

Protecting Freedom of Expression: Article 10, European Convention on Human Rights

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Background

Article 10, European Convention on Human Rights (ECHR) reads as follows:

1. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinion and to receive and impart information and ideas without interference by public authorities 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 and crime, for the protection of health and morals, for the protection of the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

Article 10 is a classic qualified right. The right is asserted as a general principle in the first paragraph and it is then to be balanced by reference to the second paragraph and the competing interests of other qualified rights, such as the right to respect for private life or the right to manifest religious belief. As with all the qualified rights, it is for the applicant to establish that their complaint falls within the scope of Article 10(1) and that there has been an interference with the rights guaranteed by Article 10(1).

The burden then shifts to the State to justify its actions on the basis of legality, necessity, proportionality and non-discrimination. If the State can justify its actions there will have been a lawful interference with the applicant's right to freedom of expression, and therefore no violation of the Convention.

Article 10 specifically provides for the licensing of broadcasting, TV and cinema. State monopolies of the broadcasting media will be virtually impossible to justify (see *Informationsverein Lentia v Austria*).

The Importance of Freedom of Expression

It is impossible to imagine a democratic society without a free press. It is worth noting that the 1998 Nobel Peace Prize winner Amartyaden Sen has written:

"In the terrible history of famines in the World, no substantial famine has ever occurred in any independent and democratic country with a free press."

He continues:

"While India [where he grew up] continued to have famines under British rule right up to independence, they disappeared suddenly with the establishment of multi-party democracy and a free press."

How Article 10(1) Works: what type of expression is covered?

The first sentence of Article 10(1) asserts that everyone has the right to freedom of expression. Everyone, for the purposes of 10(1), does mean everyone. This includes legal and natural persons (*Autronic AG v Switzerland*).

Political Expression

Article 10 covers a broad range of expression or speech from highly protected political speech to nominally protected valueless speech.

Political expression, which includes expression concerning the public interest, is the most protected form of freedom of speech (*Vgt Verein gegen Tierfabriken v Switzerland*). The Strasbourg Court has made it clear that it regards expression about matters of public interest as encompassing far more than party-political issues (*Thorgeirson v Iceland*). The Court has consistently emphasised that freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders (see *Ozgur Gundem v Turkey*) therefore where political expression is engaged it will be very difficult to justify an interference with the press and media by the State (*Observer & Guardian Newspapers v UK*). A broad range of issues falls within political expression, including publications on police conduct, impartiality of a court, public health and State housing policy. Additionally, criticism of the government and criticism of politicians and public figures fall within its scope. It can also include insults directed at politicians (*Oberschlick v Austria*; *Ozgur Gundem v Turkey*) and to a limited degree it may include criticisms of civil servants.

Public officials are entitled to be protected from verbal attacks in the performance of their duties unless the remarks form part of an open discussion on matters of public concern or involve the freedom of the press (*Janowski v Poland*). Although, polemical, aggressive, provocative and insulting expression has been found to fall within the scope of Article 10.

Moral or Religious Expression

The Strasbourg Court has distinguished between the expression of intimate personal convictions within the sphere of morals and religion as opposed to the expression of the public interest (*Murphy v Ireland*). In doing so, they have accepted that the expression of moral or religious belief is less protected than political expression. In *Murphy v Ireland* the European Court held that Ireland was entitled to decide that "the exclusion of all religious groupings from broadcasting advertisements generates less discomfort than any filtering of the amount and content of such expression by such groupings". As such the banning of the applicant's radio advert did not amount to a violation of Article 10.

In *Vgt Tierfabriken* the banning of the applicants' advertisement did constitute a violation of Article 10, and the Swiss government's desire to prevent powerful financial groups from exploiting the political process was not a sufficient reason to completely ban all political advertising on the broadcast media. What we can learn from an analysis of these two cases is that state authorities have only the narrowest of room to decide for themselves whether the potential harm that may result from political expression justified the suppression of that expression (see Geddis, A, 2 EHRLR 2004). There is little scope under Article 10(2) for restrictions on political speech or on debate on matters of public interest (*Erdogdu v Turkey*). Political expression is recognised by the Strasbourg Court as contributing towards a net positive outcome for a democratic society as a whole, even if it does offend some members of the that society. Whereas religious speech is viewed as producing fewer generally positive outcomes for society as a whole.

Artistic Expression

Artistic expression is also protected (including poetry (*Geerk v Switzerland*), images (*Chorherr v Austria*) and dress (*Stevens v United Kingdom*) and it will include shocking images such as bestiality. Even though Article 10 permits interference on the basis of morality, this cannot be used to justify wholesale censorship. In *Muller v Switzerland* there was no violation of Article 10 because the Swiss authorities could justify closing down an exhibition and fining the applicant because the exhibition was accessible to the general public, free of charge and without any age restrictions. However, in that case the Court did emphasise that "those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society". This principle means that the State is under an obligation not the encroach unduly on artistic freedom of expression. As such, pornography may be controlled but it cannot be prohibited (*Scherer v Switzerland*). Artistic expression also includes light entertainment.

Commercial Expression

Commercial expression is primarily directed at promoting commercial, economic or financial interests. Although just because a book has commercial value does not mean it ceases to amount to political expression. Commercial speech, which would include advertising, is also protected by Article 10 (*Markt Intern Verlag GmbH v Germany*). However, fairly wide restrictions are permitted in relation to commercial speech because there is a recognised need to protect commercial and confidential information, and also preventing unfair competition has been accepted as pursuing a legitimate aim for protecting the rights of others. In relation to advertising by the liberal professions, the Strasbourg Court has in essence accepted that whilst Article 10(1) may be engaged, it is for the national authorities to determine whether the right balance has been struck by the various competing interests (*Casado Coca v Spain*).

Valueless Speech

Article 10 also protects valueless and offensive speech and ideas that "offend, shock or disturb" (see *Surek v Turkey* (No 1)). This is because Article 10 seeks to create "pluralism, tolerance and broadmindedness without which there is no democratic society" (*Handyside v UK*).

A Right of Access to Information?

In relation to the right of access to information, the Strasbourg Court has consistently held that Article 10(1) only gives the right to receive information that people wish you

to receive. As such, Article 10 cannot be relied upon to require information that the State does not wish to disclose, to be made available to an individual. Therefore, in *Leander v Sweden* the refusal of the State to disclose a secret Police register could not constitute an interference with the applicant's right to receive information. However, if an individual can show that his or her private life is directly affected by the State's refusal to provide information, a positive obligation under Article 8 may oblige the State to provide the information in question (*Gaskin v UK*).

Similarly, in *Guerra v Italy* there was a violation of the State's positive obligations in relation to Article 8 to provide essential information that would enable the applicants' to assess for themselves the necessary environmental risks that they and their families ran by continuing to live in the area in which they did (see also *LCB v UK*, concerning the right to life).

Medium of Expression

The means of expression is protected as well as the content of the expression. This means that adverts, pictures, graffiti, videos and cinema, protest and any conduct intended to convey ideas, such as clothes, are protected.

It does not matter how an individual is expressing themselves, what is relevant is that the individual is expressing themselves. As such, dress codes will require justification under Article 10(2).

There is a self-evident link between freedom of expression, freedom of protest (Article 11) and the right to manifest religious belief (Article 9).

Is Truth required for Freedom of Expression to be engaged?

Article 10 protects the right to criticise, speculate and make value judgements and is not limited to "true" statements. Once statements are presented as fact, the Court must examine whether the author acted in good faith and sought to comply with the ordinary obligation to verify a factual statement. Journalists are required to act in accordance with the ethics of journalism, to act in good faith, and, in relation to their opinions, those opinions should be based upon a reliable and precise factual basis.

In *Lingens v Austria* there was a violation of Article 10 where the applicant was punished for the publication of a value judgement on the grounds that its truth had to be, and had not been, proven. Similarly in *Thorgeirson v Iceland* the Court held that requiring a journalist to prove the truth of rumours or stories relating to Police brutality that he reported, was unreasonable. This was particularly so because the articles urged the setting up of a body to investigate complaints of Police brutality.

The duties and responsibilities referred to in Article 10(2) require that a journalist acts in good faith and in accordance with the ethics of journalism.

Interference with freedom of expression rights

Interference with the right to freedom of expression includes both measures taken to restrain or limit the use of free speech in advance (prior restraint) and sanctions imposed after the exercise of the expression. A very high level of justification is

required for the interference of free speech through prior restraint (see *Wingrove v United Kingdom*).

The Positive Obligation to protect Free Speech

In addition to its obligation not to interfere with freedom of expression, the state is under a positive obligation to protect free speech where it comes under threat from third parties (*Plattform Artze fur das Leben v Austria*), although the scope of that obligation will vary having regard to the diversity of situations obtaining in contracting states, the difficulties faced in policing modern societies and the choices to be made in terms of priorities and resources (*Ozgur Gundem v Turkey*).

What is a lawful interference with Freedom of Expression Rights?

The test for lawful interference with qualified rights is as follows:

1. Any restriction on civil and political rights must be prescribed by law.
2. The restriction must be justified by one of the aims recognised under the European Convention.
3. The restriction must be shown to be “necessary in a democratic society”.
4. Any qualification to rights cannot be applied in a discriminatory fashion.

This is the standard test of the justification or lawfulness of any interference with the right to respect for freedom of expression. In relation to all but political expression the Strasbourg Court has accepted that there is a wide margin of appreciation.

Prescribed by Law

Any restriction on expression must have a basis in domestic law, which may include applicable rules of international law, statute and common law. It has also been held to include a Code of Practice based on secondary legislation. The law must also be adequately accessible, although highly complex and technical laws in relation to broadcasting across frontiers can require the help of advisers in order for them to be explained (*Groppera Radio AG v Switzerland*).

General laws will also be compatible where they concern obscenity and blasphemy in order for them to reflect changing social standards. Similarly, in *Tolstoy v UK* the Court considered the absence of detailed guidance to the jury as to the assessment of damages payable for defamation to be compliant with Article 10 to satisfy different factual situations.

In *Gaweda v Poland* a requirement to register a publication was found to be not sufficiently precise, particularly as this could amount to prior restraint.

Aims recognised under the Convention

These are spelt out in Article 10(2). They include national security, territorial integrity or public safety, the prevention of disorder or crime and the protection of the reputation or rights of others.

‘Necessary in a Democratic Society’

The third test requires a balancing act to be made by the Court in their assessment of the rights of the individual on the one hand and State or community interests on the other. In order to make that assessment the Court probe the government to justify its actions by making them establish that the interference is necessary in a democratic society. ‘Necessary’ does not mean indispensable, but neither does it mean ‘reasonable’ or ‘desirable’ (*Sunday Times v UK*). What it implies is a pressing social need and that pressing social need must accord with the requirements of a democratic society the essential hallmarks of which are tolerance and broad-mindedness (*Handyside v UK*).

In *Chassagnou v France* the Court held that, although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which

ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.

Restrictions must not only just have a pressing social need, there must also be a good reason for them. In relation to the 'necessity' of the restriction, the aim of the restriction will be relevant. For example, the issue of morality has been held to justify interferences, and therefore the Strasbourg Court has applied the doctrine of the margin of appreciation. However, of particular relevance to necessity is the type of speech concerned, i.e. political speech is very protected, artistic speech less so.

Proportionality

The principle of proportionality is not mentioned in the text of the Convention itself, but it is the dominant theme in the Court's case law. What proportionality requires is that there is a reasonable relationship between the means employed and the aims sought to be achieved. Essentially what the Court is required to do is determine whether a measure of interference which is aimed at promoting a legitimate public policy is either unacceptably broad in its application or has imposed an excessive or unreasonable burden on certain individuals (*Sporrong & Lönnroth v Sweden*).

In *Lustig-Prean v UK*, the Court held that the blanket ban on homosexuals serving in the Armed Forces was disproportionate to the UK government's legitimate public policy objective of ensuring that morale and unit effectiveness was maintained. In so finding, the Court held that less restrictive measure on the applicant's Article 8 rights could have been adopted, such as a code of conduct forbidding sexual activity within the Armed Forces. The Court also was sensitive to the fact that most Council of Europe countries did not have comparable policies in relation to their Armed Forces. The Strasbourg Court often seeks to rely on evidence from other Council of Europe countries in relation to whether a restriction is proportionate or not (*Informationsverein Lentia v Austria*).

In relation to the proportionality of a measure, the nature or severity of the restriction will be relevant. Therefore, in *Tolstoy v UK* the amount of damages awarded against the applicant in the defamation case were considered to be so disproportionate as to interfere with his right to freedom of expression.

Discrimination

As part of the test for assessing the legality of an interference with any Convention right, the issue of discrimination must be addressed, even if there has been no violation of the substantive right at issue. As a general principle the identified three tests will need to be made out. If they cannot be, and there is a difference of treatment, that difference of treatment will amount to discrimination and will be unlawful.

Preventing the Abuse of Freedom of Expression

Article 10 has built within its scheme mechanisms to limit the freedom of expression of those who wish to take advantage of that right to espouse hatred and violence. On top of these safeguards within Article 10(2), the Convention further protects against the abuse of rights. Article 17, ECHR prohibits the abuse of Convention rights to destroy the rights and freedoms of others. It can be applied only to those rights which are capable of being exercised so as to destroy the rights of others: it cannot be used

to restrict rights designed to protect the individual, such as those in Articles 5 and 6 of the ECHR: this provision, which is negative in scope, cannot be construed *contrario* as depriving a physical person of the fundamental individual rights guaranteed by Articles 5 and 6 of the Convention (*Lawless v Ireland*).

The general purpose of Article 17 is to prevent totalitarian groups from exploiting in their own interests the principles enunciated by the Convention. To achieve that purpose, it is not necessary to take away every one of the rights and freedoms guaranteed from persons found to be engaged in activities aimed at the destruction of any of those rights and freedoms. Article 17 covers essentially those rights which, if invoked, will facilitate the attempt to derive there from a right to engage personally in activities aimed at the destruction of any of the rights and freedoms set forth in the Convention (*Glimmerveen & Hagenbeek v Netherlands*).

Any measure taken under Article 17 must be strictly proportionate to the threat to the rights of others (*Lehideaux & Isorni v France*). In most cases involving the denial of the Holocaust the Court has held that Article 10 does not apply because Article 17 prevents the individuals concerned from relying upon Article 10(1) (*Kuhnen v Germany*).

In *Garaudy v France* the Strasbourg Court found no violation of the Convention following the six months imprisonment of the applicant who had written a book entitled *The Founding Myths of Modern Israel*. Article 17 was applied. However, in *Lehideux v France*, which concerned an attempt to reconsider the role of Marshall Petin in French history, the Strasbourg Court held that the applicants did have Article 10 protection. The Court noted that as time passes to appropriate response to certain types of publication changes. The lapse of time makes it inappropriate to deal with some remarks 40 years on with the same severity as 10 or 20 years previously. This forms part of the effort that every country must make to debate its own history openly and dispassionately.

Speech can therefore be banned or limited where such speech has anti-democratic motives. As such, there is also a relationship between banning speech and banning political parties. In *Refah Party v Turkey*, the banning of the Refah Party was justified under Article 11(2) because the party advocated the introduction of Sharia law. The Court did not rely upon Article 17. In *Refah* it was accepted that the ban violated Article 11(1), however, this could be justified on the basis of Article 11(2). The Strasbourg Court held that the State had a duty to protect its institutions and even though it is perfectly lawful and Convention compliant for a political party to campaign for change in the law and the structure of the State, those political parties must satisfy:

1. The means used must be legal and democratic in every respect
2. The changes proposed must be compatible with fundamental democratic principles.

Duties and Responsibilities

Article 10(2) expressly recognises that the exercise of freedom of expression carries with it duties and responsibilities. In relation to duties and responsibilities the medium of expression will be an important factor. Therefore, as the audio-visual media have a more immediate and powerful affect than print greater duties and responsibilities arise in relation to those media.

- Journalists have to act according to the ethics of journalism
- Special conditions attach to military life
- There is an obligation of civil servants requiring a degree of reserve on their part
- Judges are expected to show restraint in exercising their freedom of expression, particularly where their authority and impartiality will be called into question
- In relation to conflict zone situations there is a need for journalists and others to take particular care when expressing themselves to avoid ambiguous statements that could be interpreted as inciting violence or disorder

Limiting Freedom of Expression Rights

Below are some issues examining limits to freedom of expression. It is not a finite list.

Prior Restraint

Prior restraint where publication is prevented from going ahead may be justified under Article 10, but it calls for the most careful scrutiny on the part of a court, particularly where it concerns news as news is such a perishable commodity. An injunction prohibiting publication must be the option of last resort even when national security is concerned (*Observer & Guardian v UK*).

Criminal Sanctions

The prosecution of individuals for exercising their freedom of expression, particularly where it engages political expression and/or other Convention rights, will need to be strictly justified. In *Incal v Turkey* the Turkish authorities prosecuted Mr Incal for his pamphlets which contained virulent remarks about the Turkish government's policy in relation to the Kurdish problem in the south-east of the country. Before the Strasbourg Court the Turkish government sought to justify the prosecution on the basis that they were preventing disorder or crime. However, the Strasbourg Court noted that the leaflets did not call for violence or hatred. In finding a violation of Article 10 the Court held that the government should be subject to close scrutiny and that freedom of expression is particularly important for political parties and their active members.

Defamation

Reputation is specifically protected in Article 10(2). It is also protected by Article 8. In *Pedersen & Baadsgaard v Denmark* the applicants' prosecution for criminal defamation was held not to violate Article 10 because the programme in which they had criticised the Police Chief had been transmitted at peak viewing times and had not sought to balance their assertions in any way.

The Public Interest

As with prior restraint it will rarely be in the public interest to restrict freedom of expression. The public interest is that there should be publication and then if necessary further actions can be taken as a result of that decision to broadcast or publish. This is particularly the case where the broadcast or publication involves criticisms of the government (*Castells v Spain*).

In *Fressoz & Roire v France* the applicant journalists had breached the criminal law in disclosing confidential tax information of the managing director of Peugeot during

industrial unrest at the car manufacturer. As a result of publishing that tax information, the large salary increases of the managing director could be established, whilst he opposed salary increases for employees. As a result of the public debate on the industrial dispute the Court found the applicants' convictions to be disproportionate given the importance of the applicants' article, and the fact that the information on the tax returns was in fact already available to the public via their local municipality. Accordingly, even if a journalist breaks the criminal law for the purpose of publishing, his conviction may not be justified under Article 10 if the breach of the criminal law appears minor when compared to the public importance of the matters on which he is reporting.

Journalists' Sources

In *Goodwin v UK* the need to protect journalists' sources to ensure freedom of expression, and therefore a democratic society, was affirmed. In *Roemen & Schmit v Luxembourg* the Court emphasised the need to protect journalists' sources. In that case the office of the journalist's lawyer was searched, as well as the journalist's own home and office, in order to gain information concerning the journalist's source. The Strasbourg Court found a violation of Article 8 and Article 10.

Incitement to Violence and Racial Hatred

The relationship between incitement to violence, racial hatred and freedom of expression is complex and controversial. As was established in the *Incal* case, it is not possible merely to justify an interference with freedom of expression on the basis of the requirement to prevent disorder and crime, because the expression in issue could be construed as permitting the incitement to violence. There needs to be a direct link between the expression used and the violence intended. This principle has also been affirmed in *Surek v Turkey (no. 4)*. It is therefore necessary to distinguish between the publication of views that incite or might incite violence on the one hand and the publication of views that are intransigent and convey an unwillingness to compromise with the authorities. Other key factors to take into account in relation to incitement are the size of the target audience and the medium of the expression.

Attempts to justify interferences with freedom of expression on the basis of the territorial integrity of the state will be unlikely to succeed unless these include incitement to violence. However unpalatable it may be for the State, different perspectives must be allowed to be heard (*Surek No. 4 v Turkey*).

Elections

Freedom of expression plays a fundamental role in the election process. The rights to vote, guaranteed by Article 3 of Protocol 1 and Article 10, are therefore necessarily interrelated and operate to reinforce each other (*Bowman v UK*).

The Court has accepted that there are needs for controls on freedom of expression in the run up to elections in order to allow for a free and balanced election process. However, regarding limits on how much could be spent by an unauthorised person during an election with the view to promoting or procuring the election of a candidate, the Court found on the facts that there was a violation of Article 10 in relation to the applicant who sought to distribute information concerning the three candidates' position on abortion (*Bowman v UK*).

The Police, the Armed Forces and Civil Servants

Throughout the Convention there is a recognition that in certain circumstances greater restrictions can be imposed on the Police, the Armed Forces and civil servants (see *Kosiek v Germany*). These rights have been implied into the text of the Convention and are explicit in Article 11(2) which states:

“This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state.”

Not all those involved in the administration of the State will, however, be excluded from the principles implicit in Article 10. In *Vogt v Germany* school teachers, though as a matter of German law technically part of the administration of the State, were held to have Article 10 and, by implication, Article 11 rights.

In *Rekvenyi v Hungary* a ban on the political activities of the police (in relation to freedom of expression) was justifiable on the basis that a politically neutral Police Force is in the public interest. In *Ahmed v UK* it was held that it was legitimate to interfere with the freedom of expression rights of civil servants who wish to engage in political activity.