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The Extent of Journalistic Freedom of Expression under the European Convention on Human Rights

El alcance de la libertad de expresión periodística bajo la Convención Europea de los Derechos Humanos

Abstract:

Journalistic freedom of expression is essential for the dissemination of information as the media forms a platform for public debate necessary for a democratic society. Journalism at its best, acting in due diligence and ensuring the accuracy of gathered information in accordance with the principles and ethics of journalism, is a critical component for democracy, human rights, and the rule of law. Journalistic freedom helps curb corruption by granting society access to information thereby illuminating and exposing those engaged in corrupt activities. When broadcasts of grave human rights violations occur, it educates people about their rights and creates an instrument for the amplification of their voices. In addition, journalism uses documentary evidence as a means of communication and thus is also part of an advocacy drive of the media toward empowering people whose stories and messages might otherwise not be heard.

Keywords: Democratic society; human rights; journalism; media ethics; public interest; the rule of law

Resumen:

La libertad de expresión periodística es esencial para la difusión de información, ya que los medios de comunicación forman una plataforma para el debate público, necesario para una sociedad democrática. El periodismo en su máxima expresión, actuando con la debida diligencia y asegurando la exactitud de la información recopilada de acuerdo con los principios y la ética de este, es un componente fundamental para la democracia, los derechos humanos y el estado de derecho. La libertad periodística ayuda a frenar la corrupción al otorgar a la sociedad acceso a la información, iluminando y exponiendo a quienes participan en actividades corruptas. Cuando se producen transmisiones de graves violaciones de derechos humanos, se educa a las personas sobre sus derechos y se crea un instrumento para la amplificación de sus voces. Además, el periodismo en muchos casos utiliza evidencia documental como medio de comunicación y, por lo tanto, también es parte de un impulso de defensa de los medios de difusión para empoderar a las personas a contar sus historias y mensajes, que de otro modo no se escucharían.

Palabras claves: Derechos humanos; ética de los medios; interés público periodismo; la regla de la ley; sociedad democrática

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1. Introduction

The media is a fundamental element in a democratic society. It plays an important role of 'public watchdog'; one of the cornerstones as demonstrated on many occasions is crucial for a well-functioning democratic society (Leach, (2017), p. 464). The European Court of Human Rights in Strasbourg (hereinafter ECtHR or the Court) has reiterated in numerous cases before it that "Not only does the press 'have the task of imparting such information and ideas: the public also has a right to receive them'" (*Thorgeir Thorgeirson v Iceland*, App no 13778/88 (ECtHR, 1992), para 63). Broadcasting events ranging from reports on opposition gatherings and demonstrations of great importance for a functioning community, to grave human rights violations by government institutions, thus performing an essential function heavily influencing the basis of transparency and democracy, or the illusion thereof.

While freedom of expression is one of the fundamental human rights, it is not an absolute right. Still, interferences by the State are limited. The government is restricted in prosecuting or punishing journalists in matters relating to their profession as it may deter the media from reporting on issues of public interest. It is the duty of the State to create and maintain an effective system of protection for the press and to establish a favourable environment that encourages everyone to participate in public debate without concern of exposure to dangerous risks in case their opinion deviates from the authorities'. The Council of Europe has expressed that a 'favourable environment' is a critical element for democracy, human rights and the rule of law (Andreotti et al., 2015). Journalistic freedom helps curb corruption by granting society access to information thereby illuminating and exposing those engaged in corrupt activities.

The Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR or the Convention) applies to all member states of the Council of Europe. The ECtHR has received several complaints from journalists concerning violations of their rights deriving from Article 10 ECHR, i.e., cases that concern *disproportionate, illegitimate or unjustifiable interference* in their freedom of expression. The case law presented in this article, the conditions of *proportionality* and *necessity in a democratic society* plays a decisive role in the outcome of the judgments.

In addition, journalism uses documentary evidence as an instrument and thus is also part of an advocacy drive of the media toward empowering people whose stories and messages might otherwise not be heard. Given the current state of the world, the countless underreported events by the press and the illegitimate censures on social media to the detriment of the vulnerable, the writer wanted to take this opportunity to use this platform to advocate for the silenced voices throughout the world and to strongly encourage today's journalism to adhere to the principles and ethics of journalistic code of conduct, to seek out the truth and report on it using accurate terminology.

2. Freedom of Expression under the ECHR

Article 10 of the European Convention on Human Rights

Freedom of expression

"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."¹

Freedom of expression is not an absolute right. It shall be exercised with a certain responsibility, and it is subject to restrictions. The substantive rights are stipulated in Article 10(1). Article 10(2) stipulates the legitimate restrictions. Interference by official authorities is only permitted under the following conditions: any restriction or punishment must be 'prescribed by law', have a 'legitimate aim' and most decisively, it must be 'necessary in a democratic society'. The States are allowed a certain margin of appreciation in the sense of necessity when deciding on the legitimate aim in paragraph 2, such as 'the protection of health or morals', for instance. There must be a pressing social need and this phenomenon depends on the interests of the State in question. The Court supervises how the States have complied with the Convention and analyses the interferences by the States according to the circumstances in each individual case. The States are bound to apply the law diligently and in good faith, and in case of an interference it must be proportionate to the legitimate aim pursued, as well as relevant and appropriate.

The substance of Article 10 ECHR is inspired by and based on Article 19 of the Universal Declaration of Human Rights and Article 29(2) UDHR served as a foundational basis regarding the limitations in paragraph 2,² as it did in Article 19 of the International Covenant on Civil and Political Rights (ICCPR).³

1 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 10.

2 Universal Declaration of Human Rights (entered into force 10 December 1948) GA Res 217 A (III) UNGAOR, 3rd Sess, Supp N° 13, UN Doc A/810, art 19, art 29(2).

3 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 19. Human Rights Committee (HRC), 'General Comment 34' (12 September 2011) UN Doc CCPR/C/GC/34.

ECtHR Case Law

De Haes and Gijssels v Belgium

The Court affords the freedom of the press with strong protection where matters of general interest are publicly discussed.

In *De Haes and Gijssels v Belgium* (1997), an editor and a journalist were convicted for defamation after publishing five articles where judges of the Antwerp Court of Appeal were severely criticized after learning that they had granted the custody of children to the accused, who was initially prosecuted for incest and abuse of his children.

The allegations were supported by several medical and psychiatric reports. The articles claimed that the judges and the Advocate-General were biased, and despite the sufficient evidence against the father, they ruled in favour of him. The father worked as a notary and was from a family with strong links to the highest financial circles in Belgium.

The applicants' purpose with the published articles was to criticise the malfunctioning of the judiciary in the country, concerned that the judges had not been impartial in this case, and therefore published the articles in the interest of the children.

The Court found that the interference had been 'prescribed by law' and had pursued at least one of the legitimate aims; the protection of the reputation or rights of others. In assessing whether the interference was 'necessary in a democratic society', the Court considered the purpose of the articles in light of public interest. It goes without saying that the independence and impartiality of the judicial system is clearly within the interest of the public. Furthermore, prior to the publication, the journalists had exercised their rights responsibly when performing the diligent research in establishing the facts and evidence as a basis. Accordingly, the Court found a violation of Article 10.

The interference by the government could not be justified simply for the reason that the applicants strongly disagreed with the outcome of the judgement. Thus, the Court held that the interference had not been necessary in a democratic society.

*"The Court reiterates that 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 section of the community. In addition, journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation".*⁴

*"Article 10 (art. 10) protects not only the substance of the ideas and information expressed but also the form in which they are conveyed".*⁵

⁴ *De Haes and Gijssels v Belgium*, App no 19983/92 (ECtHR, 24 February 1997), [46].

⁵ *ibid* [48].

Oberschlick v Austria

The protection of freedom of expression afforded to journalists allows them to publish articles with a tone of exaggeration and provocation to a certain extent, without the Court having the mandate to determine the reporting methods to be allowed, or not, for the press on any matter (Schabas, (2015), p. 458).

The Court has described the conditions for politicians in a democratic society; when accepting their position, they are consenting to exposing themselves and becoming subject to criticism by the public (Leach, (2017), p. 469).

Oberschlick v Austria, a case concerning a journalist who published a copy of a criminal complaint which he among others had lodged against an Austrian politician. The politician had made discriminatory announcements in an election campaign regarding migrant workers and family allowances. The published article stated that the announcements made by the politician resembled the views of National Socialism, subsequently leading to a conviction for defamation for the journalist.

The Court found Austria to be in violation of Article 10 in respect of the discriminatory statements made by the politician which should undoubtedly be subject to criticism, thereby confirming the issue as a matter of public interest as reported by the journalist. According to the Court, it is a key function of the press to impart information and ideas on political issues and on other concerns of general interest. Freedom of political debate is a vital element of a democratic society, and politicians must therefore tolerate a higher amount of criticism than private individuals.

The Court further acknowledges that a politician has a right to have his reputation protected to a certain extent as well, "even when he is not acting in his private capacity, but the requirements of that protection have to be weighed against the interest of open discussion of political issues".⁶

The Court considered that the information provided by the journalist was of general importance since the problem of discrimination of foreigners had been very relevant and frequently occurred in other member states of the Council of Europe as well.

"Mr. Oberschlick's criticism (...) sought to draw the public's attention in a provocative manner to a proposal made by a politician which was likely to shock the people. A politician who expresses himself in such terms exposes himself to a strong reaction on the part of journalists and the public".⁷

Standard Verlagsgesellschaft mbH v Austria

Freedom of expression covered by Article 10 provides journalists with an extensive protection in their profession. Nevertheless, this does not free them of responsibilities as they are required to act

6 *Oberschlick v Austria*, App no 11662/85 (ECtHR, 23 May 1991), [59].

7 *ibid* [61].

in good faith and to assess accurate and reliable information in line with the ethics of journalism. This also involves the maintenance of balance between the rights and freedoms in the articles of the Convention to avoid overextending a granted freedom in Article 10 in such a manner to risk non-compliance, for instance, with Article 8; the obligation to respect the reputation and rights of others.

In *Standard Verlagsgesellschaft mbH v Austria*, the applicant owned a newspaper and published an article on the front page, stating that the regional governor had misled the regional government and violated rules of procedure governing the election of the supervisory board of a regional electricity company. The content was based on a press release by the political opponents. It finally came to light that the journalist had made an incorrect summary of the expert opinion. The allegations were thus false. After the applicant was prosecuted and convicted for defamation, the national court ordered the newspaper to withdraw the accusations.

In their reasoning, the Court held that the journalist should have acted in due diligence and consulted with the expert opinion. The Court continued, stating that the interference by the domestic law was relevant and proportionate, as well as ‘necessary in a democratic society’ for the protection of the reputation and rights of others. In addition, the applicant was free to discuss the issue in any other manner with no penalties imposed on them.

The measures constituted an interference with the applicant’s rights under Article 10(1). The interference was prescribed by law, pursued a legitimate aim (namely, to protect the reputation or rights of others), and it was proportionate.

The underlying expert opinion was considered to be a value judgment and was altered to the point that it resulted incorrect. Moreover, when writing the article, the journalist did not seek out to consult a counter-expert opinion. And while writing the article, without first researching whether the announcements were accurate or not, the journalist had based the article on a press release by a political party known to have opposing opinions to those of the regional governor who was subject to defamation. Hence, it could not be proved that the journalist had acted in line with the obligations to maintain journalistic diligence.

As previously declared, Article 10 does not offer unlimited freedom of expression even in matters of general interest. When exercising the rights under Article 10, one must take into consideration the duties and responsibilities deriving from it. A prerequisite for the protection granted to journalist covering issues of public interest is to ensure “acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism ” (*Standard Verlagsgesellschaft mbH v Austria*, App no 37464/02 (n 2) (ECtHR, 2007), para 38).

“Furthermore, special grounds are required before the media can be dispensed from their ordinary obligation to verify factual statements that are defamatory of private individuals. Whether such grounds exist depends

in particular on the nature and degree of defamation in question and the extent to which the media can reasonably regard their sources as reliable with respect to the allegations”⁸

The judgment from the national court emphasized that the journalist had manipulated the expert opinion for their own benefit or purpose, and that it was deliberately meant to harm the politician’s reputation. One of the reasons mentioned was the publishing of announcements claiming to be held by the expert opinion, which was false.

Since this is an issue of public interest, the government is required to examine the interference carefully to avoid any adverse impact on the media in performing its daily tasks, as it may otherwise deter them from publishing information that are contributing to a public debate. The public also have a right to receive information about their political leaders and thus allows for a certain attitude and provocation for the reader to gain a better perspective and opinion.

In conclusion, journalists are required to substantiate that they have acted in due diligence when providing facts on important matters of public debate. The Court held that the allegations against the politician were serious in this case and the journalist could not be excused for failing to consult the expert opinion.

Thorgeir Thorgeirson v Iceland

In some circumstances, however, they are not obligated to prove the authenticity of particular material or published statements. It depends on the circumstances of the case.

For instance, there is no requirement that value judgements must be proved. If that were the case, it would not be possible to hold an opinion of something in the first place, and journalists would hardly be able to contribute with anything on the daily news as it would be difficult to back up every statement with evidence. However, it must be based on facts and the journalist must have acted in good faith (Macovei, (2004), pp. 9-11).

In *Thorgeir Thorgeirson v Iceland*, the applicant published an article concerning the police brutality in the country. The wording in the article was slightly provocative towards the police, and the journalist was convicted for defamation for breaching national law. The case ultimately reached the European Court of Human Rights where the Court held that there had been a violation of Article 10. The government argued that the published article was fabricated by the applicant and thus not supported by facts, as he could not prove it. Furthermore, the government stated that the purpose with the article was to smear the reputation of the police (*Thorgeir Thorgeirson v Iceland*, App no 13778/88 (ECtHR, 1992), para 66).

The Court held that the first incident described in the first article, was the incident that initiated it all, and was based on facts. A police officer had been brutally violent against a journalist. Initially,

8 *Standard Verlagsgesellschaft mbH v Austria*, App no 37464/02 (n 2) (ECtHR, 22 February 2007), [38].

three policemen were prosecuted, and one resulted in being convicted. Notably, the government did not dispute this fact. Rumours and allegations of police brutality was something that had been frequently discussed and debated by several citizens with similar encounters by the police.

After establishing that the interference was 'prescribed by law' and had 'pursued a legitimate aim', namely, protecting the reputation or rights of others, the Court carried on examining the third criteria, whether it was 'necessary in a democratic society'. The Court noted that the journalist was merely reporting what was being discussed by the public about the ill-treatment by the police.

The Court further considered it as an unreasonable request on the part of the government to demand evidence of the statements published in the article. The judges understood that the intention with the article was to bring attention to the issue that was of serious public concern, and to call on the attention of the government to initiate an effective investigation by an independent and impartial institution.

Recognizing the aim of the article, the Court further stated that another reason the journalist had not intended to smear the reputation of the police was that the article did not mean to address all members of the police but said that "comparatively few individuals [were] responsible" (*Thorgerir Thorgeirson v Iceland*, App no 13778/88 (ECtHR, 1992), para 66).

In conclusion, the conviction and the sentence of the applicant was too stringent and could have an adverse impact on maintaining a favourable environment for a public debate. Hence, the interference was not proportionate to the legitimate aim pursued and was consequently not 'necessary in a democratic society'.

Protection of journalists

Signatory States to the ECHR have a positive obligation to protect the rights of individuals deriving from Article 10, by conducting investigations into the circumstances.

The case *Özgür Gündem v Turkey*, briefly explained, was a daily newspaper which published among other issues, articles of statements, speeches and an interview with Abdullah Öcalan, the former leader of the Workers' Party of Kurdistan (PKK). Since the publications were interpreted as support of Abdullah Öcalan, the newspaper experienced a lot of violence from individuals opposed to him. The Court found the government had failed to comply in respect of the positive obligation to investigate into the circumstances and offer protection for journalists who were subjected to violence and threats (*Özgür Gündem v Turkey*, App no 23144/93 (ECtHR, 2000)).

Dink v Turkey

Hrant Dink was a publication director and editor-in-chief of a Turkish-Armenian newspaper. He was a Turkish national of Armenian descent and published several articles in 2003 and 2004, in which he stated his opinions on the identity of individuals who shared the same origin and nationality as he.

Advocating for the significant need of Armenians to have the events of 1915 recognized as genocide. This was hopelessly ignored by Turkish society, leaving the Armenians unsuccessful in their pursuit of justice and in obtaining closure of past events, hence making the traumas still a tangible and sensitive issue.

Among his publications, he expressed that the adopted daughter of Atatürk was of Armenian descent. This resulted in strong reactions and demonstrations from extreme nationalists. Hrant Dink received threatening letters and a criminal lawsuit had been filed against him. Following the hostile events, Mr. Dink was deemed “guilty of denigrating ‘Turkishness’ (Turkish identity)”⁹ by the criminal court in 2005.

When Mr. Dink was murdered in January 2007, the criminal court dropped the proceedings as a result. The public prosecutor’s office initiated criminal proceedings against the suspects and several investigations were carried out into the circumstances, questioning whether the police departments were aware of the death threats and thus failed to take appropriate measures, some of which were pending and some of which were dropped.

The Court found that the security forces could be considered to have been informed of the situation of Mr. Dink and that he had been subject to intense hostility by extreme nationalists. The State was in violation of Article 2 ECHR since they should have been aware of the real and imminent threat of assassination of Mr. Dink but neglected it and did not take any actions to protect his life. In addition to the supporting facts of the threat being real and imminent, the police departments and one gendarmerie had been informed of the possibility of a plotted murder and who was behind it. The State had failed to comply with its positive obligations deriving from the regulation of freedom of expression, and consequently failed to create a favourable environment for participation in public debate by everyone without fear of expressing themselves.

The judgment of the Court of Cassation, which held that Mr. Dink was guilty of denigrating Turkishness, was ruled by the ECtHR to be an interference with the right to exercise his freedom of expression. Accordingly, examined alone or in conjunction with the failure to protect the journalist, the Court found a violation of Article 10.

When assessing the necessity of the interference, the Court takes into consideration the criminal proceedings instituted against the journalist for commenting on the authorities of the State for not recognizing the Armenian genocide. Article 10 protects the right of freedom of expression concerning political issues of general interest, which contributes to a public debate. The State authorities shall tolerate more criticism than private individuals, hence, journalists are allowed to be critical to a wider extent concerning official actors. Another important factor is that the articles did not incite others to violence or hatred and had not been gratuitously offensive. The purpose with the articles was to

9 *Dink v Turkey*, App no 2668/07 (ECtHR, 14 September 2010).

express his opinions on a matter that was close to his heart, and with a consensus in the Armenian community. For this reason, he was expressing an issue of public concern in a democratic society. Additionally, to seek historical truth is essential to freedom of expression and thus falls under the scope of Article 10. The interference by the State had not been necessary and there was no pressing social need.

Najafli v Azerbaijan

The case originated when a journalist reported on a demonstration in Baku. As the demonstration was unlawful, the police arrived to stop it. In the circumstances, the police used force on non-compliant demonstrators. To distinguish between journalists and demonstrators, journalists in Azerbaijan must wear a blue vest to identify them, which he was not wearing during this event, although he was wearing his journalist badge. The journalist was then beaten by the police even though he was not participating in the demonstrations, but merely reporting on them. A total of six journalists were injured. The police claimed the use of force was not unlawful since they were not aware of that he was there in his capacity as a journalist, as they could not identify him since he failed to wear the vest. The journalist argued that even though he was not wearing his vest, he was wearing a badge and repeatedly told them that he was a journalist when they beat him. Witnesses testified to the accuracy of the statement by the journalist. The journalist was seriously injured, and the medical certificates proved that the beatings on his head resulted in closed cranio-cerebral trauma and concussion (Najafli v Azerbaijan, 2012).

The journalists lodged a criminal complaint. It did not result in a successful outcome however, as the investigator suspended the criminal proceedings due to unidentified perpetrators. The journalist did not know which police officers were responsible for the beating, but he knew who oversaw the police unit and even had a photo of him. When the same police officer denied his involvement and any of the claims during his hearing, the investigator relied on his versions and suspended the proceedings. The process was rather questionable as well, as the journalist stated that he had not received neither a copy of the suspended proceedings nor a decision of a forensic examination by the investigator.

The ECtHR repeated that the press is essential in a democratic society governed by the rule of law. And if it were not able to report on demonstrations, for instance, the press would be incapable of pursuing the role of ‘public watchdog’. Being subjected to ill-treatment by the police officers would seriously discourage the press of exercising the right to receive and impart information. Moreover, this interference was not justified under Article 10(2), nor was it lawful or pursued a legitimate aim, and finally, it was not ‘necessary in a democratic society’. Accordingly, the Court found a violation of Article 10 and Article 3 of the Convention.

3. Conclusion

In conclusion, journalists possess an important professional feature that has a fundamental contribution to public service in a democratic state. With a broad span of contributions on several

divisions, including the link with the right to a fair trial. Therefore, in exercising their role, a strong element of social responsibility is required. Article 6 ECHR provides the right to a 'public trial', which is partly maintained through the press. In carrying out their duty they must be careful not to cross the line when reporting on criminal proceedings and act diligently and in good faith when assessing the information received, maintaining impartiality and independence of any commercial or political interests. In situations of non-compliance, for instance in the case where a journalist failed to respect the *rights or reputation of others*, in particular a convicted woman who was photographed without her consent on her way leaving the trial. In its reasoning the Court stated that she had been exposed in a way that was '*particularly intrusive*'. When carrying out an assessment in accordance with Article 10, in this case, the issues that must be considered and balanced against each other are; the protection of privacy of the person in question; the public interest in receiving the information about the criminal trial; to safeguard the assumption of innocence of the defendant; and proceeding with due diligence and in good faith when examining the correct facts.

The proportionality test is required in the case of an interference with the right to freedom of expression, i.e., a balance of interests based on the context of each individual case.

In conclusion, the media is afforded a wider extent of freedom of expression when publishing articles and documentary evidence that contribute to a public debate, criticism and statements made by politicians or public officials, public proceedings, demonstrations and issues of general interest. The extent to which this right can be exercised is instantly narrower in respect of private individuals.

Finally, journalists have a responsibility to seek out the events of public interest and report on it, shedding a light on issues of serious concern such as the ongoing genocides and bring them out of the darkness, to seek out the truth and act in due diligence to ensure the accuracy of the information to be reported in line with the principles and ethics of journalism.

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