the debate over publication and defamation. As one critic comments, 'not every act of dissemination can or should lead to liability for publishing defamatory matter.'[75] The fundamental concept of publication in the Internet era must be carefully explored.

Autocomplete and related searches

Returning to our analysis of *Yeung v Google*, all of the cases discussed thus far concern the liability of a search engine but do not directly address Google's Autocomplete and Related Searches functions. Interestingly, and significantly, when Justice Ng focused on these particular functions, she characterised the question as one of 'whether they [search engines] are an information provider with a neutral tool or whether they act beyond the scope of simply making information publicly available.'[76] In her view, the 'more fundamental question' is: 'as a matter of general tort principle, should or should not a person / entity remain responsible in law for acts done by his / her tool, and what are the limits of such liability (if any)?'[77] The focus in this part of her judgment switches from Google Inc.'s mere participation in publication to its instrumentality in the publication of the suggestions or predictions on its website.

The defence counsel argued that Google Autocomplete should be seen as a neutral tool because Google Inc. has adopted an algorithm that requires no human input, and is thus a mere passive facilitator.[78] He explained that the predictions or suggestions are drawn from the universe of previous users' searches,[79] with Autocomplete turning up the most relevant or most frequently searched results. Google Inc. could not police or manually interfere with the huge volume of webpages it crawls, has no control over the search terms entered by users and is unaware of predictions or search results at the time each search is conducted.[80] In addition, he further argued that the predictions or suggestions generated in the case in question did not reflect the ultimate content of the search results, which might confirm or dispel rumours of the plaintiff's triad connections.[81]

Rather than seeing Google Autocomplete as playing a passive role, however, Justice Ng considered that Google Inc. 'recombines' and 'aggregates' data from web content,

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[75] David Rolph, 'Australia: A Landmark Judgment' (28 August 2014) <https://inforrm.wordpress.com/2014/08/28/australia-a-landmark-judgment-david-rolph/>.

[76] *Yeung v Google* (n 15) [115].

[77] ibid [120].

[78] ibid [111].

[79] ibid [113].

[80] ibid [109], [113].

[81] ibid [112].

'reconstitutes' aggregations based on what other users have at one time typed and then 'transforms' that data into suggestions and predictions.[82] She cast serious doubt on the claim that Google Autocomplete is a neutral tool, given that its algorithms are 'synthesising and reconstituting input query data by previous users and web content uploaded by internet users before publishing them.' Furthermore, she highlighted a number of Google Inc. practices, such as launching 516 improvements to its searches in a single year, censoring materials, manually editing results to improve the user experience, removing pages from its index for security reasons, interfering with search results for legal reasons (eg removing child sexual abuse content or cases of copyright infringement) and deleting spam.[83]

At this juncture, one might have thought that Justice Ng was referring to the extent of control that Google Inc. has and could have exercised in the case in question. However, immediately after outlining this active role of Google Inc., her analysis turned to a discussion of the company's knowledge, the other essential element in the defamation debate concerning whether a defendant is a primary or secondary publisher. In rebutting the defence counsel's argument that, because of automation, Google Inc. could not be said to be aware of the predictions or search results generated by its own design, Justice Ng reiterated that

> under the strict publication rule, the requisite mental element is not knowledge of the defamatory content or any intent to defame, but rather whether the defendant has actively facilitated or intentionally assisted in the process of conveying the material bearing the defamatory meaning to a third party, regardless of whether he knew that the material in question is defamatory.[84]

With the control exercised by Google Inc. being obvious, and the required mental element also present, the only logical conclusion in this case was that there was 'plainly a good arguable case' against Google Inc. and that Google Inc. was not a mere passive facilitator.[85] Yet, Justice Ng stopped short of pursuing any further analysis of whether the company should be seen as a primary or secondary publisher.

Whilst Justice Ng was perfectly justified in putting the legal discussion on hold, as her task was simply to decide whether a good arguable case could be established, any further analysis of liability for Google Autocomplete results based on whether Google Inc. is a primary or secondary publisher is likely to stretch common law analysis. On the one hand, Autocomplete passes on information, including (or despite the presence of) defamatory statements, exactly as intended by Google Inc.'s computer engineers and algorithm designers. The argument that the company lacks knowing involvement in publication and has no control over the result of searches is no longer persuasive. Arguably, Google Inc. and its Autocomplete function are more like a primary (than secondary) publisher, for which the defence of innocent dissemination is of no avail.

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[82] ibid [116].
[83] ibid [116], [118]
[84] ibid [119].
[85] ibid [121].

However, the legal consequences of such a ruling would simply be too drastic, as it would mean that Google Inc. would have to stop offering that function to avoid any further defamation lawsuits.

On the other hand, to hold that Google Inc. is a secondary publisher would mean that the company plays only a subordinate role in disseminating defamatory statements, that it does not know or could not by the exercise of reasonable care be expected to know that publication of given content is likely to be defamatory and that it has no realistic ability of controlling such publication. In *Yeung v Google*, Justice Ng, who identified the requisite state of mind and degree of control that Google Inc. has with regard to Autocomplete, clearly felt some sympathy for the company, hinting that it could invoke the defence of innocent dissemination when the defence counsel raised the potential constitutional challenge to freedom of expression and chilling effect on its exercise.[86] If Google Inc. is an innocent disseminator, then it can be held liable for a defamatory statement only after receiving notice. Reaching such a conclusion certainly absolves Google Inc. of extensive liability as a primary publisher, but it runs contrary to the company's actual involvement in reality. Justice Ng's ruling in this case risks being seen as an outcome-driven legal decision.

In the context of Autocomplete, one has to admit that Google Inc.'s involvement is not extensive enough to render it akin to an author or editor. Yet, it clearly plays a more active role than that of a secondary publisher merely facilitating publication in a manner analogous to a library or post office. Unless the unique role of a search engine and its Autocomplete function is recognised in passing judgment in defamation cases such as this one, orthodox common law legal analysis will remain in limbo in this important area.

Autocomplete as unique 'processor': *RS v Google*

The German Federal Court, in contrast, has recognised the specific role and contribution of Google Autocomplete in legal infringement, and engaged in a different type of legal analysis in the case of *RS v Google*. The legal dispute involved a businessman suing Google Inc. in Germany for displaying the terms 'Scientology' and 'fraud' (*Betrug*) in Google's Autocomplete predictions whenever his (full) name was typed.[87] The plaintiff was the founder and chairman of a stock corporation that sold food supplements and cosmetics on the Internet through a network marketing system. He sought an injunction to prohibit Google from suggesting the combination of such terms, arguing that doing so was an infringement of his personality rights (*Persönlichkeitsrecht*)[88] and harmed the

[86] ibid [140].

[87] *RS v Google* (n 7).

[88] Although the English translation of the judgment uses the term 'rights of privacy', the German version uses the term *Persönlichkeitsrecht*, which is closer to 'personality rights'.

reputation of his business. A preliminary injunction was initially granted, but Google Inc. refused to issue a final declaration. Whilst the Cologne Higher Regional Court ruled in Google's favour and held that no conceptual or comprehensible meaning could be attached to the aforesaid Autocomplete suggestions, the German Federal Court of Justice (*Bundesgerichtshof*) ruled otherwise.[89]

The assessment of injunctive relief was examined by the Federal Court under Articles 1 and 2 of the German Basic Law (*Grundgesetz*)[90] in conjunction with Sections 823(1) and 1004 of the Civil Code (*Bürgerliches Gesetzbuch*)[91] and Article 7(1) of the German Telemedia Act.[92] The Federal Court engages a five step analysis in looking into (1) the infringement of personality rights; (2) the causal link between such infringement and the plaintiff's right; (3) the unlawfulness of the infringing act; (4) the extent of Google Inc.'s liability, and (5) the nature of injunctive relief to be granted.

The infringement of personality rights

As a first step, the Federal Court had to establish whether there was an infringement of personality rights. Under German Basic Law, Article 1(1) protects one's dignity, whilst Article 2(1) protects the free development of one's personality. The scope of personality rights is manifold, including protection against untrue assertions and the portrayal of any distorted picture of an individual in public.[93] The plaintiff in *RS v Google* claimed that he had never been involved with Scientology and had never been accused of, or investigated for, any fraudulent activities. Rather than viewing the terms 'Scientology' and 'fraud' as devoid of any meaning, as the Cologne Court had done, the Federal Court

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[89] German Federal Court of Justice (n 87) [4].

[90] Bundesministerium der Justiz und für Verbraucherschutz, Basic Law for the Federal Republic of Germany <http://www.gesetze-im-internet.de/englisch_gg/>.

[91] Bundesministerium der Justiz und für Verbraucherzchutz, German Civil Code <http://www.gesetze-im-internet.de/englisch_bgb/>.

Section 823 of the Civil Code states one's tortious liability in damages. It stipulates that:—

(1) A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this.

(2) The same duty is held by a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it may also be breached without fault, then liability to compensation only exists in the case of fault.

Section 1004 of the Civil Code is on a claim for removal and injunction. It stipulates that:—

(1) If the ownership is interfered with by means other than removal or retention of possession, the owner may require the disturber to remove the interference. If further interferences are to be feared, the owner may seek a prohibitory injunction.

(2) The claim is excluded if the owner is obliged to tolerate the interference.

[92] BGBl. I, 1870.

[93] Corinna Coors, 'Reputations at Stake: The German Federal Court's Decision Concerning Google's Liability for Autocomplete Suggestions in the International Context' (2013) 5 *Journal of Media Law* 322, 323.

considered that connecting the terms with the name of a real person could give rise to a meaningful association and negative connotation.[94] The average reader would be likely to link the plaintiff with the sect and with the morally reprehensible action of taking advantage of another upon seeing the terms in combination.[95] The Federal Court ruled that it would be only natural for Internet users to conclude that there was an objective link between the plaintiff and the derogatory words upon viewing the Autocomplete results.[96] As a result, the Federal Court concluded that the plaintiff's rights of personality had been encroached.

The causal link between infringement and the plaintiff's rights

In the second step, the Federal Court ruled that Google Inc. was directly responsible for infringing the plaintiff's personality rights.[97] It pointed out that it was Google Inc. that had analysed user behaviour using computer programmes it had developed and it was also Google Inc. that had made the corresponding suggestions to users.[98] Those suggestions were not arbitrary results from an 'ocean of data' (direct quote from the Federal Court judgment).[99] Further, the objectionable terms had been combined by the search engine, not by a third party.[100] The Court pointed out that the search engine had been designed by Google Inc. in a specific manner, namely, in such a way that predictions developed search queries further through a search programme driven by highly complex algorithms. Hence, search queries previously typed could later present Internet users with a combination of the terms most frequently entered in relation to the search terms in question.[101] Besides, the predictive terms had been made available on the Internet by Google Inc., and the Court thus ruled that they originated directly with Google Inc.[102] Since Google Inc. has provided the predictions over the Internet by means of its search engine without involving any third party, the infringement can be directly attributed to Google Inc. Yet, the Federal Court reminded us that establishing infringement and causality do not yet permit drawing the conclusion that Google Inc. is liable 'for each and every infringement of rights' of personality through search engine predictions.

94 German Federal Court of Justice (n 87) [33].
95 ibid [14].
96 ibid [16].
97 ibid [17].
98 ibid [17]
99 ibid [16]
100 ibid [17].
101 ibid [16].
102 ibid [17].

The unlawfulness of the infringement

Under German law, interference with rights of personality is only unlawful where the interests of the injured party take precedence over the interests of the defendants.[103] Consequently, the third step of analysis on the unlawfulness of an infringement requires balancing of conflicting rights and interests between the parties to be undertaken.

In examining the rights and interests of Google Inc., the Federal Court stated that Google Inc. could not claim exemption from responsibility under the Telemedia Act because it was a service provider in making its own information available for use.[104] The Court was quick to point out that the plaintiff had not sued Google Inc. for being the conduit of or caching or storing third-party information, which, under Sections 8–10 of the German Telemedia Act, the defendant would bear limited responsibility for. Instead, the plaintiff sued the company specifically for the search term predictions generated by its Autocomplete function, in other words for the search engine's 'own' content (direct quote from the Court).[105]

Although the plaintiff's rights to personality have been infringed by Google Inc., a comprehensive balancing of fundamental rights and conflicting interests needs to be undertaken under the principles of the European Court of Human Rights and the German Constitution.[106] The court weighed the rights of personality of the plaintiff (Articles (2) and 5(1) of the Constitution) against the defendant's rights of personality, freedom of speech and freedom to do business (Articles 2, 5(1) and 14 of the Constitution). In the Court's opinion, due to the untrue character of the statement in question, the plaintiff's interest clearly prevailed.[107]

Based on this reasoning, it was ruled that Google had 'somehow contributed towards' causing 'the unlawful impairment in an intentional and adequately causal manner' and could be held as a co-liable party because it had the legal possibility of preventing the infringing act under Section 1004 of the Civil Code.[108] Whether the defendant could be considered the offender or an accessory in the circumstances was irrelevant, particularly if it had the legal possibility of preventing the act. Liability here is strict in the sense that the defendant need not be aware of the circumstances giving rise to the offence and its unlawful nature, and fault is not required.[109]

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103 ibid [21].
104 ibid [20].
105 ibid.
106 ibid [21].
107 ibid [22].
108 ibid [24]. German Civil Code (n 91).
109 German Federal Court of Justice (n 87) [24].

The extent of Google Inc.'s liability

More significant to our present analysis is the fourth step of analysis on the extent of Google Inc.'s liability. Despite the fact that the Federal Court has ruled that Google Inc. is a co-liable party irrespective of its fault, it also made it clear that Google Inc. is not 'liable unreservedly'.[110] The Federal Court highlighted the role of a search engine under the Telemedia Act, which bears close resemblance to the aforementioned EC Directive.[111] The EC Directive defines the circumstances in which Internet intermediaries should be held accountable for material that is hosted,[112] cached[113] or carried by them but which they did not create. In effect, it provides a 'safe haven' allowing an exemption to ISPs' liability when they are merely conduits,[114] unless they have actual knowledge of unlawful activity or information,[115] but have failed to act expeditiously to remove the offending materials.[116] Under the EC Direction framework, there is no general duty on ISPs to monitor information that passes through or is hosted on their system (Article 15). The critical issue before the Federal Court in *RS v Google* was how to fit a search engine and its Autocomplete function into the existing framework.

Accordingly, when the Federal Court ruled in favour of the plaintiff, it was considering Google Inc. to be a content provider in offering word combinations, predictions and suggestions through its Autocomplete function. The Court reasoned that Google Inc.'s activities were 'not purely technical, automatic, and passive in nature'[117] nor 'confined solely to the making available of information for access by third parties'.[118] If Google Inc. was a content provider, then it would bear the highest standard of responsibility, including a duty to monitor content and remove or disable access to unlawful content (Section 7 of the Telemedia Act).[119] Following this reasoning, the only outcome would be that Google Inc. is no longer able to operate its Autocomplete function, as it would be effectively impossible for the company to carefully monitor the 'ocean of data' in cyberspace to prevent any defamatory predictions from appearing.

Once again, one is caught in an odd legal limbo. Google's Autocomplete is not a passive service provider of the search term predictions and combinations that it offers, and yet it is not the original author or source of defamatory material. It would be unfair

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110 ibid [25].

111 Article 1 of the Telemedia Act states clearly that the Act is to implement Directive 2000/31/EC. For a general discussion of the Act, see Thomas Hoeren, 'Liability for Online Services in Germany' (2009) 10 *German Law Journal* 561.

112 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) [2000] OJ L178/1, art 14.

113 ibid art 13.

114 ibid art 12.

115 ibid art 13.

116 ibid art 14.

117 German Federal Court of Justice (n 87) [26].

118 ibid.

119 Telemedia Act and Hoeeren (n 113).

to an injured party to view Google Inc. as a conduit or mere host of information, and yet it would be equally unfair to Google Inc. to hold it to the highest standard of responsibility as a content provider, which would render it impossible to offer the Autocomplete function. To resolve this difficult dilemma, the German Federal Court opted for a practical approach. It highlighted the fact that Google Inc. Autocomplete 'processes' information in a unique way beyond the existing legal framework of the 'technical process of operating and giving access to a communication network'[120] and that the company's interests and rights are protected by Articles 2, 5(1), and 14 of the German Basic Law. Under the German Constitution, Google Inc. is also entitled to the right of the free development of its personality, to freedom of speech and to freedom to do business.[121]

The nature of injunctive relief to be granted

Due to the various possibilities for an infringement of the 'personality right', the court tried to limit liability to a certain extent and examined a fifth step as to whether it was possible to prevent and reasonably expectable for the defendant to prevent the realisation of the occurrence in question. The court thereby relied on the aspect 'whether and to what extent the party sued can be expected to monitor in the relevant circumstance,' ie the duty to monitor. Thereby the Court distinguished that the search engine operator is not under obligation to monitor prediction in advance for any infractions, but it has to apply a preventive filter for certain areas. Besides, it affirmed a duty to monitor only in cases where it becomes aware of the infringement of rights.

Despite the fact that Google had contributed to the infringement of the plaintiff's personality rights in *RS v Google*, the Federal Court gave weight to the Autocomplete feature being not reprehensible but rather a legitimate business activity.[122] The Court further noted that a search engine does not aim from the outset to infringe any rights or to assert untrue allegations against any person. More specifically, the Court took into account that it was only through the additional element of certain third-party behaviour that derogatory combinations of terms could be generated by the system. Nevertheless, it emphasised Google Autocomplete's role as a processer of users' search queries using its own programme to form word combinations: '[O]wing to the processing it conducts, the defendant is responsible for the terms proposed in the form of predictions.'[123] Consequently, the Court concluded that Google Inc. could be held liable only for failing to take sufficient precautions to prevent the predictions generated by its algorithm from infringing the rights of the plaintiff.[124] Given that Google Inc. has the power and control

120 Recital 42 of the EC Directive (n 10).
121 German Federal Court of Justice (n 87) [22].
122 ibid [22], [26].
123 ibid [26].
124 ibid [27].

to remove and to interfere with word combinations and predictions, it has the obligation to monitor and prevent such infringements in future after it has received notice from a complainant.[125] In sum, the Court formulated the rule of notice-and-takedown for a special type of 'processor'. The case itself was sent back to the Cologne Higher Regional Court for a determination on whether the plaintiff is entitled to pecuniary damages.[126]

Conclusion

In juxtaposing the Hong Kong Court's decision in *Yeung v Google* and the German Federal Court's judgment in *RS v Google*, one realises that the legal challenge posed by Autocomplete lies in its ambivalent nature. Not only does this relatively new algorithm fail to fit with our understanding of what a publisher and innocent disseminator are under orthodox common law dating back to the nineteenth century, but it also sits uncomfortably with contemporary categories of ISPs, that is, passive host provider, mere conduit or content provider, formulated under the European EC model in the twenty-first century. Whilst the German Court made a bold move in recognising Autocomplete as a unique type of processor and imposing upon it a new set of obligations to monitor, block and prevent predictions with defamatory content upon notice of complaint, the Hong Kong Court is faltering along the path of defamation liability under orthodox common law concepts.

In a related debate on the role and liabilities of a search engine in different contexts (defamation, unfair competition and free speech) in the US, academics have urged us to acknowledge the special functions of a search engine and its various features. For instance, James Grimmelmann labels a search engine an 'advisor',[127] and Seema Ghatnekar calls Autocomplete an 'algorithm based re-publisher'.[128] We have all experienced the efficiency of Autocomplete, and in this chapter witnessed how its roles as advisor and re-publisher have been prominently played out in the present legal debate. Google Inc. has indisputably tampered with information transmission in exercising algorithm-based editorial control to actively generate suggestions for users. It has combined not only human input and artificial intelligence, but also the third-party content of search terms from numerous Internet users and its own sophisticated algorithm editing. It certainly has the power to exercise control and curtail results. Perhaps, Autocomplete should be seen as an 'AI processor'. Whatever it is called, until judges or legislators are willing to acknowledge this new 'in-between' creature that can combine the transmission of bits of information with the selection and transformation of content production, there remains a long way to go to reach the ultimate goal and sensible solution of a notice-and-takedown liability regime.

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125 ibid [30].
126 ibid [31].
127 James Grimmelmann, 'Speech Engines' (2014) 98 *Minnesota Law Review* 868.
128 Ghatnekar (n 3) 196.

Zoltán Tóth J

The regulation of defamation and insult in Europe

Introduction

This paper focuses on the review of material criminal law provisions of European legal systems regarding defamation and libel. Several other possible aspects could be taken into account concerning this subject, but doing so would make the analysis far exceed the limits of the essay both in terms of content and of range. As such, this paper covers statements (passing on statements) and acts that injure, or are capable of injuring, the dignity and/or honour of individual persons, as well as the position of various legal systems regarding such statements and actions; this paper does not cover the criminal law means (if differing from the above) of protecting the goodwill of legal persons or any other action violating the freedom of speech (freedom of expression). The possible sanctions for defamation and libel (or the related desecration, where relevant) under legal fields other than criminal law and the implementation of sanctions are not discussed either—this paper focuses on the consequences of these two types of acts from a *criminal law* perspective.

While European legal systems are reviewed in general, the Member States of the European Union and Switzerland—where acts against honour and human dignity are looked upon rather harshly—are given special consideration. The Hungarian rules are not covered in detail; the history, the constitutional status, and a detailed description of the Hungarian regulatory *régime*—noting that the current one penalises a wide range of defamatory actions[1]—is available to interested readers in another

[1] In addition to the three classic forms of defamation, ie defamation (Art 226 of the Criminal Code), insult (Art227) and desecration (Art 228), current Hungarian law also penalises the humiliation of defenceless persons (Art 225), the production of a sound or video recording capable of injuring honour (Art 226/A, CC), the publication of a sound or video recording capable of injuring honour (Art 226/B), and—among military delicts—two other crimes, ie the insult of service authority (Art 447), and the insult of a subordinate (Art 449). Concentrating only on the definitions of the *most important* ones of these offences, the relevant punishable acts under the Hungarian defamatory law are as follows. According to Art 226, any person who engages in the written or oral publication of anything that is injurious to the good name or reputation of another person, or uses an expression directly referring to such a fact, is guilty of defamation. As per Art 227, any person who, apart from what is contained in Art 226, makes a false publication orally or in any other way either tending to harm a person's reputation in connection with his professional activity, public office or public activity, or libellously, before the public at large, shall be punishable for insult. Moreover, any person who engages in an act to defame someone by physical assault shall be punishable in accordance with the preceding provision. As *per* Art 228, any person who violates the memory of deceased persons by the means defined in Arts 226 or 227 is guilty of desecration. And, last but not least, according to Art 225, any person who exhorts another person by exploiting his vulnerability to engage in conduct to humiliate himself is guilty of the crime of 'humiliation of defenceless persons'.

essay.[2] At least one of the acts against personal dignity or honour is penalised in some form under material criminal law in 23 of the 28 EU Member States; such crimes have already been abolished in five Member States,[3] and have been abolished in European states that are not members of the EU: Ukraine in 2001, Bosnia-Herzegovina in 2002, Georgia in 2004,[4] Montenegro in 2011, and Macedonia in 2012, and defamation was abolished but libel was preserved in Serbia in 2012.[5] Defamation has not been punishable in Moldova[6] at statutory level either since 2004.[7] Recently, Tajikistan[8] (2012) and Armenia[9] (2013) abolished the penalisation of defamatory acts. Kyrgyzstan abolished the crimes of defamation and libel in 2007,[10] but defamation has been made punishable again to a limited extent since 2014.[11] Similar acts may be sanctioned by civil law or only with respect to a specific group of persons—subject to conditions laid down by the national laws—in certain EU Member States, including the United Kingdom, Ireland, Estonia, Cyprus and Romania.

The recently unused crimes of defamation were finally abolished in the United Kingdom (in England, Wales, and Northern Ireland to be accurate) by the Coroners and Justice Act 2009[12] in 2009—after blasphemous libel was abolished by the Criminal

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[2] See Zoltán Tóth J, 'A rágalmazás és a becsületsértés Európában és Magyarországon' In András Koltay and Bernát Török (eds), *Sajtószabadság és médiajog a 21. század elején, vol. 2.* (Wolters Kluwer 2015).

[3] International Press Institute, *Out of Balance: Defamation Law in the European Union and its Press Freedom* (July 2014) 12, <http://www.freemedia.at/fileadmin/uploads/pics/Out_of_Balance_OnDefamation_IPIJuly2014.pdf>.

[4] *Press Standards, Privacy, and Libel. Second Report of Session 2009–10*, Vol II (House of Commons Culture, Media and Sport Committee 2010) 430.

[5] International Press Institute (n 3) 12. Crimes against honour and goodwill have a significant practical importance in Serbia (meaning that the abolition of defamation was far more than a mere symbolic act); in 2010, 2,739 cases were taken to court and the defendant was found guilty in 1,125 decided cases (the defendant was acquitted in 1,614 cases). Most of the cases (979) were concluded by paying a fine, while 4 defendants were put on probation, 124 defendants were reprimanded by the court, guilt was established but no punishment was imposed in 16 cases (eg insanity cases), one defendant was sentenced to community service, and imprisonment (for less than six months) was imposed in one case only. See *Statistical Yearbook of Serbia, 2010* (Statistical Office of the Republic of Serbia 2010) 445–446.

[6] Ilia Dohel, 'Freedom from Fear' 2009 (38)2 *Index on Censorship*. <www.osce.org/fom/37714?download=true> See also Jane E Kirtly et al, *Criminal Defamation: An 'Instrument of Destruction'* (University of Minnesota 2003) 7. <www.silha.umn.edu/assets/pdf/oscepapercriminaldefamation.pdf>.

[7] <http://www.lawyer-moldova.com/search/label/memorandum>.

[8] See eg <http://www.rferl.org/content/tajikistan-lower-house-passes-bill-to-decriminalize-libel/24599087.html> as well as <http://www.avesta.tj/eng/goverment/2561-eu-welcomes-decriminalization-of-libel-and-insult-in-tajikistan.html>.

[9] For the result, see Organization for Security and Co-operation in Europe, Office of the Representative on Freedom of the Media, 'Legal Analysis of Law, no 925 of 17 October 2013 Concerning the Defamation Legislation in Italy' (November 2013) 10; for the abolition process, see the Central Asia – Caucasus Institute website: <http://old.cacianalyst.org/?q=node/5327>. For the resulting Armenian Criminal Code without defamation and libel, see <http://www.legislationline.org/documents/section/criminal-codes/country/45>.

[10] See eg <http://www.osce.org/fom/48349>.

[11] See eg <http://www.osce.org/fom/117942>, <http://www.eurasianet.org/node/68388>.

[12] The act entered into force in January 2010.

Justice and Immigration Act in 2008;[13] for comparison, the Defamation Act 2013 only amended the conditions of awarding compensation for damages under civil law.[14] In Ireland, the Defamation Act 2009[15] also abolished the penalisation of common law crimes regarding defamation,[16] as well as the practical applicability of blasphemous defamation ('publication or utterance of blasphemous matter'), while the latter remained punishable only in such a narrow field that its practical use seems to be questionable. Theoretically, a person who publishes or utters anything that is grossly abusive or insulting in relation to matters held sacred by any religion, thereby causing outrage among a substantial number of the adherents of that religion, and intends to cause such outrage, shall be liable to a fine up to 25,000 euros,[17] but the defendant may not be punished if he or she proves that a reasonable person would find genuine literary, artistic, political, scientific, or academic value (meaning) in the matter to which the offence relates.[18] In other words, political statements and arguments about the features of religions (in an 'academic' sense) may not be punished, and the future actors in

[13] Ilias Trispiotis, 'The Duty to Respect Religious Feelings: Insights from European Human Rights Law' 2012–2013 19 (3) *Columbia Journal of European Law* 534. See András Koltay, 'A közéleti szereplők hírnév- és becsületvédelme Európában' In Anett Pogácsás (ed), *Quaerendo et Creando: Ünnepi kötet Tattay Levente 70. születésnapja tiszteletére* (Szent István Társulat 2014) 310-311. According to the common law of the time, there were three defamation offences subject to criminal proceedings; s 73 of the act abolished all of those possibilities. According to the section: 'The following offences under the common law of England and Wales and the common law of Northern Ireland are abolished—(a) the offences of sedition and seditious libel; (b) the offence of defamatory libel; (c) the offence of obscene libel.' (See Elizabeth Samson, 'The Burden to Prove Libel: A Comparative Analysis of Traditional English and US Defamation Laws and the Dawn of England's Modern Day' 2011–2012 20(3) *Cardozo Journal of International and Comparative Law* 783. n. 71.) While New Zealand is not a European country, note that the Defamation Act 1992 of the country abolished the criminal offence of defamation more than two decades earlier by repealing ss 211–216 of the Crimes Act 1961. See Craig Burgess, 'Criminal Defamation in Australia: Time to Go or Stay' 2013 20(1) *Murdoch University Law Review* 1.

[14] Koltay (n 13) 317.

[15] Similarly to the abolition in the United Kingdom, this act entered into force in January 2010 as well. For the statutory text, see <www.irishstatutebook.ie/pdf/2009/en.act.2009.0031.pdf>.

[16] Defamation Act 2009, s 35: 'The common law offences of defamatory libel, seditious libel and obscene libel are abolished.' Also, s 4 of the act repealed the Defamation Act 1961. Note that the Defamation Act 1961 looked upon blasphemous defamation rather harshly and imposed a fine up to 500 pounds, imprisonment for up to 2 years, or community service for up to 7 years. See Katherine A Rollinson, 'An Analysis of Blasphemy Legislation in Contemporary Ireland and Its Effects upon Freedom of Expression in Literary and Artistic Works' 2011 39(1) *Syracuse Journal of International Law and Commerce* 200–201. The rather stringent act was not applied in practice frequently; in fact, only one attempt was made to apply its provisions in *Corway v Independent Newspapers,* a case launched in 1996 and closed in 1999 (*Corway v Independent Newspapers*, [1999] 4 IR 485; [2000] 1 ILRM 426 (Supreme Court)). The case demonstrated the anachronistic nature of the act, and the Supreme Court held that this common law offence was not applicable as it was abrogated by the Constitution of 1937. For more details about the case: Stephen Ranalow, 'Bearing a Constitutional Cross Examining Blasphemy and the Judicial Role in *Corway v. Independent Newspapers*' 2000 3 *Trinity College Law Review* 95–110.

[17] Defamation Act 2009, ss 36 (1)–(2).

[18] ibid, s 36 (3).

public debates may not be intimidated or deterred from presenting their views on the role of individual religions merely on the grounds that practitioners of the given faith do not agree with that particular statement.

In Estonia, the defamation and insulting of private persons[19] has not been punishable since 2004,[20] but the defamation (*laimamine*) and insulting (*solvamine*) of a person enjoying international immunity,[21] of a representative of state authority or another person protecting public order (Section 275 of the Estonian Criminal Code), and of a judge or other person acting on behalf of the court (Section 305) is punishable with a fine or even imprisonment for up to two years[22] (the offence of debasement of the memory of a deceased person (*surnu mälestuse teotamine*) is punishable with a fine or imprisonment for up to one year).[23] In Cyprus, offences against the honour and/or dignity of a person were punishable under criminal law until 2003; the relevant provisions (Sections 194–202) were repealed by Act 84(I)/2003.[24] Finally, Romania followed the path of abolition regarding defamation crimes in 2014, after an initiative was stopped by the Constitutional Court in 2007,[25] and all related crimes[26] were repealed.[27]

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[19] *Press Standards, Privacy, and Libel* (n 4) 430.

[20] See Estonian Criminal Code, <http://www.legislationline.org/documents/section/criminal-codes/country/33>.

[21] S 247, Estonian Criminal Code: The same act, if committed by a legal person, is punishable under s 247(2) by a financial penalty.

[22] The defamation or insult of a person enjoying international immunity (s 247) has so far never occurred in Estonian criminal case-law. During the years between 2009 and 2013, 161, 284, 232, 290, and 286 proceedings were launched in each respective year for the defamation or insult of a representative of state authority or another person protecting public order (s 275). During the same years, between 2009 and 2013, 2, 3, 2, 6, and 5 proceedings were launched in each respective year for the defamation or insult of judges or persons acting on behalf of the courts. (Information provided personally by Markko Künnapu, Adviser on EU Affairs, Ministry of Justice, Tallinn, Estonia.)

[23] This latter crime is committed by a person who interferes with a funeral or any other ceremony for the commemoration of a deceased person, desecrates a grave or another place designated as a last resting place, or a memorial erected for the commemoration of a deceased person, or steals objects from such places (s 149).

[24] George N Apostolou, 'Defamation and Privacy Laws in the Republic of Cyprus' 2, <www.apostoloulaw.com/pdf_Defamation_Article.pdf>.

[25] While the prosecution of defamation and libel was abolished in Romanian law by repealing the relevant provisions of the Criminal Code in 2006, the Constitutional Court held the amendment to the Criminal Code to be inconsistent with the constitution in 2007, arguing that the balance between the freedom of speech and the protection of honour and dignity was disturbed and that those injured were left without effective legal protection against harmful or untrue factual statements and other acts. See Dohel (n 6) 2.

[26] International Press Institute (n 3) 12.

[27] Not so long ago, both libel and defamation were punishable under s 205 of the Romanian Criminal Code (<http://www.legislationline.org/documents/section/criminal-codes/country/8>) (both crimes subject to imprisonment for a period of three months to two years). It should be noted that defamation also included acts of 'wrongful charge' (*calumnia*). See Article 19, *Romania: An Analysis of Media Law and Practice*. July 1997. 17–18, <http://www.refworld.org/pdfid/4756cfce0.pdf>.

Defamation and libel in major European legal systems

Germany

In Germany, the following crimes are punishable under Chapter 14 (Libel and Slander *Beleidigung*) of the Strafgezetzbuch (StGB).[28] According to Section 185 on insults (also *Beleidigung*), an insult shall be punished with imprisonment not exceeding one year[29] or a fine and, if the insult is committed by means of an assault, with imprisonment not exceeding two years or a fine. According to Section 186 on defamation (*Üble Nachrede*), whosoever asserts or disseminates a fact related to another person which may defame him or negatively affect public opinion about him, shall, unless this fact can be proven to be true, be subject to punishment. In such base cases (similarly to the base case of insult), the perpetrator is liable to imprisonment not exceeding one year or a fine. In aggravated cases, where the offence is committed publicly or through the dissemination of written materials (StGB, Section 11(3)),[30] also similarly to the aggravated case of insult), the punishment is imprisonment not exceeding two years or a fine.

Insult may also be committed by asserting or disseminating certain facts. However, in such cases—according to Section 192 of the StGB—proof of truth does not exclude punishment, if the insult to the victim results from the form of the assertion or dissemination or the circumstances under which it was made. In other words, it is irrelevant whether the asserted fact is true or false (truth is relevant to defamation only); the question is whether the form of the assertion or dissemination was insulting or not. For example, insult is committed according to Section 185 if someone makes a comment regarding the (possibly actual) homosexuality or any other personality trait of another person, but the form of the comment is degrading, humiliating, and harmful to human dignity. In order to ensure that no legal action may be launched due to the protection of legitimate interests or mere criticism, Section 193 stipulates that critical opinions about scientific, artistic or commercial achievements, utterances made in order to exercise or protect rights or to safeguard legitimate interests, as well as remonstrations and reprimands by superiors to their subordinates, official reports or judgments by a civil servant, and similar cases shall only entail liability to the extent that the existence of an insult results from the form (and not the content) of the utterance and the circumstances under which it was made.[31]

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[28] <http://www.legislationline.org/documents/section/criminal-codes/country/28>.

[29] According to s 38(2) of the StGB, the minimum duration of fixed-term imprisonment is one month (ie no shorter period of imprisonment may be imposed by the sentence, even if no specific minimum term is set for a given crime).

[30] According to s 11(3), audiovisual media, data storage media, illustrations and other depictions are equivalent to written material.

[31] Other provisions of the Criminal Code stipulate that, as a general rule, these crimes may only be prosecuted upon request, but numerous exemptions are allowed (see StGB, s 194). If an insult is immediately reciprocated, the court may order a discharge for one or both of the offenders (s 199), and if the insult was

The crime of 'intentional defamation' (*Verleumdung*) is defined as a separate and rather serious crime under Section 187 of the StGB. This crime is quite similar to insult as defined in Section 186. The main differences include the criterion that, with regard to *Verleumdung,* the act defined therein must be specifically committed with an intent to defame ('knowingly' by the perpetrator; in other words, defamation under Section 186 may be committed with an oblique intention, but direct intention is required for the crime specified in Section 187), and the fact (due to the targeted nature of defamation) must be untrue *ab ovo*. Another difference is that, for committing this crime, the actual humiliation of the victim and negative public opinion about them (as a result) is not required, and the act is not required to be capable of having such impacts, as it is enough that the committed act may simply *endanger* the good name of the victim. In the base case, the perpetrator of this crime is liable to imprisonment or a fine. In an aggravated case (where the offence is committed publicly, through the dissemination of written materials according to Section 11(3) of the StGB, or in a meeting (*Versammlung*), the punishment is imprisonment not exceeding five years or a fine. Police statistics show that these crimes (Sections 185–187, 189) were committed many times—a total of 222,892 times—in Germany in 2013,[32] representing 3.7% of all committed crimes (5,961,662),[33] and the proportion of successful investigations was quite high, due to the nature of such crimes;[34] a total of 191,698[35] perpetrators were identified[36] (some ten thousand perpetrators committed several similar crimes).

There are not many legal systems where public figures[37] and politicians are specifically afforded not less, but *more* protection than citizens in general.[38] The

committed through dissemination of written materials (eg in a newspaper) and if a penalty is imposed, the court (acting similarly to a civil court) shall, upon such a request from the victim, order that the defendant make amends to the victim by having the sentencing judgment of the court published, possibly in the same medium (s 200).

[32] See *Polizeiliche Kriminalstatistik, Bundesrepublik Deutschland, Jahrbuch 2013* (Bundeskriminalamt Kriminalistisches Institut 2014) 14.

[33] ibid, 14. This means 277 such crimes per 100,000 residents, ibid, 17.

[34] In 2013, the perpetrator of 90.4 per cent of such delicts was identified eventually, and the previous years also show similar proportions (90.2 per cent in 2012, 90.0 per cent in 2011, 89.9 per cent in 2010, 2009, and 2008, and 89.6 per cent in 2000). ibid, 26.

[35] ibid, 49. The same figure was 185,959 in 2012.

[36] A total of 132,950 (69.4 per cent) were men and 58,748 (30.4 per cent) were women, ibid, 62.

[37] Persons in this category are hereinafter referred to as 'public figures', instead of 'popular figures', as the latter term would also cover persons who are known to a significant part of the community, but who are not engaged in public affairs. As the lower or higher level of protection is not related to popularity, but to public affairs and the freedom to discuss public affairs (more accurately, the degree of recognition of this freedom by the state), popular figures (television personalities, actors, singers, athletes, etc.) who are not public figures (ie are not involved in or do not influence the making of political decisions in a broad sense) are not relevant to the assessment of crimes that may limit the freedom of expression.

[38] As we will see, this phenomenon (ie the enhanced protection of popular figures under criminal law) is typical of a minority of European states, but cannot be considered as unique. (It is also true that these exceptional provisions are rarely applied in practice, meaning that the perpetrators of defamation or libel against popular figures are usually not punished more harshly—even where they could be. Cf with the findings of the research of András Koltay, 'A közéleti szereplők hírnév- és becsületvédelmének elemei az Európai Unió tagállamaiban' *Magyar Jog* 2013/10., 587.

substantive criminal law of Germany is one of the exemptions, as Section 188 of the StGB defines as a *sui generis* crime the defamation of persons in the political arena (*Üble Nachrede und Verleumdung gegen Personen des politischen Lebens*). This delict is committed if an offence of defamation (Section 186) is committed publicly, in a meeting or through dissemination of written materials against a person involved in public political life, and if the offence may make their public activities substantially more difficult; the penalty shall be imprisonment from three months to five years. If the act against such a public figure constitutes 'intentional defamation' under Section 187, the penalty is imprisonment for between six months and five years. Apparently, defamation committed against public figures entails imprisonment under all circumstances (at least in the base case), while the perpetrators of similar acts against other persons may 'get away' with a fine, the amount of which may range from 5 to 10,800,000 euros.

Furthermore, the 'violation of the memory of the dead' (*Verunglimpfung des Andenkens Verstorbener*) is also a punishable crime under German criminal law (Section 189). This crime is committed by any person who defames the memory of a deceased person, and the perpetrator is liable to imprisonment not exceeding two years or a fine. This crime is similar to, but should not be confused with (due to the differing passive object of) the crime of 'desecration of graves' (*Störung der Totenruhe*) defined in Section 168 of the German Criminal Code, as the latter protects the physical integrity of the body of deceased persons, as well as the place where a body is laid in state. However, the protected legal object—ie the protection of deceased persons—is the same in both cases.

A comparison of *all* delicts relating to *Beleidigung* (Sections 185–200) shows that a high number of proceedings are launched (hundreds of thousands) and many defendants are sentenced for committing these crimes. For example, defendants in 30,508 such cases were sentenced in 2012[39] (1,720 crimes were committed by minors,[40] and 26,109 crimes by men).[41] Most of the 30,508 cases were defamation cases (Section 185, *Beleidigung*, 29,594 cases); there were 450 insult cases (Section 186, *Üble Nachrede*), 450 intentional defamation cases (Section 187, *Verleumdung*), 5 cases of defamation of persons in the political arena (Section 188, *Üble Nachrede und Verleumdung gegen Personen des politischen Lebens*), and 9 cases of the violation of the memory of the dead (Section 188, *Verunglimpfung des Andenkens Verstorbener*).[42] Naturally, the number of perpetrators was lower, totalling 27,710,[43] of whom 26,320 persons committed insult, 429 committed defamation, 411 committed intentional defamation,

[39] Statistisches Bundesamt, *Rechtspflege. Strafverfolgung. Fachserie 10 Reihe 3* (2014) 24, <https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/StrafverfolgungVollzug/Strafverfolgung2100300127004.pdf?__blob=publicationFile>.

[40] ibid, 24.

[41] ibid.

[42] ibid, 32.

[43] ibid, 56. Out of which 23,440 were men.

three committed defamation of persons in the political arena and seven committed violation of the memory of the dead.[44] A punishment was imposed in 21,586 cases; a fine was imposed in 20,557 cases (the fine was subsequently converted into imprisonment in 11 cases due to non-payment), and imprisonment was applied in 1,029 cases.[45] Most of the total 1,029 imprisonment sentences were imposed due to insult (1,008), four imprisonment sentences were imposed due to defamation, 15 sentences were imposed due to intentional defamation, and one imprisonment sentence each was imposed due to defamation of persons in the political arena and due to violation of the memory of the dead.[46] Approximately two-thirds of the 1,029 imprisonment sentences (674 sentences) were suspended, and 355 sentences had to be served[47] (710 sentences were shorter than six months—with 462 sentences suspended and 248 sentences served, and 123 sentences were for six months—with 94 sentences suspended and 29 sentences served).[48] Apparently, the use of imprisonment as a punishment is not exactly insignificant in Germany; as of 31 March 2013, for example, a total of 303 persons (283 men and 20 women) were held in prison, out of whom 13 persons were held in detention before trial and 290 persons were serving their time in prison.[49]

Austria

In Austria, Chapter Four of the Special Part of the Criminal Code of 1974[50] lays down the rules applicable to crimes against honour (*Strafbare Handlungen gegen die Ehre*). Section 111 defines the crime of defamation; under Austrian law, the crime of defamation is committed by any person who attributes, in front of a third party (in a manner detectable by a third party), a despicable trait or thought to another person ('charges' him), or interacts with them in a humiliating or immoral manner, that is capable of disparaging the public opinion of them or endangering their reputation. Under Section 111(1), the perpetrator of this crime is punishable by imprisonment for up to six months or a fine consisting of 360 daily instalments; if the crime is committed

[44] ibid, 64.

[45] ibid, 90. Out of whom 18,799 defendants were men, of whom 17,849 were fined (of which 9 were converted to imprisonment), and 950 were sentenced to prison.

[46] ibid, 98. The same for fines: out of 20,557 fines, 20,101 fines were imposed due to insult, 231 fines due to defamation, 221 fines were imposed due to intentional defamation, one was imposed due to defamation of persons in the political arena, and three fines were imposed due to the violation of the memory of the dead.

[47] Out of 355 imprisonment sentences to be served, 333 sentences were imposed on men (a total of 950 imprisonment sentences were imposed on men during the year, with 617 sentences suspended), ibid, 158.

[48] ibid.

[49] Statistisches Bundesamt? *Rechtspflege. Strafvollzug – Demographische und kriminologische Merkmale der Strafgefangenen zum Stichtag 31. 3. 2013. Fachserie 10 Reihe 4.1* (2014) 20 and 22. <https://www.destatis.de/DE/Publikationen/Thematisch/Rechtspflege/StrafverfolgungVollzug/Strafvollzug2100410137004.pdf?__blob=publicationFile>.

[50] <http://www.legislationline.org/documents/section/criminal-codes/country/44> and <http://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002296>.

through printed press, television, radio, or other similar manner that makes the defamation available to the public, the perpetrator (under Section 111(2)) is punishable by imprisonment for up to one year or a fine consisting of 360 daily instalments. However, the perpetrator cannot be punished if the assertion is proven to be truthful or if the perpetrator had reason to conclude the truth of the assertion from the circumstances (Section 111(3)). In the latter situation, the perpetrator needs to demonstrate only that such circumstances existed to avoid liability, whether or not the assertion turns out to be false—despite the circumstances—or if the truth or falsehood of the assertion cannot be established based on the available evidence. Due to the undisputable presumption laid down in Section 112, submitting evidence regarding truth or good faith can be prohibited only upon request by a third party regarding assertions pertaining to private and family life and criminal offences.

Interestingly, the Austrian Criminal Code specifically requires the punishment of persons who (Section 113)—again, in a manner detectable to a third party—'reproach' an old offence of another person, for which that person has already served his punishment, was put on probation or was released on parole. No such explicit prohibition can be found elsewhere, but the adoption of such a specific rule makes much sense, as it ensures that former offenders who have served their punishment (or were exempted from the punishment wholly or in part) cannot be reproached for their old crimes retrospectively and cannot be harassed for their whole life—meaning that they have a real chance of being relieved of the disadvantageous consequences of having a criminal record (both in terms of the law and social life), so they have a chance of starting a new life with a 'clean slate' in the eyes of society. However, no person may be punished under Sections 111 or 113 who assert facts to exercise their rights or carry out their duties in the manner specified in the respective sections (Section 114(1)).

Similarly to the German Criminal Code, Section 115 of the Austrian StGB also penalises insult (*Beleidigung*). According to the StGB, whoever insults, ridicules, assaults, or threatens another person with assault publicly or in front of several people, if no more serious offence is committed, shall be punished by imprisonment for up to three months or a fine consisting of up to 180 daily instalments. The crime is committed before several people, if the act may be detected by more than two persons in addition to the perpetrators and the injured parties (Section 115(2)). However, the judge is not required to impose a punishment if the crime was committed but the act was caused by acceptable outrage or if the length of time that has passed since the commission of the crime suggests that the offence was pardoned by the victim. This rule is in fact an undisputable presumption that was introduced by the legislator into the Austrian Criminal Code to ensure that no person can be threatened for years because of acts that did not cause any real harm, and that the courts would not be burdened by already forgotten acts committed many years ago just because of passing whims. As there is no specific deadline set for submitting petitions for establishing liability under Austrian law, the Austrian legislator opted for this solution.

Finally, it should be noted that—similarly to German law—Austrian substantive criminal law provides specific protection for the dignitaries of state organs and

authorities against both defamation and insult, but the sanctions are not more stringent (or lenient, for that matter) than those applicable to crimes committed against natural persons (Section 116).

Switzerland

In Swiss law, crimes against honour and privacy (*Strafbare Handlungen gegen die Ehre und den Geheim- oder Privatbereich*) are regulated under Title Three of the Second Book ('Specific Provisions') of the 1937 Federal Criminal Code of Switzerland (*Schweizerisches Strafgesetzbuch*).[51] According to Article 173 on defamation (*Üble Nachrede*), any person who, in addressing a third party, makes an accusation against or casts suspicion on another of dishonourable conduct or of other conduct that is liable to damage another's reputation, and any person who disseminates such accusations or suspicions, is liable on complaint to a financial penalty not exceeding 180 daily penalty units. If the accused proves that the statement made or disseminated by them corresponds to the truth or that they had substantial grounds to hold an honest belief that it was true, they may not be held guilty of an offence (Article 173(2)). The accused is not permitted to lead evidence in support of and is criminally liable for statements that are made or disseminated with the primary intention of accusing someone of disreputable conduct without there being any public interest or any other justified cause, and particularly where such statements refer to a person's private or family life (Article 173(3)). If the offender shows repentance, ie they recant their statement, the court may impose a more lenient penalty or no penalty at all (Article 173(4)). According to Article 174 of the Swiss Criminal Code, the crime of 'wilful defamation' (*Verleumdung*) is committed by a person who commits any of the above acts knowing that the accusations or suspicions are untrue. As such, direct intention is required to commit the delict of *Verleumdung*—due to the targeted nature of the act —while oblique intention is sufficient for committing *Üble Nachrede*, similarly to the corresponding crimes defined by the German StGB. In cases of wilful defamation, the punishment is imprisonment for up to three years or a fine (without providing for any special minimum or maximum amount).

The special provisions of the Swiss Criminal Code also define a crime that is similar to desecration (Article 175), which is connected by the Criminal Code to the crimes of 'defamation' and 'wilful defamation', with the difference that the 'passive subject' is a person who is deceased or has been declared missing presumed dead. With regard to defamation of a deceased person, the relatives of the deceased person or the person missing presumed dead are entitled to apply for prosecution within 30 days of committing the crime; the punishment is the same as in cases of *Verleumdung* and *Üble*

[51] <http://www.legislationline.org/documents/section/criminal-codes/country/48>.

Nachrede (Article 175). The Swiss Criminal Code also prohibits insult (*Beschimpfung*, Article 177): any person who attacks the honour of another verbally, in writing, in pictures, through gestures or through acts of aggression is liable to a monetary penalty not exceeding 90 daily penalty units. If the insulted party has directly provoked the insult by improper behaviour (Article 177(2)) and in cases of mutual insults, the court may dispense with imposing a penalty on the offender (Article 177(3)). Defamation (Article 173) was committed in 694 cases in 2009, in 704 cases in 2010, in 970 cases in 2011, in 976 cases in 2012, and in 1,144 cases in 2013; during the same years, there were 523, 489, 773, 934, and 956 cases of 'wilful defamation' (Article 174) registered by the police respectively, during the same five years, 4,656, 5,166, 6,037, 7,272, and 7,355 proceedings were launched respectively for defamation (Article 177); while the offence of defamation of a deceased person (Article 175) was committed in each year between 2009 and 2013 a total of 4, 3, 28, 2, and 5 times. Hence, if the proceedings launched for the latter crime with negligible practical significance are ignored, the figures show that the legal awareness of Swiss people has been on the rise during recent years and more and more criminal complaints are filed in the protection of their honour.[52]

Italy

Italian law[53] also distinguishes between insult (*ingiuria*) and defamation (*diffamazione*), but the distinction does not seem to be sufficiently delineated. According to Article 594 of the Codice Penale, the crime of *ingiuria* is committed by a person who insults the honour or dignity or another person (for which they are liable to imprisonment for up to six months or to a fine of up to 516 euros). The insult may be made verbally (being present in person), via phone, telegraph, or any other written form or depiction. A qualified type of *ingiuria* is where the insult is caused by asserting a specific fact (in such cases, the punishment may be imprisonment for up to one year or a fine of up to 1,032 euros). Article 594 of the Italian Criminal Code lays down a sentencing principle, according to which insults caused in front of several persons are to be punished more harshly than other insulting acts. According to Article 595 of the Criminal Code, the delict of *diffamazione* is committed by a person who harms the reputation of another person before others (in communication with others) without committing *inguria*. In general cases, the punishment is imprisonment for up to one year or a fine of up to

[52] Concerning the data, see <http://www.pxweb.bfs.admin.ch/dialog/varval.asp?ma=px-d-19-3B02&ti=Polizeilich+registrierte+Beschuldigte+gem%E4ss+Strafgesetzbuch%2C+nach+Kantonen%2C+Geschlecht%2C+Alters%2D+und+Aufenthaltsgruppen&path=../Database/German_19%20-%20Kriminalit%E4t%20und%20Strafrecht/19.3%20-%20Kriminalit%E4t%20und%20Strafvollzug/&search=NACHREDE&lang=1>.

[53] Codice penale (Act 1398 of 1930), <http://www.altalex.com/index.php?idnot=36653>.

1,032 euros; qualified cases (which are the same as for *ingiuria*, ie the insult is caused by asserting a specific fact) may be punished by imprisonment for up to two years or a fine of up to 2,065 euros. Defamation may also be committed in a qualified manner: if the crime is committed in the press or by any other similar means that is publicly available, or by a public act (eg at a mass event), the perpetrator may be sentenced to imprisonment for a period of between six months and three years or they may be punished with a fine of *at least* 516 euros. Finally, Article 595 is also subject to a sentencing requirement: if the act is directed against a political body (eg the Parliament), a public administrative body, or a court (or any member or unit thereof), the perpetrator is punished more harshly (but still within the punishment limits described above) than a perpetrator of the base crime.[54]

Apparently, the distinction between insult and defamation is not based on the distinction between a value judgement (opinion) and a factual statement, but on the difference in the protected legal object: in cases of *inguria*, the attack is targeted against the honour or dignity, ie *self*-respect of the victim (either by stating an opinion or a fact),[55] while, for *diffamazione*, the target of the attack (that is, again, the statement of an opinion or a fact) is the goodwill of, ie the respect of society enjoyed by the victim. Since the behaviour of the perpetrator is the same in both cases, practical difficulties may be faced in showing the motives or purpose of the perpetrator and in deciding which abstract crime covers the act of the perpetrator. These two crimes are of great practical significance in Italy; in 2010, 850 such cases were accepted and heard by the Corte di Cassazione, the Supreme Court of Italy.[56] Reforms to the law of defamation are being worked on by the Italian legislator, in line with the December 2013 opinion of the Venice Commission of the Council of Europe.[57]

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[54] A specific request is required for launching the criminal procedure in Italy as well; if the victim is deceased, such a request may be filed by a close relative, an adoptive parent, or an adopted child. This is the situation if the injury was suffered by a living person who deceased before the deadline for submitting the request expired, or if the crime was targeted against the memory of an already deceased person (Art 597). Consequently, desecration is not a *sui generis* crime under Italian law, as it is prosecuted as one of the delicts of insult and defamation—with the same punishment as that of the base crimes. Verbal and written statements made by the parties or their legal representatives in court or during the official procedure regarding the given case are not punishable (Art 598). The judge may decide not to punish one or both parties in cases of mutual insults, and a person may not be punished for an insulting or defamatory act, if they were deliberately provoked by the other person, provided that the act was carried out during this agitated state of mind (Art 599).

[55] The only difference in this respect—as already discussed—relates to the applied sanction.

[56] <http://www.article19.org/resources.php/resource/2721/en/italy:-criminal-defamation-legislation-must-be-repealed>.

[57] Opinion on the legislation of defamation in Italy (no 715/2013). Cf Organization for Security and Co-operation in Europe, Office of the Representative on Freedom of the Media, 'Legal Analysis of Law no 925 of 17 October 2013 Concerning the Defamation Legislation in Italy' (November 2013).

France

The penal code (Code pénal) of France[58] does not define any crime against the dignity of persons, but such crimes are defined by the Act of 29 July 1881 on the Freedom of the Press (Loi du 29 juillet 1881 sur la liberté de la presse). Chapter 4 of the act specifies the acts that are punishable under criminal law, and Section 3 defines crimes against individuals. Article 29 is the first article of this section and sets forth the prohibition of defamation and libel.[59] Defamation ('*diffamation*') is committed by a person who asserts a fact about another (person, organisation, or group) that harms the honour or goodwill of the given person or entity. Even attempting to communicate or disseminate such a fact (as a targeted act) is punishable, even if the victim is not mentioned by name specifically but can be identified easily. The form of the insult is irrelevant, so —although the crime is defined in the Act on the Liberty of the Press—it may be committed by publication in the press (in a broad sense) or even by verbal communication. For the purpose of insult (*injure*), the libellous speech expressing disdain or contempt by the perpetrator, without stating any fact, is what matters. (This means that, under French law, defamation and insult are distinguished from each other following the factual statement / opinion dichotomy.) Finally, desecration is also punishable under French law; according to Article 34, a requirement for punishment is that the perpetrator commits the insulting or defamatory act against a deceased person with the purpose of hurting the surviving spouse or heirs of the deceased (thus, it is not the deceased, but the honour of the surviving persons that is protected through the memory of the deceased person). As a general rule, it is possible to prove the truth, with three exceptions: if the act concerns the privacy of a private person; if the statement relates to facts that occurred more than ten years ago (regarding the 'right to forget'); and if the statement relates to a crime after which the perpetrator has been pardoned, rehabilitated, or acquitted retrospectively. As a general rule, these are prosecuted upon private request (Article 35).

Under French law, these crimes are not punishable by imprisonment, but a significant fine may be imposed. The maximum amount of the fine depends on who the victims are: the fine is 45,000 euros (Articles 30–31) for defaming state bodies (constitutional and government bodies, armed forces and courts, and members of such bodies, if the insult is related to the operation of the body or the official function of the person, and any other person acting under the mandate of the state);[60] for private persons, the fine is 12,000 euros; the fine is 45,000 euros if the victim is a private person or a group of

[58] <http://www.lexinter.net/lois/loi_du_29_juillet_1881_sur_la_liberte_de_la_presse.htm>.

[59] The former Art 26, punishing injuries to the honour of the President of the Republic of France, was repealed in 2013, <http://www.freemedia.at/newssview/article/in-france-judicial-evolution-in-defamation-cases-protects-work-of-civil-society.html>.

[60] A special rule set forth in Article 26 protecting the honour and reputation of the President of the Republic was removed from the act in 2013. However, acts against the President of the Republic remained punishable under Article 29, similarly to other constitutional bodies.

private persons and the offence is related to the origin, ethnic group membership or non-membership, nationality, race, religion, gender, sexual orientation, or disability of such a person or group (Article 32). For insult, the maximum amount of the fine is 12,000 euros for any victim as a general rule; however, the fine may be as high as 22,500 euros or imprisonment for up to six months for hate crimes. Furthermore, French criminal courts may also impose civil sanctions: they may order (under Article 131-35 of the Code pénal) the publication of the judgment or of a notice of judgment, with the content determined by the court, by and at the cost of the offender, in the manner, for a period, and in forums determined in the judgment (for a maximum period of two months; eg in certain press organs, electronic media, posters, etc.).

Benelux countries

In Belgium, Chapter V ('Crimes against the honour or reputation of persons') of Book 2 ('Special crimes and sanctions') of the Criminal Code,[61] that is the Code pénal of 1867, sets out the criminal law provisions pertaining to the behaviours that are relevant to the subject of this paper.

Article 443 defines two forms of defamation, with the common feature being that both crimes are committed by a person who asserts a specific fact about another person that is capable of harming the honour of the latter person or of having an adverse influence on public opinion. Under Belgian law, the only difference between *calomnie* and *diffamation*—the two kinds of defamation—is that *calomnie* means the assertion of a fact where the truth of the asserted fact may be proven, while, in the latter case, proving the truth of the asserted fact is prohibited by law. The punishment may be imprisonment for a period of between 8 days and 1 year, or a fine between 26 and 200 euros, if defamation is committed publicly or via publicly available means (eg during a public meeting—during a demonstration organised by exercising the freedom of assembly, typically,—in a public place, or in a non-public place where several people are or may be present, or otherwise in any manner when people other than the victim may become aware of the act), regardless of whether the act was committed verbally or in writing, by publicly displaying, disseminating, selling, or offering for sale images or symbols, or by any other means that makes the act available to the public.[62] The truth of the asserted fact is not admissible in every case, eg if a public officer performs their obligation by asserting the fact; as a general rule, no proof may be presented, if the

[61] <http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=1867060801&table_name=loi>.

[62] According to Art 445, if the defamation results in a false accusation before an authority or the supervisor of the victim, the punishment may be imprisonment for a period of between 15 days and six months or a fine of an amount between 50 and 1,000 euros. In the former case, a criminal procedure may be conducted due to defamation under Art 447 only if the underlying procedure has been completed and the fact was actually found to be untrue.

asserted fact relates to private life (in such situations, truth may be only and especially proven if the asserted fact was established by a court judgment or in any other authentic manner).

Insult (*injure*) is a punishable crime under Article 448 of the Belgian Code pénal. This offence is committed by a person who insults another person using any of the above-mentioned public means, in writing or by other means. The punishment is imprisonment for a period of between 8 days and two months, or a fine between 26 and 500 euros (Article 450). A very similar punishment[63] is applied to the crime of 'divulgement' (malicious public disclosure of private facts—a less official or legal, but more apt term might be 'gossiping' or 'chattering') defined by Article 449, which is committed by a person who asserts a fact about another person that is not justified by public interest or lawful private interest, meaning that the only purpose of the assertion is to cause harm to the other person. Belgian criminal law uses this crime to provide protection for private secrets which are true, but are also sensitive enough for the person concerned to have an interest in keeping them secret—provided that no other person has any interest that might justify the public disclosure of the secret. Under Belgian law, such acts (with the exception of false accusation) are prosecuted at the request of the victim (or their descendant or heir, if the victim passes away in the meantime) only. The insulting or defamation of certain public entities and public officers is also punishable (Articles 275–278).

Similarly to the Belgian Criminal Code, the currently effective Dutch Criminal Code of 1881[64] (revised in 1994) is also based on the French Code pénal. Defamatory crimes are covered under Title XVI ('Insult') of the Second Book of the Dutch Criminal Code. According to Article 261(1), the crime of humiliation (*smaad*) is committed by a person who asserts a fact about another person, with the obvious intent of publication, which harms the honour or reputation of that person; the punishment is imprisonment for up to six months or a third degree fine (ie up to 8,100 euros). Under Article 261(2), humiliation committed in writing (*smaadschrift*) is also punishable with imprisonment of up to one year (with the maximum amount of the fine remaining unchanged), if it was made publicly available (in written form or as a depiction). However, the perpetrator of any of these crimes may not be punished if they acted in good faith or if the publication was justified by public interest (Article 261(3)). Furthermore, the perpetrator may not be punished if the asserted fact was established to be true by a final court judgment (Article 265(1)). If a person asserts a fact they know to be untrue by any of the above means, they may be punished by imprisonment for up to two years or a fourth degree fine (up to 20,250 euros, Article 262). Insult under Article 266 (*belediging*) is also a crime, which is committed by a person whose act is not the crime of humiliation/insult as defined under Article 261, but does insult another person in front of others (in such cases, the punishment is imprisonment for up to three months or a second degree fine,

63 The upper limit of the fine is 400 euros, not 500.

64 <http://wetten.overheid.nl/BWBR0001854/Opschrift/geldigheidsdatum_19-03-2014#>.

up to 4,050 euros). The insult may be made verbally, in writing, or with an image, but no more specific instructions are provided by the Criminal Code (Article 266(1)), so the development of the relevant conditions has been left to the courts; nevertheless, the Criminal Code makes it clear that the publication of opinions on public affairs may not be punished (Article 266(2)). It appears to be inconsistent with this provision that the punishment is increased by one third if insult is committed against a public officer or an authority in relation to such matters (Article 267). (If the fact that is harmful to honour or reputation is asserted before an authority in an official manner and it turns out to be untrue, the perpetrator may be punished for false accusation—as a general rule, the punishment is imprisonment for up to two years or a fourth degree fine, up to 20,250 euros).[65] Finally, desecration is also a crime under the Dutch Criminal Code—punishable upon request by the surviving spouse, descendant or heir of the deceased (with imprisonment for up to three months or a fine up to 4,050 euros)—which is committed by a person whose act would be regarded as defamation / humiliation or insult committed against the deceased if the 'victim' were still alive (Article 270). Similarly, the same punishment is applicable to a person who disseminates, makes publicly available, publishes, or publicly displays such an insult or slander, or publishes or distributes items containing such an insult or slander, including journalists, editors, and newspaper publishers as well; a person may even be banned from their profession if they are again found guilty of a similar crime by a court judgment within a period of two years (Article 271).

In Luxembourg, the third member of the Benelux countries, the Criminal Code of 1879 (Code pénal)[66] defines two kinds of defamation, similarly to Belgium. Both crimes may be committed by a person who asserts a specific fact about another person that is capable of damaging their honour or triggering the disdain of society; the difference is that, with regard to *calomnie*, evidence may be presented regarding the truth of the asserted fact (and liability is established only if the proof fails), while no such evidence may be presented in cases of *diffamation* (Article 443). Normally, the punishment is a fine between 251 and 2,000 euros, if the act is committed publicly or otherwise before several persons; the specific conditions laid down in the Criminal Code of Luxembourg follow the Belgian regulation.[67] Another example of Belgian influence is that the punishment for defamatory statements damaging the reputation of legal entities entails the same punishment as the defamation of natural persons (Article 446). However, the amount of the fine ranges from 251 up to 25,000 euros or even imprisonment for a period of between one month and one year, if defamation is committed as a hate crime, meaning that the asserted untrue fact relates to a protected characteristic or status of the

[65] Art 268. In 2002, 2003, and the first half of 2004, Dutch courts passed over a hundred rulings applying imprisonment as punishment in relation to these three crimes. Cf Aiden White, 'Ethical Journalism and Human Rights' *Human Rights and a Changing Media Landscape* (Council of Europe, Commissioner for Human Rights 2011) 58.

[66] <http://www.legislationline.org/documents/section/criminal-codes/country/16>.

[67] Thus, see there the meaning of 'publicity'.

victim as listed by the Code pénal (in Article 454).[68] Another provision that mirrors the Belgian rules is that a more stringent punishment is to be applied (in Luxembourg, a fine between 251 and 10,000 euros or imprisonment for a period of between fifteen days and six months), if any of the two kinds of defamation is committed before an authority or the supervisor of the victim (Article 445). The rules concerning the proof of truth also follow the Belgian rules, with the exception that the Criminal Code of Luxembourg—with reference to the provisions of the Act of 8 June 2004 on the freedom of expression in the media—specifically allows journalists, with a view to ensuring the freedom of public discourse, to publish false statements of fact, provided that they have reason to believe the publication to be true, if the publication is justified by public interest (ie journalists in such cases are only liable with regard to knowingly untrue facts), or if they take utmost care to avoid any harm to the honour of others and, in the case of disseminating statements by others, where the publication makes clear its source, the fact that it is a quotation, and that publication was justified by public interest (Article 443).

Also in line with the Belgian example, the crime of insult (*injure*) must be distinguished from both types of libel; defamation is committed by a person who insults another (natural or legal) person by asserting any fact, verbally, in writing, or using images (Article 448). Such acts may include various actions ranging from verbal insults to caricatures, distinguished by the courts; in such cases punishment is a fine between 251 and 5,000 euros, or imprisonment for a period of between 8 days and two months. It is somewhat surprising that the citizens of Luxembourg have recourse to criminal proceedings in the protection of their honour increasingly frequently: while a total of 577 proceedings were launched due to *diffamation*, *calomnie* and *injure* in 2005, the same figure was 1,434 in 2011.[69] However, only a small fraction (a couple of dozen annually) of these proceedings resulted in criminal punishment, and most of the punishments were fines. In some cases, the punishment is suspended imprisonment, and the perpetrator only rarely needs to serve prison time.[70]

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[68] These include, for example, the assumed or actual origin, skin colour, gender, sexual orientation, marital status, age, health condition, disability, moral, political or religious conviction, union activity or membership, and ethnic, national, racial, or religious affiliation of the victim.

[69] Statistics show the use of means offered by criminal law to resolve disputes is increasing steadily, the number of cases was 577 in 2005, 673 in 2006, 840 in 2007, 990 in 2008, 1,072 in 2009, 1,205 in 2010, and almost one thousand five hundred (1,434 to be accurate, as mentioned earlier) in 2011. This increasing trend cannot be explained by the trend of overall criminality: while the total number of crimes did in fact increase between 2005 and 2011 (from 25,231 to 35,702, that is by approximately 1.4 times), this increase was far from the increase of roughly two and a half times for defamatory delicts (*Annuaire statistique 2012* (Statec 2013) 181).

[70] The number of persons sentenced for committing a defamatory act was 19, 47, 33, 44, and 36 in 2008, 2009, 2010, 2011, and 2012, respectively. During this five-year period, 11 persons were sentenced for committing the basic form of defamation (eight persons for *calomnie*, three persons for *diffamation*), one person for committing defamation in public, 25 persons for qualified defamation (before an authority or the supervisor of the victim), and 22 for committing libel. (Data collected and kindly provided by Marcel Iannizzi.)

It is hardly a surprise that the fourth kind of defamation crime also has its origin in and is almost a verbatim transposition of the provisions of Belgian criminal law; 'divulgement' (*divulgation méchante*) which is also a punishable crime in Luxembourg, is committed by a person who asserts a fact about another person without justification by public interest or lawful private interest, meaning that the specific and sole purpose of the assertion is to cause harm to the victim (the punishment is a fine between 251 and 4,000 euros or imprisonment for a period of between 8 days and two months, Article 449 of the Code pénal). The rules applicable to the insulting or defamation of certain public dignitaries, public officers, judges, enforcement officers, etc. also follow the Belgian example; both the definition of the crimes and the qualified cases are almost identical to the Belgian provisions.[71]

Countries of the Iberian Peninsula

The Spanish Criminal Code of 1995 (Código Penal)[72] also includes insult (*injuria*) among the crimes against the honour of persons (Title XI of the Criminal Code).[73] According to the statutory rules, this crime is an action or expression that harms the dignity of another person, detracting from their reputation or attacking their self-esteem, provided that the crime actually results in the downturn of public opinion (Article 208). If the delict is committed by attributing acts to another person, it is not punished, except when it has been carried out knowing the falsehood thereof or with reckless disregard of the truth. This crime is not punished by imprisonment, only by a fine (which may be converted into imprisonment or community service, cf Articles 50–53). Normally, the punishment may be a fine corresponding to a period of three to seven months, but the amount may be increased to between six and fourteen months of items, if the crime is committed publicly. (*Injuria* plays little, but a somewhat increasingly important, practical role, punishment for insult is only applied in a few dozen cases annually in Spain.)[74] It is apparent that publicity is not required for establishing the commission of *injuria* (neither for stating an opinion nor a fact); publicity may be merely a qualifying circumstance. (*Calumnia*, ie false accusation, is another and more serious crime; it consists of a defamatory act [statement of fact] by which the perpetrator specifically accuses the victim of having committed a crime, Articles 205–207.)

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71 See there, and Arts 275 and 276 of the Code pénal of Luxembourg.

72 <http://www.legislationline.org/documents/section/criminal-codes/country/2>.

73 <http://noticias.juridicas.com/base_datos/Penal/lo10-1995.l2t11.html>. Arts 208–210.

74 While an average of 30 to 60 persons were sentenced for committing a crime against honour (*delitos contra el honor*) at and around the Millennium (25, 31, 39, 62, 43, 42, 60, and 39 during the period between 1995 and 2002, respectively—cf *Anuario Estadístico de España 2005* (Instituto Nacional de Estadística 2005) 296), a total of 71 persons were sentenced in 2012 (49 men and 22 women, 69 Spanish citizens—cf *Anuario Estadístico de España*, CD-ROM (Instituto Nacional de Estadística 2014)).

In Portugal, defamation may also be punished by imprisonment. Chapter VI of the Portuguese Criminal Code of 1982 (Código Penal Português)[75] deals with crimes against the honour of persons. The crime of defamation (*difamação*, assertions that damage the honour or reputation of a person) is punishable under Article 180, unless the assertion of fact was justified by the legitimate interest of someone or if it was made in good faith. However, this exception does not apply to situations where the asserted fact relates to private life, as it is afforded unconditional protection by criminal law. This means that assertions that violate the private life of others are punishable under all circumstances, by imprisonment for up to six months or a fine of up to 240 daily items. Furthermore, the assertion of facts (defamation) or the assertion of value judgements (insult, *injúria*) is also punishable, if it attacks the self-esteem of the victim. In such situations, the punishment is imprisonment for up to three months or a fine of up to 240 daily items (Article 181). If the committed defamation also constitutes false accusation (*calúnia*), the punishment is even more stringent (imprisonment for up to two years or a fine of at least 120 daily items) in Portugal (Article 183). It is a qualified situation for all three crimes, if the crime is committed against certain protected individuals, such as members of public bodies, judges, witnesses, defence attorneys, etc. in relation to their professional acts and behaviour or the performance of other obligations (in such cases, the minimum and maximum punishment are both increased by half, Article 185). Finally, desecration (serious violation of the memory of a deceased person, *ofensa à memória de pessoa falecida*) is also a crime punishable by imprisonment for up to six months or a fine of up to 240 daily items. There is an interesting provision of the Portuguese Criminal Code in this respect which stipulates that the perpetrator may not be punished if the act was committed over 50 years after the death of the deceased. It follows from this provision *a contrario* that the historical role of a person may be evaluated only after this period has passed—without risking the commission of a crime,—which seems to be a rather serious and lengthy limitation on the free discussion of history without fear and with the purpose of revealing the truth.

Defamation and libel in other EU Member States

Scandinavian countries

This Chapter provides a short overview of the regulatory schemes applied in other EU Member States. In Finland—the first Scandinavian country discussed here—Articles 9 and 10 of Chapter 24 of the 1889 Criminal Code[76] lay down the provisions pertaining to defamation. According to those provisions, a person who spreads false information or a false insinuation of another person so that the act is conducive to causing damage

[75] <http://www.hsph.harvard.edu/population/domesticviolence/portugal.penal.95.pdf>.
[76] <http://www.legislationline.org/documents/section/criminal-codes/country/32>.

or suffering to that person, or subjecting that person to contempt, or who disparages another, shall be sentenced to a fine or to imprisonment for at most six months.[77] 'Aggravated defamation' is committed if the first offence (spreading of false information or insinuation) is committed using the mass media or otherwise by making the information or insinuation available to many persons, or if considerable or long-lasting suffering or particularly significant damage is caused.[78] In such cases, the perpetrator may be sentenced to a fine or to imprisonment for at most two years. (However, defamation and aggravated defamation do not play a significant *practical* role.)[79] Nevertheless, the perpetrator may not be punished if they offered 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.[80]

In Sweden, Chapter 5 of the 1965 Criminal Code[81] lays down the provisions regarding defamation. According to Section 1 of Chapter 5, the general crime of defamation is committed by a person who points out someone as being a criminal or as having a reprehensible way of living or otherwise furnishes information intended to cause exposure to the disrespect of others, and the perpetrator must be punished by a fine. However, no punishment is imposed if the perpetrator was duty-bound to express themselves or if, considering the circumstances, the furnishing of information on the matter was defensible, or if they can show that the information was true or that they had reasonable grounds for believing it to be true. A qualified situation is where the committed defamation is 'gross',[82] and a fine or imprisonment for at most two years may also be applied. 'Defamation' also has an insult-like form under Swedish law; according to Section 1 of Chapter 5, a fine is to be imposed if a person uses a humiliating attribute (expression) against, or behaves in any other humiliating way towards, another person (in cases of 'gross' defamation, the punishment may be imprisonment for up to six months). Finally, Swedish law also penalises—without a specific name—desecration by specifically stating that the protected persons are the survivors. Thus, if a person commits any form of the crime of defamation[83] against a deceased person so that the targets of the humiliation are the survivors, they are subject to the same punishment

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77 Ch 24 s 9.

78 Ch 24 s 10.

79 In Finland, the Finnish Statistical Office does not collect data concerning defamation and aggravated defamation separately (<http://www.stat.fi/index_en.html>), but only aggregate data pertaining to crimes against 'privacy, peace and honour'. In total, 519, 546, 493, 476, and 500 such judgments were adopted in 2009, 2010, 2011, 2012, and 2013, respectively, < http://193.166.171.75/Dialog/varval.asp?ma=005_koikrr_tau_102_en&ti=Criminal+matters+decided+at+district+courts+in+2009+to+2013+Region%2C+Data%2C+composition+of+the+district+court%2C+Crime+and+Year+as+variables&path=../Database/StatFin/oik/koikrr/&lang=1&multilang=en>.

80 Ch 24 s 9(2).

81 <http://www.legislationline.org/documents/section/criminal-codes/country/1>.

82 Ch 5 s 2.

83 Ch 5 ss 1 and 2.

as if the defamation had been committed against a living person.[84] The same acts are also punishable under the Swedish Act on press freedom[85]—with reference to the Criminal Code,—by stipulating that such acts—ie defamation, gross defamation, or desecration[86]—are also punishable when committed through the press.[87] It should be noted that, according to the introductory text to Section 4 of Chapter 14 of the Act, this is not a *sui generis* crime in addition to those defined by the Criminal Code, but the repetition of the provisions laid down in the Criminal Code with an emphasis on the fact that the crime is punishable even when committed through the press. Nevertheless, punishment is rarely applied in Sweden for committing the crimes jointly referred to as defamation. While thousands of proceedings are launched against such acts every year,[88] punishment is imposed only in a few dozen cases, and the use of imprisonment (though possible)[89] is rather rare. In 2007, a total of approximately ten thousand police reports were filed for defamation, approximately 1,894 persons were charged[90] with a crime (while the discovery rate was 83 per cent),[91] and only 67 persons were found guilty.[92] (Out of the 67 persons, 58 were given a formal warning by the court (*dom*), five were subject to a fine, and four were subject to a prosecutorial measure called (*åtalsunderlåtelse*)).[93]

Chapter 27 of the Criminal Code of Denmark[94] also penalises both defamation and insult. According to Section 267, insult is committed by a person who insults the honour of another person verbally or physically; defamation is committed by a person who

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[84] Ch 5 s 4.

[85] The Freedom of the Press Act, SFS 1949:105.

[86] Act 105 of 1949, ch 7 s 4(14).

[87] Koltay (n 13) 325. Act 105 of 1949, ch 7 s 4(15).

[88] The number of filed cases was 6,740 in 2003, 7,204 in 2004, 7,744 in 2005, 8,922 in 2006, and 9,366 in 2007. *Statistik årsbok för Sverige – Statistical Yearbook of Sweden 2009* (Statistiska centralbyrån, 2009) 470.

[89] In the worst case, the perpetrator may be punished with imprisonment for up to six months, if they committed defamation physically (ch 5 s 3).

[90] A total of 233 of them were minors, ibid, 474.

[91] The discovery rate was 82 per cent in 2003, 81 per cent in 2004, 82 per cent in 2005, and 82 per cent in 2006. *Statistik årsbok för Sverige* (n 88) 472.

[92] 51 in 2003, 59 in 2004, 48 in 2005, and 84 in 2006, ibid, 475.

[93] The English translation uses the phrase 'waiver of prosecution', meaning that the public prosecutor waives the charges temporarily, while establishing the guilt of the defendant (if a confession is available). As the case is not heard by a court, no further punishment or measure is applied. This measure is primarily used with regard to juveniles and first time offenders. It may be used when it is probable that the court would only impose a fine for the given crime; if it is probable that the punishment would be suspended and there are special reasons for applying this measure; and if the prevention of committing further crimes can be ensured without the use of any other sanctions. It is an important feature of this measure that the perpetrator has a criminal record during the relevant period. (See a short description of this measure at <http://www.aklagare.se/In-English/The-role-of-the-prosecutor/Decision-to-prosecute/Waiver-of-prosecution>; for more details, see Jozef Zila, 'Sanctioning Powers of the Swedish Public Prosecution Service and Police' 2009 54 *Scandinavian Studies in Law* 397–406.)

[94] <https://www.retsinformation.dk/Forms/r0710.aspx?id=152827>.

asserts or disseminates facts ('accusations') that damage the reputation of another person. Normally, these acts are punished by a fine or imprisonment for a period of up to four months. In qualified cases (Section 268), where the perpetrator acted in bad faith or without reasonable grounds (in other words, with gross negligence), they may be punished by imprisonment for a period of up to two years. Liability may be excluded (Section 269), if the asserted fact is true or the 'accusation' was made in good faith (while being false), if the perpetrator was required by law to make the challenged assertion, or if it was justified by public interest or the private interest of the perpetrator or another person. On these grounds, obvious attacks, false statements of facts —whether their untruth is known or unknown,—and plainly humiliating behaviours that harm reputation without justification are punishable in Denmark. Furthermore, courts might (ie are not obliged and may decide at their own discretion) not impose a punishment for mutual insults or defamation which is committed when a person attacked by another person commits the same crime in response against the 'victim' as a punishment, or where the insult is merely the response of the victim to the 'improper behaviour' (ie provocation, for all practical purposes) of the 'victim' (Section 272). A person committing defamation (but not insult) against a deceased person is also punishable (with a fine or imprisonment for a period of up to four months, Section 274); however, if the defamed person has been deceased for over twenty years, the perpetrator may not be punished unless the assertion or spreading of the false fact was made wilfully ('in bad faith') or the perpetrator committed the crime recklessly.[95]

Central and Eastern Europe

Defamation and insult are punishable acts in Poland as well. The former is defined in Article 212(1) of the Polish Criminal Code.[96] A special feature of this provision is that not only are the perpetrators of defamation against natural persons punishable, but the perpetrators of defamation against groups of people and legal persons are also liable to be punished, either by a fine or even by imprisonment. Whoever insults another person in their presence, or though in their absence but in public without asserting any fact, also commits a crime,[97] and physical insult is also punishable under separate provisions (Article 217). Both the above definitions are basic cases, meaning that both defamation

[95] It should be noted that, under s 115, if the defamatory act is committed against the king or another person mentioned in the Constitution of Denmark, the punishment is doubled and, if it is committed against the queen, it is increased by one and a half times (this Section has not been applied in practice yet, cf Koltay (n 13) 332). According to s 121, physical libel against public officers (during or due to their official acts) is punished somewhat more seriously than 'ordinary' libel (the punishment may be imprisonment for up to six months, but this increase is not applicable to libel committed by verbal means only).

[96] <http://www.legislationline.org/documents/section/criminal-codes/country/10>.

[97] Art 216(1) of the Polish Press Act of 1984 releases journalists from liability if the published fact is untrue, but they exercised due care and diligence. Cf Koltay (n 13) 345.

and insult are punished in a qualified manner if the humiliating assertion or the self-esteem-damaging act was committed through the media. The court may decide not to establish guilt in cases of mutual acts or in situations where the insult was given in response to provocation by the other party. Physical insults (but not verbal ones) committed against officials are also punished more severely in Poland (by imprisonment for up to one year, Article 226(1)); if the insulting or humiliating act is committed against a constitutional body in public, the punishment may even be imprisonment for up to two years (Article 226(3)). The application of the above definitions are considered quite common in Poland: thousands of criminal proceedings are launched every year due to both basic and qualified defamation and insulting cases, as well as physical insulting (Articles 212–217), and on average around 1,000 persons are found guilty.[98]

In the Czech Republic, Section 206 of the Criminal Code[99] stipulates that a person who communicates false information which can seriously endanger another person's respect among their fellow citizens, in particular damaging their position in employment and their relations with their family or causing them some other serious detriment ('defamation'), shall be punished. In normal situations, the punishment is imprisonment for up to one year, while the punishment is imprisonment for up to two years in qualified cases (if the act was committed in the press, on film or radio, or in a television programme, or similar manner, so that the false information is given wide publicity). Under Czech law, mere statements of opinion, however offensive, are not punishable. The memory of deceased persons is not protected either.

Slovakia has put one of the most stringent criminal regulations into effect regarding defamation, ie the assertion and dissemination of known or knowingly false facts; however, this is not the case with regard to simple insult (which is not a crime in Slovakia). (Consequently, the number of criminal proceedings concluded with a guilty verdict is relatively high.)[100] The Slovak Criminal Code 2005 is (still) mostly based on the 1961 Criminal Code of Czechoslovakia (which is currently in force in the Czech Republic). As such, it is hardly surprising that the protection of human dignity is similar to that provided under the Criminal Code of the Czech Republic. Of course, the most important fact is that insult is not a crime in Slovakia; the definition of defamation is

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[98] For example, a total of 6,654 such cases were reported to the police in 2005 (the perpetrator was identified in 98.8 per cent of these cases); there were 9,838 cases in 2010 (97.3 per cent), 11,174 in 2011 (96.7 per cent) and 6,466 in 2012 (95.1 per cent). During the same years, the number actually sentenced for such actions was about 10 per cent to 20 per cent of those subject to criminal proceedings (criminal liability was established in the following number of cases: 738 in 2005, 1,064 in 2010, 1,270 in 2011, and 1,413 in 2012.) *Rocznik Statystyczny Rzeczypospolitej Polskiej – Statistical Yearbook of the Republic of Poland 2013* (Główny Urząd Statystyczny 2013) 151, 153 and 177.

[99] <http://www.coe.int/t/dlapil/codexter/Source/country_profiles/legislation/CT%20Legislation%20-%20Czech%20Republic%20Criminal%20Code.pdf>.

[100] Slovak statistics cover only 'moral crimes' in general, but defamation is the most important delict in this category. There were 840 such cases in 2008, 791 in 2009, 678 in 2010, 1,041 in 2011 and 841 in 2012. *Štatistická ročenka Slovenskej republiky – Statistical yearbook of the Slovak Republic 2013* (Štatistický úrad Slovenskej republiky 2013) 574.

strikingly similar to the one used by the Czech regulations. Hence, according to Section 373 of the Criminal Code of Slovakia,[101] defamation is committed by any person who communicates false information about another that is likely to considerably damage the respect of fellow citizens for such a person, damage their career and business, disturb their family relations, or cause them other serious harm. The punishment may be imprisonment for up to two years, even in normal cases; if it causes substantial damages,[102] is committed by reason of specific motivation (ie a contemptible reason), in public, or in business acting in a more serious manner, the punishment is imprisonment for a period of between one and five years. If the crime causes large-scale damage,[103] or causes another to lose their job, their business to collapse or their marriage to end in divorce, the punishment is imprisonment for a period of between three years and eight years. It can be seen, on the one hand, that some requirements are accurately specified (eg divorce as a result), while others are rather vague and mostly left to the courts to elaborate (eg 'specific motivation' or 'more serious manner'); and, on the other hand, that the legal subjects protected by the crime of defamation are rather diffuse and it covers material and other considerations as well, in addition to social reputation.

The Baltic states[104]

In Latvia, the currently effective statutory text[105] has undergone significant changes in comparison to the original text of the Criminal Code of 2000.[106] Until 2009, the original Criminal Code defined three crimes. Section 156 defined the crime of defamation, but the definition was rudimentary and covered both the assertion of facts (ie *sensu stricto* defamation) and humiliating acts (ie insult). The crime of 'defamation' (without establishing any further specificity) was committed by any person who 'willingly defamed' another person or 'harmed the dignity' of another person verbally, in writing or by physical action, and was punishable by a fine (of up to fifty times the monthly minimum wage) only. Section 157 punished the delict of 'humiliation', stipulating that a fine of up to sixty times the monthly minimum wage was to be applied to a person who knowingly committed the intentional distribution of fictions, knowing them to be untrue and defamatory of another person, in printed material as well as orally, if such had been committed publicly. The relationship between the two crimes was unclear, and clarification was hindered by vague statutory wording and the practical identity of the applied sanctions. Section 158 defined the qualified situations for the above crimes

101 <http://www.legislationline.org/documents/section/criminal-codes/country/4>.

102 'Substantial damages' exceed the upper limit of 'minor damages' by at least one hundred times (cf s 125 of the Criminal Code).

103 'Large-scale damages' exceed the upper limit of 'minor damages' by at least five hundred times, ibid.

104 As we have seen, certain acts damaging dignity may be punished in Estonia only in exceptional cases; Estonia was thus considered to be a fully abolitionist country.

105 <http://www.legislationline.org/documents/section/criminal-codes/country/19>.

106 <http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN018405.pdf>.

(ie 'defamation' and 'humiliation'); according to this provision, the perpetrator of any of the above crimes was liable to punishment by imprisonment for up to one year, custody,[107] community service, or a fine of up to thirty times the monthly minimum wage.[108] The previous regulations were changed as of 19 November 2009; the three separate sections were replaced by Section 157, specifying a single crime of 'defamation', the definition of which is the same as the previous 'humiliation'. In effect, this solution only provided some clarification regarding the rather vague original text, by making a person liable to punishment who knowingly commits the intentional distribution of fictions, knowing them to be untrue and defamatory of another person, in printed material, as well as orally, if such has been committed publicly. The punishment[109] is normally public service or a fine, and in qualified cases—ie if the crime is committed in the media—the punishment, in addition to the above, may also be 'temporary deprivation of freedom', which sanction—according to Section 7(2) of the currently effective Criminal Code—may be used for misdemeanours (ie lesser crimes) and means incarceration for a period of between 15 days and three months.

A new Criminal Code[110] was also adopted by Lithuania in 2000, and Chapter XXII was devoted to delicts against a person's dignity and honour. This Chapter covers two crimes: defamation and insult. According to Article 154(1), defamation is committed by a person who spreads false information about another person that could arouse contempt for this person or humiliate them or undermine trust in them. Normally, the punishment is a fine, restriction of liberty,[111] arrest,[112] or imprisonment for a term of up to one year. However, if the accusation relates to the commission of a serious or grave crime (Article 154(2)) or if it is made in the media or in a publication, the perpetrator—in addition to a fine or arrest[113]—may also be imprisoned for a term of up to two years. According to Article 155, insulti—ie a person who publicly humiliates a person in an abusive manner by an action, word of mouth, or in writing—is subject to harsher punishment than the general case for defamation (Article 155(1)). However, this delict—unlike defamation—

[107] The shortest period of incarceration is 3 days, and the longest period is half a year, during which period the prisoner may be forced to carry out the community service determined by the local government, s 39.

[108] The inconsistency of the regulations is also apparent regarding the 'qualified case', as the maximum fine amount of the typical sanction is less than the one applicable in 'normal cases' (though it may be combined with sanctions involving the deprivation of personal freedom).

[109] The current form of the system of sanctions was implemented by the amendment of 13 December 2012, not by the 2009 amendment.

[110] <http://www.legislationline.org/documents/section/criminal-codes/country/17>.

[111] 'Restriction of liberty' is a temporary sanction that restricts the freedom of movement. It may be applied in conjunction with ordering the defendant not to change the place of their residence, stay at home, carry out regular visits and reporting, comply with behaviour-related rules, not to visit certain places or contact certain persons, etc. (Art 49)

[112] Arrest means short-term imprisonment served in a short-term detention facility. It is imposed for a period from 15 up to 90 days for a crime and from 10 to 45 days for a misdemeanour (such as defamation, Art 50).

[113] 'Restriction of liberty' may not be applied in this case.

does not have any qualified cases, only a privileged case: If the crime is not committed in public, the punishment may be fine or arrest only.[114] The Criminal Code of Lithuania does provide for the punishment of desecration, but in a place that is different from the place of defamation and insult. According to Article 313, a person who, with the intent of expressing contempt for the deceased or the persons close to them, disturbs the peace of a funeral, shall be punished by community service or by a fine or by restriction of liberty or by arrest (Article 313(1)); the same punishment is applicable to a person who publicly makes false statements about the deceased, which could arouse contempt for or undermine respect for the memory of the deceased.[115] The delict of 'contempt of court' is a separate defamatory crime under the Criminal Code of Lithuania (Article 232). According to the act, a person who publicly, in an abusive manner by action, word of mouth or in writing, humiliates a court or a judge executing justice by reason of their activities shall be punished by a fine or by arrest or by imprisonment for a term of up to two years.

The Balkan states and Malta

In Slovenia,[116] Chapter Eighteen of the Criminal Code[117] lays down the rules pertaining to criminal offences against honour and reputation in a rather diverse manner. (This is a rather significant range of crimes *de iure* but not *de facto*: the crimes that follow serve as grounds for only a few dozen guilty verdicts each year in total.)[118] Article 158 applies to mere insults (the punishment is a fine or imprisonment for not more than three months or, in qualified cases, where the crime is committed through the press, radio, television or other means of public information or at a public assembly, the punishment may be a fine or imprisonment for not more than six months);[119] Article 159 applies to

[114] ibid. The act specifically stipulates for both crimes that they are prosecuted only at the request of the victim.

[115] Art 313(2). In a somewhat extraordinary manner in European criminal law, this delict is punishable at the request of the relatives or the public prosecutor (Article 313(3)).

[116] While only a small part (about one quarter) of Slovenia belongs to the Balkans, the country is discussed here as part of the Balkans due to this territorial connection. Croatia and Greece (with much larger territories in the Balkans) are also discussed here as countries of the Balkans.

[117] <http://www.legislationline.org/documents/section/criminal-codes/country/3>.

[118] The number of persons found guilty in criminal offences against honour and reputation between 2008 and 2012 is 63, 53, 56, 43, and 62, respectively. A similar ratio is also apparent from the previous years (eg in 2005 and 2000, 58 and 84 persons were found guilty of such crimes, respectively). *Statistični letopis 2013 – Statistical Yearbook* (Statistical Office of the Republic of Slovenia 2013) 214.

[119] Whoever commits the delict using offensive words, guilt may not be established under the Criminal Code if the offensive words were used in a scientific, literary or artistic work, in a serious piece of criticism or in the exercise of official duty, in a piece of journalism, in the course of political or other social activity, or in the defence of a right or protection of justified benefits, and they shall not be punished, provided that the manner of expressing such words, or that the other circumstances of the case indicate that their expression, was not meant to be derogatory (Art 158(3)). In case of mutual insults, the Court in Slovenia may also remit the punishment (Art 158(4)).

persons who assert or circulate any knowingly false information about another person ('intentional defamation');[120] Article 160 applies to defamation where the falsehood of the fact is not known by the perpetrator ('negligent defamation');[121] Article 161 applies to defamation where the asserted or circulated matter concerns personal or family affairs;[122] Article 162 applies to 'malicious false accusation of crime';[123] Article 163 applies to the 'insult to the Republic of Slovenia';[124] Article 164 applies to the 'insult to foreign country or international organisation';[125] and Article 165 applies to the 'insult to the Slovenian people or national communities'.[126] For all these crimes, the perpetrator and the responsible editor are also punishable for criminal offences which were committed in newspapers and magazines, radio and television programmes or websites,

[120] The qualified cases are the same as in the context of Art 158, with the difference that the sanction —in addition to the fine—may also be imprisonment for up to one year (Art 159(2)).

[121] The qualified cases are still the same as in the context of Art 158, and even the punishments are the same (Art 160(2)). The sole exceptions are situations where the negligent defamation is of such a nature that it may bring about 'grave consequences' for the victim (Art 160(3)), in which case the punishment is the same as applicable to qualified cases of intentional defamation (fine and imprisonment for up to one year). If the perpetrator proves either the truth of their assertions or that they had reasonable grounds to believe in the truthfulness of what has been asserted or circulated, they shall not be punished for defamation (even 'negligent defamation') but may be punished either for insult or 'bad faith false accusation' (Article 160(4)).

[122] The qualified cases are the same as those for Art 160; if such defamation is committed through press, radio, television or other means of public information or at a public assembly, they shall be punished by a fine or sentenced to imprisonment for not more than six months (Article 161(2)), and if the defamation may bring about 'grave consequences' for the defamed person, the punishment shall be a fine or imprisonment for not more than one year (Art 161(3)). The proof of truth is subject to different rules: if the protected legal subject of this kind of defamation is the sanctity of privacy and family life, truth may not be proven as a general rule (Art 161(4)); as an exception, truth may be proven (and criminal liability may be avoided), if the perpetrator asserted or circulated the relevant matter concerning the personal or family affairs of the victim in the exercise of official duty, political or other social activity, the defence of a right or the protection of justified benefits. Proving the truth must still be successful to avoid criminal liability, meaning that the perpetrator must prove that the asserted fact was true or that they had reasonable grounds for believing in the truthfulness thereof (Art 161(5)).

[123] This is committed by a person who impugns another person by asserting that they have committed a criminal offence or been convicted for the same with the intention of exposing that person to scorn. Interestingly, the punishment is *more lenient* than for defamation: the sanction is a fine or imprisonment for up to three months (Art 162(1)), which, in qualified cases (committed through press, radio, television or other means of public information or at a public assembly) may be increased to imprisonment for up to six months—in addition to the 'usual' fine (Art 162(1)).

[124] According to these provisions, whoever publicly commits any of the above offences (Arts 158–162) against the Republic of Slovenia or against the President of the Republic with respect to the exercise of their duties, and whoever has publicly desecrated the flag, coat-of arms or national anthem of the Republic of Slovenia shall be punished by a fine or sentenced to imprisonment for not more than one year.

[125] The method of commission is the same as discussed above, but the object of commission is the foreign state or the president, ambassador, flag, coat-of-arms, national anthem of the foreign state, as well as any international organisation recognised by the Republic of Slovenia, or a representative or symbol thereof. The applicable penalty is also a fine or imprisonment with a special maximum period of one year.

[126] This crime is committed by a person who publicly commits any of the offences under Arts 158–160—ie insult, intentional defamation, or negligent defamation—against the Slovenian people or against the Hungarian or Italian national communities living in the Republic of Slovenia. The punishment is also a fine or imprisonment for a term of up to one year.

unless it concerned a live broadcast of a show and the responsible editor could not prevent the crime (Article 166(1)); as well as the publisher or printer of non-periodical printed publications (eg posters, brochures), and a manufacturer of a record, CD, DVD, in a film or by other video, audio, or other means intended for a broader circle of people (Article 166(2)). However, if the perpetrator of any kind of insulting, defamation or false accusation has been provoked by the indecent or brutal conduct of the injured person, or if they offer an apology to the victim before the Court, or if they retract what they have been asserting or circulating before the Court, their punishment and that of the editor, press, producer as secondary liable persons may be rescinded (Article 167). According to the Slovenian Criminal Code, insult, false accusation and all types of defamation (Articles 158–162) are also punishable if committed against a state authority (Article 168(2)) or a deceased person (Article 168(4)). Finally, according to the Criminal Code of Slovenia, a civil law measure may be applied with regard to any and all crimes defined in Chapter Eighteen by the proceeding criminal court: the Court may order that the whole judgment or a part thereof is published at the expense of the perpetrator in the same manner as was employed when the offence was committed, fully or partly (Article 169).

In Croatia, the original text of the current Criminal Code[127]—effective since 1998—punished defamation (ex Article 200) and insult (ex Article 199) by imprisonment; under the legislative version effective as of 28 June 2006, these crimes are no longer punishable by imprisonment.[128] This means that Croatia is one of the four countries,[129] where defamatory crimes are punishable by criminal law but are punishable only by a fine (of 90 to 500 daily items).[130] Presently, defamation (ie asserting or disseminating false facts, Article 149) and insult (Article 147) are accompanied by the crime of humiliation (Article 148) committed by a person who asserts or disseminates any information to the detriment of the reputation of another person before a third person.[131]

In addition to Croatia, Bulgaria is the other South-Eastern European member state of the European Union where defamation and insult is only punished by a fine. The Criminal Code of Bulgaria[132]—originally adopted in 1968—penalises both insults (Article 146) and defamation (Article 147); the two crimes are distinguished from each other clearly following the statement of fact / opinion dichotomy. Insult is committed by a person who says or does something degrading to the honour and dignity of another in the presence of the latter; defamation is committed by a person who makes public a disgraceful fact about or attributes the commission of a crime to someone, if the

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127 <http://www.legislationline.org/documents/section/criminal-codes/country/37>.

128 Ilia Dohel, *Representative on Freedom of the Media: Report on Achievements in the Decriminalization of Defamation* (IRIS Merlin), <http://merlin.obs.coe.int/iris/2006/10/article1>.

129 France, Spain, Croatia, and Bulgaria.

130 Cf International Press Institute (n 3) 42.

131 The latter two delicts are challenged primarily by journalist organisations due to their vague wording. Cf eg <http://www.b92.net/eng/news/region.php?yyyy=2014&mm=04&dd=09&nav_id=89934>.

132 <http://www.legislationline.org/documents/section/criminal-codes/country/39>.

statement is true. The punishment for the two crimes may be a public reprimand or a fine of various amounts with the smallest limit being 1,000 levas[133] and the highest amount being 15,000 levas.[134]

The Greek Criminal Code[135] penalises a wide range of defamatory crimes and also applies imprisonment as punishment. In Greece, the following defamatory crimes are penalised: insult (Article 361), (non-provoked) physical insult (Article 361A), defamation, ie the assertion or dissemination of false facts violating human dignity, if the perpetrator knew the facts to be untrue (Article 363) and even if they did not know them to be untrue (Article 362), the assertion of facts violating the reputation of legal entities (Article 364), and desecration (Article 365).[136] While these crimes may be committed against any person, the legal subject (in part) of the crime of false accusation is the protection of the honour of persons.[137] For these crimes, the Greek courts adopt hundreds (occasionally even close to a thousand) of penal judgments each year.[138] The perpetrator of the general crime of defamation (Article 362) may not be punished if the asserted or disseminated fact turns out to be true (where the perpetrator did not know it to be untrue); but the truth may not be proven (meaning that the perpetrator is punishable anyway), if the fact relates to the privacy or family life of the victim and did not relate to any public interest, and the perpetrator acted in bad faith (Article 366(1))—this (ie proving the truth successfully) does not relieve the perpetrator from their possible liability for insult (Article 366(3)). The Greek Criminal Code also covers the criminal liability of editors; according to the rules, the editor of regularly published papers (newspaper or magazine) is required to publish the judgment on the unlawful publication in the newspaper in that paper in the same manner as the harmful information—or they may be punished by imprisonment for up to one year (Article 269(2)).

In Malta, the current Criminal Code[139]—effective since 1854—also penalises both insult and defamation. Both crimes are regulated under the rather vague Article 252 and

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133 The special minimum for the normal crime of insult.

134 The latter applies if the perpetrator commits defamation before the general public or through the abuse of their profession, and it has grave consequences.

135 <http://www.c00.org/p/greek-penal-code.html>, <http://www.greekhelsinki.gr/english/reports/ghm29-9-1998.html>.

136 With regard to the violation of human dignity, as a protected legal subject, the following acts are also penalised: attacks upon a foreign state and its head (this may be committed by attacks against honour only, in addition to physical aggression, Art 153); attacks upon the honour of diplomats (Art 154); offences against the President of the Republic (Art 168).

137 For a summary of crimes against the honour and reputation of persons, see eg Ilias G Anagnostopoulos and Konstantinos D Maglivera, *Criminal Law in Greece*. International Encyclopaedia of Laws (Kluwer Law International 2000) 88–89.

138 In total, 900, 458, 564, and 647 persons were found guilty of 'crimes against honour' in 2005, 2006, 2007, and 2008, respectively (*Statistical Yearbook of Greece, 2009 & 2010* (Hellenic Statistical Authority 2011) 214), out of whom 116, 45, 89, and 62 were repeat offenders (ibid, 217).

139 <http://www.legislationline.org/documents/section/criminal-codes/country/15>.

may even be punished by imprisonment;[140] desecration is penalised (as a qualified case of defamation, Article 255), and defamation through the press is also penalised (as a *sui generis* crime, Article 256), however, the detailed rules of and sanctions applicable to the latter are laid down by the Maltese Press Act XL of 1974. The latter crime covers a wide range of acts that may be committed through the press,[141] ranging from racism through the spreading of scare-stories to incitement against the law. In this context, defamation committed through the press is punishable under the Press Act (by a fine, Article 11). It is a qualified case if the victim is a public officer and the defamation relates to their official activities; if it is a candidate to a public office and the defamation relates to the victim's ability to fill their respective office; if the victim is a professional or artist and the defamation is related to their earning activity; if the victim is an active political figure and the statements relate to this activity; and if the victim fills a publicly trusted position affecting public interests, provided in all cases that proving the truth of the statement has failed, or—due to the private nature of the statement—no evidence on the matter may be submitted (Article 12, in such cases, the punishment may be imprisonment).

Conclusion

Europe has a long-standing tradition of using the means of criminal law to protect human dignity, and this tradition is still kept by most European legal systems. As we have seen, out of the 29 European countries (28 EU Member States and Switzerland) reviewed, a total of 24 countries apply civil law damages and *solatium doloris* in combination with penal sanctions against persons who violate the dignity or honour of other natural persons by asserting or disseminating true or false statements of fact, or by other acts that violate the protected legal subjects mentioned above. Nevertheless, an opposite trend also seems to have emerged in the last ten to fifteen years, more and more countries ceasing to apply criminal law to sanction such actions.

This abolition process is not taking place at the same speed throughout Europe; it is most apparent in the countries of Eastern and South-Eastern Europe (with the two exceptions being the United Kingdom and Ireland; the countries rejecting criminal sanctions include Ukraine, Bosnia-Herzegovina, Cyprus, Georgia, Estonia, Montenegro, Macedonia, Tajikistan, Armenia, Romania, and—standing for partial abolition—Moldova, Kyrgyzstan, and Serbia), while the traditional punitive approach is more common—at least at the level of legislation—in the Central, Southern, Northern, and Western parts of Europe. The latter observation needs particular emphasis, because the

[140] The specific punishment depends on the nature of the act and on whether it is regarded as a general or qualified case; sometimes a fine is the only punishment applied, but even imprisonment for up to one year may be applied as well.

[141] <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8743&l=1>.

courts of various countries make use of the theoretically available means of criminal law to rather varying degrees; harsher punishment is (or has been so far) more prevalent in German, French, and Italian territories, including prison time to be served by the defendant, while the Northern countries (Finland, Sweden, and even Norway—a country not covered in this paper[142]) tend not to apply a guilty verdict or to impose a lenient fine or other sanctions not involving the restriction of liberty in such criminal proceedings.

It seems certain that criminal law is to remain a fundamental means of protecting the honour and dignity of individuals in the long run, but the prevalence of making use of such means is apparently decreasing in the abolitionist countries as well as other countries. However, the general European trend of reducing the application of prison sentences, the available statistics, the example of some countries otherwise following a rigorous approach (especially Italy), as well as the case-law of the European Court of Human Rights (not discussed herein for length and simplicity-related considerations) indicate that imprisonment may be replaced, slowly and gradually during the following years and decades, by other forms of punishment—especially fines—that do not involve the restriction of liberty.

[142] In Norway, an average of 600 to 800 police reports were filed for defamation and insult between 2004 and 2012 (a total of 711, 710, 739, 861, 768, 704, 696, 670, and 607 criminal proceedings were launched during these year for such actions (*Statistical Yearbook of Norway 2013* (Kongsvinger 2013) 153), but no court judgment was adopted on such matters in 2013, eg the charge was dropped or the proceedings were otherwise closed in 152 of the discovered cases, the charge was dropped on a not guilty verdict in 31 cases, and mediation was used in 9 cases (before the Conflict Council), but no formal court hearing was held and no fine was imposed in a single case (ibid, 156.).

Rolf H Weber – Ulrike I Heinrich

Internet intermediaries as judges of conflicts between the right to be forgotten and the freedom of expression

Introduction

The 2014 year's judgment of the Court of Justice of the European Union (CJEU) concerning the so-called *Google Spain v AEPD and Mario Costeja González*[1] case opened an intensive debate about privacy on the Internet and brought the topic of the 'right to be forgotten' back into public focus.[2] This right reflects the claim of an individual to have certain data deleted so that third persons can no longer trace them. Contrary to the right to be forgotten, the 'right to forget', known for many years, addresses the situation that a historical event should no longer be revitalised due to the length of time elapsed since its occurrence.[3]

The right to be forgotten is based on the autonomy of an individual being the rightholder of his or her personal information during a given time; for obvious reasons, the farther back the origin of the information, the more likely personal interests prevail over public interests.[4]

In view of the time aspect's importance the right to be forgotten can be distinguished according to different situations depending on the circumstances and the time aspects:[5]

- If the purpose of the undertaken data processing has been achieved, the respective data should not be stored or made available any longer. In this situation, the principles of proportionality and of data minimisation, being well known in most data protection laws, justify the deletion of the data.
- The processed data are on a decreasing slope of public importance; in consequence, the public interest is 'overruled' by persisting priorities of the individual, ie the private interest prevails.
- The importance of the processed data and their respective impacts is decreasing due to substantive changes in the public priorities, ie the environment influences the justification of the data storage.

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[1] *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González*, Case No C-131/12, decision of 13 May 2014.

[2] This contribution takes up several parts of an earlier published article in a systematically restructured way, namely Rolf H Weber, 'On the Search for an Adequate Scope of the Right to Be Forgotten' (JIPITEC 2015) 1-10; the author already discussed the right to be forgotten in 2011, see Rolf H Weber, 'The Right to Be Forgotten: More Than a Pandora's Box?' (JIPITEC 2011) 120–30.

[3] Weber 2011 (n 2) 120, no. 3.

[4] ibid 125, nos. 27–31.

[5] For more details see Giovanni Sartor, 'The Right to be Forgotten: Publicity, Privacy, and the Passage of Time' in Dag W Schartum – Andrew Bygrave – Anne G Berge Bekken (eds), *Jon Bing: A Tribute* (Gyldendal Norsk Forlag 2014) 79, 81–93.

In addition, the right to be forgotten can also be differentiated according to possible compliance situations within the legal framework:[6]

- If the data processing was already initially unlawful, the storage of data will later not be suitable to be justified.
- In case of a non-initial unlawfulness the situation of prevailing private interests can occur after the beginning of the data processing but before the exercise of the right to be forgotten.
- The unlawfulness possibly only accrues subsequently, namely at the moment of the very exercise of the right to be forgotten.

So far, the discussions about the right to be forgotten have not sufficiently differentiated between the already mentioned not identical factual situations. However, such assessment is important in order to reach an appropriate delineation of the right to be forgotten; the analysis is particularly important in view of the tensions between privacy and other fundamental rights.

Conflicting interests

The right to be forgotten can come into conflict with the fundamental rights related to communications, namely the freedom to actively raise the voice (expressions) and the freedom to seek information, since the deletion of data jeopardises transparency. Both freedoms are guaranteed by many legal instruments (eg Article 19 of the Universal Declaration of Human Rights).[7]

The freedom of expression requires States to guarantee the right to receive and impart information and ideas of all kinds regardless of frontiers; non-compliance with this fundamental right is to be assumed in case of any restrictions on the operation of websites, blogs, or any other Internet-based electronic or other such information dissemination systems. The freedom of information is the freedom to seek, receive and impart information and ideas through any media; traditionally freedom of information laws have developed in relation to information by governments but increasingly the private sector is regulating access to information.

Up to now, the occurring tensions between the different fundamental rights have only been reluctantly analysed;[8] this contribution assesses the elements that need to be taken into account for an appropriate analysis.

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[6] Sartor (n 5) 99.

[7] See also Felicity Gerry and Nadya Berova, 'The Rule of Law Online: Treating Data Like the Sale of Goods. Lessons for the Internet from OECD and CISG and Sacking Google as the Regulator' (2014) 30 *Computer Law & Security Review* 465, 471.

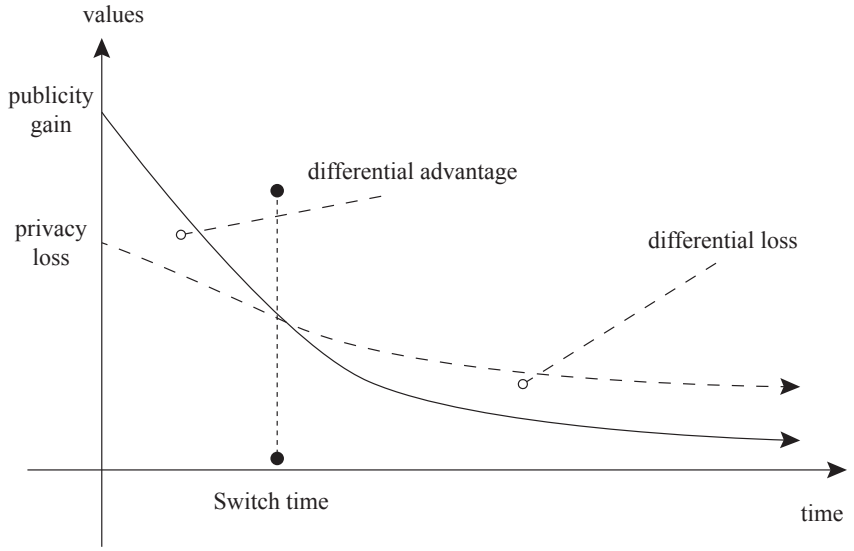
[8] See Rolf H Weber and Ulrike I Heinrich, 'Verletzt das Recht auf Vergessen(werden) des EuGH die Meinungsäusserungsfreiheit?' *Jusletter IT*, 11 December 2014; see now also the contribution of Weber 2015 (n 2) 6-7, nos. 29-38.

Tensions between the right to be forgotten and the freedom of expression / freedom of information

Looking from the perspective of assessing the scope of different fundamental rights the following scenarios exist: Tensions between the right to be forgotten on the one hand and the freedom of expression as well as the freedom of having access to information on the other hand are unavoidable in a theoretical perspective and mirror the balancing test between private and public interests in practice.

Specific information is often relevant to the public for a short time after its publication, for example the information about a crime. The information could progressively lose its value for the general public but it continues to have a significant impact on the interests of the person concerned (the convicted person in prison). Consequently, while at the time of the information's disclosure the benefit for society might outweigh the interest of the individual, at a certain point in time a change occurs insofar as the loss in privacy could outweigh the benefits derived from the freedom of expression.

After the above-mentioned crossing point of two interests' curves, the concerned individual must be entitled to exercise the right to be forgotten.[9] At this moment in time, the overall outcome's maximisation is obtained by switching from distributing information to erasing the data. The differential advantage and the (hereinafter emerging) differential loss can be shown in a graph as follows:[10]

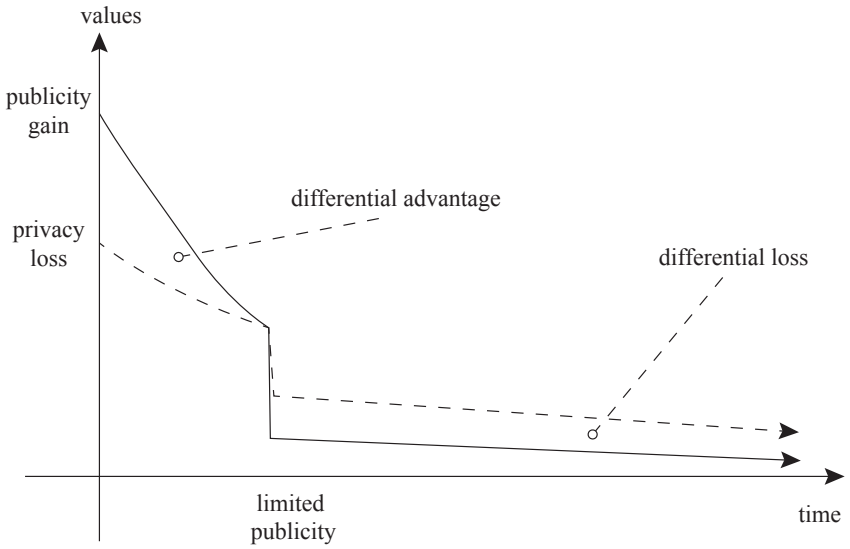


[9] In this situation the right to be forgotten has been based on the personality right of individuals in the past, see Weber 2011 (n 2) 121, no. 7.

[10] Taken from Sartor (n 5), 88.

Similarly, the right to be forgotten can play a role in a situation in which certain information relevant to security loses most of its significance after a short time (eg since the effects of crimes can be immediately detected) whilst continuing to have a negative impact on the privacy of the person whose data are stored.[11]

In order to conceal the discrepancies between privacy and publicity, a new form of processing of data at the relevant point of time could be the most efficient solution. This situation can be shown in a graph as follows:[12]



Obviously, probability considerations have to be taken into account in case of assessing the flow of time. In order to properly identify the point of time from which the data controller will no longer be motivated to continue distributing the information, Sartor looks at three aspects:[13] (i) The loss that the party would suffer in case the data were considered to be illegal (publicity interests being outweighed by private interests), (ii) the probability that the party assigns to the data being considered illegal and (iii) the motivation that the party has for leaving the material online. These general considerations should be kept in mind hereinafter when the recent court practice to the right to be forgotten and the attempts for its legislation are discussed.

[11] To the civil law perception see Weber 2011 (n 2) 121–22, nos. 5–9.
[12] Taken from Sartor (n 5) 92.
[13] ibid 99.

Jurisprudence of the Court of Justice of the European Union: Facts and decision

In May 2014 the Court of Justice of the European Union (CJEU) was called to assess the right to be forgotten for the first time when deciding the *Google* case.[14] In so doing, the CJEU acknowledged 'its' right to be forgotten with the following reasoning:

A Spanish citizen whose property had been seized more than ten years ago filed a complaint with the national Data Protection Agency in the year 2010 against both a Spanish newspaper and Google Spain / Google Inc. The individual was of the opinion that an auction notice dating from 1998 and related to his repossessed home appearing on Google's search results in case of entering his name would infringe his privacy rights. The individual was arguing that the proceedings had been fully resolved for a number of years and hence the reference to these proceedings was entirely irrelevant. As far as Google Spain and Google Inc. were concerned, the individual requested the deletion of the link to the respective information on the website of the Spanish newspaper so that it no longer appeared in the search results.

The competent Spanish court referred the case to the Court of Justice of the European Union submitting three questions, namely (i) whether EU law applied to Google Spain, given that the company's data processing server was in the United States, (ii) whether the Data Protection Directive 1995 of the EU applied to search engines such as Google, and (iii) whether an individual has the right to request that his or her personal data be removed from accessibility via a search engine (the so-called 'right to be forgotten').

In its ruling of 13 May 2014 the CJEU answered these three questions as follows: (i) Even if the physical server of a company processing the relevant data is located outside Europe, the EU rules apply to search engine operators if they have a branch or a subsidiary in an EU Member State which promotes the selling of advertising space offered by the search engine (on the territoriality of EU rules). (ii) Search engines are controllers of personal data and therefore Google cannot escape its responsibility when handling personal data through a search engine in Europe (leading to the applicability of EU data protection rules to a search engine). (iii) Individuals have the right under certain conditions to ask search engines to remove links with personal information about them (right to be forgotten).

Concerning the removal of links, the Court of Justice considered that the right to be forgotten would apply if the information was inaccurate, inadequate, irrelevant or excessive for the purposes of the data processing.[15] The CJEU also expressed the opinion that in this particular case the interference with a person's right to data protection could not be justified merely by the economic interest of the search engine.[16]

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[14] *Google* (n 1); see also the summary in Weber 2015 (n 2) 4-5, nos. 17-22.
[15] *Google* (n 1), nos. 92–94.
[16] ibid no. 81.

However, the Court of Justice clearly stated that the right to be forgotten would not be absolute but would always need to be balanced against other fundamental rights.[17] Without discussing a balance of interest test between privacy and the freedom of expression in detail, the CJEU clarified that a case-by-case assessment was needed, considering the type of information in question, its sensitivity for the individual's private life and the interest of the public in having access to the relevant information.[18]

The decision of the Court of Justice[19] does not impose an obligation on Google to delete the respective information, it 'only' concerns the deletion of a link out of the search engine's result list. In other words, the critical information can still be found by way of searching through eg google.com or another search engine.

Google's reaction to the judgment

Google has criticised the decision of the CJEU in substance; nevertheless, the search engine reacted quickly by uploading a form on the website helping individuals to file a request for removal of links to personal data.[20] The form is relatively straight-forward; apart from the need to write a detailed paragraph outlining the reasoning for the request, no specific interests are to be disclosed. Nevertheless, a clear identification of the intervening individual must take place. Google also announced that it would cooperate closely with the European data protection authorities and appointed an independent council designing the general principles to be applied in individual cases.

Until October 2015, about 325,000 erasure requests have already been filed with Google; according to its own Transparency Report about 40 per cent of the requests were approved.[21] However, a clear picture in respect of the detailed reasoning of the requests cannot be drawn from this information source, ie Google's decision-making power when assessing the complaints is very broad. Consequently, Google has become a judge in assessing the corresponding values of two fundamental rights.[22]

Implementation of Guidelines

As outlined, many statements in the *Google* decision of the CJEU are not very clear; therefore, the level of legal certainty as to how to handle erasure requests is low. In consequence of this assessment, the Article 29 Data Protection Working Party adopted

17 ibid.
18 ibid nos. 81 and 94.
19 For further details see Gerry and Berova (n 7) 473–75.
20 <https://support.google.com/legal/contact/lr_eudpa?product=websearch&hl=en>.
21 <http://www.google.com/transparencyreport/removals/europeprivacy/?hl=en>.
22 For further details see the 'Unclear and incomplete rules' below.

Guidelines on the implementation of this judgment on 26 November 2014.[23] These guidelines concretise the right to be forgotten by offering a list of 13 criteria for European data protection authorities (DPA) to take into consideration when handling complaints (on a case-by-case basis).

At first instance, the DPA have to ensure that the research results relate to a natural person and concern a search on the data subject's name (No 1); provided the data subject plays a role in public life, there is usually an interest of the public in having access to the information about them (No 2). The data subject's age can be seen as another important factor; in the event that the data subject is a minor the DPA should more likely require a delisting of the relevant results (No 3).

The further criteria as developed by the Article 29 Data Protection Working Party can be summarised as follows:

– In case of published data, the DPA need to assess whether the data are accurate, relevant and not excessive (Nos 4 and 5).
– If the accuracy is given it must be assessed whether the data are up to date or being made available for longer than is necessary for the purpose of the processing (Nos 7 and 8).
– If the relevant information is classified as being sensitive within the meaning of Art. 8 of the Directive 95/46/EC or if the search results provide a link to information putting the data subject at risk the DPA are more likely to intervene when a de-listing request is refused (Nos 6 and 9).
– The result of the assessment should be the same in cases where the content was voluntarily made public by the data subject that revoked its once given consent later (No 10).
– If the published data relate to a criminal offence, the interest of the general public of having access to the information might be prevailing (No 13).

Apart from the above criteria, it can also be relevant to consider whether the information has been published for a journalistic purpose (No 11) and whether the publisher of the data had a legal power or obligation to make the personal data publicly available (No 12).

These guidelines help Google and other DPA to evaluate and judge the increasing number of erasure requests and, in the sequel, support the creation of legal certainty.

[23] Article 29 Data Protection Working Party, 'Guidelines on the Implementation of the Court of Justice of the European Union Judgment on *Google Spain and Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, C-131/12, adopted on 26 November 2014' <http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp225_en.pdf>; Weber 2015 (n 2) 8, no. 41.

Data protection regulation

In January 2012, the European Commission submitted the proposal for a Data Protection Regulation (DPR)[24] which is supposed to replace the Data Protection Directive 1995.[25]

Justification for the new regulation

When presenting the new Data Protection Regulation, Commissioner Viviane Reding emphasised that 'if an individual no longer wants his personal data to be processed or stored by a data controller, and if there is no legitimate reason for keeping it, the data should be removed from their system.'[26] The right to be forgotten should enable the data owners to be in control of their own identity online. This rationale is reaffirmed in Recital 53 of the DPR that, after affirming the right to be forgotten of the data subject, observes the particular relevance of this right 'when the data subject has given the consent as a child, when not being fully aware of the risks involved by the processing, and later wants to remove such personal data especially on the Internet.' Nevertheless, it has always been assessed that the right to be forgotten is not absolute and that it must not 'take precedence over freedom of expression or freedom of the media' (Recital 53).[27]

The already existing 'right to erasure' contained in the Data Protection Directive 1995 has been enlarged to a 'right to erasure and to be forgotten' in Article 17 of the draft Regulation submitted by the European Commission. During the parliamentary discussions the motion was adopted that it would be more appropriate to 'delete' the term 'right to be forgotten' again and to concentrate on the right to erasure;[28] however, the Council of the European Union's position of December 2014 still names Article 17 DPR 'Right to be forgotten and to erasure'.[29]

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[24] See <http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf>; see also Weber 2015 (n 2) 3, nos. 5-7.

[25] 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.

[26] Viviane Reding, 'The EU Data Protection Reform 2012: Making Europe the Standard Setter for Modern Data Protection Rules in the Digital Age Innovation' Speech, 22 January 2012.

[27] See also Weber 2015 (n 2) 6, no. 6.

[28] See also Giovanni Sartor, 'The Right to be Forgotten in the Draft Data Protection Regulation' (2015) 5(1) *International Data Privacy Law* 71.

[29] Council of the European Union, 15395/14, 19 December 2014. 71 <http://amberhawk.typepad.com/files/dapix-text-eu-council-dp-reg-december-2014.pdf>.

Scope and content of the proposed rules

Article 17 (1) DPR specifies the scope of the right to be forgotten (ie the right to erasure). This right can be invoked against the data processor if (i) the processing concerns data that are no longer necessary 'for the purpose for which they were collected or processed'; (ii) consent has been withdrawn or the storage period consented to has expired, such consent providing the only legal basis for the processing; (iii) the data subject validly objects to the processing, or (iv) the processing violates the legal instrument on any other ground.[30]

As mentioned above, the need to assess the justification of data processing and storage in view of the circumstantial time scale requires the application of the fundamental privacy principle of purpose limitation that has been contained in data protection laws for many years. The withdrawal of consent also constitutes a well-known concept; if the justification reason for the data processing has elapsed, the storage of data cannot continue any longer. The most difficult situation occurs in case of a valid objection by the data subject. The last condition has a residual function, covering processes that are unlawful for any other grounds.

The main entitlement in the right to be forgotten is the normative power to inhibit the continuation of the processing or storage of data. From a procedural perspective, the data subject has a right to an injunction to this effect. Furthermore, the data subject is entitled to enforce the termination of the illegal processing and storage; this right is inalienable, similarly to a property right, and cannot be renounced.

A certain limitation of the scope and content of the right to be forgotten consists in the description of the addressee being obliged to comply with an erasure complaint: According to Article 4 (5) and (6) DPR in conjunction with Article 17 DPR only the controller of data is subject to the obligation to delete certain data upon request. Consequently, only if Internet intermediaries (ie search engines) can be qualified as data controllers in regard to content originated from third parties, will they be subject to these obligations;[31] this condition will often but not always be fulfilled.

Contents of foreseen exceptions

The right to be forgotten is not an absolute right. Some apparent exceptions are set out in Article 17 (3) DPR: For example, the controller of data is exempted from the obligation to erase the data to the extent that (i) the processing is necessary for the sake of certain other rights and interests, namely the exercise of the freedom of expression in line with Article 80 DPR, (ii) public health considerations prevail (Article 81 DPR),

[30] See also Weber 2015 (n 2) 3, no. 8.
[31] Sartor (n 28) 65.

(iii) requirements of historical, statistical and scientific research need to be met (Article 83 DPR), and that (iv) compliance with other legal obligations is compulsory.

As far as the freedom of expression is concerned, legal problems cannot be overlooked: Article 80 DPR 'only' contains an authorisation / obligation for Member States to limit data protection in order to enable the processing of data carried out for the purpose of journalism and authentic and literary expression. However, the scope of this provision is unclear: Should the rule be understood in the way that processing of personal data for the purposes of journalism and authentic and literary expression are forbidden according to EU law? Should an authorisation to process personal data for such purposes 'only' exempt the processing from the right to be forgotten while maintaining its unlawfulness? Probably, both questions are to be answered in the negative.[32] Nevertheless, at first instance the fundamental right of freedom of expression does not seem to be covered by the exception rule, ie the scope of the right to be forgotten as stated in Article 17 DPR might not be subject to limitations by reference to this fundamental right.

Unclear and incomplete rules

Without any doubt, the intention of giving the data subject the right to have certain data deleted over time must be supported. However, as mentioned, Article 17 DPR fails to address important problems that have justified its proposal. In particular, the new legal instrument does not contain provisions as to (i) the extent up to which a publication or its persistence through time is legitimate, even when it may go against the interest, or in any case the will, of the data subject, and (ii) the extent up to which the intermediary, rather than the originator of the information, can be responsible for its publication or for failing to comply with removal requests.[33]

The first issue pertains to the general problem of freedom of expression as confronted with the privacy rights of data subjects. These rights can hardly be 'reconciled', if reconciling means maximising the satisfaction of both; the occurring conflict can only be 'settled' by applying a balance of interest test. Thereby, in order to find an appropriate trade-off, not only general rules should be applied, but the path-dependency of the contextual factors must be taken into account (as in the *Google* case).

With respect to the second issue regarding the liability of intermediaries, it appears to be doubtful whether data protection law alone can provide the best legal framework, even if complemented with fundamental rights. In other words, the specific provisions as contained in Articles 13–15 of the EU E-Commerce Directive of 2000[34] merit better attention in the context of the right to be forgotten.

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[32] ibid 67.

[33] ibid 70; Weber 2015 (n 2) 4, no. 14.

[34] OJ L 178, 17 July 2000, 1–16; for a more detailed discussion of this issue see Weber 2015 (n 2) 8, no. 45.

Reconciliation of tensions between privacy and 'openness'

In his submission to the CJEU of 25 June 2013, the Advocate General, Niilo Jääskinen, discussed the already mentioned tensions between the freedom of information and the freedom to exercise the search engine business on the one hand and the interest of individuals to have certain data deleted (right to be forgotten) on the other hand.[35] The Advocate General pointed to the fact that (i) search engines would play an important role in the information society, in principle to the benefit of individuals being interested in finding certain information, and (ii) the search processes would constitute an important concretisation of the freedom of expression and the freedom of information in the information society.[36] Based on this acknowledgment the Advocate General pleaded for the application of an appropriate balancing test between the different fundamental rights protecting different freedoms. As a result of such a balancing test, in the opinion of the Advocate General, the communications freedoms must be considered as the prevailing human rights.[37]

Similarly, a judge of the German Constitutional Courts published a so-called position paper in which he argued that the decision of the European Court of Justice would undermine the liberal principles of communications freedoms. In addition, the judge expressed the opinion that the search engines could not reasonably assess the conflicting interests between the individuals (protection of privacy) and the Internet intermediaries (safeguarding the openness of communications channels).[38] The representative of the German Constitutional Court clearly stated the fear that Google would become a 'private arbitral tribunal' with far-reaching discretionary decision-making power in relation to the (free) communications flow in the Internet.[39]

Nevertheless, with a view to the *Google* decision of the European Court of Justice it should not be overlooked that the Court did not order Google to fully delete the contested information but 'only' to delete the link to this information. Subsequently, Google declared it would apply this order within the geographical scope of the Member States of the European Union and some additional European countries. Therefore, the problematic information can still be found if somebody is searching through google.com or is doing a combined search (for example public auction, Spain, 1998). From this fact the conclusion can be drawn that, in contrast to some pronouncements, the freedom of information has not become obsolete, it is only slightly

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35 Opinion of the Advocate General Jääskinen, 25 June 2013 <http://curia.europa.eu/juris/document/document.jsf?doclang=EN&text=&pageIndex=0&docid=138782&cid=87431>.

36 ibid nos. 121 and 131.

37 ibid nos. 127–28 and 133.

38 Johannes Masing, 'RiBVerfG Masing: Vorläufige Einschätzung der «Google-Entscheidung» des EuGH vom 21. Mai 2014' 14 August 2014, Thesis No 2, <http://www.verfassungsblog.de/ribverfg-masing-vorlaeufige-einschaetzung-der-google-entscheidung-des-eugh/>.

39 ibid Thesis No 1.

more complicated to find the respective information. Google is even inviting the public in connection with the deletion of the link to do a thorough search by referring to the fact that the search results could possibly be modified due to European data protection laws.[40]

As a consequence, some restrictions with respect to the freedom of information will become relevant as a consequence of the *Google* decision; however, this fundamental right is not fully jeopardised. Therefore, an interpretation according to the proportionality principle must take place; the judge has to ask what level of limitations in the search process for certain information could remain acceptable under the heading of the freedom of expression if another individual should be protected in his or her privacy right.

In order to induce search engines to thoroughly assess the legal situation in case of an erasure request, the risk of becoming liable due to a 'wrong' decision should be limited. Therefore, it would be worthwhile to consider whether the specific liability provisions contained in Articles 13-15 of the E-Commerce Directive should not also be applicable in connection with the right to be forgotten.

Overall assessment and outlook

Privacy is an important value and a fundamental right that has been underestimated for many years. In the meantime, more emphasis is put on the compliance with privacy objectives. But the enforcement of privacy rights is becoming more and more difficult in the virtual world. Therefore, privacy must be perceived as a fundamental right which merits higher attention. An emanation of this trend is the newly propagated right to be forgotten which protects the right of the data subject to exercise control over his or her data.

However, the legal implementation of such a right is more difficult than the moral appreciation. The deletion of information can have an impact on third persons and on society as a whole.[41] This assessment is clearly reflected if an analysis of the proposed Article 17 DPR is undertaken; the rationale of the proposed provision merits support but the wording as such does not convince and should be adapted and amended in order to become a guiding force in the field.

A similar assessment appears to be justified in relation to the *Google* decision rendered by the EU Court of Justice in May 2014: The wish to have the Spanish citizen

[40] Weber and Heinrich (n 8) nos 32 and 41.

[41] A disadvantage for the whole of society would occur if criminals were able to delete critical information.

protected against disclosure of quite old information is understandable; however, the chosen approach does not solve many problems but rather causes additional problems.[42] Furthermore, Google is not obliged to delete certain pieces of information but only to remove the link to this information implying that the information can still be found through other technical measures, such as the search engine of google.com or the initiation of a search process with more variables.

In particular, neither the draft of a new Data Protection Regulation nor the *Google* decision clearly address the tensions caused by the parallel application of the freedom of expression / freedom to obtain information on the one hand and the right to be forgotten on the other hand.[43] The tensions are caused since two fundamental rights need to be balanced against each other in order to avoid contradictory results. This 'balancing of interests' test must be done notwithstanding the fact that reconciliation between the two fundamental rights is quite difficult. Even the DPR in its draft form, that could have stated specific rules in relation to the applicability of the right to privacy or the freedom of expression, remains silent on this point.

This situation leads to the problem that Internet intermediaries and search engines become responsible for monitoring Internet traffic. Such an unfortunate situation cannot easily be remedied. Notwithstanding the fact that the *Google* decision only requests the search engines to remove the links to the contested information, but not to delete the information, more attention should be paid to the possibilities of improving the difficult reconciliation between the two fundamental rights. In this context the responsibility of search engines in their function as Internet intermediaries needs to be reconsidered and legally adapted to the requirements of the respected activity.

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[42] In the meantime, several follow-up decisions after the CJEU-judgment have been rendered: The 'original' Barcelona Court awarded damages to the offended person but much less than requested (Barcelona Court of Appeals, 364/2014, 17 July 2014). A French court imposed a 1000 euros a day fine in Google France unless it stops linking to a defamatory article (Paris Tribunal de Grande Instance, 14/55975, 16 September 2014). An Amsterdam court refused to apply the right to be forgotten concept since the concerned information was not sufficiently 'negative' (District Court (Rechtbank) Amsterdam, C/13/569654 / KG ZA 14-960, 18 September 2014).

[43] For more details see Weber and Heinrich (n 8); Weber 2015 (n 2) 9, no. 50.

6. Hate speech and blasphemy

Uladzislau Belavusau*

Memory laws and freedom of speech: Governance of history in European law

Preface

European legislative and judicial practice in recent years is abundant with continual attempts to regulate historical freedom of expression and collective memory by law. Various forms of national and European—both Council of Europe (CoE) and European Union (EU)—law provide examples, which convincingly demonstrate that legal regulation of memory is not yet a dying rudiment of the past. Instead, at the beginning of the twenty-first century, it remains a vivid reality. Legal governance of history is often addressed under the tag of *memory laws*.[1] Social scientists often scrutinise memory laws as central to the *politics of memory*, that is, political means by which events are classified, commemorated or discarded to influence community values and attitudes.[2] Accounts written by lawyers have been mostly focusing on—sometimes truly brilliant yet geographically limited—studies of specific laws and judgments.[3] In this regard, the issue of Holocaust denial undoubtedly overtops literature on memory laws by legal scholars, followed by country-specific memory laws and legal practices.[4]

This chapter offers to revisit memory laws as a phenomenon of transnational and, in particular, pan-European law. To these ends, it will look into both principal segments of

* The author would like to thank Aleksandra Gliszczyńska-Grabias and Wojciech Sadurski for the valuable comments on the draft version, as well as the research platform ACCESS-Europe for the support of this study.

[1] See eg Mark J Osiel, *Mass Atrocity, Collective Memory, and the Law* (Edison 1997); Pierre Vidal-Naquet, *Assassins of Memory. Essays on the Denial of the Holocaust* (Columbia University Press 1992); Samuel Moyn, *Human Rights and the Use of History* (Verso 2014).

[2] Eg Stiina Löytömäki, *Law and the Politics of Memory: Confronting the Past* (Routledge 2014); Alexandra De Brito et al (eds), *The Politics of Memory and Democratization* (OUP 2011); Maria Mälksoo, The Memory Politics of Becoming European: The East European Subalterns and the Collective Memory of Europe (2009) 15(4) *European Journal of International Relations* 653–80.

[3] Eg Joseph M Tamarit-Sumalla, *Historical Memory and Criminal Justice in Spain: A Case of Late Transitional Justice* (Intersentia 2013). Austin Sarat and Thomas R Kearns, *History, Memory, and the Law* (University of Michigan Press 1999). Ludovic Hennebel and Thomas Hochman (eds), *Genocide Denial and the Law* (OUP 2011); Christian Joerges and Navraj Singh Ghaleigh, *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions* (Hart 2003).

[4] See Robert A Kahn, *Holocaust Denial and the Law: A Comparative Study* (Palgrave-Macmillan 2004). The exceptions are some recent Italian and French publications, eg Giorgio Resto and Vincenzo Zeno-Zenkovich (eds), *Riparare Risacrcire Ricordere: Un Dialogo tra storici e giuristi* (Editoriale Scientifica 2012); Domenico Losurdo, *Il revisionismo storico: Problemi e miti* (Laterza 1996); Antoine Garapon, *Peut-on réparer l'histoire? Colonisation, esclavage* (Shoah 2008).

European legal space, namely the law of the CoE (in particular, addressing the contradictory jurisprudence of the European Court of Human Rights (ECtHR)) and EU law. It will, thus, unpack the ways European law certifies historical narratives, distinguishes zones covered by academic freedom of speech, sets claims for historical truth, prescribes commemoration practices, and excludes ineligible revisionist accounts.

This chapter is organized into three central parts. It will first systemise the genesis and history of memory laws, as well as explain the reasons for the impressive proliferation of that initially European phenomenon within diverse legal systems. Likewise, it will trace the role of the Holocaust trauma in the mass 'legalisation' of history in both international and national law after World War II. It will look into the mechanics of that spillover effect in various legal settings. The second part of the chapter will deduce how European law regulates memory. This part is divided into two sub-parts, covering separately the law of the CoE and the EU law. The first sub-part will, therefore, scrutinise the jurisprudence of the ECtHR, concerning the Holocaust and the Armenian genocide. The currently pending case of *Perinçek*[5] in the Grand Chamber will serve as a central example of the numerous flaws and free speech fallacies in the reasoning of the Court. The second sub-part will turn to EU law, demonstrating how the Council Decision 2008 has converted the initial soft law invitation to remember into a duty of memory placed on EU citizens. Finally, the conclusions will summarise current ethical dilemmas in European balancing of free speech and memory laws, and will criticise the choice of the monumental method in European governance of history.

Genealogy and rise of memory laws

> That there shall be on the one side and to others a perpetual Oblivion, Amnesty, or Pardon of all that has been committed since the beginning of these Troubles, in what place, or what manner soever the Hostilitys have been practis'd. ... That they shall not act, or permit to be acted, any wrong or injury to any whatsoever; but that all that has pass'd on the one side, and the other, as well before as during the War, in Words, Writing, and Outrageous Actions, in Violence, Hostilitys, Damages and Expences, without any respect to Persons or Things, shall be entirely abolish'd in such a manner that all that might be demanded of, or pretended to, by each other on that behalf, shall be bury'd in eternal Oblivion.[6]

This passage from the Treaty of Westphalia (1648) aptly captures the trope of oblivion pertinent to the nascent transnational law of early Modernity. At the epoch, Europeans fused the imperative to forgive by forgetting with the Christian symbol of

[5] *Perinçek v Switzerland* (App no 27510/08). The case is currently pending in the Grand Chamber of the European Court of Human Rights. The hearings before the Grand Chamber took place on 28 January 2015. The previous case was decided by the Court in December 2013 and is analysed in this chapter, in part about Council of Europe.

[6] Treaty of Westphalia, Title II. 'Peace Treaty between the Holy Roman Emperor and the King of France and their Respective Allies' <http://avalon.law.yale.edu/17th_century/westphal.asp>.

oblivion. This explains why, for example, even the rigorously fanatic Jean Calvin wrote that forgiveness obligates casting away hatred and revenge and banishing the remembrance of injustice to oblivion.[7] Hence, the possibilities for collective public practices of remembrance and commemoration in the seventeenth century—the age of the classical political rationalism of Thomas Hobbes—were essentially limited.[8]

Yet already the French Revolution shed a novel light on the legal regulation of memory. In contrast to medieval Christian oblivion,[9] French republicanism gave birth to civic rituals of remembrance prescribed through legal reforms. Amongst those mnemonic novelties, the most visible were the introduction of a new calendar (*calendrier républicain français*)[10] and museum reforms including state appropriation of church property.[11] Throughout the eighteenth century, museums evolved from 'cabinets of curiosity' into sites of glory and podiums of state achievements. Rather than displaying their collections in random order, museums gained a sense of organisation and taxonomy. Quite emblematically for the revolutionary changes, the Louvre was opened in 1793, enabling free access to the former French royal collection for all citizens. This effectively transformed museums and public collections into instruments of republican citizenship and social management, encouraging active political participation and offering a strong invitation to commemorate and remember the heroes and victims.[12] That monumental invitation to remember was part and parcel of imagining a new community of national states that highlighted heroism and willingness to sacrifice for the sake of the state. Such chief collective virtues were later translated into the duties of the citizen under the republican citizenship paradigm. History has been represented as the struggle of citizens for the glory of imagined civic communities, embraced by states.[13] It has thus played a strong didactic function in setting role models, prescribing mourning for victims and assigning a dichotomist sense of guilt to all the rivals of a nation state. The 1776 Declaration of Independence by the United States of America, for example, maintained that the 'history of the present King

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[7] Bradford Viviane, *Public Forgetting: The Rhetoric and Politics of Beginning Again* (Penn State University Press 2010) 43.

[8] Christian Volk, 'Struggle, Dissent and Debate: Politics and Memory in Europe' *Eutopia: Ideas for Europe Magazine*, 18 July 2014, <http://www.eutopiamagazine.eu/en/christian-volk/columns/struggle-dissent-and-debate-politics-and-memory-europe>.

[9] On the Medieval forms of commemoration, see Elma Brenner – Mary Franklin-Brown – Meredith Cohen (eds), *Memory and Commemoration in Medieval Culture* (Ashgate 2013).

[10] The calendar was adopted by the Decree of 24 October 1793 and abolished on 1 January 1806 by Emperor Napoleon I. It was used again briefly during the Paris Commune of 1871. A new clock was also decreed with a day divided into 100 hours of 100 minutes. The decimal system eventually became the world standard for all other measures except time.

[11] Andrew McClellan, *Inventing the Louvre: Art, Politics, and the Origins of the Modern Museum in Eighteenth-Century Paris* (University of California Press 1994).

[12] For a popular account of museums and citizenship, see Tony Bennett, *The Birth of the Museum* (Routledge 1995).

[13] Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso 1991).

of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states.'[14] Prescription of collective memory via legal instruments has served as a means to legitimise socio-political reality and to homogenise a group.[15]

In his 'Untimely Meditations', Friedrich Nietzsche offered a classic critique of what he identified as a monumental method of history dominant in Bismarck's imperial epoch, that is, invocation of the glorious past to justify the nationalist present through deceiving analogies: 'Monumental history is the theatrical costume in which they pretend that their hate for the powerful and the great of their time is a fulfilling admiration for the strong and the great of past times. In this, through disguise they invert the real sense of that method of historical observation into its opposite . . . Their motto: let the dead bury the living.'[16]

This monumental narrative of republican citizenship had infiltrated the language of law to the degree that the Treaty of Versailles (1919) stipulated a specific 'War Guilt Clause', assigning full responsibility for all loss and damage in World War I to Germany.[17] In contrast to Westphalian oblivion, Versailles ascribed to transnational law a myth of foundational guilt. Through the proliferation of national secular states and colonialism, this mnemonic narrative of law has pervaded constitutional ideals of citizenship far beyond the Western world, including, for example, Turkey, with its cult of Atatürk,[18] or Japan, with its censorship of military history,[19] or even Portugal, granting its citizenship to the descendants of the Sephardic Jews as acknowledgement of the memory of sufferings and exclusions.[20]

However, the truly universal effect of the duty to remember was reached in the aftermath of World War II, with subsequent (and spectacular) criminal proceedings,

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[14] <http://www.archives.gov/exhibits/charters/declaration_transcript.html>.

[15] See Ziya Meral, 'A Duty to Remember? Politics and Morality of Remembering Past Atrocities' (2012) 5(1) *International Political Anthropology* 29–50.

[16] 'Vom Nutzen und Nachteil der Historie für das Leben' (On the Use and Abuse of History for Life, 1874) is one of four essays written by Friedrich Nietzsche between 1873 and 1876 under the title of 'Unzeitgemässe Betrachtungen' (Untimely Meditations). To be objective, Nietzsche claims, one should evoke both monumental and antiquarian methods together with a critical method, through condemning the past without rose coloured glasses and adopting 'forgetting' alongside 'remembering'.

[17] Article 231 of the Treaty of Versailles. This article sets up later articles in the Reparations part of the Treaty. Germany was required to conduct war crimes proceedings against the Kaiser and other leaders for waging an aggressive war, which largely resulted in acquittals and were widely perceived as a sham, even in Germany. See Ruth B Henig, *Versailles and After, 1919–1933* (Routledge 1995).

[18] Basak Ince, *Citizenship and Identity in Turkey: From Atatürk's Republic to the Present Day* (IB Tauris 2012).

[19] Laura Hein and Mark Selden (ed), *Censoring History: Citizenship and Memory in Japan, Germany and the United States* (ME Sharpe 2000).

[20] The Parliament of Portugal has recently decided to grant citizenship to descendants of persecuted Sephardic Jews, whose ancestors were expelled in the fifteenth century. See *The Guardian*, 29 January 2015 <http://www.theguardian.com/world/2015/jan/29/portugal-citizenship-descendants-persecuted-sephardic-jews>.

most famously during the international military tribunal in Nuremberg (1945–1946),[21] the Israeli trials of Adolf Eichmann (1961)[22] and Ivan Demjanjuk (1986–1988),[23] the French trial of Klaus Barbie (1987),[24] etc. These trials gave sense to the new crime entering international law under the heading of *genocide*.[25] The United Nations General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide on 9 December 1948 as a General Assembly Resolution 260.[26] Not only was it the first crime with a retroactive effect, the subsequent prohibition on Holocaust denial in various countries has set the most widespread example of legal regulation of memory. Denial, minimisation, and gross trivialisation of the fact of annihilation of six million Jews by Nazis has been criminalised by an impressive number of states either as hate speech (incitement to hatred, *Volksverhetzung*) or as a self-standing crime of genocide denial.[27] The list of subsequent show trials beyond Germany, most famously includes the proceedings against James Keegstra (1984)[28] and Ernst Zündel in Canada (1985)[29] and the lengthy libel case against the American historian Deborah Lipstadt, brought by a Holocaust denier David Irving, etc.[30] In this regard the most eminent

[21] See Michael J Bazyler, 'The Holocaust, Nuremberg, and the Birth of Modern International Law' in David Bankier and Dan Michman (eds), *Holocaust and Justice: Representation and Historiography of the Holocaust in Post-War Trials* (Yad Vashem & Berghahn Books 2010) 45–58. See also Antoon de Baets, *The Impact of the Universal Declaration of Human Rights on the Study of History*. History and Theory no 48 (2009) 20–43.

[22] The trial has been particularly renowned due to the journalism and philosophical account of Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (first published in 1963, Penguine 1994). See also Costas Douzinas, *History Trials: Can Law Decide History?* Annual Review of Law and Social Science no 8 (2012) 273–89.

[23] Tom Teicholz, *The Trial of Ivan the Terrible: State of Israel vs. John Demjanjuk* (2nd edn, St Martins 1990).

[24] Ted Morgan, 'Voices from the Barbie Trial' *The New York Times Magazine*, 2 August 1987 <http://www.nytimes.com/1987/08/02/magazine/voices-from-the-barbie-trial.html>.

[25] Gabriele Della Morte, 'International Law between the Duty of Memory and the Right to Oblivion' (2014) 14 *International Criminal Law Review* 427–40.

[26] The notion of genocide was first introduced in the essay of Raphael Lemkin, 'The Crime of Barbarity', see James T Fussell, *Comprehensive Bibliography: Writings of Raphael Lemkin* <www.preventgenocide.org/lemkin/bibliography.htm>; see also Ana Filipa Vrdoljak, 'Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law' (2009) 20(4) *European Journal of International Law* 1163–94.

[27] *Volksverhetzung* is a criminal offence under Section 130 of the Criminal Code (*Strafgesetzbuch*) in Germany. Similar provisions about incitement of group hatred have been enshrined in most of the continental European criminal codes. In Germany, it can lead to up to five years imprisonment. For many years that criminal clause was interpreted as covering Holocaust denial, while in the 1990s special provisions on Holocaust denial as well as, most recently, on justifying or glorifying the Nazi government were added. Similar self-standing (ie separate from 'hate speech') provisions on Holocaust denial exist these days in various countries, from Israel to France.

[28] Steve Mertl and John Ward, *Keegstra: The Trial, the Issues, the Consequences* (Western Producer Prairie Books 1985).

[29] Robert Lenski, *The Holocaust on Trial: the Case of Ernst Zündel* (Reporter Press 1990).

[30] Later on, Irving was convicted in Austria (2006). Dr Lipstadt chronicled her 5-year legal battle in *History on Trial: My Day in Court with David Irving* (Ecco 2005).

precedent in international law is the 1996 decision of the UN Human Rights Committee, which upheld the conviction of the French scholar Robert Faurisson.[31] One of the most featured Holocaust deniers, Faurisson received a special award for 'courage' from the Iranian President Mahmoud Ahmadinejad at an 'academic' event in Teheran in February 2012, emblematic of the notorious political culture of Holocaust denial in the Islamist world.[32]

Apart from demonstrating respect by acknowledging the suffering of millions of Jewish victims, criminalisation of Holocaust denial after World War II has transformed social reality and led to a global spread of memory laws in three ways:

(a) It advanced the Judaic version of repentance, in contrast to Christian rituals of 'oblivion' and ideal of forgiveness, where only direct victims can pardon perpetrators and several generations provide extensive mourning;[33]
(b) Together with the prohibition of Nazi memorabilia, symbols and literature (ie other major restrictions on freedom of speech),[34] Holocaust denial laws have shaped the monumental dichotomist vision of World War II, with absolutised guilt of Nazi Germans and their collaborators, in contrast to the mega-praise of the winning allies. This narrative commonly omitted inconvenient episodes, as for example, the tacit consent to transfer Sudetenland to Germany under the Munich Agreement (1938), the Molotov-Ribbentrop's partition of Poland (1939), the Katyń massacre, which was long attributed to the Germans, while in fact committed by Soviet NKVD, the unnecessary bombing of Dresden in February 1945 by British and US Army Forces, the massive rapes of German and Hungarian women by Soviet soldiers, the atomic bombings of Hiroshima and Nagasaki by the Americans in August 1945 and other *causes célèbres* before, during and in the aftermath of World War II;
(c) These memory laws have become instrumental to the politics of *Vergangenheits-bewältigung* (coming to terms with past) in Germany and other countries.[35] On the one hand, this monumental dichotomist 'good / bad' of 'victim / perpetrator', versions of history have been extremely successful in bringing up admirable

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[31] Case *Robert Faurisson v France*, Communication no 550/1993, UN Doc CCPR/C/58/D/550/1993(1996).

[32] Joseph Weissman, 'Holocaust Denier Receives Award at Iranian Film Festival' *Huffingtonpost*, 14 February 2012, <http://www.huffingtonpost.co.uk/joseph-weissman/faurisson-iranian-film-festival_b_1274572.html>; see also Meir Litvak and Ester Webman, *From Empathy to Denial: Arab Responses to the Holocaust* (Hurst 2009).

[33] See Uladzislau Belavusau, 'Historical Revisionism in Comparative Perspective, Law, Politics, and Surrogate Mourning' EUI Working Paper no 12 (2013) 5–6. For the account of Judaic 'apology', see Arnaldo Momigliano, Silvia Berti, Mura Masella-Gayley, *Essays in Ancient and Modern Judaism* (University of Chicago Press 1994) 58–66. For a general account of apology, see Aaron Lazare, *On Apology* (OUP 2004).

[34] To give just one, out of many European examples, s 86a (use of symbols of the unconstitutional organizations) of the German Criminal Code outlaws Nazi symbols and insignia.

[35] See Theodor W. Adorno, 'What Does Coming to Terms with the Past Mean?' in Geoffrey Hartman (ed), *Bitburg in Moral and Political Perspective* (Indiana University Press 1986) 114–29.

generations of German civil society, who not only acknowledge guilt for the massive annihilation but also always take into account this traumatic past in building a more emancipating and tolerant future.[36] On the other hand, such memory laws have been central to the concept of *militant democracy,* which excludes incitement to hatred from constitutional protection of free speech for the sake of preservation of liberal democracy.[37]

Furthermore, the monumental legal prescription of historical truth has fulfilled a remarkable role in the project of Europe's unification, with both major European organisations (the EU and the CoE) building their foundational discourse on the urge to avoid the misfortunes of World War II through European integration and acknowledgement of foundational atrocities.[38]

Holocaust denial laws have been followed by at least four—interlinked and not necessarily chronologically distinctive—streams of memory laws after World War II:

(1) The first stream encompasses attempts to retrospectively recognise atrocities and prohibit genocide negationism in an effort to mimic restrictions on Holocaust denials. The most discussed example of such memory laws are the recent attempts of legal recognition (in France, Switzerland, Slovakia, Greece) of the Armenian genocide, that is the Ottoman government's extermination of approximately 1.5 million Armenians from their historic homeland within present-day Turkey.[39] Yet so far, judiciaries in France (2008)[40] and before the ECtHR (2013)[41] have been reversing the criminalisation of Armenian genocide denial, finding it incompatible with freedom of speech, in contrast to the prohibitions on Holocaust denial. Such a stance raises a question of the magnification of a certain hierarchy amongst genocides, with *Shoah* occupying a special place in the monumental legal doctrine of historic memory.[42] Similar questions have been also advanced with regard to specific-country attempts to enact memory laws, covering, *inter alia*, the

[36] Dan Michman (ed), *Remembering the Holocaust in Germany 1945–2000: German Strategies and Jewish Responses* (Peter Lang 2002).

[37] For a scrutiny of the concept of militant democracy, see Uladzislau Belavusau, 'Hate Speech and Constitutional Democracy in Eastern Europe: Transitional and Militant?' (2014) 47(1) *Israel Law Review* 27–61.

[38] For a detailed analysis, see Aline Sierp, *History, Memory, and Trans-European Identity: Unifying Divisions* (Routledge 2014) 125–27.

[39] For statistics of legal and declarative recognition, see <http://www.armenian-genocide.org/recognition_countries.html>.

[40] Décision du Conseil Constitutionnel, no 2012-647 DC (28 February 2012).

[41] On 28 January 2015, the Grand Chamber of the ECtHR had hearings in case *Perinçek* (n 5). In its previous decision (December 2013), the Court held that criminal measures against an Armenian genocide denier in Switzerland violated his freedom of expression.

[42] For a broader comment on the previous decision of the Court in *Perinçek* (n 5), see further sub-part on the CoE.

prescription of positive-negative roles of French colonialism in France,[43] the recognition of *Holodomor*—a policy of mass starvation orchestrated by Bolsheviks during 1932–1933 with 2.4 to 7 million victims—in Ukraine,[44] Asian controversies about laws on the commemoration of Japanese military during World War II,[45] etc. The French discussion on the borders of law in prescribing historical memory, subsequent to a series of legislative attempts to regulate colonial historiography, has stimulated academic popularity of the very tag 'memory laws' (*les lois mémorielles*).[46]

(2) The second stream addresses falls of twentieth-century dictatorships in the period after World War II and the legal prescriptions of historical commemoration in the subsequent democratic regimes. Such legal means cover both legislative and judicial impositions of truth about victims and condemnations of perpetrators. The most eminent European example in this group is the Law on Historic Memory in Spain (2007).[47] Likewise, this group covers rich legislative practices and jurisprudence by Latin American courts fixing various mechanisms of transitional justice, while instrumentalising the invitation and duty to remember via legal means.[48]

(3) The third stream was triggered by the decommunisation and collapse of the Soviet empire and is, therefore, geographically limited to the countries of Central and Eastern Europe and the ex-Soviet Union. The dilemma of so-called *Historikerstreit* is particularly emblematic for this group as historians long dispute the singularity of the *Shoah* and comparability of Nazi and Stalinist repressions.[49] This diverse group covers judicial sagas on the Katyń massacre (the execution of Polish officers in the 1930s by the Soviets, which was attributed to the Nazi regime for a long time),[50] the constitutional revision of national history in Hungary,[51] the recognition

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[43] Eg loi no 2005-158 du 23 février 2005 portant reconnaissance de la Nation et contribution nationale en faveur des Français rapatriés. *Journal officiel*, 24 February 2005.

[44] Ukrainian law no 376-V of 28 November 2006, Vidomosti Verkhovnoi Rady Ukrajiny no 50, 504.

[45] Osiel (n 1); Vidal-Naquet (n).

[46] Sévane Garibian, 'Pour une lecture juridique des quatre lois « mémorielles »' *Esprit*, February 2006, 158–73.

[47] La Ley por la que se reconocen y amplían derechos y se establecen medidas en favor de quienes padecieron persecución o violencia durante la Guerra Civil y la Dictadura (Ley de Memoria Histórica) 31 October 2007.

[48] See Maria Chiara Campisi, 'From a Duty to Remember to an Obligation to Memory? Memory as Reparation in the Jurisprudence of the Inter-American Court of Human Rights' (2014) 8(1) *International Journal of Conflict and Violence*; Sévane Garibian, 'Ghosts Also Die: Resisting Disappearance through the 'Right to Truth' and the *Juicios por la Verdad* in Argentina' (2014) 12(3) *Journal of International Criminal Justice* 1–24.

[49] Michael Geyer and Sheila Fitzpatrick (eds), *Beyond Totalitarianism: Stalinism and Nazism Compared* (CUP 2009).

[50] See *Janowiec et al v Russia* (App nos 55508/07 and 29520/09, 21 October 2013, Grand Chamber).

[51] See Thomas Ország-Land, 'New Hungarian Constitution Shirks Responsibility for the Holocaust' *New English Review*, September 2011 <http://www.newenglishreview.org/custpage.cfm/frm/96102/sec_id/96102>.

and prohibition of denial of the fact of the Soviet occupation of the Baltic states,[52] and the EU's resolutions recognising and commemorating Stalinist repressions,[53] etc.

(4) Finally, the fourth stream deals with genocides and other mass atrocities subsequent to the introduction of the crime of genocide in international law. This group is, to a large degree, intertwined with the second stream of 'transitional' memory laws and is different from the third stream as it spreads geographically further than the ex-Soviet Union and CEE. This group of judicial and legislative engagements with memory covers international criminal proceedings subsequent to crimes against humanity in Rwanda,[54] former Yugoslavia,[55] the spectacular trials of the former heads of the Khmer Rouge in Phnom Penh,[56] and the barriers to the commemoration of the mass displacement of Palestinians (*Naqba* laws) in Israel,[57] etc.

Governance of memory in European law

Unlike in the USA (where historical revisionism is undoubtedly covered by the wide protective scope of the First Amendment to the American Constitution),[58] the European model of engagement with memory is more complex, hosting layers on the national

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[52] Lauri Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR: A Study of the Tension Between Normativity and Power in International Law* (Martinus Nijhoff 2003).

[53] Declaration of the European Parliament on the Proclamation of 23 August as European Day of Remembrance of Victims of Stalinism and Nazism.

[54] International Criminal Tribunal for Rwanda, established in 1994.

[55] International Criminal Tribunal for former Yugoslavia, established in 1993.

[56] The Extraordinary Chambers in the Courts of Cambodia (ECCC), commonly known as the Khmer Rouge Tribunal, is a court established to try the most senior responsible members of the Khmer Rouge for crimes perpetrated during the Cambodian genocide.

[57] High Court of Justice Decision 3429/11, *Alumni of the Arab Orthodox High School in Haifa et al v The Minister of Finance et al* (25 January 2012, yet not published; the '*Naqba* Law' case).

[58] The American legal approach to the problem may be deduced in the laconic conclusion of James Weinstein that 'for a mixture of theoretical and practical reasons, the [Supreme] Court would probably find that the most salient harm caused by Holocaust denial that government can legitimately address—the infliction of psychic injury of Holocaust survivors and their families—is not weighty enough to justify the suppression of even false statements within public discourse' (see James Weinstein, 'An Overview of American Free Speech Doctrine and Its Application to Extreme Speech' in Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (OUP 2009) 90). Although historical revisionism (unlike hate speech) has never been an issue for the Supreme Court, the USA is definitively a hotbed of revisionist narratives among Western democracies precisely due to the libertarian construction of the free speech epistemology in ('harder') hate speech cases. For a detailed overview of differences in the approach to hate speech in the USA and Europe, see Uladzislau Belavusau, *Freedom of Speech: Importing European and US Constitutional Models in Transitional Democracies* (Routledge 2013). In part, the difference in judicial reasoning in the USA and Europe may be attributed to the appraisal of the Holocaust as a specifically European stigma. However, this approach does not explain why in neighbouring Canada the legal prohibition is reminiscent of the European approach.

level, the Organization for Security and Co-operation in Europe (OSCE), the CoE and, finally, the EU. Since national legislation does not fall into the scope of this chapter,[59] the focus will be further put on the trans-European instruments within two major axes of European law: the Council of Europe and the EU.

Council of Europe

The legal core of the position on Holocaust denial in the CoE stems from the Declaration of the Stockholm International Forum on the Holocaust (2000) where states agreed to institute educational programmes and national commemorative initiatives. This Declaration was followed by the European Parliament Resolution on Remembrance of the Holocaust, Anti-Semitism and Racism (2005). The parallel supporting instruments of the OSCE include the Permanent Council Resolution (2004), the Berlin Declaration (2004), the Cordoba Declaration (2005), and the Brussels Declaration of the OSCE Parliamentary Assembly (2006).

In March 2007, the European Monitoring Centre on Racism and Xenophobia was reconstituted into the newly formed EU Agency for Fundamental Rights. The organisation came up with the Working Definition of Anti-Semitism, intended as a road map for criminal justice tribunals.[60] The Working Definition, in particular, identifies as manifestly anti-Semitic acts of denying the fact, scope, mechanisms (for example, gas chambers), or intentionality of the genocide of the Jewish people at the hands of National Socialist Germany and its supporters and accomplices during World War II ('Holocaust').

The case law of the ECtHR reveals that Strasbourg has traditionally tackled the issue of Holocaust denial on the basis of Article 17 of the European Convention of Human Rights (finding the violation at stake incompatible with the Convention's values as such) instead of engaging in detailed proportionality (as in hate speech cases) based on

[59] For perhaps the most detailed summary of the comparative perspectives on the problem, see Kahn (n 4) and collection of articles in Hennebel and Hochman (n 3); Kenneth Bertrams and Pierre-Olivier de Broux, 'Du négationnisme au devoir de mémoire. L'histoire est-elle prisonnière ou gardienne de la liberté d'expression?' (2008) 35 *Revue de la faculté de droit et de criminologie de l'ULB* 75–134; Domenico Losurdo, *Il revisionismo storico: Problemi e miti* (Laterza 1996). British scholar Michael Whine raises interesting statistical arguments and demonstrates that before the imposition of the Holocaust-denial ban into legislation, the UK was a world centre for publishing such materials (in the 1980s and 1990s). See Michael Whine, 'Expanding Holocaust Denial and Legislation Against It' in Hare and Weinstein (n 58) 539.

[60] The document states as follows: 'Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and / or their property, toward Jewish community institutions and religious facilities.' This 'working definition' was adopted in 2005 by the EUMC, now called the European Union Agency for Fundamental Rights (FRA) and disseminated on its website and to its national monitors. Units of the Organization for Security and Co-operation in Europe (OSCE) concerned with combating anti-Semitism also employ the definition.

Article 10 of the ECHR (freedom of speech).[61] Two German cases in Strasbourg are particularly emblematic of this approach: *Hoffer and Annen v Germany*[62] and *PETA v Germany*.[63] In *Hoffer and Annen*, applicants were prosecuted for anti-abortion leaflets comparing the 'Babycaust' to the Holocaust. In *PETA v Germany*, the animals rights association was defending its artistic campaign ('the Holocaust on your plate'), where pictures of animals in stocks were contrasted with images of inmates in concentration camps. A US-based association (People for Ethical Treatment of Animals) led this campaign under the title 'The Holocaust on Your Plate'. The ECtHR upheld the decision of the domestic courts in both of the cases, maintaining that the leaflets and the advertisement trivialised the sufferings of the Holocaust victims and, therefore, the prohibitive measure was found proportional under Article 10 of the ECHR. Most interestingly from a comparative perspective, the analogous campaign had been carried out in the USA in the same manner, without serious legal challenges.

At the end of 2013, the ECtHR delivered an impressively extensive judgment in the case *Perinçek v Switzerland*.[64] The condemnation of a Turkish politician for the denial of Armenian genocide by Swiss courts violated freedom of expression. During his 2005 visit to Switzerland, a Turkish politician Dr Doğu Perinçek gave several public speeches alleging conspiracies against Turks and an 'international lie' about Armenian genocide. According to Perinçek, the scope and nature of atrocities against Armenians in the Ottoman Empire cannot be deemed genocide. Swiss courts found Perinçek guilty of the criminal offence of genocide denial. Together with two concurring opinions, the judgment in Strasbourg consists of 80 pages. Although the decision was later sent to and is currently pending before the Grand Chamber,[65] it offers a useful flashback on the Court's engagement in multiple aspects of historical memory.

While finding the criminal measure legitimate and partially necessary, the Court fosters a lower margin of appreciation for the Swiss authorities. The Court emphasises the particular social significance of historical discussion and the absence of consensus on this issue. It even doubts if such a 'general consensus' is possible. Most importantly, the Court establishes several distinctions between Holocaust deniers and Perinçek. (1) The applicant contested only a legal qualification of certain events, supposedly not denying historical facts. (2) In case of Holocaust deniers, a conviction for the Nazi crimes was explicitly prescribed in the Charter of the Military Tribunal in Nuremberg

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[61] Most of the cases reaching Strasbourg on the issue had been found inadmissible, including *T v Belgium* (App no 9777/82); *FP v Germany* (App no 19459/92); *Honsik v Austria* (App no 25062/94); *Remer v Germany* (App no 25096/94); *Nachtmann v Austria* (App no 36773/97); *Witzsch v Germany* (App no 41448/98).

[62] *Hoffer and Annen v Germany* (App nos 397/07 and 2322/07, 13 January 2011).

[63] *PETA v Germany* (App no 43481/09, 8 November 2012).

[64] *Perinçek* (n 5).

[65] The hearings before the Grand Chamber took place on 28 January 2015 and have attracted a lot of media attention, considering that the year 2015 also marks 100th anniversary of the Armenian genocide.

(1945).[66] (3) The Holocaust is a fact that has been clearly established by international jurisdiction. (4) Holocaust denial is a primary engine of the powerful anti-Semitic movements. Meanwhile the rejection of the genocidal character of the 1915 events cannot cause comparable consequences. (5) The Court cites the 2006 research conducted by the Swiss Institute of Comparative Law. The study revealed that of the 16 countries analysed only 2 had a general provision on genocide denial (ie broader than just Holocaust denial).[67] (6) Furthermore, the Court extensively quotes constitutional decisions in Spain (2007)[68] and France (2012)[69] to affirm that the recent national jurisprudence rejects the broad criminalisation of genocide denials. (7) Finally, the Court rules that Switzerland failed to demonstrate that a social need for this measure is stronger than in other countries. Thus, the Swiss authorities extended the permissible limits of the margin of appreciation in violation of Article 10 of the ECHR.

It is hard not to agree agree with the ECtHR on two central findings. First, drafting history is indeed an enterprise where consensus is hardly possible. Therefore, it is worth transferring disputes about historical events from courts to discussions amongst scholars and civil society. Second, it is difficult to see how the issue of Armenian genocide addresses a sufficient social need for criminal prosecution in Switzerland. The outcome of the case is a plausible victory for the freedom of academic expression. However, it is equally doubtful if this social need for state monopoly over historic discussion is higher in other liberal democracies. The Court creates a speculative distinction between the Holocaust and other twentieth century atrocities. There are three fundamental fallacies in this approach, which undermine judgment and provoke the stigmatisation of Armenian communities worldwide.

1) The Court distinguishes Perinçek (who supposedly insists on an alternative qualification of the events) from Holocaust revisionists (who deny the substantial facts of the *Shoah*). It is hard to see how Perinçek could have constructed his denial argument without requalifying the malicious intent of the state, the number of victims (1–1.5 millions), the role of the Ottoman imperialism, and methods of annihilation used on the Armenian population. Moreover, legal practice shows that discussion of history (the role of Atatürk, repressions against Armenians, Kurds, Assyrians, etc.) remains substantially censored in Turkey. Attacks by the state and by individuals on dissidents with alternative historical viewpoints remain common. The case of the Turkish-Armenian journalist, Hrant Dink (who extensively commented on the Armenian genocide) is truly emblematic here. Prosecuted for the absurd crime of denigrating Turkishness, he was assassinated in 2007. Three years later, the ECtHR ruled that Turkey violated Dink's right to freedom of expression.[70]

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[66] The Charter of the Military Tribunal. Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis ('London Agreement'), 8 August 1945.

[67] Para 70 in the Judgment.

[68] Tribunal Constitucional de España 235/2007.

[69] Décision du Conseil Constitutionnel, no 2012-647 DC du 28 février 2012.

[70] *Dink v Turkey* (App no 2688/07).

In contrast, 'Holocaust deniers' are not exclusively people who blatantly refute the existence of Jewish victims. Holocaust revisionists include those who question the number of victims, the methods of annihilation, the role of perpetrators, and those who suggest (despite all the abundant historical evidence) that Nazi governments did not have intent of complete annihilation of the Jews. On a closer comparison, both issues (*Auschwitzlüge* and the Armenian genocide) are a matter of qualification.

2) The Court suggests that unlike the Armenian genocide, the Holocaust is an internationally recognised crime. The Court forgets to mention that the Holocaust (unlike many other atrocities) ranks amongst the few endowed with specific 'legal' recognition. Judges Nebojša Vučinić and Paulo Pinto De Albuquerque end their powerful dissenting opinion by citing Raphael Lemkin, a lawyer who coined the term of genocide. It was, in fact, the Armenian tragedy that initially inspired Lemkin's ideas.[71] He considered the League of Nation's ignorance of the Armenian massacre truly shameful. The 1945 Nuremberg Statute (mentioned by the Court as clear grounds to prosecute Nazis) did not precede the crime of the Holocaust. Likewise, Lemkin's term 'genocide' entered international vocabulary only by virtue of the 1948 Genocide Convention. Apart from the Holocaust, neither the Roma genocide (approximately 300,000 people), nor persecution of gays, nor any other mass annihilation conducted by the Nazis received a comparable legal acknowledgement. The Court ignores a simple fact that all genocides are a matter of contested recognition.

3) This judgment constructs the Holocaust as a mega-genocide to which all else pales by comparison. The Holocaust becomes a universal unit of measurement. It is unclear whether the Armenian massacre stands as 0.5 or 0.8 of that unit. One can trace this meta-crime approach in the recent cases in Strasbourg. In the preceding aforementioned cases of *Hoffer and Annen* (about anti-abortion leaflets comparing the 'Babycaust' to the Holocaust) and *PETA v Germany* (animal rights campaign drawing comparisons to Holocaust), the Court—rather erroneously—found no violation of freedom of expression, fostering an incredibly broad margin of appreciation for Germany. It remains unclear how those two instances reflect a deep social need. In *Perinçek*, the Court even says that the denial of the Armenian genocide is incapable of producing effects similar to the danger of anti-Semitism. With this statement the Court ignores extreme sensitivity to this issue on the part of both the Armenian communities in Diaspora (referring to the events as '*Meds Yeghern*', literally 'Great Crime') and state propaganda in Turkey and Azerbaijan (after territorial conflict with Armenia). Placing the Armenian genocide into the second class of 'contested massacres', the Court overlooks the sufferings of hundreds of thousands of Armenian people murdered and tortured in the 'death march' to the desert in Syria, deported, raped, poisoned and burned alive during and after World War I.

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[71] Lemkin's own definition of genocide was much broader. See Raphael Lemkin and Samantha Power, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposal for Redress* (Lawbook Exchange 2005, originally published by Raphael Lemkin (Carnegi Endownment for International Peace, Division of International Law 1944)).

In this respect, the concurring opinion of Judges Guido Raimondi and András Sajó provides an extensive disclaimer for Armenians (explaining the difficult position of the Court). Yet the only true difficulty is the trap into which the Court had cornered itself in its previous Holocaust cases. While privileging the *Shoah* as a meta-crime, it is practically impossible to justify the difference with comparable atrocities. Meanwhile, the Holocaust distinction gives the Turkish government a green light for fostering xenophobic, Turkic-centric identity. It hardly makes reconciliation of Armenians with Turks any easier. It diminishes and degrades historical accounts of Western Armenians indispensable for the history of the Middle East and the Caucasus. Finally, it gives further impetus for the hysteria about a Jewish conspiracy by anti-Semites of all kinds.

The decision to move the qualification of the Armenian genocide away from state monopoly and leave it to historians and civil society should be wholeheartedly welcome. However, the Court's continuous misleading approach (distinguishing the Holocaust from other fairly comparable atrocities) substantially undermines the judgment of 2013 in *Perinçek*. In normative terms, it essentially trivialises the sufferings of a million Armenians in the Ottoman Empire and projects a flimsy judicial iconography with the Holocaust rising over other 'second-class' evils.

European Union law

The Maastricht Treaty (1992) has reinforced the discourse of peace and the post-World-War-II trauma as a foundational myth for EU competences in fundamental rights and the project of EU citizenship, both formalised since then as primary law.[72] Likewise, the soft law of the Union has shaped a strong legal invitation to remember via various resolutions of the Parliament and Commission.[73] Those legal initiatives capitalise on the rhetoric of the Holocaust as a mega-atrocity. They address the fiction of the common memory of EU citizens as a new specific element of pan-European identity, whose symbolical core is founded on the ethical lessons of the World War II. In fostering a European *demos*, EU institutions have been capitalising on moral commitment to the past as a promise of a better future. Central to this vision of EU citizenship and its core values has been the Europe for Citizens Programme launched in December 2006 by Decision 1904/2006/EC of the European Parliament and of the Council.[74] The

[72] See Christian Joerges and Navraj Singh Ghaleigh (eds), *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions* (Hart 2003). See also Stijn Smismans, 'The European Union's Fundamental Rights Myth' (2010) 48(1) *Journal of Common Market Studies* 45–66.

[73] Eg European Parliament Resolution of 23 October 2008 on the Commemoration of the *Holodomor*, the Ukraine artificial Famine (1932–1933), *Official Journal of the European Union*, 21 January 2010, C 15 E/78; European Parliament Resolution of 2 April 2009 on European Conscience and Totalitarianism; Resolution on the Remembrance of the Holocaust, Anti-Semitism and Racism 2005; Resolution on a Political Solution of the Armenian Question, Doc A2-33/87.

[74] A detailed description of the programme is available on the webpage of the EU Commission: <http://eacea.ec.europa.eu/citizenship/index_en.php>.

Programme, initially established for the period from 2007 to 2013, was in itself an extensive transnational memory law supporting a series of activities and organisations that promoted 'Active European Citizenship'. Driving on the activist paradigm of citizenship, seen as the encouragement of civil society to solemnise the Holocaust and other atrocities of totalitarian regimes, the programme has become an important aspect in fostering European integration and in 'developing a sense of common identity among European citizens based on recognised common values, history and culture'. Furthermore, one of the Programme's four action lines is explicitly devoted to 'Active European Remembrance'.[75] In the renewed Europe for Citizens Programme 2014–2020, the 'European remembrance' of totalitarianism was further reinforced with increased funds going towards action in this area, available for various research institutes, associations of survivors, museums, and organisations active in the promotion of human rights, as well as in the creation of additional channels of communication across the EU by networking organisations which were formerly only active at the domestic level.[76]

Yet recent developments of EU law indicate the substantial evolution of the activist citizenship discourse on historic memory, from *invitation to remember* towards *duty to remember*.[77] This paradigm of memory-building straightforwardly outlaws denial, trivialisation, and minimisation of certain atrocities. Since the adoption of Framework Decision 2008/913/JHA,[78] this second paradigm has become currently the most controversial in EU law and the politics of memory.[79] Previously, a prescription to remember and the criminalisation of revisionist practices have been emblematic of republican forms of citizenship in nation states. This somewhat outdated vision of citizenship links common goals of community to foundational historical myth(s). Republican citizenship, thus, seeks to reproduce a morally unbiased population and its symbolical duty to commemorate history and community values. As was convincingly argued, the EU—although proclaiming duties of citizenship in primary law[80]—does not

[75] Action 4 'Active European Remembrance', see <http://eacea.ec.europa.eu/citizenship/programme/action4_en.php>.

[76] Annabelle Littoz-Monnet, 'The EU Politics of Remembrance: Can Europeans Remember Together?' (2012) 35(5) *West European Politics* 1182–202.

[77] Emanuela Fronza, 'The Punishment of Negationism: The Difficult Dialogue between Law and Memory' (2006) 30 *Vermont Law Review* 609–26.

[78] EU Council Framework Decision on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law, 2008/913/JHA. For a detailed account of the controversial history of the Decision's adoption, see Mark Bell, *Racism and Equality in the European Union* (OUP 2008) 164–68.

[79] Laurent Pech, 'The Law of Holocaust Denial in Europe: Towards a (Qualified) EU-Wide Criminal Prohibition' Jean Monnet Working Paper 10/9 (NYU School of Law 2009) 1–51; Luigi Cajani, 'Criminal Laws on History: the Case of the European Union' (2011) 11 *Historien* 19–48.

[80] Under Article 9 of the Treaty on the European Union and Article 20 of the Treaty on the Functioning of the European Union, every person holding the nationality of a Member State is a citizen of the Union. Nationality is defined according to the national laws of that State. Citizenship of the Union is complementary to, but does not replace, national citizenship. EU citizenship comprises a number of rights and duties in addition to those stemming from citizenship of a member state.

demand any duties of EU citizens in practice.[81] Such a duty-less citizenship is a great achievement too, in line with a progressive shift from community and population towards individual values and dignity. It, therefore, raises many questions as to why EU law has recently opted for criminal restrictions on the free market of historical ideas. This turn mimics the 'duty to remember' imposed on citizens in several Member States, in contrast to encouraging a critical dialogue on memory in the EU.

One of the underlining ideas for the harmonisation of the Union approach to hate speech and historical revisionism may draw a parallel with the internal market itself, ie the goal to prevent racist groups from moving to countries with less restrictive legislation,[82] as well as the intention to elaborate a common approach on the issue in negotiations on international instruments such as the CoE's Cyber-Crime Convention, designed for the criminalisation of hate speech on the Internet. Another rationale is the codification of the CoE's approach and case law of the ECtHR at EU level (embracing the ethos of fundamental rights in the Union) with a subsequent harmonisation requirement among Member States.

The proposal for this harmonised EU ban on hate speech appeared in 2001.[83] It took seven years until in November 2008 it was adopted under the German presidency.[84] The deliberations of Member States perfectly echo the fundamental controversy of such exclusion of certain types of expression. Laurent Pech notes that in 2001 only ten of the current EU countries had criminal provisions on Holocaust denial (Austria, Belgium, the Czech Republic, France, Germany, Lithuania, Poland, Romania, Slovakia, and Spain). Several other countries regarded the problem within the realm of hate speech, conjoining the *mens rea* of Holocaust denial with discrimination against Jews or incitement of violence. In other countries 'revisionist ideologies' could be punished under general criminal provisions dealing with the maintenance of public peace or those addressing statements and behaviour motivated by racist intent.[85] Moreover, at least in one EU country (Spain), the constitutional court held the clause penalising genocide denial in the Criminal Code incompatible with the constitutional right to freedom of

[81] Dimitry Kochenov, 'EU Citizenship without Duties' University of Groningen Faculty of Law Research Paper no 15 (2013).

[82] Point 5 in the preamble to the Council Framework Decision on Combating Certain Forms and Expression of Racism and Xenophobia by Means of Criminal Law, 2008/913/JHA, suggests that 'it is necessary to define a common criminal-law approach in the European Union to this phenomenon in order to ensure that the same behaviour constitutes an offence in all Member States and that effective, proportionate and dissuasive penalties are provided for natural and legal persons having committed or being liable for such offences.'

[83] COM (2001) 664 final, [2002] OJ C 75E, submitted by the Commission on 29 November 2001. The seminal idea for criminalisation stems from the earlier Council Joint Action 96/443/JHA of 15 July 1996 concerning action to combat racism and xenophobia (OJ L 185, 24 July 1996). The latter instrument is now obsolete.

[84] Council Framework Decision on Combating Certain Forms and Expression of Racism and Xenophobia by Means of Criminal Law, 2008/913/JHA. For a detailed account of the controversial history of the Decision's adoption, see Bell (n 78) 164–68.

[85] Pech (n 79) 3, 6.

speech.[86] The balancing of freedom of speech and dignity by the Constitutional Tribunal of Spain, in fact, is reminiscent of the marketplace of ideas and content-neutrality in the United States:

> La libertad de configuración del legislador penal encuentra su límite en el contenido esencial del derecho a la libertad de expresión, de tal modo que, por lo que ahora interesa, nuestro ordenamiento constitucional no permite la tipificación como delito de la mera transmisión de ideas, ni siquiera en los casos en que se trate de ideas execrables por resultar contrarias a la dignidad humana que constituye el fundamento de todos los derechos que recoge la Constitución y, por ende, de nuestro sistema político.[87]

Moreover, the recent French bill on the criminalisation of the Armenian genocide denial was actually drafted as an initiative 'transposing EU anti-racist law in national legislation.'[88] Completely ignoring the issue of EU harmonisation in criminal law, the French Conseil Constitutionnel struck the law as *per se* contradictory to the constitutional protection of freedom of expression. In a very short decision much less refined than the Spanish 2007 one, the French Court held that:

> Considérant qu'une disposition législative ayant pour objet de « reconnaître » un crime de génocide ne saurait, en elle-même, être revêtue de la portée normative qui s'attache à la loi ; que, toutefois, l'article 1er de la loi déférée réprime la contestation ou la minimisation de l'existence d'un ou plusieurs crimes de génocide « reconnus comme tels par la loi française » ; qu'en réprimant ainsi la contestation de l'existence et de la qualification juridique de crimes qu'il aurait lui-même reconnus et qualifiés comme tels, le législateur a porté une atteinte inconstitutionnelle à l'exercice de la liberté d'expression et de communication ; que, dès lors, et sans qu'il soit besoin d'examiner les autres griefs, l'article 1er de la loi déférée doit être déclaré contraire à la Constitution.[89]

The very wording of the EU Framework Decision appears disproportionate as it leaves a lot of room for speculation and the potential for a chilling effect in the

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[86] Tribunal Constitucional de España 235/2007. For a commentary, see María Lidia Suárez Espino, 'Comentario a la sentencia 235/2007 por la que se declara la inconstitucionalidad del delito de negación de genocidio' (2008) 2 *Revista para el análisis del derecho* 1–12.

[87] ibid, para 6, 'The discretion of a criminal legislator is limited by the essential content of the right to freedom of expression, whereas our constitutional system does not allow the criminalisation of the mere transmission of ideas, even in cases of execrable ideas that contradict human dignity, which lays the basis of all rights contained in the Constitution and, therefore, of our political system.'

[88] See La Proposition de loi portant transposition du droit communautaire sur la lutte contre le racisme et réprimant la contestation de l'existence du génocide arménien, 18 October 2011, no 3842.

[89] Translation: 'Considering that a legislative provision having the objective of "recognising" a crime of genocide would not itself have the normative scope which is characteristic of the law; that nonetheless, Article 1 of the law referred to punishes the denial or minimisation of the existence of one or more crimes of "genocide recognised as such under French law"; that in thereby punishing the denial of the existence and the legal classification of crimes which Parliament itself has recognised and classified as such, Parliament has imposed an unconstitutional limitation on the exercise of freedom of expression and communication; that accordingly, without any requirement to examine the other grounds for challenge, Article 1 of the law referred to must be ruled unconstitutional' (Décision du Conseil Constitutionnel, no 2012-647 DC du 28 février 2012, para 6).

interpretations of the concrete clauses.[90] Despite the fact that the proposal appeared two months after the tragedy of Twin Towers in New York, its text illustrates that the focus was not on hate speech by Islamic radicals, but on far-right groups and adversaries of immigration policy. Aside from the political rhetoric, the question around this new Brussels instrument is the arguable incentive for the exclusion of something that has been traditionally perceived as political speech.

Tracey Kyckelhan raises an extra-legal point to explain the spillover effect of hate speech bans in European countries. She argues that:

> As one political entity or organization adopts certain practice, others will find it compelling to do so as well, often to gain legitimacy as the practice becomes seen as 'the way things are done'. This process of increasing conformity is referred to as institutional isomorphism. As will be seen, the institutional structures, political cultures, and historical events at the national and international level shaped the development and debate over the EU's proposed hate speech law.[91]

Kyckelhan suggests that the European Commission's informal power is believed by some political scientists to be at its greatest when information about a topic is vague or when the Commission has more information than Member States.[92] She observes that for some countries, such as Italy, with a xenophobic movement inside the ruling coalition it was particularly acute. Therefore, the success of the Framework Decision may well be compared to that of the Racial Equality Directive, passed in 2000 to a large degree aimed at the situation of the far-right party in Austria and a consequent intention to avenge the situation.[93] Nonetheless, the preamble of the Decision maintains: 'Since the Member States' cultural and legal traditions are, to some extent, different, particularly in this field, full harmonisation of criminal laws is currently not possible.' Such wording leaves a certain, albeit very unclear, margin for the states to assess a pure racist (not political) scope of the concrete hate speech utterances.

Another controversial issue, which illuminates the populist character of the Decision, is the exclusion of gender and sexuality as the grounds for hate speech. The hate-speech ban is based on religion, ethnicity, and descent, ie exclusively on the groups 'identified by certain characteristics (such as race or colour), but not necessarily all of these characteristics still exist. In spite of that, because of their descent, such persons or groups of persons may be subject to hatred or violence.'[94] The formulation of the *mens*

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[90] For similar conclusions on over-broadness of the Decision, see John C Knechtle, 'Holocaust Denial and the Concept of Dignity in the European Union' (2008) 36 *Florida State University Law Review* 41–65.

[91] Tracey Kyckelhahn, 'Hate Speech Laws in Europe and the Role of the European Union' paper presented at the annual meeting of the American Society of Criminology, Atlanta Marriott Marquis, Atlanta, Georgia, (13 November 2007) 4 <http://www.allacademic.com/meta/p201745_index.html>.

[92] ibid, 6.

[93] ibid, 7.

[94] Point 7 in the Preamble. On hate speech in the context of EU law, see Uladzislau Belavusau, 'A Penalty Card for Homophobia from EU Non-Discrimination Law' (2015) 21(2) *Columbia Journal of European Law* 237-259; Uladzislau Belavusau, 'Fighting Hate Speech Through EU Law' (2012) 4(1) *Amsterdam Law Forum* 20–35.

rea in the Framework decision covers not only incitement to violence but also the very expression of hatred.[95] Other grounds for criminalisation are the expression of historical revisionism, since the punishable conduct includes:

> (1) Publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group;
> (2) Publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.

In the absence of a Luxembourg (Court of Justice of the European Union) specification of what constitutes 'the conduct carried out in a manner likely to incite to violence or hatred against such a group', it remains difficult to assess the potential of the severe and unequivocal criminalisation of historical revisionism in the EU. What is striking on the surface is the extremely broad scope of the criminalised offence. That makes the Decision a potential watchdog for a free historical discussion with regard to the contradictory aspects of World War II. Moreover, the Decision suggests the term of such criminal effect being at least between one and three years of imprisonment.[96] The *lex personae* of the Decision is not limited to individuals and encompasses legal persons,[97] which leaves an important discretion for a State to grapple with certain political movements.[98]

Although the Directive clearly maintains that it does not require States to take measures that contravene the fundamental right to freedom of expression,[99] the yardstick of the compatibility with freedom of expression is unclear. The only reasonable *tertio comparationis* in the situation of a potential clash seems to be the analysis of the Strasbourg case law on Article 10 of the ECHR.

Furthermore, considering the new, more strongly embedded paradigm of fundamental rights in the Union law, subsequent to the parallel changes brought by the Treaty of Lisbon (2008–2010), the domestic catalogue of fundamental rights in the Union (the

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[95] Article 1(a): '[Each Member State shall take the measures necessary to ensure that the following conduct is punishable:] publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin.'

[96] Article 3(2).

[97] Article 5.

[98] The subsequent art 6 suggests the measures as follows: (a) exclusion from entitlement to public benefits or aid; (b) temporary or permanent disqualification from the practice of commercial activities; (c) placement under judicial supervision; (d) a judicial winding-up order.

[99] Article 7.

EU Charter of Fundamental Rights) became part of primary law.[100] The inscription of the dignity in the Charter (absent in the text of the European Convention of Human Rights) sheds a fresh light onto the ethical dimension of EU integration, arguably capable of justifying partial criminalisation of Holocaust denial. Yet unlike the formulation of the right to freedom of speech in the Convention, Article 13 of the Charter encompasses a special scope for artistic and academic freedom of expression. It maintains as follows: '[t]he arts and scientific research shall be free of constraint. Academic freedom shall be respected.'

Likewise, Article 15(3) of the UN Covenant on Economic, Social and Cultural Rights (ICESCR) provides that contracting States 'undertake to respect the freedom indispensable for scientific research and creative activity'. Therefore, it appears important that the Charter positions freedom of speech not as a pure right to freedom of artistic or scientific expression but as a strong stipulation that the arts and scientific research be free from constraint. Subject to effective enforcement of this Charter's clause beyond a purely 'guiding principle', the vision of freedom of expression in the Union law should encompass a wider scope of academic liberty. Furthermore, the wider scope of freedom of speech in the Charter should rather extend it to historical revisionism than criminalise genocide denials.

Finally, Article 9 of the Decision creates the basis for judicial cooperation and the detention of suspects in the territory of other member states.[101] The Decision came into force on 28 November 2010, ie the same year as the Lisbon Treaty, which makes the Charter (with its emphasis on academic freedom of expression) a part of primary EU Law.

Conclusions: Towards the ethics of memory via free speech

From the place where we are right
Flowers will never grow.
Yehuda Amichai

In Greek mythology, the personification of memory, Mnemosyne, spawned nine Muses, including Calliope (Poetry), Clio (History), Melpomene (Tragedy) and Polyhymnia (Hymnes), etc. In a similar way, memory laws—impressively spread after the French

[100] Article 6 of the TEU, *inter alia*, obliges the EU to accede the European Convention of Human Rights, confirms the previous scope of fundamental rights as general principles of EU law, derived from the constitutional traditions of the member states and the European Convention of Human Rights, and makes the Charter a directly enforceable instrument of primary law.

[101] For an account of cross-border cooperation, see Bell (n 78) 168–71. For a more general recent account of the dispositions for the post-Lisbon development of EU criminal law, see Ester Herlin-Karnell, 'What Principles Drive (or Should Drive) European Criminal Law?' (2010) 11 *German Law Journal* 1115–30.

revolution—mothered contemporary requisites of republican citizenship: academic history, museums, architecture, and naming in urban space, national heroic epos, and commemoration of victims-citizens. Memory laws, thus, have played a central role in establishing a hegemony of monumental history, and have forged national identities and integration processes in Europe and beyond.

Analysis of the ways in which the CoE and EU have been regulating memory reveals advancement of the monumental governance of history. Both of the major European organisations seem to appropriate historical memory as a foundational myth legitimising European integration and fostering pan-European citizenship. Common memory, in particular the traumatised vision of Holocaust, serves as a basic virtue projected on European citizens, first, as an *invitation to remember* and, recently, as a strong *duty of memory*. Moral commitment to the past in European law has been steadily presented as a promise of a better future. The monumental narrative of memory laws performed the didactic history for the European present. It remains extremely doubtful whether this pompous legal approach has avoided conveying imperialistic, chauvinistic and irredentist positions that contributed to citizens' views of inter-state conflicts as inevitable.

The criminal model with regard to genocide denial adopted at the EU level is particularly worrisome. As the recent case of *Perinçek* in Strasbourg has demonstrated, previous criminalisation of Holocaust denial raises multiple questions. It is ultimately unclear whether European law can justify any plausible distinction between the *Shoah* and comparable genocides (ie Armenian genocide), where to put a full stop on criminal effect (eg with regard to the doubtful cases of 'trivialisation' of genocide) and whether criminal provision is an adequate mechanism to limit freedom of historic discussions by judges.

Historiography often stands as an agent of power delimitating the 'authorised truth' as well as interplaying with mass traumas. In this respect, a trauma should be conceived of as any unexpected experience which the subject is unable to assimilate. These individual and collective traumas (infinitely interrelated with historical memories) circulate in the socio-symbolic public sphere, and operate through repression, oppression, and the media. In the literature, it is argued that national trauma can only be treated by using modified psychoanalytical methods, such as political discussion, testimony, and deliberation as ways of dealing with national crises. Society uses essentially similar defences to those unconsciously applied by the individual (such as reaction-formation, isolation, undoing, projection, and turning against oneself). The final defence mechanism for nations and individuals experiencing trauma is that of turning against oneself, which occurs when the 'torturer begins to torture himself'.[102]

[102] See Shelliann Powell, 'Psychoanalysis and the Study of Political Science' in Howard J Wiarda (ed), *Grand Theories and Ideologies in the Social Sciences* (Palgrave Macmillan 2010) 97–112. See also Joachim J Savelsberg and Ryan D King, 'Law and Collective Memory' (2007) 3 *Annual Review of Law and Social Science* 189–211; Jeffrey K Olick and Joyce Robbins, 'Social Memory Studies: From "Collective Memory" to the Historical Sociology of Mnemonic Practices' (1998) 24 *Annual Review of Sociology* 105–40.

For European societies whose national victimhood is still explicitly articulated and who (in particular, in Central and Eastern Europe) were deprived of the opportunity to discuss their history—alternative to that imposed by the superpowers after World War II, whose semiotic spaces trace the tragedies and *lieux de mémoire* of Holocaust and communist atrocities, the criminalisation of alternative modes of constructing history immediately brings a chilling effect on the advancement of historical truth and the construction of new 'contra-xenophobic' identities. The continued treatment of history as a discourse (apparent both in the case law of the European Court of Human Rights and in the EU Framework Decision 2008/913), which can be imposed by authority in a mode similar to the most archaic political propaganda, brings dividends only to the camps of political populists. They have been exploiting national inferiority complexes, a sense of victimhood stemming from the way national borders were imposed, and recurrent anti-Semitism. Moreover, they can use it as a generous incentive for further speculations on the phobias of conspiracy. The European legal stance on history badly needs a new approach that conceives the ethics of memory in the terrain of freedom of speech instead of as surrogate mourning.

Robert A Kahn

The overlapping of fools?

Drawing the line between anti-Semitism and anti-Zionism in the wake of the 2014 Gaza protests

Introduction[1]

Israel's July 2014 invasion of Gaza saw massive protests across Europe. Many protests were peaceful and focused primarily on statements of Palestinian solidarity. But others included chants ('Jews to the gas!') and actions (such as firebombing a synagogue) that raise questions about the relationship between opposition to Israel and Zionism on the one hand, and anti-Semitism on the other.[2]

The 2015 attacks on a Jewish grocery in Paris and a Copenhagen synagogue have added urgency to this question as Europeans scramble to respond to the new anti-Semitism.[3] At times, the approach has been hasty, and a bit clumsy—as when Germany proposed a commission to tackle anti-Semitism that contained no Jews.[4] Furthermore, there has been a tendency—especially after the 2015 attacks—to focus on Europeans of Muslim or Arab origins, with the potential consequence of stoking the flames of Islamophobia.[5]

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[1] I would like to thank Jacqueline Baronian, Mitchell Gordon, Megan Tinajero, and Robert Delahunty for their helpful comments and suggestions. An abbreviated version of this paper was presented at a University of St Thomas School of Law works in progress meeting. I also want to thank the students of my Hate Speech and the Law: Comparative and Theoretical Perspectives class for letting me present my ideas to them during the course of the Spring 2015 semester.

[2] Jon Henley, 'Antisemitism on Rise Across Europe "in Worst Times Since the Nazis"' *The Guardian*, 7 August 2014.

[3] For example, there has been renewed support for the draft European Framework National Statute for the Promotion of Tolerance, a twelve-page document created by the European Council on Tolerance and Reconciliation in 2013. Ian Traynor, 'Jewish Leaders Call for Europe-Wide Legislation Outlawing Antisemitism' *The Guardian*, 25 January 2015. Among other things, the document calls for mandatory education on tolerance, criminalisation of 'overt approval of totalitarian ideology' and bans FGM, and covering one's face in public. ibid.

[4] Kirsten Grieshaber, 'German Jews Upset About Government Group on Anti-Semitism' AP, 10 February 2015.

[5] To be more precise, official repudiation of Islamophobia is combined with an unease with Muslim statements that either support, or do not adequately condemn, the attacks. While French President François Hollande has warned against violence against Jews and Muslims, France vigorously prosecuted those expressing support for the attacks on the *Charlie Hebdo* offices and the Hyper Cacher kosher deli. 'Hollande Says Anti-Semitism and Anti-Muslim Acts Threaten France' AP, 17 February 2015; Doreen Carvajal and Alan Cowell, 'French Rein in Speech Backing Acts of Terror' *New York Times*, 15 January 2015.

These developments raise several questions: Is this the end for Jews in Europe, as a recent *Atlantic* article suggests?[6] What are the sources of the new anti-Semitism in Europe? Does it come from the wearing off of the 'inoculation' against anti-Semitism that arose in the aftermath of the Holocaust? Is it a function of the never ending conflict over the Israel / Palestine conflict? Or does it have other sources?[7]

It is beyond the scope of this chapter to answer these questions. The situation on the ground is moving so fast that any statement about the ideological shape of European anti-Semitism in March 2015 will be out of date in a few years' time. Moreover, the different forms of anti-Semitism, debates over its severity, and discussions about an appropriate response, could easily fill a book.

Instead, this chapter focuses on a narrower issue: The relationship between anti-Semitism and anti-Zionism.[8] Although the 2014 Gaza demonstrations have been a flashpoint, the term anti-Zionist has been used in other settings. For example, Holocaust deniers since the 1970s have called the *Shoah* a Zionist lie; theories of world conspiracy, such as Ernst Zundel's *The West, War and Islam*, which speaks of a conspiracy among bankers, communists, freemasons and Zionists, takes the same form.[9]

The goal of my paper is to provide a framework for analysing the relationship between anti-Semitism and anti-Zionism. Is anti-Zionism always anti-Semitic? Are the two ideas always distinct categories? Or does the extent of the overlap between the two concepts depend on the circumstances in which the speech or action takes place?

Let me start with a general overview. There is a general consensus that 'legitimate criticism of the state of Israel' is neither anti-Semitic nor (possibly) anti-Zionist.[10] There is also a growing awareness that some opponents of Israel, including those in the Arab and Muslim world, express anti-Semitic thoughts (although this hardly distinguishes them given the global reach of anti-Semitism). Pushed further, there is likely consensus on classifying certain speech acts as legitimate criticisms of Israel ('The Gaza attacks were a mistake') and others as anti-Semitic ('Jews to the gas!').

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[6] Jeffrey Goldberg, 'Is it Time for the Jews to Leave Europe?' *The Atlantic*, April 2015. For a critical response, see William Saletan, 'We'll Always Have Paris: How Can We Help Jews Stay in Europe?' *Slate*, 18 March 2015.

[7] For example, it has been argued that Muslim populations in Europe are attracted to anti-Semitism, not because of a primal hatred of Jews or Israel, but because of a desire to be seen as genuinely European. Richard Seymour, 'The Anti-Zionism of Fools' *Jacobin Magazine*, August 2014. (To the extent this is true, it finds an interesting parallel in the way opponents of Islam in Europe—such as Geert Wilders—pose as Israel's best friends.)

[8] Some scholars also speak of 'anti-Israelism'—which recognizes that Zionism is a political movement, thus speech directed at Zionists is not necessarily targeting Israel and *vice versa*. For example, Manfred Gerstenfeld uses the term 'anti-Israelism' rather than 'anti-Zionism'. See Manfred Gerstenfeld, 'Anti-Israelism and Anti-Semitism: Common Characteristics and Motifs' (2011) 19(1–2) *Jewish Political Studies Review* 83–108.

[9] For an overview see Deborah Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory* (Plume 1994).

[10] See Emanuele Ottolenghi, 'Anti-Zionism is Anti-Semitism' *The Guardian*, 28 November 2003 (writing that there is 'nothing wrong, or even remotely anti-Semitic in disapproving of Israel's policies').

In theory, it should be relatively easy to isolate those comments that through their anti-Semitism or anti-Zionism harm the human dignity of others and those that do not. One could then, as a further step, discuss where, when and how such speech acts should be proscribed by law—or, since I am writing from an American perspective—responded to with educational efforts and public condemnation by the media, public figures and society at large.[11]

Yet reality is more complex. While anti-Semitism has a fairly well understood meaning as speech criticising Jews, the meanings of anti-Zionism are harder to pin down. For example, are anti-Zionist statements inherently anti-Semitic given that Zionism is a movement calling for the establishment of a Jewish homeland in Palestine? Are anti-Israel comments anti-Semitic given that Israel presents itself as a Jewish state?

The exemption for 'legitimate criticism of Israel' raises an additional question: Can one take a position on whether a given speech act is anti-Semitic without also taking a position on the Israel-Palestine conflict? In addition, any analysis of speech acts should focus on the context (time, place, and manner) of the speech act at hand. Here one might distinguish a number of factors including: what was said; where it was said (was it, for example, in front of a synagogue or a kosher deli?); the state of mind of the speaker; and the larger political and social context in which the statement or action takes place.[12]

To map this reality, I adopt two methods. First, I examine efforts to draw universal, 'all or nothing' rules about the relationship between anti-Semitism and anti-Zionism. On the one hand, some see comments against Zionists and Israel as inherently anti-Semitic; others see them as never (or almost never) anti-Semitic. While these positions may be plausible statements about anti-Semitism as a cultural and political phenomenon, the 'all or nothing' approaches help less with analysing particular speech acts.

Therefore, the second part of the paper identifies rules of thumb that make it more likely that an anti-Zionist speech act is also anti-Semitic. These 'rules of thumb' include the location of the act (did it occur outside a synagogue?), presence of anti-Semitic tropes (does the anti-Zionist statement speak of a world conspiracy, lust for money, or other classic anti-Semitic stereotypes?), and the extent to which the speech act targets Jews rather than the state of Israel (does an anti-Zionist group boycott Israeli products or kosher ones?).

Before proceeding, let me offer some caveats. First, I am not an expert on Israel-Palestine studies. As a Jew living in the diaspora, I am sceptical about many of Israel's

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[11] For a discussion of how this type of public condemnation can operate as an informal regime of censorship in the context of Holocaust denial, see Robert A Kahn, *Holocaust Denial and the Law: A Comparative Study* (Palgrave 2004) 119–20.

[12] Context plays an important role in assessing the harm caused by genocide denial. See Thomas Hochmann, 'One Century Later: Freedom of Speech and Denial of the Armenian Genocide' *CritCom*, 20 February 2015 (distinguishing the harm posed by bare Holocaust denial from bare denial of the Armenian Genocide as a matter of context). For a competing view, see Uladzislau Belavusau, 'Armenian Genocide v Holocaust in Strasbourg: Trivialisation in Comparison' *Verfassungsblog*, 13 February 2014.

policies—including the attack on Gaza. That said, I think it is possible (and important) to have a discussion about anti-Semitism, and to draw *some* conclusions about it, without having a position on every aspect of the Israel / Palestine conflict.

Second, as noted above, my focus on distinguishing anti-Semitism from anti-Zionism is legalistic. In other words, I seek to explore when anti-Zionist speech acts become hate speech that, in most countries of the world, is punishable by civil or criminal sanctions.[13] Given the legalistic nature of my argument, and the importance of protecting a wide range of speech, my preference is to err in favour of tolerating speech: So even if a speech act has anti-Semitic resonances, or shows from a genealogical perspective the merging of anti-Semitism and anti-Zionism into a single coherent discourse, I will only classify it as anti-Semitic if it can be seen as directly targeting Jews.[14]

Third, the rules of thumb are not perfect. First, they do not take into account a series of empirical problems. There may, for example, be disputes about what was actually said. For example, there are competing accounts of the anti-Gaza war protests in Paris.[15] On a more theoretical level, a speech act may have different meanings for different hearers of the message: what one person may understand as an angry but narrow critique of Israel's policy in Gaza another might interpret as visceral anti-Semitism.

An additional concern with the rules of thumb involves the fluidity of discourse—words not only have meanings, these meanings change over time. As Judith Butler has observed, the term Queer, initially a derogatory term for homosexuals, acquired a new meaning over time.[16] As a result, the meaning of a potentially anti-Semitic speech act about Zionists or Israel in 2014 might have a different meaning five or ten years later.

Finally, let me address the relationship between anti-Semitism and Islamophobia. Supporters of Israel who complain about anti-Semitism in the Palestine solidary movement should be just as concerned with Islamophobic comments by defenders of Israel. For one thing, arguments against the usefulness of Islamophobia as a concept

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[13] For a global overview of hate speech laws, see Tanya K Hernandez, 'Hate Speech and the Language of Racism in Latin America: A Lens for Reconsidering Global Hate Speech Restrictions and Legislation Models' (2011) 32 *University of Pennsylvania Journal of International Law* 805.

[14] One might contrast this to a more open-ended, cultural analysis of the link between anti-Zionism and anti-Semitism, where one might highlight anti-Semitic strands in anti-Zionist discourse to understand what motivates it. This would be similar to the Frankfurt School which during the 1930s and 1940s sought to understand anti-Semitism as a response to modernity. See Martin Jay, *The Dialectical Imagination: A History of the Frankfurt School, and the Institute for Social Research*, *1923–1950* (University of California Press 1973) 233.

[15] For example, on 13 July 2014 a crowd gathered on the Rue de la Roquette. The parade route passed by a synagogue. While initial media reports alleged that the protesters hurled projectiles at the synagogue, later reports dispute this. There were also disputes about the frequency of anti-Semitic chants ('Death to the Jews') and the role of the Jewish Defense League. See Seymour (n 7). While violence did occur in Sarcelles, a Paris suburb with a large Jewish and Muslim population, there are disputes about how closely related the rioting was to the anti-Gaza war demonstrations. ibid. As Seymour notes, 'eyewitness reports are notoriously unreliable,' especially for protests that unfold quickly. ibid.

[16] Judith Butler, *Excitable Speech: A Politics of the Performative* (Routledge 1997).

(Muslims are not an ethnic group, the concept of Islamophobia will lead to a ban on all criticism of religion, etc.)[17] bear an uncanny resemblance to the argument that anti-Semitism is merely a tool used to undermine the Palestine solidarity movement. In both instances, the fear of chilling a much broader debate is used to deny the harm of particular speech acts.

Moreover, to the extent European anti-Semitism has a large Muslim component, one must ask what feeds this. In *The Fatal Embrace: Jews and the State* (1993), American political scientist Benjamin Ginsberg has argued: 'Jews have traditionally offered their services to the state in exchange for the regime's guarantee of security and opportunity.'[18] This relationship, in turn, exposes Jews to hostility from the populist groups who feel marginalised from the state.[19] Sometimes these groups come from the Right (Ginsberg concludes his book by warning about the possibility of a Klan revival in the United States), sometimes they come from the Left.[20]

In today's Europe, the major marginalised group are Muslim migrants.[21] As a group, they outnumber European Jews, in France by a ratio of 10–1.[22] Given how poorly they are treated in a Europe that identifies itself against the background of the Holocaust, is it any wonder that alienated Muslims lash out at the Jews? Given these circumstances, it is in the interest of those concerned about the daily life of European Jews to work to alleviate this marginalisation – combating Islamophobia is one way of doing this.[23]

That said, the focus of this paper is anti-Semitism—some of which comes from the Muslim community in Europe, some of which has other sources. The question is whether one can distinguish it from anti-Zionism. To that subject we now turn.

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[17] These arguments often come up in the context of the debate over the proposal by majority Muslim countries for a global standard on defamation of religions. See Bennett Graham, 'Defamation of Religions: The End of Pluralism' (2009) 21 *Emory International Law Review* 69. For a critical response, see Robert A 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.

[18] Benjamin Ginsberg, *The Fatal Embrace: Jews and the State* (University of Chicago Press 1993) 57.

[19] ibid.

[20] ibid 240.

[21] One should include both ongoing economic and social discrimination as well as a new set of cultural concerns targeting Muslim religious clothing, religious buildings and religious practices (circumcision and ritual slaughter). For an overview see Amikam Nachmani, *Europe and its Muslim minorities: Aspects of Conflict, Attempts at Accord* (Sussex Academic Press 2010); Yvonne Y Haddad (ed), *Muslims in the West: From Sojourners to Citizens* (OUP 2002).

[22] There are approximately 500,000 Jews and five million Muslims in France. Dan Bilefsky, 'Fear on Rise, Jews in France Weigh an Exit' *New York Times*, 12 January 2015.

[23] In this regard, see Walden Bello, 'How the Left Failed France's Muslims' *Foreign Policy in Focus*, 6 February 2015. Bello describes how majority culture French Leftists who, in previous years, served as a bridge between disadvantaged French communities and the larger society, were missing in the aftermath of the 2005 riots in the Paris suburbs. The failure of this bridge (and an economic pipeline that runs from jobs, through union activity to cultural integration) has helped make the suburbs a recruiting ground for terrorists. ibid.

'All or nothing' positions on anti-Semitism and anti-Zionism

Anti-Zionism is *always* anti-Semitic

It is tempting to offer a single, 'all or nothing' answer to the relationship between anti-Semitism and negative comments about Jews and Israel. On the one hand, some people (most but not all of them defenders of Israel), assert that anti-Zionism is always (or almost always) anti-Semitic.[24] On the other hand, others (often critics of Israel), argue that 'anti-Zionism is not anti-Semitism', adding that authorities often use anti-Semitism to discredit the Palestine solidarity movement.[25]

Here one can separate two positions. A categorical approach argues that there is something about anti-Zionism, for example, that is intrinsically anti-Semitic, or that anti-Semitism is always an excuse used to discredit the movement for Palestinian rights. These approaches echo United States Supreme Court Justice Clarence Thomas who has argued that given the history of the Ku Klux Klan in the United States cross burning is always an act of intimidation.[26]

A second, quantitative version of the argument takes the narrower position that many, most or almost all anti-Zionists fall into the critic's chosen category. For example, a critic of Israel might concede that Gaza protests led to some anti-Semitic incidents but conclude that they are 'rare'.[27] Likewise, a proponent of the 'anti-Zionism = anti-Semitism' position might concede that it is a convenient short hand that largely characterises the underlying (slightly messier) reality.[28]

In assessing the validity of these 'all or nothing' arguments, one confronts a semantic dilemma. One can 'prove' one's case by defining anti-Semitism broadly or narrowly enough. For example, if anti-Semitism is defined to include criticism of Israel, there is little need for further analysis. Likewise, one could define anti-Semitism to exclude any statements motivated by the Israel / Palestine conflict. This is one way to read the

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[24] See eg Jonathan S Tobin, 'Anti-Zionism Always Equals Anti-Semitism' *Commentary*, 18 August 2014; Ottolenghi (n 10).

[25] For example, the French Noveau Parti Anticapitaliste put out a statement after the Gaza demonstrations accusing French leaders of making 'the scandalous choice to confuse the fight for Palestinian rights and anti-Semitism.' Quoted in Massoud Hayoun, 'French Palestine Supporters Warn Paris Protest Man may Provoke "Intifada"' *Aljazeera America*, 21 July 2014.

[26] Justice Thomas made these statements in *Virginia v Black*, 538 US 343, 388 (2003) (J Thomas, dissenting), which upheld the right of states to ban cross burning when done with 'intent to intimidate'. For more, see Robert A Kahn, 'Offensive Symbols and Hate Speech Law: Where to Draw the Line?' in András Koltay (ed), *Media Freedom and Regulation in the New Media World* (Wolters Kluwer 2014) 441, 446–48.

[27] See Lindsey German, 'Are the Demonstrations Against Israel's Attack on Gaza Anti-Semitic?' *Stop the War Coalition*, 29 July 2014.

[28] The more exceptions from the general rule (anti-Zionism always [or never] is anti-Semitic), the closer one winds up with the case-by-case analysis of speech acts that I describe later in this chapter. Here, however, I focus on those arguments that—despite the nod to exceptions—take an 'all or nothing' approach.

German administrative judge's ruling that the July 2014 firebombing of the Wuppertal Synagogue was not motivated by anti-Semitism[29]—although, as we shall see, there are other ways of looking at this.

It is not my goal here to provide an exacting definition of anti-Semitism; there have been many attempts to do this.[30] While the definitions often conflict, they agree on one point: anti-Semitism is hatred of the Jews. The question, therefore, is whether anti-Zionist speech *always* expresses hatred of the Jews.

The 'all or nothing' positions largely accept this framework. For example, one argument used by those who claim anti-Zionism is always anti-Semitic focuses on the idea that Israel is the Jewish state, often combined with an assertion that the vast majority of Israeli citizens are Jews (a calculation that leaves out the Palestinian inhabitants of the occupied territories). If all (or most) Zionists are Jews, then speech targeting Zionists (or Israel) is by definition anti-Semitic: at least when the speech or behaviour in question goes beyond 'legitimate criticism of Israel'.

A slightly different perspective comes from Jean Amery, an Austrian Holocaust survivor who wrote: 'anti-Zionism contains anti-Semitism like a cloud contains a storm.'[31] This perspective builds on the fact that most anti-Semites are also anti-Zionists to suggest that the opposite is true. To take one example, if the Hungarian Jobbik party, which describes itself as anti-Zionist has anti-Semitic elements,[32] could other anti-Zionists also be anti-Semitic, at least covertly? Could this latent anti-Semitism then explain why, out of all the examples of war, racism, and human cruelty in the world, critics of Israel 'single out Jewish people, the Jewish religion, the Jewish culture, or the Jewish nation for condemnation?'[33]

This argument has empirical and political problems. From an empirical perspective, it ignores the publically stated opposition to anti-Semitism among some members of the Palestine solidarity movement. For example, in a March 2015 piece, Matt Carr of the Stop the War Coalition, a British Palestine solidarity group, strongly rejected anti-Semitism, arguing that Israel is not 'responsible for every act of mayhem in the Middle

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[29] Hana L Julian, 'Synagogue Arson in Germany "Not Anti-Semitism" Says Judge' *The Jewish Press*, 7 February 2015.

[30] See eg Gerstenfeld (n 8).

[31] Amery is quoted in Benjamin Weinthal, 'Why Anti-Zionism is Modern Anti-Semitism' *National Review*, 29 July 2014.

[32] For an overview, see Aviva Stahl, 'Hungary's Far-Right and "Jewish Ancestry" Slippage' *Aljazeera*, 27 April 2014. Jobbik describes itself as an anti-Zionist party. On the occasion of a World Zionist Conference meeting in Budapest, party members drew comparisons between Israel's colonisation of Palestine and colonial efforts directed at Hungary (ibid), a formulation that is not explicitly anti-Semitic. However, in 2012 the mask slipped when a party member called on the government to 'tally up people of *Jewish* ancestry' because they pose a 'national security risk' (ibid, emphasis added).

[33] Alan Dershowitz, *The Case for Israel* (John Wiley & Sons 2004) 2. One place this argument arises is with Syria. For example, at the height of the Gaza protests in Germany, political scientist Stephan Grigat of the Jewish Studies Institute at the University of Vienna asked 'why 200 dead Palestinians are enough to send 10,000 people into the streets but nobody seems interested when 100,000 people are killed in Syria.' See 'Growing Opposition to Israel in Germany' *DW*, 22 July 2014.

East' and that one can 'criticize Israel's brutal treatment of the Palestinians' without calling Israel 'a Nazi state'.[34] One can argue about numbers—how many of the Gaza protesters agree with Carr? But it is very hard to claim that *all* protesters are anti-Semites.

This reflects the fact that Jews, Israelis and Zionists are not equivalent categories. In particular, not all Jews support the state of Israel; indeed, some Jews are anti-Zionist on religious grounds. For example, Neturei Karta is an international group of Hasidic Jews opposed to Zionism on the ground that under the Torah (Jewish religious law) 'it is forbidden for us to rise up and build ourselves, until the Almighty Himself redeems us without the help of anyone else, and without our power.'[35] Secular Jews have also expressed doubts about Israel and have taken part in the Palestine solidary movement.[36]

Behind this lies a larger argument. While 5.6 million Jews live in Israel; 1.4 million live in Europe.[37] Indeed, most Jews still live in the diaspora. As such, they are exposed to forms of anti-Semitism unrelated—or at least not directly related—to the Israel / Palestine conflict. While increasing numbers have chosen to immigrate to Israel, the vast majority have not.

This also applies to France where, in 2014, 7,000 Jews chose to emigrate from France to Israel, double the number from the previous year.[38] In the wake of the attack on the Hyper Cacher deli this number will grow, perhaps reaching as high as 50,000.[39] But this number still means that the vast majority of French Jews (roughly 90 per cent) will remain in the country and have to deal with anti-Semitism on a daily basis.[40]

Equating anti-Zionism with anti-Semitism undermines the European Jew who wants to wear a *kippa*, pray in a synagogue, or send his or her children to a Jewish school without worrying about violence.[41] Nothing in the stated aims of the Palestine solidarity movement prevents them from doing this—refusing to distinguish anti-Zionism from anti-Semitism, however, just might lead to this result over time.

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[34] Matt Carr, 'Why Antisemitism is a Blight that Palestinian Solidarity does not Need' *Stop The War Coalition*, 8 March 2015.

[35] Neturei Karta, Jews United Against Zionism, 'Response by Anti-Zionist Orthodox Rabbis to Recent Statements of Israel PM in France' Press Release, 15 January 2015. In other words, they take the position that Israel cannot exist until the return of the Messiah.

[36] For example, Stahl (n 32) identifies herself as a Jewish opponent of Israel.

[37] See Michael Lipka, 'The continuing decline of Europe's Jewish population' *Pew Research Center*, 9 February 2015.

[38] Bilefsky (n 22).

[39] ibid.

[40] Moreover, emigration to Israel from other countries is lower. For example, in Denmark, where the Chief Rabbi, Jair Melchior described the anti-Semitic incidents arising out of the Gaza war as 'not a dangerous anti-Semitism'. 12 of the country's 7,000 Jews emigrated in 2014—down from 17 in 2013. 'No to Netanyahu: Jews' Loyalty to Denmark Runs Deep' *Reuters*, 17 February 2015.

[41] For an example of this sentiment, see Jennifer Helgeson, 'Gaza Protests in Paris: Pro-Palestinian or Anti-Jewish?' *Fair Observer*, 1 August 2014 (expressing concern about using Yiddish words while calling her mother from the park).

Nor is the argument that anti-Zionism is inherently anti-Semitic because it 'singles out' Israel any more persuasive. While anti-Israel protesters do single out Israel, this does not mean that they—as individuals—only focus on that country's failings.[42] One can criticise Israel on Monday, Wednesday, and Friday and criticise Syria, Iran, the United States or Germany on the remaining days of the week. To be sure, there may be contextual situations where constant criticism of Israel could take on an anti-Semitic cast (imagine a school teacher who constantly berates Israel in front of his fifth grade class which contains one or two Jewish students).[43] But, normally, singling out Israel, however unfair it may be, is not *inherently* anti-Semitic.[44]

In addition to empirical arguments against treating all anti-Zionism as anti-Semitism, there are prudent reasons why someone concerned about the growth of anti-Semitism in Europe would want to distinguish between the two concepts. Simply put, if one treats flying a Palestinian flag, focusing excessively on Israel's human rights violations, or participating in pro-Palestinian rallies as anti-Semitism of the first degree, how can one distinguish those acts that are much closer to what most people would agree is traditional anti-Semitism?

For example, in the wake of the verdict in the Wuppertal Synagogue attack, in which—as noted above—the judge held that three Palestinian attackers were not motivated by anti-Semitism, James Kirchick wrote a blog post in *The Daily Beast* in which he compared the synagogue bombing to a hypothetical example in which a group of skinheads torch an African-American church in the American South.[45] In Kirchick's example, the attackers justify their attack on the African-American church by mentioning 'the injustices of Zimbabwean dictator Robert Mugabe.'[46]

While Kirchick properly questions why 'Jews in Germany should have to suffer for the supposed sins of a government half a world away,'[47] the use of the Mugabe example—which likely has little if any resonance among American whites living in Alabama, Arkansas or Mississippi—ignores the importance the Gaza war has for Palestinians living in Europe. The choice is intended to raise the question of 'singling out'; the focus on Israel in Germany is meant to seem as odd as the American skinheads

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[42] Consider in this light the comparison between Israel and Syria. Are critics like Grigat (n 33) correct that Syrian casualties are met with relative indifference? Or is there a tendency to downplay moments of concern about the Syrian civil war because they often take place outside the lens of the Israel / Palestine conflict?

[43] Of course, given the age differential, one could just view this as routine bullying.

[44] See Brian Klug, 'No, Anti-Zionism is not Anti-Semitism' *The Guardian*, 2 December 2003. Klug questions the divide between 'legitimate' Israel criticism and anti-Semitism, pointing out that people 'on both sides [of the Israel / Palestine conflict] are liable to be partisan.' Just as Israel supporters who do so are not 'necessarily anti-Muslim', opponents of Israel who do so are not necessarily 'anti-Jewish'. ibid.

[45] James Kirchick, 'German Court Rules Synagogue Firebombing an "Act of Protest"' *The Daily Beast*, 9 February 2015.

[46] ibid.

[47] ibid.

focus on Mugabe. In the process, Kirchick loses what should be his main point: That attacking a synagogue (as opposed to the Israeli embassy)[48] is morally wrong, and under the circumstances, most likely anti-Semitic.

Anti-Zionism is *never* anti-Semitism

If one rejects the view that anti-Zionism is always anti-Semitic, what about the opposing view that anti-Zionism is never anti-Semitism? Or to put it another way, that charges of anti-Semitism have been used unfairly to discredit the Palestine solidarity movement?

Some versions of this view are benign. According to Richard Seymour, accusations of anti-Semitism carry a special stigma.[49] And, from a Palestinian solidarity perspective, Aviva Stahl stakes out a tenable position when she asserts that: 'No anti-Semitic threat, whether present or past, real or imagined, warrants the ongoing colonisation and ethnic cleansing of Palestine.'[50] While one could take issue with the 'real or imagined' language, her statement appears in an article in which she exposes the anti-Semitic activities of the Hungarian Jobbik party.[51]

But the Palestine solidarity movement labours under a special burden. While Israel was not founded in response to the Holocaust, the mass murder of the Jews is something anti-Zionists must deal with given Israel's self-identity as a protector of the Jews.[52] This leads supporters to sometimes claim not simply that the movement is largely free of anti-Semitism but that society is as well.

In Europe, this is a difficult case to make. Anti-Semitic attitudes on the Continent predate the founding of Israel and the recent upsurge of anti-Semitic violence predates the recent Gaza war.[53] Since, as noted above, anti-Semites are often also opposed to Israel, the vitality of European anti-Semitism poses problems for the movement.

Consider in this light the French comedian Dieudonné. On one level, his is an easy case: Dieudonné is an anti-Semite. He has introduced the *quenelle* a quasi-Nazi salute,[54] made connections with Alain Soral, a former speech writer for the far right National Front.[55] One special area of interest is the role of Jews in the slave trade.[56]

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[48] ibid. I agree with Kirchick about the anti-Semitic nature of the choice of targets (see below).

[49] Seymour (n 7).

[50] Stahl (n 32). Likewise, when Reuben Bard-Rosenberg's asserts that 'the claim that anti-Semitism is a dominant or generalized' feature of the Palestine solidarity movement is a 'falsehood', he is not engaging in anti-Semitism, even if one were to disagree with him on empirical grounds. Quoted in Carr (n 34).

[51] Stahl (n 32). Indeed, Stahl saw the presence of Neturei Karta at a pro-Jobbik rally in London as proof that 'Jews can have anti-Semitic ideas.'

[52] Carr (n 34).

[53] For example, the United Kingdom saw 1,168 anti-Semitic incidents, more than double the previous year. While some of this increase reflected a jump in incidents during the Gaza protests, the number was set to eclipse the 2013 totals before the Gaza war began. Robert Booth, 'Antisemitic Attacks in UK at Highest Level Ever Recorded' *The Guardian*, 4 February 2015.

[54] Scott Sayare, 'Concern Over an Increasingly Seen Gesture Grows in France' *New York Times*, 2 January 2014.

[55] ibid.

[56] Seymour (n 7).

In another way, however, Dieudonné is a harder case. In addition to being an anti-Semite, he is also an anti-Zionist. He has performed sketches about the 'Nazi' Israeli settlers and 'Americano-Zionist axis'.[57] While Stahl, Carr and Bard Rosenberg are correct to distinguish the mainstream of the Palestine solidarity movement from Dieudonné's mix of anti-Semitism and anti-Zionism, his example shows the theoretical possibility that the two ideologies can be present in one place.

When is a given anti-Zionist speech act also anti-Semitic?

'All or nothing' approaches fail as descriptions of the universe of anti-Zionist speech acts and make a political response to the growth of anti-Semitism in Europe more difficult. The times call for a principled way to identify those statements and actions in which the anti-Zionism is window dressing for an anti-Semitic animus. In what follows, I suggest three different ways in which one can classify a given speech act or action as more or less anti-Semitic.

Location

Although it sounds simplistic, one of the best indicators of the nature of an anti-Zionist speech or action is where it takes place. As critics of the Wuppertal ruling point out, if the defendants had wanted to make a statement against anti-Zionism, they could have firebombed the Israeli embassy.[58] The same logic applies to anti-Zionist marches that take place in Jewish communities, outside kosher stores or at synagogues—especially during times of prayer. While the location of an act does not necessarily make an anti-Zionist protest, speech or attack anti-Semitic—especially if it occurs in a neighbourhood like Sarcelles where both Jews and Muslims (or Palestinians) live together—it is a factor worth considering.

At the same time, it is important to be clear about why an attack on a synagogue is anti-Semitic. It is not because of the intent of the attackers but because of its impact on Jews. While there is a principle in US law that the accused intends the 'ordinary consequences of his [or her] acts',[59] there is a difference between the intent a society as a social matter imposes on criminal defendants, and the motive (or reason) the accused had for undertaking the voluntary act in question.

Usually, motive is legally irrelevant. This is a logical position given the society's emphasis on the harm of the accused's actions. So, to take the example of the Wuppertal Synagogue firebombing, the defendants were tried (and convicted) for committing an

[57] ibid.
[58] Kirchick (n 45).
[59] *Sandstrom v Montana*, 442 US 510 (1979).

act of arson. Given that the building attacked was a synagogue, the underlying act is clearly anti-Semitic. To the extent presiding judge Jörg Sturm's verdict, which refers to the attack as an act of protest against the Gaza war, is taken as a statement about the character of the act itself, the criticism of his ruling is justified.[60]

However, one could read the 'act of protest' language as bearing on the motivation of the three Palestinian defendants, who each apologised to the community at the start of the trial. To the extent this is true, one has a rather common situation in German jurisprudence: An anti-Semitic attack described by the court as motivated by angry young men, a formulation used for years to minimise violence by skinheads and neo-Nazis. While this approach to anti-Semitic violence is unfortunate, it does not suggest that the judge (or Germany as a whole) is denying the anti-Semitic potential of the act itself.

To put it another way, attacks against synagogues, kosher markets, and Jewish day schools are *per se* acts of anti-Semitism. They may often be motivated by anti-Semitism. Sometimes, however, they will be motivated by other factors—including anti-Zionism. The motivation, however, does not change the character of the underlying act, even if—as a practical matter—it plays a role in how the court sees the case.

However incongruous the distinction between the act itself and the attackers' motivation may be, it is necessary for pragmatic purposes. In a Europe in which 'visible' Jews face 'no-go' zones,[61] the attacks on Jews need to be labelled clearly as anti-Semitic. On the other hand, to view the Wuppertal firebombing as motivated by 'pure' anti-Semitism leaves no place to distinguish between three young men very upset by a war in their country of origin, and hardened neo-Nazis whose attack on Jews stems largely from their hatred of Jews.

Presence of anti-Semitic tropes

Another way to distinguish anti-Zionism from anti-Semitism is the presence of certain themes associated with the latter. The core characteristics Manfred Gerstenfeld identifies include treating the Jew as a scapegoat, portraying the Jew as the killer of God, desire for power and genetic inferiority.[62] Likewise, Frankfurt School scholar Theodor Adorno

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[60] Some of the criticism has been quite harsh. For example, Rabbi Avichai Appel, Chairman of the German Orthodox Rabbinical Conference, describes the verdict as 'a permit to attack Jews on the basis of anti-Zionism'. Cynthia Blank, 'German Verdict Allows Attacks on Jews Based on Anti-Zionism' *Arutz Sheva*, 5 March 2015. The language recalls the 1994 case in which a Mannheim District Court described Günter Deckert, a right-wing political leader and defendant in a Holocaust Denial case in overly sympathetic terms. The result was a scandal of massive proportions. For an overview see Kahn (n 11) 70–77.

[61] For a sense of the current atmosphere in Europe, see 'German Jewish Leader Warns Against Wearing Skullcaps' *Reuters*, 26 February 2015.

[62] Gerstenfeld (n 8). Gerstenfeld goes a step further and offers analogues to anti-Zionism. For example, he sees an excessive focus on Israel's sins as scapegoating writ large. ibid. As a description of anti-Zionism, there is much to be said for this approach. But for an anti-Zionist speech act to seen as anti-Semitic, one

compiled a list of forms that anti-Semitism can take including: the Jew as parasite, the Jew as racially inferior, and the Jewish lawyer who deprives the honest man of his hard won wealth.[63]

Identifying anti-Semitic tropes is important because they have a resonance both for Jews (who experience a sense of victimisation after being 'reminded' of Jewish greed, lust for power, etc.) and traditional anti-Semites for whom such speech is often a call to action. At the same time, it is important to distinguish between statements of opinion at least partially grounded in fact ('AIPAC is a powerful lobby group in the United States') and statements in which anti-Semitic myths about Jewish / Zionist power predominate ('There is a Zionist conspiracy that rules the world').[64]

Acts can also have anti-Semitic resonances. The Jobbik representative's call to create a list of people of 'Jewish ancestry' is not anti-Semitic merely because the representative by a slip of the tongue said 'Jewish' instead of 'Zionist'. The statement is anti-Semitic because it brings to mind the way such lists were used to round up Jews in the Holocaust. Likewise, the phrase 'Zionists to the gas!' or 'I want to kill every last Zionist' in addition to being hate speech, have an added anti-Semitic resonance because of the gas chambers and the goal of making Europe free of all Jews (*Judenrein*).

The claim that Israel is a 'Nazi' state that treats Palestinians the way Hitler treated the Jews poses closer questions. To the extent the comparison is meant to draw an explicit equivalence between the Nazi mass murder of the Jews and what is currently happening in Gaza, the statement trivialises the Holocaust and, as such, could be seen as anti-Semitic.[65]

However, if 'Nazi' is meant as an adjective for 'totalitarian', 'cruel', or 'horrific', the case for anti-Semitism is harder to make. For example, the disappointed teenager who complains that his 'Nazi' junior high-school library will not stock copies of *Catcher in the Rye*[66] is most likely not drawing comparisons to cattle cars, death camps and gas

should require a direct or indirect appropriation of an anti-Semitic trope (as opposed to an anti-Semitic trope modified to apply to Israel and Zionists). For example, one can suspect anti-Semitism when one speaks of the avariciousness of Zionists, the existence of a world Zionist conspiracy, or allegations that the American Israel Political Action Committee (AIPAC) is a modern day version of international Jewish conspiracy outlined in *The Protocols of the Elders of Zion*.

63 Theodor Adorno, 'Research Project on Anti-Semitism' in Theodor Adorno (ed), *The Stars Down to Earth* (Routledge 1994) 181, 205–10.

64 One might add here Baroness Jenny Tonge's statement that 'The pro-Israel lobby has got its grips on the Western world, its financial grips.' Gerstenfeld (n 8).

65 To the extent, however, the claim is that the 1948 expulsion of the Palestinians (the *nakba*) is equivalent to the Holocaust, the argument shifts somewhat. Of critical importance is the extent to which the comparison is intended to draw attention to the enormity of the *nakba*, or whether the main goal is to trivialise the Holocaust.

66 Jerome D Salinger's *The Catcher in the Rye* (1951) was a book frequently banned from public school libraries because of its vulgar language, sexual references, and supposed encouragement of 'rebellion'. See SJ Whitfield, 'Cherished and Cursed: Toward a Social History of *The Catcher in the Rye*' (1997) 70 *New England Quarterly* 567.

chambers. While one could argue that, in light of the Holocaust, a Palestinian opponent of Israel should be careful in loosely using the 'Nazi' label, a casual use of the term to refer to Israel's behaviour during the Gaza war is not inherently anti-Semitic.

On the other hand, Nazi language can suggest anti-Semitic intent. For example, I agree with Gerstenfeld that referring to Zionists as 'rats', 'cockroaches' or 'locusts' is clearly hateful and most likely anti-Semitic.[67] Likewise, the Hamas Charter's reference to the *Protocols of the Elders of Zion* is clearly anti-Semitic[68]—although this does not make every supporter of Hamas, or opponent of Israel's invasion of Gaza, an anti-Semite. Wherever possible, the focus should be on the speech act itself, rather than on the speaker (or the group he or she represents).

Boycotts and discrimination

A final set of issues involves protest activity meant to isolate Israel in the global community—the major goal of the BDS (Boycott, Divestment and Sanctions) movement. In its emphasis on economic measures to bring about political change, the BDS movement follows in the footsteps of the anti-Apartheid movement of the 1970s and 80s. During the anti-Apartheid struggle, some opponents questioned the wisdom of sanctions, preferring instead an approach of 'constructive engagement'.[69] Likewise, modern critics of the BDS movement question the wisdom of extending the anti-Israel boycott to academic and cultural issues, especially given the limited power of artists or academics to change policies they might personally oppose.

These objections, however, are different from saying that the BDS movement is anti-Semitic. And, in general, the idea of using boycotts against Israel is not anti-Semitic even though the Nazis during the 1930s called for boycotts against Jewish-owned stores.[70] The critical question is the target of the boycotts: Is it Israel (the ostensible target)? Or do the boycotts extend to the Jewish community at large?

Some examples will make this distinction clearer. A boycott of Israeli goods is a legitimate way to put pressure on Israel to change its policies in the West Bank and Gaza Strip; a boycott of kosher goods is not. Instead, such a policy punishes Jews—perhaps even anti-Zionist ones like *Neturei Karta* who, for religious reasons, need access to kosher food.

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[67] Gerstenfeld (n 8).

[68] ibid.

[69] For a critical view of this argument, see Nima Shirazi, '"Constructive Engagement" didn't Work in South Africa, so Why are Liberal Zionists Pushing it for Israel' *Mondoweiss: The War of Ideas in the Middle East*, 15 April 2013.

[70] In one of the earliest anti-Jewish measures after seizing power, on 1 April 1933, the Nazi party orchestrated a one day boycott of Jewish stores across Germany. See 'Boycott of Jewish Businesses' *Holocaust Encyclopedia*, United States Holocaust Memorial Museum.

This has been an issue in the United Kingdom where, after a series of protests against Israeli goods, a major supermarket removed kosher goods from its shelves.[71] The difficult question here is one of causation: Can the decision of the supermarket to remove kosher food be laid at the feet of the protestors, who appear to have limited their focus to Israeli goods? Probably not—although the situation changes a little if the protesters, instead of removing the offensive items, prevent shoppers from accessing them by standing in front of the store.[72]

Food is not the only item subject to boycott; people are as well. At UCLA Rachel Beyda, a college sophomore and applicant to the university's judicial board was asked whether as a 'Jewish student' who was 'very active in the Jewish community' she could 'maintain an unbiased view?'[73] This led to a forty minute debate about whether the student's involvement in a campus Hillel rendered her unfit for a judicial position on campus; while the student was initially rejected, the decision was reversed on the advice of a faculty adviser, who explained that membership in a Jewish organisation should not disqualify a student from participating in student government.[74] The students who asked the questions later apologised.[75]

The UCLA case is interesting in several respects. First, it shows that the United States is not entirely immune from the wave of anti-Semitism sweeping Europe. Second, the questioning and debate was noteworthy in the absence of Israel or Zionism—despite a recent campus debate over divestment, the questioning of the student candidate turned entirely on her Jewish affiliations.[76] As such, it serves as a testament to the lingering power of anti-Semitism—especially the idea that a Jew cannot be unbiased or loyal.

Finally, the incident points out the danger of conflating Jews and Zionists – a danger that only grows larger when defenders of Israel refuse to distinguish between anti-Semitism and anti-Zionism. Clearly, questioning Rachel Beyda on the basis of her Jewish background was anti-Semitic, and as the title of the *New York Times* article hints, the incident brings back memories of a time not long ago when quotas limiting the percentage of Jewish students allowed on college campuses was a fact of American life, along with restrictive covenants and Gentlemen's Agreements.[77]

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[71] Sam Rkaina, 'Sainsbury's Removes Kosher Food from Shelves—because of Gaza Protest' *Daily Mirror*, 18 August 2014.

[72] This is what happened at a Tesco Express Market in Oldham. Local residents complained about the intimidating nature of the mass protests, especially for elderly customers. Although potentially counterproductive, there is little here that is explicitly anti-Semitic. 'Tesco Boycott Demo Over Gaza—Clarksfield, Oldham, UK' Posted on Boycott.Israel.Org.

[73] Adam Nagourney, 'In UCLA Debate Over Jewish Student, Echoes on Campus of Old Biases' *New York Times*, 5 March 2015.

[74] ibid.

[75] ibid.

[76] ibid.

[77] For a discussion of quotas in American medical schools, see Leon Sokoloff, 'The Rise and Decline of the Jewish Quota in Medical School Admissions' (1992) 68 *Bulletin of the New York Academy of Medicine*

Had Beyda been running for elective office—rather than for a judicial post—and had she taken an explicit position on the BDS movement, then a questioner at a candidate's debate could have legitimately asked her about her position on the subject, especially given the recent debate on campus over sanctions. But none of this was the case here; despite the diversity of Jewish attitudes toward Israel, Beyda's questioners simply assumed she would take a hard-core Zionist position. This was unfair and anti-Semitic.

Conclusion: The limits and importance of distinguishing anti-Semitism from anti-Zionism

In general, anti-Zionist speech is fairly easy to distinguish from anti-Semitic speech. If the speech act takes place in front of a synagogue, Jewish school, or kosher restaurant, it is likely to be anti-Semitic. Likewise, a speech act that relies on conspiracy theories, tropes about greed or rhetoric of racial inferiority is also probably anti-Semitic in inspiration—even if the language used is 'Zionist' rather than 'Jew'. Finally, while boycotts against Israeli food, or political supporters of Israel on campus can be viewed as narrowly anti-Zionist, the assumption that all Jews support Israel is anti-Semitic.

The line drawing of fools?

On the other hand, there are hard cases. A given act may be anti-Semitic in nature but motivated by something else—youthful anger, alienation, an uptick in violence in the Israel / Palestine conflict, or a combination of these factors. While it is important not to lose sight of what, given the history of the Holocaust, a burning synagogue means for a Jewish family living in Paris, Amsterdam or Wuppertal, that same family must —late at night—wonder whether lumping together angry protesters with hardened anti-Semites is the best way to prevent the spread and deepening of anti-Semitism across Europe.

An equally serious problem is factual. Protest rallies are large, unwieldy events; even participants may be unable to tell what proportion of the crowd was chanting 'Jews to the gas!' or why a seemingly peaceful crowd devolved into a riot. But most of the time, we will not be present. Deprived of the benefit of direct observation, we must rely on second or third-hand accounts of an event. This raises the problem of

497–518. The term 'Gentlemen's Agreement' refers to informal agreements to discriminate against Jews (and other minorities) in housing, travel, and vacation resorts. These agreements, because they were rarely written down, were seen as outside the scope of the law. See Garrett Power, 'The Residential Segregation of Baltimore's Jews: Restrictive Covenants or Gentlemen's Agreements?' (1996) 5 *Generations* 1–7. The 1947 film *The Gentleman's Agreement* starring Gregory Peck also takes up this issue.

disappointed expectations. If the initial accounts of a pro-Palestinian demonstration speak of rocks being thrown at a synagogue, this will frame the subsequent understanding of the event—even if it turns out to be false.

Sometimes, a careful perusal of the evidence—perhaps, for example, someone took a videotape of the protest—will provide reliable insight into what likely happened. More often, however, we are left having to make a series of if-then statements. If the protesters took kosher items off the shelves, that is anti-Semitic; if they only took Israeli items off the shelves, it is not.

A third problem with line drawing concerns hate speech. The unwritten assumption in the paper so far is that anti-Semitism is more likely to be hate speech than anti-Zionism. But this is not necessarily the case. In theory, harsh anti-Zionist invective could be hate speech against Israelis just as harsh anti-Serbian hate speech targets Serbs.[78]

Conversely, one could imagine an anti-Semitic statement ('Jews have too much power') that lacks the abusive rhetoric traditionally associated with hate speech. While the anti-Semitism / anti-Zionism distinction is important, it is not true that all anti-Semitism and only anti-Semitism is hate speech.

Finally, to the extent one relies on line drawing, and the relevant parties know the lines, they can speak in coded messages to avoid punishment.[79] In other words, instead of chanting 'Jews to the gas!' protesters could say ('Kill every last Zionist!') in circumstances where the intended victims were Jews. On the other hand, some of the guidelines raised here—such as the focus on location—is harder to evade in this way. An attack on a synagogue is an attack on a synagogue; it is hard to dress up as easily as one might convert an anti-Semitic chant into an anti-Zionist one.

The benefits of singling out anti-Semitism

Moreover, there are some tangible benefits to line drawing. From a Jewish perspective, the effort to distinguish anti-Semitism from anti-Zionism encourages opponents of Israel to do what they can to oppose the anti-Semites in their midst.

When a representative of the Stop the War Coalition says that anti-Semitism 'needs to be denounced'[80] whenever it arises, I want to help in this effort by identifying (or at least rank-ordering) what should be denounced, rather than taking Alan Dershowitz's approach under which the fairly mild statements are actionable anti-Semitism because they single out Israel for special opprobrium.[81]

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[78] During the Bosnian and Kosovo Wars in 1990s, Serb-Americans often faced discrimination for being on the 'wrong' side. See Nancy Polk, 'For some Serbs Here, Sting of Discrimination' *The New York Times*, 25 July 1999.

[79] Bans on Holocaust denial have had this effect, especially in France. See Kahn (n 11) 115–17.

[80] Carr (n 34).

[81] Dershowitz (n 33).

In addition, the conflation of anti-Zionism and anti-Semitism ignores a number of important dynamics behind the current situation in Europe including the lingering anti-Semitism among 'native' Europeans, the poor treatment of Muslims and migrants in Europe, and the role anti-Semitism plays in 'integrating' alienated Muslims into European society.[82]

It has become fashionable to compare Europe today to the 1930s.[83] The firebombing of the Wuppertal Synagogue is compared to *Kristallnacht*, the 9 November 1938 attack on Jewish businesses and synagogues orchestrated by the Nazis. But Jews are not the only Europeans to make the comparison; alienated European Muslims also wonder if they are like Jews in the 1930s.[84] These statements are often made against the background of laws banning ritual slaughter, male circumcision and the public display of religious garb.

Perhaps there is a way European Jews and Muslims can make common cause over this. At the same time, the Israel / Palestine conflict is not going away; so long as it exists, it acts as an impediment to Muslim-Jewish understanding in Europe. A better sense of what is—and is not—anti-Semitism will not solve these problems by itself, but it might point the way forward.

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[82] In this regard, one must question the draft tolerance statute's inclusion of a footnote suggesting that 'given the need to fight crime, persons may not be allowed to cover their faces in public.' A European Framework National Statute for the Promotion of Tolerance, s 4(b)(iii). While there may be an argument—in my opinion a weak one—for banning the *burqa* or *niqab* for reasons of gender equality, the public security rationale given here strikes me as a rather thin cover for an underlying concern about Islamic clothing that seems out of place in a statute about promoting tolerance.

[83] Goldberg (n 6).

[84] See Robert A Kahn, 'Who's the Fascist? Uses of the Nazi Past at the Geert Wilders Trial' (2012) 14 *Oregon International Law Review* 279.

Joanna Kulesza

#JeSuisCharlie: Free expression in the age of global media

On the current threats to free expression

On 7 January, 2015 the world was taken aback by a brutal terrorist attack in Paris. The doors to the editorial offices of a popular French periodical were forced by two men wielding firearms. The perpetrators left embarked on a shooting spree, taking 12 lives and wounding 11 people.[1] They left behind more victims on their escape route and inspired similar attacks that unfolded in France in the following days. There was no doubt that the *Charlie Hebdo* attack was a brutal revenge on the satirical magazine, which practised a no holds barred editorial policy, whether the intended pun was on politicians, nations, communities or religions. Shortly after the attack the gunmen acknowledged their Al-Qaeda adherence and claimed the attacks to have been ideologically driven. *Charlie Hebdo*, notorious for publishing controversial cartoons, was first targeted with terrorist threats after its contentious 2010 'special edition' with Muhammad as editor-in-chief and, subsequently, in 2012 after a series of Muhammad's cartoons, including his nude depictions, considered offensive to Muslims. Eventually it exposed itself to religious extremism with its 2013 declaration to publish a comic on the life of the Prophet.[2]

Clearly *Charlie Hebdo* is not the only satirical magazine to publish cartoons with a religious edge. The 2013 released Al-Qaeda hit list, naming cartoonists and journalists who had offended Islam, included some of the 2015 shooting victims, journalists from *Jyllands-Posten*, a Danish periodical of similar character, which was behind the controversial 2005 Muhammad and Islam depictions, as well as politicians and writers.[3]

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[1] For the details of the attack see eg the full report by *Le Figaro*, 'Revivez l'attaque de Charlie Hebdo minute après minute', *Le Figaro*, 7 January 2015 <http://www.lefigaro.fr/actualite-france/2015/01/07/01016-20150107LIVWWW00152-en-direct-Charlie-Hebdo-Paris-fusillade.php>.

[2] See a critical comment on the limits of free expression stretched by the planned publication from UK's *The Independent*: Jerome Taylor, 'It's *Charlie Hebdo*'s Right to Draw Muhammad, but They Missed the Opportunity to do Something Profound' *The Independent*, 2 January 2013 <http://www.independent.co.uk/voices/comment/its-charlie-hebdos-right-to-draw-muhammad-but-they-missed-the-opportunity-to-do-something-profound-8435693.html>.

[3] Dashiell Bennett, 'Look Who's on Al Qaeda's Most-Wanted List' The Wire, 1 March 2013, <http://www.thewire.com/global/2013/03/al-qaeda-most-wanted-list/62673/>. The 'Wanted: Dead Or Alive for Crimes Against Islam' list included Geert Wilders (controversial Dutch politician), Ayaan Hirsi Ali (Somali-born Dutch politician), Morris Sadek (publisher of the controversial anti-Islam video 'Innocence of Muslims'), Carsten Juste and Flemming Rose (editors of *Jyllands-Posten*), Kurt Westergaard and Lars

The fact that both the controversial, possibly offensive cartoons, as well as the vengeance hit list, encouraging the taking of lives of individuals who have exercised their freedom of expression in media are available online, provokes a crucial question on the limits of media freedom in the information society. Does the social reluctance towards Internet filtering together with its technical deficiency mean that any actual limitation on free speech in the era of online communications is a delusion? Or is it quite to the contrary—in a global media market do we need a uniform set of rules to defend universal values, such as the sense of morality or religious beliefs? What does the once popular hashtag #JeSuisCharlie actually mean for media and freedom of expression in 2015 and beyond?[4] That there are no limits to the freedom of expression or that those are set by private individuals rather than state legislature, judges and policemen? Is it bloggers versus bombers or is there a peaceful middle ground to be found in the global search for free expression online? This chapter is a modest attempt at answering these questions.

The legal framework: Free expression and its limits

When trying to identify the freedom of expression compromise there is a lot of earlier experience to rely on. One might even go as far as to presume everything has already been said when it comes to the limits of freedom of expression, as, in addition to national laws and regulations, there are international treaties, tribunals and plentiful case law. Generations of media professionals and lawyers have researched and practised this uneasy consensus. Freedom of expression is a well-recognised and thoroughly discussed human right. It has been a founding element of the Universal Declaration of Human Rights (UDHR), referred to in its Article 19.[5] It states that the freedom of expression is a compound of three complementary rights: the right to hold opinions, the right to seek and receive information and, most importantly for the argument made here, the freedom to impart one's own ideas. While the UDHR has no formally binding value—it is not an international treaty and, subsequently, was not subject to ratification—it is perceived as an embodiment of binding international customary law in the area of human rights. Followed by a number of binding, multilateral, global treaties, it provides the basic traits of this crucial individual liberty. As such it warrants for free expression to be exercised 'through any media and regardless of frontiers'.[6]

Vilks (Dutch cartoonists), Molly Norris (American cartoonist), Stephane Charbonnier (editor of *Charlie Hebdo*), Terry Jones (a US preacher) and Salman Rushdie (the author of *The Satanic Verses*). For a detailed description and analysis of the Danish case see eg Marion G Müller and Esra Özcan, 'The Political Iconography of Muhammad Cartoons: Understanding Cultural Conflict and Political Action' (2007) 2 *PS: Political Science & Politics* 287–91.

[4] For a discussion on the #JeSuisCharlie slogan see further in this text.

[5] United Nations 1948. Universal Declaration of Human Rights (UDHR).

[6] ibid art 19.

Those general declarations from 1948, documenting the need to guarantee freedom of expression to each individual, were put into more detail in the 1966 International Covenant on Civil and Political Rights (ICCPR), ratified so far by a majority of the world's countries.[7] In its corresponding Article 19 it confirms each person's right to 'hold opinions without interference' (Paragraph 1), and to seek and receive as well as to impart information of all kinds, regardless of national borders (Paragraph 2). This right may be exercised in any form: orally, in writing or print, or through any other means of expression.[8] These stipulations are broadly considered the foundations of media law – this individual right may be exercised as a part of a collective enterprise, enabling the operation of media outlets, whether printed or audiovisual.[9] Crucial for this area of human activity are the limits of such freedom set by the ICCPR within its Article 19 Paragraph 3, ensuring that the right to free expression is not an absolute one.[10] It provides for limitations to freedom of speech for the purpose of protecting the rights and freedoms of others or public interests. The international consensus present in the ICCPR requires that any such limitation be provided by law and introduced only when it is necessary for the respect of the rights of others. Hence those safeguards have been translated into national laws on personal rights aimed at protection of privacy, individual reputation, morality or religious beliefs. They may also be introduced when necessary for reasons of national security, public order, public health or morals. Moreover, any such limitation must be proportionate, where any restriction must fit the case-specific assessment of the necessary degree of interference. This is assessed when measuring the proposed limitation against the significance of its purpose.[11]

As clearly presented above, not only is free expression fundamental to dignified human existence, it is also surrounded by limitations, which are as detailed in wording, as they are vague in application.[12] At the global level it is the UN Human Rights Council who have produced numerous documents explaining the practical meaning and application of the general limitative clause in Article 19 Paragraph. 3. One of the relatively recent attempts to do so is the 2009 Resolution 12/16 on the freedom of

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7 United Nations 1966. International Covenant on Civil and Political Rights (ICCPR).

8 ibid art 19 para 2.

9 See eg András Koltay, *Freedom of Speech: The Unreachable Mirage* (Wolters Kluwer 2013) 37–40.

10 Also according to UDHR art 29 para 2, everyone shall be subject to limitations determined by law states in the exercise of their rights and freedoms. Such limitations may be introduced only to safeguard 'due recognition and respect for the rights and freedoms of others' or in order to meet the requirements of 'morality, public order, and the general welfare in a democratic society'.

11 See eg Ron Deibert (ed), *Access Denied: The Practice and Policy of Global Internet Filtering* (MIT 2008) 81. In the ICCPR regime the proportionality principle is derived from the word 'necessary' used in art 19 para 3 discussing the limitative clause. See eg Yutaka Arai and Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002) 186.

12 This vagueness is best expressed in the title of a monograph devoted to the legal and political analysis of free speech by Koltay (n 9), especially 77–95.

opinion and speech.[13] This very brief (5 paragraphs) document is more of a declaration of the necessary applicability of all human rights obligations to both off- and online communications than a detailed guideline on how those rights ought to be exercised in the virtual environment. Despite however rich international soft law and extensive court practice the application of freedom of expression guidelines remains challenging. There are at least two key reasons for this state of affairs: 1) cultural conditioning of free expression and its meaning; 2) globalisation of mass communication and media. While the former is well known and has been much discussed, resulting in the notorious lack of any universal definitions of 'morality' or 'public order' for the sake of protecting which free expression may be curtailed; the latter—sudden dawn of instant, global communications—significantly worsened the problem posed by the former. While publications were solely in print on paper, their propagation was necessarily limited to the physical capabilities of publishers and distributors, using horse power, bicycles, steam engines, cars or planes. With the rise of digital media and its social genre freedom of expression became a highly cherished global value, exercised more eagerly than ever before. Identifying its regional, not to mention global, boundaries proved most complex, even for well-developed regional legal regimes, such as the European one, relying on its economic ties within the European Union or the social ones shared by the Council of Europe countries. While any substantial analysis of freedom of expression in Europe would reach far beyond the scope of this chapter, an exemplification of how deficient the current lawmaking mechanisms and their application are will be made. As indicated at the very beginning of the paper, this will be done with reference to the most recent and most shocking event involving media freedom and protection of individual values, such as freedom of religion—the *Charlie Hebdo* case. The chapter will look at how national laws and European case law on the limits of press freedom, artistic expression, caricature and other comic content, are to be set against the protection of religious values. This will be done to point to the urgent need for a transnational consensus on the merits and technicalities of free expression and protection of fundamental values in the information society.

Limits of free expression in Europe

The Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights, ECHR) was introduced in 1950 and has been ratified so far by 47 countries, members of the Council of Europe.[14] The right to free expression is granted in its Article 10 and accompanied by rich European Court of Human Rights' (ECtHR) jurisprudence. Serving as the blueprint for the above-

[13] United Nations 2009. Resolution adopted by the Human Rights Council, 'Freedom of Opinion and Expression' UN Doc A/HRC/RES/12/16.

[14] As of April 2015.

mentioned ICCPR, ECHR grants each individual in the jurisdiction of the state parties 'the right to freedom of expression', which includes the freedom to hold, receive and impart information and ideas 'without interference by public authority and regardless of frontiers'.[15] In its Article 10 Paragraph 2 the Convention includes particular duties and responsibilities inherent to this freedom, subjecting it to 'such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society.'[16] A crucial element of the ECtHR practice in assessing the exercise of Article 10 rights is the 'margin of appreciation' doctrine, granting individual states much liberty in interpreting ECHR freedom of expression criteria.[17] The notion was coined by the ECtHR to grant state parties the necessary freedom in adopting the text of the convention to their local, historical and cultural needs.[18] As a consequence any restriction on the freedom of expression applied by state parties, when subject to ECtHR assessment, must meet the criteria of: necessity (must be necessary in a democratic society), legality (must be in accordance with or prescribed by law) and proportionality (assessed by confrontation with a pressing social need) with those three being interpreted in the light of local culture and values. The term and the practice of the doctrine have been subject to heated debate and recently resulted in adoption of Protocol No 15 to the ECHR which will introduce to the Preamble of the Convention a direct reference to the margin of appreciation.[19] The application of the doctrine results in an apparent paradox: a court's decision in one country may be recognised as a breach of the Convention by the ECtHR while a similar decision of another national court is seen as being in accordance with it.[20] Effectively there is little uniformity in state practice on Article 10 and the interpretation of its criteria. It is safe to say that it is national laws rather than international consensus that hold a predominant value in shaping the boundaries of free expression in member states, with the ECtHR providing monitoring of state actions within its power of review. The ECtHR is particularly reluctant to assess the restrictions put onto freedom of expression for the protection of the rights of others in respect of religious beliefs and practice, leaving much room for states to guarantee the protection of local values, shared by the community they represent. Such was the case in eg

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15 ECHR, art 10 para 1.

16 ibid art 10 para 2. Those restrictions may be introduced: '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.'

17 For a detailed discussion on the issue see eg Steven Greer, *The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights* (Council of Europe Publishing 2000).

18 On the origins and the history of the term see ibid 5.

19 Protocol No 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, ETS 213, Strasbourg, 2013.

20 Such was the case in the fundamental judgment which introduced the margin of appreciation criteria to the Strasbourg court practice: *Handyside v the United Kingdom* (App no 5493/72, judgment of 7 December 1976, A 24) where the ECtHR recognized the UK's right to ban a controversial publication as harmful to minors despite it being freely available in other Convention states.

the 1994 decision in the *Otto-Preminger-Institut v Austria* judgment.[21] The ECtHR supported Austria's restriction on the propagation of a film critical of the catholic faith, recognised as blasphemous by local authorities. According to the ECtHR a court-ordered ban on the distribution of a film 'made it permanently impossible to show the film anywhere in Austria,' yet it found 'that the means employed were not disproportionate to the legitimate aim pursued and that therefore the national authorities did not exceed their margin of appreciation in this respect.' It thereby recognised the competence of the Austrian authorities to protect the Catholic majority in the country and its beliefs, as the responsibility for protecting the rights of individuals within state jurisdiction rests solely upon them. A similar assessment was made in a case against the UK, *Wingrove v The United Kingdom*[22] from 1996 where the Court acknowledged the denial of a distribution certificate for the controversial and potentially blasphemous short film *Visions of Ecstasy*. The decision was made by the UK media supervisory authority for the reasons of protecting the 'rights of others' and 'to provide protection against seriously offensive attacks on matters regarded as sacred by Christians.' In this case the Court took a clear stance on blasphemy laws, emphasising that they are not per se contrary to the Convention, yet may serve as justification for limiting an individual's freedom of expression, as in the *Wingrove* case. It observed that:

> the application of these laws has become increasingly rare and . . . several States have recently repealed them altogether… . However, the fact remains that there is as yet not sufficient common ground in the legal and social orders of the member States of the Council of Europe to conclude that a system whereby a State can impose restrictions on the propagation of material on the basis that it is blasphemous is, in itself, unnecessary in a democratic society and thus incompatible with the Convention.[23]

Blasphemy laws are therefore an interesting case of regulations restricting freedom of expression for the sake of protecting religious beliefs of others.[24] Since the leading case of *Charlie Hebdo* touches on this very scenario, a brief look at blasphemy laws and accompanying case law is presented below.

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[21] *Otto-Preminger-Institut v Austria* (App no 13470/87).

[22] *Wingrove v the United Kingdom* (App no 17419/90).

[23] In 2012 'The visions of Ecstasy' was allowed distribution in the UK, 23 years after its production (in 1989).

[24] The terminological dilemmas surrounding 'blasphemy' and other forms of religiously offensive expression (eg insults to religious beliefs or doctrines, interfering with religious worship and/or freedom of religion, sacrilege against an object of worship, inciting discrimination or religious hatred and the like) go far beyond the scope of this paper. For a detailed discussion on the definition of blasphemy and similar offences, see eg Recommendation of the CoE General Assembly no 1805, 'Blasphemy, Religious Insults and Hate Speech Against Persons on Grounds of Their Religion' 2007, Doc 11296 <http://assembly.coe.int/ASP/Doc/XrefATDetails_E.asp?FileID=17569>; as well as European Commission for Democracy Through Law, 'Report on the Relationship Between Freedom of Expression and Freedom of Religion: The Issue of Regulation and Prosecution of Blasphemy, Religious Insult, and Incitement to Hatred' Study no 406/2006, CDL-AD(2008)026, Council of Europe 23/10/2008, <http://www.venice.coe.int/webforms/documents/?pdf=CDL-STD%282010%29047-e>.

Blasphemy laws in France

Seemingly the *Charlie Hebdo* case is a blasphemy related one. The attackers undoubtedly identified the Mohammad caricatures published by the periodical on various occasions as the reason for the attack. They claimed that it was the strong conviction of the Muslim community they represented that the way in which the cartoonists depicted the prophet and the fact that they ridiculed him, the religion and its leaders was blasphemous and needed to be punished by death. They decided the punishment needed to be executed without a court order. They were clearly not satisfied with the legal protection France offers to the freedom of conscience, even though France holds a strong stance on non-discrimination, also one based on religious or philosophical views and freedom of speech. The uneasy balance between those two values has often conflicted the French community yet so far the decisions of courts weighing the views of the conflicting sides have been the final line for any dispute settlement.[25]

While there is no nation-wide regulation on blasphemy as such,[26] or a direct reference to hate speech and discrimination in the French constitution, France offers both civil and criminal protection to religious views though a series of legal acts. The criminal law regulation on defamation and insult bans any non-public defaming or insulting of a person or a group because of their belonging to a particular religion.[27] The same regulation disallows any non-public *'incitement to discrimination or to hatred or violence'* against an individual or a group because of their adherence to a particular religion.[28]

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[25] The most media-acclaimed cases include the 1989 decision on Salman Rushdie's *Satanic verses* to be freely available in France, the 2002 acquittal of Michel Houellebecq for having called Islam 'the stupidest religion' in a press interview, the 2005 acquittal of *Libération* for the allegedly insulting depiction of Christ wearing a condom; the 2007 sentencing of the French comedian Dieudonné for calling Jews 'a sect' and 'a fraud' and the 2008 fifth consecutive conviction of the famous actress, Brigitte Bardot, for offensive reference to Muslims in France. For details on the cases see Esther Janssen, 'Limits to expression on religion in France' (2009) 1(5) *Agama & Religiusitas di Eropa Journal of European Studies* 22–45; Houellebecq acquitted of insulting Islam, *The Guardian*, 22 October 2002 <http://www.theguardian.com/books/2002/oct/22/islam.religion>.

[26] Only in the region of Alsace-Moselle the offence of public blasphemy against God (but not a Prophet) remains punishable under arts 166 and 167 of the local Penal Code, a regulation inherited from the original German Criminal Code of 1871. It was acknowledged in local laws from the early twentieth century (La loi du 17 Octobre 1919 and le Décret du 25 Novembre 1919) yet no convictions of the crime have been made. As such it ought to be considered an outdated and lapsed statute, no longer enforceable due to a long lasting practice of non-enforcement (desuetude). See Venice Commission, Annex II, CDL(2008)090add2, 37–38; Janssen (n 25) 31.

[27] See art R. 624-3 of the French Penal Code on defamation, and its art R. 624-4 on insult; Code pénal, Version consolidée au 28 mars 2015: 'La diffamation non publique commise envers une personne ou un groupe de personnes à raison de leur origine ou de leur appartenance ou de leur non-appartenance, vraie ou supposée, à une ethnie, une nation, une race ou une religion déterminée est punie de l'amende prévue pour les contraventions de la 4e classe. Est punie de la même peine la diffamation non publique commise envers une personne ou un groupe de personnes à raison de leur sexe, de leur orientation sexuelle ou de leur handicap.'

[28] Article R. 625-7 of the French Penal Code.

Criminal responsibility for hate speech is also prescribed in the very act regulating free speech and media, Law on the Freedom of the Press of 29 July 1881.[29] While it provides for the freedom of press, within its Article 24, the limits of such freedom are clearly set. As per its provisions it is prohibited to publicly incite anyone to discriminate against, hate or harm another person because of their religious beliefs under the penalty of a year's imprisonment and/or a fine of up to 45,000 euros and possibly also a suspension of civil rights. Echoing the Penal Code regulation the press law act also provides for a prohibition of defaming and insulting, in this case when done publicly.[30] Any public defamation of an individual or a group based on their religious beliefs is punishable with up to a year's deprivation of liberty or/and a fine of up to 45,000 euros. Any insult of the same character may result in a six months' prison sentence and/or up to 22,500 euros fine. The law also allows public prosecutors to act upon an infringement when no individual complaint is filed, acting in the name of protecting public order. As well as criminal proceedings, a civil claim may be filed by an individual who feels his or her freedom of conscience has been violated by a particular activity or transmission. Also non-governmental organisations may file complaints and seek damages for those misdemeanors.

The *Charlie Hebdo* attackers were clearly dissatisfied with those legal guarantees, assuming that a court proceeding would not halt the publications they felt were infringing upon their liberties. They might have been right in that last assertion, as *Charlie Hebdo* editors served as defendants in Paris courts on a number of occasions with their Mohammad cartoons recognised as falling within the limits of allowed freedom of comic expression, not as an incitement to hate or discrimination.[31] The attackers' opinion of the alleged blasphemous or, to be more precise, discriminatory character of the *Charlie Hebdo* cartoons was not shared by French courts. Just to mention the 2006 special issue where the satirical magazine reprinted some of the controversial Danish *Jyllands-Posten* cartoons adding a few of their own with the same theme. The plaintiffs, The Paris Grand Mosque and the Union of French Islamic Organizations (UOIF), claimed the cartoons insulted all Muslims because of their faith, depicting them all as terrorists.[32] The editors of the comic periodical responded with a claim that the targets of the cartoon were only violent actions of Muslims, Muslim fundamentalists and terrorists, not the faith or the community. The focus of the suit were three cartoons, with two of them clearly targeting terrorist acts and a third one

[29] Loi du 29 juillet 1881 sur la liberté de la presse, Version consolidée au 5 avril 2015.

[30] Articles 32 and 33 of the French press law act.

[31] See Louis-Léon Christians, 'France, 2011 Expert Workshop on the Prohibition of Incitement to National, Racial or Religious Hatred' Annex, European Legislations, 4–5 <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Vienna/Annexes/France.pdf>.

[32] Gregory Viscusi, 'French Magazine is Cleared Over Muhammad Cartoons' (Update2), Bloomberg, 22 March 2007 <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a2D6ohiV5mbA&refer=europe>.

depicting the Prophet Mohammed wearing a turban in the shape of a bomb.[33] The court of first instance found that the first two cartoons were not infringing upon the rights of all Muslims as they were clearly not targeted at them, only at those committing acts of terrorism. The last one was referring to the Muslim faith, however the court found it fell within the limits of free speech, as having appeared in the Danish periodical it incited public debate that any media outlet, including *Charlie Hebdo*, is a part of. Reprinting the controversial image served therefore the good of the public debate.[34] This view was shared by the appellate court, who set *Charlie Hebdo* free from any criminal responsibility.

While assessing the limits of free speech has always been difficult for communities in general and for courts in particular, it is undisputed that a society needs to rely on its judicial system in order to remain peaceful. This view was shared directly after the 2007 *Charlie Hebdo* ruling by its claimant, the president of the UOIF who stated that 'As a citizen, I respect the decision, but as a citizen the law also gives me the right to appeal'.[35] It seems therefore that the Mohammad cartoons published by *Charlie Hebdo* remain within the limits of free speech set by the French community within national laws and executed by the national judicial system. The problem lies in them being contrary to the teachings of Islam, whose multiple followers live also in France.

Free speech, blasphemy, and Islam

While the *Quran* itself expresses a clear contempt of any offensive utterance against God, the Prophet or any secret writing, it remains silent as to the punishment for such breaches.[36] Yet according to the Sharia, with its teachings derived from the reports of the life of the Prophet (the hadiths), those who deprive of life ones abusing or insulting him will be free from punishment.[37] It is also worth noting that Islam is an aniconic religion, where, unlike in the Catholic faith for example, no depictions of the holy figures are allowed.[38] In various Islamic countries the very creation or propagation of depictions of Mohammad have therefore been found blasphemous. At the same time it must be noted that roughly 40 years after the UDHR Islamic states have explicitly followed up on their human rights obligations. The Cairo Declaration on Human Rights in Islam (CDHRI) adopted by the members of the Organization of the Islamic Conference in 1990 recognises human rights yet with full reference to the laws of

33 ibid.
34 ibid.
35 ibid. The appellate court upheld the decision of the court of first instance.
36 Lutz Wiederhold, 'Blasphemy against the Prophet Muhammad and his companions (*sabb al-rasul, sabb al-sahabah*): The introduction of the topic into shafi'i legal literature and its relevance for legal practice under Mamluk rule' (1997) 42(1) *Journal of Semitic Studies* 39–70.
37 ibid.
38 ibid.

Islamic sharia as their source.[39] Even though some Muslim countries have been involved in the drafting of the 1948 UDHR, there has been criticism about it not reflecting the cultural and religious principles of the Islamic faith. In its majority the CDHRI reflects the ideals behind the UDHR, yet adds a religious background to the wording and contents of the right they generate. And so Article 22 of the CDHRI states that 'everyone shall have the right to express his opinion freely' yet in that same line adds that this right may only be exercised 'in such manner as would not be contrary to the principles of the Shari'ah.'[40] It also holds a modest hate speech clause disallowing 'to excite nationalistic or doctrinal hatred or to do anything that may be an incitement to any form or [sic!] racial discrimination'.[41] It ought to be noted however that while Article 1 holds a direct reference to all men being equal 'without any discrimination on the basis of . . . belief . . . religion . . . or other considerations' there is no direct reference to religion or belief in Article 22.

While the CDHRI grants everyone the freedom to disseminate information as a 'vital necessity to society' it clearly states that the information 'may not be exploited or misused in such a way as may violate sanctities and the dignity of Prophets, undermine moral and ethical Values or disintegrate, corrupt or harm society or weaken its faith.'[42] Moreover, the freedom of expression is clearly limited only to content that is 'right' giving individuals the right to 'propagate what is good, and warn against what is wrong and evil according to the norms of Islamic Shari'ah.'[43] This guarantee strongly differs from those enshrined in the UDHR or the ECHR, where protection is granted to all information, regardless of its 'good' or 'evil' character. As per the ECtHR jurisprudence, particular protection is granted to content that is deemed controversial or critical, as it serves the public debate and democratic values in a society.[44]

It ought to be noted that the CDHRI has been subject to strong criticism from Western jurists, non-governmental organisations and government representatives alike.[45] The criticism is focused on two key points: one being that the Declaration in

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[39] Cairo Declaration on Human Rights in Islam, 5 August 1990, UN Doc A/CONF 157/PC/62/Add 18 (1993).

[40] CDHRI, art 22(a).

[41] CDHRI, art 22(d).

[42] CDHRI, art 22(c).

[43] CDHRI, art 22(a)1.

[44] In the 1976 *Handyside v UK* (n 20) judgment mentioned above the ECtHR emphasised that it is in particular controversial opinions that need to be granted special protection: 'Freedom of expression . . . is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".' [49].

[45] For the key point of such criticism see eg Marie-Luisa Frick and Andreas T Mueller (eds), *Islam and International Law: Engaging Self-Centrism from a Plurality of Perspectives* (Martinus Nijhoff 2013) 210, who note that human rights may not be dependent on a particular religion; or Eva Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff 2001) 259, who provides detailed references to the papers critical of the CDHRI.

itself is discriminatory (eg to women, granting them only selected rights; and to atheists, as the Declaration does not recognise the right to change one's religion) and another that the document was implemented by states with a poor record of human rights protection solely to 'disarm international criticism of their domestic human rights record'.[46] On the same note it ought to be observed that the Declaration may be considered a statement on the shape of human rights within a particular culture and as such ought to be taken into serious consideration when seeking a universal compromise on their catalogue in the twenty-first century.

#JeSuisCharlie or #JeNeSuisPasCharlie?

The 2006 *Charlie Hebdo* issue and the ensuing lawsuit discussed above heated the public debate in France on the limit of free speech in the context of inciting religious hate. While the residing President Jacques Chirac labelled the issue as an 'overt provocation' aimed at inciting emotions, his successor to the President's office, at the time of the publication France's interior Minister, Nicolas Sarkozy, went as far as to send a letter to the court in support of the periodical, claiming that freedom of speech was the highest value to be protected. François Bayrou and the present President François Hollande also took the side of the periodical. The latter statements by top French politicians were recognised by the French Council of the Muslim Faith (CFCM) as manifestations of religious prejudice.[47]

After the 2015 attacks not only French politicians were uniform in their support of the victims of the terrorist attack and the Twitter slogan #JeSuisCharlie, quickly spread across the Internet to become the synonym of support for media freedom. It was the theme of marches in the streets of many cities in Europe and beyond, with the most significant one, by famous politicians and world leaders marching for free media everywhere, in the streets of Paris under high police surveillance a few days after the attack.[48]

Among those opposing the solidarity marches and the sudden spree of solidarity with the cartoonists were not only the attack survivors, sickened by the sudden support and incommensurate interest,[49] but, above all, Muslims all over the world. The latter

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[46] Eva Brems 'Islamic Declarations of Human Rights' in Brems (n 45) 241–84.

[47] 'Caricatures: Le soutien de Sarkozy à Charlie Hebdo fâche le CFCM' TF1 News, 15 December 2011 <http://lci.tf1.fr/france/societe/2007-02/soutien-sarkozy-charlie-hebdo-fache-cfcm-4889140.html>.

[48] Just a few days after the attacks, on 11 January 2015 more than a million people, including 44 top politicians, marched across the streets of Paris and roughly 3.7 million marched on the streets of other cities to express their solidarity with the victims and support for free media. See eg 'Marche républicaine à Paris : une ampleur «sans précédent», Libération, 11 January 2015 <http://www.liberation.fr/societe/2015/01/11/en-direct-la-place-de-la-republique-noire-de-monde_1178277>.

[49] See eg Willem, 'Nous vomissons sur ceux qui, subitement, disent être nos amis' *Le Point*, 10 January 2015 <http://www.lepoint.fr/societe/willem-vomit-sur-ceux-qui-subitement-disent-etre-nos-amis-10-01-2015-1895408_23.php>.

protested against the post-attack issue of *Charlie Hebdo*, which, again, used a depiction of Mohammed for its cover.[50] The so-far local, French provocateur and its actions suddenly became an international yardstick for measuring the support for freedom of expression and/or religion in different communities. These varied opinions on the editorial policy of the French cartoonists are best demonstrated by the fact that in 2015 the periodical was awarded two British prizes, both coming from NGOs: the international 'Islamophobe of the Year' award from the Islamic Human Rights Commission[51] as well as Secularist of the Year award from the National Secular Society 'for their courageous response to the terror attack'.[52]

Reflecting the *Charlie Hebdo*'s supporters' actions, its opponents coined a mirroring #JeNeSuisPasCharlie slogan, representing those who felt that the periodical had gone too far in exercising their free speech, if not for purely legal, then for ethical reasons, inciting religious reluctance and promoting harmful cultural stereotypes.[53] While the numbers for each of those contradictory positions are impossible to estimate, the arguments of both sides need to be noted. The global information society was divided as to what kind of satire is allowed in the globalised, multicultural community that they have formed.

Seeking the Holy Grail for free expression: The Internet challenge of global communications

While the question of the universal standard of free expression remains open, a practical solution to the problem is urgently needed. Were *Charlie Hebdo* available only locally and in print, arguably it would not have caused as much controversy as it did at a time of universal, instantaneous communications with its issue available online throughout the world. May the fact of publishing the abovementioned Al Qaeda 'Wanted: Dead Or Alive for Crimes Against Islam' list online serve as proof of the ideological debate on the limits of permissible satire having reached a new, international level. Freedom of

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[50] See eg Emma Graham-Harrison, 'Niger Rioters Torch Churches and Attack French Firms in *Charlie Hebdo* Protest' *The Guardian*, 17 January 2015 <http://www.theguardian.com/world/2015/jan/17/niger-protesters-burn-churches-charlie-hebdo-protest>; '"Love to Prophet Mohammed": Crowds Protest *Charlie Hebdo* Cartoons in Chechnya' *Russia Today*, 19 January 2015 <http://rt.com/news/224051-russia-chechen-rally-1mln/>; '"Death to blasphemers": Muslims Protest New *Charlie Hebdo* Cartoons Across the Globe' *Russia Today*, 16 January 2015 <http://rt.com/news/223255-muslims-protest-charlie-hebdo/>.

[51] Victoria Richards, '*Charlie Hebdo*: Murdered Staff Given "Islamophobe of the Year" Award' *The Independent*, 11 March 2015 <http://www.independent.co.uk/news/world/europe/charlie-hebdo-murdered-staff-given-islamophobe-of-the-year-award-10100317.html>.

[52] National Secular Society, '*Charlie Hebdo* Staff Awarded Secularist of the Year Prize for Their Response to Paris Attacks' *www.secularism.org.uk*, 28 March 2015 <http://www.secularism.org.uk/news/2015/03/charlie-hebdo-staff-awarded-secularist-of-the-year-prize-for-their-response-to-paris-attacks>.

[53] See eg Julian Vigo, '#JeNeSuisPasCharlie: Why I Can't Support the Original Hashtag' *The Huffington Post*, 15 March 2015 <http://www.huffingtonpost.ca/julian-vigo/jesuischarlie-racism_b_6435038.html>.

expression is no longer an issue that multicultural communities get to deal with in isolation, the discussion on universal values and the appropriate way to ensure their effective protection has gone beyond national parliaments and local media. That is not to question the legitimacy of local authorities to regulate the limits of individual freedoms within their jurisdiction, but rather to emphasise the practical limits of their competence. In order to protect persons within their power from content deemed harmful by local customs and laws, forever more governments reach out to modern technical tools and introduce 'Internet filtering'—technical measures aimed at limiting or, optimally, disabling access to certain content from within state territory. Consequently, content deemed harmful within Islamic states will be blocked by state authorities in order to protect Muslims within their jurisdiction from being offended. This practice, shunned by civil society organisations and, at the same time, forever more popular among states' executives in democratic and non-democratic regimes alike, needs to be assessed from a legal point of view, with emphasis on the human rights limitations foreseen to the right to free expression.

Internet filtering—pros and cons

Despite the troubles with identifying the middle ground in freedom of expression acceptable to all, there is little doubt that Internet filtering resulting in blocking access to all online content is a clear violation of the right to free expression, or, more precisely, its complementary right to access information. Such a broad infraction of the right to free expression may hardly be justified even if exercised with a legitimate justification and based on an act of law applicable in a particular case, as it cannot be considered proportionate to whatever significant aim the local government might consider protection-worthy.[54] Even at a time of 'war or other public emergency threatening the life of the nation' an absolute ban on free speech is not allowed, as per the ECHR, as even then freedom of speech must be granted to aliens in all respects while performing their political activities.[55]

The same may not be said for less extensive filtering practices, as the right to free expression is not an absolute one. Be it the UDHR in Article 29 Paragraph 2 or the ICCPR in Article 19 Paragraph 3, they both foresee limitations of this freedom. Introducing those may only be done on case-specific basis and solely for the reasons

[54] So far Egypt was the only country to enforce a complete Internet blackout in 2011 when the country was troubled by internal turmoil. See eg Catharine Smith, 'Graph Visualizes Egypt's Internet Blackout' *The Huffington Post*, 28 January 2011 <http://www.huffingtonpost.com/2011/01/28/this-is-what-egypts-cutoff-from-the-net-looks-like_n_815335.html>. For a detailed legal analysis of the Egypt case see Joanna Kulesza, 'Social Media Censorship vs State Responsibility for Human Rights Violations' in Bogdan Pătruț and Monica Pătruț (eds), *Social Media in Politics: Case Studies on the Political Power of Social Media* (Springer 2014) 259–80.

[55] See ECHR, arts 15–16.

named above while based on a particular act of law applicable to given circumstances, as discussed in detail at the beginning of this chapter. The very circumstances of enforcing restrictions for free speech online have been the subject of a detailed analysis provided by UN Special Rapporteur Mr Frank William La Rue on the promotion and protection of the right to freedom of opinion and expression. Among his valuable and numerous reports, one most relevant to the focus of this chapter is the 2011 report on the 'Promotion and protection of the right to freedom of opinion and expression' where the Special Rapporteur puts particular focus on online communications as the substance of freedom of expression in the contemporary global society.[56] While La Rue emphasises that the basic value of all online communications is their freedom, he provides detailed guidelines on when such freedom may be limited. Next to the general reference to the limitative clause present in the ICCPR and other regional human rights treaties, he goes further to identify four categories of speech that ought to be declined protection.[57] These include: 1) child pornography; 2) direct and public incitement to commit genocide; 3) advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence and 4) incitement to terrorism.[58] With that he makes it clear that not all online expression is protection-worthy. He identifies three categories of content, two of which may be deemed deprived of legal protection:

a) expression that constitutes an offence under international law and can be prosecuted criminally;
b) expression that is not criminally punishable but may justify a restriction and a civil suit, and
c) expression that does not give rise to criminal or civil sanctions, but still raises concerns in terms of tolerance, civility and respect for others.[59]

As he rightfully observes, each of those categories deserves a different response from authorities and poses different legal challenges.[60] For the two first categories states may impose legal and technical restrictions, yet those must also meet the general minimal human rights standards, that is the 'three-part test of prescription by: unambiguous law; pursuance of a legitimate purpose; and respect for the principles of necessity and proportionality.'[61] La Rue recognizes blocking as the most common method of disabling access to content deemed illegal. He emphasises that the decisions as to what particular content needs to be blocked and on its justification as well as the necessity to disable access thereto must be taken 'by a competent judicial authority or a body which is independent of any political, commercial, or other unwarranted influences' to make sure

56 UN Doc A/66/290.
57 ibid 6–7.
58 ibid 8–13.
59 ibid 7.
60 ibid.
61 ibid 13.

that blocking will not serve the actual purpose of censorship.[62] This observation is of particular significance as it refers to the growing role of commercial stakeholders in the process of enabling content, making them the actual decision makers as to what content is enabled within a state jurisdiction (a unique Cerberus model). Such decisions are often made without consulting state organs, be they legislative or judiciary, but solely based on company policies.[63] Echoing the recommendations of the UN Human Rights Committee, La Rue refers to the bottom line for any restriction on free speech as enshrined in Article 19 paragraph 3 ICCPR. As such any restriction reflecting the contemporary human rights standards needs to be content-specific, yet the decision to block certain content may not rely only on the fact that it is 'critical of the government or the political social system espoused by the government'.[64] Moreover, any content that does not fall within the first two categories named by the Special Rapporteur should not be subject to any restriction, as that might hold an inherent chilling effect.[65] With that in mind La Rue indirectly addresses individuals publishing controversial yet not illegal content online, emphasising that care should be taken to create focus on issues significant to the international and intercultural dialogue rather than inciting conflicts based on intolerance. The latter, while not always punishable by criminal law or resulting in civil liability, should be subject to prevention and education of all Internet users, as well as promoting 'a culture of peace'.[66] This reference may be interpreted as an implication of the growing role of extra-legal and ethical tools in solving conflicts of values in the online environment.[67] La Rue explicitly identifies the promotion of free speech, including empowering minorities and indigenous people as the solution to the censoring policies. As he argues: 'More speech can be the best strategy to reach out to individuals, changing what they think and not merely what they do.'[68]

La Rue goes on to identify categories of content that under no circumstances should be subject to blocking. Among information that should be given particular protection from censorship is any discussion over national policies or those related to local politics, including reports on governmental actions and, in particular, local corruption. Also human rights reports, peaceful demonstrations or other political initiatives, as well as election reports should be given particular care when it comes to potential restrictions.

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62 ibid.

63 As in the much debated 2010 case of 'The Innocence of Muslims' video published on YouTube by a US resident, which resulted in the entire website being blocked in Pakistan and much political debate at the highest level over the possibility to have the video removed from its original hosting service. For a detailed account of the case see eg Sean A Pager and Adam Candeub, *Transnational Culture in the Internet Age* (Edward Elgar 2012) 83.

64 UN Doc A/66/290, 13.

65 ibid 14.

66 ibid.

67 For a thorough discussion on the significance of ethical standards for effective online governance see Joanna Kulesza and Roy Balleste, 'Signs and Portents in Cyberspace: The Rise of Jus Internet as a New Order in International Law' (2013) 23 *Fordham Intellectual Property, Media & Entertainment Law Journal* 1311–54.

68 UN Doc A/66/290, 14.

Reflecting the long standing standard on special protection given to controversial speech, La Rue mentions also any 'expression of opinion and dissent, religion or belief', with emphasis on minority views as those requiring meticulous care when any restriction is to be enacted. La Rue is implicitly reflecting the Human Rights Committee's views on the need to ensure protection from unjustified restrictions on any advocating for democracy and human rights. Moreover no form of physical oppression may be justified as a result of someone exercising their freedom of expression.[69] He concludes by emphasising the positive duty of states *vis-à-vis* their human rights obligations, consisting of taking active measures aimed at securing the exercise of free expression by individuals within their jurisdictions.[70] With this positive duty in mind, the multistakeholder model of Internet governance holds much significance. Given the decentralised network that the Internet is, the duty of states to protect individuals within state jurisdiction can no longer be exercised by state authorities alone. Any effective human rights protection online, or any effective denial of access to criminal content for that matter, can only be effective when the national enforcement authorities are supported by companies offering online services within their jurisdiction. With the globalised character of online services in mind, this requires above all the compliance of transnational corporations, with their seat often outside state territory. For this collaboration to protect free expression effectively, as well as the rights of others, a new model of cooperation is needed. Below is a brief attempt at identifying such a model.

In conclusion—towards cooperative sovereignty

The multistakeholder nature of the Internet has strongly challenged the well-established, yet always controversial notion of national sovereignty. The notion of a country's independence has long been heralded as the legitimisation of dissenting from international practice, either by using the persistent objector concept against developing customary law or deciding against the adoption of a multilateral treaty. While most human rights norms are recognised as *ius cogens* principles and require states' execution despite their reluctance towards a particular contract or lack of individual consent, freedom of expression, with its inherently vague characteristics is impossible to enforce against states unwilling to fully recognise it in the form recommended by the UN Human Rights Council or its Special Rapporteurs. Yet, as already stated above, in the multistakeholder environment that is the Internet, states are no longer the only ones who can effectively enforce legal obligations. Because of this, some writers offer the notion of cooperative sovereignty[71] as a worthy substitute for the current matrix of

[69] ibid.

[70] ibid 15.

[71] See eg Rolf H Weber, 'New Sovereignty Concepts in the Age of Internet' (2010) 14(8) *Journal of Internet Law* 19, Franz X Perrez, *Cooperative Sovereignty* (Kluwer Law International 2000) 264 ff proposing the general duty to cooperate as a principle of international law.

rights and obligations of various actors. The concept is derived from treaty-based shared sovereignty specific to i.e. the European Union. It was designed as an alternative to the fundamental Westphalian order, still present in current global politics.[72] Shared sovereignty seems to appropriately reflect the multistakeholderism model in Internet governance,[73] which results in Internet governance being executed jointly, although 'in their respective roles' by three stakeholder groups, and any effective consensus requires their cooperation.[74] Along with states, these are business and civil society, including NGOs, academia and individuals. Effectively, decisions on the accessibility of online content, as on any other issue of Internet governance, ought to be made by consensus of representatives of the three stakeholder groups.

While no formal forum for such broad consensus seeking exists, the transboundary character of cyberspace, creating a direct threat to national rule of law and legal security of state nationals, calls for the reconsideration of the notion of sovereignty. The notion of cooperative sovereignty is rooted in a presumption that it is possible to identify shared values undermining different interpretations of sovereignty, which will then allow for the identification of universally accepted, fundamental values. Cooperative sovereignty could then stimulate any further discussion of the possible compromise on sharing state powers.[75] Such a compromise would need to envisage the sovereignty based state prerogatives with obligations laid upon states according to international law, in particular human rights law. Weber suggests, that states share a joint, international obligation to create and implement policies focused on human rights protection.[76] Perez identifies cooperative sovereignty with the international obligation to cooperate as one of the principles of international law.[77] It is in that context that the need to identify and implement a universal standard for protecting free speech online should be understood. Achieving such a compromise seems possible in the light not only of the rapid development of human rights law in the last 60 years, but particularly the recent UN Human Rights Council's First Resolution on Internet Free Speech—a soft law document, symptomatic of the increasing interest of the UN in international Internet law issues.[78] The renegotiation of the stringent yet outdated concept of state sovereignty together with promoting 'a culture of peace' through education for all Internet users that La Rue calls for seem a step in the direction of finding consensus on the limits of free expression online.

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[72] See Stephen D Krasner, 'The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law' (2004) 25(4) *Michigan Journal of International Law* 1092 ff.

[73] Weber (n 71) 14.

[74] United Nations. Report of the Working Group on Internet Governance. 2005. <www.wgig.org/docs/WGIGREPORT.pdf>, 4.

[75] Weber (n 71) 14.

[76] ibid 16.

[77] Perrez (n 71) 264 ff.

[78] Human Rights Council, 'The Promotion, Protection, and Enjoyment of Human Rights on the Internet' [2012] UN Doc A/HRC/20/L.13.

Jeroen Temperman

Media and incitement: Context-based assessments by the European Court of Human Rights

Introduction

The mass media are allocated an ambivalent position in the jurisprudence of the European Court of Human Rights, one that is reminiscent of the position of politicians: a delicate balance has been found between the importance attached to their role within a democracy and the fact that their messages may be highly influential, not only in relation to the promotion of 'good' causes, but potentially also in relation to fostering 'adverse' outcomes—adverse, that is, from the perspective of human rights promotion.[1]

It is well-established jurisprudence that the written press and other media have a vital role in any democratic society in their capacity of 'public watchdog'.[2] Accordingly, the Court will typically be extra vigilant when it comes to restrictions in this area, leaving a narrower margin of appreciation to State parties to the European Convention on Human Rights.

At the same time the Court has observed that the media, too, should avoid inciting violence or discrimination. The European Convention on Human Rights, unlike the United Nations Covenant on Civil and Political Rights,[3] does not contain an express incitement prohibition. Any extreme speech restriction, also and especially when imposed *vis-à-vis* the media, must be firmly based on the existing grounds for limitation recognised by Article 10 of the European Convention.[4] This freedom of expression

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[1] See also Jacob Rowbottom, 'Extreme Speech and the Democratic Functions of the Mass Media' in Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (OUP 2011) 608–30, particularly 610–13. The present chapter draws on a comprehensive analysis of context-based assessments in the case-law of the European Court of Human Rights in Jeroen Temperman, *Religious Hatred and International Law* (Cambridge University Press, 2016), particularly in chapters 10 and 11.

[2] For example, *The Sunday Times v the United Kingdom (No 2)* (App no 13166/87, plenary court judgment of 26 November 1991) [50]; *Observer and Guardian v the United Kingdom* (App no 13585/88, Grand Chamber judgment of 26 November 1991) [59]; *Pedersen and Baadsgaard v Denmark* (App no 49017/99, Grand Chamber judgment of 17 December 2004) [71]; and more recently in eg *Von Hannover v Germany (No 2)* (App nos 40660/08 and 60641/08, Grand Chamber judgment of 7 February 2012) [102].

[3] See ICCPR, Article 20(2). See also the International Convention on the Elimination of All Forms of Racial Discrimination, Article 4.

[4] This is not to suggest that Article 20(2) ICCPR-based restrictions ought not to be legitimised on the basis of Article 19's system of justifiable restrictions, for they most definitely must be. See Human Rights Committee, 'General Comment No 34. Article 19: Freedoms of Opinion and Expression' (CCPR/C/GC/34, adopted at its 102nd session, Geneva, 11–29 July 2011), para 50: 'a limitation that is justified on the basis of article 20 must also comply with Article 19, paragraph 3.'

clause recognises as a pertinent limitation ground 'the protection of the reputation or rights of others', amongst other grounds.

The objective of this chapter is to shine a light on which factors are—or ought to be—taken into account by the European Court of Human Rights when addressing the question whether or not the media have overstepped the mark, ie abused free speech with a view towards inciting violence or discrimination.

Balancing content and context

While journalists have a licence to exaggerate or even provoke,[5] they should avoid becoming a 'vehicle for the dissemination of hate speech and the promotion of violence'.[6] Thus in *Sürek v Turkey (No 1)* the fact that the applicant in his capacity of owner of a weekly review could be said to be a member of the written press or the media did not exonerate him. To the contrary, 'as such [he] had the power to shape the editorial direction of the review', which made him partly responsible for the dissemination of the extreme views at stake, which consisted of inciteful readers' letters published by the review.[7] Indeed, his negligence had provided an 'outlet for stirring up violence and hatred'.[8] The Court further contended that media professionals face greater responsibilities in 'situations of conflict and tension', in this particular case being a reference to Kurdish separatism.[9]

The 'setting' chosen for the dissemination of extreme views, may, however, indicate that the reporter of the item at stake is not to be associated with the extremist views expressed in the news item. Thus, in *Jersild v Denmark* it mattered a great deal that the journalist in question had not himself made racist remarks, though his TV programme on racist youths had formed a platform for their dissemination (which under Danish law was at the material time sufficient to prosecute him). While a number of dissenting judges doubted the good faith of the makers of a TV programme on racist youths, the majority felt that Jersild had sufficiently clearly introduced his TV item, announcing that a discussion about extremist persons and extremist views would ensue, which

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[5] Rowbottom (n 1) 611. See eg *Prager and Oberschlick v Austria* (App no 15974/90, 26 April 1995) [38].

[6] Rowbottom (n 1) 611. See eg *Erdoğdu and İnce v Turkey* (App nos 25067/94 and 25068/94, Grand Chamber judgment of 8 July 1999) [54]; *Erdoğdu v Turkey* (App no 25723/94, 15 June 2000) [62]; *Sürek v Turkey (No 4)* (App no 24762/94, Grand Chamber judgment of 8 July 1999) [60]; *Sürek and Özdemir v Turkey* (App nos 23927/94 and 24277/94, Grand Chamber judgment of 8 July 1999) [63]; and Şener *v Turkey* (App no 26680/95, 18 July 2000) [41]. Note that in all these cases the Court ultimately held that journalistic freedoms were not abused, thus pronouncing freedom of expression violations.

[7] *Sürek v Turkey (No 1)* (App no 26682/95, Grand Chamber judgment of 8 July 1999) [63]. Note that this was a split (11 – 6) decision. See also Anne Weber, *Manual on Hate Speech* (Council of Europe Publishing 2009), 38.

[8] *Sürek v Turkey (No 1)* (n 7) [63].

[9] ibid.

distanced the programme maker from the programme's content.[10] Moreover, the broadcast was part of 'a serious Danish news programme and was intended for a well-informed audience'.[11] In sum, while both Sürek and Jersild, in their respective cases, were not individually responsible for the extremist views expressed, in the latter case it was the TV programme's setting that took the edge off the risks emanating from the inciteful statements made.

Although this was not made explicit, one could also distil from these cases a sense that Jersild lacked *mens rea* to incite discrimination, while the same could not be said about Sürek, who in no way whatsoever had sought to balance the separatist and violent views published in his magazine through counter-speech.

Nevertheless, one may wonder whether this distinction in itself is sufficient to hold that Jersild's TV programme amounted to protected speech, and that Sürek's magazine amounted to punishable incitement. Arguably, there are—in addition to 'setting' and 'intent'—a host of additional context factors that ought to be taken into account when judging this type of incitement case. Notably, there are such variables as the person of the speaker (his role and potential influence), the 'extent' of the speech, the extreme speech's public, and the vulnerability of the person or group of persons verbally attacked.[12]

There are hints of such a profound context-based assessment in the jurisprudence of the Strasbourg Court, albeit never as holistically as stipulated by the *Rabat Plan of Action*, which combines a handful of context factors which, in turn, influence how likely it truly is that harm will emanate from an inciteful speech act.

In *Klein v Slovakia* the Strasbourg Court touched upon the *extent* of the speech by placing much emphasis on a point made by the applicant that the Slovakian Government ought not to exaggerate the potential impact of the impugned defamatory statements about a Catholic Church leader given the medium in which the statements were published as well as given the readership concerned. Specifically, the European Court of Human Rights underscored the fact that Klein's article 'was published in a weekly journal aimed at intellectually-oriented readers', which was 'in line with the applicant's explanation that he had meant the article to be a literary joke' and that the relevant 'journal was then published with a circulation of approximately 8,000 copies.'[13] All in

[10] *Jersild v Denmark* (App no 15890/89, judgment 23 September 1994) [33].

[11] ibid [34].

[12] Compare '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), para 22. For an analysis of context considerations in the workings of UN bodies, see 'Prohibitions of Incitement under International Law: The Case of Religion', in Andras Koltay (ed), *Media Freedom and Regulation in the New Media World* (Wolters Kluwer, 2014), 459–469.

[13] *Klein v Slovakia* (App no 72208/01, 31 October 2006) [48] (underscoring the applicant's arguments made in [42]).

all Klein's attack on the Catholic Church leadership could not be interpreted as a punishable attack on Catholic believers.[14]

The *person* of the hate speaker was crucial in, for instance, *Seurot v France*. The Strasbourg Court underscored that the person penalised, a school teacher, held a position of authority *vis-à-vis* impressionable youths.[15] In the light of that it was all the more likely that his racist and hateful statements about North Africans, published in a bulletin meant for pupils and their parents, brought about harm. Having made this point *in abstracto*, the Court refrained from a more concrete risk assessment.

In *Nur Radyo Ve Televizyon Yayinciligi AS v Turkey* the Strasbourg Court concluded that deplorable though the impugned speech act may have been, it was 'unlikely' that it would have successfully incited religious discrimination or violence.[16] The case revolves indirectly around the remarks made by a leader of the Mihr religious community in Turkey who had claimed that an earthquake killing thousands of persons in Izmit was 'a warning from Allah' against the 'enemies of Allah', by which he was referring to non-believers. As a result of these statements made on the radio, the broadcasting licence of the radio station was suspended. The Court goes a long way towards recognising Turkey's concerns. It recognises the outrageous nature of the impugned statements, particularly in the light of the tragic context in which they were made.[17] Also, it notes that attributing religious significance to a natural disaster may inspire superstition and intolerance in some persons.[18] However, all in all the shocking and offensive statements are just that: shocking and offensive. The Court does not accept that they purported to incite violence or discrimination and still less that it was likely that hostile acts against non-believers would ensue following the radio programme.[19]

In *Lehideux and Isorni v France*,[20] somewhat of a risk assessment was carried out, which led the Court to find in favour of the applicants, thus concluding that their speech ought to have been protected, not combated by France. The incident at stake represents a rather ambiguous case of glorification of historical atrocities. Rather than directly glorifying acts perpetrated by the Nazis, these two—respectively a former minister in Pétain's Vichy Government and Pétain's defence lawyer during his post-war trial—sought to rehabilitate Pétain. In so doing they had publically glorified the collaboration with the Nazis, and through still further implication the atrocities perpetrated by the Nazis. In condemning the two of the crime of condoning Nazi collaboration the French

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[14] *Klein v Slovakia* (n 13) [52].

[15] *Jacques Seurot v France* (App no 57383/00, admissibility decision of 18 May 2004).

[16] *Nur Radyo Ve Televizyon Yayinciligi AS v Turkey* (App no 6587/03, 27 November 2007) [30].

[17] ibid (n 16) [30] ('*le contexte particulièrement tragique*').

[18] ibid.

[19] ibid. See also, *mutatis mutandis*, *Özgür Radyo-Ses Radyo Televizyon Yayın Yapım Ve Tanıtım AŞ v Turkey (No 2)* (App no 11369/03, 4 December 2007).

[20] *Lehideux and Isorni v France* (App no 55/1997/839/1045, Grand Chamber judgment of 23 September 1998).

judiciary had concentrated on the one-sided nature of their writing (an advertisement in *Le Monde*).[21] France defended its prohibition of this speech offence and the enforcement thereof in the present case in the Strasbourg Court. The French Government conceded that these two men had not committed Holocaust denial, yet 'in order to glorify Philippe Pétain's record during the Second World War they had been impelled to deny, by deliberately omitting to mention it, the existence of his policy of collaboration with the Third Reich.'[22] The European Court of Human Rights was unable to agree with France. First of all, no malicious intent was established.[23] Second, contextual elements persuaded the Court to find in favour of a freedom of speech violation. In relation to *likelihood* (of harm coming a target group's way) specifically, the Court finds that 'ten or twenty years previously' the statements made would have made a more severe impact.[24] This lapse of time argument, which has featured in the Court's freedom of expression jurisprudence on other occasions too,[25] is interesting since in relation to clear-cut forms of negationism the Court is not for the time being willing to consider a similar argument.

By contrast, in *Leroy v France*, concerning a cartoon published in a newspaper with which the applicant allegedly had condoned and glorified the 9/11 attacks, the Court places much emphasis on the politically sensitive (Basque) region, suggesting that France could reasonably have anticipated that violent acts would be stirred up.[26] Admittedly, that conclusion would have benefited from an even more comprehensive risk assessment.

To return to the case of *Sürek*, the question remains whether the publication by a weekly review of two inflammatory letters justified interferences with freedom of expression. Did the European Court of Human Rights get it right when it found no violation of free speech? The letters had been written by readers of the review and vehemently condemned acts by the Turkish authorities against the Turkish Kurds, accusing the former of perpetrating massacres and other brutalities.[27] In assessing whether the penalties imposed (fines) on the applicant, who acted as major shareholder of said review, were legitimate the Grand Chamber contends that 'there is a clear intention to stigmatise the other side to the conflict by the use of labels such as "the fascist Turkish army", "the TC murder gang" and "the hired killers of imperialism" alongside references to "massacres", "brutalities" and "slaughter". In the view of the Court the impugned letters amount to an appeal to bloody revenge by stirring up base emotions and hardening already embedded prejudices which have manifested

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21 ibid [21].
22 ibid [42].
23 ibid [37] (views Commission), [47], and [53] (Court).
24 ibid [55].
25 Eg European Court of Human Rights, *Monnat v Switzerland* (App no 73604/01, 21 September 2006) [64].
26 European Court of Human Rights, *Leroy v France* (App no 36109/03, October 2008) [45].
27 *Sürek v Turkey (No 1)* (n 7) [11].

themselves in deadly violence.'[28] The Court finds that the review for which Sürek was responsible functioned as an outlet to stir up violence and accordingly no violation of free speech could be established.[29]

Judge Palm argued that the majority's emphasis on the content of the letters was rather beside the point. Specifically, she wrote that 'the majority has attached too much weight to the admittedly harsh and vitriolic language used in the impugned letters and insufficient attention to the general context in which the words were used and their likely impact. Undoubtedly the words in question shock and disturb the reader with their general accusatory tone and their underlying violence. But in a democracy, as our Court has emphasised, even such "fighting" words may be protected by Article 10.'[30] She went on to contend that '[t]he question in the present case concerns the approach employed by the Court to decide the point at which such "violent" and offensive speech ceases to be protected by the Convention. My answer to this question is to focus less on the vehemence and outrageous tone of the words employed and more on the different elements of the contextual setting in which the speech was uttered. Was the language intended to inflame or incite to violence? Was there a real and genuine risk that it might actually do so? The answer to these questions in turn requires a measured assessment of the many different layers that compose the general context in the circumstances of each case.'[31]

Applying these context factors, Judge Palm established a violation of Article 10, concluding that there was no real likelihood that the published letters would stir up violence. Her comparison of *Sürek* to the older case of *Zana v Turkey* is most illuminating and proves a powerful explanation of the necessity of a context-based risk assessment in this type of case.[32] Zana, a former mayor, had remarked in an interview with journalists that he supported the PKK national liberation movement. Whilst he was 'not in favour of massacres,' he added rather ambiguously that 'Anyone can make mistakes, and the PKK kill women and children by mistake.'[33] He was sentenced to twelve months' imprisonment for condoning violent acts. The Strasbourg Court emphasised that 'the interview coincided with murderous attacks carried out by the PKK on civilians in south-east Turkey, where there was extreme tension at the material time', which meant that an interview 'by the former mayor of Diyarbakır, the most important city in south-east Turkey' that was 'published in a major national daily newspaper' could reasonably have been regarded by Turkey 'as likely to exacerbate an already explosive situation in that region.'[34]

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[28] ibid [62].
[29] ibid [63].
[30] Partly dissenting opinion of J Palm.
[31] Partly dissenting opinion of J Palm.
[32] *Zana v Turkey* (App no 69/1996/6888/880, Grand Chamber judgment of 25 November 1997). See the partly dissenting opinion of J Palm.
[33] ibid [12].
[34] ibid [59]–[60].

Thus, in *Zana* Turkey and subsequently, the European Court of Human Rights in its own assessment, could determine a host of contextual elements that pointed to an increased degree of likelihood of harm (here potential violence). Notably, there was the special *status of the speaker*. Zana, as a former mayor and public figure, could be said to exercise a degree of influence on public opinion. This fact differs considerably from the case of *Sürek*, who merely acted as the major shareholder of the impugned review. Further, there is the factor of the *medium used* and the particular *setting* in which the speech acts are made public. Zana ventilated his views in a national newspaper. The impugned letters in Sürek's review arguably were less likely to have an adverse impact, not only on account of its more moderate circulation, but also, as Judge Palm argued, especially since 'letter-writing by readers does not occupy a central or headline position in a review and is by its very nature of limited influence. Moreover some allowance must be made for the fact that members of the public expressing their views in letters for publication are likely to use a more direct and vehement style than professional journalists.'[35] Last but not least, Zana's (ambiguous) condoning of murder occurred during a peak of regional violence.

Palm's dissent struck a chord with some of the other judges. In a series of judgments delivered by the Court that same day on cases brought against Turkey, this contextual approach was expressly shared by a number of other judges, but also generally impacted the approach taken by the plenary Court in some cases. For instance, in *Arslan v Turkey*, concerning a book that according to the Turkish authorities 'glorified the acts of insurgents in south-east Turkey',[36] the Grand Chamber unanimously held that freedom of expression was in fact breached. While the Court came to this conclusion having argued that the book did not contain express incitement and on account of the book having only limited potential of achieving the harm which Turkey had attributed to it,[37] Judge Palm and four other judges—this time in the form of a concurring opinion—urged their colleagues to assess contextual elements even more rigorously. 'It is only by a careful examination of the context in which the offending words appear', they emphasised, 'that one can draw a meaningful distinction between language which is shocking and offensive—which is protected by Article 10—and that which forfeits its right to tolerance in a democratic society.'[38] This opinion is also appended to most of the dozen additional freedom of expression decisions concerning Turkey—mostly revolving around alleged instances of glorification of separatist violence—that were

[35] Partly dissenting opinion of J Palm.

[36] *Arslan v Turkey* (App no 23462/94, Grand Chamber judgment of 8 July 1999) [10].

[37] ibid [48].

[38] Joint Concurring Opinion of Js Palm, Tulkens, Fischbach, Casadevall, and Greve, final paragraph. Judge Bonello for his part also emphasised the need of making a concrete risk assessment. See concurring opinion of J Bonello, engaging with the 'clear and present danger' doctrine and the 'imminent lawless action' doctrine as formulated in United States Supreme Court jurisprudence.

handed down that same day.[39] In that body of case-law, the Court among other things held that insurgent poetry, even when 'very aggressive in tone' and calling 'for the use of violence', inherently has limited potential to cause harm given its small audience.[40] Turkey's anti-extremism policies had furthermore overstepped the mark by undermining academic freedom (scholarship in relation to the Kurdish plight),[41] uninhibited news reporting (in relation to the Kurdish plight),[42] and journalism in general.[43]

Conclusion

This contextual approach has been reiterated and further conceptualised in subsequent decisions against Turkey involving instances of alleged glorification,[44] also impacting later cases of alleged religious incitement.[45] In the final analysis, only such a context-based risk assessment can unveil whether it is likely that harm will emanate from an inciteful speech act. Hence, only by virtue of a profound contextual approach can it be established whether a restriction on extreme speech is truly 'necessary in a democratic society'.

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[39] See *Sürek and Özdemir v Turkey* (n 6); *Sürek v Turkey (No 2)* (App no 24122/94, Grand Chamber judgment of 8 July 1999); *Sürek v Turkey (No 3)* (App no 24735/94, Grand Chamber judgment of 8 July 1999); *Sürek v Turkey (No 4)* (n 6); *Ceylan v Turkey* (App no 23556/94, Grand Chamber judgment of 8 July 1999); *Gerger v Turkey* (App no 24919/94, Grand Chamber judgment of 8 July 1999); *Polat v Turkey* (App no 23500/94, Grand Chamber judgment of 8 July 1999); *Karataş v Turkey* (App no 23168/94, Grand Chamber judgment of 8 July 1999); *Erdoğdu and İnce v Turkey* (n 6); *Başkaya and Okçuoğlu v Turkey* (App nos 23536/94 and 24408/94, Grand Chamber judgment of 8 July 1999); *Okçuoğlu v Turkey* (App no 24246/94, Grand Chamber judgment of 8 July 1999).

[40] *Karataş v Turkey* (n 39) [52].

[41] *Başkaya and Okçuoğlu v Turkey* (n 39) [65]. See also, *mutatis mutandis*, *Polat v Turkey* and *Arslan v Turkey* (n 39), which both revolved around books that though not of an academic nature contained historical passages.

[42] See specifically *Sürek v Turkey (No 2)* (n 39); *Sürek v Turkey (No 4)* (n 39); *Ceylan v Turkey* (n 39), and *Gerger v Turkey* (n 39).

[43] *Erdoğdu and İnce v Turkey* (n 6), concerning sentences imposed on the editor of a monthly review and an interviewee.

[44] See also eg *Erdoğdu v Turkey* (n 6); *Kizilyaprak v Turkey* (App no 27528/95, 2 October 2003); *Alinak v Turkey* (App no 40287/98, 29 March 2005); *Ergin v Turkey (No 1)* (App no 48944/99, 16 June 2005); *Ergin v Turkey (No 2)* (App no 49566/99, 16 June 2005); *Ergin v Turkey (No 3)* (App no 50691/99, 16 June 2005); *Ergin v Turkey (No 4)* (App no 63733/00, 16 June 2005); *Ergin v Turkey (No 5)* (App no 63925/00, 16 June 2005); *Ergin v Turkey (No 6)* (App no 47533/99, 4 May 2006); *Ergin and Keskin v Turkey (No 1)* (App no 50273/99, 16 June 2005); *Ergin and Keskin v Turkey (No 2)* (App no 63926/00, 16 June 2005); *Başkaya v Turkey* (App no 68234/01, 3 October 2006); *Halis Dogan and Others v Turkey* (App no 50693/99, 10 January 2006); *Halis Dogan v Turkey (No 2)* (App no 71984/01, 25 July 2006); *Refik Karakoç v Turkey* (App no 53919/00, 10 January 2006); *Bingöl v Turkey* (App no 36141/04, 22 June 2010); Şener *v Turkey* (App no 26680/95, 18 July 2000); *Erdal Tas v Turkey* (App no 77650/01, 19 December 2006); *Faruk Temel v Turkey* (App no 16853/05, 1 February 2011).

[45] Eg European Court of Human Rights, *Erbakan v Turkey* (App no 59405/00, 6 July 2006).

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Table of cases

European Court of Human Rights and European Commission of Human Rights

Court of Justice of the European Union

UN Human Rights Committee

Inter-American Commission of Human Rights

National cases – Australia

National cases – Belize

National cases – Canada

National cases – Estonia

National cases – Germany

National cases – Hong Kong

National cases – India

National cases – Israel

National cases – New Zealand

National cases – PRC

National cases – Scotland

National cases – South Africa

National cases – United Kingdom

National cases – United States