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REPORT

**ON SELF-REGULATION WITHIN THE MEDIA
IN THE HANDLING OF COMPLAINTS**

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Introduction

1. This opinion on self-regulation within the media is a part of a study on the constitutional and legal aspects of “the role of the media for democracy,”¹ which the Venice Commission has undertaken in co-operation with the Parliamentary Assembly of the Council of Europe.² The aim is to develop a catalogue of indicators for an appropriate legal and policy framework for a well functioning media in democracy. The comments I have been asked to write address *the issue of self-regulation within the media in the handling of complaints as to the content of programmes or articles*.

Problem

2. The **performance of the media as the public watchdog is increasingly called into question in the process of globalization** and concentration leading to the growth of multinational, including European media and communications groups. This situation, as noted by the Committee of Ministers in a declaration in January 2007, is fundamentally changing the media landscape where “*media concentration can place a single or a few media owners or groups in a position of considerable power to separately or jointly set the agenda of public debate and significantly influence or shape public opinion, and thus also exert influence on the government and other state bodies and agencies,*” as worded in a declaration from the Committee of Ministers in January 2007. Widely the media landscape is politicized and journalists struggle for professionalism in an environment where they are poorly trained, often badly paid and even subject to intense pressure from owners, powerful business groups in society, political factions and religious groups.

3. The **public watchdog role of the media in democracy** entails the requirement to hold authorities accountable by reporting on issues affecting the life of the community and sustaining an active political debate. At the same time journalists must be careful in not overstepping the bounds clashing with other fundamental rights. This principle applies in theory to all news media – not only broadcasting which is traditionally subject to licensing conditioned on requirements of accuracy, fairness and impartiality. In every country of the world, government has attempted to regulate the development of broadcasting, also in countries where other parts of the media, notably the printed press have not been closely regulated.³

4. Regulation is based on various normative sources that are available to constitute or constrain media conduct. Inherent in the role of public watchdog are several dilemmas which draw attention to forms of regulation. There are **proscriptive legal rules** and principles which are intended to eliminate practices which are harmful to other fundamental interests, such as those contained in the law relating to crime and torts. Laws on defamation, obscenity, contempt of court, confidentiality and official secrecy are proscriptive norms which are also found in the **professional codes of journalists**, which do not have the same binding effect.⁴ This is **self-regulation**, which in principle shifts the responsibility of the traditional public service remit to the individual actor. The emphasis on self-regulation is a market oriented approach, which in

¹ The term media or press is used interchangeably to refer to any kind of periodic dissemination of edited information such as newspapers, periodicals, radio, television and web-based news-services (cf. Council of Europe Committee of Ministers Recommendation Rec (2004) 16 on the right of reply in the new media environment.

² Cf., Doc. 10935, 22 May 2006.

³ Wolfgang Hoffman-Riem, *Regulating Media: The licensing and supervision of broadcasting in six countries*, 1996 The Guilford Press, p. 2.

⁴ Cf. Thomas Gibbons, *Regulating the Media*, 1998 Sweet and Maxwell, p. 5.

principle also denies the impact of market failure.⁵ The **market regulation** of the media can be an active impediment for the press in the role of public watchdog as the public service remit often conflicts with the underlying economic logic.

5. Regulating the media is not an easy task in light of the conflicting principles underlying the operation of the media e.g. the principle of press freedom from any prior restraint (apart from the licensing of broadcasting and requirements attached to public service values), the economic logic of the independent media and last but not least the expectations that the press must meet in democratic society.

6. Journalists trying to conduct investigative journalism often face constraints not only through the deployment of law as a form of deterrence, through charges of seditious libel and criminal defamation but also due to economic restrictions on the independent media and even detention of journalists, editors and publishers without trial. Consequently, many journalists publish anonymously, using a pseudonym to avoid being personally targeted when addressing politically sensitive issues, as described in a report of Article 19 on Freedom of the Press in one of the Council of Europe newer member states.⁶ The International Federation of journalists has witnessed a steady increase in the numbers of media victims in recent years. In 2006 the IFJ recorded at least 155 murders, assassinations and unexplained deaths of journalists.⁷ These killings have highlighted how vulnerable journalists contributing to the political debate are.⁸

7. The danger facing journalists in Europe is taking many forms. Precarious employment conditions, deterioration of bargaining rights, government prosecution of investigative reporters and confidential sources, and abandonment of public service journalism values are making the lives and livelihoods of journalists extremely uncertain.⁹

8. In a recent Manifesto signed by the European Federation of Journalists and other NGOs: "*Why a Declaration on Media and Democracy in Europe*"¹⁰ the emphasis is on enhancing quality and public service values in a new media environment where public broadcasters struggle to compete with transnational commercial companies and where investigative journalism and editorial independence are seriously threatened. The need to confront the developing concentration of media markets and enhance public participation by opening access to broadcast systems is called for. Attention is drawn to the need to reinforce the independence of media professionals, both in commercial and in the public sector stating:

⁵ Cf. Herdís Thorgeirsdóttir, *Journalism Worthy of the Name: Freedom within the Press and the Affirmative Side of Article 10 of the European Convention on Human Rights*, 2005 Brill.

⁶ Extracts from the Report of Article 19 on Freedom of the Press in Ukraine in Ukrainian *Media Group v. Ukraine*, Judgment, 29 March 2005.

⁷ IFJ Report on journalists and media staff killed in 2006, 17/01/2007 (<http://www.ifj.org/default.asp?Index=4561&Language=EN>)

⁸ Cf. In many countries there are no serious investigations because of police or judicial corruption or governmental negligence. (ibid.) The IFJ and other international media support groups launched an international commission of inquiry into the killings of journalists in Russia, following the assassination of journalist Anna Politkovskaya in Moscow on Oct. 7th 2006. There have been more than 200 killings of journalists in Russia since 1993.

⁹ According to a report of the European Federation of Journalists (<http://www.ifj.org/pdfs/JournalistsKilled2007finalweb.pdf>).

¹⁰ www.ifj.org 22. Feb. 2007. The Coalition for Media Freedom and Integrity, formed for concerned professional media organizations and civil society groups in Europe, invite other organizations and NGOs working on media, to sign their proposal Declaration on Media and Democracy in Europe.

There is a gradual deterioration in employment standards as media professionals are increasingly forced into atypical forms of working. Many work without contracts, and are unable to exercise their rights to collective bargaining, to non-discriminatory and equal opportunities between women and men, to non-discriminatory and adequate wages, and to minimal standards of social protection.

At the same time, they work without the professional status that allows them to apply appropriate codes of ethics, codes of practice, complaints procedures and other instruments of **self-regulation**, training and professional development. Legislative, regulatory and policy changes are urgently needed to address these gaps in protection.¹¹

9. The more insidious type of restriction facing journalists and linked to **self-regulation**¹² is that of **self-censorship** where journalists refrain from reporting certain news or imparting views for fear of not biting the hand that feeds them.¹³ Due to ownership concentration on the media market,¹⁴ journalism is not only dependent on an affirmative appraisal of the market but also the good will of authorities which due to corporate funding in politics often have close ties with the business community. Whatever the amount of financial pressure on journalism, the mere presence of the power of the business community and the unclear division between it and the political sphere is a reminder of the much more complex ways of 'interference' not prescribed by law at the dawn of the 21st century than at the conception of the Convention in 1950.¹⁵ The media fighting for independence from external pressures is, in many of the Council of Europe member states, the victim of precarious economic conditions, which make it easy prey for mighty political and economic interests.¹⁶

10. The Committee of Ministers in a declaration in January 2007 stated: "Concerned that media concentration can place a single or a few media owners or groups in a position of considerable power to separately or jointly set the agenda of public debate and significantly influence or shape public opinion, and thus also exert influence on the government and other state bodies and agencies; Conscious that the above-mentioned position of power could potentially be misused to the detriment of political pluralism or the overall democratic process," hence reiterating prevailing concerns in many member states.

11. Prior to that the Committee of Ministers had urged the Member States to encourage media organizations to strengthen editorial and journalistic independence voluntarily through **editorial statutes or other self-regulatory means** in recommendation No. R (99) 1 on measures to promote media pluralism and diversity of media content. It is acknowledged that the **market**, despite a plethora of media outlets, "does not by itself guarantee a diversity of sources of information or that various ideas or opinions can be expressed and presented to the public."

¹¹ <http://www.ifj.org/default.asp?index=4695&Language=EN>

¹² Cf. Pedersen and Baadsgaard, para 59: The reasoning is as follows from the Danish Union of Journalists that maintained: "that it was essential to the functioning of the press that restrictions on their freedom of expressions be construed as narrowly as possible, with self-censorship being the most appropriate form of limitation.

¹³ Cf. H. Thorgeirsdóttir, "Journalism Worthy of the Name: Freedom within the Media and the Affirmative Side of Article 10 of the European Convention of Human Rights", Brill 2005.

¹⁴ Parliamentary Assembly Doc. 9000, 19 March 2001, Freedom of Expression in the media in Europe; Report Committee on Culture, Science and Education. (Rapporteur: Mr. Gyula Hegyi.)

¹⁵ Herdís Thorgeirsdóttir, *supra*.

¹⁶ Cf. Parliamentary Assembly Council of Europe, Doc. 9000 19 March 2001, Freedom of Expression and information in the media in Europe, Report Committee on Culture, Science and Education (Rapporteur: Mr. Gyula Hegyi.)

12. The Committee of Ministers has also emphasized that the **right of reply** is an appropriate remedy in the new online environment as well as the traditional media – enabling natural and legal persons to correct inaccurate facts or contested information. It is acknowledged that the right of reply can be assured not only through legislation, but also through co-regulatory or **self-regulatory** measures.¹⁷

13. The focus of this report is on the **self-regulatory** processes in achieving the objectives of responsible journalism. In this respect it is important to keep in mind that the media in modern societies is subject to the interaction of the legal regulation, the control of the market¹⁸ and the struggle of **self-regulation** within the media in this relationship.¹⁹ The form of regulation must also be scrutinized from the dilemma inherent in the rights and duties of journalists; that is the right to impart and resort to provocative methods in order to draw attention to the message or information and the duty to inform and enlighten the public which in turn may impose a personal danger on the media personnel trying to do their duty. When journalists are doing the latter they often have problems with confining their conduct within the acceptable limit. Hence they have been granted special privileges recognizing their special status albeit they seem not to be adequately protected as evident from the dangers involved in being a journalist in Europe today.

The case for self-regulation

14. The idea that **self-regulation** might be the best approach to encourage responsible journalism is based on the premises that it avoids any hint of government intervention and the fear of state censorship; that the media works most effectively when it is institutionally independent of the state and society's dominant forces.²⁰ The case for **self-regulation within the media** is firmly entrenched in the constitutional principle of freedom of expression from prior restraints. The principle of freedom of expression is widely understood as the organisational structure and governance of self-regulatory bodies or mechanisms available in the media sector.

15. **Self-regulation** within the media means that journalists adhere to the codes of conduct adopted by journalists' association widely. **Self-regulation** within the press relying on ethical standards for journalists is seen as approaching some form of press responsibility without being subject to state control.²¹ The voluntary conduct means that editors and journalists submit their decisions under critical examination and is typically applicable where editorial discretion is crucial in evaluating the bounds that are not to be overstepped for the protection of the reputation of others. Although codes contain integrity rules, where journalists are assumed to act in accordance with the duty to inform the public, the staff of the media has little, actual support in these rules when criticizing vital corporate/political interests.

¹⁷ Council of Europe Committee of Ministers Recommendation (2004)16 on the right of reply in the new media environment; Resolution (74) 26 on the right of reply – position of the individual in relation to the press; Recommendation No. R (99) 15 on measures concerning media coverage of election campaigns.

¹⁸ Cf.,

¹⁹ H. Thorgeirsdóttir, "Journalism Worthy of the Name: Freedom within the Media and the Affirmative Side of Article 10 of the European Convention of Human Rights", Brill 2005.

²⁰ J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by W. Rehg, 1996, The MIT Press, p. 299.

²¹ H. Thorgeirsdóttir, *Journalism Worthy of the Name. A Human Rights Perspective on Freedom within the Press*, Lund University 2003, p. 454.

16. Even if **self-regulation** is not seen as an adequate guarantee of responsible journalism within the media there is prevailing scepticism of legislating on the media out of fear of abuse by power holders and the **slippery slope effect**. The reasoning is as follows from the Danish Union of Journalists that maintained: “that it was essential to the functioning of the press that restrictions on their freedom of expressions be construed as narrowly as possible, with self-censorship being the most appropriate form of limitation.”²²

17. The present support for decriminalizing defamation on the pan-European level is significant for the view that **journalists must not be deterred** from carrying out their tasks with the chilling effect of legislation which can lead to imprisonment of journalists who are struggling to act as the public watchdog by criticising authorities. This view is in full congruity with Convention jurisprudence. The Court has recognized the **chilling effect** of criminal or punitive sanctions on the work of journalists.²³ It has acknowledged the stigma that a criminal record has on the future of a person and to the fact, that even when suspended, criminal records can persistently influence the exercise of journalists’ legitimate work.²⁴

18. The Committee of Ministers in a **declaration 2004 political debate** emphasized this view²⁵ stating that the exercise of freedom of expression carries with it duties and responsibilities, which media professionals *must bear in mind*, and that it may legitimately be restricted in order to maintain a balance between the exercise of this right and respect for other fundamental rights, freedoms and interests protected by the Convention.

19. The European Court of Human Rights has **never upheld or condoned a prison sentence for defamation** in cases involving media professionals or entities. When discussing cases where criminal sanctions might meet the proportionality test in the context of freedom of expression, the Court has focused on issues of public order, the protection of certain aspects of **private life**, not the protection of reputation.

20. There were calls for the drafting of a European Convention on Privacy following Princess Diana’s death.²⁶ The right to privacy, guaranteed by Article 8 of the European Convention on Human Rights, had already been defined by the Assembly in the declaration on mass communication media and human rights, contained within Resolution 428 (1970), as “the right to live one’s own life with a minimum of interference.” The Parliamentary Assembly Resolution on Privacy stated that: “It is therefore necessary to find a way of balancing the exercise of two fundamental rights, both of which are guaranteed by the European Convention on Human Rights: the right to respect for one’s private life and the right to freedom of expression.” The Parliamentary Assembly urged that “the media should be encouraged **to create their own guidelines for publication** and to set up **an institute with which an individual can lodge complaints** of invasion of privacy and demand that a rectification be published.”

21. The media industry as a reaction to proposed legislation to more responsible journalism usually offers to improve its performance by raising standards. This is done with **codes of conduct and press complaints councils** in an effort to strengthen independent journalism. Recent efforts include intents to establish internal editorial charters in line with international

²² Cf., Pedersen and Baadsgaard v. Denmark, judgment 19 June 2003, para 59

²³ *Jersild v. Denmark*, judgment 23 September 1994.

²⁴ Cf. *Schorschach and News Verlagsgesellschaft v. Austria* (2003), § 32.

²⁵ “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.”

²⁶ Resolution № 1165 (1998) of the Parliamentary Assembly of the Council of Europe on the right to privacy.

standards,²⁷ with the objective to secure editorial independence of journalists (for example their right to act according to conscience). Firewalls between advertisement departments and editorial offices are suggested as well as the implementation of internal standards and the designation of a member of the staff to act as ombudsman or contact person to whom concerns and problems of an ethical and professional nature can be addressed. The intention behind strengthened self-regulatory efforts is to guard media personnel against “political and commercial interests that jostle for influence in a rapidly-expanding media landscape.”²⁸

22. It is however increasingly acknowledged by journalists themselves that although issues related to ethics and content of media should primarily be matters for media professionals, governments and regulatory authorities have a key role to play in creating the enabling conditions for a legal and regulatory environment in which independent media can develop.²⁹

Article 10 jurisprudence

23. Article 10 of the Convention for the protection of Human Rights and Fundamental Freedoms³⁰ taken together with the Council of Europe Committee of Ministers Declaration on the Freedom of Expression and Information constitutes a European Media Charter.³¹ One of the main concerns of Article 10 jurisprudence is that the media serves the public interest by adequately informing everyone. A constant thread running through the Court’s case-law is the insistence on the essential role of a free press in ensuring the proper functioning of democracy.³² The Court has always attached great importance to the vital role played by the press when it comes to raising, analyzing and making public matters of public interest, even those liable to cause displeasure to the Government, the persons concerned and the prevailing majority.³³

24. Article 10 has been referred to widely in domestic courts in the CoE member states when the right to freedom of information is viewed as taking precedence over both political, legal and economic imperatives given as reasons for restricting it. When freedom of the press is thus at stake, the authorities have only a limited margin of appreciation to decide whether there is a “pressing social need” to interfere.³⁴

25. Article 10 guarantees freedom of expression and opinion and freedom to receive and impart information and ideas without interference. This freedom is not absolute. It may be restricted in certain circumstances, limiting either its content or the circumstances where it applies. The Court must determine whether the reasons adduced by the national authorities to justify interference were “relevant and sufficient” and whether the measure taken was “proportionate to the legitimate aims pursued”. In doing so, the Court has to satisfy itself that the national authorities, basing themselves on an acceptable assessment of the relevant facts, applied standards which were in conformity with the principles embodied in Article 10.³⁵ States

²⁷ Cf. in Brussels (<http://www.ijnet.org/Director.aspx?P=Ethics&ID=203101&LID=1>)

²⁸ Ibid.

²⁹ Cf., www.ifj.org;

³⁰ ETS No. 005

³¹ Adopted by the Committee of Ministers on 29 April 1982 at its 70th session (DH-MM 98-2).

³² *Pedersen and Baadsgaard v. Denmark*, judgment 17. Dec. 2004, § 71.

³³ Cf. *Stoll v. Switzerland*, chamber judgment, 25 April 2006, dissenting opinion of Judge Wildhaber, joined by Judges Borrego and Sikuta. This case was referred to the Grand Chamber, which has not as of this date delivered its judgment.

³⁴ Cf. *Editions Plon v. France*, no. 58148/00, § 44, third paragraph, ECHR 2004-IV

³⁵ See, among other authorities, *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, §§ 88-90, ECHR 2004-XI,

have a certain margin of appreciation in curtailing this freedom – even in the case of political speech.³⁶

26. Press freedom is certainly part of the overall protection offered by Article 10 and rests on the same foundation as the individual freedom of expression. The **imparting process itself**, however, requires a separate theory and justification due to the legally ascribed role of the press as public watchdog where journalists have duties and responsibilities with regard to the exercise of freedom of expression which other citizens are not burdened with. Journalists have the **duty (not simply a right)** to impart information and ideas on all matters of public interest, in a manner which sometimes may include a degree of **exaggeration or even provocation**.³⁷

27. Statements made in the press which are value judgments, used in the context of political rhetoric, are not susceptible to proof.³⁸

28. The weight to be attached to journalistic freedom in a democratic society is recognized, amongst else by warranting journalists with special protection in not revealing their sources. The Court stressed in the case of *Goodwin v. the United Kingdom*³⁹ that the "protection of journalistic sources is one of the basic conditions for press freedom, **as is reflected in the laws and the professional codes of conduct** in a number of Contracting States (...)" The Court continued that "without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest" (see, *ibid.*).⁴⁰

29. The Court has also submitted on the basis of the fact that producing news articles on short deadlines journalists are under pressure that "news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest."⁴¹

30. Journalists' rights to report free of official intimidation⁴² are recognized as part of the corollary right of the public to receive. The Court has reiterated the general principle in Article 10 case law that, "whilst the mass media must not overstep the bounds imposed in the interests of the protection of the reputation of private individuals, it is incumbent on them to impart information and ideas concerning matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them."⁴³

³⁶ There are for example now proposals from the Germany government to make Holocaust denial a crime throughout the European Union and to ban the display of the swastika (to some a 5,000-year-old symbol of peace). "Holocaust denial", *The Economist* 25 January 2007.

³⁷ Cf., Partly dissenting opinion of Judge Rozakis joined by Judge Kovler and Judge Steiner in *Pedersen and Baadsgaard v. Denmark*, judgment 19 June, 2003.

³⁸ *Ukrainian Media Group v. Ukraine*, judgment 29 March, 2005.

³⁹ *Goodwin v. the United Kingdom*, 27 March 1996, § 39.

⁴⁰ See also: The Council of Europe, Committee of Ministers Recommendation No. R (2000)7 on the right of journalists not to disclose their sources of information

⁴¹ *Ekin Association v. France*, judgment 17 July 2001.

⁴² Cf. The German Federal Constitutional Court ruled (27. Feb. 2007) that journalists cannot be legitimately accused of betrayal of state secrets for publishing classified information obtained from informers. The decision was made in the context of a legal case prompted by the police searching the offices of German political monthly *Cicero* in Potsdam near Berlin, in September of 2005.

⁴³ *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 62, ECHR 1999-III.

31. An informed electorate⁴⁴ is a prerequisite for an effective political democracy. Protecting the two-way flow of information and ideas is seen as preserving pluralism, broadmindedness and tolerance akin to the notion of the uninhibited marketplace of ideas in which truth will ultimately prevail. The necessity to preserve the media as a forum for an open public debate in the interest of democracy and democratic processes has shed the focus on the most effective means to ensure **editorial independence** within the media and responsible journalism.⁴⁵

32. The principle of editorial independence is traditionally viewed as most effectively guaranteed by **self-regulation**.⁴⁶ Although it is doubtful to derive from that assumption that editorial independence is an aspect of the publisher's right to enjoy his/her property as press freedom 'should not be made to turn on the source of its property rights or the particular dynamics that gave rise to them.'

33. Although it is very clear that editorial independence and journalistic freedoms are protected for the sake of securing the democratic function of the media the Court has acknowledged the significance of the economic logic for the press as a corporation. In the case of *Groppera* the Court recognized that it was essential for a medium to keep its audience which required it to maintain its financing from advertising revenue; for the employees, it was a matter of their job security as journalists. It is not the economic enterprise *per se*, which is protected under Article 10 but the media as a legal person attending to the vital role of the Public Watchdog. Its operation must take aim at the economic logic necessary to survive and hence the essential means are protected.

34. The *Autronic AG v. Switzerland* case⁴⁷ has provoked concern that the Court was mitigating the Public Watchdog role of the press as it held, by a majority of sixteen against two, that neither the applicant's legal status as a limited company nor the fact that its activities were commercial nor the intrinsic nature of freedom of expression could deprive it of Article 10 protection. The Court has stated that Article 10 applies to 'everyone', whether natural or legal persons. It is hence applicable to profit-making corporate bodies. It applies not only to the content of information but also to the means of transmission or reception since any restriction imposed on the means necessarily interferes with the right to receive and impart information.⁴⁸

35. In more recent case law the Court is evidently aware of the potential threat which market failure may impose on freedom of expression. In the case of *Appelby v. the United Kingdom* where a ban on freedom of expression was bestowed upon a group of individual in a quasi-public forum the Court stated:

"... the acknowledged importance of freedom of expression, does not bestow any freedom of forum for the exercise of that right... Where however the bar on access to property has the effect of preventing any *effective exercise* of freedom of expression or it can be said that the essence of the right has been destroyed, the Court would not exclude that a positive obligation could arise for the State to protect the enjoyment of Convention rights by regulating property rights. The *corporate town*, where the entire municipality was controlled by a private body, might be an example."⁴⁹

⁴⁴ US Supreme Court recognizes the right to receive information and ideas regardless of their social worth (*Winters v. New York*, 333 U.S. 507, 510, 1948)

⁴⁵ Cf. Recommendation Rec (2007)2 of the Committee of Ministers to member states on media pluralism and diversity of media content.

⁴⁶ Cf. In US Supreme Court jurisprudence, in the case of *Miami Herald v. Tornillo* the principle of editorial independence was seen as threatened by the Florida statute on the right of reply.

⁴⁷ *Autronic AG v. Switzerland*, 22 May 1990, Series A no. 178, § 47.

⁴⁸ Ibid.

⁴⁹ Ibid, § 47, quoting *Marsh v. Alabama*, 326 US 501 (1946).

36. In the *Informationsverein Lentia v. Austria* case, the government adduced an economic argument that the Austrian market was too small for abandoning state monopoly of broadcasting. The Court pointed to the coexistence of private and public stations in countries of a comparable size where they were accompanied by measures preventing the development of private monopolies⁵⁰ and concluded that, 'such an undertaking' (especially valid in relation to broadcasting but not excluding newspapers and printed press) 'cannot be successfully accomplished unless grounded in the principle of pluralism, of which the State is the ultimate guarantor'.⁵¹

37. Guaranteeing pluralism requires that states take into account that journalism conducted in the modern environment where journalism is a part of a corporate structure. Since there are no particular professional requirements as with "other" intellectual professions in modern societies owners of the media determine who enters journalism. This may mean that the composition of the media staff is of more like-minded individuals, conforming to the prevailing views of those in charge rather than exercising professional and critical discretion.

38. The Court in its judgment in *Ösgür Gundem* provided that due to the key importance of freedom of expression for a functioning democracy:

"Genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection even in the sphere of relations between individuals."⁵²

39. How the positive obligation inherent in Article 10 can benefit journalists in alerting the public about presumed misappropriation on the part of public authorities⁵³ and business leaders is not clear. The Court has reiterated *with regard to the "duties and responsibilities" which journalists undertake, that the safeguard afforded by Article 10 in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.*⁵⁴

⁵⁰ *Informationsverein Lentia and Others v. Austria*, 24 November 1993, Series A no. 276, § 42.

⁵¹ Ibid. § 36 and § 38.

⁵² Ibid. § 42.

⁵³ (31/01/06) [Stângu and Scutelnicu v. Romania](#).

⁵⁴ See *Goodwin v. the United Kingdom*, judgment of 27 March 1996, Reports 1996-II, § 39, and *Fressoz and Roire*, § 54. Italics added.

Assessment of self-regulation in light of case-law (gaps in protection)

40. The ethical codes of journalists entail guidelines of the boundaries not to be crossed (protecting the reputation and rights of others⁵⁵), e.g. what constitutes grave professional offences, such as plagiarism, malicious misrepresentation, calumny, slander, libel and unfounded accusations. These ethical guidelines are also the means by which journalists appear to assert the integrity of their conduct and their independence from external pressures. This means for example that they may not accept bribes in any form in consideration of either publication or suppression.

41. Examples of the areas covered by the codes are: publicity rules, integrity of journalists with regard to outside pressures, rejection of interference by public authorities, protection from employers and advertisers, the right to refuse assignments, and separation of advertisements and editorial material.

42. At least 29 journalists' unions in Europe have written codes of ethics.⁵⁶ The status of the journalists' codes varies, from providing discussion forums and declarations to an elaborate set of rules like in Germany and Sweden.⁵⁷ These ethical considerations and disciplinary rules are meant to give moral guidance by setting standards against which conduct can be measured and evaluated.⁵⁸

43. The first principle of the professional codes is according to the standards set forth by the International Federation of Journalists in 1954 "respect for truth and for the right of the public to truth is the first duty of the journalist".⁵⁹ This principle requires that journalists are careful in not overstepping clashing with other fundamental rights as well as imparting to the public all information and ideas of legitimate concern.

44. The Court has in its case law mainly focused on the former duty of the journalist as the applications brought forth usually concern punishments for defamation where journalists have allegedly not shown enough respect in their work; for example not verified factual statements defamatory for private individuals.⁶⁰ The interest in protecting one's reputation must be counter-balanced by an important public interest.⁶¹

45. Integrity rules succumb to the principle of the public's right to receive information and "acquire an objective picture of reality."⁶² This principle is entrenched in Article 10 where "it is incumbent on the press to impart information and ideas concerning matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them." (See *Bladet Tromsø and Stensaas v. Norway* (GC), no. 21980/93, § 62, ECHR 1999-III).

⁵⁵ Cf. *Pedersen and Baadsgaard v. Denmark*, judgment 17. Dec. 2004, § 78.

⁵⁶ T. Laitila, 'Codes of Ethics in Europe' in K. Nordenstreng (ed.), *Reports on Media Ethics in Europe*, University of Tampere Series B 41/ 1995, p. 35.

⁵⁷ Ibid.

⁵⁸ Cf. C. Frost, *Media Ethics and Self-Regulation*, 2000 Longman, p. 99; T. Laitila, 'Codes of Ethics in Europe' in K. Nordenstreng (ed.), *Reports on Media Ethics in Europe*, University of Tampere Series B 41/ 1995

⁵⁹ International Federation of Journalists: Declaration of Principles on the Conduct of Journalists.

⁶⁰ *Bladet Tromsø and Stensaas v. Norway*, § 66, Times – ath obershlick

⁶¹ *Times Newspapers Ltd. v. the United Kingdom*, application nos. 23676/03 and 3002/03.

⁶² UNESCO International Principles of Professional Ethics in Journalism Principle I: People's Right to True Information.

46. Journalists must seek truth and report it; at the same time they must minimize the harm inflicted upon others yet be vigilant and courageous about holding those with power accountable. This form of self-regulation requires enormous discipline in a work environment where journalists are under stress from meeting deadlines and also often under pressure from those that they are trying to hold accountable – often lacking stamina and strength to carry on this task due to its confrontational nature.

47. It is reasoned that the key factor of self-regulation is the involvement of journalists in the regulatory process, relying on their codes, which are not subject to public power of enforcement, and that journalists scrutinize each other's behaviour to ascertain whether it complies with standards and norms. This view of self-regulation is based on the presumption that individual responsibility can fill the legal void.⁶³ It accentuates the 'necessary' self-restraint by the state as part of protecting the negative freedom within the media. It is also based on the presumption that journalists or editors have 'regulative control' to ensure what is written and what is not.⁶⁴ The outcome is responsive to the editorial staff only, i.e. journalists and editors have control over what is published/reported independent of corporate contexts. Hence, 'if the [journalistic] profession regulates its own affairs, the state has no reason or excuse to intervene'.⁶⁵

48. The Court has long held that "political expression", including expression on matters of public interest and concern, requires a high level of protection under Article 10 (see, for example, *Thorgeir Thorgeirson v. Iceland*, judgment of 25 June 1992, Series A no. 239, and also *Hertel*, cited above, p. 2330, § 47). Along the same lines the Court has been steadfast in maintaining that journalists are allowed "recourse to a degree of exaggeration, or even provocation" (see, for example, *Bladet Tromsø and Stensaas*, § 59, or *Prager and Oberschlick v. Austria*, judgment of 26 April 1995, Series A no. 313, p. 19, § 38). Special grounds are however required before a newspaper could be dispensed from its ordinary obligation to verify factual statements (*McVicar*, § 84).

49. Political expression is not confined to high politics nor elected authorities alone. In the recent case of *Steel and Morris v. the United Kingdom* the Court stated: "It is true that large public companies inevitably and knowingly lay themselves open to close scrutiny of their acts and, as in the case of the businessmen and women who manage them, the limits of acceptable criticism are wider in the case of such companies (see *Fayed v. the United Kingdom*, judgment of 21 September 1994, Series A no. 294-B, p. 53, § 75).

50. The Court however submits that: "in addition to the public interest in open debate about business practices, there is a competing interest in protecting the commercial success and viability of companies, for the benefit of shareholders and employees, but also for the wider economic good. The State therefore enjoys a margin of appreciation as to the means it provides under domestic law to enable a company to challenge the truth, and limit the damage, of allegations which risk harming its reputation (see *Markt intern Verlag GmbH and Klaus Beermann v. Germany*, judgment of 20 November 1989, Series A no. 165, pp. 19-21, §§ 33-38). 95. If, however, a State decides to provide such a remedy to a corporate body, it is essential, in order to safeguard the countervailing interests in free expression and open debate that a measure of procedural fairness and equality of arms is provided for."⁶⁶

⁶³ Cf. J. Ukrow, Self-regulation in the Media Sector and European Community Law: an independent study of European Law, prepared at the request of the Federal Commissioner for Cultural Affairs and the Media at the Institute of European Media Law, 1999, p. 5, (in H. Thorgeirsdottir, Journalism Worthy of the Name, p. 470).

⁶⁴ P. A. French, Corporate Ethics, 1995 Harcourt, Brace & Company, p. 43.

⁶⁵ Ukrow, supra p. 5.

⁶⁶ *Steel and Morris v. the United Kingdom*, judgment 15 February, 2005.

51. Given the circumstances journalists work in they are in an inferior position to those they are to hold accountable, bound by their codes to seek the truth and report it – yet lacking actual protecting in doing their work. The Court drew attention to this fact in the *Steel and Morris v. the United Kingdom*, referring to campaign groups and not journalists. The principle however holds as the Court stated:

“The more general interest in promoting the free circulation of information and ideas about the activities of powerful commercial entities, and the possible “chilling” effect on others are also important factors to be considered in this context, bearing in mind the legitimate and important role that campaign groups can play in stimulating public discussion (see, for example, *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, p. 27, § 44; *Bladet Tromsø and Stensaas*, cited above, § 64; and *Thorgeir Thorgeirson*, cited above, p.28, § 68). The lack of procedural fairness and equality therefore gave rise to a breach of Article 10 in the present case.”

52. The recent Declaration of the Committee of Ministers on protecting the role of the media in democracy in the context of media concentration focused *inter alia* on the ability of powerful media owners to suppress any form of dissident views, as the above-mentioned position of power could potentially be misused to the detriment of political pluralism or the overall democratic process.

53. The principle set forth by the court that journalists forfeit their protection under Article 10 if they do not adhere to their ethical codes while doing their work – also applies to their duty to report the truth, e.g. which may have unforeseen consequences for a journalist who wants to hold his/her job.

54. Self-regulation may be accessible when there is an inaccuracy in writing or a clear breach of the rules concerning publicity, in most established media there is a standard operating procedure for such cases. Self-regulation may conduce the media to be accurate in correcting evident mistakes and in enforcing right of reply claims; in other words toward taking care in having the details correct or reacting promptly to rectify obvious abuse in the coverage of matters where the injured party can verify his claim. It is highly questionable if the self-regulatory mechanisms by their nature are able to achieve the aims of guaranteeing freedom within the media or media responsibility. When the positive obligations are neglected self-regulation has obviously failed. It may be argued that self-regulation brings journalistic activity to the sphere of morality and that the codes have that impact on journalistic conduct. But that does not result in editorial independence. The codes of conduct do not provide a shield for principled resistance to external efforts subverting editorial independence and professional integrity.⁶⁷

55. The Council of Europe member states have the duty to resort to positive measures to protect journalists who are ethically imparting material that may have dangerous consequences for them.⁶⁸ The positive obligations that arise from Article 10 require that the member states shape their legal systems in a way, which conforms to the Convention and that its scope also applies to relationships between individuals. This positive dimension of Article 10 is subsequently important for self-regulation within the media. For if self-regulation is inadequate in ensuring the pluralism and diversity of views in the media then the member state in question is in breach of its guarantee for ‘openness’ in the communication process.

56. In the Convention case law professional codes have been regarded as laws⁶⁹ as well as unwritten law⁷⁰ capable of restricting the rights described in Article 10 § 1. By the same token

⁶⁷ Herdís Thorgeirsdóttir, *Journalism Worthy of the Name: Freedom within the Press and the Affirmative Side of Article 10 of the European Convention on Human Rights*, 2005 Brill, p. 469.

⁶⁸ Cf. *Ösgur Gündem v. Turkey*, 16 March 2000, RJD 2000-III.

⁶⁹ *Barthold v. the Federal Republic of Germany*, 25 March 1985, Series A no. 90.

restrictions on journalistic conduct through **self-regulation** may be classified as legal reservations under Article 10 § 2. Journalists are in the position to abuse their scope under self-regulation to restrict the imparting process protected under Article 10 § 1.⁷¹ They may impose excessive restrictions on themselves, filtering and withholding information in breach of their duty to impart all matters of public concern. According to the traditional case-law of the Court, there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest (see *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV).

57. The public right to receive is an independent right⁷² which the member states must guarantee. The Court has not excluded that a positive obligation could arise for the State to protect the enjoyment of Convention rights by regulating property rights. This might apply where ownership concentration threatens responsible journalism.⁷³

58. Journalists' associations seem keen on self-regulatory measures in keeping their independence from both the elected authorities and powerful corporations. There is however increased awareness concerning the failure of self-regulation in the present media landscape as they are urgently calling for legislative initiatives to address the gaps in the protection.⁷⁴

⁷⁰ *Sunday Times v. the United Kingdom*, 26 April 1979, Series A no. 30, § 65.

⁷¹ See Herdís Thorgeirsdóttir, *Journalism Worthy of the Name: Freedom within the Press and the Affirmative Side of Article 10 of the European Convention on Human Rights*, 2005 chapter 5. 2. 3 on the requisite to conform to get the job.

⁷² *Sunday Times v. the United Kingdom*, § 65: 'Not only do the media have the task of imparting such and ideas, the public also has a right to receive them.' (Emphasis added).

⁷³ Appelby, § 47, quoting *Marsh v. Alabama*, 326 US 501 (1946).

⁷⁴ Cf. *Why a Declaration on Media and Democracy in Europe?* (<http://www.ifj-europe.org/default.asp?Index=4695&Language=EN>).