

Political Debate and the Role of the Media

The Fragility of Free Speech

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The New German expression, “the Media Chancellor”, demonstrates just how closely intertwined politics and the media are in this day and age. Describing the exceptional success of the German Federal Chancellor with the media, this label also brings together spheres of activity that are discernibly growing together more and more in reality. In other countries the “union” between politics and the media denotes a mechanism whereby media magnates turn into leading politicians, or the simple fact that state media monopolies continue to exist.

The right to political discourse, which is safeguarded by the European Convention on Human Rights, is currently exercised with the assistance of the media. Traditional media and the new media create the linkage between those who send out messages and those who receive them.

However, the role of the media is by no means restricted to that of an “intermediary”. The media “are capable of” much more than that. They can support balanced political debate, thus fostering democracy, itself. To this end, for example, via a range of programmes, the Council of Europe is promoting the operation of a professional, independent and pluralistic media sector. But the media are in a position to influence elections, too. It is not without good reason that we have a large number of regulations controlling the conduct of the media during election periods. The media can both enhance and destroy political careers. This is why it proved especially hard to distribute the Michael Moore Films criticising Bush in the USA. The media can influence the general public in both the short and the long term. Were this not the case, are we sure the television-viewing public in the Netherlands would have voted Pim Fortuyn the greatest Dutchman of all time? Pim Fortuyn was the leader, described as charismatic, of a nationalist-orientated party with good prospects of a strong presence in the Dutch parliament. Shortly before the parliamentary elections he was assassinated, an event that was covered in depth by the media in countries other than just the Netherlands.

This *IRIS Special* examines the significant issue of whether the media *should* be doing what they *are able* to do when it comes to political debate.

Therefore, initially, it will be given over to the concept of “political debate” and the obligation that is incumbent upon the state to safeguard the right to engage in it. Does a politically motivated television advertisement constitute political speech, and so a type of discourse that should enjoy specific protection? Or is it a case of straightforward advertising? What should the state actually be doing to safeguard our right to freedom of expression? Should it use the law, or even institutions, to make sure the public is given certain information?

The question then arising, as to the possible limiting of the right to freedom of expression, is of utmost importance. Could there ever be any justification for restrictions? When we start to consider this issue, other protected areas, such as privacy, personal honour and national security will come into our field of vision. For instance, should the state prohibit the media from distributing messages if they are put out by terrorists? Which of the limits placed on the media – and thus on freedom of expression – as part of the campaign against terrorism are actually necessary and justified?

The suggestion that the media can be used to manipulate political debate is a fact that is also discussed in the publication. But what are the legal consequences thrown up by such a scenario? How do we decide whether the media are simply being provided as a forum for free expression or

whether they are being abused for illegitimate purposes? Does the law guarantee that such abuse will not occur? Indeed, is it able to do so? What are the areas where regulation is needed?

The issues raised in this *IRIS Special* are also very interesting because the context in which they arise has been altered by the continuing development of technology. Modern technology is opening up new and diverse ways in which the media can be used in political debate, for good and for ill. Niklas Luhmann's pivotal question: "How do the mass media construct reality?" is a question that poses itself in a new guise. The role of the media has grown in significance accordingly.

The explosive nature of the topics being addressed knows no geographical bounds. The questions being asked are extremely pressing on all five continents. However, the publication concentrates on the European debate, and, as a comparison, refers to the system developed in the USA to cater for political discourse.

This *IRIS Special* is based on the round table organised in June 2004 by the European Audiovisual Observatory and its partner organisation, the Institute for Information Law (IViR) of the University of Amsterdam, entitled "The changing hues of political expression in the media".

A report by Tarlach McGonagle (IViR) summarises the round table discussion for you. His report, which appears at the beginning of this *IRIS Special*, is followed by four contributions that reflect the round table presentations given by Professor Dirk Voorhoof, Toby Mendel, Páll Thórhallsson and Professor Frederick Schauer. In nine further articles, round table participants discuss various aspects of political speech and the role the media plays in it. Being structured in this way, the entire volume provides insights into the most important aspects of *political debate and the role of the media*, as well as experiences gleaned from 12 different countries, and relevant activities that the Council of Europe is currently engaged in.

The European Audiovisual Observatory is greatly indebted to all who participated in the round table and especially to Professor Jan Kabel (IViR), who chaired the discussion. In addition, colleagues at IViR made sure that the round table went "without a hitch". For the processing of the texts, the competence and reliability, and not least the speed of the translators and revisers, not to mention a number of other colleagues from the Observatory, was called upon. They have all contributed to the honing of the publication, and produced an excellent standard of work. Thanks are also due to the members of that team.

Strasbourg, December 2004

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Workshop Report: The Changing Hues of Political Expression in the Media

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Preface

This article is based on a workshop entitled “The changing hues of political expression in the media” which was jointly organised by the European Audiovisual Observatory and its partner organisation, the Institute for Information Law (IViR) of the University of Amsterdam. The workshop was convened on the IViR premises in Amsterdam on 19 June 2004. It seeks to give an accurate and comprehensive account of the wide-ranging discussion which took place at the workshop.¹ The topics broached in the course of that discussion have been rearranged for editorial purposes: a thematic rather than a chronological approach has been preferred. Additional information has also been introduced into the article wherever necessary in order to supplement and clarify information presented in summary fashion during the discussion. However, the four sections referring to the topics that structured the workshop discussions are mere summaries of the corresponding presentations given at the workshop.

Introduction

At the very core of the right to freedom of expression is the principle that political debate should be free, robust and uninhibited.² This has been consistently borne out by the case-law of the European Court of Human Rights and successive Council of Europe *prises de position* over the years. Most recently, its enduring place on the media agenda was reaffirmed by the Council of Europe Committee of Ministers’ Declaration on freedom of political debate in the media.³ This topic has always made for fascinating comparative analysis, owing to the highly divergent approaches to its regulation, reflecting diverse and deep-rooted societal concerns and priorities. This is all the more true in the present climate of constitutional and political reconfiguration in Europe, with the recent adoption of the new European Union Constitution and the historic enlargement of the Union. Furthermore, technological advances inevitably prompt new lines of enquiry and exploration as far as some aspects of political expression in the media are concerned and these factored into the workshop discussion at appropriate junctures.

The *forte* of the workshop was its comprehensive treatment of political expression in the media from a unique range of thematically cohesive perspectives; allied to a keen sense of how contemporary parameters of reflection and problem-solving are changing due to the enlargement of the European Union and the continuing growth spurts of broadcasting laws, policies and technologies, sometimes in

1) The author is grateful to all participants in the workshop for the information provided then, and afterwards, and in particular to Nico van Eijk and David Goldberg for their generous advice concerning the planning of the workshop. All errors and inaccuracies remain the responsibility of the author.

2) Paraphrasal of the United States Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

3) Adopted on 12 February 2004, available at: <http://wcm.coe.int/ViewDoc.jsp?id=118995&Lang=en>. See further: Christophe Poirel, “Committee of Ministers: Declaration on Freedom of Political Debate in the Media”, *IRIS* 2004-3: 3.

co-, self- and de-regulatory directions. All of this was enhanced by the discussion's tendency towards comparative analysis and examination of concrete examples.

As will be demonstrated *infra*, political expression in the media is subject to a vast array of regulatory measures which alternately seek to uphold certain standards in political debate; organise, control or restrict certain kinds of content relating to political expression; organise, control or restrict the modalities of distribution of political expression; guarantee or foster certain types of political expression, such as news, current affairs, official messages from State organs, and a plurality of voices generally. The nine country overviews published in this volume attest to the sheer diversity of regulatory mechanisms dealing with political expression currently in place at the national level. The overviews also explore various theoretical and practical issues concerning relevant regulatory measures.

What is Political Expression?⁴

The lynchpin for the protection of the right to freedom of expression in Europe is Article 10 of the (European) Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR), which 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. 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.

Thus, from an exegetical point of view, no distinction is made in Article 10 ECHR, between various forms of expression.⁵ Nevertheless, the European Court of Human Rights has, on occasion, relied on a rather convenient kind of classification of expression,⁶ whereby it recognises the main generic categories as being political, artistic and commercial:

Article 10 [...] does not apply solely to certain types of information or ideas or forms of expression [...], in particular those of a political nature; it also encompasses artistic expression [...], information of a commercial nature [...] - as the Commission rightly pointed out - and even light music and commercials transmitted by cable [...].⁷

Against the background of this rough scheme of classification, the European Court of Human Rights has traditionally attached different levels of legal protection to different categories of expression (with primacy for expression that is predominantly political in character, and considerably less protection for expression that is mainly of commercial coloration). This prioritisation can be explained by the centrality of freedom of expression to the broader vision of a democratic society which informs relevant judicial thinking.

Freedom of political debate is a *sine qua non* for healthy democracy. In *Bowman v. the United Kingdom*, for instance, it was held that, "[F]ree elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system."⁸ In *Lingens v. Austria*, the European Court of Human Rights ruled that it is "incumbent on [the press] to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to

4) This question is also tackled by Toby Mendel and Páll Thórhallson in their respective papers, *infra*.

5) See, *inter alia*, *Müller and Others v. Switzerland*, judgment of 24 May 1988, Series A no. 133, para. 27.

6) The Court's classification scheme has subsequently been replicated elsewhere, including in leading textbooks such as David J. Harris, Michael O'Boyle & Chris Warbrick, *Law of the European Convention on Human Rights* (London, Butterworths, 1995), with the result that it has now come to be used quite conventionally.

7) *Casado Coca v. Spain*, Judgment of the European Court of Human Rights of 24 February 1994, Series A no. 285, para. 35.

8) Judgment of the European Court of Human Rights of 19 February 1998, Reports of Judgments and Decisions, 1998-I, para. 42.

receive them.”⁹ The Court then proceeded in the same vein, averring that “freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention.”¹⁰ This stance has consistently been upheld – and indeed incrementally expanded in Article 10 ECHR case-law since. It is now generally taken to include debate on matters of public interest in a broader sense of the term.¹¹

It is interesting to note that the scheme of categorisation employed by the European Court of Human Rights has not necessarily been adopted by other international human rights judicial or quasi-judicial bodies. At the global (as opposed to European) level, the main source of legal protection for the right to freedom of expression is the International Covenant on Civil and Political Rights (ICCPR). Article 19 ICCPR reads:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

In the case of *Ballantyne, Davidson and McIntyre v. Canada*,¹² the United Nations Human Rights Committee rejected the argument that it is useful to categorise different types of expression in order to determine hierarchical levels of protection which each category should enjoy:

[...] Article 19, paragraph 2, must be interpreted as encompassing every form of subjective ideas and opinions capable of transmission to others, which are compatible with article 20 of the Covenant,¹³ of news and information, of commercial expression and advertising, of works of art, etc.; it should not be confined to means of political, cultural or artistic expression. [...] The Committee does not agree either that any of the above forms of expression can be subjected to varying degrees of limitation, with the result that some forms of expression may suffer broader restrictions than others.¹⁴

The case involved a challenge to legislation in Québec prohibiting the use of English for the purposes of advertising, e.g. on commercial signs outside the business premises, or in the name of the firm. The Human Rights Committee found that the applicants’ right to freedom of expression, as guaranteed by Article 19 ICCPR, had indeed been breached by the manner in which this legislation had been applied.

Thus, arguments of principle can be made for the desirability of treating all kinds of expression equally, or in like manner. A reluctance to classify and hierarchise expression can also be prompted by very practical considerations. Attempts to come up with a set of generic categories of expression rarely result in a system of classification that can boast watertight definitions: political, religious and artistic expression often have a (clear) commercial character as well, for instance. This definitional permeability can significantly reduce the usefulness of taxonomical distinctions, given the *de facto* hierarchisation of different categories of expression in the Court’s Article 10 jurisprudence. Continuing in this vein, it has been argued that:

9) Judgment of the European Court of Human Rights of 8 July 1986, Series A, no. 103, para. 41.

10) *Ibid.*, para. 42.

11) See further: *Thorgeir Thorgeirson v. Iceland*, Judgment of the European Court of Human Rights of 25 June 1992, Series A, no. 239; *Bladet Tromsø & Stensaaes v. Norway*, Judgment of the European Court of Human Rights of 20 May 1999, Reports of Judgments and Decisions, 1999-III; *Nilsen & Johnsen v. Norway*, Judgment of the European Court of Human Rights of 25 November 1999, Reports of Judgments and Decisions, 1999-VIII; *Fressoz & Roire v. France*, Judgment of the European Court of Human Rights of 21 January 1999, Reports of Judgments and Decisions, 1999-I; *Bergens Tidende & Others v. Norway*, Judgment of the European Court of Human Rights of 2 May 2000, Reports of Judgments and Decisions, 2000-IV.

12) *Ballantyne, Davidson & McIntyre v. Canada*, Communications Nos. 359/1989 and 385/1989, Views of the United Nations Human Rights Committee of 31 March 1993.

13) Footnote added by author: Articles 19 and 20 ICCPR should be viewed through the same optic. The latter reads: “1. Any propaganda for war shall be prohibited by law.”/ “2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

14) *Ballantyne, Davidson & McIntyre v. Canada*, *op. cit.*, para. 11.3.

[T]he taxonomy of expression employed by the European Court of Human Rights is broad-brush. While it may be useful for indicating more salient distinctions at the macro level, it fails to deliver on the necessary detail and precision at the micro level. This is largely a result of the blurring of definitional distinctions in practice, or “category crossover”,¹⁵ as it has also been called.¹⁶

If categories are blurred along the edges, one plausible solution would be to develop supplementary sub-categories. However, such an approach also involves some theoretical trouble-shooting; as pointed out by Frederick Schauer, sub-categorisation can create a danger of excessive doctrinal splintering.¹⁷

Topic 1: Towards a Categorisation of Political Expression (Special Focus on Advertising and Elections)

Political expression can, of course, take many forms, and Dirk Voorhoof’s categorisation of the miscellany of relevant forms (see further, *infra*) provides a useful framework for more specific discussions to follow. Distinctions (both conceptual and practical (e.g. regulatory)) between public and private utterances of a political nature are not always clear. A preoccupying problem in a number of countries at the moment is that of determining whether political advertising should be classed as advertising *simpliciter* (thus requiring the application of general advertising regulation); a type of advertising that should be subjected to stringent financial and content regulation owing to its potential impact on political or electoral processes, or a type of speech meriting enhanced protection by virtue of its democracy-enhancing goals. The perplexities associated with this categorisation underlie the discussion paper on political advertising issued in 2002 by the Council of Europe’s Standing Committee on Transfrontier Television.¹⁸ Special consideration will also be given to the various regulatory approaches pursued in relation to different media services.

The coverage of election campaigns (and (constitutional) referenda) by the media has been the subject of much international and national attention in recent years, for pretty self-evident reasons. At election-time, the general requirements that political debate be impartial and involve equality/equitability of access for relevant players acquire added acuteness. Elections in many states often attract accusations of improper practices, thereby underscoring the importance of reliable and unbiased reporting by the media if their “watchdog” function is to be fulfilled. Guidelines for party political broadcasts; the curbing of campaign finance for political messages; the regulation of the broadcasting of opinion polls, and the circumvention of relevant regulatory norms by means of technological innovation feature among the primary concerns in this connection.¹⁹

Topic 2: Restrictions on Political Expression

Tensions between tolerance, hate speech and robust political debate are highly topical in many countries at the moment, as are the perennial conceptual collisions between national security/anti-terrorism interests (which have been radically reappraised since September 2001) and vigorous political discussion. As pointed out in Toby Mendel’s paper, *infra*, while these issues are not necessarily related, they all help to shape the parameters of political expression in different ways. Defamation and privacy (both of which are frequently-cited grounds for restricting political expression) remain areas of law which are undergoing dynamic changes and reappraisal, not least because of technological developments. While the changing faces of defamation law and privacy law (concerning its relational and informational aspects alike) have been widely debated, the discussion here considers their impact specifically on political expression. By way of illustration, the defamation in a political context includes a consideration of the legitimacy of criminal defamation laws; questions of jurisdiction for defamatory

15) Colin R. Munro, “The Value of Commercial Speech”, 62 *Cambridge Law Journal* No. 1 (March 2003), pp. 134-138, at 149.

16) Tarlach McGonagle, “Commercial expression – the usefulness of an imperfect notion?”, in Eoin O’Dell, forthcoming. See further: *Barthold v. Germany*, *Stambuk v. Germany*, *Hertel v. Switzerland*, *VgT v. Switzerland* and *Murphy v. Ireland*.

17) Frederick Schauer, “Commercial Speech and the Architecture of the First Amendment”, (1988) 56 *Cincinnati Law Review* 1181, at p. 1199. See further, *ibid.*, p. 1200.

18) *Discussion paper by Secretariat on political advertising*, Doc. No. T-TT (2002) 025, 32nd meeting of the Standing Committee on Transfrontier Television, 12-13 December 2002, available at: http://www.coe.int/t/e/human_rights/media/5_Documentary_Resources/2_Thematic_documentation/Broadcasting_&_convergence/PDF_T-TT_2002_025%20E%20Political%20advert-1.pdf

19) For a longer inventory of relevant issues, see Yasha Lange, *Media and elections: Handbook* (Strasbourg, Council of Europe, 1999), available at: http://www.coe.int/t/e/Integrated_Projects/democracy/Media&Elections.pdf. See also, *Election Reporting: a Practical Guide to Media Monitoring* (London, ARTICLE 19, 1998) and Bernd Peter Lange & David Ward, Eds., *The Media and Elections: A Handbook and Comparative Study* (Lawrence Erlbaum Associates, forthcoming).

statements distributed on the Internet and the continued pre-condition for open and rigorous political debate that politicians be more thick-skinned than ordinary members of the public. Privacy in a political context, for its part, presents issues pertaining to the collection and processing of personal data for political purposes, such as the compilation of voter profiles or the dissemination of political or electoral messages. Topic 2 also embraced an analysis of miscellaneous other factors impinging on political expression in the media, e.g. relevant structural considerations such as ownership-related regulations.

Topic 3: Political Expression and the Media: Council of Europe Objectives and Synergies

The Declaration on freedom of political debate in the media deals squarely with issues touched upon by previous Committee of Ministers' Recommendations and Declarations (freedom of communication on the Internet; measures concerning media coverage of election campaigns; the media and the promotion of a culture of tolerance; the right of reply (see in this connection, the draft Recommendation on the right of reply in the new media environment), and others). The approach adopted by Páll Thórhallsson in his paper, *infra*, uses the Article 10 ECHR *jurisprudence* of the European Court of Human Rights as the back-drop to its examination of the aforementioned Committee of Ministers' statements dealing with freedom of political expression.²⁰ As the term political expression is understood in a broad sense of the word, the paper then proceeds to catalogue various ongoing initiatives by the Council of Europe which aim to promote freedom of political expression in a wider context.

Topic 4: A U.S. Perspective on Political Expression in the Media

The operative part of the First Amendment to the U.S. Constitution reads: "Congress shall make no law [...] abridging the freedom of speech, or of the press [...]". However, the force of this provision in practice goes far beyond its literal strength, as is convincingly demonstrated in Frederick Schauer's paper in this *IRIS Special*.

At a first and formalistic glance, it may seem somewhat disingenuous to compare the U.S. free speech tradition (the product of one country's legal order) and that of the Council of Europe (an international, intergovernmental organisation), as is done in the present report. However, even if this could technically be considered a comparison between apples and pears, the points of comparison and contrast are far too interesting and instructive to avoid a concerted examination of two different legal orders on a common theme. The fact is that both have developed qualitatively different regimes for the protection of freedom of expression. It is therefore actually very natural to want to consider the qualitative differences between both legal cultures of protection. The approach to freedom of expression that prevails in Europe is more relativist than the "purportedly absolute"²¹ approach of the U.S., and this is at least partly explained by American society having the character of a "*tabula rasa* society":²²

Although the modern genesis of the right to freedom of expression may be traced to the common conceptual crucible of Enlightenment thinking in Europe, the intellectual and practical evolutions which the concept has undergone in Europe and in the US have been far from identical. Kevin Boyle explains that this state of affairs has been heavily influenced by the fact that the U.S., a "'drawing board' society built by immigrants made possible the assertion of new principles of democratic republican order."²³

20) Relevant instruments adopted by the Committee of Ministers include: Declaration on freedom of political debate in the media (2004); Declaration on freedom of communication on the Internet (2003); Rec (2002) 2 on access to official documents; Rec (2000) 7 on the right of journalists not to disclose their sources of information; Declaration on cultural diversity (2000); Rec (99) 15 on measures concerning media coverage of election campaigns; Rec (99) 1 on measures to promote media pluralism; Rec (97) 21 on the media and the promotion of a culture of tolerance; Rec (97) 20 on "hate speech"; Rec (96) 10 on the guarantee of the independence of public service broadcasting; Declaration on the protection of journalists in situations of conflict and tension (1996); Rec (96) 4 on the protection of journalists in situations of conflict and tension; Declaration on freedom of expression and information (1982), all available at: http://www.coe.int/t/e/human_rights/media/5_Documentary_Resources/1_Basic_Texts/2_Committee_of_Ministers'_texts/List.asp#TopOfPage

21) Luzius Wildhaber, "The right to offend, shock or disturb? – aspects of freedom of expression under the European Convention on Human Rights", Sixth Annual RTE/UCD Lecture in the series: Broadcasting, Society and the Law, Dublin, 11 October 2001, and also published under the same title: (2001) xxxvi *Irish Jurist* 17.

22) Kevin Boyle, Address on 8 December 1999, Human Rights Centre, University of Essex, England. See further: Tarlach McGonagle, "Wresting (Racial) Equality from Tolerance of Hate Speech", (2001) 23 *Dublin University Law Journal* (ns) 21.

23) Kevin Boyle, "Overview of a Dilemma: Censorship versus Racism" in Sandra Coliver (Ed.), *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* (Essex, ARTICLE 19 & University of Essex, 1992), pp. 1-9, at 4.

In any event, a crucial point of commonality between both legal systems under scrutiny is that both of them show considerable deference to the right to freedom of expression, which derives firstly from its importance to democracy, and secondly from “the primordial place of democracy”²⁴ within those legal systems. Finally, to undertake a comparative analysis such as this in an open-minded spirit attests to what Kevin Boyle has termed “the emergence of a global village of precedent.”²⁵

In the U.S., political expression – in all of its multifarious aspects – has achieved a very high level of constitutional and judicial protection, not to mention rich and copious scholarly attention. A comparison of (regulatory) approaches to pertinent issues on both sides of the Atlantic proved highly instructive for the workshop. After examining any putative lessons to be learnt from the U.S. approach, this focus led to a round of reflection and discussion drawing on similarities and divergences in country-specific approaches.

Report of Workshop Discussion²⁶

Constitutional Matters

In constitutional terms, the most significant event of the past months has been the adoption of the new European Union Constitution,²⁷ which *inter alia* incorporates the (Nice) Charter of Fundamental Rights of the European Union.²⁸ Article 11 (Freedom of expression and information) of the Nice Charter:

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.

Article 11 has a dual objective. First, it seeks to provide a modernised articulation of Article 10 ECHR, which would implicitly crystallise and incorporate the body of case-law developed by the European Court of Human Rights over the years.²⁹ It is likely that over time, the above-quoted provision will become the pinnacle of the European Union’s approach to freedom of expression. Provided this prediction comes true, there is likely to be much questioning about which provision should be regarded as *the* primary source of fundamental protection for the right to freedom of expression, information and opinion at the European level. Pending such developments, however, this recognition is reserved for Article 10 ECHR.

The freedom to hold opinions, alluded to in Article 10(1) ECHR, can be regarded as an internal element of the overall right to freedom of expression. Given its internal, non-public nature, it cannot be subject to the restrictions envisaged in Article 10(2). This presumption of non-interference with the right to hold opinions is put more explicitly in Article 19(1) ICCPR (quoted *supra*). It was noted in passing that the right to remain silent – as enshrined in some national constitutions, for example - would not necessarily be breached by a law coercing voting, at least insofar as the law would allow for abstentions within the voting process.

It was felt that in the jurisprudence of the European Court of Human Rights, the right to express information has enjoyed greater attention and development than the right to receive information.

24) Luzius Wildhaber, “A constitutional future for the European Court of Human Rights?”, in 23 *Human Rights Law Journal* (No. 5-7, 2002), pp. 161-165, at p. 162.

25) Kevin Boyle, *op. cit.*, 1999.

26) The following text is a report of a workshop discussion, and as such, the views reported are not necessarily shared by all participants in that workshop, the Institute for Information Law (IVIR), the European Audiovisual Observatory, or the Council of Europe.

27) Provisional consolidated version of the draft Treaty establishing a Constitution for Europe, approved by the Conference of the Representatives of the Governments of the Member States [of the European Union] on 18 June 2004, Doc. No. CIG86/04 (Brussels, 25 June 2004), available at: http://europa.eu.int/futurum/eu_constitution_en.htm

28) Charter of Fundamental Rights of the European Union, Nice, 7 December 2000, as published in the *Official Journal of the European Communities* of 18 December 2000, C 364/1. See further: Susanne Nikoltchev, “European Convention: Towards Protection of Freedom of Information through EU Charter”, *IRIS* 2000-9: 4.

29) See further: Paul Mahoney, “The Charter of Fundamental Rights of the European Union and the European Convention on Human Rights from the Perspective of the European Convention”, 23 *Human Rights Law Journal* 300-303 (2002).

Nevertheless, the Court has consistently held that “[n]ot only do the media have the task of imparting such information and ideas: the public also has a right to receive them”.³⁰

It stands to reason that certain readings of Article 10 ECHR, which would afford the right to receive information greater weighting than has hitherto been the case also have implications for the right to impart information. On one such reading, the right to impart information (in other words, the rights of speakers) could be conceived in instrumental terms, thereby furthering the Millian truth-seeking theory that it is of cardinal importance that a wide range of ideas and information be able to circulate freely in society.

So construed, the right to receive information could be bolstered by greater protection for journalistic sources and whistle-blowers, and even for anonymity in the context of public debate. The last suggestion is admittedly more controversial, however. While there may be certain circumstances in which the anonymous publication of information could be in the public interest or promote public debate, the Swiss Federal Court ruled in 2002 that “Public debate has to be fair, which means in particular that the author’s identity has to appear on billboards or documents”. The case in which this pronouncement was made resulted in the conviction of the author of anonymous billboard posters attacking female politicians who were supporting a proposal to legalise abortion during the first 12 weeks after conception.³¹ Notwithstanding the elevated threshold of tolerance for statements made in the context of political discussion, the Court took the view that the deliberate concealment of the author’s identity in the case before it was disserving the ideal of open public debate.

Pursuing this logic further, one could argue that if the right to impart information really was designed to be an end-goal in itself and thus more than merely functionalist or instrumentalist or facilitative, far wider rights of individual liberty and individual expression should be granted than is currently the case in most States.

The notion of a collective right to receive information has not been without its critics,³² not least because of the numerous (procedural) questions it raises about its judicial enforceability: who would count as a victim?, who would qualify to have *locus standi*?, who would be held to have failed to provide the complainant with what information?

One argument used to counter the above reservations about the enforceability of the right to receive information is that the right involves the reception not so much of particular pieces of information as of information generally – and in a systematic manner. Thus styled, it is a right to receive in the sense of a pluralism of voices rather than the right to receive particular points of information, which could be a much more contentious proposition.³³

According to the “living instrument” doctrine, the European Court of Human Rights is empowered to read new obligations into Article 10 ECHR, thereby allowing it to evolve with the times. In the *Lentia* case, the Court ruled that the State is the “ultimate guarantor”³⁴ of pluralism in the audiovisual sector. It also found that of all the possible means for upholding pluralism and other values, a public monopoly in broadcasting (such as the one under scrutiny in the case at hand) “is the one which imposes the greatest restrictions on the freedom of expression”.³⁵ The Court was not proactive in developing any positive obligations in this respect: it was only after most Council of Europe States had introduced licensing systems for private broadcasting that the Court altered its case-law in *Lentia* to reflect this development and state that there was a positive obligation to facilitate the development of pluralism in the private broadcasting sector as well.³⁶

While the case-law emanating from Strasbourg is firm on the negative obligations relating to public debate, the same cannot be said about its track record in carving out corresponding positive obligations. Indeed, the Court has been much more willing to countenance – and find violations of –

30) *The Sunday Times (No. 1) v. United Kingdom*, Judgment of the European Court of Human Rights of 26 April 1979, Series A, No. 30, para. 65.

31) See further, Franz Zeller, *infra*, Switzerland: Freedom of Political Expression in the Media – Selected Issues, at 2.1.

32) See, for example, Ronald Dworkin, “Is the Press Losing the First Amendment?”, *The New York Review of Books*, 4 December 1980.

33) Although one notable exception to this general proposition would be the systematic abuse of human rights, in which case the public would have an incontrovertible right to know what took place.

34) Para. 38.

35) Para. 39.

36) This can even be deduced from the judgment itself: see paras. 36 and 39, for example.

positive obligations on States in relation to, for example, privacy interests safeguarded by Article 8 ECHR. Notwithstanding its (divisive) judgment in the *Hatton* case³⁷ (concerning flights over Heathrow airport), the Court has gone quite far in its Article 8 *jurisprudence* requiring Member States to create appropriate procedures and safeguards so as to avoid violations of the right to privacy and family life. There is arguably little or no such precedent in the Article 10 case-law, e.g. to guarantee certain procedures on the fairness of public debate (see *supra* for the tendency of the Court to leave such matters for determination by the journalistic profession itself). In the *Murphy* case,³⁸ which upheld a prohibition on the broadcasting of religious advertising, the Court showed considerable deference to the margin of appreciation doctrine. In Ireland there are parallel prohibitions on religious and political advertising,³⁹ which suggests that the finding in *Murphy* could have analogous application.

To date, the Court has appeared reluctant to impose positive obligations on States as regards the disclosure of information. This reluctance was affirmed most recently in the case of *Sirbu and others v. Moldova*,⁴⁰ concerning, *inter alia*, public access to official governmental information. The Court held that freedom of information (as interpreted in the *Leander* case⁴¹) “cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to disclose to the public any secret documents or information concerning its military, intelligence service or police.”⁴² In the *Sirbu* case, the applicant fire inspectors contended that the secrecy of a governmental decision concerning their financial entitlements as personnel of the Ministry of Internal Affairs was in violation of their right to be informed, as guaranteed by Article 10 ECHR. In reaching its conclusion, the Court distinguished between the right of the public to receive information “as a corollary of the specific function of journalists, which is to impart information and ideas on matters of public interest”,⁴³ on the one hand, and a positive obligation on the State to render Government decisions public, on the other.

It was submitted at the workshop that the Court missed a historic opportunity on this occasion by failing to countenance a general right to access official documents under Article 10 ECHR. While the Council of Europe has adopted various documents promoting access to official documents, most notably the Committee of Ministers’ Recommendation Rec (2002) 2 Access to official documents,⁴⁴ these are no more than so-called “soft-law” which are not subject to direct enforcement by the European Court of Human Rights. At the present time, most if not all Member States of the Council of Europe have put in place laws and structures allowing for varying levels of access to official documents. The Court’s judgment did not give any in-depth exploration to the developing nature of the right to information at the national level.

Right of persons or parties to have content broadcast in principle does not exist, an issue could arise under Article 14 ECHR (prohibition of discrimination), for example in the context of discriminatory policies towards certain political parties or candidates around election-time. This basis for preventing discriminatory access could also be a platform on which procedures to ensure pluralism could be built. It could be used to develop procedures to allow minority groups representation in the media, or procedures to safeguard balanced public debate between government and opposition parties. Local content or content targeting minors could be prioritised in the same fashion. The modalities for doing so are numerous (although the means of enforcement of such a collective right could remain problematic). One illustration would be the German example whereby the goal of pluralism has given rise to an obligation to include regional windows in private broadcasting. Such windows ought to be used for reporting on public policy issues, although in practice, the output may only amount to infotainment or human interest stories.

37) *Hatton and others v. the United Kingdom*, Judgment of the European Court of Human Rights (Grand Chamber) of 8 July 2003, Application No. 36022/97.

38) *Murphy v. Ireland*, Judgment of the European Court of Human Rights (Third Section) of 10 July 2003, Application No. 44179/98.

39) See Section 10(3) of the Radio and Television Act 1988 (which governs the independent broadcasting sector) and Section 20(4) of the Broadcasting Authority Act 1960 (concerning the public service broadcaster). Note, however, that the ban on religious broadcasting has been attenuated somewhat by the Broadcasting Act 2001. See further: Tarlach McGonagle, *infra*, Ireland: an Overview of Selected Issues on Freedom of Political Expression, at 6.

40) *Sirbu and others v. Moldova*, Judgment of the European Court of Human Rights (Fourth Section) of 15 June 2004.

41) *Leander v. Sweden*, Judgment of the European Court of Human Rights of 26 March 1987, Series A, no. 116. In the *Leander* judgment, the Court stated that the freedom to receive information *per* Article 10(2), ECHR: “basically prohibits a government from restricting a person from receiving information that others may wish or be willing to impart to him” (para. 74).

42) *Ibid.*, para. 18.

43) *Ibid.*, para. 17.

44) Adopted on 21 February 2002.

Political Expression in the Media: What Kind of Regulation Is Necessary in a Democratic Society? (Topic 1)

There is a high degree of interdependence between the media and politics, and this interdependence is rarely more evident than during media coverage of (pre-)election periods. However, owing to the number and diversity of factors influencing this interdependence, it can be exceedingly difficult to gauge the precise impact of the media on political communication in an electoral context.

A vast array of rules and regulations governing opportunities for, and restrictions on, political communication generally, as well as particular forms and modalities of political expression, exist throughout the sweep of European States. These are meticulously schematised as an appendix to Dirk Voorhoof's paper (*infra*). Regulation inevitably begs questions about supervision and enforcement: questions that are particularly relevant in the case of political expression, given the extreme variety of regulatory modes involved.

Underlying this mass of regulatory instruments lies an abundance of sociological theory, the complex ramifications of which are also highlighted. First of all, various media models have been developed, cursorily summarised as: "from the determinist hypodermic model (*stimulus-response*) over the theories of minimal consequences to the null effects-approach, with in between theories and studies focussing on multi-step influences, uses and gratifications, agenda-setting, reinforcement effect, cognitive dissonance, spiral of silence, the mediatisation of politics...".⁴⁵ The slickness of political campaigns and divergent interpretations of messages among members of the public can be relevant. Broader societal factors, too, especially patterns of media consumption, help to shape individual attitudes and political preferences. As a consequence, the ability of the media to sway public opinion is but one of the determinative factors at play.

Homing in on recent Belgian electoral experience could serve to illustrate the complex interaction of the aforementioned factors. The most recent electoral fortunes of the *Vlaams Blok* – an extremist right-wing party – are central to this analysis. The party received almost 25% of the votes cast in the Flemish Community in the elections which took place on 13 June 2004. The reasons for this upsurge in support for the *Vlaams Blok* – which is all the more surprising given the comparative regression of electoral support for extreme right-wing parties elsewhere in Europe – are probed *infra*. For present purposes, it is crucial to note that the electoral advances were scored despite (i) very negative (mainstream) media coverage of the party, its policies and activities (including of its members) prior to the elections, (ii) a court ruling that found the party to be guilty of incitement to racism and discrimination, and (iii) reduced access for the party to political programmes broadcast by the Flemish public service broadcasting organisation, VRT. This reduced access stems from internal VRT policy which precludes it from being a vehicle for the dissemination of statements or opinions of parties that do not respect democratic values and openly incite to hatred. Furthermore, the VRT has committed itself to foster tolerance in society and promote community relations in pluriethnic and multicultural societies. Another relevant consideration is that the Flemish Parliament decided in 2002 to abolish VRT's obligation to allocate television broadcasting time to parties represented in the Flemish Parliament.

Although an extensive battery of regulations and restrictions has been elaborated in order to equalise the structures and other conditions of political debate, these must be measured against the standards developed by the European Court of Human Rights, in particular in its Article 10 jurisprudence. A key tenet of this jurisprudence is that there is little scope for restrictions on political speech or on debate on questions of public interest.

A list of statements has been formulated in order to stimulate further careful assessment of the relevance/necessity of certain types of regulation and restrictions concerning political expression, the media and elections. Each of these self-contained statements invites, or rather, demands, further careful analysis. Taken together, they confirm that there is much more reflection and discussion still to be done on these pressing questions:

- "Political advertising" on television is no advertising from the perspective of the Television Directive 89/552/EG (art. 1, c) and should not be treated as "commercial speech" from the perspective of Article 10 of the European Convention.

45) See further, Dirk Voorhoof, *infra*, Political Expression in the Media: What Kind of Regulation is Necessary in a Democratic Society?, at 4th paragraph after the quote.

- A total prohibition of paid political advertising on television is considered by the European Court of Human Rights as a legitimate restriction on the freedom of expression necessary in a democratic society. This is contradictory to the fact that in some democratic societies paid political advertising on television is allowed and is not (considered as) endangering democracy.
- Political advertising on television ought to be restricted, but not banned, because a total ban is a disproportionate restriction on the freedom of expression.
- If candidates and parties have fair access to airtime for free political advertising during election campaigns, there is less (or no?) need for paid political advertising.
- A television channel should not refuse the broadcasting of a political ad, arguing that the content is illegal, since the competence to decide upon the illegal character lies with the judiciary (or any other competent authority).
- Enforcement by law of a pre-election opinion poll silence is in breach of the freedom of expression as guaranteed by Article 10 of the Convention.
- From the perspective of Article 10 of the Convention, there cannot be at the same time little scope for restrictions on political speech and a wide margin of appreciation for the member states legitimating interferences with political broadcasting and reporting opinion polls.⁴⁶

Political Advertising

Within political advertising as a category of political expression, an important distinction should be made between paid political advertising and free political advertising (i.e., airtime allocated to all registered political parties, or all political parties with parliamentary representation, etc.). Policies of allocation and regulation are of crucial importance here, as are general measures designed to ensure standards of equality and fairness across the board. A whirl of other questions is also of relevance: whether governmental organs should have direct access to the airwaves for the dissemination of official information, and if so, whether this access should be limited to public service broadcasting. The extent of rights/opportunities of reply by opposition parties and the public at large are important considerations. Whether negative campaigning should be permitted on the broadcast media can also lead to controversial positioning, particularly in States with serious social divisions and tensions. The focus here will be mainly on (paid) party political advertising and issue-oriented advertising.

Two of the most persuasive rationales for restricting or, *a fortiori*, prohibiting (certain forms of) political advertising in the broadcast media are that such advertising would:

- (i) Lead to divisiveness in society and give rise to public order concerns, or
- (ii) Favour those who can muster greatest financial resources (the so-called "level playing field" argument)

A third plausible rationale – the preservation/promotion of the quality of political debate – is invoked somewhat less frequently, possibly because it is fraught with dangers of subjectivity and line-drawing. One of the main dilemmas to be faced here concerns the media and the level of plurality in their output. Tapping once again into the discussion, *supra*, of positive obligations by which the media could be bound: should the mainstream media be strengthened by special privileges on the basis that they reach the greatest number of people or should fringe media be promoted in order to ensure that fringe constituencies and interest groups are catered for? Or, to tackle the question from a different angle, should the dominant media be required to broaden the array of voices included in their services? More fundamentally, it could be asked whether all voices ought to be heard or just the most relevant or most effective ones?⁴⁷ The answer to the question should turn not only on the information offer, but also on the right to receive information.

46) For the full list of statements formulated by Dirk Voorhoof, see *infra*, statements 1. to 9. (end of article).

47) See further: E.J. Dommering, "Advertizing and Sponsorship law, Problems of partly liberalized Markets", *Europäisches Medienrecht*, Berlin: Jehle Rehm 1998, Schriftenreihe des Instituts für Europäisches Medienrecht, Band 18, Saarbrücken, 49-60.

The expressed fears of social division and the domination of debate by those parties with the deepest pocket can, of course, also exist simultaneously. A case in point is Kosovo, where the violence that erupted in March 2004 testifies to the potential of media output for having an impact on an already divided society.⁴⁸ In addition, it is proposed to introduce paid political advertising on television and radio for parliamentary elections. The regulatory challenge ahead will have to contend with an absence of transparent funding as regards the three dominant political parties and television stations without any transparent pricing policies. A cautionary note can be sounded about the potential impact of paid political advertising: “where the political system is in flux and voter volatility rises [...] the image component [of political advertisements] may grow in importance, which may again make political advertising on television a more powerful tool for those who have the resources to use it”.⁴⁹

On closer examination of Dirk Voorhoof’s categorisation of political expression, it emerges that as far as paid political advertising is concerned, there is an entire spectrum of regulatory possibilities, stretching from an outright ban to virtually unlimited scope. As posited by Tom Moring, *infra*, “[B]etween the extreme alternatives of total ban and total laissez-faire, limitations may concern campaign expenditure, non-discriminatory rules, regulations on transparency of access and tariffs, price, spending limits, length, disclaimers, silence time before Election Day and content restrictions.”⁵⁰ In the United States, restrictions on political advertising are virtually non-existent. In practice, the distinction between whether a political advertisement can also be classed as commercial or not is largely irrelevant as so much protection is accorded commercial advertising anyway.

Finland, for its part, also lies close to the unregulated end of the spectrum, for no spending, time or content limitations have been set by the Finnish regulatory authorities. The only relevant content limitations applied specifically to paid political television advertising were devised – voluntarily – by MTV3, the largest commercial television station in the country. These limitations comprise a refusal to broadcast personal attack advertisements and mixed product/political advertisements. As MTV3 is the market leader in commercial television broadcasting, (i) the standards it sets tend to be followed by other broadcasters, and (ii) political spots are usually produced for broadcasting on that channel, but are also used on other channels as well.⁵¹ While this system might seem to disadvantage smaller or new parties, there is empirical evidence to show that the contrary is indeed the case. The 2004 campaign directors of the three smallest parliamentary parties in Finland have declared themselves to be in favour of the *status quo*. One reason (mentioned by a party that does not use paid political advertising) is that they are largely satisfied with their image in the public eye and can therefore use the State funding which they receive – like other parties – for purposes which they find to be more effective for their advancement. Another reason (mentioned by a party that does use paid political advertising) is that small parties find it hard to get into the limelight of television news, and paid political advertising provides a path to added TV-visibility also for them.⁵²

Despite clear tendencies towards lighter touch regulation in the broadcasting sectors of many European States, it remains somewhat exceptional for paid political advertising via the broadcast media to be permitted at all, never mind virtually unregulated. Yet this has been the case in Finland since 1991 and plans are afoot in Norway to also remove the prohibition.⁵³ Despite the deregulated character of the Finnish approach, its political system has remained consistently stable, with the three main parties routinely collecting almost 65% of votes cast. Crucial to a proper understanding of how the non-regulated system works in practice is a cost-effects analysis of party-political expenditure on advertising, and its impact on the electorate.

In this connection, a number of factors have to be weighed up: the size of the overall campaign budget; the cost of mounting advertising campaigns in the various media and their comparative levels of impact; the specific features of television advertising (high production and diffusion costs; the need to repeat advertisements to make impact; the short time-span for transmitting a message means that emphasis is placed on an imagistic approach); the rise in popularity of information-seeking media such as the Internet (among certain sections of the electorate).

48) See further, Bob Gillette, *infra*, Kosovo: Media and the Riots of March 2004. For a more comprehensive treatment of these events, see also the Temporary Media Commissioner’s report on the link between media reporting and violence in Kosovo in March 2004, available at: http://www.osce.org/documents/mik/2004/04/2765_en.pdf

49) Tom Moring, *infra*, Finland: A Reality Check – 10 Years of Paid Political Advertising on TV at 4.

50) Tom Moring, *infra*, introduction

51) See further, Tom Moring, *infra*, at 2.

52) See further, Tom Moring, *infra*, at 3.

53) For further details of this proposal, see Tom Moring, *infra*, at 1.

Hitherto, the focus has been on party political advertising. Issue-oriented advertising can also assume a manifestly political character and this, too, can attract regulatory censure, if restrictive statutory or other provisions are in place. In the early 1980s, a particularly striking advertisement (reproduced as Figure 1), used as part of a campaign against the apartheid regime in South Africa ended up as the subject of a famous court case. The advertisement in question read (in translation), "Do not consume [South African] Outspan oranges. Do not squeeze a South African",⁵⁴ and graphically depicted a native South African's head being squeezed on a lemon squeezer. It was publicly condemned by the self-regulatory Dutch *Reclame Code Commissie* (Advertising Code Committee) for breaching the Code's prescribed standards of decency and good taste and the condemnation was upheld by its *College van Beroep* (Code Appeal Board). The condemnation consisted of a recommendation to publishers (of newspapers and magazines) that the advertisement should not be published.

Figure 1



The campaign organisers, *Boycot Outspan Aksie* (BOA), initiated a civil action against the Committee before the Amsterdam Court, claiming that the Committee had acted *ultra vires* its powers (as their advertisement was non-commercial in character). BOA also claimed that the boycott of their advertisement by publishers, which had resulted from the Committee's public condemnation, constituted a violation of their right to freedom of expression.

The Amsterdam Court reversed the pronouncement of the Code Committee. The Court found that while it was within the mandate of the Committee to consider non-commercial as well as commercial advertising, it should nevertheless exercise greater restraint in evaluating the former. The Court agreed that the boycott of the impugned advertisement had amounted to a serious interference with BOA's right to freedom of expression. The advertisement should only have been condemned if it had offended the sense of good taste and decency of a majority section of society to an extreme degree, and was liable to make readers ill-disposed towards any publication carrying the advertisement, the Court continued. This was patently not so in the present case, it concluded. Thus, it was left to individual publishers to decide for themselves whether or not they would publish the advertisement.⁵⁵

In Ireland, there is a prohibition on broadcast advertising towards a political end: a formulation that has given rise to some interpretative difficulties. Some of the advertisements which have been found to come under this provision include: an anti-abortion organisation; books (an autobiography and a collection of short stories) by a prominent politician; a concert organised as part of an anti-war

54) *Eet geen Outspan sinaasappelen. Pers geen Zuid-Afrikaan uit.*

55) Ruling of the Amsterdam Court, 30 October 1981, *Nederlandse Jurisprudentie* 1981, 422. See further: Jan Kabel, *Praktijkboek Reclamerecht*, Ch. XII B, nr. 3 (Deventer, Kluwer, Suppl. 1995).

campaign (and in particular in protest at the proposed visit of U.S. President George Bush to Ireland). These examples of contested notions of what is political (i.e., in the narrow sense of electoral politics or in the more expansive sense of debate on matters of public interest) point to a definitional dilemma that has been experienced in many States.⁵⁶

In Switzerland, a prohibition on paid political advertising on television and radio also applies. In the past, the Federal Court tended to interpret the notion of political advertising broadly. However, in the case of *Verein gegen Tierfabriken (VgT) v. Switzerland*, the European Court of Human Rights found such a broad interpretation of the notion to be in violation of Article 10 ECHR, in the particular circumstances of the case. The facts of the case involved a refusal to broadcast a television commercial against the meat industry which was produced by an animal rights organisation. Following this ruling against them, the Swiss authorities have since opted for a more restrictive interpretation of the relevant legislative provision. It is now only in the context of elections and popular ballots (which can take place on a whole range of social and political issues) that the broadcasting of political advertisements – even when treating very divisive issues – is prohibited. The relevant competent authority makes a public announcement in respect of the commencement of the pre-voting period.

As part of the ongoing debates in the Swiss Parliament concerning the revision of the existing Radio and Television Act, there has been a proposal to abolish the prohibition altogether. In March 2004, a majority of one chamber of Parliament favoured removing the prohibition on political and religious advertising. The underlying arguments for and against such prohibitions in broadcasting taken on a rather unique character in Switzerland, owing to the country's system of direct democracy:

“[T]he system depends on affording a degree of equality of opportunity to the different interest groups. This thinking requires that financially powerful groups be prevented from obtaining an even bigger competitive political advantage. For two reasons this problem may be more serious in Switzerland than anywhere else: first, political parties rely almost exclusively on contributions made by party members or private donors to fund their campaigns, because the Swiss parliament has rejected all moves towards a system where the state contributes substantially to the funding of political parties. And second, due to the system of direct democracy voting is much more frequent in Switzerland than in any other European state.”⁵⁷

The above discussion has demonstrated that it is not always easy to determine whether a broadcast message can be classed as advertising, let alone political advertising. The Spanish case of *Hay Motivo* (“There is a reason”) shows just how blurred the definitional curves can be.⁵⁸ The case involved a film, *Hay Motivo*, which comprised 32 short pieces portraying various aspects of Spanish social and political reality. The *Partido Popular* (Popular Party) claimed to be targeted by the film, which it considered to be a political advertisement. There is a general prohibition on televised political advertising in Spain. Against this background, the public service broadcaster, TVE, and private television channels opted not to broadcast the film during the election period, and only a few local television stations broadcast it before the elections. Nevertheless, the film was available for downloading via the Internet, which prompts questions about the effectiveness of prohibitions on other media.

Broadcasting is more heavily regulated than other mass media, a fact usually attributed to spectrum scarcity in the past, as well as the impact and influence of the broadcast media. While other forms of mass media do not come within the focus of the present discussion, it may nevertheless be worth mentioning in passing that London borough sued two record companies, Sony and BMG, for fly-posting,⁵⁹ under a new instrument, the Anti-Social Behaviour Act.⁶⁰ If applied to political advertising, this legislation would enable Government regulation of fly-posting to affect the climate around election time and thereby the general awareness of parties and issues.⁶¹

56) See further, Tarlach McGonagle, *infra*, at 6.

57) Franz Zeller, *infra*, at 4.

58) See further, Francisco Cabrera, Spain: Open Questions regarding Political Expression and Elections, *infra*, at 2.

59) See further: Steven Morris, “Sony promises to stop flyposting after court threat”, *The Guardian*, 15 June 2004, available at: <http://society.guardian.co.uk/crimeandpunishment/story/0,8150,1238840,00.html> ; Matt Born, “Sony backs down in flyposting row with council”, *The Telegraph*, 15 June 2004, available at: <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2004/06/15/nfly15.xml>

60) UK Anti-social Behaviour Act 2003 (s. 43 Penalty notices for graffiti and fly-posting), available at: <http://www.hmso.gov.uk/acts/acts2003/20030038.htm>

61) Similarly, environmental protection/anti-litter measures also have restrictive potential for the free circulation of political pamphlets.

Media and Elections

Political expression becomes particularly acute during election periods. This explains why different regulatory paradigms and practices often govern broadcasting coverage of the same. The primary concerns from the point of view of the regulator are maintaining a level playing field in political discussion transmitted by broadcasters and upholding the standards of such discussion. Another question concerns the recent emergence of new formats in broadcasting, such as tele-voting (drawing on audience appreciation) and participation by politicians in infotainment shows. Whether these new formats will be subject to new, specific or traditional regulation, or indeed, self- or co-regulation, remains to be seen.

In Italy, political communication, including during election time, is governed by the detailed Political Communication Act 2000 (as amended). This Act guarantees that all bodies of a political nature are granted equal access to programmes on radio and television containing political content (e.g. party political broadcasts, debates, interviews, etc.). The public service broadcaster (RAI) and free-to-air private national broadcasters are under an obligation to broadcast such programmes. During the 45 days preceding an election, the presence of political subjects is determined on the basis of criteria relating to the representativeness of the parties.

Political parties, coalitions and candidates are entitled to have political advertisements (officially known as *messaggi autogestiti*) broadcast free of charge on national broadcasters (public and private) and for half the usual rate on local broadcasters.⁶² Such messages can last between one and three minutes where the chosen medium is television and between 30 and 90 seconds on radio. Although there is a general ban on national broadcasters carrying paid political advertising, an exception is made for those national broadcasters who broadcast these *messaggi autogestiti*. The underlying thinking is that the mechanism should be virtuous, balancing the interests of parties and broadcasters alike.

There can be considerable divergence in regulatory approaches to the broadcasting of opinion polls; a term which can itself usefully be subdivided into polls on general attitudes to politics; voting intention polls, and exit polls. Another variant on this theme is the imposition of a "silence time" between the end of an election campaign and the conclusion of voting. In Poland, such an arrangement applies to the publication of the results of public opinion polls treating probable voting behaviour and election results. The argument usually advanced in defence of restrictions or temporal prohibitions on the broadcasting of various kinds of opinion polls is that they can have undesirable or perverse effects at critical stages of the voting process. A contiguous argument is that the electorate is entitled to a period of reflection before going to the polling booths: a justification that is also frequently proffered for prohibiting the reporting of political affairs in the immediate run-in to polling-day (like in Ireland).⁶³ These arguments can be countered by the assertion that the ability of particular messages to influence the electorate should not, *per se*, be a reason to restrict or prohibit them.

Provisions seeking to safeguard the purity and equality of political debate during electoral periods can involve other measures, too. During the Spanish parliamentary elections in March 2004, two such provisions were thrust into the limelight.⁶⁴ Regulatory provision is made for information pertaining to programming schedules to be published at least 11 days before the actual broadcasts are due to take place (this applies to programming generally). Any re-scheduling after publication of this information is only allowed if it results from unforeseen circumstances. In other words, rescheduling cannot take place at the whim of a broadcaster. On the eve of the national elections, the Spanish public service channel *La Primera* replaced an entertainment programme with a documentary about victims of ETA terrorist activities. The change in the schedule occurred during primetime and without prior notification. As responsibility for the 11 March bombings had at that point not yet been determined, and given the enormous influence such a determination would have on the outcome of the elections, this rescheduling attracted critical scrutiny.

The second incident arose during the European Parliament elections in Spain in June 2004. There was a disagreement about the proposed date for scheduling a televised debate which was to have involved representatives from the two leading political parties. The *Junta Electoral Central* (independent body charged with overseeing elections) intervened and impressed on two private broadcasters that they were also obliged to give coverage to parties contesting the election other than the two largest ones.

62) "During the last 30 days before an election, local broadcasters are granted a refund of the expenses" – Maja Cappello, *infra*, Italy: Pluralism and Freedom of Expression in the Media at 5.

63) See further, Tarlach McGonagle, *infra*, at 5.

64) For further details, see Francisco Cabrera, *infra*, at 4.

In Italy, news and current affairs programmes broadcast during election campaigns must meet a number of criteria of evaluation elaborated by AGCOM in 2003. There are general requirements of impartiality, non-influencing of the public and limiting candidates to appearing only on news/current affairs programmes. Aside from these, more specific criteria include temporal factors (e.g., whether a programme is broadcast over a period of time); content considerations (e.g., the topic of the programme must be the basis for the evaluation of participants' equality of access), and subjective criteria (e.g., reference to the qualifications of the subjects participating in the discussion). Thereafter, a range of detailed qualitative and quantitative criteria also apply.⁶⁵

It is by no means atypical for the regulation of media coverage of elections to be grounded in disparate pieces of primary and secondary legislation, as well as self- and co-regulatory codes of practice and other measures, and the in-house guidelines of individual media entities. In Poland, for instance, there exists a significant raft of election-related legislation, on top of the operative provisions of the Broadcasting Act. Italy, as already mentioned, is subject to a detailed Political Communication Act. This Act was amended in November 2003 and now facilitates co-regulatory initiatives for electoral broadcasting at the local level.⁶⁶ The European Parliament elections in June 2004 were the first occasion on which the amended provisions could be applied.⁶⁷ In short, local broadcasters are allowed to carry paid political advertising, but the price of such advertising may not exceed 70% of the price charged for regular advertising. This exemption was designed to stimulate political discussion at the local level. In the past, local broadcasters were loath to give access out of a fear of contravening complex election-related legislation, if the equality of access provisions were not met.

It is also worth pointing out in connection with the application of special sets of rules to political expression during election time that special sets of rules can also apply to constitutional referenda and other forms of issue-oriented public ballots, where such plebiscites are features of the political culture of a State. While these respective special sets of rules generally articulate similar concerns and seek to guard against comparable abuses, they tend to contain salient differences.⁶⁸

Restrictions on Political Expression (Topic 2)

The point of departure of Toby Mendel's paper is that freedom of political expression lies at the very heart of democratic society and it accordingly granted the highest level of protection. The scope of political expression stretches across concentric circles: from a core of explicitly political expression (including criticism of elected officials or commentary on overtly political matters); through commentary on public authorities (i.e., not necessarily elected officials); to matters of public concern (while not formally political in nature, "it falls into a closely related category of speech relating to societal or public, rather than private, matters"). This is also consistent with the approach of the European Court of Human Rights. The paper enters an important proviso, however:

"[...] political expression defines a category of speech not by reference to the fact that it may not be restricted, but rather by reference to the type of speech involved. Criticism of the public performance of a politician, even if defamatory and illegal, is still undoubtedly political expression. Racist speech falls into the category of speech relating to societal matters [...]."⁶⁹

Under international law, a three-step test is applied in order to assess the legitimacy of restrictions on freedom of expression: is the restriction (a) prescribed by law; (b) for the purpose of safeguarding a legitimate public or private interest; and (c) necessary to secure this interest?

However, a paradigm-shift of sorts is taking place in terms of the protection of freedom of expression. Whereas previously, governments were the main actors restricting freedom of expression, "[T]he main threat now is seen by many as the collapse of public space and of local voices, and the loss of diversity in the media, notwithstanding the massive increase in available broadcasting channels and the new media".⁷⁰ This places a new emphasis on the right to receive information, such as local content, and on pluralism generally. Increased weighting for the right to receive (as opposed to the

65) See further, Maja Cappello, *infra*, at 6.

66) See further, Maja Cappello, "IT – Co-regulation to Ensure Pluralism in Local Broadcasting", *IRIS* 2004-7: 13.

67) See further, Maja Cappello, *infra*, Italy: Pluralism and Freedom of Expression in the Media, at 8.

68) See further the country overviews of Ireland and Switzerland, *infra*.

69) Toby Mendel, *infra*, Restrictions on Political Expression, at 3.

70) *Ibid.*, at 1.

right to impart) information entails pitting “the speaker against the listener, a private rights model of freedom of expression against one which seeks to preserve public expressive space, a traditional, non-interference, paradigm against one which calls for regulation to protect the right to receive”.⁷¹

Whereas restrictions are usually placed on the right to freedom of expression in order to protect other social interests (e.g., privacy, public order, or the administration of justice), the prioritisation of the right to receive information seeks rather to promote one particular conception of the right to freedom of expression, perhaps at the expense of another. This, of course, opens up debate on very complex issues involving competing visions of freedom of expression. In the past, however, the European Court of Human Rights has been reluctant to read positive rights into Article 10, particularly as regards the right to receive information.

This paper also examines a number of (not necessarily related) restrictions on the freedom of political expression in the media, beginning with defamation. A number of positive trends are noted: the development of a reasonableness defence in many States; increasingly required that the onus to prove falsity be placed on the plaintiff in cases involving matters of public concern.⁷² However, the continued failure of the European Court of Human Rights to squarely state that criminal defamation laws are – by definition – a violation of the right to freedom of expression is regarded as a source of disappointment. The Court has, however, stated that governments, owing to their dominant position, should exercise restraint in the application of criminal measures in defamation actions. The paper also levels criticism at the recent Declaration on freedom of political debate for going “beyond simply recognising criminal defamation, contemplating imprisonment for defamation, even for political statements”, and for introducing hate speech into the equation (see further, *infra*). Underlying these criticisms is the conviction that criminal law is a disproportionate means of tackling unwarranted attacks on reputation (with civil defamation laws offering adequate redress to aggrieved parties) and gives rise to an “unacceptable chilling effect on freedom of expression”.⁷³

As regards the impact of the Internet, jurisdictional questions are obviously to the fore, as are questions of Internet Service Provider (ISP) liability. Relevant developments as regards both are documented. It has been proposed by the Report of the Committee on Legal Affairs and the Internal Market of the European Union that the draft Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations,⁷⁴ so that liability for content published on the Internet will be determined by the laws of the jurisdiction in which the material is uploaded, or else where the publisher is established. As far as ISP liability is concerned, the Council of Europe Declaration on freedom of communication on the Internet sets out that ISPs should not be held liable for providing short-term access to content passing through their service (on the grounds that they have no connection to the source of the content). Following the European Community’s E-Commerce Directive, the Council of Europe Declaration states that ISPs should be held liable for failing to remove illegal content after becoming aware of its presence. However, this does not place policing duties on ISPs, according to the Declaration. Furthermore, content should not be removed simply because complaints about it have been made: over-hasty take-down policies could have a chilling effect on freedom of communication on the Internet.

Finally, it was posited that:

“the guarantee of freedom of expression applies to sanctions, as well as primary restrictions, so that unduly harsh or disproportionate sanctions, of themselves, breach the right to freedom of expression. As a result, the guarantee of freedom of expression requires States to impose the least chilling form of sanction that will adequately protect the legitimate interest in question.”⁷⁵

In this connection, a case favouring self-regulatory measures for dealing effectively with the issues involved in restrictions on political expression is briefly outlined. Such measures often offer superior flexibility for dealing with subtle problems.

71) *Ibid.*, at 4.

72) This is in keeping with Principle 7 of ARTICLE 19’s *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation* London, 2001.

73) Note from the editor: considering the context, in which the Declaration was passed, namely that defamation is still a criminal offence in most Member States of the Council of Europe, the Declaration was, however, the only reachable compromise between these Member States and others who would have liked to go beyond the Declaration. In all likelihood, striving for more at that stage would have simply ended several years of negotiations without any results. See further, Páll Thórhallsson, *infra*, Freedom of Political Debate and the Council of Europe, at 2.1.

74) (“Rome II”), 22 July 2003, COM (2003) 427 final, available at: http://europa.eu.int/eur-lex/en/com/pdf/2003/com2003_0427en01.pdf

75) Toby Mendel, *infra*, at 8.

Structural Considerations

Whereas in the past, States tended to be regarded as the most likely parties to infringe the right to freedom of expression, nowadays there are increasing fears surrounding the ability of private actors – especially commercial and political actors – to do so. From this perspective, the concentration of media ownership and the lack of pluralism it generally tends to bring with it can have serious consequences for political expression and debate. This is particularly true when ownership is concentrated in the hands of a political figure or organisation or a politically active figure or organisation.⁷⁶ Unease over such a state of affairs in Italy has drawn concerned and critical scrutiny from both the European Parliament⁷⁷ and the Parliamentary Assembly of the Council of Europe⁷⁸ over the past months. However, in the Italian case, content-related rules governing political communication are perhaps even more important than media concentration rules,⁷⁹ which have proved largely ineffective to date.⁸⁰

In some States, legislative safeguards are in place to prevent political actors from owning media outlets, or to restrict their ability to do so. The disqualification of certain bodies or certain categories of bodies from holding broadcasting licences⁸¹ can therefore be described as another aspect of ownership regulation. One of the most persistent exclusions from holding broadcast licences is political organisations (as variously defined). However, of late, some liberalisation appears to be informing relevant policies at the national level. In the United Kingdom, for example, under Section 349 of the Communications Act 2003, it is now possible for local authorities to hold broadcasting licences (or indeed to contract out such licences to third parties), as long as the purpose of maintaining the broadcasting outlet is to transmit or distribute either or both of the following:

- (a) information concerning the services within the area of the authority that are provided either by the authority themselves or by [certain] other authorities [...];
- (b) information relating to the functions of the authority.

In this connection, concern was expressed that the definition of “local authority” be clear and unambiguous and that the broadcasting exercise be strictly limited to the functions and services of the authority in question (or other relevant authorities).⁸² The perceived neutrality of information issued by administrative authorities can often mask political or politicised agendas or content, which could confer a publicity-like advantage on the dominant party in such authorities.

76) It is important to mention the distinction between a political entity and a politically active entity. For example, when broadcasters have traditionally had links with particular political parties, conflicts of interest – or at the very least perceptions of conflicts of interest – arise.

77) Report on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights) (2003/2237/(INI)), European Parliament Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (Rapporteur: Johanna L.A. Boogerd-Quaak), 5 April 2004, Doc. A5-0230/2004 (Final), available at: <http://www2.europarl.eu.int/omk/sipade2?L=EN&OBJID=75982&LEVEL=2&MODE=SIP&NAV=X&LSTDOC=N>. See further: Tarlach McGonagle, “European Parliament: Adoption of Report on Media Independence and Pluralism”, *IRIS* 2004-6: 6.

78) Monopolisation of the electronic media and possible abuse of power in Italy, Recommendation (Provisional Edition), Parliamentary Assembly of the Council of Europe, 24 June 2004; Monopolisation of the electronic media and possible abuse of power in Italy, Resolution 1387 (2004) (Provisional Edition), Parliamentary Assembly of the Council of Europe, 24 June 2004, and Monopolisation of the electronic media and possible abuse of power in Italy, Report of the Committee on Culture, Science and Education (Rapporteur: Mr. Paschal Mooney), Parliamentary Assembly of the Council of Europe, 3 June 2004, Doc. 10195, all available at:

<http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/Documents/AdoptedText/ta04/ERES1387.htm>
<http://assembly.coe.int/Mainf.asp?link=http://assembly.coe.int/Documents/WorkingDocs/Doc04/EDOC10195.htm>

See further: Tarlach McGonagle, “Parliamentary Assembly: New Texts Criticising Media Concentration in Italy”, *IRIS* 2004-7: 3.

79) See, for a recent development in this connection, Law 3 May 2004, no.112, Regulations and principles governing the set-up of the broadcasting system and the RAI-Radiotelevisione italiana S.p.a., authorizing the government to issue a consolidated broadcasting act (the so-called “Gasparri Law”), available (in English) at:

<http://www.comunicazioni.it/en/Img/9/Law%203%20MAY%202004,%20no.%20112.pdf>. For commentary, see: Maja Cappello, “IT – New Law on Broadcasting”, *IRIS* 2004-6: 12.

80) For the latest reform, see *Legge 20 luglio 2004, n. 215 “Norme in materia di risoluzione dei conflitti di interessi”* (the so-called “Frattini Law”), available at: <http://www.camera.it/parlam/leggi/04215l.htm>. Under this “conflict of interest” law, persons holding government office are only disqualified from being managers (and not owners) of business enterprises. See further: Maja Cappello, “IT – AGCOM Will Monitor on Conflict of Interests in the Broadcasting Sector”, *IRIS* 2004-10: 14, see <http://merlin.obs.coe.int/redirect.php?id=9350>

81) For example, in the United Kingdom, a religious body cannot own a national broadcasting licence (although it can own other sorts of radio and television licences) and nor could advertising agencies prior to the introduction of the Communications Act 2003.

82) It should be noted in this connection that in some States, such as Poland, legislative provision is made for certain government officials to have direct access to the media for specific messages. See further, Małgorzata Pęk, *infra*, Poland: Political Expression in Electronic Media with Special Focus on Election Campaign and Other Forms of Political Debate, at 2.

It should be noted that within the framework of UK restrictions, the main concern is not so much for questions of competition as regards ownership or of guaranteeing pluralism or quality in public debate, as for securing a system to maintain a level playing field in electoral politics. Viewed from this optic, there is a clear link to the statutory ban on paid political advertising at any time via the broadcast media. In Switzerland, by way of contrast, the objective of pluralism *does* inform relevant legislation: while there is no prohibition on political or religious organisations holding broadcasting licences, “the overall range of programme services in any one supply area shall not be unduly biased towards specific parties, lobbies or ideologies”.⁸³

Privacy

As noted *supra*, privacy issues can arise in the context of political discussion in the media and new media alike. For example, before the commencement of polling in the European Parliament elections in Italy in June 2004, the Presidency of the Italian Council of Ministers arranged with mobile phone operators for the following message to be sent as an s.m.s. to mobile phone users throughout the country: “Elections 2004: you can vote from Saturday 12th from 3 a.m. to 10 p.m. and Sunday 13th from 7 a.m. to 10 p.m. ID and electoral card needed”. The initiative met with stiff criticism because of the privacy implications it entailed. A complaint was lodged with the Data Protection Authority which held that the message was permissible on public order grounds. The explanation was that it informed the public that voting would be spread over two days (instead of one) and should thereby have helped to avoid excessive queuing and congestion at polling booths. The matter was regarded as an institutional message rather than as political communication, which would have placed it within a different regulatory framework.⁸⁴

As regards more general media reporting, the rule of thumb should be that invasions of the privacy of public figures should only be allowed when justified in the public interest.

Defamation

The part of the discussion focusing on defamation pivoted on the extensive analysis provided in the papers by Toby Mendel, Páll Thórhallson and Fred Schauer. As a result, reference is simply made here to the relevant parts of those papers.

Tolerance

It is a truism that all European States are becoming more heterogeneous in terms of their social composition. The exercise of freedom of expression in a pluralist society will inevitably experience points of friction as majority and minority opinions seek to balance each other out or vie with one another for legitimacy or supremacy. In his contribution, *infra*, Aernout Nieuwenhuis explores these inevitable points of friction, both conceptually and as manifested in practice in contemporary Dutch society.

A recent Memorandum adopted by the Dutch Government, *Grondrechten in een pluriforme samenleving* (Fundamental rights in a pluralist society), discusses a number of controversial cases in the Netherlands. These have included public utterances likening theft to homosexuality, and describing homosexuality as an aberration and a threat to society. Both defendants were acquitted, with the Court of Appeal finding the utterances to be offensive, but shorn of a criminal nature owing to the religious context in which they were made (the utterances were made by an orthodox Christian politician and an Islamic imam, respectively). The case involving the likening of theft to homosexuality was appealed to the *Hoge Raad* (Supreme Court), which upheld the finding of the Court of Appeal, but crucially also stressed the importance of public debate.⁸⁵ In addition, offensive remarks about Islam (to the effect that Islam is a backward religion and that Mohammed was a pervert) made by a politician also caused controversy, but the public prosecutor decided not to pursue the matter before the courts.

⁸³) Article 3(2) of the Swiss Radio and Television Act, 1991.

⁸⁴) See further *supra* and Maja Cappello, *infra*, Italy: Pluralism and Freedom of Expression in the Media, at 8.

⁸⁵) See further, Judgment of the Dutch Supreme Court of 9 January 2001, *Nederlandse Jurisprudentie* 2001, 203.

Dutch courts, and most importantly, the Dutch Supreme Court, generally tend to closely track the *jurisprudence* of the European Court of Human Rights, fixing the outer limits of freedom of expression at the point where expression amounts to racism or incitement to hatred. This is also the point at which societal tolerance and hate speech square up to one another.

The Declaration on freedom of political debate in the media, adopted earlier in 2004 by the Committee of Ministers of the Council of Europe, has been subjected to criticism for the way in which it appears to bracket defamation and hate speech together (see *supra*). The operative part of Section VIII of the Declaration (“Remedies against violations by the media”) reads:

[...] Defamation or insult by the media should not lead to imprisonment, unless the seriousness of the violation of the rights or reputation of others makes it a strictly necessary and proportionate penalty, especially where other fundamental rights have been seriously violated through defamatory or insulting statements in the media, such as hate speech.

The precise criticism is therefore that defamation is concerned primarily with the protection of one’s reputation or “good name”, and hate speech is essentially an expression of hatred or incitement to hatred targeting an individual or group on the basis of certain fundamental characteristics of that individual or group. They are therefore different types of wrongs. In terms of sanctions, it was argued that imprisonment is never appropriate for defamation, whereas insofar as hate speech is concerned, the issue could be less clear-cut.

The latter is not entitled to any protection under Article 10 ECHR, as it falls foul of Article 17 ECHR (“Prohibition of abuse of rights”). Article 17 was designed as an in-built safety mechanism to prevent the Convention from being subverted by those whose motivation is contrary to its letter and spirit.⁸⁶ Article 17 reads:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

In a long line of cases, the Court has seldom wavered in its refusal to grant racist speech or hate speech, especially when it touches on Holocaust denial, any protection under Article 10 ECHR.⁸⁷ In what has arguably been its most trenchant stance against hate speech to date, the Court held in the *Garaudy* case that:

[...]There can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust, as the applicant does in his book, does not constitute historical research akin to a quest for the truth. The aim and the result of that approach are completely different, the real purpose being to rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history. Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others. Its proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention.

The Court considers that the main content and general tenor of the applicant’s book, and thus its aim, are markedly revisionist and therefore run counter to the fundamental values of the Convention, as expressed in its Preamble, namely justice and peace. [...]⁸⁸

86) See further, Tarlach McGonagle, “Protection of Human Dignity, Distribution of Racist Content (Hate Speech)”, in Co-Regulation of the Media in Europe, *IRIS Special* (European Audiovisual Observatory, Strasbourg, 2003), pp. 43-46, at p.46.

87) See further, Tarlach McGonagle, *op. cit.*

88) *Garaudy v. France*, Inadmissibility decision of the European Court of Human Rights (Fourth Section) of 24 June 2003, Application No. 65831/01.

National Security

Depriving political parties with extremist inclinations of the “oxygen of publicity” will not necessarily have the regulator’s desired effect of curtailing electoral advances registered by the parties targeted by such restrictions or prohibitions (as exemplified by the recent electoral performance of the *Vlaams Blok* in Belgium, discussed *supra*). Nor is widespread criticism or demonisation of those parties by the mainstream media a sure-fire means of achieving the same goal of electoral or political ostracisation. Indeed, extremist parties can be very adept at turning adversity to their own advantage. The theme of being generally downtrodden and discriminated against, muscled out of general debates, roundly and routinely victimised, is often used to curry favour with the section of the electorate with an inclination towards protest-voting.

At the beginning of the 1990s, the (now defunct) European Commission for Human Rights considered applications against Ireland and the United Kingdom concerning broadcasting bans applying in those jurisdictions.⁸⁹ The Irish ban was more strict than its U.K. equivalent, but both applications were ultimately rejected by the Commission, allowing national security interests to prevail over freedom of expression concerns in the particular circumstances of the cases in question. The chilling effect of broadcasting bans is well-documented and the Irish example demonstrates how such bans can cast a long shadow stretching beyond the cessation of the prohibition itself.⁹⁰

The many facets to the relationship between freedom of expression, information and national security, are covered extensively in the Johannesburg Principles on National Security, Freedom of Expression and Access to Information.⁹¹ However, since the adoption of this set of Principles, much has changed in the debate about national security and freedom of information, leading to a very significant re-evaluation of traditional conceptions of national security.

The recent war in Iraq and heightened fears of terrorist attacks throughout the world have fuelled increased concerns about, and criticism of, governments’ information policies on security and defence matters. Examples of such public suspicion and discontent abound in the U.S., and allegations of secrecy, spin-doctoring and falsification of official information have also surfaced in a number of European countries as well. Among the more famous examples were the events which gave rise to the Hutton Inquiry in the United Kingdom⁹² and the immediate response of the Spanish government to the Madrid bombings in March 2004.⁹³

The Report of the Hutton Inquiry largely exonerated the British Government of falsifying and “sexing-up” its dossier, *Iraq’s Weapons of Mass Destruction*. The BBC had made claims regarding the sexing-up of the dossier which, it should be noted, carried very significant weight in the British Government’s decision to go to war. The Hutton Report stated:

The communication by the media of information (including information obtained by investigative reporters) on matters of public interest and importance is a vital part of life in a democratic society. However the right to communicate such information is subject to the qualification (which itself exists for the benefit of a democratic society) that false accusations of fact impugning the integrity of others, including politicians, should not be made by the media. Where a reporter is intending to broadcast or publish information impugning the integrity of others the management of his broadcasting company or newspaper should ensure that a system is in place whereby his editor or

89) *Purcell & Others v. Ireland*, Decision of inadmissibility of the European Commission for Human Rights of 16 April 1991, Application. No. 15404/89; *Brind & Others v. United Kingdom*, Decision of inadmissibility of the European Commission for Human Rights of 9 May 1994, Application. No. 18714/91.

90) See further, Tarlach McGonagle, *infra*, Ireland: An Overview of Selected Issues on Freedom of Political Expression, at 3.

91) ARTICLE 19, November 1996, available at: <http://www.article19.org/docimages/511.htm>. For an extensive analysis of the Principles, see: Sandra Coliver, “Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information”, in Sandra Coliver, Paul Hoffman, Joan Fitzpatrick & Stephen Bowen, Eds., *Secrecy and Liberty: National Security, Freedom of Expression, and Access to Information* (The Hague, M. Nijhoff Publishers, 1999), pp. 11-81. For a consideration of these principles in the post-9/11 era, see the collection of essays entitled, *National Security and Open Government: Striking the right balance* (New York, Campbell Public Affairs Institute, The Maxwell School of Syracuse University, 2003), available at: <http://www.maxwell.syr.edu/campbell/opengov/>

92) Lord Hutton, “Report of the Inquiry into the Circumstances Surrounding the Death of Dr David Kelly C.M.G.”, 28 January 2004, available at: <http://www.the-hutton-inquiry.org.uk/content/report/>. See further, Tony Prosser, “GB – Official Inquiry Leads to Resignation of Chairman and Director-General of the BBC”, *IRIS* 2004-4-10, and David Goldberg, “GB – Hutton Inquiry Judge Rules against Televising Witnesses Giving Evidence”, *IRIS* 2003-9: 8.

93) See further, Cabrera, *infra*.

editors give careful consideration to the wording of the report and to whether it is right in all the circumstances to broadcast or publish it.⁹⁴

A similar debate has proved controversial and divisive in Spain.⁹⁵ As noted by a recent European Parliament report, "government pressure on the public-service broadcaster TVE resulted in blatant distortion and ignoring of the facts regarding responsibility for the appalling terrorist attacks of 11 March 2004".⁹⁶

It is still early days for evaluating the quality and quantity of information made available to the public about national security issues. The precise nature of the impact that the Internet has had on both is as yet unclear. It is also difficult to gauge levels of secrecy, even in comparative terms, both between countries and between historical periods. Additionally, there is the age-old difficulty of the relationship between media and government,⁹⁷ which plays crucial roles in securing the release of information into the public domain. On the one hand, governments throughout the world are constantly castigated by the media for their penchants for secrecy. On the other hand, information is generally filtered through the media, meaning that (i) the public relies on the media to learn about the extent of the information that is not reaching them, and (ii) the criticism levelled by the media is certainly not disinterested.

It was predicted that in the future there is likely to be a collision course between freedom of expression values and the online publication of instructions about how to make bombs, nerve gas and weapons of mass destruction. Advice on how to plant bombs while avoiding detection and a host of other terrorist-related activities could also be placed in the same group. The extent to which relevant principles of regulation can be analogously derived from, say, precedents dealing with instructions for narcotics remains moot.

Concern at the implications of the war against terrorism in the wake of 11 September 2001 has frequently been voiced at the international level, not least by the specialised mandates for promoting freedom of expression of three international organisations, *viz.* the United Nations Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe Representative on Freedom of the Media and the Organization of American States Special Rapporteur on Freedom of Expression. In the section, "Countering Terror", of their joint statement of November 2001, the three specialised mandates state:

- Terror must not triumph over human rights in general, and freedom of expression in particular;
- Certain governments have, in the aftermath of the events of 11 September, adopted measures or taken steps to limit freedom of expression and curtail the free flow of information; this reaction plays into the hands of the terrorists;
- Guarantees for freedom of expression have developed over centuries but they can easily be rolled back; we are particularly concerned that recent moves by some governments to introduce legislation limiting freedom of expression set a bad precedent;
- We are of the view that an effective strategy to address terror must include reaffirming and strengthening democratic values, based on the right to freedom of expression;
- The events of 11 September have brought in their wake a rise in racism and attacks against Islam; we call on governments, as well as the media, to do all within their power to combat this dangerous trend;⁹⁸

94) Lord Hutton, *op. cit.*, Chapter 12 "Summary of conclusions", para. 467 (3) (ii). Concerning more specific allegations, the Report continues: "The allegations that Mr Gilligan was intending to broadcast in respect of the Government and the preparation of the dossier were very grave allegations in relation to a subject of great importance and I consider that the editorial system which the BBC permitted was defective in that Mr Gilligan was allowed to broadcast his report at 6.07am without editors having seen a script of what he was going to say and having considered whether it should be approved."

95) See further, Francisco Cabrera, *infra*, at 1.

96) Report on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights) (2003/2237/(INI)), European Parliament Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (Rapporteur: Johanna L.A. Boogerd-Quaak), 5 April 2004, Doc. A5-0230/2004 (Final), available at: <http://www2.europarl.eu.int/omk/sipade2?L=EN&OBJID=75982&LEVEL=2&MODE=SIP&NAV=X&LSTDOC=N>

97) See in this connection, Edward S. Herman & Noam Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media* (Great Britain, Vintage, 1994).

98) Available at: <http://www.article19.org/docimages/1244.doc> or http://www.osce.org/documents/rfm/2001/11/193_en.pdf

Counter-terrorist strategies that have been developed in the context of conflicts unrelated to the issues underlying the 11 September 2001 attacks, have followed different evolutionary curves. For instance, the experience of former Soviet Union countries has been heavily influenced by the Chechen conflict and its overspill. In 1998, Russia introduced a counter-terrorism law to deal with the Chechen conflict.⁹⁹ The law prohibits the dissemination of information that “serves to promote or justify terrorism and extremism” and in any case, the public distribution of information about terrorist activities must be carried out in accordance with the stipulations of the Chief of the anti-terrorism operations centre.¹⁰⁰ This has the effect of restricting the media’s ability to disseminate certain types of information when it emanates from a zone in which counter-terrorist operations are in place. Criticism has been levelled at the authorities’ attempt to interpret the statutory definition of a “counter-terrorist operation zone” in an expansive manner, *viz.* by applying it to the whole of Chechnya, which has a surface area of some 16,000 square kilometres.

Counter-terrorism legislation was subsequently adopted elsewhere: by the end of 1998, a model statute on the fight against terrorism had been drafted by the Commonwealth of Independent States (CIS) and a number of countries adopted this legislation, translating it and making some adaptations to give the Russian prototype a more national flavour.¹⁰¹ Turkmenistan was an exception to this trend, however. It effectively prohibited any media (live or recorded) messages from being disseminated from areas of counter-terrorist operations, and assigned the media the task of educating the nation to forestall the occurrence of any terrorist events.

When these laws failed to stifle media reporting of terrorist activities, legislative efforts were redoubled, leading to a wave of new laws being adopted in various States,¹⁰² this time aiming to prevent extremism (a notion described in the earlier laws as being an element of terrorism, but without defining the notion further). Building on existing provisions in the Criminal Code, the Russian Law on the counteraction of extremism ascribes new features to the offence, in particular a link to violence or incitement to violence. In a legal context, extremism is now understood in Russia as including “activities on planning, organization, preparation and carrying out of actions directed towards violent... breakage of the Russian Federation’s entity, destruction of Russia’s security and safety; take-over or assumption of power, organization of illegal armed formations, and implementation of terrorism activities”.¹⁰³

The media view the emergence of this anti-extremism legislation as a troubling development because for first time in post-Soviet history, prosecutors at any level have been granted the power to punish not just individual reporters, but media entities *qua* entities as well. They can issue warnings to press organisations, and suspend the activities of press organisations for the dissemination of extremist information. As propaganda for extremism is now punishable as an extremist activity, the media rue the fact that apart from two clear-cut examples (propaganda for Nazism or for Italian Fascism under Benito Mussolini), definitional vagueness persists.

As is documented in Andrei Richter’s paper, *infra*, this is far from being merely a hypothetical fear, as there have been several prosecutions of local media outlets and attempts to shut them down since the adoption of the 2002 law. His paper also describes other legislation touching on media reporting of issues relating to national security: the Criminal Code (1996, as revised in 2003); the Law on mass media (1991, as revised in 2002); the Law on the state of emergency (2001), and the Law on the state of martial law (2002). Elevating any lessons from the Russian situation to a more general plane, it is clear that when an accretion of legislation seeks to regulate various aspects of media behaviour from diverse angles - on top of more contained, media-specific legislation - there is a heightened risk that such laws will amount to more than the sum of their parts and that over-regulation could jeopardise freedom of the media, or at least exert a chilling influence on the same. It has been submitted in some quarters (particularly in CIS governmental circles) that legislative responses of Western European States and of the CIS to various kinds of terrorism have a considerable degree of congruence with one another.

99) Law on the fight against terrorism of 25 July 1998.

100) Article 15, Law on the fight against Terrorism, adopted on 25 July 1998.

101) Kyrgyzstan, (21 October 1999); Uzbekistan (15 December 2000); Moldova (12 October 2001); Belarus (3 January 2002); Ukraine (20 March 2003); Turkmenistan (15 Alp Arslan (August) 2003).

102) A Law on the counteraction of extremist activity was adopted in Russia (25 July 2002) and in Moldova (21 February 2003) and in Belarus, the legislation is still in draft form.

103) See further, Andrei Richter, *infra*, Russia: “War on Terrorism” and the Freedom of the Mass Media, at 2.

Freedom of Political Debate and the Council of Europe (Topic 3)

Freedom of political debate lies at the confluence of many of the Council of Europe's key areas of interest and activity. Treaties, case-law of the European Court of Human Rights, standard-setting of the Committee of Ministers, monitoring programmes of various limbs of the Council, promotion of best constitutional practice by the Venice Commission, support for elections and democracy, rooting out of corruption in governmental circles. Its centrality is reflected in the large corpus of binding and non-binding legal instruments touching on the issue, and in the incorporation of the issue into various institutional programmes within the Council. Finally, freedom of political expression is amply accommodated in integrated projects undertaken by the Council, such as "Making democratic institutions work", and in the assistance provided by specialised bodies of the Council to Member States in the development/reform of their media legislation.

Emphasising that freedom of political expression is a *sine-qua-non* of democratic society, the European Court of Human Rights has tended to interpret the notion broadly. Thus, it recognised that discussion on matters of public interest such as police violence (in the *Thorgeirson* case), or the size of chief executive salaries in a company at the time of major cutbacks and lay-offs (*Fressoz & Roire v. France*) were deserving of the highest level of protection under the ECHR. In terms of defamation, as set out in *Lingens v. Austria*, politicians have to be prepared to accept higher levels of criticism than ordinary members of society. As regards other types of expression, the Court has consistently drawn the line at racist expression, expression inciting to violence, and expression amounting to terrorist propaganda.

As regards sanctions for defamation, it is posited in this paper that while greater stigma attaches to criminal sanctions than civil ones, the former can often prove just as costly for the defendant. Furthermore, "the Court's case-law contains indications that in practice a prison sentence in a freedom of expression case will hardly ever be considered in conformity with the proportionality requirement of Article 10".¹⁰⁴ It is also submitted that the reference to imprisonment as a possible sanction for defamation in the Committee of Ministers' Declaration on freedom of political debate in the media (quoted *supra*) is "quite nuanced".¹⁰⁵

Specific forms of political expression (see *supra*), such as election-time communication and political advertising are treated in some (non-binding) Council of Europe instruments which do envisage certain restrictions on expression in order to achieve other goals. One example would be the placing of limitations on the publication of opinion polls just before elections in order to guarantee the authenticity, and free and fair aspects of voting.¹⁰⁶ New communications technologies also merit careful consideration. These new communications technologies have impacted on political debate in a variety of ways: while the Internet enhances communicative opportunities, it can also lead to the increased fragmentation of public discourse.

The range of possible positive obligations on Member States concerning freedom of expression is a little explored domain. In this paper, the possible positive obligations examined are: public service broadcasting; open information policy in the public sector; media pluralism, and the promotion of public consultations as part of the democratic process.

It is widely recognised that public service broadcasting makes an important contribution to the upholding of pluralism in the broadcasting sector, and this can be reflected in legislation which sets out different obligations for public and private broadcasters as regards political communication.¹⁰⁷ Recommendation No. R (96) 10 on the guarantee of the independence of public service broadcasting¹⁰⁸ therefore sets out standards that should help to reduce the strain placed on the public broadcasting sector by economic, political and technological pressures. The extent and effect of these pressures were examined in a report adopted by the Parliamentary Assembly of the Council of Europe at the beginning

104) See further, Páll Thórhallsson, *infra*, at 2.1.

105) *Ibid.*

106) See, for example, Recommendation No. R (99) 15 of the Committee of Ministers to Member States on measures concerning media coverage of election campaigns.

107) For the Polish example, see Małgorzata Pęk, *infra*, at 2.

108) Available at:

[http://www.coe.int/t/e/human%5Frights/media/5%5FDocumentary%5FResources/1%5FBasic%5FTexts/2_Committee_of_Ministers'_texts/Rec\(1996\)010%20E%20&_Exp_Mem.asp#TopOfPage](http://www.coe.int/t/e/human%5Frights/media/5%5FDocumentary%5FResources/1%5FBasic%5FTexts/2_Committee_of_Ministers'_texts/Rec(1996)010%20E%20&_Exp_Mem.asp#TopOfPage)

of 2004.¹⁰⁹ In response to the technological challenges that public service broadcasters are increasingly having to meet, the focus of the forthcoming 7th European Ministerial Conference on Mass Media Policy, Kiev, Ukraine, 10-11 March 2005, will include the initiation of work on public service broadcasting in the Information Society.¹¹⁰

Freedom of access to information is a *de minimis* requirement if citizens are to participate actively and meaningfully in governance at any level. The Council of Europe has consistently promoted an open information policy in the public sector, as is evidenced *inter alia* by its Committee of Ministers' Declaration on freedom of expression and information (1982) and Recommendation 2002 (2) on access to official documents. In times of conflict and tension, freedom of information is often an early casualty. The Council of Europe is currently in the process of elaborating a Draft Declaration on freedom of expression and information in the media in the context of the fight against terrorism.¹¹¹ It examines questions such as whether public authorities should be allowed to deliberately provide false information to journalists; to knowingly provide incomplete information, or keep it secret, or to deliberately divert attention from key information.

The Council of Europe expends much energy in attempting to foster media pluralism, *inter alia* by encouraging Member States to adopt laws geared towards the elimination of media concentrations. A number of Council of Europe documents reflect this in general (Recommendation (99) 1) and in specific contexts, such as elections (Recommendation (99) 15 on media coverage of elections). Given that the Member States are considered by the European Court of Human Rights to be the ultimate guarantors of media pluralism, this can be understood as a positive obligation. An effective right of reply can also be an important factor in safeguarding media pluralism by seeking to ensure the completeness of information and that members of the public would have the opportunity to react to (negative) statements in media concerning them, thereby providing a more complete picture of the situation. It is important to extend this right to online services?¹¹²

The promotion of public consultations as part of the democratic process is enumerated as another positive obligation on Member States. The Council of Europe is currently working on a draft Recommendation of the Committee of Ministers to member states on electronic governance ("e-governance"),¹¹³ which would aim to harness e-technologies to optimise opportunities for participation in political debate and decision-making and thereby render processes of governance more inclusive, democratic and dynamic.

Under the umbrella of the Integrated Project, "Making democratic institutions work", a *Green Paper: The Future of Democracy in Europe*¹¹⁴ was recently released for public consultation. It contains some far-reaching suggestions for enhancing the quality of democratic activities in Europe, taking the general line that an overhaul of "existing formal institutions and informal practices" should be preferred to their fortification and perpetuation.

Broader Democratic Processes and Practices

A recurrent insistence throughout the workshop was that political expression – or any regulation thereof – does not occur in a vacuum. A whole gamut of other factors – political, societal, civic, economic, historical, educational, etc. – can exercise a determinative influence in defining the parameters of the arena in which political expression takes place. The co-existence of all these factors has a relativising effect on the relevance of legal guarantees for freedom of expression. Considerable attention was therefore paid to the responsibilities of governments and of the media themselves for assuring that political expression can take place in optimal circumstances.

109) Public service broadcasting, Report of the Committee on Culture, Science and Education (Rapporteur: Mr. Paschal Mooney), Parliamentary Assembly of the Council of Europe, 12 January 2004, Doc. 10029 (see also the Addendum to the Report of 21 January 2004), available at: http://assembly.coe.int/EMB_NewsView.asp?ID=353
<http://assembly.coe.int/Main.asp?link=http%3A%2F%2Fassembly.coe.int%2FDocuments%2FWorkingDocs%2Fdoc04%2FFED0C10029.htm> . See further: Tarlach McGonagle, "Parliamentary Assembly: New Recommendation on Public Service Broadcasting", *IRIS* 2004-3: 3.

110) See further: http://www.coe.int/T/E/Human_Rights/media/7_Links/consultation_announcement_E.asp#TopOfPage

111) At the time of writing, no version of this document had yet been made public.

112) See further: http://www.coe.int/T/E/Human_Rights/media/

113) Document IP1 (2004) 21 rev., 25 May 2004 , available at:
http://www.coe.int/t/e/integrated_projects/democracy/02_Activities/01_e-governance/01_e-gov_draft_rec_third_rev_25_May_04.asp#TopOfPage

114) Available at: http://www.coe.int/t/e/integrated_projects/democracy/05_Key_texts/Green_Paper/default.asp#TopOfPage

(a) Good Governance and Civic Education

Good governance should, by its very nature, entail a high degree of attentiveness to the importance of the goal of promoting civic education. After all, citizen disinterest in the workings of government and governance is, to an extent, the fault of public institutions for failing to generate sufficient interest among the public.

Even if observations about the shortcomings of European institutions and democratic deficit at times seem a tired refrain, the causes and effects of dissatisfaction at, and disillusion with, political processes have not gone away. The quest for better governance continues both within the European Union¹¹⁵ and the Council of Europe.¹¹⁶ The European Commission's White Paper on European Governance has enumerated five key principles of good governance: openness, participation, accountability, effectiveness and coherence.¹¹⁷ The Council of Europe's Green Paper on the future of democracy in Europe contains some far-reaching proposals for reforming democratic institutions and practices in Europe (see further, Páll Thórhallson, *infra*).

Disaffection with politics is more pronounced as regards the European level than the national, as was evidenced by the poor turn-out for the European Parliamentary elections in 2004. The European institutions are located at considerable physical and psychological distance from the majority of European citizens and their complicated workings and generally less localised thematic preoccupations tend to push them out of reach of citizens. This situation is compounded by the tendency of political parties in many States to accord lesser priority to European stakes. Their power-base is usually national, which explains why most of their energies and finances are channelled into national elections. If political parties themselves are lukewarm about engagement at the European level, it was speculated that compensatory measures of various descriptions might help to redress this state of affairs. Such measures could include States providing political parties with additional funding specifically for European Parliament elections. Another example could draw on an initiative by the second public channel in Germany during the 2004 European Parliament elections: it made a special effort through its programming services to acquaint younger viewers with the workings and activities of the European Union.

In a similar vein, within the Council of Europe, there is a working group on the role of promoting the media in democratic society. It is looking at, *inter alia*, the possibility of establishing a moderated online discussion forum which would take feedback to a higher level, such as policy-makers, thereby giving the public a greater sense of meaningful involvement.

On the one hand, the televising of parliamentary proceedings does go some way towards meeting the demands of the public as regards transparency in the work of elected representatives. However, the practice has not escaped criticism: it legitimates and consolidates a particular model of democracy, namely that of the parliamentary variety. Where edited extracts of parliamentary proceedings only are broadcast, the exercise of editorial discretion is at play, begging questions about safeguards for impartiality. Furthermore, in a kind of zero-sum argument, the devotion of portions of broadcasting time to parliamentary proceedings could be considered to reinforce the problem that new parties have to surmount considerable obstacles in order to establish a viable presence in the public consciousness.¹¹⁸

(b) Openness, Accessibility and Transparency

The right to access information can be enshrined at Constitutional or statutory level. In Poland, for instance, Article 61 of the Constitution safeguards such a right.¹¹⁹ In Ireland, the freedom of information regime owes its origins to a piece of legislation; nevertheless, the fact that the confidentiality of Cabinet deliberations is provided for in the Constitution sets a tone of sorts. The

115) See, in this connection, *European Governance: A White Paper*, Commission of the European Communities, 25 July 2001, COM(2001) 428 final; Mandelkern Group on Better Regulation Final Report, 13 November 2001; both of which were welcomed by the Laeken European Council, 14-15 December 2001.

116) Philippe C. Schmitter & Alexander H. Trechsel, Co-ordinators, *The Future of Democracy in Europe: Trends, Analyses and Reforms* (A Green Paper for the Council of Europe), commissioned by the Secretary General of the Council of Europe, Integrated project "Making democratic institutions work", available at: http://www.coe.int/t/e/integrated_projects/democracy/05_Key_texts/Green_Paper/default.asp#TopOfPage

117) White Paper on European Governance, *op. cit.*, p. 10.

118) It was noted in passing that it would be interesting to undertake comparative research to determine the extent and nature of regulation pertaining to the broadcasting of parliamentary proceedings in Europe.

119) For relevant details, see Małgorzata Pęk, *infra*, at 1.

strong freedom of information regime boasted by the United States springs directly from an Act of Congress, not the First Amendment as such. Since its introduction in 1966, the Freedom of Information Act has become an indelible feature of the U.S. political landscape. The effects of governmental secrecy and public access to information are considered further *infra*, laying particular emphasis on national security considerations.

Efforts to ensure openness and transparency in the political sphere can sometimes take unusually radical turns. A 1993 Bill on the rights of parliamentary opposition was recently rejected by the Russian national parliament. The Bill envisioned *inter alia* the possibility for any group with 30% of the deputies in the national parliament to form a shadow cabinet, members of which would have been able to attend meetings of the government proper, with the right to speak at such meetings. The Bill also envisaged for the opposition a right of access to media, in particular broadcasting.

Obligations of openness and transparency should also extend to law-making and regulatory processes. It was submitted that international governmental organisations, as well as non-governmental organisations should insist upon minimum engagement rules before offering expert advice to governments on the drafting of laws. In the interest of guaranteeing that the process is democratic, these minimum engagement rules should prioritise maximum transparency and reliance on public consultations throughout the various stages of the process. Any insistence upon firm process values can, however, prove difficult in practice. In some States, a culture of freedom of information has yet to take root properly, meaning that it is not always easy to obtain copies of adopted laws, let alone draft versions of laws that are still in preparation. Furthermore, many States have traditionally not placed much stay by public consultation exercises as a step in the law-making process. When State authorities consent to receive external advice on the drafting of particular laws, it is common practice for their acquiescence to be sought before rendering advice or versions of draft legislation public. If resultant legislation is to be democratic in terms of both substance and process, the entire drafting exercise should be pervaded by a spirit of openness on the part of all actors involved.

The new EU Electronic Communications Regulatory Package obliges all National Regulatory Authorities to use public consultations as a tool for adopting legislation – this works to stimulate active participation through auditions and public hearings, etc.¹²⁰

Media Responsibilities

In accordance with Article 10(2) ECHR, the enjoyment of journalistic freedoms by media actors is contingent on the simultaneous exercise of certain duties and responsibilities. These include, first and foremost, that journalists obey the ordinary criminal law,¹²¹ and also that they act “in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism”.¹²² Alongside these legal duties are responsibilities of a moral or ethical order, such as balance, fairness, impartiality, etc. That these responsibilities are distinct from legal duties is reflected in the fact that they are usually incorporated into (self-regulatory) codes of practice or ethics rather than in legislation. Furthermore, the European Court of Human Rights has traditionally been slow to instruct the media how to carry out their functions, opting instead to accord them a wide berth of operational autonomy and editorial discretion.

Having said all that, there is a growing public awareness of the responsibilities borne by the media and this has resulted in higher expectations as regards quality of output and overall performance than in the past. The Netherlands provides a particularly illustrative example of the growth spurts and the growing pains of public consciousness of standards of media performance. The fatal shooting of far-right politician Pim Fortuyn in 2002 was a watershed moment in Dutch political life. Since then there has been a narrowing of political debate and a hardening of political opinion.¹²³ A 2003 report,

120) See, in particular, Article 6 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), *Official Journal of the European Communities* L108/33 of 24 April 2002.

121) *Fressoz & Roire v. France*, Judgment of the European Court of Human Rights of 21 January 1999, Reports of Judgments and Decisions, 1999-I, para. 52.

122) *Bergens Tidende & Others v. Norway*, Judgment of the European Court of Human Rights of 2 May 2000, Reports of Judgments and Decisions, 2000-IV, para. 53, drawing on *Goodwin v. United Kingdom*, Judgment of the European Court of Human Rights of 27 March 1996, Reports of Judgments and Decisions, 1996-II, para. 39.

123) See further: Egbert Dommering, “De grenzen van de vrijheid van meningsuiting”, published in: *Utrechts Dagblad*, 21 July 2004, *BN/De Stem*, 22 July 2004, *Limburgs Dagblad*, 24 July 2004 and *Het Parool*, 31 July 2004, available at: <http://www.ivir.nl/publicaties/dommering/grenzenuitingsvrijheidParool.html>

Medialogica, examines the interrelationship between the media, citizens and politics, and points out perceived media shortcomings in this regard and formulates a series of proposals. The report has been criticised in some quarters for failing to adequately state the importance of, and need for, the protection of media freedom. The Dutch Government has adopted two of the proposals contained in the report, i.e., (i) to provide enhanced support for the activities of the Press Council (but, contrary to the *Medialogica* proposal, without strengthening the force of the Council's judgments), and (ii) to introduce a press diversity test into the more economically-oriented press merger control mechanism.¹²⁴

In the Netherlands (despite the final consequences of the aforementioned proposals) and elsewhere, concerns for and criticisms of media performance are unlikely to disappear. It is important, however, to temper such concerns and criticisms to the requirements of a healthy freedom of expression regime. Increasingly, there is an expectation that the media will also engage in the promotion of a culture of tolerance¹²⁵ and the promotion of media literacy, both of which could play an important role in enhancing the quality of political debate in the media. The term "media literacy" is potentially of very broad scope and its vagueness has perhaps led to uncertainty about how it should be pursued.

The promotion of media literacy was one of the positive obligations placed on the regulatory authority by the United Kingdom Communications Act.¹²⁶ While the term is not defined in the Act, it would appear to involve creating better public awareness and understanding of "the nature and characteristics of material published by means of the electronic media"; the processes by which such material is selected or made available; the relevant regulatory background, and available systems for controlling the reception of such information. It would also seem to include encouragement of the "development and use of technologies and systems for regulating access to such material, and for facilitating control over what material is received, that are both effective and easy to use".¹²⁷ OFCOM also launched a wide-ranging consultation exercise to try to ascertain what the obligation could or should entail.¹²⁸ It remains to be seen how much scope there would be for media literacy to stimulate greater awareness of the role of the media in political debate.

The precise contours of "media literacy" have not yet been drawn authoritatively at the European level either. In the Council of Europe's Internet Literacy Handbook,¹²⁹ which was developed as part of the Integrated Project "Making democratic institutions work",¹³⁰ media literacy is described as:

being able to analyse information contents, verify information sources and seek other points of view. This enables us to avoid being dictated to by written and broadcast media; it implies being equal through being able to make up our own mind, and being unprejudiced because we know multiple points of view exist. This conditions our ability to vote independently and hence maintain democracy.

Nevertheless, the concept is featuring with increasing frequency in relevant media documents emanating from both the Council of Europe and the European Union. For instance, media literacy is one focus of an ongoing Council of Europe project concerning democratic citizenship in general. Moreover, within the European Union, one of the stated goals of the recent proposal for a recommendation on protection of minors and human dignity and the right of reply is to promote, *inter alia*:

action to enable minors to make responsible use of on-line audiovisual and information services, notably by improving the level of awareness among parents, educators and

124) At the time of writing, the details of these proposals had yet to be worked out.

125) See, in this connection: Recommendation No. R (97) 21 of the Committee of Ministers to Member States on the media and the promotion of a culture of tolerance, adopted on 30 October 1997, available at: [http://www.coe.int/t/e/human_rights/media/5_Documentary_Resources/1_Basic_Texts/2_Committee_of_Ministers'_texts/Rec\(1997\)021%20E%20&_Exp_Mem.asp#TopOfPage](http://www.coe.int/t/e/human_rights/media/5_Documentary_Resources/1_Basic_Texts/2_Committee_of_Ministers'_texts/Rec(1997)021%20E%20&_Exp_Mem.asp#TopOfPage)

126) UK Communications Act 2003 (s. 11 Duty to promote media literacy), available at: <http://www.hmso.gov.uk/acts/acts2003/20030021.htm>. See further, Tony Prosser, "GB – New Communications Act Becomes Law", *IRIS* 2003-8: 10.

127) Section 11(1)(e), *ibid.*

128) Ofcom's strategy and priorities for the promotion of media literacy, see further: <http://www.ofcom.org.uk/consultations/past/strategymedialit/?a=87101>. At the time of writing, the consultation exercise had concluded, but its results had yet to be published.

129) Available at: http://www.coe.int/T/E/Integrated_Projects/democracy/02_Activities/03_Internet_literacy/Internet_Literacy_Handbook/default.asp

130) This was one of two Council of Europe so-called "Integrated Projects" launched in January 2002. For further information, see: http://www.coe.int/T/e/integrated_projects/

teachers of the potential of the new services and of the means whereby they may be made safe for minors, in particular through *media literacy* or media education programmes.¹³¹

It is important to consider the scope of notions such as media literacy from national and European perspectives alike, as has been done here. While the notion undoubtedly contains a kernel of characteristics that apply both nationally and internationally, some other characteristics are variable and necessarily have to be adapted to meet situational needs. One example of attuning media literacy to national cultural and legal specificities could involve language. In a multilingual state, it is very conceivable that a case would be made calling for media literacy to promote the use in broadcasting – alongside the State/official language - of minority languages and also languages that could play a role for inter-community communication (e.g. a/the State language, or a widely used non-State language, or even (but perhaps more controversially), a dominant foreign language to reflect certain outward-looking aspirations.

Media Law, Media Content, and American Exceptionalism (Topic 4)

American constitutional exceptionalism is evident in the U.S. approach to international relations generally and also in a number of key policy areas. Even against this broader context of exceptionalism, the American free speech tradition is unique in that it affords a particular right a higher level of protection than it would enjoy in other comparable liberal democracies, e.g. in Europe. In the United States, formal legal liability for political expression is strikingly less, and resultant sanctions noticeably lower. Specific legal developments have played a powerful role in helping this state of affairs to come about. Until 1964, U.S. defamation law was very much in line with its common law origins; it was a strict liability tort, meaning that plaintiffs only had to prove on the balance of probabilities that certain words or statements tended to harm his/her reputation in the eyes of the community. In order to mount the defence of fair comment on matters of public importance, the defendant would have to establish the total factual truth of the commentary.

However, in *New York Times Co. v. Sullivan*¹³² – the famous case involving a paid advertisement alleging official hostility in the State of Alabama to the civil rights movement – the U.S. Supreme Court gave a radically new direction to defamation law. The Court held that the notion of liability without fault was in conflict with the First Amendment's commitment to debate that is robust, wide-open and uninhibited. A necessary condition of such debate is that public officials and policies must be able to be subjected to harsh criticism. In order to avoid the chilling effect of debilitating libel actions, the Court was keen to come up with a formula whereby liability for harm of published falsity would be less than the harm of unpublished truth. Under the resultant "actual malice" rule, in order to prevail in defamation suits, public officials would have to prove with convincing clarity not only that offending material was false but that it was published with actual knowledge of its falsity at the time of publication.

Nowadays, as a result of all of the above, it is highly unusual for a defamation action to be taken by a public official or figure. As a consequence of the strong presumption in favour of freedom of expression in the United States, it routinely trumps other societal values or collective interests that tend to be more highly valued in, for example, most Council of Europe States. This is why the U.S. legal system tends to pay short shrift to arguments favouring the introduction of hate speech laws (e.g., prohibiting or restricting advocacy of racial hatred and Holocaust Denial). Defamation and hate speech are the most emphatic illustrations of U.S. free speech exceptionalism, but free speech interests also tend to prevail even when pitted against other competing interests, such as the fair administration of justice/court reporting, privacy, stolen State secrets, etc. Furthermore, of particular interest for present purposes:

In the context of elections and referendums, attempts to make campaign and electoral communications accurate, fair, equal, open, non-coercive, and balanced typically founder on the rocks of a strong preference for the communicative rights of broadcasters, newspapers, and candidates, or for the rights of individual and corporate speakers, over

131) Emphasis added. Proposal for a Recommendation of the European Parliament and of the Council on the protection of minors and human dignity and the right of reply in relation to the competitiveness of the European audiovisual and information services industry, COM (2004) 341 final, 30 April 2004, available at:

http://europa.eu.int/comm/avpolicy/legis/key_doc/legispdffiles/com04-341-en.pdf . See further, Sabina Gorini, "European Commission: Proposal for New Recommendation on Protection of Minors and Human Dignity", *IRIS* 2004-6: 5.

132) *Op. cit.*

the more diffuse rights of the polity to a fairer but more controlled environment of political and electoral communication.¹³³

The high-absolutism of the First Amendment culture that reigns in the U.S. today can be explained, or at least contextualised, as follows: “[...] American society, as a matter of history and political culture far more than constitutional text or even constitutional law, is plainly a libertarian culture, persistently choosing values of individual liberty over often conflicting values of equality, civility, and community”¹³⁴ It is significant that there is no in-built balancing mechanism to define how the right to freedom of expression should interact with other potentially competing rights/values.

Allied to this “preference for liberty”, there has traditionally been “pervasive distrust of government” in American society. This endemic distrust resonates in different ways, perhaps most stridently in the implicit opposition to the idea that any one individual or organ of the State be entrusted with the task of determining “what is true and what is false, and what is valuable and what is worthless”. In other words, the U.S. First Amendment tradition rejects any tampering with viewpoint neutrality, as well as the idea that the State should be vested with “distinction-drawing capacities” in the realm of speech.

Unsurprisingly, the constitutional and symbolic force of the First Amendment have led to the growth of a distinct political culture around it; a culture that is to an extent self-perpetuating due to the influence and dynamism of the interest groups involved. Needless to say, it is also the product of a concatenation of a wide range of other (political, social, philosophical and economic) influences.

When translated into practice, there is plenty of empirical evidence to suggest that American society and American public debate comprise a rather narrow range of public opinions. Tellingly, “if one important function of legally uninhibited political communication is to foster an environment in which a wide range of views are expressed, debated, and taken seriously, then it is not at all clear that American free speech libertarianism is a sufficient condition for that consequence, and thus not at all clear that American free speech libertarianism has produced a wider range of robust political communication than one sees in some number of countries with a less libertarian approach to freedom of communication”.¹³⁵

In the design of decision-making institutions, attention should be paid to two types of errors. The first concerns positive action taken erroneously, such as corrupt or inefficient officials, thus empowered, taking positive action. The second type of error is a failure to take positive or beneficial action, such as preventing well-intentioned, able public officials from exercising their power for the greater good. In the context of American political culture and First Amendment culture, it could be argued that a wariness of the first type of error predominates. This explains the rather negative vision of how the courts should interpret the First Amendment and its values.

Comparative Overview of the U.S. and Europe

The penchant of the U.S. Supreme Court for categorisation of speech could be viewed as a methodological attempt to introduce order into a large volume of case-law. What has been witnessed in the jurisprudence of the Supreme Court is the gradual abandonment of original broad, open standards such as necessity and proportionality. Over the stretch of time and experience, as patterns repeat themselves and as accumulated case-law has developed, the need to categorise grows accordingly. The laconic text of the First Amendment, coupled with the common law tradition of the U.S. means that there was a certain inevitability about how relevant doctrine would develop on the basis of precedent. It should not be ruled out that over a comparable stretch of time and experience, the European Court of Human Rights might also opt to rely on various sorting, filtering and categorising devices, in order to cope with a vast case-law.

Against the U.S. courts’ overwhelmingly negative conception of rights in general and freedom of expression in particular, a flurry of claims of affirmative rights of access to government buildings, special privileges for reporters were all rejected. In *CBS v. Democratic National Committee*¹³⁶ it was held that private broadcasters for constitutional purposes at least in terms of political speech were not to be treated as targets of positive rights. In other words, individuals do not enjoy a positive/constitutional right of access to CBS broadcasting time.

133) Fred Schauer, *infra*, Media Law, Media Content, and American Exceptionalism, at 1. (footnote omitted).

134) Fred Schauer, *infra*, at 4.2.

135) Fred Schauer, *infra*, at 5.

136) *Columbia Broadcasting System Inc. v. Democratic National Committee*, 412 U.S. 94 (1973).

The First Amendment does not have horizontal application at all: under the so-called “State action doctrine”, journalists do not have free expression rights against papers or broadcasters, and employees do not have judicially enforceable freedom of expression rights against employers. All of this plays into a tendency to increase power and concentration of particularly strong organisations which are understood in U.S. law as having their own free speech rights, including the right to hire whoever they want to send out their message. One of the end-results of this (obviously influenced by other factors too) is that the media have become so much part of political institutional system that they are treated as part of the political power system that is outside the system of judicial control. The establishment press is now the beneficiary of range of legal doctrines largely not created for establishment entities.

As noted *supra*, public official defamation actions have virtually disappeared from American public communications. On the rare occasions on which defamation actions are initially successful, jury awards are almost always reversed on appeal. Apart from the already-outlined substantive legal reasons for these trends, a few procedural and other considerations could also be mentioned. In the U.S., libel insurance is very inexpensive and widely available, and coupled with system in which there is no fee-shifting, even a winning plaintiff has to be able to stand cost of litigation at the outset.

National security/anti-terrorism is, of course, highly topical in the U.S. today. While there are some classic American cases on prior/previous restraint,¹³⁶ it was submitted that it would be unlikely that the media today would publish the names of secret agents, or clearly sensitive details of troop movements, changes of location, exact positions, etc., out of a sense of their professional/ethical responsibilities and a deference to genuine security concerns. On a less altruistic plane, they would not like to be branded as unpatriotic or to jeopardise their privileged access to official security information. Such privileged access can be the product of formal or informal collaboration with governmental officials or security forces. For instance, during the first Iraq War, the official U.S. press pools included only mainstream news organisations. Several left-wing magazines requested inclusion but were refused and brought a law-suit to gain inclusion. The case was overtaken by events, however: the war ended and the courts did not have to pronounce on the matter.

In conclusion, it was not clear that there were any transportable lessons that could be learnt from the U.S. experience. Given the very strong American preference for liberty over community, civility, equality, etc. – all of which are grounded in a complex seam of social, economic, philosophical, political and historical influences – the importability of First Amendment doctrine¹³⁷ seemed to be fraught with subjectivity. Another question is whether it is even the best doctrine for the U.S. itself.

136) For example: *Near v. Minnesota*, 283 US 697 (1931); *New York Times v. United States* 403 US 713 (1971) (colloquially known as “The Pentagon Papers Case”).

137) Paraphrasal of title of book: Ian Loveland, Ed., *Importing the First Amendment – Freedom of Expression in American, English and European Law* (Oxford, Hart Publishing, 1998).

Political Expression in the Media: What Kind of Regulation is Necessary in a Democratic Society?

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"If once you let broadcasting into politics, you will never be able to keep politics out of broadcasting".

Postmaster-General, UK, in 1926, cited in O. Scannel and D. Cardiff, *A Social History of British Broadcasting*, Volume One, 1922-1939: Serving the Nation, Oxford, Blackwell, 1991, 23.

"Assuming the BBC is for the people and that the Government is for the people, it follows that the BBC must be for the Government".

John Reith, in 1926, cited in T. Burns, "The Organisation of Public Opinion", in J. Curran, M. Gurevitch and J. Woollacott (eds.), *Mass Communication and Society*, London, Arnold, 1977, 54.

"If Kinnock wins today, will the last person to leave Britain please turn out the light".

Frontpage of *The Sun*, the day before the elections in the UK on 9 April 1992.

"The Voting Test is a dangerous programme on Flemish broadcasting. It should not be allowed to broadcast such a programme in a democracy".

Louis Michel, Vice Prime Minister of Belgium, Minister of Foreign Affairs, a few days before the elections of 13 June 2004 for the European Parliament and for the Regional Parliaments in Belgium, *Knack* 9 June 2004, 34.

"Free elections and freedom of expression, particularly political debate, together form the bedrock of any democratic society".

European Court of Human Rights, *Bowman v. UK*, 19 February 1998.

"A prohibition of political advertising which applies only to certain media, and not to others, does not appear to be of a particularly pressing nature".

European Court of Human Rights, *VGT Verein Gegen Tierfabriken v. Switzerland*, 28 June 2001.

The media influence politics. Politics influence the media. The interdependent relation between media and politics is especially reflected in the media coverage and political communication in pre-electoral periods, elections being the *holy days* in a democracy, the decisive moments when people vote what kind of politics and politicians they want.¹ From this perspective the media play an important role in a democracy, by informing the electorate about the *res publica*, by creating perceptions about politics and by giving a forum to politicians in pre-electoral periods, by imparting news, opinions and commentary with explicit or implicit political meaning.

In all countries in Europe an impressive set of rules has been promulgated in order a) to ban or restrict some types or content of political communication, b) to organise and control, or c) to stimulate, to guarantee certain types or formats of political expression in the media.

That media and political communication have an effect on and influence society and the electorate is generally taken for granted. How this effect functions however, in what direction, under what circumstances, to whom and when, is still uncertain.

All kind of theories and models have been developed, from the determinist hypodermic model (*stimulus-response*) over the theories of minimal consequences to the null effects-approach, with in between theories and studies focussing on multi-step influences, uses and gratifications, agenda-setting, reinforcement effect, cognitive dissonance, spiral of silence, the mediatisation of politics...² It is also recognized that people perceive messages differently: the same content can communicate contradictory messages. And last but not least: many other factors in society, patterns of media-consumption and especially individual characteristics influence the attitudes and political preferences of the people. Therefore it is very difficult to isolate the media-effect or the media's political content in order to "measure" whether and if so how they influence public opinion, or rather the process of individual's opinion formation and expression. Both media and politics are also in a permanent flux or transition, local and global, which is an additional factor that complicates reaching coherent, reliable and general conclusions about the way media and political campaigning influence public opinion and more precisely have an effect on the voting behaviour of individuals. Understanding the mechanisms of (*short- and long-term*) media-effects on the electorate remains a complicated matter.

It is actually out of discussion, however, the fact that journalistic reporting on politics, media coverage on upcoming elections and strategic political campaigning do influence at least in some way, and to some extent, a significant part of the electorate, especially the so-called *undecided* voters. A popular interpretation is that the political party that wins an election is the one who has run the most effective campaign and/or has been supported the most or the best by the media during the pre-electoral period. There is, however, no systematic evidence to support this interpretation.

Let's consider as an example what happened in Belgium, more specifically in the Flemish Community, during the last elections on 13 June 2004. As in some other countries, these elections concerned not only the voting for the representation in the European Parliament, but also national/regional elections. In addition, on 13 June 2004 the electorate in the Flemish Community voted for a new Flemish Parliament.

The most striking result of the 13 June 2004 elections in the Flemish Community was that almost 25%³ - nearly one million of the 4 million voters - voted in favour of the extreme-right party *Vlaams Blok*, which received the highest number of votes ever. A striking result indeed, as in the weeks and months before the elections the *Vlaams Blok* had received very negative media coverage. It was also an atypical result, because in the rest of Europe extreme-right nationalistic parties such as for instance the *Front National* of Jean-Marie Le Pen in France or the *FPÖ* of Jörg Haider in Austria are in decline.

13 June 2004 prompted a debate about the role of the media and their alleged contribution to the success of *Vlaams Blok*, a party with its roots in neo-nazi and extreme-right ideologies, a party with a definite anti-immigrant profile and which is focused on a narrow nationalistic and intolerant discourse, and the propagation of "*Eigen Volk Eerst*".

1) Although remember the anarchistic slogan: "If elections would really have an impact on the division of power in society, they would have been abolished".

2) For a general introduction, see P. Norris a.o., *On Message. Communicating the Campaign*, London, Sage, 1999 and D. Mc Quail, *McQuails Mass Communication Theory*, London, Sage, 2000.

3) To be more precise: the *Vlaams Blok* received 24,2 % of the votes for the Flemish Parliament.

In the pre-electoral period the *Vlaams Blok* and some of its candidates received very critical and negative coverage in the media. On 21 April 2004, after a procedure which lasted four years, the Court of Appeal of Ghent came to the conclusion that the *Vlaams Blok* in some of its publications and publicity had systematically and openly incited to discrimination and racial hatred, esp. defaming, humiliating and criminalising migrants from Turkey and Morocco. Three legal entities within the *Vlaams Blok*⁴ were convicted for their participation in an organisation that systematically and openly propagated discrimination and racism. The conviction of 21 April 2004 was the first ever of the *Vlaams Blok* as a result of the application of the antiracism law of 30 July 1981.⁵ The judgment of the Court of Appeal in Ghent and its legal and political consequences received a lot of media attention during the election campaign. It became obvious that the judgment of 21 April 2004 could have far-reaching consequences for the functioning of the *Vlaams Blok*, as it substantially reduced its opportunities to take part in a future government - it was not conceivable that any other political party would be available to start a coalition with a party convicted for incitement to racism and discrimination.

This was not the only newsworthy event the *Vlaams Blok* was involved in during the pre-electoral period. Several politicians of the *Vlaams Blok* had to cope with very negative media coverage during the period short before election day on 13 June 2004: one party member of the *Vlaams Blok* was put into jail for drug trafficking, another was prosecuted for shooting at a man with a rifle in a café and last but not least, a candidate for the Flemish Parliament was prosecuted for beating up his wife in a public place. These facts received a lot of critical media coverage - the *Vlaams Blok* being strongly opposed to drug trafficking, and referring constantly to the dangerous increase in crime and defending a rather conservative approach to the institution of marriage.

For several years the *Vlaams Blok* has been criticizing and complaining about a media boycott, as there are indications that some newspapers and broadcasters do not focus on the activities or political actions of the *Vlaams Blok* (or at least do it less) or do not invite their representatives or MPs to take part in political debates or interviews (or at least do it less).⁶ The *Vlaams Blok* has been complaining for many years that the media only pay attention to the party when they want to criticize it or to report negatively about its programme, its action or its representatives. It might be relevant in this perspective to refer to recent academic research that revealed that almost 75 % of the journalists in the Flemish Community are to be situated politically left of centre (esp. socialists/social-democrats and green party), which is one more argument for the *Vlaams Blok* to complain about their underrepresentation in the media due to the alleged leftwing leanings of the majority of journalists in the Flemish media.

It is worth mentioning that in 2001 the public broadcasting organisation VRT prepared the internal guidelines entitled "The VRT and democratic society", stating that the Flemish public broadcasting organisation cannot be an instrument for the dissemination of statements or opinions of organisations or political parties that do not respect the fundamental values of democracy and tolerance, and which openly incite to hatred and discrimination. In the internal guidelines explicit references are made to the *Vlaams Blok*, a party which supports a programme and policy-options assumed to contain statements that are not compatible with the mission statement of the VRT. VRT's task is also "to contribute to tolerance in society and to promote community relations in pluri-ethnic and multicultural societies", as it was formulated in the Media Minister's Declaration of Prague in 2000. As a result of the application of these guidelines the *Vlaams Blok* and its politicians are prevented to issue statements and opinions which do not respect the mission statement of the VRT or which are in breach of the Prague Declaration of 2000. There are indications that the *Vlaams Blok* representation in the Flemish parliament and its politicians are underrepresented or have reduced access to the political programmes of the VRT, especially the programmes where representatives of the political parties are invited to participate in political debates.⁷ Since 2002 the Flemish Parliament has put an end to the obligation of the VRT to offer broadcasting time to political parties represented in the Flemish Parliament. The abolition of the right of access by political parties to broadcasting time on public television was strongly criticised by the *Vlaams Blok* and was considered as a strategic decision by the other political parties to further "censor" the *Vlaams Blok* and cut it off from the audience of party political broadcasting programmes.

4) The *Vlaams Blok* as a political party has no legal personality. Its MP's are under a privilege of parliamentary immunity.

5) Court of Appeal Gent 21 April 2004, *Auteurs & Media* 2004/2, 170. See also D. Voorhoof, "Het *Vlaams Blok*-arrest: de antiracismewet is geen loutere symboolwet", *TvMR (Tijdschrift voor Mensenrechten)* 2004/2, 9-11.

6) See the *Vlaams Blok* website: www.vlaamsblok.be

7) See D. Voorhoof en J. Debackere, "Nieuwsberichtgeving en de democratische rechtsstaat. De journalistieke opstelling in Vlaanderen tegenover racisme, discriminatie en extreemrechts", in D. Biltereyst en Y. Peeren (eds.), *Nieuws, Democratie en Burgerschap*, Gent, Academia Press, 2003, 27-54.

Regardless of this negative media coverage and reduced access to the media in the months and weeks before election day, the *Vlaams Blok* obtained its best results ever and grew to become the biggest political party in the Flemish Community.⁸

The day after the elections, the impressive success of the *Vlaams Blok* was explained by some politicians, academics and journalists by arguing that some media and especially the VRT had treated the *Vlaams Blok* in a too friendly way, by giving the opportunity to the candidates of the *Vlaams Blok* to participate or to be interviewed in some programmes qualified as “infotainment”.

The example of the *Vlaams Blok* indicates that under-representation in the media and critical coverage in most newspapers, magazines and broadcasting programmes did not determine decisively the performance of a political party on Election Day. One could even assume that some of the legal rules, restrictions and internal guidelines applied by the media with regard to coverage of the *Vlaams Blok* might have had a perverse effect, putting the *Vlaams Blok* and its candidates in the (attractive?) role of underdog, the one being “censored” and restricted in their freedom of expression, the one being criticised by the establishment (the government, the majority in parliament, the judiciary and... the media).

It can be argued that the set of legal rules and restrictions applicable to media reporting at election time has been developed to create a “level playing field” in order to give all relevant or democratic political parties equal or proportional access to the media and to guarantee fair and balanced reporting, all in the name of the proper functioning of democracy and the right of the people to be properly informed.

There are indications, however, that not all laws and regulations applicable in the area of political expression, elections and the media do effectively (or proportionately) contribute to those legitimate aims. The aim of this introductory contribution is to open the debate on to the legitimacy and democratic necessity of some of those restrictions and regulations.

According to national and international standards of law with regard to freedom of expression, it is generally recognised and strongly emphasised that there is little scope for restrictions on political speech. In its case law in application of Article 10 of the Convention, the European Court of Human Rights has repeatedly emphasised that “there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest”.⁹

However, an immense quantity and complex body of law and regulation precisely focuses on political speech or has indirect or direct effect on the freedom of political expression by politicians, political parties and the media, especially in pre-electoral periods (*see annex*).

In order to elaborate on the analysis of the relevance, or rather on the necessity in a democratic society of some types of regulation and restrictions with regard to political expression, media and elections, a list of statements is formulated. The statements focus on political advertising, on the control by the media or by postal services (on the distribution) of certain types of political propaganda and on the reporting of pre-election opinion polls (voting intention polls).

8) The largest political fraction, the CD&V with NV-A being a merger of two political parties.

9) European Court of Human Rights, Sürek n° 1 v. Turkey, 8 July 1999, § 61; European Court of Human Rights, Müslüm Gündüz, 4 December 2003, § 37-53 and recently: European Court of Human Rights, Hrico v. Slovakia, 20 July 2004, § 40.

1. *“Political advertising” on television is no advertising from the perspective of the Television Directive 89/552/EG (art. 1, c) and should not be treated as “commercial speech” from the perspective of Article 10 of the European Convention.*
2. *A total prohibition of paid political advertising on television is considered by the European Court of Human Rights as a legitimate restriction on the freedom of expression necessary in a democratic society. This is contradictory to the fact that in some democratic societies paid political advertising on television is allowed and is not (considered as) endangering democracy.*
3. *Political advertising on television ought to be restricted, but not banned, because a total ban is a disproportionate restriction on the freedom of expression.*
4. *If candidates and parties have fair access to airtime for free political advertising during election campaigns, there is less (or no?) need for paid political advertising.*
5. *A television channel should not refuse the broadcasting of a political ad, arguing that the content is illegal, since the competence to decide upon the illegal character lies with the judiciary (or any other competent authority).*
6. *Postal services should not be allowed to refuse the distribution of printed material or political advertising they consider as inciting to racism or hatred or infringing other laws, since the competence to decide upon the illegal character of the materials lies with the judiciary.*
7. *Enforcement by law of a pre-election opinion poll silence is in breach of the freedom of expression as guaranteed by Article 10 of the Convention.*
8. *Compelling the media to refer to a set of characteristics of an opinion poll when reporting opinion polls is impossible to enforce in practice.*
9. *From the perspective of Article 10 of the Convention, there cannot be at the same time little scope for restrictions on political speech and a wide margin of appreciation for the member states legitimating interferences with political broadcasting and reporting opinion polls.*

ANNEX

Political Expression

- Political system
 - Proportional system, threshold, parliamentary/presidential election
 - Electoral law
 - Party system, number of (represented) political parties
 - Professionalism of political communication
- Media system
 - Public/private media
 - Print, audiovisual, Internet
 - Editorial autonomy and journalistic professionalism
 - Level of pluralism (internal/external)
- Civil society/citizens/consumers/market
- Law & regulation

Relevant Types of Law and Regulation

- Constitutional law
- Press law
- Broadcasting law
- Advertising law
- Criminal law (defamation, insult, privacy)
- Civil law (personality rights, honour and reputation, privacy)
- Law on public opinion polls or voting intention polls
- Law on the public financing of political parties
- Law on political campaigning
 - Financial restrictions (spending ceiling on campaign expenditure)
 - Time restrictions
 - Media restrictions (print media, cinema, radio and television, billboards, internet, email)
- Right of reply
- Copyright law
- Non-discrimination law, competition law, anti-concentration law
- Privacy law and data-protection law
- Journalistic ethics
- Forms of self-regulation (media, opinion polls, politics)

Political Advertising

- Print media, newspapers and magazines
- Commercial, regional and local radio's
- Commercial, regional and local televisions
- Public broadcasting
- Internet
- Telephone and sms
- Billboards
- Cinema
- Self promotion of political parties

Political Broadcasting and Political Advertising on Television (and Radio)

- News and current affairs programmes and impartiality, fair and balanced coverage
 - General rules or specific regulation
 - In statutory law or internal/editorial guidelines
 - Differences between private and public broadcasting
 - Minimum percentage of airtime to news and information?
- Political programmes/debates and equal access
- Televising Parliament
- Free political advertising
 - Allocation
 - equal access or proportionally divided
 - for all parties or only for those already

- represented in parliament
 - with a minimum for non-represented parties?
 - time/quantity limitations
 - basic studio facilities
 - Content restrictions?
- Paid political advertising
 - Total ban or (un)limited
 - (Un)limited campaign expenditure
 - Non-discriminatory: equal opportunities rule
 - Transparent modalities of access and tariffs
 - Lowest price unit
 - Limit of spending per party/candidate (spending ceiling)
 - Minimum length
 - Clear indications (disclaimers)
 - Silence time (day for elections?)
 - Content restrictions?
- Governmental communications
 - Only on public broadcasting?
 - Limitations (period preceding elections)
 - (Not) a right of reply for the opposition
- Negative campaigning (discrediting opponents)
 - In political advertising
 - In the media
 - On the Internet
 - (No) need for regulation?
- Different types
 - Political party messages
 - Individual candidates
 - Individuals who are not candidates supporting party or candidate
 - Advertisement which reflects a social/political debate

Other Formats

- Televoting, voting in studio during a programme
- Infotainment (light interviews, human interest, privacy)
- Television entertainment and games with participation of politicians
 - Prohibition for politicians to participate (in pre-election time)?
- Websites with petitions, referenda, discussion groups
- "Do the voting test"-formats

Reporting Opinion Polls

- Opinion polls
- Voting Intention polls
- Exit polls
 - No reporting on exit polls before ballot boxes have closed?
- Silence period?
- Quality control – quality label
- How to report polls: statutory law or self-regulation (see also www.esomar.org)
- Undesirable (perverse?) effect of reporting horse race polls?

Who Supervises, Controls or Sanctions?

- Jurisdictional control
 - Criminal court
 - Civil court
 - Commercial court
 - Administrative court
 - Summary proceedings/injunctions
- Quasi-jurisdictional control/independent authorities (media authorities)
- Self-regulatory bodies
- Parliament/government/political parties
- Effective control mechanisms?

Restrictions on Political Expression

Toby Mendel
ARTICLE 19

1. Introduction

The topic assigned for this paper is restrictions on political expression, a topic of almost unlimited potential breadth. The paper assumes that readers are fairly familiar with the general issues this topic raises, as well as the broad legal framework within which restrictions on freedom of expression are assessed. It takes as its starting point international guarantees of freedom of expression.¹

An initial question to be answered, at least for purposes of the paper, is the scope of what is meant by political expression, an often used, but little defined, term. This paper takes a broad approach to this question, in line with the way in which legal rules relating to freedom of expression have been developed, including within its ambit all expression relating to matters of public concern.

Given the enormous potential breadth of the topic at hand, the paper focuses on a number of different themes, all of which relate to political expression but not necessarily to each other. It can be taken as a given that political expression lies at the very heart of a democratic system of government and that it deserves the highest degree of protection under international law. Numerous court decisions, both international and national, attest to this; these will not be repeated here.

An important part of the paper addresses the controversial issue of changing conceptions of freedom of expression, a subject that can also be looked at from the perspective of changing threats to the free flow of information and ideas in modern societies. Whereas traditionally, the State, or more particularly the government, was normally the leading threat to freedom of expression, in many modern societies, this has changed. The main threat now is seen by many as the collapse of public space and of local voices, and the loss of diversity in the media, notwithstanding the massive increase in available broadcasting channels and the new media. The paper also looks at new developments in a number of more established areas, such as defamation law, regulation of the Internet and protection of privacy.

2. Restrictions on Freedom of Expression Under International Law

International law and most constitutions do permit limited restrictions on the right to freedom of expression in order to protect various private and public interests. Once a measure is found to restrict, or interfere with, the right to freedom of expression, international law provides for a strict three-part test by which to assess the legitimacy of that restriction. This test requires any restriction to be (a)

1) Indeed, such guarantees provide the name of the organisation for which the author works, derived from Article 19 of the *Universal Declaration of Human Rights*, UN General Assembly Resolution 217A(III), 10 December 1948.

provided by law; (b) for the purpose of safeguarding a legitimate public or private interest; and (c) necessary to secure this interest.²

To be “provided by law” implies not only that the restriction is based in law but also that the relevant law meets certain standards of clarity and accessibility. The legitimate interests which may justify a restriction on freedom of expression are listed in the various instruments; these lists are not illustrative but are rather exhaustive so that any measures which does not seek to protect a listed interest is not legitimate. Finally, the third part of the test, the requirement of necessity, means that even where measures seek to protect a legitimate interest, the government must demonstrate that there is a “pressing social need” for the measures; moreover, the restriction must be proportionate to the legitimate aim pursued and the reasons given to justify the restriction must be relevant and sufficient.³

3. Scope of Political Expression

It is important to start by defining the scope of what comprises political expression, at least for purposes of this paper.

This issue is of particular relevance in Australia where, although freedom of expression is not explicitly protected in the constitution, the courts have held that freedom of political communication is implicitly protected as integral to the system of representative government. In *Lange v. Australian Broadcasting Corporation*, the Australian High Court discussed the scope of this protection at some length, noting:

Moreover, the conduct of the executive branch is not confined to Ministers and the public service. It includes the affairs of statutory authorities and public utilities which are obliged to report to the legislature or to a Minister who is responsible to the legislature.⁴

There is an uncontroversial core of political expression which is explicitly political in nature and which does not need elaboration. Criticism of elected officials or comment on specifically political matters, for example, are both clearly political speech. In *Lingens v. Austria*,⁵ the applicant had been convicted of defaming a retiring chancellor. The European Court of Human Rights specifically noted that the impugned expression related to a political issue, a particularly important type of expression which warranted special protection.

Public comment on public authorities, even if it does not specifically reference an elected official, can also fairly uncontroversially be described as political expression, although in this case a broader conception of political expression is engaged.⁶ In *Castells v. Spain*,⁷ the applicant was convicted for having criticised the Spanish authorities for the way in which they dealt with certain events in the Basque Country. Once again, the European Court specifically referred to the expression as being political in nature, involving, as it did, reference to governance issues.

A more difficult question is whether expression relating generally to matters of public interest or public concern⁸ is political expression. *Bladet Tromsø and Stensaas v. Norway*, for example, involved a defamation case based on criticism of seal hunters. Although the statements in question were not political in the strict sense of the word, the European Court of Human Rights held that a higher standard of scrutiny of the restriction, analogous to that applied to criticism of officials, was warranted due to the need for open debate in society about such matters:

2) The test flows fairly clearly from the text of the guarantees. For an elaboration of the test by the UN Human Rights Committee, see *Mukong v. Cameroon*, 21 July 1994, No. 458/1991, para. 9.7. This test has also been elaborated in some detail in the European context by the European Court of Human Rights in *Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74.

3) *Sunday Times v. United Kingdom*, *ibid.*, para. 62. These standards have been reiterated in a large number of cases.

4) (1997) 71 ALJR 818, p. 826.

5) 8 July 1986, Application No. 9815/82 (European Court of Human Rights).

6) Private communications with public authorities about private matters would not normally qualify as political expression but some private communications might.

7) 23 April 1992, Application No. 11798/85 (European Court of Human Rights).

8) The term “matters of public concern” is to be preferred as it rules out matters which, while they interest the public, would not for legal purposes be considered to be matters of public interest.

Very careful scrutiny is required where measures taken or sanctions imposed by a national authority are capable of discouraging the participation of the press in debate over matters of legitimate public concern.⁹

For purposes of this paper, political expression will be understood as comprising expression on matters of public concern. While the latter may not formally be political in nature, it falls into a closely related category of speech relating to societal or public, rather than private, matters.

A rather more difficult question arises in relation to types of expression, like racist speech, which are not of legitimate public concern and may even fall into a category of speech which international law requires States to prohibit. It is submitted that such speech, even where it is not protected by the guarantee of freedom of expression, must still be regarded as political expression. It may be noted that political expression defines a category of speech not by reference to the fact that it may not be restricted, but rather by reference to the type of speech involved. Criticism of the public performance of a politician, even if defamatory and illegal, is still undoubtedly political expression. Racist speech falls into the category of speech relating to societal matters, noted above. It may also be political in the smaller sense of addressing governance issues.

Another borderline issue arises in relation to expression directed at a public official or figure which does not concern societal matters, for example because it relates to his or her personal life. It may be difficult to draw a clear line between the public and private life of a politician or public official. In the UK, for example, Prime Minister Blair has been questioned about whether or not he had given his own children a certain vaccination which was being officially promoted, in the context of concern about possible health risks associated with that vaccination. The behaviour of celebrities may have important social repercussions. In some cases, these individuals serve as role models for whole sections of society and information about their private behaviour may be closely related to this.

4. Redefining Restrictions

A legal rule will normally be understood as restricting freedom of expression if it places fetters of any sort on expression. Assessment of the legitimacy of the rule will then move on to the three-part test for restrictions, outlined briefly above.

However, in some cases the rule may actually be designed to promote freedom of expression or a certain aspect of that right. For example, a rule which requires broadcasters to carry minimum quotas of local content can enhance freedom of expression and, in particular, the right to receive information and ideas. In the absence of such a rule, broadcasters have a tendency to carry large amounts of foreign material for various reasons, including because it is normally much cheaper to purchase content than to produce it on a home-grown basis. The impact of an appropriately formulated local content rule, therefore, is to ensure that viewers and listeners have access to locally produced material and information, an important aspect of diversity.

The African Charter on Broadcasting, adopted at a major conference in Windhoek in May 2001 hosted by UNESCO and the Media Institute of Southern Africa, recognised the importance of local content rules in the following terms:

Broadcasters should be required to promote and develop local content, which should be defined to include African content, including through the introduction of minimum quotas.¹⁰

There are a number of other areas where what may be claimed to be restrictions on freedom of expression are actually designed to promote the free flow of information and ideas. Broadcast licensing, necessary to ensure orderly use of frequencies in the public interest, is an example. Rules designed to prevent undue concentration of media ownership are another example, as are rules limiting private political advertising during election periods. In the latter two cases, the rules are designed to prevent commercially powerful voices from becoming unduly dominant.

One may be tempted to classify these types of measures under the rubric of positive measures to promote freedom of expression and this has some superficial attraction. On closer analysis, however, it becomes apparent that this construct is both inappropriate and inadequate. A rule limiting private

9) 20 May 1999, Application No. 21980/93, para. 64.

10) Part I.6.

political advertising, for example, is hard to characterise as a positive measure to promote the free flow of information and ideas; it specifically rules out certain communications. It is, rather, designed to promote a level playing field, quite a different goal.

Furthermore, such a classification fails to capture the rationale for these measures. They are not designed to promote more expression, however that may be defined, but rather to enhance the quality of the expression that is available. A highly concentrated media market may offer enormous choice in terms of number of broadcast channels and even of topics and styles. However, it is also susceptible of political and/or owner interference with the result that the coverage of certain important political issues may be suppressed or limited, undermining the quality of information available to the public.

It is submitted that the measures noted above, rather than being positive in nature, are better understood as promoting the right to receive, rather than to impart, information and ideas. It may be noted that, in many cases, these measures actually limit the right to impart information and ideas. As such, they pit the speaker against the listener, a private rights model of freedom of expression against one which seeks to preserve public expressive space, a traditional, non-interference, paradigm against one which calls for regulation to protect the right to receive.

In most cases, restrictions on freedom of expression are specifically designed to promote other social interests, such as privacy, public order or the administration of justice. The measures noted above, in contrast, are designed to promote freedom of expression, albeit one aspect, perhaps one conception, of this right and frequently at the expense of another. This does not mean that such measures may not, if they do also restrict another aspect, or perhaps another conception of, freedom of expression, be deemed to be in breach of this right.

The question, however, is how the legitimacy of measures of this sort should be assessed or, more concretely, how courts should analyse whether or not such measures breach the guarantee of freedom of expression. Courts would normally ask whether the impugned measures do interfere with the right to freedom of expression and, if so, move on to the three-part test. In most cases, the analysis focuses on the last part of the test, namely whether or not the measures can be justified as necessary in a democratic society. The necessity part of the test can be said to operate as a presumption in favour of protecting the right to freedom of expression.

However, this presumption is not appropriate when the legitimate interest being served is actually a human right and particularly when that right is freedom of expression. In other words, it is not appropriate to apply an analysis that automatically accords one conception of freedom of expression priority over another. To give a concrete example, local content rules may be claimed to restrict the rights of media owners to freely impart information, while promoting the rights of the general public to receive information. The simple fact that an owner has launched a challenge to such a rule should not mean that his or her rights claim is presumptively superior. Applying the three-part test to the measure would, however, lead to exactly that result.

One option is for courts to start by assessing whether, taking all of the circumstances into account, the impugned measures do, on balance, restrict freedom of expression. To continue with the example of local content rules, a court faced with a challenge to such a rule would assess whether, on balance, freedom of expression was served or hindered by it. If it decided that freedom of expression was, overall, served, the rule would not be deemed to be a restriction and the challenge would fail. If freedom of expression was not served by the rule, it would, to that extent, be subjected to the three-part test.

This is obviously philosophically superior to the alternative, which would automatically subject any measures promoting the right to receive information and ideas, which also impacted negatively on the right to impart these same things, to the three-part test. As noted above, this would effectively amount to a presumption in favour of the vision articulated by the challenger.

At the same time, this approach presents other problems. It calls on courts to weigh competing visions of freedom of expression, something they are often reluctant to do. It may be noted that while international courts, in particular the European Court of Human Rights, have proven reasonably willing to address the issue of positive rights in areas such as family life and privacy,¹¹ they have been very reluctant to recognise the right to receive information or ideas as an aspect of the right to freedom of

11) See, for example, *Airey v. Ireland*, 9 October 1979, Application No. 6289/73.

expression.¹² Perhaps one reason for this is that courts do not want to be drawn into deciding cases based on philosophical comparisons.

Second, there is a danger that the approach noted above, which will sometimes lead to a situation where application of the three-part test is avoided, may lead to shoddy or unprincipled analysis, to the detriment of human rights. On the other hand, perhaps application of this approach over time would generate structured analytical models which would prevent this result.

It is submitted that, regardless of the problems, human rights and constitutional courts will be forced to address this issue more seriously in the future. Examples of measures which promote the right to receive information, at the apparent expense of the right to impart it, abound in countries around the world and they are bound to be challenged. Furthermore, the consequences of a failure to provide adequate protection for the right to receive are becoming evermore apparent. Indeed, in many countries government interference is no longer the main threat to the free flow of information and ideas. Rather, it is private actions, for example resulting in undue concentration of ownership, a cosy relationship between media owners and politicians, or a serious decline in local voices in the media, that are most problematical.

5. Defamation

One of the most important restrictions on freedom of political expression is defamation law. Every country recognises that speech must be limited to protect reputations but, at the same time, if such restrictions are not carefully and narrowly drawn, they may unduly limit political debate.

Many media and freedom of expression groups are of the view that criminal defamation laws breach the right to freedom of expression. Historically, such laws have been justified due to the close relationship between protecting reputations and public order. As the Supreme Court of Canada has noted in relation to the offence of *Scandalum Magnatum*, an early (1275) prohibition on defamation, "the aim of the statute was to prevent false statements which, in a society dominated by extremely powerful landowners, could threaten the security of the state."¹³ This justification for criminal defamation can hardly be said to exist today.

There are two principled reasons why defamation should not be a matter of criminal law. First, use of the criminal law represents a disproportionate means of addressing the problem of unwarranted attacks on reputation, which exerts an unacceptable chilling effect on freedom of expression. This is particularly so in relation to political statements.

Second, civil defamation laws, on their own, provide adequate redress for harm to reputation. The experience of a number of countries, including countries at a relatively low stage of economic and/or democratic development, conclusively demonstrates this.¹⁴ If civil laws are an effective remedy, they must be preferred to criminal defamation laws, since restrictions on freedom of expression must be carefully designed so as to limit the right as little as possible.

It is, however, significant that the European Court of Human Rights has refused to hold that criminal defamation laws, on their own, breach the right to freedom of expression. Indeed, in a small number of cases, it has upheld criminal convictions for defamation¹⁵ while at the same time noting:

[T]he dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.¹⁶

12) See, for example, *Leander v. Sweden*, 26 March 1987, Application No. 9248/81; *Gaskin v. United Kingdom*, 7 July 1989, Application No. 10454/83; *Guerra and Ors. v. Italy*, 19 February 1998, Application No. 14967/89; and *McGinley and Egan v. United Kingdom*, 9 June 1998, Application Nos. 21825/93 and 23414/94. In these cases, the Court recognised in principle the right to receive information as an aspect of family or private life, but not as an aspect of the right to freedom of expression.

13) *R. v. Keegstra* [1990] 2 SCR 697, p. 722.

14) The following countries have abolished their criminal defamation laws with no apparent fallout in terms of patterns of media reporting: Ghana (2001), Sri Lanka (2002) and the Ukraine (2001).

15) See for example, *Tammer v. Estonia*, 6 February 2001, Application No. 41205/98. See also *Panev v. Bulgaria*, 3 December 1997, Application No. 35125/97 (European Commission of Human Rights).

16) *Castells v. Spain*, note 7, para.46.

The recent Declaration on freedom of political debate in the media adopted by the Committee of Ministers of the Council of Europe, however, includes the following statement:

Defamation or insult by the media should not lead to imprisonment, unless the seriousness of the violation of the rights or reputation of others makes it a strictly necessary and proportionate penalty, especially where other fundamental rights have been seriously violated through defamatory or insulting statements in the media, such as hate speech.¹⁷

This goes beyond simply recognising criminal defamation, contemplating imprisonment for defamation, even for political statements. It also introduces the concept of hate speech, normally treated separately from defamation law.

Other authoritative international bodies have been less reticent in condemning criminal defamation laws and an important case on this matter has recently been decided by the Inter-American Court of Human Rights.¹⁸ ARTICLE 19, in common with a number of other NGOs, has identified this as a priority issue.

International and comparative practice has increasingly recognised a special defence for defamatory statements on matters of public concern, even in relationship to civil defamation laws. It has been widely recognised that defamation laws which do not allow for any errors in relation to statements of fact on matters of public concern, even if the author has acted in accordance with the highest professional standards, cannot be justified. A strict liability rule of this nature is particularly untenable for the media, which are under a duty to satisfy the public's right to know and often cannot wait until they are sure that every fact alleged is true before they publish or broadcast a story. Even the best journalists make honest mistakes and to leave them open to punishment for every false allegation would be to undermine the public interest in receiving timely information. Instead, both international and national courts have adopted a more appropriate balance between the right to freedom of expression and reputations by protecting those who have acted reasonably,¹⁹ while allowing plaintiffs to sue those who have not. For purposes of this paper, this will be called the reasonableness defence.

The European Court, for example, has held that to punish even false and defamatory statements may breach the right to freedom of expression.²⁰ In these cases, the Court has looked at all of the circumstances and found that, on balance, it was reasonable to publish the statements. While it has not used the term reasonableness defence, its analysis is very similar to that outlined above. A number of national courts have followed this approach.²¹

In the United States, the Supreme Court has gone even further, in two key ways. First, originally in relation to public officials but subsequently in relation to a broader range of political speech, the Court has held that only statements made with knowledge of falsity, or with reckless disregard for the truth, may attract liability. Second, the Court has placed the onus on the plaintiff in such cases to prove that the statements are false and made with knowledge of falsity.²²

6. Privacy

Another area of restriction on political expression is privacy law which, if interpreted unduly broadly, may pose a barrier to investigative journalism, including in relation to political matters.

Courts have identified four different types of privacy interest worthy of protection: unreasonable intrusion upon the seclusion of another, appropriation of one's name or likeness, publicity which places one in a false light and unreasonable publicity given to one's private life.²³ For our purposes, the most important of these is unreasonable publicity given to private life.

17) Adopted 12 February 2004, Principle VIII.

18) *Ulloa and Rohrmoser v. Costa Rica*, Case No. 12.367. The case was decided in July 2004.

19) Different courts use a range of terms to refer to the precise standard, including 'due diligence', and in some cases it has been limited to a requirement of acting in good faith.

20) See, for example, *Bladet Tromsø and Stensaas v. Norway*, 20 May 1999, Application No. 21980/93 and *Dalban v. Romania*, 28 September 1999, Application No. 28114/95.

21) See, for example, *National Media Ltd v. Bogoshi*, 1998 (4) SA 1196 (South African Supreme Court of Appeal); *New York Times v. Sullivan*, 376 US 254, 279 (1964) (United States Supreme Court); *Rajagopal & Anor v. State of Tamil Nadu* [1994] 6 SCC 632 (Indian Supreme Court); *Theophanous v. Herald & Weekly Times Ltd* (1994) 124 ALR 1 (Australian High Court); and *Reynolds v. Times Newspapers Ltd and others*, [1999] 4 All ER 609 (House of Lords).

22) *Ibid.*, *New York Times v. Sullivan*.

23) See, *Lake v. Wal-Mart-Stores Inc.*, 30 July 1998, Minnesota Supreme Court, C7-97-263. See also, *Restatement (Second) of Torts*, § 652B-E (1977).

It is fairly clear that, if understood broadly, prohibitions on unreasonable publicity given to private life could significantly undermine the ability of investigative journalists to work effectively. Imagine, for example, how difficult it would be to investigate how a public official on a modest salary managed to buy a lavish home; personal finances are, after all, quite clearly part of private life.

The primary vehicle by which courts have sought to counter the otherwise extremely broad ambit of privacy rules is by looking at whether or not publication can be justified in the public interest. Although no clear definition of public interest has emerged, the case law points to a number of relevant factors. To avoid a chilling effect, the public interest must be defined broadly so that journalists and editors are not forced to make excessively fine distinctions with the result that the flow of important information to the public is diminished.

In a number of French cases, courts have held that everyone, including politicians, has an absolute right to his or her image.²⁴ In these cases, however, it would appear that the use of the images was purely commercial. In another case, where the images were used as part of a story about a famous photographer, thus arguably engaging the public interest, the court weighed the competing interests more carefully. In holding that pictures taken while the plaintiff was on a yacht violated a privacy interest, the Court noted that the boat was not on a port or near a beach, so that its occupants had a reasonable expectation of privacy.²⁵

A Canadian case, *Aubry v. Éditions Vice-Versa Inc.*, involved a claim based on the right of an artist to publish photographs without the consent of the subject. In that case, the photograph was of an unknown 17-year old in a public place. The majority of the Supreme Court noted:

The public's right to information, supported by freedom of expression, places limits on the right to respect for one's private life in certain circumstances. This is because the expectation of privacy is reduced in certain cases. ... Only one question arises, namely the balancing of the rights at issue. It must, therefore, be decided whether the public's right to information can justify dissemination of a photograph taken without authorisation.²⁶

The Court noted a number of circumstances in which freedom of expression might prevail, including where the subject is a public figure or someone "whose professional success depends on public opinion", where a previously unknown individual is called upon to play a high-profile role or where the individual is accidentally or incidentally included in a photograph, for example as part of a crowd.²⁷ In the circumstances of the case, it would have been relatively simple for the photographer to have obtained the consent of the subject, perhaps by paying him, so the privacy interest prevailed.

The standard commonly applied in this context in the United States is whether the matter publicised is of a sort that (a) would be highly offensive to a reasonable person and (b) is not of legitimate concern to the public.²⁸

A recent decision by the European Court of Human Rights, *Von Hannover v. Germany*, sets out a number of clear rules in this area. That case involved a number of photos of Princess Caroline of Monaco, for example riding on horseback, on a skiing holiday and tripping over something on a private beach. The Court stated:

In the cases in which the Court has had to balance the protection of private life against the freedom of expression it has always stressed the contribution made by photos or articles in the press to a debate of general interest.²⁹

The Court also stipulated:

The Court considers that a fundamental distinction needs to be made between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions.³⁰

24) See *Pompidou v. L'Express*, 4 April 1970, *Dorléac v. Sté Presse Office*, 14 May 1975 and *Giscard d'Estaing v. M. Ways*, 15 October 1976, all decided by the Paris Court of Appeal.

25) *Schneider v. Sté Union Éditions Modernes*, 5 June 1979, Paris Court of Appeal.

26) *Aubry v. Éditions Vice-Versa Inc.* [1998] 1 SCR 591, paras. 57 and 61.

27) *Ibid.*, paras. 58-9.

28) *Lake v. Wal-Mart-Stores Inc.*, note 23.

29) 24 June 2004, Application No. 59320/00, para. 60.

30) *Ibid.*, para. 63.

The domestic courts held that Princess Caroline was a figure of contemporary society *par excellence* and therefore had no right to privacy unless she was in a secluded place out of the public eye. This standard might be applicable to politicians exercising official functions, but was not applicable in the present case. As the Court noted in relation to the applicant, “the interest of the general public and the press is based solely on her membership of a reigning family whereas she herself does not exercise any official functions.”³¹

It is interesting to note that the Court appeared to be prepared to allow wide latitude, even to photos, which made some contribution to debate on a matter of public interest. The complete lack of such contribution in the present case – perhaps best exemplified by the photo of Princess Caroline tripping on the beach – mandated the particular conclusion reached.

7. Internet

One of the most important distinguishing features of the Internet is its global nature. Something that is uploaded in a small room in Bishkek, for example, is immediately accessible throughout the world. Once material is uploaded in one jurisdiction, there is very little that can be done, particularly by small publishers with limited means, to prevent the material from being downloaded anywhere else. This is in contrast to the case of print and broadcast media, where there is arguably a reasonable degree of control over where publications are distributed. However, there are no globally agreed rules on the question of jurisdiction in relation to claims arising out of Internet publication.

This has led to some unexpected cases. Recently, the Australian High Court ruled that a local businessman in the State of Victoria could legitimately sue Dow Jones for on-line defamation – even though the article discussed the US securities market, had been written by an American reporter for US consumption and had been uploaded in New Jersey. The judge ruled that “publication takes place where and when the contents (are) comprehended by the reader”.³² Analogous cases have been heard in Germany and France.³³

Under the Australian High Court’s reasoning, all those who publish over the Internet need to know (and comply with, on pain of potential liability) the laws of defamation in every State where a reputation may be affected by their statements. This applies regardless of whether or not those laws are compatible with international standards of freedom of expression or the freedom of expression laws where the publisher is established or where the material is uploaded. This situation is particularly onerous for the millions of Internet ‘publishers’, including individuals and small organisations, who cannot possibly comply with foreign defamation laws.

A similar situation would have pertained pursuant to a regulation relating to the choice of law for non-contractual obligations (Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations)³⁴ currently being developed by the European Commission for the European Union countries. In its submission on the draft Regulation, ARTICLE 19 argued that the law applicable to Internet publications should be the law of the country where the material was uploaded or, alternatively, the law of the country where the publisher is established. Subsequently, the Report of the Committee on Legal Affairs and the Internal Market of the European Union proposed that the Regulation be amended to take this concern into account.

The position of Internet Service Providers (ISPs) and other intermediaries (for example, search engines or other sites that carry ‘links’ to content outside their own sites) raises separate issues. ISPs play an important role by providing users with access to the Internet and, as part of that role, they both transit content through their systems and often “host” content published by their subscribers on websites. This has led to them being compared with book publishers and, in some countries, they have been deemed to be legally liable for material that they “host”.

There are serious problems with this for fairly obvious reasons. Hosting a website is in no way analogous to publishing a book. It is wholly impractical for ISPs to police their sites and, unlike traditional publishers, they have no financial or other interest in the material on hosted websites.³⁵

31) *Ibid.*, para. 72.

32) *Gutnick v. Dow Jones* [22] HCA56.

33) For example, see *The People v. Felix Somm*, 17 November 1999, File no. 20 Ns 465 Js 173158/95 (Munich Regional Court); *UEJF and Licra v. Yahoo!*, 20 November 2000, No. 00/05308 (Tribunal de Grande Instance de Paris).

34) Brussels, 22.07.2003 Com (2003) 427 final 2003/0168 (COD).

35) They do get a fee for use of this service, but that bears no relationship to the actual content hosted, unlike publishers who obviously depend on publishing popular works.

The Council of Europe has recently adopted a Declaration on Freedom of Communication on the Internet³⁶ which states that intermediaries should not be liable simply for providing short-term access to content which passes through their service:

Member States should ensure that service providers are not held liable for content on the Internet when their function is limited, as defined by national law, to transmitting information or providing access to the Internet.³⁷

In terms of liability for hosted websites and other more permanent content storage systems, the Council of Europe Declaration provides for liability for service providers where the material is illegal and where the provider fails to remove that content after becoming "aware" of its presence.³⁸ A similar policy is advocated in the European Community's "E-Commerce Directive".³⁹ However, the Declaration stresses that this poses no obligation whatsoever on service providers to "police" their servers, which would in any case be quite impossible for them to do:

Member States should not impose on service providers a general obligation to monitor content on the Internet to which they give access, that they transmit or store, nor that of actively seeking facts or circumstances indicating illegal activity.⁴⁰

The Declaration also stresses that content should not lightly be removed:

When defining under national law the obligations of service providers [to remove material once made aware of their illegality], due care must be taken to respect the freedom of expression of those who made the information available in the first place, as well as the corresponding right of users to the information.⁴¹

The Explanatory Note to the Declaration goes on to warn that ISPs cannot be expected to act and take down material upon receipt of a single complaint or even several complaints. This would seriously endanger, for example, the right of an individual to publish material that, though it may be offensive to many, is perfectly legal. It states:

States should, however, exercise caution imposing liability on service providers for not reacting to such a notice [to take down material]. Questions about whether certain material is illegal are often complicated and best dealt with by the courts. If service providers act too quickly to remove content after a complaint is received, this might be dangerous from the point of view of freedom of expression and information. Perfectly legitimate content might thus be suppressed out of fear of legal liability.⁴²

8. The Application of Restrictions

Finally, this paper briefly addresses the question of how restrictions are applied in practice. There is a great deal of difference between a criminal and a civil sanction, as the discussion above regarding defamation makes clear. There is at least as great a difference between legally binding and self-regulatory rules.

It may be noted that the guarantee of freedom of expression applies to sanctions, as well as primary restrictions, so that unduly harsh or disproportionate sanctions, of themselves, breach the right to freedom of expression.⁴³ As a result, the guarantee of freedom of expression requires States to impose the least chilling form of sanction that will adequately protect the legitimate interest in question.

36) Adopted 28 May 2003.

37) Principle 6.

38) *Ibid.*

39) 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 (E-Commerce directive), Articles 12-15. See also *Godfrey v. Demon Internet Ltd* [1999] 4 All ER 342 and *Venables and Thompson v. News Group Newspapers Ltd.*, 10 July 2001, QB (not yet published).

40) Declaration on Freedom of Communication on the Internet, note 36, Principle 6.

41) *Ibid.*

42) *Ibid.*, Explanatory Note, p. 11.

43) See, for example, *Tolstoy Miloslavsky v. United Kingdom*, 13 July 1995, Application No. 18139/91 (European Court of Human Rights).

In general, self-regulatory measures are the least intrusive and hence to be promoted, at least whenever they are realistic, in the sense that the media community either has put in place, or is capable of putting in place, an effective self-regulatory system. A number of benefits of such a system may be noted. It will normally lead to sanctions which are less restrictive of freedom of expression and yet are effective in addressing the harm. The sanction most common in self-regulatory systems, a requirement to recognise and correct a wrong, is certainly far less intrusive than the large damage awards so often handed out in court cases. As the South African Supreme Court of Appeal so eloquently put it: “[N]othing can be more chilling than the prospect of being mulcted in damages”.⁴⁴

Perhaps even more importantly, self-regulatory measures can deal more appropriately and effectively with the subtle issues which are often raised when political expression is being challenged. In many instances, such challenges raise difficult borderline questions and, in these cases, it is more important to clarify acceptable professional limits than to vindicate or punish a media outlet or journalist. Furthermore, a self-regulatory system may be able to sanction expression in situations where a formal legal prohibition would represent a breach of the right to freedom of expression. It thus represents a far subtler means of addressing challenges to political expression.

9. Conclusion

In the modern world, important challenges to the free flow of information and ideas are increasingly coming from non-official sources, or at least not directly from official sources. This is not to say that governments are no longer a threat – in many parts of the world this is, unfortunately, very far from true – but rather that other, newer challenges are emerging.

An important part of the solution to these challenges could be providing greater protection for the right to receive information and ideas, including by regulating commercial media markets. While it may be argued that the right to freedom of expression demands such measures, they will also undoubtedly be challenged by some as illegitimate restrictions on this key right. At some level, courts faced with such challenges will only be able to resolve them by resorting to conceptual understandings of the nature of freedom of expression. At the root of such challenges is the question of whether or not, taking everything into account, the measures actually restrict or promote freedom of expression.

In a number of other areas, international consensus is emerging over the limits of acceptable restrictions on political expression. It is increasingly being recognised that criminal defamation laws are illegitimate and that new defences to civil defamation claims are needed to enable the media to inform the public in a timely and fulsome fashion. Privacy rules are also changing as it is increasingly recognised that the overall public interest may effectively trump privacy interests. Special rules are necessary for the Internet, which cannot simply be treated as a publisher or broadcaster. In particular, the global nature of the Internet raises unique jurisdictional challenges, while the technical role of service providers means that they should receive some protection against liability for content they host.

This paper attempts to point to solutions to these problems which are consistent with freedom of expression while also recognising that there are often legitimate countervailing interests at stake. There is little doubt that the global trend is towards greater recognition of the importance of freedom of expression, and particularly of political expression. It is submitted that the reason for this is clear: the importance of freedom of political debate has often been significantly undervalued in the past and the trends highlighted herein are a means of redressing this.

44) *National Media Ltd v. Bogoshi*, 1998 (4) SA 1196, p. 1210.

Freedom of Political Debate and the Council of Europe

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1. Introduction

The protection of freedom of political debate is seen as fundamental in the system of the Council of Europe. Not only is free political debate at the core of freedom of expression protected by Article 10 of the European Convention on Human Rights, but it is also a cornerstone of a truly democratic society.

The Council of Europe approaches the matter from different angles and different organs of the organisation are concerned with it. There is firstly the work of the European Court of Human Rights, which by applying the European Convention on Human Rights defines the limits of freedom of political debate and the limits of state or third party intervention. A number of other binding or non-binding legal instruments are of relevance, such as the Additional Protocol to the Cybercrime Convention, with its provision on racist and xenophobic speech on the Internet, the Recommendation of the Committee of Ministers No. R (99) 15 on measures concerning media coverage of election campaigns and the most recent 2004 Committee of Ministers Declaration on freedom of political debate in the media. A decision to issue a Declaration on this matter was taken in 1998 following a monitoring exercise of the Committee of Ministers in the field of freedom of expression and information which showed that in many Member States journalists were persecuted because of their criticism of politicians or public authorities. The aim was to send a strong political signal to condemn such practices and reaffirm the Council of Europe's attachment to the fundamental value of free political debate.

The Council of Europe carries out a number of activities to assist Member States in bringing their legislation and practice in line with its standards. Most of the recent Member States have had their media legislation, ranging from constitutional provisions on freedom of expression, to broadcasting law, press law and penal code provisions on defamation and insult thoroughly reviewed by Council of Europe experts. One of the aims of this review is to bring legislation closer to European standards, enabling free political debate. Training is also offered to public officials, including judges and prosecutors in order to raise awareness about these standards. Furthermore, an effort is made to enhance professional standards in the media with the aim of encouraging them to take on a public watchdog function and provide a platform for political debate.

What do we mean by free political debate? The case-law of the European Court of Human Rights provides some useful insights. Freedom of expression is at stake irrespective of the nature of the information which is being publicly imparted, be it political, cultural, economical, professional, commercial or artistic. It is nevertheless clear that political discourse is at the core of the protection since: "Free elections and freedom of expression, particularly freedom of political debate – together form the bedrock of any democratic system."¹

1) *Bowman v. the United Kingdom*, Judgment of the European Court of Human Rights of 19 February 1998.

In the case-law of the Court sometimes the term political debate seems interchangeable with the expression “debate on questions of general interest”. The Court has certainly resisted attempts by governments to reduce the core elements of Article 10 of the European Convention on Human Rights, which enjoy the highest protection.²

Freedom of expression is in principle enjoyed by “anybody, natural or legal person”,³ also by public officials, notwithstanding their obligation of reserve,⁴ and even soldiers, because freedom of expression “does not stop at the gates of army barracks”.⁵ It is particularly important for politicians themselves as noted by the Court: “A person opposed to official ideas and positions must be able to find a place in the political arena. While freedom of expression is important for everybody, it is especially so for an elected representative of the people ... Accordingly, interferences with [his] freedom of expression ... call for the closest scrutiny on the part of the Court.”⁶

There is no need to elaborate in this paper about the fundamental role of the press as a motor for public debate on general issues, including political questions. Article 10 of the ECHR includes for example the right not to disclose sources of information. Without such a right journalists would have less access to information and chances are that public debate would therefore be less enlightened.

The concept of political debate implies an exchange of views about issues in politics and about shared problems facing society as well as discussion of different approaches to solve them. This involves a critical debate about the deeds of government and those who hold governmental power. But the same critical approach can be directed at the opposition and those who wish to replace the government of the day in future elections. Debate should be uninhibited, participation should be as widespread as possible and not limited to parliamentarians or to an elite in society. Finally, it should lead somewhere; it should have an impact on politics. It should help voters decide whom to trust for governing the country and it should also help keep government accountable after elections.

At present, freedom of political debate is facing many challenges in Europe. Some politicians in power seek to stifle political debate. We have seen many examples of public opinion being manipulated, in particular in the run-up to elections or whenever the authorities in some countries are in fear of dwindling public support.

The fight against terrorism is increasingly used to justify interferences with free political debate. In some countries the authorities do not tolerate media scrutiny of their actions (and possible excesses) in the combat of terrorism. The media are often pressurised into taking a stand alongside the authorities in their fight against “the enemy”. Such an environment is not conducive to uninhibited debate.

There is evidence in some countries of certain topics becoming “taboo” to the extent that journalists cannot address them without putting their lives at risk. Corruption is one of those topics. In other countries we seem to be witnessing an increasing instrumentalisation of the media which are now being used to promote the interests of the powerful in society. Whereas in the past this used to mean political parties, nowadays it is the business moguls who want to control their own media to further their interests.

Finally, the recent elections to the European Parliament gave us a striking warning that we are facing growing public fatigue and lack of interest in traditional politics. This trend may certainly have an impact on our thinking about the value of political debate.

Following this lengthy introduction I would like to take a closer look at the obligations of public authorities in this respect which are first and foremost to abstain from intervention, i.e. a negative obligation **(2)**. We will need to consider as well whether there might be a positive obligation to intervene in order to create conditions for a free and informed debate, ultimately rebuilding trust between politicians and citizenry, and we will establish what such an obligation might entail **(3)**.

2) See for example *Thorgeir Thorgeirson v. Iceland*, Judgment of the European Court of Human Rights of 25 June 1992, and *Fressoz and Roire v. France*, Judgment of the European Court of Human Rights of 21 January 1999. See also *VGT Verein gegen Tierfabriken v. Switzerland*, Judgment of the European Court of Human Rights of 28 June 2001: “... in the present case the extent of the margin of appreciation is reduced, since what is at stake is not a given individual’s purely “commercial” interests, but his participation in a debate affecting the general interest.”

3) *Autronic AG v. Switzerland*, Judgment of the European Court of Human Rights of 22 May 1990.

4) *Vogt v. Germany*, Judgment of the European Court of Human Rights of 26 September 1995.

5) *Grigoriades v. Greece*, Judgment of the European Court of Human Rights of 25 November 1997.

6) *Piermont v. France*, Judgment of the European Court of Human Rights of 26 April 1995.

2. The Negative Obligation: The State Should Not Interfere with Political Expression

Freedom of expression is certainly not without limitations. Member States have a margin of appreciation when deciding on the limitations, which varies according to the grounds for the restriction at issue. There is, in the words of the European Court of Human Rights, "...little scope ... for restrictions on political speech or on debate of questions of public interest".⁷

The need for any restrictions "must be established convincingly, particularly where the nature of the speech is political rather than commercial..."⁸

2.1 Defamation Law Should Be Applied Restrictively

In the case law of the European Court of Human Rights certain prerequisites have been formulated for defamation law and its application. These requirements leave sufficient room for freedom of expression, including political expression.

Member States, in particular the courts, are under an obligation to distinguish between value judgments and factual statements when applying defamation law. In addition, courts must allow a good faith excuse, and any sanction that is applied must be in proportion to the offence.

Several non-governmental organisations in the field of freedom of expression are pushing for the decriminalisation of defamation in Europe. What is the Council of Europe's position on this matter? In fact there are two separate questions here. Should defamation, insult and related offences be fully erased from criminal law? Or, should at least prison sentences for speech violations be abolished? There is no clear stand as to the first question. In fact it might be contradictory to advocate the decriminalisation approach when at the same time the Additional Protocol to the Cybercrime Convention - which is a Council of Europe text - contains provisions where parties to the Convention agree to penalise certain forms of speech as criminal offences. This conduct is qualified in the Convention as "dissemination of racist and xenophobic material", "racist and xenophobic motivated threat", "racist and xenophobic motivated insult", "denial, gross minimisation, approval or justification of genocide or crimes against humanity", in all cases when done through a computer system. It is true that the Additional Protocol does not deal with defamation, but the demarcation line may sometimes be unclear. Defamation could sometimes be so extreme that it may fall under the provisions of the Additional Protocol.

The impact of decriminalising certain offences may also be less than expected. Although criminal sanctions of course carry more stigma than civil remedies, the latter can be often just as costly for the defendant. For a media company it does not necessarily matter whether it has to pay a fine to the state or damages to the plaintiff.

Furthermore, it was not to be expected that the recent Declaration on freedom of political debate in the media would propagate the decriminalisation of defamation. Defamation is still a criminal offence in most Council of Europe Member States⁹ and the European Court of Human Rights has stated clearly that it is up to them to decide whether such measures are taken or not.¹⁰

As regards the second question, the Court's case-law contains indications that in practice a prison sentence in a freedom of expression case will hardly ever be considered in conformity with the proportionality requirement of Article 10. The Committee of Ministers introduced finely-tuned distinctions in its 2004 Declaration on freedom of political debate in the media: "Defamation or insult by the media should not lead to imprisonment, unless the seriousness of the violation of the rights or reputation of others makes it a strictly necessary and proportionate penalty, especially where other fundamental rights have been seriously violated through defamatory or insulting statements in the media, such as hate speech (Principle VIII)."

7) *Wingrove v. The United Kingdom*, Judgment of the European Court of Human Rights of 25 November 1996.

8) *VGT Verein gegen Tierfabriken v. Switzerland*, Judgment of the European Court of Human Rights of 28 June 2001

9) See "Legal provisions concerning defamation, libel and insult", compiled by the Media Division, DG II, Council of Europe in 2003, available at

[http://www.coe.int/t/e/human_rights/media/5_Documentary_Resources/2_Thematic_documentation/Freedom_of_expression/DHMM\(2003\)006%20rev%20Bil%20Legal%20prov%20defamation,%20libel%20&%20insult.asp#TopOfPage](http://www.coe.int/t/e/human_rights/media/5_Documentary_Resources/2_Thematic_documentation/Freedom_of_expression/DHMM(2003)006%20rev%20Bil%20Legal%20prov%20defamation,%20libel%20&%20insult.asp#TopOfPage)

10) *Castells v. Spain*, Judgment of the European Court of Human Rights of 25 June 1992.

Behind this compromise formulation lies the reality that all Member States were not willing to give up the possibility of imposing prison sanctions for the most extreme defamatory or insulting statements. In practice in those countries where imprisonment for defamation or insult is still permissible this will be extremely rare and confined to the most outrageous and destructive attacks on individuals, for example when such verbal attacks constitute hate speech the same time.

The European Court of Human Rights has in addition developed what might be called a gradual system of protection linked to who is complaining about what violation. This nuanced approach permits a careful balance between the interests of society in the existence of a robust public debate and the rights of individuals. According to this approach, private persons enjoy the highest protection, while the protection decreases gradually for public officials, political figures and finally the state or government as such.¹¹

One of the most difficult points to solve when the Declaration on freedom of political debate in the media was being prepared was whether it was justified to give criminal law protection to the reputation or dignity of state institutions such as the President or Parliament. Such provisions are still to be found in the law of several Member States. It was impossible to reach the consensus necessary for the 45 Member States to ban those provisions.¹² In the end, the following compromise was found: "The State, the government or any other institution of the executive, legislative or judicial branch may be subject to criticism in the media. Because of their dominant position, these institutions as such should not be protected by criminal law against defamatory or insulting statements. Where, however, these institutions enjoy such a protection, this protection should be applied in a restrictive manner, avoiding in any circumstances its use to restrict freedom to criticise. Individuals representing these institutions remain furthermore protected as individuals. (Principle II)"

2.2 What Are the Limits, then?

Even the freedom to take part in a genuine political debate has its limits. It does not include freedom to express racist opinions or opinions which are **incitement to hatred, xenophobia, antisemitism and all forms of intolerance**.¹³ And "[i]n case of conflict and tension", there is need to avoid situations where the media become "a vehicle for disseminating hate speech and incitement to violence".¹⁴

The **fight against terrorism** may justify a ban for members of terrorist organisations to use the media to disseminate their ideology and recruit new members.¹⁵

A **player on the political scene** may enjoy wider freedom than somebody who has nothing to do with politics: "The Court observes, however, that the applicant was writing in his capacity as a trade-union leader, a player on the Turkish political scene, and that the article in question, despite its virulence, does not encourage the use of violence or armed resistance or insurrection."¹⁶

The importance of maintaining **public confidence in the judiciary** can also be of relevance: "Regard must, however, be had to the special role of the judiciary in society. As the guarantor of justice,

11) To quote the case of *Oberschlick v. Austria* (No. 2), Judgment of the European Court of Human Rights of 1 July 1997: "[t]he limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt Article 10 para. 2 enables the reputation of others – that is to say, of all individuals – to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues" (para. 42)

12) See the report of the 60th meeting of the Steering Committee on the Mass Media, available at www.coe.int/media. During the preparation of the Draft Declaration, the argument for criminal law protection for state institutions was summarized in the following manner: "In practice, it will not always be possible to distinguish between statements directed at institutions and those directed against the official representing it. Moreover, whereas, a state institution and the officials representing it can be expected to accept a more critical assessment of their action in political debate, there is ... no compelling reason why they should be deprived of the general protection provided by the criminal law against defamation or insult. As political debates in the media entail by their very nature a much wider dissemination of defamatory statements than those exchanged among ordinary citizens, such statements can be particularly harmful for the persons concerned. It should also be pointed out that the protection the criminal law affords in this respect is conducive to enhancing the dignity, decency and objectivity of political debate and thus contributing to a healthy political climate." Opinion issued by the Bureau of the CDPC on the draft Declaration on freedom of political debate in the media, document CDMM (2002) 4.

13) Preamble to the Declaration on freedom of political debate in the media.

14) *Surek v. Turkey*, Judgment of the European Court of Human Rights of 8 July 1999.

15) *Hogefeld v. Germany*, admissibility decision from 20 January 2000, application number 35402/97.

16) *Ceylan v. Turkey*, Judgment of the European Court of Human Rights of 8 July 1999.

a fundamental value in a law-governed State, it must enjoy public confidence if it is to be successful in carrying out its duties. It may therefore prove necessary to protect such confidence against destructive attacks that are essentially unfounded, especially in view of the fact that judges who have been criticised are subject to a duty of discretion that precludes them from replying.”¹⁷ In another judgment the Court qualified statements as protected since they did not constitute a “gratuitous personal attack”.¹⁸

As regards **the protection of private life**, the Declaration on freedom of political debate in the media summarises the position as follows in its Principle VII: “The private life and family life of political figures and public officials should be protected against media reporting under Article 8 of the Convention. Nevertheless, information about their private life may be disseminated where it is of direct public concern to the way in which they have carried out their functions, while taking into account the need to avoid unnecessary harm to third parties. Where political figures and public officials draw public attention to parts of their private life, the media have a right to subject those parts to scrutiny.”

Limitations as regards political advertising and publication of opinion polls, which aim at reducing the chances of manipulation of public deliberation and opinion building, find support in Council of Europe instruments such as the Recommendation of the Committee of Ministers No. R (99) 15 on measures concerning media coverage of election campaigns.

The above elements are of course far from being exhaustive, but should give an indication as to where the limits are.

3. The Positive Obligations:

Can the State Be Expected to Intervene in order to Create Conditions for an “Informed and Meaningful” Political Debate?

It seems clear that even when freedom of political expression is in place there is no guarantee that the ensuing debate will be meaningful or have any impact on decision making. Means need to be sought to guarantee access to information about public authorities. Ways should also be sought to avoid the fragmentation of political debate – that is to say debate happening in many different places but never strong or focused enough to influence public opinion, let alone to have impact on how a given community or country is governed.

For a long time it was not clear whether there were any positive obligations to be drawn from Article 10 of the ECHR. Two judgments from the year 2000, *Fuentes Bobo v. Spain* of 29 February 2000 and *Özgür Gündem v. Turkey* of 16 March 2000, suggest that in principle such obligations may exist.

In the following section of this paper, I will present some thoughts on the possible shape this kind of intervention might take. Obviously the prospect or expectation that the State will act in these circumstances is at present first and foremost based on Council of Europe non-binding instruments. Although it cannot be stated unequivocally that this type of intervention is part of the obligations of the authorities under Article 10, there seems to be grounds for expecting a degree of intervention - at least to some extent.

3.1 Public Service Broadcasting

The Committee of Ministers Recommendation No. R (96) 10 on the guarantee of the independence of public service broadcasting reaffirms “the vital role of public service broadcasting as an essential factor of pluralistic communication which is accessible to everyone at both national and regional levels, through the provision of a basic comprehensive programme service comprising information, education, culture and entertainment”. Furthermore, the same text says that the “legal framework governing public service broadcasting organisations should clearly stipulate that they shall ensure that news programmes fairly present facts and events and encourage the free formation of opinion”.

A recent Recommendation by the Parliamentary Assembly of the Council of Europe highlights the importance of public service broadcasting in a democratic society. At the same time the Recommendation drew attention to the different challenges of an economic, political and technological nature faced by public service broadcasters, as follows: “The situation varies across Europe. At one

17) *Prager and Oberschlick v. Austria*, Judgment of the European Court of Human Rights of 26 April 1995.

18) *Oberschlick v. Austria, No. 2*, Judgment of the European Court of Human Rights of 1 July 1997.

extreme national broadcasting continues to be under strict governmental control and there is little prospect of introducing public service broadcasting by legislation in the foreseeable future.”¹⁹ The forthcoming 7th European Ministerial Conference on Mass Media Policy to convene in Kiev in March 2005 will deal with the future of public service broadcasting in Europe under the heading “Cultural and media diversity”.

The Council of Europe’s efforts in the new Member States to push for the transformation of State – read government – broadcasting into independent public service broadcasting reflect the belief that this is an essential element of a democratic media system.

3.2 Open Information Policy in the Public Sector

Already in 1982 the Committee of Ministers declared that in the field of information and mass media the Member States should pursue “an open information policy in the public sector, 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”.²⁰

Two years ago, the Council of Europe adopted Recommendation (2002) 2 on access to official documents emphasising “the importance in a pluralistic, democratic society of transparency of public administration and of the ready availability of information on issues of public interest...” and “Considering that wide access to official documents ...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 and on the authorities that govern them, whilst encouraging informed participation by the public in matters of common interest”.

In times of tension, there will unfortunately be a tendency by governments to withhold information or even try and distort public opinion. These difficulties are addressed in the draft Declaration on freedom of expression and information in the media in the context of the fight against terrorism under preparation by the Council of Europe’s Steering Committee on the Mass Media (CDMM).

3.3 Ensuring Media Pluralism

One of the main concerns of the Council of Europe’s work in the media field over the past decades has been the maintenance of media pluralism, a concept which encompasses a plurality of political content in the media. As stated in Recommendation No. R (99) 1 on measures to promote media pluralism: “Member states should consider possible measures to ensure that a variety of media content reflecting different political and cultural views is made available to the public, bearing in mind the importance of guaranteeing the editorial independence of the media and the value which measures adopted on a voluntary basis by the media themselves may also have”.

The plurality of viewpoints is particularly important during election time, see the Recommendation of the Committee of Ministers No. R (99) 15 on measures concerning media coverage of election campaigns: “During electoral campaigns, regulatory frameworks should encourage and facilitate the pluralistic expression of opinions via the broadcast media.”

In a celebrated judgment²¹ the European Court of Human Rights also stated that the State is the ultimate guarantor of media pluralism, implying that at least here there is a clear positive obligation on the State to ensure plurality of sources.

Partly serving the same purpose is the right of reply, advocated by the Committee of Ministers’ Resolution (74) 26 on the right of reply – position of the individual in relation to the press. The preamble to the Resolution justifies this right by pointing out that “it is also in the interest of the public to receive information from different sources, thereby guaranteeing that they receive complete information”. Currently the Steering Committee on the Mass Media is updating this Resolution with the aim of determining the extent to which the right of reply should apply to online media.

19) Recommendation 1641 (2004), available at <http://assembly.coe.int>

20) Declaration on the freedom of expression and information adopted on 29 April 1982.

21) *Informationsverein Lentia and others v. Austria*, Judgment of the European Court of Human Rights of 28 October 1993.

3.4 Promoting Public Consultations as a Part of the Democratic Process

The Council of Europe is currently preparing a draft Recommendation on e-governance which would invite Member States to “provide opportunities for all to participate in decision-making, thereby contributing to a more dynamic, inclusive democracy.” An important element in the draft Recommendation is the idea that public authorities should actively engage the public in discussions on policy questions.

At the same time the CDMM has been considering e-governance from the point of view of the role of the media. Preliminary findings suggest that, if well managed, online consultations can make important contributions to better governance, more active citizenship and improved trust between representatives, the media and citizens. Certain members of the CDMM have nevertheless sounded a cautionary note: research has shown that new technologies do not necessarily replace traditional democratic processes. The primary benefit to be derived from new technologies was to allow more voices to be heard in public, however these technologies did not necessarily promote enlightened debate or reasoned decisions.²²

4. Conclusions

Leaving perhaps the field of the Council of Europe’s immediate concerns, I would like to mention the Green Paper on the future of democracy in Europe, which has now been made public for consultation. Among the ideas proposed in it we find the suggestion to replace referenda to some extent with so-called citizens’ assemblies, *inter alia* out of concern for the quality of political debate. Such an assembly would be composed of a randomly selected sample of the entire eligible citizenry. It should be considered as a committee of the whole citizenry, and empowered by the normally elected assembly to assist it with legislative review – in other words, it should be regarded as a measure to strengthen, not to weaken the legitimacy of the regular parliament. According to the proposal, it would meet once a year with the purpose of reviewing or voting on 1 or 2 bills passed by the regular parliament for which a part of the deputies had explicitly requested a stay of implementation. “In polities that already have referendum or initiative provisions, the Citizen Assembly could replace such arrangements – at lower cost and greater visibility, and with more opportunity for deliberation.”²³

There are certainly other actions which the state should and could undertake to favour free and uninhibited political debate. In brief, I could mention for example legal measures to protect whistleblowing,²⁴ the right to publish anonymous articles in the press, as well as “education for democratic citizenship”, to use the Council of Europe expression.

It is necessary for an intergovernmental organisation such as the Council of Europe to adopt a broad and multi-faceted approach to the matter. In some European countries there is still a struggle to make public authorities understand and accept that they must allow free political debate and open criticism.

In other countries, even those with the highest NGO ratings for press freedom, we see democratic institutions such as public service broadcasting organisations that have been neglected with dire consequences in the long term for the quality of the public debate.

The challenge for us in Europe seems to be to continue efforts on the one hand to ensure the implementation and respect across Europe of those standards of protection which are by now relatively clear and established, and on the other hand, to design innovative ways to involve the public in public debate and decision making.

22) Report of the 61st meeting of the Steering Committee on the Mass Media, available at www.coe.int/media

23) Green Paper on “The future of democracy in Europe”, Council of Europe, 2004, pages 105-106, available at http://www.coe.int/T/E/Integrated_Projects/democracy/

24) At the 6th European Ministerial Conference on Mass Media Policy in Krakow in 2000, this topic was included as a subject for the CDMM to address, but due to other urgent matters which called for lengthy negotiations, such as the Declaration on freedom of political debate in the media, work on this interesting subject has not in fact started as yet.

Media Law, Media Content, and American Exceptionalism

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The constitutional law of the United States differs in numerous ways from its counterparts in other open liberal democracies. Some of these differences are highly controversial, such as the constitutional permissibility of capital punishment in the United States and the reluctance of American courts to make much use of ideas, models, and precedents from other countries. Indeed, it is often charged that such American constitutional exceptionalism reflects a larger American exceptionalism in international relations generally, with the United States increasingly standing virtually alone on numerous issues of legal, political, and economic importance. Yet there is one area in which American exceptionalism is both quite extreme and largely non-controversial, and that is the domain of freedom of expression. Although lawyers and academics have occasionally noted American freedom of expression exceptionalism, the fact that the United States is a substantial outlier internationally among open liberal democracies on questions of freedom of speech and freedom of the press² attracts far less attention³ (and not only in the United States) than the fact that the United States is an outlier among Western democracies on questions of capital punishment and of positive social and economic rights. Perhaps this relative lack of attention is due in part to the fact that American freedom of expression exceptionalism inclines in a different direction, with the United States in general providing more and not less protection for a right that virtually all human rights documents and international understandings recognise as fundamental. Yet this explanation is not entirely satisfactory, because granting more robust protection for freedom of expression typically comes at the expense of other rights that are arguably equally fundamental, including the rights to equality, privacy, reputation, and

1) Frank Stanton Professor of the First Amendment, John F. Kennedy School of Government, Harvard University. This paper was prepared for the Workshop on Political Expression in the Media organised by the European Audiovisual Observatory of the Council of Europe and the Institution for Information Law of the University of Amsterdam, and held in Amsterdam on 19 June 2004. Research support has been generously provided by the Joan Shorenstein Center on the Press, Politics and Public Policy, Harvard University.

2) Nothing in this paper turns on any differences among the phrases "freedom of speech," "freedom of the press," "freedom of expression," and "freedom of communication." Although "freedom of expression" is the most common international formulation, and is the phrase used in, inter alia, the European Convention on Human Rights, the Constitution of South Africa, and the Canadian Charter of Rights and Freedoms, there is some risk that the English language ambiguity of the word "expression" may obscure close analysis. Although "expression" is a common synonym for "communication," it is also the word often used to describe the external manifestations of inner feelings or desires. As a result, there is a possible confusion if "freedom of expression" is understood to include the full range of self-expressive activities, whether primarily communicative or not. See Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge: Cambridge University Press, 1982), chapters 1, 4, 5. Nevertheless, "freedom of expression" has become the dominant phrase internationally, and as long as it is understood to designate communicative freedoms rather than a much larger concept of personal liberty the confusion will be lessened.

3) There are exceptions. See, for example, Eric Barendt, *Freedom of Speech* (Oxford: Clarendon Press, 1988); Ian D. Loveland, ed., *Importing the First Amendment* (Oxford: Hart Publishing, 1998); Ian Loveland, *Political Libels: A Comparative Study* (Oxford: Oxford University Press, 2000); Roy Leeper, "Keegstra and R.A.V.: A Comparative Analysis of Canadian and U.S. Approaches to Hate Speech Legislation," *Communication Law and Policy*, vol. 5 (2000), pp. 295-322; G. Quinn, "Extending the Coverage of Freedom of Expression to Commercial Speech: A Comparative Perspective," in L. Heffernan, ed., *Human Rights: A Comparative Perspective* (Dublin: Trinity College Press, 1994); Michel Rosenfeld, "Hate Speech in Comparative Perspective: A Comparative Analysis," *Cardozo Law Review*, vol. 24 (2003), pp. 1523-67.

dignity. Yet whatever the reason for the lack of close examination of American freedom of expression exceptionalism, it is a lack that should be remedied, and thus I want in this paper to consider the implications of the American approach to freedom of speech and freedom of the press on the actual content of public deliberation and on the actual character of American political life.

1.

It will be useful to begin by describing those aspects of American freedom of expression exceptionalism that appear to produce the greatest impact on political communication and public discussion of matters of public policy. And with this as the goal, there is perhaps no topic as significant as the unique American approach to defamation – the law of libel and slander. Prior to 1964, American defamation law, with few exceptions,⁴ tracked the English common law from which it emerged.⁵ Defamation was a strict liability tort, meaning that in order to recover damages the victim needed only to show by a bare preponderance of the evidence that words had been uttered or published about him which tended to harm his reputation in the community. Significantly, the victim as plaintiff was not required to show any intent to injure the victim, and was not even required to show that the defendant's behaviour had been negligent or in any other way inconsistent with professional standards. Nor did the plaintiff even need to prove that what was said about him was false, although the defendant/publisher could prevail by establishing truth as an affirmative defence.⁶ And although there existed a privilege for so-called "fair comment" on matters of public importance, this defence required total factual truth as a precondition, such that the defence was unavailable if any of the facts contained in the commentary were untrue, whether negligently so or not.

All of this changed dramatically in the United States in 1964. The stringency of the common law and the particularly stringency of the defence of fair comment had allowed an Alabama jury to award damages of USD 500,000 against the *New York Times* on the basis of a paid advertisement alleging official hostility in Alabama to the civil rights movement, and the Supreme Court was at the time particularly concerned to protect the civil rights movement and its underlying agenda of ending racial segregation. As a result, the Court in *New York Times Co. v. Sullivan*⁷ for the first time held that the law of defamation, especially in the context of published statements about public officials and their official behaviour, was tightly constrained by the First Amendment. The Court concluded that the common law approach of liability without fault was inconsistent with the First Amendment's commitment to "robust," "wide-open," and "uninhibited" public debate, and that this commitment inevitably included the toleration of often harsh published attacks on public officials and the policies they adopted. Moreover, the Supreme Court was particularly concerned about the behaviour of publishers under conditions of uncertainty. If publishers feared the potential of financially crippling libel suits, the Court reasoned, they would, if behaving rationally under conditions of uncertainty, steer well clear of any danger of liability, and thus would refrain from publishing some commentary on public officials and their policies that was in fact true, even though it might not be known to be true with absolute certainty at the time of the publication. This concern – the so-called "chilling effect"⁸ – dominated the *Sullivan* opinion, and led the Court to craft a rule of liability that treated the harm of published falsity as far less grave than the harm of unpublished truth, thus allowing a considerable amount of falsity to be published in order that the least amount of truth would go unsaid.

Although the Court referred to the rule it announced as a rule requiring "actual malice," that term is misleading, for nothing in the rule requires a showing of ill-will or intent to injure. Rather, the Court held that public officials (as well as candidates for public office⁹) could prevail in defamation suits against the media only if they could establish with "convincing clarity"¹⁰ that the offending material

4) One of the more noteworthy is *Coleman v. McClennan*, 78 Kan. 711, 98 P. 281 (1908).

5) In 1952 the Supreme Court explicitly affirmed what had been largely assumed, that the entire law of defamation was at the time unconstrained by the First Amendment's protection of freedom of speech and freedom of the press. *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

6) In some American jurisdictions, as in some of the Australian states, even truth was insufficient, with the defence of truth being available only if the publisher could establish that what was said or published was both true and said for a good purpose.

7) 376 U.S. 254 (1964).

8) See Frederick Schauer, "Fear Risk, and the First Amendment: Unraveling the 'Chilling Effect,'" *Boston University Law Review*, vol. 58 (1978), pp. 685-726.

9) *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971).

10) This standard of proof, although lower than the "proof beyond a reasonable doubt" standard applicable to criminal prosecutions, is noticeably higher than the "preponderance of the evidence" standard typically applied in civil litigation. See Frederick Schauer and Richard Zeckhauser, "On the Degree of Confidence for Adverse Decisions," *Journal of Legal Studies*, vol. 25 (1996), pp. 27-52.

was not only false, but also that it was published with actual knowledge of its falsity at the time of publication.¹¹ Only such an extraordinarily high standard of liability, the Court concluded, would create the “breathing room” necessary for political actors, publishers, reporters, and authors to be able to criticise public officials and their policies without fear of impending libel litigation and the consequent financial penalties.

Shortly after the *Sullivan* decision, the Court emphasised that its holding applied to slander as well as to libel, and to criminal as well as to civil libel penalties.¹² Much more importantly, the Supreme Court had within a few years of *Sullivan* extended the *Sullivan* ruling from public officials to all public figures, not only those who hold official office, but also those who in one way or another figure prominently in public life.¹³ Significantly, this category includes not only religious leaders, trade union officials, high corporate executives, and others whose presence in public affairs and public policy is no less simply because of the non-governmental nature of their employment, but also the full range of movie actors, sports stars, television chefs, and various other celebrities whose fame is unconnected with any involvement in matters of genuine public policy concern.¹⁴ And even those defamed individuals who are neither public officials nor public figures must demonstrate negligence as well as falsity in order to recover anything at all, and must too demonstrate “actual malice” in order to recover punitive damages.¹⁵

Forty years on, the effects of *New York Times v. Sullivan* have been dramatic. Although there was a small flurry of suits brought by prominent public officials in the 1970s and 1980s – by General William Westmoreland against CBS Television and by Ariel Sharon against *Time* magazine, to name two especially prominent ones – for all practical purposes the libel suit brought by a public official or public figure against the media or against a political opponent has disappeared from American public life. The causes for this virtual disappearance of libel law are complex, but most of these causes start with the *Sullivan* case. It is *Sullivan* that leads appellate courts routinely to vacate large damage awards against the media, it is *Sullivan* that produces relatively inexpensive and widely available libel insurance, and it is *Sullivan* that leads prospective plaintiffs to believe, correctly, that the possibility of being able to demonstrate *knowing* falsity with convincing clarity is so remote that it is far better to respond in kind than to expect redress in the courts. And because American practice requires litigants, with only a few exceptions not germane here, to bear their own litigation costs regardless of the outcome of the lawsuit, the barriers even to initiating a libel suit are so high as to have virtually eliminated the libel suit from the American public political environment. The fact that there were in all of 2003 in the entire country, in both the state and federal court systems, only six libel verdicts against the media (two or three of which, based on past statistics, are likely to be reversed or substantially limited on appeal)¹⁶ is vivid evidence of the *Sullivan*-produced demise of libel litigation as a significant factor in American political communication.¹⁷

2.

American free speech exceptionalism is as manifest with respect to incitement to racial hatred and other forms of “hate speech” as it is with respect to libel and slander.¹⁸ Although laws prohibiting incitement to racial hatred are routine in liberal democracies and indeed are required by various

11) Although the *Sullivan* decision refers to “reckless disregard” for the truth as well as to knowledge of falsity, subsequent cases have made clear that even the “reckless disregard” standard requires publication in the face of a publisher’s “actual suspicion” of falsity prior to publication. *St. Amant v. Thompson*, 390 U.S. 727 (1968).

12) *Garrison v. Louisiana*, 379 U.S. 64 (1964).

13) *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

14) See Frederick Schauer, “Public Figures,” *William and Mary Law Review*, vol. 25 (1984), pp. 905-35.

15) *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

16) The six verdicts were a result of only fourteen trials, eight of which produced verdicts for media defendants. All figures come from the Libel Defense Resource Center, now, not surprisingly, renamed the Media Law Resource Center.

17) See the 2003 report of the Libel Defense Resource Center (now the Media Law Resource Center), The six verdicts against the media represent slightly under half of the total of fourteen libel suits that went to trial during the year, a figure that has been moderately constant in recent years, with an average of 12.5 libel trials in the United States for the years 2000-2003. This is down from an average of 23 trials per year in the 1990s and 24 trials per year in the 1980s, but all of these figures are, given the size of the United States, its proclivity to litigiousness, and its multiplicity of overlapping jurisdictions, astonishingly small.

18) See Eric Barendt, *Freedom of Speech* (Oxford: Clarendon Press, 1985), pp. 163-65; Wojciech Sadurski, *Freedom of Speech and Its Limits* (Dordrecht, Netherlands: Kluwer Academic Publishers, 1999), chapter 6; David Kretzmer, “Freedom of Speech and Racism,” *Cardozo Law Review*, vol. 8 (1987), pp. 445-62; Michel Rosenfeld, “Hate Speech in Comparative Perspective: A Comparative Analysis,” *Cardozo Law Review*, vol. 24 (2003), pp. 1523-67.

international conventions,¹⁹ such laws remain plainly unconstitutional in the United States. Because advocacy of unlawful acts is constitutionally protected unless such advocacy explicitly incites to imminent unlawful acts that are likely to occur as a consequence of the advocacy²⁰ – standing in front of an angry mob and urging them to immediate violent action – advocacy of racial hatred, racial discrimination, and indeed racial violence is in general constitutionally protected. And because the American prohibition on so-called “viewpoint discrimination” is virtually absolute,²¹ it makes no constitutional difference that the advocacy concerns race, religion, ethnicity, nationality, gender, or sexual orientation rather than some other topic, and it makes no constitutional difference that the advocacy is, say, in favour of racial hatred rather than racial equality, in favour of religious intolerance rather than religious tolerance, or in favour of ethnic violence rather than ethnic harmony and respect.²²

Other aspects of hate speech are treated similarly. The United States does not have, nor could it have, laws prohibiting Holocaust denial, nor could more general laws be used to reach that end.²³ So too with respect to the clear unconstitutionality under current American constitutional doctrine of laws that would prohibit racial, religious, or ethnic epithets or insults.²⁴ And when in 1977 Frank Collin, the leader of the American Nazi Party,²⁵ sought permission for a Nazi parade – complete with swastikas, flags, uniforms, and jackboots – in a community heavily populated with survivors of the Holocaust, it was so plain that he could not be denied permission to march that the Supreme Court did not even find it necessary to hear the case.²⁶

When these strands of American First Amendment doctrine are taken together, it is plain that Jean-Marie Le Pen could not be sanctioned in the United States, as he was in France, for accusing Jews of exaggerating the Holocaust. Brigitte Bardot could not be fined in the United States, as she was in France, for crusading against Islam and urging deportation of those of Arab ethnicity. James Keegstra could not be charged, as he was in Canada, with a hate speech crime on the basis of his denial of the existence of the Holocaust. That the United States has refused on First Amendment grounds to enforce a French judgment against an Internet service provider that was selling Nazi items in an on-line auction²⁷ illustrates well the gulf between American and non-American approaches,²⁸ as does the fact that the United States has refused on American constitutional grounds to acquiesce in those parts of various international treaties, such as Section 4 of the 1965 International Convention on the Elimination of All Forms of Racial Hatred, that require signatories to prohibit the incitement to racial

19) Although many international human rights documents explicitly or implicitly allow the prohibition of incitement to racial hatred, some are noteworthy in either directly prohibiting such incitement or requiring national prohibition by all signatories. The most prominent examples of this latter and thus stronger statement are Article 20 of the International Covenant on Political and Civil Rights, Section 4 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, and Article 13(5) of the 1969 American Convention on Human Rights.

20) *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

21) *United States v. Kokinda*, 497 U.S. 720 (1989); *Texas v. Johnson*, 491 U.S. 397 (1989); Geoffrey R. Stone, “Content Regulation and the First Amendment,” *William and Mary Law Review*, vol. 25 (1983), pp. 189-240; Susan Williams, “Content Discrimination and the First Amendment,” *University of Pennsylvania Law Review*, vol. 139 (1991), pp. 201-58.

22) Indeed, *Brandenburg* itself, see note 20 above, was a case involving a Ku Klux Klan leader who urged acts of “revengeance” against Jews and African-Americans. See also *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); Charles Fried, “The New First Amendment Jurisprudence: A Threat to Liberty,” *University of Chicago Law Review*, vol. 59 (1992), pp. 225-73; Frederick Schauer, “Intentions, Conventions, and the First Amendment: The Case of Cross-Burning,” *Supreme Court Review*

23) The question is so obvious in the United States that there is not even a court case on the issue. For a thorough international comparison, see Joseph Magnet, “Hate Propaganda in Canada,” in W.J. Waluchow, ed., *Free Expression: Essays in Law and Philosophy* (Oxford: Clarendon Press, 1994), pp. 223-50. See also Kent Greenawalt, *Fighting Words: Individuals, Communities, and Freedom of Speech* (Princeton: Princeton University Press, 1995), pp. 64-70; Roy Leeper, “Keegstra and R.A.V.: A Comparative Analysis of Canadian and U.S. Approaches to Hate Speech Legislation,” *Communication Law and Policy*, vol. 5 (2000), pp. 295-322.

24) This state of affairs is not without American criticism. See Randall Kennedy, *nigger: The Strange Career of a Troublesome Word* (New York: Free Press, 2002); Richard Delgado, “Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling,” *Harvard Civil Rights - Civil Liberties Law Review*, vol. 17 (1982), pp. 133-72.

25) An organization that could not under American First Amendment doctrine be deemed illegal in itself.

26) *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), cert. denied, 439 U.S. 916 (1978); *Village of Skokie v. National Socialist Party of America*, 373 N.E.2d 21 (Ill. 1978). Aryeh Neier, *Defending My Enemy: American Nazis, the Skokie Case, and the Risks of Freedom* (New York: Dutton, 1979).

27) *Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Antisémitisme*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001). See Mark D. Rosen, “Exporting the Constitution,” *Emory Law Journal*, vol. 53 (2004), pp. 171-232.

28) Much the same can be said about defamation, where at least two American courts have refused to recognise non-American libel judgments on the grounds that non-American libel standards violate the public policy of the United States. *Telnikoff v. Matusевич*, 702 A.2d 230 (Md. 1997); *Bachchan v. India Abroad Publications, Inc.*, 585 N.Y.S.2d 661 (App. Div. 1992). More recently, the same claim has been raised in litigation between the Dow-Jones Company (*The Wall Street Journal*) and Harrods regarding libel litigation in the British courts, but the American court held the issue not yet ripe for decision. *Dow Jones & Co. v. Harrods, Ltd.*, 237 F. Supp. 2d 394 (S.D.N.Y. 2002). See generally on this issue Mark D. Rosen, “Should Un-American Foreign Judgments Be Enforced?,” *Minnesota Law Review*, vol. 88 (2004), pp. 783-824.

hatred. In numerous respects, American law steadfastly protects speakers, even speakers whose speeches are likely to promote racial and ethnic intolerance, racial and ethnic inequality, racial and ethnic hatred, and even, under most circumstances, racial and ethnic violence. As the American constitutional law of hate speech dramatically demonstrates, the First Amendment, as interpreted, embodies a strong preference for freedom of expression over potentially conflicting rights and values in equality, dignity, civility, and community.

3.

Defamation and hate speech offer the most dramatic examples, but in fact the phenomenon of American freedom of expression exceptionalism pervades the law of freedom of political, social, religious, and ideological communication. In disputes between the interests of the press in reporting on ongoing criminal prosecutions and the proceedings of criminal trials, on the one hand, and the right of the accused to a fair trial unhindered by sensationalist tabloid-driven pre-trial publicity and newspaper accounts of matters that may never be heard by the jury, on the other, the United States favours the former to a degree unmatched in the world.²⁹ Much the same applies to the extent to which trials are open to the media, which is the virtually universal rule in the United States, where in addition there are very few constitutionally permissible restrictions on what the media may report about what goes on in open court or what is contained in written court records.³⁰ And in disputes between the interests in privacy of victims of crimes – including their interests in not having their names and pictures revealed to the world at large – and the interests of the media in reporting on criminal proceedings once again typically resolved in favour of the media and against the victim's privacy.³¹ In all of these related areas, the American approach treats the judiciary as no less a part of government than the legislature, the executive, and the bureaucracy, and thus no less a matter of public concern and an appropriate subject for public scrutiny and public criticism.

In other areas of law, American choices are similar. In protecting the publication of even illegally obtained information, as occurred most famously in the case of the stolen top-secret *Pentagon Papers*, First Amendment doctrine goes further in protecting publication, even if not the thief, than even the most press-protective of liberal democracies.³² In the context of commercial advertising, the First Amendment substantially constrains forms of tobacco and alcohol advertising that are routine elsewhere.³³ In the context of elections and referendums, attempts to make campaign and electoral communications accurate, fair, equal, open, non-coercive, and balanced typically founder on the rocks of a strong preference for the communicative rights of broadcasters, newspapers, and candidates, or for the rights of individual and corporate speakers, over the more diffuse rights of the polity to a fairer but more controlled environment of political and electoral communication.³⁴

There are numerous other examples, of course, and I have offered just the briefest glimpse at even the ones I have mentioned, but these should be sufficient to make clear the extent of American freedom of expression exceptionalism regarding a wide range of political and policy communications. But before turning to causes and effects, it is worth noting that all of the above applies not only to constitutional decisions, but also to legislative action and the larger political environment. Although American First Amendment doctrine does not grant positive constitutional rights of access to governmental deliberations and records,³⁵ American politicians have not forgotten the maxim that one should “never argue with the fellow who buys ink by the barrel.” Consequently, and as a matter of legislative grace and not constitutional mandate, the public (and in practice mostly the media) are

29) *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979); *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976); *Bridges v. California*, 314 U.S. 252 (1941).

30) *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

31) *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

32) *Bartnicki v. Vopper*, 121 S. Ct. 1753 (2001); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978); *New York Times Co. v. United States (Pentagon Papers Case)*, 403 U.S. 713 (1971).

33) See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); Kathleen M. Sullivan, “Cheap Spirits, Cheap Cigarettes, and Free Speech: The Implications of 44 Liquormart,” *Supreme Court Review*, vol. 1996, pp. 123-61; Colin Munro, “The Value of Commercial Speech,” *Cambridge Law Journal*, vol. 62 (2003), pp. 134-59. This dimension of American freedom of expression exceptionalism has recently had a substantial effect on the negotiations regarding the 2003 WHO Framework Convention on Tobacco Control.

34) See *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995); *City of Ladue v. Gilleo*, 512 U.S. 43 (1994); *Burson v. Freeman*, 504 U.S. 191 (1992); *Brown v. Hartlage*, 456 U.S. 45 (1982); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

35) *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974); *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978).

granted rights of access to documents, records, and meetings to an extent unheard of in the rest of the world. The Freedom of Information Act is not constitutionally compelled, but the role it plays is enormously important, as is the role played by various “sunshine” laws opening a vast number of government meetings open to public attendance and inspection. Even beyond what the Constitution has been interpreted to require, the First Amendment’s penumbra has been hugely influential in producing a remarkable and internationally unmatched degree of legally uninhibited political communication in the United States.

4.

The fact of American freedom of expression exceptionalism is clear, but now we must look deeper. And, initially, it is important to examine the causes of American freedom of expression exceptionalism. I have written extensively elsewhere about this issue,³⁶ so I will offer here only a brief summary.

Some years ago it might have been possible to attribute American freedom of expression exceptionalism simply to differential experience. With the First Amendment dating back to 1791, and with active judicial involvement in its interpretation and explication going back at least as far as 1919, it might have been plausible until relatively recently to suggest that other nations would converge on something like American practice once they had the same degree of experience and commitment to freedom of expression that the United States had had for generations. Moreover, the tendency towards convergence might have been assisted by the active American promotion internationally of American ideas about freedom of speech and freedom of the press.

Yet although such a prediction might have been plausible a decade or two ago, that prediction has not been borne out. In defamation, for example, courts and law reform institutions in Great Britain, Australia, New Zealand, Canada, and South Africa, among others, have carefully considered the American approach and have consciously rejected it. There have, to be sure, been recent liberalisations of defamation law in most liberal democracies, but those democracies have typically examined the American approach (often having been urged to do so by the national media) and have concluded that it goes too far in the direction of protecting freedom of political communication at the expense of individual reputation, at the expense of public civility, and sometimes at the expense also of creating an environment most conducive to attracting capable people into public life.

This same pattern exists for many areas of hate speech, for questions about restrictions (if any) on campaign and election advertising, for issues of commercial speech, and for many others. No longer can it be said that American divergence from what appears to be an international norm among open liberal democracies is a function of differential experience, for in most areas in which the American approach remains different it is partly because Americans have been uninterested in harmonisation with international freedom of expression norms, and because democratic non-American nations, after careful consideration, are equally uninterested in following the American approach. And if we look at the reasons for this persistent divergence, a number of causes seem each to contribute, in part, to the larger phenomenon.

4.1 An Imbalanced Text

Although the right to freedom of expression is virtually universally recognised in written constitutions and human rights documents, that recognition is typically qualified. At times, as in the Constitution of South Africa and the Canadian Charter of Rights and Freedoms, the right is subject to restriction as long as the restriction satisfies a test of necessity and proportionality, and at times, as in Article 10 of the European Convention on Human Rights, the right itself contains a list of particular exceptions. By contrast, the First Amendment to the Constitution of the United States appears linguistically absolute, containing no exceptions or qualifications. Of course no competent American lawyer would claim that in practice the American First Amendment is anywhere near absolute in either strength or scope, for the doctrine is strong evidence to the contrary. Still, the absence of explicit allowance for overrides or exceptions is not without rhetorical significance, and likely contributes to an environment in which it is understood that the First Amendment should be interpreted with great strength. Moreover, although the Constitution of the United States explicitly protects equality and the rights of those charged with crimes, it says nothing, unlike for example the German Basic Law, about dignity, reputation or privacy. So insofar as the American constitution guarantees freedom of

36) Frederick Schauer, “*The Exceptional First Amendment*,” in Michael Ignatieff, ed., *American Exceptionalism in Human Rights* (Princeton: Princeton University Press, forthcoming 2005).

expression but says nothing in the constitutional text about some of the rights and interests with which it often conflicts further assists in tilting the balance between freedom of expression and other rights and interests in the direction of freedom of expression.

4.2 A Preference for Liberty

Although there are occasionally conflicts between freedom of expression and other strongly individual rights, most of the issues regarding freedom of expression reflect larger conflicts between values of individual liberty and autonomy, on the one hand, and values of community and equality, on the other. And with respect to such larger conflicts, American society, as a matter of history and political culture far more than constitutional text or even constitutional law, is plainly a libertarian culture, persistently choosing values of individual liberty over often conflicting values of equality, civility, and community. This preference for liberty is reflected in the absence in American history of any serious socialist or social democratic tradition, in the lack of much sympathy for enforceable social or welfare rights, in a state that is itself far less oriented towards universal social welfare as a goal than one would find in much of Europe, in relatively low tax rates even for the highest earners, and in numerous other ways. And even aside from economic issues, the United States has been for so long a society whose diversity has resisted any strong form of communitarianism. Against this background of a general preference for individual (and corporate) liberty over the often competing values of equality, civility, dignity, and community, the American First Amendment tradition, again a strongly libertarian one, may be understood, at least in part, as an instantiation of much larger political, social, philosophical, and economic themes.

4.3 A Culture of Distrust

Looking back over more than two hundred years of American history, there is little to suggest that Americans ought to have a special distrust of government. Indeed, much the same can be said about the last eighty-five years, if we want to consider the time span within which the First Amendment has been taken seriously. Yet despite the history, it has been well-documented that Americans generally have much more distrust of government than do their counterparts elsewhere, including their counterparts in countries in which there is far more reason to distrust government than there tends to be, taking the long view, in the United States. This pervasive distrust of government has numerous manifestations, but one is an understanding of the First Amendment according to which “under the First Amendment there is no such thing as a false idea.”³⁷ Now of course there *are* false ideas, and all Americans understand this, but the issue is whether any arm of the state, including the judiciary, can be reliably trusted to determine which ideas are true and which false. And on this issue the American tradition of distrust of government is most apparent, with First Amendment doctrine persistently sceptical of the ability of any institution of the state to determine what is true and what is false, and what is valuable and what is worthless. This distrust may at times seem extreme to non-Americans, as with the First Amendment’s unwillingness to treat Nazis and members of the Ku Klux Klan any differently for almost all First Amendment purposes than Democrats and Republicans, but it is nevertheless true that a pervasive distrust of government in general is manifested in a pervasive unwillingness to distinguish among speakers and ideas based on the content of those ideas. The American approach to freedom of expression, therefore, is in part an approach that reflects a characteristically American distrust of the distinction-drawing capacities of the state.

4.4 The Political Culture of the First Amendment

The law of freedom of expression does not arise in a vacuum, but rather emerges in large part as a consequence of various political and sociological forces determining what forms of legislation will be enacted, and when those affected by that legislation will challenge it in court. The background principles of freedom of expression do play a role, and so does the internal logic of any area of legal doctrine. But although it would therefore be excessively reductionist to attribute too much of the American approach to freedom of expression to political culture alone, so too would it be a mistake to ignore such factors entirely.³⁸ And thus it is necessary to understand that in the United States numerous interest groups and pressure groups serve an important role in developing and sustaining an especially strong freedom of expression culture. It is true that groups such as ARTICLE 19 have an international presence, but that presence is less consequential than the effect that groups such as the American Civil Liberties Union, People for the American Way, the American Library Association, the American Booksellers Association, and many others have in the United States. All of these groups see

³⁷) *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

³⁸) See Frederick Schauer, “*The Boundaries of the First Amendment*,” *Harvard Law Review*, vol. 117 (2004), pp. 1765-1809.

their mission almost entirely in anti-censorship terms, and have both the history and the resources to be significant political and social actors. Moreover, the political power of the American organised and institutional press (which, unlike in most other countries, at least historically, has included non-governmental television and radio broadcasting as well) in protecting its own interests is equally substantial. There is an old American aphorism, "Never argue with the fellow who buys ink by the barrel," that captures well that risk that any political figure (and to a lesser extent judges as well) runs by proposing policies that would restrict the institutional media. So although the development of American media law may not have been inspired by interest groups or press self-interest, these factors appear to play a large role in forestalling any movement in the opposite direction.

5.

The factors outlined above, and perhaps others as well, may explain much of American freedom of expression exceptionalism, but they tell us little about its consequences. At one level, the consequences seem clear, for it is almost certainly true that American political communication is less inhibited by formal law than is the case anywhere else in the free as well as in the less free world. Speakers speak and protest with (legal) impunity, publishers publish with virtually no fear of any legal liability regardless of the content of the publication, and broadcasters broadcast with little worry about formal legal consequences. The spectre of fine or imprisonment is virtually non-existent for the overwhelming majority of American political communications, and thus if we are seeking to explain the behaviour of American speakers, demonstrators, protesters,³⁹ writers, editors, broadcasters, and publishers we must look elsewhere than at the role of formal law and the effect of potential civil or criminal liability.

Yet legal freedom of speech is not an end in itself, but rather a means to a larger end. And that larger end, in the context of political communication, is best understood to include, at the very least, a proliferation of challenges to received political opinion, a wide range of spoken and published political views available to much of the population, and print and broadcast (and, increasingly, Internet) media that actively monitor, investigate, and criticise official behaviour. It is plausible to understand the negative liberty – freedom from governmental restriction – of freedom of communication as being instrumental to the end state of, in the words of Justice Brennan in *New York Times Co. v. Sullivan*,⁴⁰ a genuinely "wide-open," "robust," and "uninhibited" public debate on matters of public and political importance.

If we thus examine not the extent to the negative liberty, which in the United States is vast, but rather the end state to which that negative liberty is in theory instrumental and facilitative, then the picture is more complex. American political communication is indeed characterised by harsh and frequent criticism of public officials (both those who do and do not deserve it), but in other respects the picture of American political communication is less favourable, and less consistent with the ideals so often found in the free speech and free press literature. For one thing, American political communication generally takes place within the narrow range of political opinion that characterises American politics generally. Political debates, whether formal or informal, are often between Democrats and Republicans and often involve little substantive policy difference. Positions significantly to the left of the American Democratic Party or significantly to the right of the Republican party are rarely expressed and even more rarely seen in major media outlets. Thus, if one important function of legally uninhibited political communication is to foster an environment in which a wide range of views are expressed, debated, and taken seriously, then it is not at all clear that American free speech libertarianism is a sufficient condition for that consequence, and thus not at all clear that American free speech libertarianism has produced a wider range of robust political communication than one sees in some number of countries with a less libertarian approach to freedom of communication.

Much of the explanation for this situation may lie in the importance of not attributing too much either to negative liberty in particular or to the law in general. It is almost certainly true that American freedom of expression libertarianism has produced more and wider political debate than would have existed in the United States without it, but that says little about the background conditions in other societies, and thus about whether societies with different background political conditions but less freedom of expression libertarianism might because of those differential background conditions still foster an environment with broader and more robust political

39) I exclude here those acts of civil disobedience that violate laws enacted and enforced without regard to the content of the message, as for example laws against trespass and the destruction of private or governmental property.

40) 376 U.S. 254 (1964).

communication. Thus, if American political communication takes place within boundaries narrower than those seen in some other liberal democracies, this may have relatively little to do with the American law of freedom of speech and freedom of the press, and much to do with American political culture. And although this political culture is, to be sure, itself created partly by a very legally free press and extremely legally free political debate, it is likely created even more by an American non-parliamentary political system that encourages office-holders and office-seekers to gravitate to the centre,⁴¹ by first-past-the-post electoral design that significantly impairs the ability of small political parties to enter the system and exercise political influence,⁴² and by an American political history that has been harsh to socialism and especially sympathetic to minimal government. And this last factor may in turn have something to do with the makeup of the American population (comprised almost entirely of people with good reasons in their family history to distrust the government), and even more to do with economics. The United States is a prosperous country, even (by absolute standards) in the lower regions of its economic hierarchy, and that very prosperity may do much to explain the relatively narrow and relatively conservative (in the non-political sense of that word) state of American political debate.

The role of economic considerations may be even greater than suggested in the previous paragraph. Although the United States has both public radio and public television, these institutions have a cultural focus (and, to some, a consequent elite bias) that prevents them from being a major factor in American broadcasting. And thus, with no tradition of serious and mainstream state-owned broadcasting, and with no state-owned mainstream newspapers or magazines, the United States finds itself with a market-dominated media. Thus, the very nature of the market, and the consequent necessity of appealing to advertisers as well as to views and readers, may reinforce a tendency to exclude those views without a pre-existing constituency. To put it differently, non-mainstream views face high economic as well as political barriers to entry, and this, far more than the absence of legal barriers to entry, may explain the paucity of such views in American political debate.

There is also a perverse way in which existing libertarian American freedom of expression doctrine may contribute to the narrowing of American policy debate. Because of First Amendment barriers to suits for libel and invasion of privacy,⁴³ personal attack is especially easy and largely free of legal risk. And as a result, focusing on the individual behaviour of American public officials is especially easy for the media and for others involved in political debate.⁴⁴ To the extent that this ease creates a path of least resistance for much of the media, American legal doctrine may have contributed to an environment in which serious political commentary and serious investigative journalism have given way more than would otherwise have been the case to forms of political commentary that are less deep but command more immediate audience interest.

The way in which American First Amendment doctrine channels political communication in one direction rather than another may be an even larger phenomenon. In the design of any political, social, or other decision-making institution, attention must be paid to two types of errors, errors that map onto the statistician's now-commonplace distinction between Type I and Type II errors. Thus, we can stipulate that the Type I error is the false positive, in which action is taken, but mistakenly. And in our immediate context, we can say that the Type I error is the error that occurs when evil or corrupt or simply incompetent officials are nevertheless empowered, often with disastrous consequences, to take official action. And the corollary is that the Type II error is the false negative, the failure to take positive or beneficial action. Thus, the Type II error is the error of preventing well-meaning, capable, and effective public officials from exercising their power for the public good.

41) There are of course positive and negative features of this phenomenon. The same aspects of institutional design that tend to narrow political debate may prevent political figures with the views of Jean-Marie Le Pen, Jörg Haider, and Pim Fortuyn from gaining the footholds that they have or had gained in their respective countries.

42) Again, this phenomenon may have costs and benefits. The absence of low threshold proportional representation impedes the rise of non-mainstream groups, but it also impedes the ability of such groups, as in Israel, to exercise disproportionate influence on political and public policy.

43) As a common law country, the United States has no tradition of insult laws as such, although it is virtually certain that such laws, even were they to exist, would not withstand existing First Amendment constraints.

44) The example of President Clinton comes immediately to mind, but the example is a complex one. The view that Clinton's behaviour was "personal" or "private," widespread in Europe, depends not only upon contested views about the realms of the public, the private, and the personal, but also upon contested views about sexual harassment and about the appropriateness of sexual activity between employer (or teacher, or other authority figure) and employee. On this topic as well, there is a quite different form of American exceptionalism, with much of the American political and legal environment less tolerant of sexual harassment and employer-employee sexual relations than is the case elsewhere. See Abigail C. Saguy, "Employment Discrimination or Sexual Violence?: Defining Sexual Harassment in American and French Law," *Law and Society Review*, vol. 34 (2000), pp. 1091-1128.

In the context of the foregoing framework, American political culture in general, and the American First Amendment in particular, may embody the view that Type I errors are far more serious than Type II errors, and thus that it is far more important to guard against corrupt, evil, and incompetent public officials than it is to empower capable and well-meaning ones to advance the public good. Thus, preventing the false positives of policy disasters is thought sufficiently more important than preventing the false negatives of disabling policy successes that the system is designed to maximise its prevention of false positives even at the expense of increasing the number of false negatives. American political culture, and especially the culture of the First Amendment and its most active supporters, may consequently embody Karl Popper's mandate that political systems be designed not with a focus on the question of "Who should rule,?" but instead with paramount attention to the question of "How can we organise our political institutions so that bad or incompetent rulers cannot do too much damage."⁴⁵ And to the extent that this is so, and to the extent that this analytical structure is a valuable lens through which to view the American approach to freedom of political communication, it is not implausible to suppose that the American system of freedom of political communication has been moderately effective in minimising the damage that would be caused by the evil or corrupt or incompetent officials that any political system will on occasion select, but that it has done so at the expense of excessively restricting the entry of honest and well-meaning and competent people into public life, and of excessively impeding the ability of such people to do good when they in fact find themselves with the power to make public policy.

In designing a system that focuses on eliminating the Type I error even at the cost of increasing the incidence and consequences of Type II errors, the American system has thus chosen to stifle the entry into public life of those who do not relish personal and occasionally false attacks on their character and behaviour, who do not wish to engage in public debates with racists, and who wish on occasion to keep their policy discussions secret. Insofar as the American approach to freedom of political communication puts public officials at the risk of these and related consequences more than do other open and democratic approaches, the American approach may pay for its obsession with distrusting government and for its obsession with rooting out evil and incompetence and corruption in the currency of the talent and commitment of those who choose to enter public life, and in the currency of the policy effectiveness of those who do make policy. But whether these costs are worth paying can only be measured in a span of history far longer than any one individual is conceivably able to experience.

45) Karl R. Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge* (London: Routledge & Kegan Paul, 4th revised edition, 1972), p. 25.

SWITZERLAND: Freedom of Political Expression in the Media – Selected Issues

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1. Introduction: “Public Debate Is the Soul of Direct Democracy”

Freedom of political discussion is essential to every democratic state. It is particularly important in a country such as Switzerland in which citizens enjoy the far-reaching rights known as rights of co-determination with the authorities. The often used instruments of direct democracy (referenda and popular initiatives) are still fundamental to the Swiss political system. The proper functioning of this particular form of government depends very much on the existence of a pluralistic and fair public debate, especially in the media: “Public debate is the soul of direct democracy.”¹ This recent statement of the highest judicial authority, the Federal Court, expresses the consensus that exists in Switzerland on this matter.

There is also consensus as regards the view that the right to free expression and the existence of robust debate is not, however, unlimited. Even if there is little scope for restrictions on political speech, statements that are defamatory or racist, or that advocate violence or the breach of confidentiality remain prohibited, even if uttered in a political context (2.).

In addition to “traditional” barriers to free (political) expression, there are some specific rules to promote equal opportunities for the expression of opponents in political debate and to guarantee the people’s right to be informed – especially about the subject matter of the dozens of popular ballots that are held at the federal, cantonal and communal level every year. Right before these polls there is high public interest in the existence of a plural and fair political debate with equal chances to all for participation, especially for minorities with little financial resources. These aims are protected in a number of different ways (3.). One of the instruments for protection is the (partial) prohibition of political advertising on radio and television, which will be discussed at the end of this paper (4.).

2. “Traditional” Restrictions on Free (Political) Expression

2.1 Defamation, Racism and Confidential Information

The Swiss Criminal code prohibits (public) statements that are defamatory (article 173) or racist (art. 261^{bis}). Recent judicial proceedings concerning defamation or racism in a political context have usually not been directed against professional journalists but more frequently against (individual) participants in the political debate, for example individual members of political parties or radical opponents of abortion.

1) Judgment of the Swiss Federal Court, 14 May 2002, BGE 128 IV 53; cons. 1d, page 60

In 2002 the Federal Court upheld a conviction for defamation against the author of anonymous billboards. The billboards attacked female politicians that were supporting a proposal to allow abortion in the first 12 weeks after conception. The billboards were illustrated with a photograph of a killed fetus at the age of about 20 weeks and mentioned the names of the relevant politicians all under the headline "They want a culture of death in Switzerland!" The Federal Court reiterated that the threshold of tolerance had to be higher for statements made in political discussion. Nevertheless, this tolerance shall not be for the benefit of people refusing to participate in an open public debate and who deliberately chose to hide their identity: "Public debate has to be fair, which means in particular that the author's identity has to be disclosed on billboards or documents."²

Concerning the role of the mass media in reporting racist remarks, there has been some discussion in the field of standards of professional ethics,³ but so far no professional journalist has been brought to trial before a Swiss court for the dissemination of racial statements made by others. A criminal case against a journalist who had published the racist remarks made by an interviewee was dropped in 1999.⁴

A more important obstacle standing in the way of professional journalists seeking to report freely on political issues is Article 293 § 1 of the Swiss Criminal Code, which provides that "anyone who, without being entitled to do so, makes public all or parts of the proceedings of an investigation or of the deliberations of any authority which are secret by law or in virtue of a decision taken by such an authority acting within its powers shall be punished with imprisonment or a fine."

In 1997, for example, a Sunday paper published excerpts from a confidential message sent by the Swiss ambassador in the U.S.A. to the Swiss government. The journalist was convicted of violating article 293.⁵ (The Swiss press council had independently considered this publication to be justified from the point of view of journalistic ethics.)

2.2 Additional Restrictions in the Field of Radio and Television Programmes

(Political) reporting on radio and television has to follow additional rules. The Swiss radio and television Act (RTA) prohibits for example the featuring of items in programmes which endanger the internal or external security of the country, glorify or play down violence (Article 6 RTA). These obligations have much more relevance than the rarely applied criminal provisions against advocating violence (Art. 259 Criminal Code) or the showing of brutal violence (Art. 135). They are not only applicable to the mainly publicly funded broadcasters (above all the Swiss Broadcasting Corporation, SBC), but also to commercial broadcasters. The respect of all obligations on programme content (including the obligation to report events fairly and to reflect a variety of views adequately; see below 3.1.) is controlled by the Independent Radio and Television Appeal Board (Art. 93 § 5 of the Swiss Federal Constitution), which in turn also required to give sufficient weight to the broadcaster's freedom of expression (Art. 17 § 1 and 93 § 3 Const.).

In two recent cases the Independent Appeal Board deemed acceptable the broadcast of violent content on SBC's highly regarded evening news. By a majority of 6:3 it rejected an appeal against the manner in which SBC had shown the dead bodies of Saddam Hussein's sons in September 2003. The majority held that the showing of violent pictures on television news programmes was often necessary for a realistic depiction of conflicts and had to be admitted as long as there were no excesses. The minority held that the photographs taken by U.S. troops were not able to prove conclusively the deaths of Kusai and Uday Hussein. To show them on television was, in their opinion, tantamount to playing down violence and disregarding human dignity.⁶

Recently the Appeal Board accepted the broadcast of a news programme item summarizing a press conference organized by masked opponents of the World Economic Forum (WEF) whose statements documented their willingness to protest with violent means. The Board held unanimously that the programme item had not endangered internal security.⁷

2) Judgment of the Swiss Federal Court, 14 May 2002, BGE 128 IV 53; cons. 1d, page 60

3) The Swiss Press Council has published several statements on this issue; <http://www.presserat.ch/12330.htm>

4) Franz Zeller, *Öffentliches Medienrecht*, Bern 2004, p. 186

5) Judgment of the Federal Court, 5 December 2000, BGE 126 IV 236 (Jagmetti – Sonntagszeitung)

6) Decision b. 479 of the IAB, 5 December 2003; <http://www.ubi.admin.ch/entschei/x/b.479.pdf>

7) Decision b. 483 of the IAB, 14 May 2004; <http://www.ubi.admin.ch/entschei/x/b.483.pdf>

2.3 Measures against the Distribution of Illegal Foreign Publications in Switzerland

In a number of cases the Swiss authorities have seized (and later destroyed) foreign political advertising materials considered to endanger the State. One case concerned 88 kg of books and magazines of the Kurdish Workers' Party PKK that advocated violence and were aimed at winning support for their armed struggle against the Turkish authorities. Another case concerned CDs and singles brought from Germany that contained publicity materials for the extreme right. In both cases the European Court of Human Rights (ECHR) declared the complaints under Article 10 of the Convention were manifestly ill-founded.⁸

In 1998 the ECHR also deemed acceptable under the Convention the following measures taken by the Swiss government (Federal Council) against a member of the Algerian *Front Islamique du Salut* (FIS): prohibition to distribute propaganda for organisations justifying or encouraging violent acts, confiscation of his fax machine and blocking his access to the Internet.⁹

3. Measures Protecting the Public's Right to Be Informed and Guaranteeing Equal Opportunities in Political Debate

Freedom of (political) communication does not only mean a journalist's right to free expression. Swiss constitutional law has always emphasized the importance of the public's right to be informed. This aspect is mentioned in the provision on radio and television (article 93 § 2 of the Constitution), and it has particular importance in the political field - the constitutional guarantee of political rights (article 34 § 2) not only protects the unaltered expression of the will of the citizenry but also "the free formation of opinion by the citizens".

In the first place the free formation of opinion may be jeopardized by the actions of the authorities. There is an abundant case-law of the Federal Court on the limits to be placed on the information to be provided by the authorities prior to a popular vote.¹⁰ In exceptional cases, untrue or misleading statements of private organizations (such as the media) made immediately before the polls (and thus published too late to be rectified by the authorities) may also have such a negative impact on the formation of opinion that balloting may be postponed or repeated.¹¹

On the other hand, there is no such thing as a compulsory pre-polling day's opinion poll silence period. Attempts made in the Swiss parliament have not led to the regulation of this issue so far. (Incidentally, such a period of silence would have to be very long to be effective, because of the Swiss tradition of postal voting.)¹²

Existing Swiss broadcast media regulation focuses on fair and balanced reporting in the audiovisual media. There are no comparable rules for newspapers, leaflets or billboards. A proposal by a parliamentary commission to introduce a new independent body entrusted with determining the appropriateness of specific political advertisements distributed in the period prior to a popular vote has been rejected by parliament in 2002.

3.1 Fair and Balanced Reporting on Radio and Television Programmes

Swiss radio and television law obliges all broadcasters to *present events factually* (or fairly; article 4 § 1 RTA). The aim of this obligation is to protect the public from manipulation, as the broadcaster must enable the public to form its own opinion.

The duty to present events fairly does not only apply to news programmes. Swiss regulation goes beyond the requirements of article 7 § 3 of the European Convention on Transfrontier Television (ECTT) as the Swiss obligation covers any item of a programme service supplying information.

8) Decisions N° 55641/00 "Faruk Kaptan against Switzerland" from 12 April 2001 and N° 43874/98 "R.L. against Switzerland" from 25 November 2003

9) Decision N° 41615/98 "Zaoui against Switzerland" from 18 January 2001

10) See Michel Besson, *Behördliche Information vor Volksabstimmungen*, Bern 2003

11) Judgment of the Federal Court, 4 August 1993, BGE 119 Ia 271 cons. 3c page 274

12) The Federal Act on Political rights of 17 December 1976 (an unofficial English translation is available on: http://www.admin.ch/ch/e/rs/c161_1.html) states in Article 8 that cantons shall provide a simple procedure for postal voting. Some cantons/communes have been piloting schemes for electronic voting.

Reporting must not only be factual (fair). It must also be *balanced*: there is a duty to reflect sufficiently a variety of events and opinions (article 4 §1 second sentence RTA). The principles of impartial, fair and balanced reporting are particularly important prior to popular ballots. During this sensitive period, when the outcomes of the democratic process could be influenced, broadcasters are under a duty to be particularly accurate. The Federal Court has emphasized that broadcasters have an extraordinary responsibility in the process of formation of public opinion and must respect the political rights of the citizenry. According to the Federal Court's case-law,¹³ this principle also applies during the period provided for the collection of signatures for an optional popular referendum¹⁴ or for a popular initiative.¹⁵

When reporting on the subjects of scheduled popular ballots, broadcasters must pay particular attention to granting equality of opportunity. All relevant interest groups and parties must be able to communicate their opinions to a large audience. The broadcaster has to take all the measures necessary to ensure that the different sides of a controversy have equal opportunity to be expressed – whenever possible in the same item of a programme.¹⁶ Nevertheless, there is no obligation to treat all parties, candidates and interest groups in an absolutely identical manner, for the broadcasters must not only ensure that they give equality of opportunity but they must take into account the information needs of viewers and listeners.

Concerning a telecast about a forthcoming election in the canton of Geneva it has thus been judged acceptable to treat more important parties or candidates (slightly) differently than others and give them more speaking time.¹⁷ Furthermore, the weight to be given in news to the different positions to a specific referendum or initiative does not have to be identical either; broadcasters are allowed to allocate time and attention by resorting to journalistic criteria (news value).¹⁸

3.2 Right to Programme Access

The fact that broadcasters are obliged to provide accurate and balanced reporting does not mean that certain parties, organizations or individuals have an enforceable right to be part of a programme. The European Commission of Human Rights has held that the right to freedom of expression does not include a general or unfettered right to access to broadcasting time. In particular circumstances, however, the denial of air time might give rise to an issue under the Convention – for example, if one political party was excluded from broadcasting facilities at election time while other parties were given broadcasting time.¹⁹ What is true during election time, must also be true prior to a popular ballot on an initiative or a referendum. Consequently, the Swiss broadcasting authorities may have to determine in a formal procedure whether such specific circumstances exist and whether the broadcaster in question has to give access to airtime. So far, this has never been the case.²⁰

An even better chance to bring their opinions to viewers and listeners exists for organizations holding a licence to broadcast a programme. Swiss law does not prohibit the granting of broadcasting licences to political or religious organizations. Nevertheless, article 3 § 2 RTA makes clear that “the overall range of programme services in any one supply area shall not be unduly biased towards specific parties, lobby groups or ideologies.”

The ECHR has given the Swiss authorities a wide margin of discretion for deciding when to grant or refuse a broadcasting licence. The ECHR has taken into consideration the particular political circumstances that obtain in Switzerland which necessitate the application of sensitive political criteria such as considerations of cultural and linguistic pluralism.²¹

13) Judgment of the Federal Court, 25 November 1988, BGE 114 Ib 334 cons. 4b page 343 (“EOS”)

14) At the federal level: 100 days from the date of the final official publication of the enactment (Article 59 of the Federal Act on Political Rights)

15) At the federal level: 18 months from the date of publication of the text of the initiative in the Official Federal Gazette (Article 71 § 1 of the Federal Act on Political Rights).

16) Judgment of the Federal Court, 2 November 1999, BGE 125 II 497 cons. 3b page 503 (Tamborini)

17) Judgment of the Federal Court, 2 November 1999, BGE 125 II 497 cons. 3c page 506 (Tamborini)

18) Decision b. 474 of the Independent Appeal Board, 16 October 2003 (“Tagesschau: Kernenergie”)

19) Decision N° 28079/95 “De Angelis v. Italy”, 17 January 1997 (and earlier decisions)

20) The position of the Swiss authorities has been confirmed in decision N° 23550/94 “Association mondiale pour l’Ecole Instrument de Paix v. Switzerland”, 24 February 1995

21) ECHR judgment N° 38743/97 “Demuth v. Switzerland” (Car TV), 5 November 2002, § 44

4. Limits to Political Advertising

Article 18 § 5 RTA prohibits paid political (and also religious) advertising on radio and television. In the Swiss system it is the duty of the broadcaster to refuse to broadcast an illegal (political) advertisement.

Which advertisements are to be considered political? Originally, the Federal Court favored a broad interpretation of this term. In 1997 it accepted the refusal of a television commercial produced by an association for the protection of animals (*Verein gegen Tierfabriken*) directed against the meat processing industry. According to the ECHR, however, this refusal was in breach of freedom of expression (Article 10 of the Convention).²²

In the aftermath of this judgment the Swiss authorities have changed their interpretation of Article 18 § 5 RTA. They recognized that the former, broad interpretation given to the prohibition on political advertising could not be maintained. It has now been reduced to its very core: the protection of the institutionalized democratic process in the form of elections and of scheduled popular ballots on particular issues. Advertisements broadcast before or after this period are permitted, even if they concern highly controversial political issues such as nuclear energy or asylum politics.²³ There is no longer in place the more general prohibition of the advertising that addressed an ongoing social or political debate.

In Swiss politics it is still a matter of controversy if any restriction on political advertising in the audiovisual media is to be maintained at all. When discussing the government's draft for a revised Radio and Television Act in March 2004, a majority of one chamber of Parliament (National Council) voted – quite surprisingly – against any prohibition of political (and religious) advertising. This decision provoked critical comments in the Swiss media, and it is not certain whether the other chamber will share the National Council's view.²⁴

The reasons for the reluctance to allow political advertising on radio and television are connected with the Swiss system of direct democracy: the system depends on affording a degree of equality of opportunity to the different interest groups. This thinking requires that financially powerful groups be prevented from obtaining an even bigger competitive political advantage. For two reasons this problem may be more serious in Switzerland than anywhere else: first, political parties rely almost exclusively on contributions made by party members or private donors to fund their campaigns, because the Swiss parliament has rejected all moves towards a system where the state contributes substantially to the funding of political parties. And second, due to the system of direct democracy voting is much more frequent in Switzerland than in any other European state.

At the federal level alone, in 2003 Swiss citizens did not only elect a new federal parliament, but voted on no less than on seven different popular initiatives and four referenda as well – concerning important issues such as nuclear energy, the military, health insurance or facilities for the disabled.²⁵

Financially powerful groups have been in a position to secure themselves more weight in the political debate, especially by means of paid political advertising in newspapers and billboards. Political advertising on radio and television is as a general rule much more expensive than other means of conducting campaigns. Accepting advertising even in the period before popular ballots would reinforce this tendency and substantially influence the democratic process of opinion-forming.

22) ECHR judgment N° 24699/94 "Verein gegen Tierfabriken v. Switzerland", 28 June 2001

23) Independent Appeal Board, decision b. 467, 27 June 2003, <http://www.ubi.admin.ch/entschei/x/b.467.pdf>

24) For the revision of the RTA see <http://www.parlament.ch/e/homepage/do-dossiers-az/do-rtvg-revision.htm>

25) For a list of all popular votes at the federal level since 1848 see <http://www.admin.ch/ch/d/pore/va/index.html>

SPAIN:

Open Questions regarding Political Expression and Elections

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1. Introduction

It is well-known that the last national elections in Spain were considerably affected by the Madrid terrorist attacks of 11 March 2004. This was indeed a unique state of affairs in the history of Spanish (and probably European) democracy. Those barbaric acts, which left behind 191 dead and around 1500 wounded, also stirred a political controversy that divided and continues to divide Spanish society. The government as well as the public service broadcaster TVE were strongly criticised over their way of informing the public about the identity of the terrorists. For example, a Report by the European Parliament¹ observed *inter alia* "that government pressure on the public-service broadcaster TVE resulted in blatant distortion and ignoring of the facts regarding responsibility for the appalling terrorist attacks of 11 March 2004".² At the same time, some private media close to opposition parties are said to have released biased information in order to undermine the government's credibility.

The writer of this short presentation does not seek to take position as regards the political controversy surrounding the Madrid terrorist attacks of 11 March and the subsequent elections. Neither does the author intend to provide a detailed analysis of the extremely complex political and social issues surrounding those two events nor does he seek to find truth, crime or culprit.³ However, it is impossible to summarise issues regarding political expression in Spain without addressing at least some of the situations that this tragedy created, situations that are otherwise hard to imagine in the context of a normal electoral process. Therefore, this presentation will provide three recent examples related to the general elections of 14 March 2004. They illustrate the difficulty of drawing the line between freedom of expression/information and political advertising. Examples 1. and 2. show *inter alia* the role that new technologies can play in the opinion-making process during electoral periods. Example 3. deals with the accusation that public service television was used to influence the outcome of the elections. Example 4. concerns the regulation of debates between candidates taking place on

1) European Parliament, Report on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights) (2003/2237(INI)). Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, Rapporteur: Johanna L.A. Boogerd-Quaak. Available at: <http://www2.europarl.eu.int/omk/sipade2?L=EN&OBJID=75982&LEVEL=2&MODE=SIP&NAV=X&LSTDOC=N>

2) In fact, TVE has been criticised for political clientelism on many occasions in the last years. In the same report quoted in note 1 the European Parliament further noted that the employees of TVE denounced "the unprofessional practices used to foster unbalanced, biased or manipulated provision of information between 28 February and 5 March on the military intervention in Iraq". Similarly, the Parliamentary Assembly of the Council of Europe criticised TVE's "manipulation of information under political influence that led to the unprecedented sentencing of TVE for its coverage of the general strike in Spain in June 2002". See Parliamentary Assembly Report on Public service broadcasting, Doc. 10029 of 12 January 2004 Committee on Culture, Science and Education Rapporteur: Mr Paschal Mooney, Ireland, Liberal, Democratic and Reformer's Group. Available at: <http://assembly.coe.int/Documents/WorkingDocs/doc04/EDOC10029.htm>

3) A Parliamentary commission has been created to investigate these questions.

the media during electoral periods, illustrated by a controversy that arose during the recent European Parliamentary elections. Please note that these examples are explored with the sole aim of encouraging discussion and not in order to provide definitive answers to any questions raised.

2. *Hay Motivo*, to Be or Not to Be (a Political Advertisement)

Hay motivo (There is a reason) is a long-feature film composed of 32 short pieces of approximately 3 minutes each. Each of these little films was directed by a different Spanish filmmaker (some of them well-known film directors such as Imanol Uribe, Julio Medem or Vicente Aranda). This film, completed weeks before the 14 March elections (that is, before the terrorist attacks⁴), sought to highlight in each of its individual parts a particular aspect of Spanish social and political reality which the authors considered to have been “badly developed during the last legislative period”. The filmmakers wanted citizens to open their eyes to problems “neglected, manipulated, avoided or directly hidden from the public eye” by the last government. Its authors wanted the film to be shown both on public and private national TV channels before the elections as an independent contribution to the electoral campaign.

The *Partido Popular* (Popular Party – PP)⁵ considered this film to be an item of political advertisement directed against it. In Spain, political advertising on TV is generally forbidden by Art. 9.1 c of the Act 25/1994 of 12 July implementing the “Television without Frontiers” Directive.⁶ Art. 9.1 c states that “advertisements with essential or fundamental political content, or directed at the consecution of political objectives, are prohibited”.⁷ The only exception to this rule is contained in Act 5/1985 of 19 June (with amendments) regulating elections in Spain.⁸ Section VI of the Act contains a provision by virtue of which the State must make available free advertising time on public service television and radio during electoral periods to political parties, federations, coalitions and groups standing for election.⁹

Possible questions for discussion:

- The definition of “television advertisement” made by Article 3 c) of Act 25/1994 includes “any kind of message broadcast on behalf of a natural or moral person, be they public or private, in order to promote a given attitude or behavior among the audience”. Is the film in question just an example of the filmmakers’ use of their freedom of expression or is it also a political advertisement?
- Both TVE and private television channels decided not to show the film during the electoral period, and only some local television stations broadcast it before the elections. The film was however posted on the Internet.¹⁰ Given the rising importance of Internet as a means of political expression (and advertising), what type of regulation, if any, should apply to this film during an electoral period? Should the prohibition of political advertisements on TV be extended to other media?

3. From *No pasarán* to *Pásalo*: Elections and New Technologies

On Saturday 13 March 2004, the day before the national elections took place, a message inviting people to demonstrate in front of the *Partido Popular* headquarters in various Spanish cities was widely distributed by e-mail and SMS. The text included an invitation to pass it on (“*pásalo*”) to other people. Nobody knows for sure who started off this invitation.

4) An additional sequence of the film addressing the situation created after the 11-M attacks is currently on production.

5) The *Partido Popular* is the main conservative party in Spain and supported the Aznar government in the period 1996-2004.

6) *Ley 25/1994, de 12 de julio, por la que se incorpora al Ordenamiento Jurídico Español la Directiva 89/552/CEE, sobre la coordinación de disposiciones legales, reglamentarias y administrativas de los Estados miembros, relativas al ejercicio de actividades de radiodifusión televisiva* (as amended by Act 22/1999 of 7 June). A consolidated version of this act is available at: http://noticias.juridicas.com/base_datos/Admin/125-1994.html

7) More specific norms such as *Ley Orgánica 2/1988, de 3 de mayo, Reguladora de la Publicidad Electoral en emisoras de Televisión Privada* (Act 2/1988 regulating Electoral Advertising on Private TV) as well as *Ley Orgánica 14/1995, de 22 de diciembre, de Publicidad Electoral en emisoras de Televisión Local por ondas terrestres* (Act 14/1995 regulating Electoral Advertising on Local TV) also contain an explicit prohibition of political advertising.

8) *Ley Orgánica 5/1985, de 19 de Junio, del régimen electoral general* (modified lastly by Act 16/2003, de 28 de noviembre).

9) As regards local elections, Act 14/1995 contains a similar provision granting free advertising time on city-owned TV stations. However, many private local TV stations in Spain have broadcast political advertisements for some years without constraints. See José Luis Dader and Ángeles Moreno, *Elecciones sin ciudadanos (y televisiones sin ley)*, available at: <http://www.lapaginadefinitiva.com/tribuna/2.htm>

10) See <http://www.haymotivo.com/cortos.html>

A number of demonstrations in Spain were successfully convened. The PP argued that these demonstrations were illegal, because they were directed against a specific political party with the aim to influence the vote the day before the elections. On the eve of the polls, party-political advertising is strictly forbidden by art. 53 of Act 5/1985.

Possible question for discussion:

- The *Junta Electoral Central* (this is the independent body in charge of the administration of elections – JEC) finally decided that these demonstrations were illegal. However, was the invitation (and the forwarding of it) illegal as well? And does it make a difference whether the invitation is made by a political party as an entity or whether it is made by individual members of a political party?

4. From *Noche de Fiesta* to *Asesinato en Febrero*: TV Rescheduling the Night before the Elections

On Saturday 13 March, the day before going to the polls to choose national authorities, the Spanish public service television channel *La Primera* changed its evening schedule (an entertainment programme called *Noche de Fiesta*) to show on prime time television a documentary film about two victims of ETA terrorism in Spain entitled "*Asesinato en Febrero*". TVE stated that this film had been shown as a "plea against terrorism" and to pay homage to the victims, no matter who the actual terrorists were.

Regulations concerning prior information to be given to the audience about TV programming¹¹ require that programming schedules must be published at least eleven days in advance of the actual broadcasting of a programme. The only acceptable modifications are those caused by unforeseeable events such as those that do not depend on the broadcaster's will.

Possible question for discussion:

- At one point it was not completely clear (or at least it was not made public) who was behind the attacks, whether ETA or Islamic extremists. Everyone was in agreement that the outcome of the elections depended on who had committed the crime. Therefore, can this programme rescheduling be considered as an attempt to influence the outcome of the elections?

5. Debating the Debates

Regarding the last European Parliamentary elections of 13 June 2004, the Spanish political parties agreed to participate in televised debates. One of those debates was to involve candidates from several political parties, and it was organised by public service broadcaster TVE. In addition, two debates between candidates of the PP and PSOE¹² were organised by private broadcasters Telecinco and Antena 3.

A few weeks later after the above agreement had been reached, TVE announced a debate between PP and PSOE candidates to be broadcast on 8 June 2004, on the same day as Antena 3 was to broadcast its own PP-PSOE debate. Following protests by the PP, who had already agreed to participate in the Antena 3 debate, the JEC ordered TVE to stop advertising its 8 June debate. The JEC advised both political parties to find another suitable date for a debate to be shown on TVE. The JEC also reminded Antena 3 and Telecinco of their obligation to offer the remaining political parties time on air for debates or interviews with their candidates. After this decision was made by the JEC, the Socialist candidate accepted to take part in the Antena 3 debate. The socialist candidate took the opportunity to press for a law that would regulate the broadcasting of debates during electoral periods.

Possible question for discussion:

- Should these debates broadcast on the audiovisual media be regulated by law, and if so, what should be the content of such regulation?

11) *Real Decreto 1462/1999, de 17 de septiembre, por el que se aprueba el Reglamento que regula el derecho de los usuarios del servicio de televisión a ser informados de la programación a emitir, y se desarrollan otros artículos de la Ley 25/1994, de 12 de julio, modificada por la Ley 22/1999, de 7 de junio.* (Statutory Instrument 1462/1999, of 17 September, which approved the regulations on the right of the audience to be informed about TV programme schedules, and which develops other articles of Law 25/1994, of 12 July, amended by Law 22/1999 of 7 June).

12) *The Partido Socialista Obrero Español (Socialist Party – PSOE) is the main social democrat party, and supports the current Spanish government.*

FINLAND: A Reality Check – 10 Years of Paid Political Advertising on TV

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In his presentation, Dirk Voorhoof mentions ten different ways of regulating paid advertising on television. Between the extreme alternatives of total ban and total laissez-faire, limitations may concern campaign expenditure, non-discriminatory rules, regulations on transparency of access and tariffs, price, spending limits, length, disclaimers, silence time before Election Day and content restrictions. But what if none of these are in use? Are we to expect serious dis- or malfunctions of the political system? Judging from a decade's experience in Finland: not necessarily. The case at hand is of course too limited to be generalised. It gives us, however, one example of unregulated paid political advertising being introduced in the context of a relatively stable political system with relatively marginal system effects. And, though limited to one country only, the study presented here¹ is the result of more than 10 years of systematic observation of developments in that country. Nonetheless, the issue of regulation appears as the main question in recent developments in Scandinavia, as Norway prepares to lift the ban on paid advertising on television.

1. The Nordic Countries: Changing Scenery

As in most countries in Europe paid political advertising on television was for many decades prohibited in all the Nordic states. A remarkable and relatively early exception was Finland, where commercial television had a long-standing history of co-existence alongside public service-television. When television regulations in other parts of Western Europe were lifted, Finland went one step further in this field. In 1991 the license holder for all TV-broadcasts (at that time the Finnish Broadcasting Company) lifted the ban prohibiting paid political advertising. When the commercial channels got their own licenses some years later, no regulations were put in place. Thus, from the local elections in 1992 onwards, political parties and candidates were allowed free purchase of advertising time on television.²

In a Nordic context Finland has so far been the odd case. In Sweden only a few single political ads have been broadcast, by broadcasters operating for the Swedish market but broadcasting from abroad. In Denmark there is no formal ban, but the political parties have agreed not to use political advertising on television in political campaigns. In Norway the authorities have not so far allowed political advertising on television. This became contested in elections in the late 1990s, and again in the local elections in 2003. Broadcasters explicitly made reference to principles of freedom of expression in accordance with article 10 of the European Convention on Human Rights.

1) The study referred to was presented earlier at the ECPR Conference, Marburg, 18-21 September 2003. See Moring, Tom (2003) Between ban and laissez faire - Nordic strategies to political television advertisements. Paper presented at the 2003 ECPR Conference in Marburg, Germany.

2) Contrary to many other European states, in Finland no free advertising time is given to parties on public or private television stations. Debates and party leader interviews are conducted under certain principles of fairness, decided by the broadcasters themselves, increasingly according to what the broadcasters define as "programming" or "journalistic" principles.

Today, breaking news in Norway is that a party financing committee has been asked to make suggestions on how the ban on paid political advertising on television can be lifted. The task includes to clarify how to compel TV-operators to allot free time to political parties, suggest limits regarding how much money a party can spend on political TV-advertising and suggest maximum time limits on how much broadcasting time a political party can purchase.

2. Finland: The Wild East

Bearing in mind the rather regulative mindset expressed in the task description for the Norwegian committee, Finland will obviously still remain the odd case, even if Norway eventually decides to lift the ban. Finland knows no spending limits, time limits or content limits set by the regulatory authorities of paid political advertising on commercial television.³ The same is true for paid political advertising on commercial radio. The only content limits applied especially to paid political advertising on television are set voluntarily by the biggest commercial television station (MTV3). The station does not allow personal attack ads, or mixed product/political ads. As MTV3 is market leader in the commercial sector, the standards set by this channel have consequences beyond that channel itself. Parties and candidates normally produce their spots to be aired on this channel and use the same spots also on other channels.

When a general regulatory framework was introduced in 1998, in order to adjust Finnish media legislation to the "Television without Frontiers" Directive (97/36/EC), an effort was made by the authorities to include issue- and ideological advertising within this framework. In the government proposition such advertising was included within the definition of paid advertising. The Constitutional Law Committee, however, argued that this was against the principles of freedom of expression in article 10 of the Finnish constitution. Thus it is unclear whether paid political advertising is subjected to any regulation at all. It remains an open question what the supervisory body in Finland would do if political advertising would exceed maximum time limits of advertising under the Finnish law and Directive; or if a paid political message would appear in a programme without any markers required for a commercial break before and after the message.

These issues are not, however, of any practical concern as yet. Paid political spots tend to be short. As Christina Holtz-Bacha and Lynda Lee Kaid have argued,⁴ ads tend to get shorter when produced and broadcast under commercial constraints. In paid advertising, indeed, time is money. Also, both political parties and journalists have been careful not to mix advertising content with other programme content, as this type of publicity may back-fire on the advertising party or the medium itself.

3. Investment in TV-Ads by the Four Biggest Political Parties in Finland 2003

In the last parliamentary elections in Finland television was the medium that received the biggest share of the campaign budgets of the country's political parties. In 2003, the biggest parties used between a third and more than a half of their campaign resources on TV-ads (see table 1). The sums spent on paid television advertising are astonishingly similar, irrespective of size differences between parties and their total campaign budgets. The explanation for this is simple. According to the "game of the trade", an advertising campaign on television requires a certain amount of repeats to take effect. The TV-advertising budget of all the biggest parties is actually targeted at this minimum level, allowing the average television viewer to be exposed to the spots 5-6 times during the campaign.

3) Moring, Tom (1995) The North European Exception: Political Advertising on TV in Finland. In Kaid, Lynda Lee and Christina Holtz-Bacha (Eds.) Political Advertising in Western Democracies. London: Sage. 161-85.

4) Holtz-Bacha, Christina and Lynda Lee Kaid (1995), A Comparative Perspective on Political Advertising: Media and Political System Characteristics. In Kaid, Lynda Lee and Christina Holtz-Bacha (Eds.) (1995): Political Advertising in Western Democracies. London: Sage. 8-18.

Table 1. The campaign budget of the four biggest parties and the share of costs for paid television advertising in Finland 2003 (Moring 2003).

	Conservative Party	Center Party	Social Democratic Party	Left Wing Alliance	Total
Campaign budget (total)	750.000	670.000	620.000	466.000	2.506.000
Party TV-ads	230.000	280.000	300.000	266.000	1.076.000
Share of TV-ads (%)	31 %	42 %	48 %	57 %	43 %

Clearly, advertising campaigns on television make some difference. The big parties normally get a 75% recognition rate of their ads. In 2004, an average of 10 % of the respondents considered television ads to have had a positive effect on the outcome of the party they voted for, while 4 % considered them to have a negative effect.⁵ There are, however, considerable between-party differences. The campaign queen of the 2003 election was the charismatic Party Chair of the Left Wing Alliance, Ms Suvi-Anne Siimes. Though the voters for this radical left party traditionally have been more critical towards paid advertising,⁶ 21 % of the voters for the party thought the effects of the advertising campaign on television were positive for the party and 0 % thought they were negative. This can be compared to the sentiments among voters for the Conservative Party: only 8 % of voters thought the advertisement campaign on television had positive effects on the party's success, while 16% thought the effects were negative. Again, the voters for this party generally have a more positive opinion about paid advertising.

On the other hand, it seems as if the effects of the advertisement campaign on television come nowhere near the amounts invested. The informative effects of different media on the voting decision have been followed in a series of Finnish surveys since 1992. Though self-reported effects are not as such a good measure – advertising effects tend to be under-estimated – comparisons between elections over time make sense. At the outset in 1992, only 5 % admitted political advertising on television to have had more than marginal informative value. By the end of the 1990s this figure had doubled, but it fell back to 5 % again in 2003. Political advertising on television is seen as mainly image-oriented by voters as well as by party campaign managers.

If we look at political stability factors, such as share of volatile voters or relative share of votes for the parties, we see quite small changes over the period of time elapsed since political advertising was introduced in 1991. In fact, if we take into account all national elections since 1983 the three biggest parties have received a share of the votes that has varied within the interval 64.5 (EU-elections 1999) and 69,2 (local elections, 1988).

This would also indicate that the margin for smaller parties has remained the same during these years, irrespective of their much more limited resources. In 2003, the small Swedish People's Party used 51,000 Euro for television advertising, and the equally small Christian Democrats used 60,000 Euro, the somewhat bigger Green League did not advertise on television at all. The campaign leaders of these parties did not, however, express any dissatisfaction whatsoever with the Finnish system.⁷

The small parties obviously feel that at least to some extent, advertising gives them a chance to, appear on national television where they otherwise rarely appear featured in journalistic content such as news broadcasts. Also, the biggest parties have not been able to gain any obvious benefits from their considerable investments on television advertising. It has been shown in Germany⁸ that the big parties, in spite of the comparative advantage in the form of visibility on screen, have started to lose interest in political advertising on television. There are specific factors that may explain in part this emerging

5) The data is based on a post election survey by Gallup Finland. The survey (1,511 respondents) was carried out as part of a weekly electronic omnibus and is representative with respect to the Finnish electorate.

6) Our research shows that between-party differences in attitudes towards paid political advertising exist, but that they are not very big. The success of its TV-campaigns seems to have further reduced opposition towards this medium among the voters of the far left.

7) These interviews have been made for a Finnish study on the parliamentary elections. See Borg, Sami and Tom Moring (forthcoming) *Vaalikampanja*. In Paloheimo, Heikki (Ed.) (forthcoming 2004) *Vaalit ja edustuksellinen demokratia Suomessa*.

8) *Holtz-Bacha, Christina (2003), To the advantage of the big parties but they seem to lose interest – TV advertising during the 2002 German national election campaign. Paper presented at the 2003 ICA conference in San Diego/USA.*

lack of interest among German parties – such as price restrictions that make broadcasters less interested to broadcast and disclaimers that make parties less interested in promoting themselves. These constraints, however, only come in as additional factors to the cost-effectiveness assessment that also in Finland evidently may lead to a questioning of the rationale of heavy paid political advertising on television. On the other hand, if the electorate becomes more volatile and television advertising starts to matter, this sentiment among the smaller parties could rapidly change.

4. Conclusions

As part of de-regulation of broadcasting and freedom of media, there appears to be a surge towards a more permissive attitude towards paid political advertising on television in many European countries. In the Nordic countries this is illustrated by the Norwegian example. This development is accompanied by a debate on targeted and limited regulative tools to avoid dis- or malfunctional consequences. However, Finland lifted the ban against political advertising on television already in 1991 without introducing regulatory tools. Political advertising was even kept aside EU-inspired regulations concerning regular commercial advertising. This one-off example shows little system effects taking place in the decade that followed, other than exaggerated spending by the biggest political parties on political advertising on television. As has been shown also in Germany, bigger parties get a comparative advantage in the form of visibility on television screens. It may be, however, that the biggest Finnish parties – just as their counterparts in Germany – have lost some of their interest in this tool due to its poor performance in the political market place. A reservation has to be made, however, for situations where the political system is in flux and voter volatility rises. In those situations the image component may grow in importance, which may again make political advertising on television a more powerful tool for those who have the resources to use it.

IRELAND: An Overview of Selected Issues on Freedom of Political Expression¹

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1. Constitutional Background

Article 40.6.1 of the Constitution of Ireland, *Bunreacht na hÉireann*, 1937,² sets out the freedom to express one's convictions and opinions, subject to the exigencies of public order and morality:

The State guarantees liberty for the exercise of the following rights subject to public order and morality:

- i. The right of the citizens to express freely their convictions and opinions.
- ii. The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State.
- iii. The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law.

It is worthy of note that the "education of public opinion" is singled out for special attention and that criticism of Government policy is envisaged as a key component of the right to freedom of expression. Also of relevance for present purposes is the specific guarantee of the right to good name contained in Article 40.3.2: "[T]he State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of harm done, vindicate the [...] good name [...] of every citizen".

2. Defamation

Defamation law in Ireland, with the Defamation Act, 1961, as its centrepiece, is long due a complete overhaul. Some tentative steps have recently been taken in this direction. In 2002, the Minister for Justice, Equality and Law Reform appointed a Legal Advisory Group on Defamation.³ The Group was asked to report to the Minister on a number of specific matters in the context of a commitment in the agreed Programme for Government to bring Irish defamation law into line with that of other States. The publication of the Report of the Legal Advisory Group on Defamation (March 2003) was followed by a public consultation.⁴

1) Owing to constraints of space, only a selection of issues is covered in this piece – and in summary fashion; relevant issues are considered in depth in Marie McGonagle, *Media Law* (Second Edition) (Dublin, Thomson Round Hall, 2003). All of the Irish statutes mentioned are available online: <http://www.irishstatutebook.ie/front.html> (up until and including 2002); <http://www.oireachtas.ie/ViewDoc.asp?fn=/documents/bills28/acts/default.htm&CatID=53&m=l> (1997-2004). For the relevant case-law of the Irish Courts, see: <http://www.ucc.ie/law/irlji/index.php>

2) Available at: <http://www.taoiseach.gov.ie/upload/static/256.pdf>

3) See further, Marie McGonagle, "IE – New Advisory Group on Defamation", *IRIS* 2003-1: 15.

4) The consultation process concluded on 30 January 2004. See further (also for the text of the Report of the Legal Advisory Group on Defamation): <http://www.justice.ie/802569B20047F907/vWeb/wpMJDE5U5DHD>

Issues addressed in submissions to the public consultation included: the need for greater alignment of Irish defamation law with international standards and best comparative practices; the lowering of levels of pecuniary damages; increased provision for non-pecuniary remedies; the development of a defence of reasonable publication, and also one of innocent publication (with special protection for Internet Service Providers when they are only providing access to the Internet, transporting data across the Internet or storing a website).⁵

The trend in Irish Courts to award elevated damages in libel cases is troubling because the inhibitive nature of such damages can be responsible for the creation of a chill-factor and a climate of self-censorship which thwarts robust, investigative journalism.⁶ One of the best single examples of large damages being awarded to politicians is the much-publicised case, *De Rossa v. Independent Newspapers Ltd.*,⁷ a case that is currently pending before the European Court of Human Rights.⁸ In brief, the case arose out of a newspaper article which made reference to “special activities” (of a criminal nature) which “served to fund the Workers’ Party” (of which party the applicant had been the leader). It should be noted that the damages awarded (IEP 300,000) to the applicant politician were, at the time, approximately twenty times the annual industrial wage in Ireland.⁹

3. National Security/Anti-Terrorism

For the past few decades, a number of emergency statutes and structures have been in place in Ireland; they were in the main conceived of in response to the Troubles in Northern Ireland. One of the most infamous of these, Section 31 of the Broadcasting Authority Act, 1960, as amended (hereinafter “Section 31”) empowered the responsible Government Minister to order radio and television broadcasters not to broadcast “a particular matter or any matter of a particular class” which, in his/her opinion, was “likely to promote or incite to crime or which would tend to undermine the authority of the State”. Section 12 of the Radio and Television Act, 1988, brought local radio stations within the purview of Section 31. The effect of the ministerial orders issued pursuant to this section was a blanket prohibition on broadcasting interviews with spokespersons for, or representatives of, certain proscribed organisations¹⁰ and Sinn Féin,¹¹ or election broadcasts on their behalf.

Section 31 attracted attention – and criticism – internationally. The United Nations (UN) Special Rapporteur urged the Irish Government to amend Section 31 along the lines recommended by the UN Human Rights Committee in 1993 and to thereby ensure that “legislation must exclude the possibility of State authorities influencing the programmes in such a way that would damage the balance, free expression and impartiality of information.”¹² An unsuccessful challenge to Section 31 was mounted under the European Convention on Human Rights in *Purcell & Others v. Ireland*.¹³ The European Commission for Human Rights held that the objectives of Section 31 (i.e., the protection of the interests of national security and the prevention of disorder and crime) were legitimate, and that the scope of the restrictions imposed on the applicants by Section 31 was “limited”, referring to the

5) See, for example, ARTICLE 19, Global Campaign for Free Expression, *Submission on the Report of the Legal Advisory Group on Defamation*, January 2004, available at: <http://www.article19.org/docimages/1719.doc>

6) See, for example, the Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Abid Hussain, submitted in accordance with Commission resolution 1999/36: Addendum, Report on the mission to Ireland. E/CN.4/2000/63/Add.2, paras. 73 & 84.

7) [1999] 4 I.R. 432.

8) *Independent Newspapers v. Ireland*, Application No. 55120/00. The case was declared admissible by the Third Section of the Court on 19 June 2003.

9) See further, Marie McGonagle, *Media Law* (Second Edition) *op. cit.*, p. 135.

10) The proscribed organisations included the Irish Republican Army (IRA), Republican Sinn Féin, the Ulster Defence Association (UDA), the Irish National Liberation Army (INLA) and others, as determined by s. 21 of the Northern Ireland (Emergency Provisions) Act, 1978 – an Act of the British Parliament.

11) Sinn Féin is a political party, which in the past would widely have been regarded as the political wing of the Irish Republican Army (IRA).

12) Special Rapporteur’s Report on Ireland, *op. cit.*, para. 86. See also paras. 47 - 50, especially para. 50.

13) Decision of inadmissibility by the European Commission for Human Rights of 16 April 1991, Appn. No. 15404/89.

“overriding interests” it was designed to protect.¹⁴ No ministerial order was issued after 1993 and Section 31 was eventually repealed by Section 3 of the Broadcasting Act, 2001.¹⁵

4. Freedom of Information

A Constitutional amendment in 1997 enshrined the concept of Cabinet confidentiality in the Irish Constitution. This amendment diluted the absolutism of a Supreme Court judgment a few years beforehand,¹⁶ but not to any significant extent. In that case, a majority of the Court had held that Cabinet confidentiality was an absolute value, admitting of no exceptions. By virtue of the 1997 amendment, however, Article 28.4.3 of the Constitution now allows for some limited instances in which the content of cabinet discussions may be disclosed:

The confidentiality of discussions at meetings of the Government shall be respected in all circumstances save only where the High Court determines that disclosure should be made in respect of a particular matter –

- i. in the interests of the administration of justice by a Court, or
- ii. by virtue of an overriding public interest, pursuant to an application in that behalf by a tribunal appointed by the Government or a Minister of the Government on the authority of the Houses of the Oireachtas to inquire into a matter stated by them to be of public importance.

It was against the general background of a “culture of concealment, dignified as confidentiality”¹⁷ that the Freedom of Information Act, 1997, was introduced.¹⁸ Despite some recent set-backs for the freedom of information regime in Ireland,¹⁹ the Act has had a largely positive effect on access to political information. For example, the Information Commissioner held in 1999 that the identity of individual members of the *Oireachtas* (the national bicameral parliament of Ireland) and their expenses should be made available under the Act. He found that “the public interest in ensuring accountability for the use of public funds greatly outweighed any right to privacy which the members might enjoy in relation to details of their expenses claims.”²⁰

5. Coverage of Elections and Referenda in the Broadcast Media

It is a well-established feature of broadcasting in Ireland that coverage of current affairs and matters of public controversy and debate should be governed by general requirements of impartiality, objectivity and fairness.²¹ The allocation of airtime to political parties during election campaigns is also provided for by relevant legislation.²² Furthermore, the Broadcasting Commission of Ireland (BCI) is required to draw up/revise a code of standards and practice relating to the above-mentioned topics, as the need arises.²³

14) *Ibid.* It should be noted that the Commission also relied on the limited interference with journalists’ freedom of expression in its ruling of inadmissibility in *Brind & Others v. United Kingdom* (Decision of inadmissibility by the European Commission for Human Rights of 9 May 1994, Appn. No. 18714/91). The case involved a challenge to a similar broadcasting ban throughout the United Kingdom (including Northern Ireland), which was modelled on, but not quite as stringent as, Section 31. The United Kingdom ban was set forth in notices issued by the Secretary of State for the Home Department on 19 October 1988 to the British Broadcasting Corporation (BBC) and to the Independent Broadcasting Authority (IBA). These notices allowed for the broadcasting of statements by, for example, members of Sinn Féin, when read by actors. Unlike Section 31, these notices were relaxed during election campaigns.

15) However, as posited by one commentator, should Section 31 “come back from the dead, the US Supreme Court clear and present danger cases and the European Court of Human Rights Turkish cases taken together should fashion a stake to run through its heart!”: Eoin O’Dell, *The Sound of Silence: Political Dissent and the Broadcasting Ban*, paper delivered to a conference in Trinity College Dublin, 5-6 December 2003.

16) *A.G. v Hamilton* [1993] 2 IR 227.

17) Joseph Lee, “Towards Open Democracy?”, in D. Keogh (Ed.), *Irish Democracy and the Right to Freedom of Information* Ireland: A Journal of History and Society, pp. 55-57, at p. 55.

18) See further: Marie McGonagle, “Ireland: New freedom of information”, *IRIS* 1997-10: 8.

19) For example, the introduction of elevated fees for requests for information and, in particular, appeals against refusals to disclose information. See further: Tarlach McGonagle, “IE – Developments concerning Freedom of Information”, *IRIS* 2003-9: 14.

20) Decision of Information Commissioner of 27 July 1999, Case 99168 – Mr Richard Oakley, *The Sunday Tribune* Newspaper and the Office of the Houses of the Oireachtas, available at: http://www.irlgov.ie/oic/223e_3c2.htm

21) These requirements are grounded in legislation: Section 18(1) of the Broadcasting Authority Act, 1960, as replaced by Section 3 of the Broadcasting Authority (Amendment) Act, 1976 (for RTÉ); Section 9 of the Radio and Television Act, 1988 (for the independent sector).

22) Section 18(2) of the Broadcasting Authority Act, 1960 and Section 9(2) of the Radio and Television Act, 1988, for RTÉ and the independent broadcasting sector, respectively.

23) Section 9(3) of the Radio and Television Act, 1988. See also, in this connection: “Election and Referenda Campaigns”, *RTÉ Programme-Makers’ Guidelines* (2002), p. 71, available at: <http://www.rte.ie/about/organisation/ProgrammeMakersGuidelines.pdf>

The most recent BCI Guidelines concerned the Local and European elections and a referendum on Irish citizenship, all of which took place in June 2004.²⁴ Both sets of Guidelines included, *inter alia*, a 24-hour moratorium on coverage of “candidates or electoral interest groups” (or “the activities of any referendum interest group, or referendum issues”) before polling commenced and while it was under way, in order to allow voters “a period for reflection in the final stages of a campaign”.²⁵ One case which arose in this context involved the BCI ordering certain radio stations on the eve of the elections to discontinue their news coverage of the opposition of SIPTU, Ireland’s largest trade union, to the Government’s decentralisation plans. The BCI was of the view that the news coverage in question constituted reporting that could interfere with the election process, and was therefore in breach of the aforementioned moratorium.

The Constitution of Ireland can only be amended by way of referendum.²⁶ As such, specific rules apply to media coverage of referenda. In *Coughlan v. Broadcasting Complaints Commission and RTÉ*,²⁷ it was held that the allocation of equal air-time to all political parties, even though a majority of them were advocating the same result in the 1995 divorce referendum, had the effect of skewing public debate and was thus unlawful. This judgment built on the earlier precedent that “[T]he use by the government of public funds to fund a campaign designed to influence the voters in favour of a ‘Yes’ vote is an interference with the democratic process and infringes the concept of equality which is fundamental to the democratic nature of the State”.²⁸

6. Political Advertising

It is provided in Section 10(3) of the Radio and Television Act 1988 (which governs the independent broadcasting sector) that: “[N]o advertisement shall be broadcast which is directed towards any religious or political end or which has any relation to an industrial dispute”, and a similarly-worded provision binds the national public service broadcaster (*Radio Telefis Éireann – RTÉ*).²⁹ The constitutionality of this statutory provision has been challenged – and upheld – on a number of occasions over the past few years. In *Murphy v. Independent Radio and Television Commission (IRTC)*,³⁰ a case concerning a refusal to broadcast an advertisement of religious character, it was held by the Supreme Court: “All three kinds of banned advertisement relate to matters which have proved extremely divisive in Irish society in the past. The *Oireachtas* was entitled to take the view that the citizens would resent having advertisements touching on these topics broadcast into their homes and that such advertisements, if permitted, might lead to unrest.”³¹

The interpretation of “political end” has proved problematic, as was amply illustrated in the case, *Colgan v. IRTC*,³² which dealt with a refusal to broadcast a radio advertisement on behalf of Youth Defence, an anti-abortion organisation. The High Court found that in light of other provisions of the 1988 Act, the term, “political end”, had a broader meaning than “party political end”, but did not extend quite so far as to embrace “public affairs generally”. Furthermore, the Court was of the opinion that “it was unreal to separate the advertisement from the immediate and public background of the advertiser in this case”.³³ It continued: “[T]he advertisement was so clearly bound up with the political objectives of Youth Defence that it would be unrealistic and artificial to shut one’s eyes to those objectives and to construe the advertisement out of context and severed from its background”.³⁴

24) Guidelines in respect of coverage of the Local and European elections 2004; Guidelines in respect of coverage of the referendum on Irish citizenship, Broadcasting Commission of Ireland, 6 May 2004, both available at: <http://www.bci.ie/public.html>

25) Emphasis per original: see Section 9 of each set of Guidelines. In 2001, a Government proposal to introduce a prohibition on the publication of opinion polls during the last week (i.e., seven days) of election campaigns met with much opposition and was ultimately abandoned.

26) See Articles 46 and 47, *Bunreacht na hÉireann*, *op. cit.*

27) [2000] IESC 44 (26 January 2000). See further: Candelaria van Strien-Reney, “IE – Broadcasts Regarding Referendums”, *IRIS* 2000-2: 7.

28) *McKenna v. An Taoiseach (No. 2)*, [1996] 1 ILRM 81, at p. 102.

29) Section 20(4) of the Broadcasting Authority Act, 1960.

30) [1998] 2 ILRM 360. This case has since been considered in Strasbourg: *Murphy v. Ireland*, Judgment of the European Court of Human Rights (Third Section) of 10 July 2003. See further: Dirk Voorhoof, “European Court of Human Rights: Case of *Murphy v. Ireland*”, *IRIS* 2003-9: 3.

31) *Ibid.*, p. 370. The Supreme Court also found that the interference with the applicant’s freedom of expression was “minimal” and that the requirements of the impugned provision were proportionate to the aim pursued.

32) [1998] 1 ILRM 22.

33) *Ibid.*, p. 25.

34) *Ibid.*, p. 26.

A more recent example concerned a radio advertisement for a book, *Hope and History: Making Peace in Ireland*, written by Sinn Féin President Gerry Adams, which was scheduled to be broadcast on a number of local radio stations towards the end of 2003. The Broadcasting Commission of Ireland considered that pursuant to the operative phrase in the 1988 Act, it would have been impermissible to broadcast the advertisement in question. There was a certain element of *déjà vu* in the facts of this case: in 1992, under the shadow of Section 31 of the Broadcasting Authority Act, 1960, RTÉ had refused to broadcast an advertisement for a collection of short stories by Gerry Adams entitled *The Street and Other Stories*.³⁵

In June 2004, radio advertisements for an anti-war concert featuring well-known musicians were taken off the air after the BCI found them to be in contravention of Section 10(3) of the 1988 Act. The group behind the advertisements was the Irish Anti-War Movement, which had registered its "Stop Bush Campaign" as a political party.³⁶

35) The publishers of the book sought judicial review of RTÉ's decision: *Brandon Book Publishers Ltd. v. Radio Telefís Éireann* [1993] ILRM 806. See also, *Brandon Book Publishers Ltd. v. IRTC*, unreported, High Court, 29 October 1993.

36) See further: Mark Hennessy, "Anti-war adverts taken off air", *The Irish Times*, 12 June 2004.

ITALY: Pluralism and Freedom of Expression in the Media

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1. The New Broadcasting Act

The entry into force of the so-called Gasparri law¹ on 5 May 2004 has introduced several changes into Italian media legislation. There is, for example, explicit reference to fundamental rights such as freedom of expression and opinion of any individual, conceived both as freedom to receive as to communicate information and ideas without limitations of frontiers.

The Act has introduced a number of changes in the legislative instruments aimed at protecting pluralism and freedom of information, such as new rules concerning the use of frequencies, media concentration and public service broadcasting.

2. Licensing Procedures

As the deadline for the turn off of analogue terrestrial transmissions has been fixed for 31 December 2006,² the need to accelerate the switchover process has become one of Italy's main priorities. The law foresees two stages for the coverage of DTT: 50% of the population by 1 January 2004 and 70% of the population by 1 January 2005. During this transition period, RAI will transmit on two multiplexes using both analogue and digital technology.

In order to achieve the best possible management of the frequencies that are destined for digital broadcasting, AGCOM (the Italian Communications Authority) has been put in charge of the implementation of the national frequency plan in force since January 2004.³ AGCOM will both encourage experimentation and safeguard existing broadcast services. During the transition to digital, current broadcasters will continue their analogue transmissions while they invest on digital frequencies – obtaining them by purchase from other broadcasters. It is expected that frequency trading will be the main method for the acquisition of new frequencies. AGCOM will monitor the correct allocation of spectrum.

Licenses for the use of frequencies by network operators in the DTT environment will be issued by the Ministry of Communications and will be granted to existing broadcasters who apply by July 2005 (date of expiry of existing concessions).

1) Act no. 112/2004, "Norme di principio in materia di assetto del sistema radiotelevisivo e della RAI-Radiotelevisione Italiana S.p.a., nonché delega al Governo per l'emanazione del testo unico della radiotelevisione", available at <http://www.camera.it/parlam/leggi/041121.htm>

2) Act no. 66/2001, "Conversione in legge, con modificazioni, del decreto-legge 23 gennaio 2001, n. 5, recante disposizioni urgenti per il differimento di termini in materia di trasmissioni radiotelevisive analogiche e digitali, nonché per il risanamento di impianti radiotelevisivi", available at <http://www.camera.it/parlam/leggi/010661.htm>

3) AGCOM deliberation no. 339/03/CONS "Approvazione del piano nazionale integrato di assegnazione delle frequenze per la radiodiffusione televisiva terrestre in tecnica digitale (PNAF DVB-T)", available at http://www.agcom.it/provv/d_399_03_CONS.htm

3. Media Concentration

New rules on media concentration contain both economic and technical thresholds. The current threshold requirement of 20 per cent of available programmes according to the frequency plan is confirmed. In addition, reference is made to the DTT frequency plan and consequently to a larger number of programmes.

The threshold requirement based on economic revenue is lowered from 30 per cent to 20 per cent, while the terms of reference for the calculation no longer relate to traditional broadcasting, but to a so-called "integrated communication system" which covers daily and periodical press, yearbooks even if on Internet, radio and television broadcasting, cinema, outdoor advertising, communication initiatives and sponsorships.

Cross-ownership limitations between television broadcasting and press will be limited to an asymmetric rule allowing press operators to acquire participation in the broadcasting sector. Nonetheless, the acquisition of print media by broadcasters will be prohibited until 31 December 2010. Another limitation set out in the law concerns telecom operators who collect more than 40 per cent of the revenue produced by the telecommunications services market, and those operators may not acquire a stake that represents more than 10 per cent of the revenue of the whole integrated communications system.

4. Public Service Broadcasting

General public service broadcasting is reserved, as previously, to a public concessionaire (RAI-*Radiotelevisione italiana*) who acts on the basis of national and regional contracts signed by the Minister for Communications on behalf of the Government and which is renewed every three years.⁴ Public service broadcasting has to ensure coverage of the whole national territory and it is under an obligation to devote an adequate number of transmission hours to educational, informative and cultural programmes according to a 3-year plan set out by AGCOM.

Specific provisions of the new Broadcasting Act concern access to party political broadcasts, the promotion of the Italian language and culture abroad, the protection of minority languages in Italy, as well as the storage of RAI's audiovisual archive, etc. AGCOM and the Ministry of Communications will jointly issue guidelines for the renewal of the contracts of service.

AGCOM is in charge of controlling that the income deriving from the public service fee is used only to meet the costs of public service programming in accordance with the requirements specified in the European Commission's Communication of 15 November 2001 on the application of State aid rules to public service broadcasting. An official auditor appointed by RAI and approved by AGCOM will monitor the yearly budget. In case of non-compliance with its public service obligations, RAI may be sanctioned with a fine of up to 3 per cent of its revenue.

All three RAI channels will be privatised, but no stakeholder may possess more than 1 per cent of the shares and a quota of the stocks will be reserved to people who have regularly paid the public service fee the previous year.

5. Political Communication and Advertising

After the Italian Parliament reached a difficult consensus in February 2000, electoral campaigns and political communications are now subject to a set of rules which has proved effective in practice. The Political Communications Act⁵ contains provisions on access to mass media with regard to political and electoral communications and its coverage ranges from political information to electoral campaigns. The Act replaces several provisions of the former Electoral Act. In relation to any electoral campaign, AGCOM is now entrusted with implementing the rules of the new Act.⁶

4) The last contract of service was signed on 23 January 2003 for the period 2003-2005 and is available at http://www.comunicazioni.it/it/DocSupp/627/contratto%20rai%202003_bis.pdf

5) Act no. 28/2000, "Disposizioni per la parità di accesso ai mezzi di informazione durante le campagne elettorali e referendarie e per la comunicazione politica", available at <http://www.camera.it/parlam/leggi/00028l.htm>

6) All regulations adopted by AGCOM on this topic are available at http://www.agcom.it/par_condicio/index.htm

The main rule is that any body of a "political nature" (*soggetto politico*) enjoys equal access to those programmes on radio and television that broadcast political opinions, such as party political broadcasts, debates, round tables, public discussions, interviews and other programmes in which the voicing of political views appears relevant. The transmission of such programmes is compulsory for the public concessionaire (RAI) as well as for private national concessionaires transmitting free over the air. The last 45 days before the electorate goes to the polls, the presence of "political subjects" on air is assured by the allocation of time in proportion to the degree of representativeness enjoyed by each political party. The publication of opinion polls is forbidden during the last 15 days before an election.

Political parties, coalitions and candidates are entitled to broadcast political advertisement (*messaggi autogestiti*) of aduration that may range between one and three minutes on television and between 30 and 90 seconds on radio. The transmission of those messages is compulsory for the public concessionaire and optional for private broadcasters; it is free of charge if made on national channels (public or private), while local broadcasters are under an obligation to give a 50 per cent discount on their going rates. For broadcasts made during the last 30 days before an election, local broadcasters are entitled a refund of their expenses. Only those broadcasters who have accepted to transmit free messages may transmit fee-paying messages - provided that the transmission time assigned to free and paid messages remains the same.

6. Political Expression in News and Current Affairs Programmes

The broadcast of news and current affairs programmes during electoral campaigns is subject to specific rules:

- Broadcasters are required to ensure that any information is impartial;
- It is forbidden to influence the public even indirectly;
- Candidates may only appear on screen during information programmes.

In Spring 2003, AGCOM summarised the criteria used to evaluate such programming:

- Considerations of time:
The programme has to be broadcast for a continued period of time and account needs to be taken of its periodical nature, if applicable;
- Considerations of content:
The topic of the programme provides the basis for the assessment of whether there was equal access to all participants in it
- Considerations of subject-matter:
The theme of the programme has to be evaluated with regard to the the subject-matter of the discussion.

Once the programme has been assessed according to the above criteria, it is then evaluated in light of the following conditions:

- Quantitative:
 - All subject-matter was addressed equally;
 - All participants were granted approximately equal time to speak;
- Qualitative: (how the programme was conducted)
 - Information is presented accurately and in good faith;
 - All participants are granted a right of reply and treated equally;
- The structure of the programme:
 - The format and the editing of the programme facilitate presenting all views in a balanced way;
 - The contribution of any external elements, such as the audience giving a round of applause, the intervention of experts, the introduction of surveys etc. has to ensure that the requirements on objectivity and impartiality of the information are maintained.

7. Co-regulation to Ensure Pluralism

A new approach was adopted recently and for the first time ever, during the electoral campaign for the renewal of the European Parliament: it consisted in the introduction of a co-regulatory methodology for the regulation of local broadcasting. The Political Communications Act was amended in November 2003⁷ to entitle broadcaster associations adopt a code on political communications. The code was submitted to AGCOM for approval and amendments⁸ and it was adopted by a ministerial decree.⁹ It is based on the same ideas that underpin the Act, but it is softer in its approach to the application of its rules.

8. A Practical Example from the Recent European Parliamentary Elections

Before the start of the voting for the renewal of the European Parliament, the Presidency of the Council of Ministers asked the Italian mobile phone operators to send the following SMS message to all their subscribers and holders of rechargeable phone cards (total subscribers: TIM 26 million, Vodafone 21 million, Wind 10 million): "Elections 2004: you can vote Saturday 12th from 3 a.m. to 10 p.m. Sunday 13th from 7 a.m. to 10 p.m. ID and electoral card needed".

The reaction to this SMS was very hard and a question about it was raised before the Data Protection Authority who in the end held¹⁰ that the sending of that message was allowed. The SMS in question was not considered as an item of political communication, but as an institutional message to inform the population that, unlike previous elections, the polls were open also on the Saturday.

7) Act no. 313/2003, "Disposizioni per l'attuazione del principio del pluralismo nella programmazione delle emittenti radiofoniche e televisive locali", available at <http://www.camera.it/parlam/leggi/033131.htm>

8) Amendments were decided by AGCOM deliberation no. 43/2004/CONS, available at http://www.agcom.it/provv/d_43_04_CSP.htm

9) Decree of Minister of communications of 8 April 2004, available at <http://www.comunicazioni.it/it/DocSupp/831/decreto%208%20aprile%202004.pdf>

10) Decision of the Data protection Authority 7 July 2004, available at <http://www.garanteprivacy.it/garante/doc.jsp?ID=1030885>

KOSOVO: Media and the Riots of March 2004

Robert Gillette

Temporary Media Commissioner, Kosovo

On the evening of 16 March, Kosovo broadcasters reported the disappearance and presumed drowning of three young boys in the Iber River near Mitrovica, a small city bitterly divided between ethnic Albanians and Serbs.

Within hours, search teams recovered the body of one boy. Despite appeals for caution from UN police, television reports – most notably by the Kosovo public broadcaster, RTK – quickly, firmly and wrongly asserted that Serbs had killed the children by chasing them into the river, thereby giving this incident immediate explosive potential.

Not only did RTK get the basic factual story entirely wrong by misquoting the only eye-witness, a surviving fourth boy of 13 years, but the broadcaster compounded its error by bringing a militantly anti-Serb human rights activist repeatedly into its programming that night to explain the significance of the boys' deaths:

"We are used to these Serbian bandits," the human rights activist said in the first of two interviews broadcast that evening. "This shows what Serbs are willing to do when the situation is calming down in Kosovo. They play at all costs and it is not to their advantage to have a stable Kosovo."

Later, in the last of a series of special news reports by RTK that night, the same human rights activist, standing on the river bank where the boys had drowned, introduced the grieving father of one whose body had just been recovered. The father said "The Serb Chetnik hordes have killed my son in the most miserable way."

There was no factual basis for these reports, then or now. The surviving 13-year old boy never actually said that Serbs, or people, had chased him and his companions into the river. The text of his public television interview reads:

"We, some cousins of mine and some friends of mine, and me were walking and we went close to the river when some Serbs with a dog have, for example, have sworn at us from a house. We looked at them, I can identify them if I see them, and I know their house, and we tried to escape but we couldn't because we were close to the river. My brother, Florent Veseli 9 years old, was with me, he can't swim. I put him on my back, I swam 15 meters, and I couldn't swim more than that."

In fact, as he told his story later the same evening to one of the two private Kosovo-wide TV channels, the boys had run in fear not from people but from a dog. Police subsequently concluded that even this story contained contradictions, and they could find no evidence to support even the allegations of a dog chasing the children. To this day, we do not know how or why the three boys drowned.

None of these uncertainties reached the public on the night of 16 March or the next day. The following morning, newspapers, even the best of them, carried headlines reflecting the absolute certainty of television newscasts the night before that Serbs had murdered three Albanian children. "We can no longer tolerate Serbs drowning our children," said a headline in one newspaper.

At mid-morning on 17 March a protest of a thousand schoolchildren in Mitrovica, some carrying neatly painted banners demanding that Serbs stop killing Albanian children, led by their teachers, turned violent as about a hundred young men, using the children as cover, dashed across the bridge separating Albanian from the Serb side of Mitrovica. Gunfire erupted from both sides and the riots were on.

Clashes between protestors and police and KFOR spread rapidly across Kosovo as attacks began on Serb homes, community facilities and churches in more than 30 locations.

By that afternoon, Kosovo Albanian political leaders were on television urging calm, urging people at least not to attack international police and KFOR, leaving aside the fact that the main targets were not internationals but Serb communities.

However, with the notable exception of Prime Minister Bajram Rexhepi, Kosovo's leaders coupled their calls for calm with expressions of outrage at the presumed murders that in some cases bordered on or qualified as hate speech. The Minister of Education said the childrens' deaths reminded him of the holocaust. There were broad, indiscriminate references to "Serb criminals" and intelligence agents. The president of the parliament said that Mitrovica evidently was still in need of "denazification." Indeed some of the most inflammatory material broadcast by radio and television came from Kosovo Albanian political leaders.

No one interviewed Serbs.

Two days later, 19 people – 11 Albanians and 8 Serbs – were dead, hundreds were injured, several hundred homes of Serbs and other minorities were burned or looted, 4,000 people were sheltering at bases of NATO-led KFOR and other havens, and some of Kosovo's most historic religious heritage lay in smoking ruins.

The role of media in this catastrophe has been reviewed by the Office of Temporary Media Commissioner – in our role as broadcast regulator we have issued a 60-page dissection of the incident – and by the OSCE's Representative for Freedom of Media, and, in a much broader political context, by the International Crisis Group in its report, "Collapse in Kosovo."

All three reports rightly single out Kosovo's public broadcaster for particular criticism. The two private Kosovo-wide television stations made mistakes. But the conduct of the public broadcaster RTK – an institution built by OSCE and the European Broadcasting Union beginning in 1999 – was particularly disturbing. It not only got the story wrong, it politicized and sensationalized this baseless story, generating around it a patriotic hysteria that did much to ignite a social atmosphere that proved far more volatile than the international community had appreciated.

It appears in retrospect that the management of public television was guided by a sense of mission best described as patriotic mobilization or national liberation – reflecting the consuming political goal of the Kosovo Albanian community of independence – rather than national integration and ethnic peace.

It is hard to avoid the conclusion that this broadcasting effectively incited violence – or provided a useful pretext for opportunistic organizers of violence who attached themselves to more or less spontaneous protest demonstrations. But the specific nexus between the broadcasts (which contained no direct calls for demonstrations or violence) and the public reaction is not yet well understood.

This incident has led us to consider both the role and the definition of hate speech in the context of a fragile Balkan region.

While some statements broadcast on the crucial night of 16 March might well satisfy the legal definition of hate speech in most European countries, it does not appear to us that specific phrases we might define as hate speech fully or even substantially explain the public reaction.

These factors may have played a much more important role:

1. A high level of public frustration with the poor general social situation in Kosovo (60 per cent unemployment) and many related sources of frustration including perceived failures of the international community to build a market economy and resolve Kosovo's political status.
2. Intense residual bitterness toward the remaining Serb minority (about 130,000 in a Kosovo population of more than 2 million) fed in part by envy of covert subsidies from Belgrade to Serbs living in sheltered enclaves.
3. A constant flow of hate speech **in subdued or coded form** that is part of daily media life. This prejudicial journalism, which on any given day may not rise (or sink) to the standard of recognizable hate speech, nevertheless has a corrosive, propagandistic effect on public perceptions of the Serb minority that leads even educated Albanians to believe almost any assertion of wrong-doing by any Serbs, including the random killing of children. For example:
 - Constant reminiscences mainly in newspapers of Serb oppression and Serb atrocities, in the guise of historical analysis, or references to specific Albanians as Serb collaborators.
 - Regular graveside memorials marking the anniversaries of Serb attacks on one village or another, or the death of one KLA hero or another, all of them reverentially covered on television.
 - **A well established myth, which requires only indirect references to recall, that Serbs are killers of children.** RTK occasionally broadcasts a documentary titled, "When Serbs Kill Children," about atrocities from 1999. When unknown assailants shot four Serb children while they were swimming last summer, the nationalist newspaper Bot Sot commented that Albanians could not have been responsible because killing children is not part of Albanian culture – as if it IS part of someone else's culture.
4. The nearly total absence of any reporting by Albanian-language media in which a journalist takes an interest in Serbs or Serb communities from neutral, humane or tolerant point of view. Perhaps unsurprisingly, media provide no antidote to their own prejudicial reporting.
5. The rigid separation of two media worlds in Kosovo. Of 112 licensed broadcasters, 33 or 30 per cent are Serb radio and television stations. But fewer than half a dozen local, multi-ethnic radio stations actually provide communication between Kosovo's Albanian and Serb communities. Media apartheid is nearly complete in Kosovo. (Public television broadcasts a daily 10-minute newscast in Serbian, translated from Albanian news, but almost never includes Serbs in its nightly round of current affairs discussion shows.)
6. It cannot be said that most Serb media in Kosovo are any more tolerant or balanced than their Albanian counterparts. Our inquiries have focused on Kosovo Albanian media for the simple reason that Albanian crowds were the aggressor and Serbs the chief victims in the March violence.

THE NETHERLANDS: Snapshots of a Heated Debate concerning Freedom of Speech

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1. Introduction

Freedom of speech and freedom of the press have many aspects: restrictions to protect privacy and reputation, special facilities for journalists to do their job, press merger control, press councils, and so on. However, it might not be a good idea to give an exhaustive and detailed treatment of all recent developments in the Netherlands. This contribution therefore highlights two of the most important issues: freedom of speech in a pluralistic society and uneasiness about the functioning of the media.

2. Freedom of Speech in a Pluralistic Society

Dutch society is a pluralistic society. There is of old a wide range of religious and political ideologies and all kinds of minorities live together. The immigration of Moslems has even added to the variety. The increase of pluralism has implications for the limits of freedom of speech.

2.1 Group Defamation Law

Under Dutch law, defamation of a group on account of race, religion or philosophical conviction, or hetero- or homosexual tendencies, is a criminal offence. The same holds true for incitement to hate against, discrimination of, and violence against a group on account of race, religion or philosophical conviction, hetero- or homosexual tendencies, or on account of sex.

The reasons for this regulation are partly to be found in international law obligations. Article 4 (a) of the International Convention on the Elimination of all Forms of Racial Discrimination demands to: "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement of racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin (..)."

This regulation is meant to reinforce Dutch anti-discrimination policy and to protect the position of various minorities. The current bill proposing to expand the provisions to include similar utterances about disabled persons, shows pre-eminently the last-mentioned reason.

Since their introduction, the Criminal Code provisions are enforced against various kinds of utterances. In the first category there are openly racist or a little bit more subtle discriminatory anti-immigrant utterances of right wing political parties and groups. The second category consists of offensive utterances referring to the Shoah. In those categories the enforcement has actually led to convictions. In a third category are religiously inspired utterances against homosexuality. Until now however this last mentioned and more recent application of the provisions did not result in a conviction.

2.2 The Memorandum “Fundamental Rights in a Pluralistic Society”

These Criminal Code provisions trigger all kinds of freedom of speech questions. In a nutshell: do they leave enough space for an unhampered public debate? This main question and some more specific questions are the subject of a recently published government memorandum *Grondrechten in een pluriforme samenleving* (Fundamental rights in a pluralistic society).¹

The memorandum opens with an outline of some basic values: human dignity, democracy and the rule of law. Against this background several cases are discussed, some of them taken from recent jurisprudence:

Rather well-known in the Netherlands are the case of an orthodox Christian politician who compared theft with homosexuality and the case of an imam describing homosexuality as an aberration and a threat to society. In the end both defendants were acquitted. The *Gerechtshof* (Appellate Court) found the utterances offensive as such, but the context of the exposition of the religious conviction did take away the criminal offensiveness.² The *Hoge Raad* (Supreme Court) reviewed one of the cases and accepted this argumentation, but not however without adding the importance of public debate.³

The utterance of a politician of the Liberal Party: “the Islam is a backward/idiotic religion and Mohammed was a pervert”. The public prosecutor decided not to prosecute. This case is the most interesting because calling Islam backward/idiotic is exactly what was done by Pim Fortuyn, the leader of the anti-immigration party LPF, who was shot dead in May 2002. His provocative utterances opened up public debate, which may have been a little bit dimmed by political correctness.

The memorandum does not discuss more generally the line between on the one hand critical utterances about immigration, foreigners and multi-cultural diversity which are part of the well protected public debate and on the other hand prohibited hate speech against foreigners. In the past there were convictions because of openly racist speech, because of utterances insinuating that all foreigners were criminals, and because of a combination of utterances such as “Stop the multicultural society” and “Our own people first”⁴. Commentators were not happy with the judgement mentioned last.

2.3 A Middle Course

All these cases are to be set in the context of a pluralistic society. The main question in this respect is: does pluralism mean that minorities are to be protected against offensive speech and hate speech or does it mean that every minority may express their – sometimes offensive - opinions? This question is nowadays especially important as far as the Moslem minority is concerned.

The government memorandum “Fundamental rights in a pluralist society”⁵ seems to implicate that criticism of the ideas and customs of the various Moslem groups is to be allowed; incitement to violence and intimidation must be prevented. Conversely, the various Moslem schools of thoughts may express their ideas, as long as their utterances do not amount to incitement to violence or intimidation.

The Dutch Supreme Court seems to adopt a middle course just like the European Court of Human Rights. The European Court of Human Rights links on the one hand freedom of expression always with broadmindedness and freedom to utter speech that offends, shocks or disturbs. Toleration is supposed to be essential in a democratic society. The European Court of Human Rights leaves on the other hand room for restrictions such as incitement to violence, and racist, anti-democratic or very offensive speech.

The boundary between the dissemination of dissenting but acceptable opinions and prohibited group defamation will have to be drawn again and again. All the time new problems arise.

1) *Min v. Binnenlandse Zaken, Grondrechten in een pluriforme samenleving* (Fundamental rights in a pluralistic society, Den Haag 2004.

2) *Gerechtshof Den Haag* 9 June 1999, AB 1999, 328.

3) HR 9 January 2001, NJ 2001, 203.

4) HR 18 May 1999, NJ 1999, 634.

5) See footnote 1.

3. Media Performance

In the Netherlands there exists a rather vague but growing uneasiness about the way in which the media function. Thus far it's all but coherent criticism. Let us just sum up some of the claims and ideas recently put forward.

3.1 An Impression of the Uneasiness Felt

The following statements reflect utterances recently published in the press:

The idea that the media have made a demon out of the popular and anti-immigration politician Fortuyn and by doing so have contributed to his violent death is in some circles rather persistent.

A secret service report suggests that negative press reports about Islam and the polemical writings of columnists might contribute to a climate in which terrorist ideas get a chance to be disseminated.

More generally, the feeling exists that public debate in the media is hardening.

A law professor gives his opinion that tort law is tort law and defective media reports must be judged in the same way as other defective products; freedom of speech not justifying a more area-specific approach.

There is a widespread opinion that the media don't respect well enough the privacy of people - for example the privacy of a kidnapped and raped child.

An ambitious survey states that the people's confidence in the media is decreasing.

The minister-president contends that the media are overstepping moral bounds in making a parody of the life of the royal family.

Another cabinet minister argues that the media don't give fair reports on government decisions and policy.

There is a generally held opinion that the media copy each other too easily and do not really control each other.

Some of this criticism may have been around for as long as the press exists. Still, the idea that the influence of the media must be countered by new regulation or some other new responsibility mechanism seems to be on the rise.

3.2 The Report "Medialogics"

Some of those ideas converge in a recent report issued by a government advisory body. This report is entitled *Medialogics (Medialogica)*.⁶ The report highlights specific shortcomings of the media:

Firstly, the media too often do rush jobs and copy each other without checking anything, only to beat the competition. By these mechanisms inaccurate news coverage is multiplying.

Secondly, the media pay too much attention to scandals and personal conflicts, issues that normally only have a short term interest. Moreover, this way of news coverage might cause cynicism and lack of social confidence. In this respect the report states that the confidence of the public in the media is declining.

An additional side-effect of the way in which the news is covered might result in citizens getting a wrong view of government policy. Nevertheless, an alleged "connivance" of politicians, civil servants and journalists is the very object of criticism of a report produced by another government advisory body.⁷

6) *Raad voor Maatschappelijke ontwikkeling, Medialogica. Over het krachten veld tussen media, burgers en politiek (Medialogics, about the field of force between media, citizens and politics)* Den Haag RMO 2003.

7) *Raad voor het Openbaar Bestuur, Politiek en Media, pleidooi voor een LAT-relatie (Politics and Media a plea for living apart together)*, Den Haag 2003.

The Medialogics report results in various proposals to improve the functioning of the media, among others:

Introduction of regulation to reinforce the position of the editorial staff of newspapers versus the business management.

Improving the functioning of the *Raad voor de Journalistiek* (Press Council) and increasing the force of its judgements.

The creation of public panels to comment upon media performance.

The creation of a press ombudsman to monitor media performance.

Introduction of a press diversity (*pluriformiteit*) test in the economically based media merger control.

3.3 Government Reaction

The report and the proposals have not been received with great acclaim. The main criticism may have been that freedom of the press is left rather neglected, especially when proposing measures, which one way or another restrict that very freedom.

The government has decided to adopt only two of the recommendations: some more support for the activities of the Press Council, without however reinforcing the status of its judgements, and the introduction of a press diversity test in the press merger control.⁸ Both proposals however are still to be developed.

It is not certain that the uneasiness about the performance of the media will decrease if those rather modest government proposals are executed. On the other hand, it is hard to imagine deeper measures that do not meet with the right of freedom of the press. That is the very reason why proposals are to be examined with scepticism.

4. Concluding Remarks

Freedom of speech in a pluralistic society and media performance are both important issues in a democratic society. The first question has no simple or ideal answer. One has to search for a balance between the interests of free speech and the interest to protect minorities and public order. It will be hard to draw a clear line between these two interests, if only because unexpected new utterances will spring up.

News coverage and the dissemination of information in the public interest is an important issue as well. Simple or ideal solutions are also out of the question. There is no consensus about the best or most interesting way to cover the news. The freedom of the press leaves room for different approaches and different kinds of papers. Government measures supporting the dissemination of information in the public interest have to comply with the right of freedom of the press.

8) *Brief aan de kamer* 12 July 2004, TK 2004/05, 29692, 1.

POLAND: Political Expression in Electronic Media with Special Focus on Election Campaign and Other Forms of Political Debate

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1. Constitutional Guaranties of Freedom of Expression

Freedom of expression is one of the fundamental rights laid down both in international legal instruments, and in the national legal order of Poland. The Constitution of The Republic of Poland of 2nd April 1997¹ confirms that right in its article 54, which states that:

- “1. The freedom to express opinions, to acquire and to disseminate information shall be ensured to everyone.
2. Preventive censorship of the means of social communication and the licensing of the press shall be prohibited. Statutes may require the receipt of a permit for the operation of a radio or television station.”

Moreover in article 14 it is stated that: “The Republic of Poland shall ensure freedom of the press and other means of social communication.” Also other constitutional provisions make reference to this issue.

Article 31 paragraph 3 states that: “Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.”

Article 61 paragraph 1 provides that a citizen shall have the right to obtain information on the activities of organs of public authority as well as persons discharging public functions, while paragraph 2 of the same article provides that the right to obtain information shall ensure access to documents and entry to sittings of collective organs of public authority formed by universal elections, with the opportunity to make sound and visual recordings.

Considering the special role of broadcasting, its impact on public opinion, as well as the role of this medium in public debates, the Constitution establishes the National Broadcasting Council (NBC) as an independent authority in the field of broadcasting, stating in article 213 that the “National Broadcasting Council shall safeguard freedom of speech, the right to information as well as safeguard the public interest regarding radio broadcasting and television”.

1) <http://www.sejm.gov.pl/english/konstytucja/kon1.htm>

2. Public Broadcasters Obligations Referring to the Presentation of the Public Debate

Bearing in mind the role of public broadcasting as a medium, and a factor in forming public opinion as well as considering that public service broadcasting fulfils a public remit, the Polish lawmaker has imposed upon public broadcasters special duties for reporting public debate. The Broadcasting Act of 29th December 1992 (with subsequent amendments)² in its article 21 paragraph 2 enumerates the following among the obligations of public broadcasters: to provide reliable information about the vast diversity of events and processes taking place in Poland and abroad; to encourage an unconstrained development of citizens' views and formation of public opinion; to enable citizens and their organisations take part in public life by expressing diversified views and approaches as well as exercising the right to social supervision and criticism.

While the Broadcasting Act provides certain guidelines for the conduct of public broadcasters referring to impartiality, fair and balanced coverage in programmes, the conduct of private broadcasters is subject to internal, editorial guidelines in this respect. Special obligations imposed on public broadcasters in this regard result from the public broadcasters' remit, and which take into account that the latter benefit from public financing.

Public broadcasters are also obliged to facilitate the direct presentation and explanation of State policy by the supreme State authorities. The regulation of 21 August 1996 concerning the procedure related to presenting and explaining the policy of the State by supreme national authorities on public radio and television³ was passed by the National Broadcasting Council and provides more detailed provisions.

The President of the Republic of Poland, the Speaker of the Parliament and of the Senate as well as the Chairman of the Council of Ministers may directly present and explain the policies of the State on public radio and television programme services. The public radio and television broadcasters shall, free of charge, prepare and transmit these presentations on national and regional programme services, on the indicated channel. Such presentations shall not exceed 10 minutes and shall be transmitted separately from any other programme item. The public radio and television broadcasters shall not bear any responsibility with regard to the contents of such presentations. When transmitting electoral programmes, the presentations mentioned above shall be transmitted on channels other than those broadcasting electoral programmes and shall not contain any electoral debates or persuasion items.

In addition, the Broadcasting Act provides that public broadcasters are obliged to enable political parties to present their position on major public issues, the same applies *mutatis mutandis* to national trade unions and employers' organisations. And again, the NBC's regulation of 24 April 2003 contains procedures for the presentation of points of view on crucial public issues, by political parties trade unions and employers' organizations on public radio and television, and gives more detailed rules in this respect. Public broadcasting organisations have the duty to present the standpoints of political parties, trade unions and employers' organizations with regard to public issues, in a reliable and pluralistic manner, reflecting a diversity of approaches. Such standpoints involve in particular the presentation on public radio and television programmes of discussions, analyses, statements and addresses, events related to the activities of political parties, trade unions and employers' organizations, as well as other usual methods of expression. This regulation requires that public broadcasters should produce and transmit programmes that inform on current public events and aforementioned standpoints.

Moreover, public broadcasting organisations are obliged to provide current information on the work of the Lower House of Parliament (the *Seym*) and the Senate in the form agreed upon with the presiding authorities of both these chambers. Public broadcasting organisations shall transmit at least one television programme per week and one radio programme per week in which they present the standpoints of political parties, trade unions and employers' organizations with regard to crucial public issues; that programme should have a length of at least 45 minutes and should be shown between 4 p.m. and 11 p.m.

2) <http://www.krrit.gov.pl/stronykrrit/english.htm>

3) <http://www.krrit.gov.pl/stronykrrit/english.htm>

Besides, the Broadcasting Act contains provisions on electoral campaigning on public broadcasting. It states that entities participating in elections to the *Seym*, the Senate, the local self-government and the European Parliament shall be entitled to transmit election programmes on public radio and television on terms determined by separate provisions. The same applies *mutatis mutandis* to the election of the President of the Republic of Poland. Moreover, entities entitled to take part in a referendum campaign launched on radio and television programme services as defined in the Act of 14 March 2003 on Nationwide Referenda shall be authorised to transmit referendum programmes on public radio and television according to the terms laid down in separate provisions.

More specific obligations are found in a number of electoral laws: The Act of 12th April 2001 on Elections to the *Seym* of the Republic of Poland and to the Senate of the Republic of Poland (articles 180 – 186, 216–217, and 85–94), the Act of 27th September 1990 on Election of the President of the Republic of Poland (articles 76b–83b), the Act of 23rd January 2004 on Election of the European Parliament (articles 73–82), the Act of 16th July 1998 on Elections to Commune Councils, District Councils and Voivodeship⁴ Councils (articles 65–79), the Act of 20th June 2002 on Direct Election of the Head of a Commune, Mayor and President of Town (articles 23–25). The Act of 27th June 1997 on Political Parties (especially its chapter 4 “Finances and financing of political parties”) also contains relevant provisions.

We can see that even though there are some common rules, each kind of electoral campaign is governed by a specific statute.

3. Election Campaigning in Radio and Television Programmes

As mentioned above, there are specific arrangements for different electoral campaigns. Some of the complex, detailed rules on election campaigning to the *Seym* of the Republic of Poland will now be described as an example.

Election committees shall have the right to election campaigning on radio and television programmes in the form of election programmes and election announcements. An election announcement constitutes an advertisement in the meaning of the Broadcasting Act, prepared and delivered by an election committee⁵ and then emitted as an element of its election campaigning. An election programme is a part of a radio or television programme service, not provided by the broadcaster, that is broadcast free of charge and separate from other parts of the programme service in content or form. The broadcasting of election programmes enables an electoral committee to exercise the right to broadcasting time referred to in article 181 of the Act on Elections to the *Seym* of the Republic of Poland and to the Senate of the Republic of Poland.

More precisely, from the 15th day before polling day up to the day ending the electoral campaign public television and radio broadcasters shall broadcast, without payment, on nationwide and regional channels the election programmes prepared by election committees. The total time of those broadcasts shall amount to:

- on nationwide channels – 15 hours on channels of Polish Television Joint-stock Company, including up to three hours for satellite channel “TV Polonia”, and 30 hours on channels of Polish Radio Joint-stock Company, including up to five hours broadcast for listeners abroad;
- on regional channels - 10 hours on channels of Polish Television Joint-stock Company and 15 hours on channels of Polish Radio Joint-stock Company.

An election committee shall have the right to broadcast its electoral materials on:

- nationwide public channels – if it has registered constituency lists in at least one-half of electoral constituencies;
- on regional public channels – if it has registered a constituency list in at least one electoral constituency.

4) See also at the provisions of the Act of 24 July 1998 on three-level State territorial division. Entities of that division constitute communes, districts and voivodeships (provinces).

5) Election committees in the name of political parties and of voters, engage in electoral activities, in particular the nomination of candidates for deputies to the *Seym* and candidates for senators, and exclusively conduct the election campaign on their behalf. The organ of a political party that is authorised to represent a party in its external contacts acts as the election committee for the political party in question. (see art. 95 – 106 of the Act of 12 April 2001 on Elections to the *Seym* of the Republic of Poland and to the Senate of the Republic of Poland)

The length of time devoted to broadcasting the electoral material referred to above, in nationwide public channels is divided in equal parts between the electoral committees so entitled, based on the information submitted by the National Electoral Commission *Państwowa Komisja Wyborcza*.⁶ This information specifies the election committees that have registered their constituency lists in at least half the election constituencies. In contrast, the time for broadcasting electoral material on regional public channels is proportionally divided between the electoral committees so entitled according to the number of constituency lists registered by them. The decision is taken on the basis of the information concerning registered constituency lists provided by the constituency electoral commissions territorially competent for the area that is covered by the regional channel in question. The National Broadcasting Council has issued regulations on 13 August 2001 and on 21 August 2001, containing more detailed provisions in this regard. They include principles for the procedure of allocating broadcasting time for election programmes, the scope of their registration, their method of preparation and broadcast, as well as the methods for publishing information on the timetable for broadcasting such programmes, and the total length of time of transmitting election programmes on each of the national and regional channels and the schedule of total time allocation in the period between the 15th day before polling day up to the day ending the election campaign.

No later than the 18th day before polling day the editors-in-chief of the national and regional public television channels and of "TV Polonia", as well as the editors-in-chief of Polish Radio, in the presence of the persons who submitted the lists, shall determine by drawing lots the sequence of election programmes to be broadcast each day.

The election programmes of an election committee shall be delivered to Polish Television or Polish Radio no later than 24 hours before the day of broadcast. Its length shall not exceed the time limit determined by the law.

Still, notwithstanding the length of time allotted to the broadcast of election programmes, each electoral committee may broadcast paid election advertisements emitted by radio and television broadcasters starting from the day when the election campaign begins.

Rates for broadcast time of paid election advertisements referred to above shall be fixed in equal terms for all participants in accordance with the price list in force on the day of the announcement of elections.

The rules concerning advertising on television and radio (described in the Broadcasting Act, and reflecting provisions of the "Television without Frontiers" Directive) shall apply to election programmes. What is important, however, is that the time allocated to the broadcast of paid election advertisements shall not be subject to the time limits set for commercials, as established by the Broadcasting Act.

The Act on Elections to the *Seym* of the Republic of Poland and to the Senate of the Republic of Poland states that broadcasters bear no responsibility for the contents of election programmes and election advertisements, and that broadcasters shall not refuse broadcasting election programmes and election advertisements.

Concerning time limits for the election campaign (both for the *Seym* and the Senate), it should be noted that they start on the day when the President of the Republic announces the Order on Elections and end 24 hours before polling day. Electoral campaigning may be performed only during the run for election and only according to the rules, forms and time periods prescribed by law.

There are additional rules referring to the silence time; from the end of the electoral campaign until the conclusion of the voting it is forbidden to publish the results of public opinion polls (pre-election surveys) on probable voting behaviour and election results. From the end of the election campaign until the conclusion of voting it is forbidden to organise voters' assemblies, marches and demonstrations, to make speeches or distribute leaflets or to engage in any other campaigning in support of candidates and lists of candidates. It is forbidden to carry out any form of electoral campaigning on the premises of a polling station and inside the building where such premises are located.

6) The National Electoral Commission is a permanent, supreme institution competent in the conduct of elections. It is composed of 3 judges of the Constitutional Tribunal, designated by the President of the Constitutional Tribunal, 3 judges of the Supreme Court, designated by the President of the Supreme Court; 3 judges of the Supreme Administrative Court, designated by the President of the Supreme Administrative Court. The President of the Republic of Poland by a resolution, appoints those judges to the National Electoral Commission. (see articles 36 - 43a of the Act of 12 April 2001 on Elections to the *Seym* of the Republic of Poland and to the Senate of the Republic of Poland)

Another important rule in the Electoral Law concerns the dissemination of false information during the election campaign for the *Seym* and Senate. If posters, slogans leaflets, announcements or other forms of electoral campaigning contain false or inaccurate details and information, the candidate for a deputy seat in the *Seym* or candidate for a seat in the Senate, or an agent of any concerned electoral committee have the right to petition the district court for a ruling on:

1. prohibition of publication of such (false) details and information,
2. confiscation of those materials,
3. rectification of false information,
4. publication of a reply in the case of infringement of the rights of an individual,
5. an apology to the person who was libelled.

The district court (a single judge) shall examine a petition within 24 hours in proceedings that are non-litigious. The court may examine the case in the (justified) absence of the petitioner or participant properly notified of the time of the proceedings. A ruling that terminates the proceedings in a case shall be notified immediately by the court to the person concerned, to the electoral commission of the appropriate constituency and to any person duly obliged to observe the court's ruling.

Within 24 hours the ruling of the district court may be subject to an appeal. The court of appeal is obliged to examine the appeal within 24 hours. There is no further legal recourse and the ruling of the appellate court is subject to immediate execution.

False details and information related to elections and concerning the electoral campaign are subject to rectification within 48 hours at the expense of the person so obliged. The court shall indicate the daily newspaper, in which the rectification must be published, and the time limit for carrying out the publication. If the rectification is not published, the court, at the request of an interested party, may order the publication of the rectification by a writ of execution, at the expense of the person obliged to do so.

The exercise of those rights under electoral law does not prevent any wronged or injured person from asserting his/her rights under other statutes.

RUSSIA: “War on Terrorism” and the Freedom of the Mass Media¹ – Laws Restricting the Freedom of the Mass Media

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1. The Law “On the Fight against Terrorism” (1998)

Special attention to the media’s role in counter-terrorist activity was first given by the Russian law-makers when the federal law “On the Fight against Terrorism” was passed on 25 July 1998. That law stretched the boundaries of the notion of “terrorism,” which earlier existed only in the 1996 Criminal Code of the Russian Federation. In the Criminal Code, terrorism is defined as “the committal of explosive devices detonation, arson or any other activity that threatens to cause loss of life, significant property damage or other socially-dangerous consequences; if these actions are carried out for the purpose of violation of public security, intimidating the public or influencing government authorities in their decision-making process, as well as a threat of committing the above described actions for the purpose stated” (para 1 of Article 205). The federal law “On the Fight against Terrorism” incorporated this meaning in a wider range of actions, such as the seizure of hostages, dissemination of false facts on an act of terrorism, organization of an illegal armed formation or involvement in one, attempts on the lives of statesmen or public figures; attacks on representatives of foreign states or staffers of international organizations who are under international protection (Art. 3).

In the spring of 2000 the dust was shaken off this law and it was used to limit freedom of the mass media. In March 2000, at the meeting of the Commission on Prevention of Political Extremism, Mikhail Seslavinsky, then First Deputy Minister of Press, Broadcasting and Mass Communications, announced that “in addition to the law “On Mass Media,” there’s also the law “On the Fight against Terrorism,” and from now on, all the journalistic materials on Chechnya are going to be evaluated according to it.” In the authorities’ opinion, Article 15 of this law concerns the mass media. Article 15 states that public distribution of information about terrorism actions must be carried out in the forms and volumes defined by the Chief of the Anti-Terrorism Operations Centre. Apart from that, Article 15 prohibits the dissemination of information that “serves to promote or justify terrorism and extremism.”

The blind side of the attempt to apply the federal law “On the Fight against Terrorism” to the Chechen conflict was pointed out by the Moscow Media Law and Policy Institute as early as March 2001. According to Article 3 (“Basic Terms”) of this law, “a counterterrorist operation zone,” where a specific legal regime may be enforced, effective for mass media as well, is “the particular areas of land or water, vehicle, building, structure, installation, or premises and the adjoining territory or waters within which the aforementioned operation is carried out.” Therefore, this limited list implies a territory of a relatively small size. The military, followed by the Ministry of Press, tried to give the expression “particular areas” a wider meaning: as a territory of constituent entities of the Russian Federation of

1) Excerpts from a chapter of a textbook on contemporary journalism in Russia and the U.S. to be published in Russian in 2004 by the University of Missouri Press.

approximately 16,000 square kilometers (Chechnya). Then, this notion was applied to the Russian Federation as a whole. There are also other ideas casting doubt on the lawfulness and validity of the federal law "On the Fight against Terrorism" being applied to journalists who cover the Chechnya conflict.²

2. The Law "On Counteraction to Extremism" (2002)

In 2002, another law - "On Counteraction to Extremism" - was created and passed under the initiative of the President of the Russian Federation. It was passed on 25 July 2002 (No. 114-FZ). As far as the media is concerned, this legal act prohibited the mass media from implementing extremism activities and disseminating extremist materials.³ The law extended the measures of amenability such as warnings and termination of activity of mass media if the law is violated. That being said, the point here is under what conditions the activities of a mass media outlet can be considered extremist.

According to the law, extremism is defined as a list of actions that are included into the objective side of the constituent elements of a crime, specified by the Criminal Code of the Russian Federation. However, these actions are also accompanied by some new characteristics, such as their connection with violence or exhortation to violence. Extremism includes "activities on planning, organization, preparation and carrying out of actions directed towards violent ... breakage of the Russian Federation's entity, destruction of Russia's security and safety; take-over or assumption of power, organization of illegal armed formations, and implementation of terrorism activities" as well as some other actions. Hence, these actions characterize the enemy of the state in the Chechnya conflict.

Besides that, the mass media's dissemination of public exhortation to extremist actions or assistance in their implementation were also considered as an activity of extremism.

As far as the liability of the mass media for dissemination of extremist materials, the law contains serious internal contradictions.⁴

According to the law, extremism activities, or dissemination of extremist materials, are penalized by issuing a warning to the media outlet or filing a lawsuit, initiated by the Ministry of Press, against a media organization and demanding termination of activity. It is important to point out that, in addition, the power of issuing warnings and filing legal claims against mass media was given to public prosecutors.⁵

Appropriate changes were made to Articles 4 and 16 of the law "On Mass Media."

3. Laws "On the State of Emergency" (2001) and "On the State of Martial Law" (2002)

The law "On the State of Martial Law" (passed on 30 January 2002 - No. 1-FKZ), for instance, makes provisions for limitations of the freedom of the press in case of aggression or immediate threat of aggression to the Russian Federation applied to the state territory as a whole or its separate regions. Some of the regulations of this law contradict the concept of freedom of mass media stated by the Russian Federation law "On the Mass Media."⁶

In case of martial law, certain measures are enforced on the territory where there is military action: control of operations of objects that provide communication; control of operations of printing facilities and mass media outlets, and usage of these entities for the purposes of defense; prohibition of use of personal transmitter-receiver radios. Unfortunately, the law does not specify the notion of "control" and the forms it can take.

2) "The interview with terrorists: the warnings from the Ministry of Press are still being made without any explanations." The commentary of the Moscow Media Law and Policy Institute: "Laws and practices of mass media." See issue nr. 3, 2001. pp. 25-28.

3) "Political extremism and the mass media: time to cross the T's." The commentary of the Moscow Media Law and Policy Institute, "Laws and practices of mass media." See issues nr. 8-9, 2002.

4) Ibid.

5) The detailed commentary is available in the article by Ye. Lysova "What does the federal law "On Counteraction to Extremism" bring to the Russian mass media?" in "Laws and practices of mass media." See issue nr. 6, 2003, pp. 6-10.

6) "The State of Martial Law and Mass Media," commentary of the Moscow Media Law and Policy Institute: "Laws and practices of mass media." See issue nr. 3, 2002.

Special attention should be paid to the possibility of introducing additional measures as necessary, directed towards the enforcement of the secrecy regime by the state government authorities, or any other government, military, or local governments and organizations (Article 7, para 2, point 18). The presence of this regulation allows us to speculate that under the circumstances of martial law the access by journalists to the offices of state and local governments may be legally restricted.

Other measures can be enforced on the whole territory of the country even if the martial law is introduced only in a portion of it. Those measures include the introduction of temporary restrictions on the right to seek, distribute, receive, produce and disseminate information (para 1, Article 8). In addition to the federal laws that may restrict the freedom of mass media, the FCL contains a legal source named as "other regulatory legal acts," which usually includes President's decrees, government regulations, and the acts of legislation of constituent entities of the Russian Federation and local authorities. Therefore, it is implied that there is the possibility of enforcing certain restrictive measures related to the search and dissemination of information, which will affect mass media directly. Moreover, these restrictions will be based not only on federal laws but also on President's decrees and departmental acts.

The Federal Constitutional Law ("FCL") "On the State of Emergency" (passed on 30 May 2001 – No. 3-FKZ) points to the possibility of announcing the state of emergency under conditions of armed riots and terrorism acts; blocking or take-over of high-security objects or separate regions; preparation and activity of illegal armed formations; international, interdenominational, or regional conflicts, followed by violent actions and creating an immediate threat to the life and safety of the public and the normal functioning of government bodies and local authorities.

By the Presidential decree for the duration of the state of emergency a special regime may be introduced that results in restrictions on the freedom of movement in the territory where the state of emergency is announced. In addition, the freedom of press can also be restricted by introducing pre-publication censorship and temporary confiscation or arrest of printed materials, transmitting and sound-amplifying technical devices, copying-and-duplicating machines, as well as the establishment of a special procedure for journalists' accreditation.

4. The Law "On Mass Media" (1991, as revised in 2002)

The law "On Mass Media" (passed on 27 December 1991 – No. 2124-1) could have played an important role in determining the right balance between freedom of mass media and the war on terrorism.

Article 1 of this law states that after the law is passed, any restrictions or limitations to mass media can be enforced *only* by the law "On Mass Media." However, this regulation almost never works, because priority is given to legal acts passed later in time - as more recent laws of the same level, or to federal constitutional laws - as more judicially powerful regulatory legal acts. Thus, there is always the possibility of restricting the freedom of the mass media, which was not envisioned in the law "On Mass Media."

The law "On Mass Media" sets formal procedures for issuing warnings and terminating the activity of a medium.⁷ Issuing warnings is one of the several steps of this procedure. The procedure can be carried out by the Minister of Press, Broadcasting and Mass Communications (at present, The Federal Service on Supervision Law Observance in the Sphere of Mass Communications and on Protection of Cultural Heritage at the Ministry of Culture and Mass Communications) and the public prosecutors when there is a violation of Article 4 ("Inadmissibility of Freedom of the Press Abuse"). Use of mass media for extremist actions is one of the instances of abuse of freedom of the mass media as per the law "On Mass Media," as revised on 25 July 2002 (No. 112-FZ).

5. The Criminal Code (1996, as revised in 2003)

On 8 December 2003 (No. 162-FZ), the federal law "On Making Changes and Amendments to the Criminal Code of the Russian Federation" was passed, it introduced substantial changes, including those applicable to the mass media.

7) See on mass media's termination of activity in "Legal fundamentals of journalism," by A.G. Richter. Moscow State University Press, 2002, pp. 54-55.

Article 282, formerly known as “Incitement of Ethnic, Racial, or Religious Enmity,” is now called “Incitement of Hatred or Enmity, as well as Abasement of Human Dignity.” This new title reflects the fact that from now on the incitement of not only enmity but also hatred is a criminal act. At the same time, the propaganda of certain views, ideas, and opinions does not constitute a legally defined crime anymore. In the new version of this disposition, the lawmakers made provisions for criminal responsibility in a far higher number of cases: the ethnic dignity of an individual or a group is subject to protection; there is a prohibition to debase on the basis of gender, race, language, religion, origin, or affiliation with any social group. Thus, this current regulation was turned from ethno-confessional to an anti-discriminative clause. I should also mention that if earlier “ethnic dignity” was subject to protection, now this law is about “an individual” or “a group of individuals.”

Actions listed in this Article, contain the characteristics of a crime only if they were committed in public or with the use of mass media. The question is whether journalists and editors will be the subject to criminal liability in this case. Some lawyers say: yes, they will, since they become practically the accomplices of this type of crime.

It seems that the question should have the same answer related to the para 2 of Article 280 of the Criminal Code (“Public Exhortation to Actions of Extremism”) and para 2 of Article 354 of the Criminal Code (“Public Exhortation to the Unleashing of an Aggressive War”). The main criteria for solving the problem of journalistic and editorial liability should be whether the mass media provided the platform for the criminal, participated in the crime, or informed the public about the events taking place. The differences between the crime and the distribution of information about it can be drawn from presence or absence of direct intent to committing the crime.⁸

6. The Mass Media Self-Regulation

Russian mass media’s self-restrictions in connection with the “war on terrorism” and the carrying out of anti-terrorism operations, as well as on reporting on acts of terrorism are usually of a more forced character. Acceptance of the so-called Antiterrorism Convention in April 2003 is the best way to prove it.

The standards of conduct were developed and signed in the presence of the Minister of Press on 8 April 2003. The Anti-Terrorism Convention (or, Rules of professional conduct for mass media in case of a terrorism act and an anti-terrorism operation) comprises eight sections. According to the first section, “during a terrorism act or an anti-terrorism operation priority is given to saving people and to the personal right to life over any other rights and freedoms.”

The Convention also put a range of restrictions on the actions of journalists. In particular, journalists shall not:

- interview terrorists on their own initiative during a terrorism act; except when asked or authorized by the Operations Center
- allow terrorists to get on the air without prior consultations with the Operations Center
- take the role of mediator at the journalist’s own discretion, etc.⁹

The Convention was signed by Konstantin Ernst; Anton Zlatopolsky, the director-general of *Rossiya* channel (“Russia Channel”); Alexander Lyubimov, the president of *MediaSoyuz*; Aleksey Venediktov, the editor-in-chief of radio station *Ekho Moskvy* (“Moscow’s Echo”); Dmitry Voskoboynikov, the first deputy of the director-general of the Interfax news agency; and others.

Soon after it was passed, the Convention and its standards seemed to be forgotten by both the media and the authorities. Hence, regardless of the rules of “be tactful and attentive to the feelings of friends and family of the victims of terrorism” and “avoid excessive coverage and naturalism while reporting from the events, and showing its participants,” the media, in fact, relished in all the details of the acts of terrorism that took place in the end of 2003 and in early 2004 at the hotel “National” and in the Moscow metro.

8) Maria Kitaichick, “Changes in the Criminal Code of the Russian Federation related to the actions of journalists.” “Laws and practices of mass media.” Issue nr. 2, 2004, pp. 3-4.

9) The full text of the Anti-terrorism Convention is available in “Gazeta” newspaper (9 April 2003).

7. Publication of Interviews with “Terrorists” and “Extremists”

Judging by the lawmaker’s activity and law enforcement practices, extremist materials are the biggest concern for the government in relation to mass media content in the context of the topic. The most rage is generated by publication of “interviews” with Chechen leaders, putting up the resistance against the government.

In the fall of 1999, at the start of the second conflict in Chechnya, the State Duma adopted the resolution “On the Situation in the Republic of Dagestan, High-Priority and National Security Measures, and the Fight against Terrorism”. The State Duma deputies called to “take all the due measures to prevent the representatives of illegal armed formations from addressing the media.” “Failure to comply with this enforcement should be considered as a gross violation, resulting in the application of sanctions, provided by the laws of the Russian Federation, including the revocation of the broadcasting license.”

As far as the practices used by the law enforcement agencies are concerned, it is interesting to look at the statistical data of warnings issued to mass media by the Russian Federation Ministry of Press, Broadcasting, and Mass Communications Affairs. From 2000 to the end of 2003, the Ministry issued 45 warnings for abuse of freedom of the press; 35 of which concerned the instigation of international dissention.¹⁰ Talking about the typology of this largest group of warnings, we must admit that most attention of the government was focused on to these media due to the interviews with separatists.

A quiet ban on addresses by Chechen leaders in broadcast and print emerged with the beginning of the second Chechen conflict. In August of 1999, the Russian Federation Ministry of Press, Broadcasting, and Mass Communications sent out a telegram to all national broadcasting companies. The telegram recommended in a soft form not to interview the Chechen fighters. In February of 2000 Mikhail Seslavinsky warned radio stations *Svoboda* (“Radio Liberty”) and *Ekho Moskvy* (“Moscow’s Echo”) that “if one of the Chechen terrorists started talking about his opinions and views through the Russian mass media, justifying terrorism acts and hostages’ takings, this would become the subject matter for the Ministry of Press.”

The Russian Federation’s Ministry of Press, Broadcasting, and Mass Communications, in April 2000, issued warnings to *Kommersant* (“The Merchant”) and *Novaya Gazeta* (“The New Newspaper”). These newspapers were charged with violation of Article 4 of the Russian Federation law “On Mass Media” and Article 15 of the law “On the Fight against Terrorism.”

In March 2001, the warning was issued to *Nezavisimaya Gazeta* (“Independent Newspaper”). Incidentally, all of the warnings mentioned above followed the publication of different interviews with Chechen President Aslan Maskhadov. In the case of *Nezavisimaya Gazeta*, the warning was issued because “the editorial staff published material propagandizing war; instigating a violent change of the constitutional system and the state’s entity; abused freedom of the press; and thus, violated Article 4 of the law “On Mass Media.”

Interestingly, in the 1990s in order to issue a warning related to an abuse of freedom of the press, the Ministry used to conduct numerous consultations with experts; refer to the Prosecutor-General’s Office and state research institutes for assessment and evaluation of the texts. In the early 2000s, the Ministry issued all those warnings at lightning speed. In the case of “Kommersant” and “Novaya Gazeta”, it was done on the date of publication; “Nezavisimaya Gazeta” received it the day after publication.

Finally, the newspaper *Zavtra* (“Tomorrow”) got the warning on 26 February 2003 for publishing an interview by its editor-in-chief Alexander Prokhanov of Akhmed Zakayev, “Maskhadov’s emissary.”¹¹ (*Zavtra* is a leading opposition newspaper and Prokhanov is a well-known nationalist writer in Russia.) This publication, said the Ministry in the warning, violated Article 4 of the law “On Mass Media” and Articles 1 and 8 of the federal law “On Counteraction to Extremism.”

10) The source is at <http://www.lenizdat.ru/a0/ru/pm1/c.thtml?i=1016744&p=0#1>

11) “What’s good for London is too early for Moscow...” in “Zavtra,” No. 6 (481), 4 February 2003 and No. 7 (482), 11 February 2003. Available at <http://zavtra.ru/>

The newspaper's founder and editor-in-chief filed a lawsuit against the Ministry of Press at the Tverskoy Intermunicipal Court of Moscow. The appeal of the disciplinary action was heard on May 5, 2003, and the motion was dismissed. The Court took into account an evaluation of published materials, done by request of the Ministry of Press. The evaluation was performed by a chief researcher of the Institute of Ethnology and Anthropology of the Russian Academy of Sciences, who, at the same time, happened to be the chairperson on the Moscow's Coordination Board for Cultural and Public Organizations of Chechnya.¹²

On 21 May 2003, then Deputy Minister of Press, Valery Sirozhenko, announced at a round table in the State Duma that "Zavtra's" registration will be suspended any day soon as an out of court procedure. This procedure was, indeed, provided for by Article 8 of the "On Counteraction to Extremism."¹³

12) The source is at http://www.gazeta.ru/kz/more_business.shtml

13) The source is at <http://www.i-news.org/viewnews/sng/4722>

The Changing Hues of Political Expression in the Media

Workshop held on 19 June 2004 in Amsterdam

Participants

Francisco Cabrera	European Audiovisual Observatory
Maja Cappello	Autorità per le garanzie nelle comunicazioni (AGCOM)
Egbert Dommering	Institute for Information Law (IViR)
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