

STANDARDS OF CONDUCT FOR JOURNALISTS UNDER EUROPE'S FIRST AMENDMENT

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ABSTRACT

When it comes to the protection of the freedom of the press, Article 10 of the European Convention on Human Rights, which protects the freedom of expression, fulfills a function similar to the First Amendment in controlling states' regulation of damage to reputation. An analysis of the abundant case law of the European Court of Human Rights highlights the development of common professional standards for journalists, concerning publications with the potential to affect individuals' reputations. It appears that the Court has developed distinct standards depending on the nature of the medium at issue, comprising two categories: information and opinions. It is clear that the Court wishes to promote and protect a press it considers serious and useful for the public debate.

INTRODUCTION

Since its landmark ruling in *New York Times Co. v. Sullivan*,¹ the United States Supreme Court has implemented a

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1. 376 U.S. 254 (1964).

progressive “constitutionalization of defamation”² under the auspices of the First Amendment.³ Beyond its global impact on free speech, this movement has been crucial in the development of jurisprudence that circumscribes the power of states to protect individuals’ rights to reputation,⁴ as well as the freedom of the press, through the establishment of implicit behavior standards for the journalistic profession as a whole.⁵

A similar phenomenon can be observed in Europe through the guarantees embedded in the European Convention on Human Rights (ECHR or “the Convention”). From Portugal to Russia and from Iceland to Turkey, almost fifty member states are required to implement this international treaty’s substantive provisions and have given their residents the possibility, after the exhaustion of local remedies, to challenge the decisions of domestic courts before the European Court of Human Rights (“the European Court” or “the Court”).⁶ Given the deep control and influence of the

2. Stanley Ingber, *Defamation: A Conflict Between Reason and Decency*, 65 VA. L. REV. 785, 801 (1979).

3. See RUSSELL L. WEAVER ET AL., *THE RIGHT TO SPEAK ILL: DEFAMATION, REPUTATION AND FREE SPEECH* 39-76 (2006).

4. See Robert C. Post, *Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 721-22 (1986) (discussing how states lost much of their ability to protect the right to reputation after the Supreme Court, in *New York Times*, held that defendants’ First Amendment rights could not be ignored in defamation suits).

5. Lackland H. Bloom, Jr., *Proof of Fault in Media Defamation Litigation*, 38 VAND. L. REV. 247, 330 (1985); Brian C. Murchison et al., *Sullivan’s Paradox: The Emergence of Judicial Standards of Journalism*, 73 N.C. L. REV. 7, 12 (1994).

6. The ECHR was adopted under the auspices of the “Council of Europe,” which aims “to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and to facilitate their economic and social progress.” Statute of the Council of Europe, Europ. T.S. No. I art. 1a (London, May 5, 1949). This intergovernmental organization is larger than and distinct from the European Union, which has implemented its own human rights instruments. See STEVEN GREER, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ACHIEVEMENTS, PROBLEMS AND PROSPECTS* 47-55 (2006); see generally Olivier De Schutter, *The Two Europes of Human Rights: The Emerging Division of Tasks Between the Council of Europe and the European Union in Promoting Human Rights in Europe*, 14 COLUM. J. EUR. L. 509

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European Court jurisprudence over domestic legal orders in member nations, this treaty acts in much the same way as the Fourteenth Amendment of the U.S. Constitution, which incorporates the Constitution's Bill of Rights to apply to the states.⁷ Both have been instrumental in the protection of fundamental rights of individuals,⁸ most notably the right to freedom of expression.⁹

Unlike the First Amendment, the Convention does not expressly protect the freedom of the press. Article 10(1), protecting "freedom of expression," which includes the "freedom to hold opinions and to receive and impart information and ideas," has been the main vehicle for the incorporation of freedom of the press under the Convention.¹⁰ In the same way as the Supreme Court, but to a more significant extent, the European Court has reviewed claims of reputation damage recognized by domestic courts under national law with Article 10. This has led the European Court to revamp old censure legislation and, more broadly, to modify domestic legislation with small impressionistic strokes.¹¹

(2008) (addressing the tension between the Council's and the EU's protections of fundamental rights as well as their duplication of tasks).

7. Colin Warbrick, "Federal" Aspects of the European Convention on Human Rights, 10 MICH. J. INT'L L. 698, 700 (1989).

8. *Id.* at 704-08.

9. Colin Warbrick, "Federalism" and Free Speech: Accommodating Community Standards—the American Constitution and the European Convention on Human Rights, in IMPORTING THE FIRST AMENDMENT: FREEDOM OF EXPRESSION IN AMERICAN, ENGLISH AND EUROPEAN LAW 173, 173-195 (Ian Loveland ed., 1998).

10. Convention for the Prot. of Human Rights and Fundamental Freedoms, Europ. T.S. No. 5, art. 10(1) (Rome, Nov. 4, 1950) [hereinafter Convention Article 10]. For an overview of the scope of rights covered by Article 10, see Henry G. Schermers & Rick A. Lawson, *The Fundamental Rights of Communication*, in FUNDAMENTAL RIGHTS IN EUROPE AND NORTH AMERICA (EUROPEAN COURT OF HUMAN RIGHTS) 77, 77-93 (Albrecht Weber ed., 2003); KAREN REID, A PRACTITIONER'S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 342-366 (3rd ed. 2007); JEAN-FRANÇOIS RENUCCI, TRAITÉ DE DROIT EUROPÉEN DES DROITS DE L'HOMME 159-214 (2007)(Fr.).

11. See Lyn François, *La Preuve de la Diffamation en Droit Français et la Convention Européenne des Droits de l'Homme*, in REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 445, 445 (2005) (Fr.); P. VAN DIJK & G.J.H. VAN

This article highlights the standards developed by the European Court in cases in which members of the press are accused of some type of “damage to reputation” (the torts of defamation, libel, slander, calumny, etc.).¹² From this melting pot of legal traditions, the European Court has drawn several lines circumscribing the scope of freedom of the press in order to protect reputation. This has led journalists in member nations to attain a higher standard of ethical behavior in creating their work product, leading one author to describe it as “journalism worthy of the name.”¹³

Part I of this Article briefly presents the global functioning of the protection of freedom of the press in the Convention and highlights the methodology of Article 10 interpretation, which is used to locate the legal issues specifically related to reputation. The press is the vehicle for two distinct kinds of content: information and opinion. Part II discusses the legal regime with respect to the right to reputation in the information medium, while Part III analyzes the legal regime of this right in the opinion medium.

I. INTERPRETATION OF ARTICLE 10 IN LIGHT OF DAMAGE TO REPUTATION

A. *Structure and Methodology of Interpretation of Article 10*

Contrary to the U.S. Constitution’s First Amendment, which protects the freedoms of speech and press, the Convention’s

HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 557-85 (3rd ed. 1998).

12. As one author points out, “[t]he European practice surprises because it interprets the Convention in a way which carries the provisions of the treaty so deeply into the legal systems of the member States, favoring a European standard over diverse national ones.” Warbrick, *supra* note 7, at 699.

13. See generally 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) (discussing the importance of the press’s role as a public watchdog without the fear of facing repercussions from the government).

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freedom of expression provision, including its progeny freedom of the press, is not an absolute right and is explicitly limited in the Convention. Article 10 of the Convention provides:

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.¹⁴

On the basis of this article, the European Court has implemented a now long-standing, five-stage approach to determine whether a domestic court's conviction of an individual or a legal entity, be it civil or criminal, constitutes a violation of Article 10. The test is composed of the following steps that must be analyzed successively.

The first stage of the test concerns Article 10(1) and requires that the case relate to a right protected under Article 10 of the Convention. The second stage considers whether there has been an interference with the aforementioned right. Responsibility incurred for damage to reputation constitutes such an interference. For

14. Convention Article 10, *supra* note 10 (emphasis added).

instance, in *Constantinescu v. Romania*,¹⁵ the European Court found that a “conviction for libel constitutes an interference by the public authorities with the . . . exercise of freedom of expression for the purposes of Article 10 of the Convention.”¹⁶

Once an interference with a right protected under Article 10(1) has been established, a condition that is almost always undisputed in practice, the Court analyzes the case under Article 10(2). Article 10(2) has been interpreted to require that three questions¹⁷ be answered affirmatively to justify the interference under the Convention.¹⁸

First, has this interference been prescribed by law? With regard to this criterion, the Court has emphasized the “foreseeability” of the interference, which must be sufficiently precise, while still providing national courts a high degree of latitude in interpreting their domestic laws.¹⁹ Second, does this interference

15. 2000-VIII Eur. Ct. H.R. 25.

16. *Id.* at 42.

17. These three questions provide the remaining three stages (stages three to five) of the five-stage approach introduced above.

18. *Lingens v. Austria*, 103 Eur. Ct. H.R. 11, 34 (1986). In *Lingens*, the Court underlined that “[s]uch interference contravenes the Convention if it does not satisfy the requirements of paragraph 2 of Article 10. It therefore falls [sic] to be determined whether the interference was ‘prescribed by law’, had an aim or aims that is or are legitimate under Article 10 § 2 (art. 10(2)) and was ‘necessary in a democratic society’ for the aforesaid aim or aims.” *Id.* at 24.

19. *Tammer v. Estonia*, 2001-I Eur. Ct. H.R. 263, 275. In *Tammer*, the Court held that “[a] norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. . . . Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice [I]t is primarily the task of national authorities to apply and interpret domestic law.” *Id.* See also *Radio France v. France*, 2004-II Eur. Ct. H.R. 119, 147 (discussing the system of civil liability for defamatory remarks provided by Article 1382 of the French Civil Code); *Alithia Publ’g Co. Ltd. and Constantinides v. Cyprus*, App. No. 17550/03, paras. 47-52 (Eur. Ct. H.R. May 22, 2008), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=835591&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

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serve one of the “legitimate aims” recognized by the Convention? This condition is not frequently disputed before the Court since Article 10(2) expressly mentions that “the protection of the reputation or rights of others” serves a legitimate aim.²⁰ Interestingly, in developing this factor, the Court has also taken into account Article 8 of the Convention, which makes protecting the right to privacy a legitimate aim.²¹ The third question asks whether this interference is “necessary in a democratic society.” This condition is undoubtedly the most disputed in case law involving damage to reputation under Article 10. It has been recently considered by the European Court in the following terms:

The test of “necessity in a democratic society” requires the Court to determine whether the “interference” complained of corresponded to a “pressing social need,” whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient. In assessing whether such a “need” exists and what measures should be adopted to deal with it, the national authorities are left a certain margin of appreciation. This power of appreciation is not, however, unlimited but goes hand in hand with European supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10.²²

20. Convention Article 10, *supra* note 10, at Art. 10(2).

21. For instance, in *Radio France* the Court stated that “[t]he Court would observe that the right to protection of one’s reputation is of course one of the rights guaranteed by Article 8 of the Convention, as one element of the right to respect for private life.” 2004-II Eur. Ct. H.R. 119, 148.

22. *Tønsbergs Bland As and Haukom v. Norway*, App. No. 510/04, para. 81 (Eur. Ct. H.R. Mar. 1, 2007), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=814018&portal=hbk&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (citation omitted); *see also* *Lindon, Otchakovsky-Laurens and July v. France*, Applications Nos.

Although this passage suggests that the European Court has precisely defined a methodology of applying this last condition, its judgments have shown otherwise; the Court has employed a case-by-case approach rather than an overarching method to determine whether Article 10 has been breached, given the diversity of domestic regulations that are usually at stake. However, based on the jumble of case law, it is possible to discern the main axes of what could be described as a weighted balancing test,²³ considering that “[t]he Court is faced not with a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted.”²⁴

*B. Balancing Freedom of the Press and Right to Reputation:
Freedom of the Press in the Balance*

It is important to understand how much weight the European Court gives to the protection of the freedom of the press in order to comprehend fully how the weighted balancing test functions. In its landmark judgment on Article 10 in 1976, *Handyside v. United Kingdom*,²⁵ the European Court stated in a much-quoted passage that “[f]reedom of expression constitutes one of the essential foundations of such a society, one of the basic

21279/02 and 36448/02, para. 45 (Eur. Ct. H.R. Oct. 22, 2007), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=824752&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (discussing how national authorities have some discretion in deciding when it is necessary to restrict speech, but ultimately, the European Court has supervisory jurisdiction to review these decisions and overturn them if they do not correspond with the standard provided in Article 10).

23. Loukis G. Loucaides, *Freedom of Expression and the Right to Reputation*, in *THE EUROPEAN CONVENTION ON HUMAN RIGHTS: COLLECTED ESSAYS* 143, 152 (2007) (pointing out that “in defamation cases the Court has been placing freedom of speech in the position of a right expressly guaranteed by the Convention while the protection of reputation has been simply considered as a ground of permissible restriction to the right in question”).

24. *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) at 41 (1979).

25. 24 Eur. Ct. H.R. (ser. A) (1976).

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conditions for its progress and for the development of every man” and is applicable “not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive . . . but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society.’”²⁶ The Court emphasized its position in *Sunday Times v. United Kingdom* in 1979, finding that “[t]hese principles are of particular importance as far as the press is concerned.”²⁷ As the main vehicle for the dissemination of information and ideas, the press has the “vital role of ‘public watchdog,’”²⁸ and thus its protection is a crucial part of the protection of the freedom of expression.

The abundant press-related cases decided in the wake of *Sunday Times* have given the Court opportunity to extend significantly and clarify what content is protected under the freedom of expression. According to the Court in *Jersild v. Denmark*,²⁹ this right has a wide application that covers both print and audiovisual media.³⁰ However, ten years later the Court found it relevant to note that the latter has been said to have “a much more immediate and powerful effect than the print media.”³¹ The Convention therefore protects the expression of any information debated in a democratic society, leaving open almost unlimited possibilities for content to be published or broadcast by the media.³²

26. *Id.* at 23.

27. *Sunday Times*, 30 Eur. Ct. H.R. (ser. A) at 40.

28. *Observer and the Guardian v. United Kingdom*, 216 Eur. Ct. H.R. (ser. A) at 30 (1991) (“Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of ‘public watchdog.’”).

29. 19 Eur. Ct. H.R. 1 (1994).

30. *Id.* at 26.

31. *Pedersen and Baadsgaard v. Denmark*, App. No. 49017/99, para. 79 (Dec. 17, 2004), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=709500&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

32. See Jean-Manuel Larralde, *L’Article 10 de la Convention Européenne des Droits de l’Homme et la Liberté de la Presse*, 69 *REVUE TRIMESTRIELLE DES DROITS DE L’HOMME* 39, 44 (2007) (Fr.).

The Court has interpreted this public interest in access to information very broadly, finding that it includes not only debate on political and social issues, but also topics related to foreign countries,³³ health and scientific discoveries,³⁴ history and religion,³⁵ and information on private corporations and their executives.³⁶

Protecting this key function of the press, according to the Court, has left a small “margin of appreciation” for states, and while interference with this function is not prohibited per se, it is subject to strict scrutiny by the Court.³⁷ Its broad scope suggests, however, that there is a progressive demarcation between both the public and private spheres.

33. See *Colombani v. France*, 2002-V Eur. Ct. H.R. 25, 28 (upholding the French newspaper *Le Monde*'s publication of an article revealing the involvement of the Moroccan royal family's entourage in cannabis trafficking).

34. See *Bergens Tidende v. Norway*, 2000-IV Eur. Ct. H.R. 371, 374 (invalidating damages awarded against a newspaper for publishing articles on the dissatisfied patients of a plastic surgeon); *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) at 39-42 (1979) (addressing an injunction restraining the publication of an article related to the noxiousness of drugs containing thalidomide).

35. See *Giniewski v. France*, 2006-I Eur. Ct. H.R. 277, 291 (finding the conviction of an author of a newspaper article that alleged a connection between the Christian doctrine and the origins of the Holocaust to be an “‘interference’ in the exercise of . . . freedom of expression”).

36. See *Fressoz and Roire v. France*, 1999-I Eur. Ct. H.R. 1, 4 (finding that a private interest in “[p]reserving fiscal confidentiality” was insufficient to override the public interest in freedom of the press and public debate, which in this case occurred through the *Canard Enchaîné*'s publication of information about the salary of the chairman and executive director of the car manufacturer Peugeot based on his tax forms); *Goodwin v. United Kingdom*, 1996-II Eur. Ct. H.R. 484, 485 (finding that a private corporation's interest in “unmasking [a] disloyal employee” did not outweigh the public interest in protection of a journalist's source).

37. See *Observer and the Guardian v. United Kingdom*, 216 Eur. Ct. H.R. 3, 30 (1991). In this case, the Court underlined that in the case of Article 10, the assessment of this margin of appreciation is not “limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was ‘proportionate to the legitimate aim pursued’ and whether the reasons adduced by the national authorities to justify it are ‘relevant and sufficient.’” *Id.*

Article 10 protects the dissemination of information and opinions, two types of content that could affect individuals' reputations. Although embedded in the same article, their legal treatment differs under the Convention, and accordingly, the Court has developed different standards for information and for opinions. Both standards recognize the need to factor in the subject's right to reputation. The Court pointed out in *Lingens v. Austria* that "a careful distinction needs to be made between facts and value judgments"³⁸ to the extent that "[t]he existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof."³⁹

II. DISSEMINATION OF INFORMATION AND THE RIGHT TO REPUTATION

The Court has frequently pointed out that the mission of the press is to "provide accurate and reliable information,"⁴⁰ and it is obvious that freedom of expression cannot shield the press from penalties for damage to reputation caused by the dissemination of false information. However, the standards developed by the European Court go beyond a simplistic dichotomy between false and true statements.

A. *The Newsworthiness of Facts*

1. An Issue of Applicability of Article 10

The Court has suggested that the newsworthiness of the facts at stake determines the applicability of Article 10 and that the publication of information of a strictly private nature should not be protected under freedom of expression unless it is proven that such information contributes to the public debate. In *Von Hannover v.*

38. *Lingens v. Austria*, 103 Eur. Ct. H.R. 11, 28 (1986).

39. *Id.*

40. *Colombani v. France*, 2002-V Eur. Ct. H.R. 25, 43; *Goodwin*, 1996-II Eur. Ct. H.R. at 500; *see also Fressoz*, 1999-I Eur. Ct. H.R. at 24 (mentioning "reliable and precise information").

Germany,⁴¹ a case related to the publication of photos showing Princess Carolina von Hannover with a French actor in several German tabloids, the Court considered that

a fundamental distinction needs to be made between reporting facts . . . capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions . . . and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions.⁴²

It specified that this right to be informed “in certain special circumstances, can even extend to aspects of the private life of public figures, particularly where politicians are concerned.”⁴³

2. The Requirement of the Contribution to the Public Debate

The contribution to the public debate criterion was discussed in *Éditions Plon v. France*,⁴⁴ a case involving the publication of private medical information of the former French president, who concealed his early cancer diagnosis for several years. The Court pointed out that “the book was published . . . on a matter of public interest, in particular the public’s right to be informed about any serious illnesses suffered by the head of State”⁴⁵ and determined that “freedom of the ‘press’ was thus at stake.”⁴⁶ This judgment indicates that the publication of private information on public officials may be permitted to the extent that such information is closely connected to the officials’ pre-eminent function.

Thus, the Court has permitted the dissemination of information concerning the polemical political past of a prime

41. 2004-VI Eur. Ct. H.R. 41.

42. *Id.* at 70.

43. *Id.*

44. 2004-IV Eur. Ct. H.R. 39.

45. *Id.* at 68-69.

46. *Id.* at 69.

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minister⁴⁷ or the salaries unlawfully earned by someone who is “not just a local politician of limited importance but a member of the Austrian Parliament, as well as a member of the European Parliament.”⁴⁸ The Court has found, however, that the publication of photographs showing the lifeless body of a public official lying on the ground just after he was assassinated, despite the persistent objection of the family, is protected under Article 8 since they concern “certain events in the life of a family [that] must be given particularly careful protection.”⁴⁹

47. See *Feldek v. Slovakia*, in which the Court essentially allowed the publication of information about the “fascist past” of the Slovak Minister of Culture and Education, as it was not without factual basis. The Court considered this statement to be a “value judgment,” but emphasized that it was “satisfied that the value judgment made by the applicant was based on information which was already known to the general public.” *Feldek*, 2001-VIII Eur. Ct. H.R. 85, 109-110. As the Court considered this statement “part of a political debate on matters of general and public concern relating to the history of Slovakia which might have repercussions on its future democratic development,” it can therefore be argued that the underlying information on which the statement is based is covered and protected by the Article 10. *Id.* at 108.

48. *Krone Verlag GmbH & Co. KG v. Austria*, App. No. 34315/96, para. 29 (Eur. Ct. H.R. Feb. 26, 2002), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=698050&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>. Although this case concerned mainly the opportunity to publish large pictures of this politician accompanying the article, the Court underlined that,

A politician is certainly entitled to have his reputation protected, even when he is not acting in his private capacity, but the requirements of that protection have to be weighed against the interests of the open discussion of political issues In the present case, . . . [t]he subject matter of the published articles concerned his financial situation and the accusation that not all of his income had been earned lawfully. This is without doubt a matter of public concern which does not fall wholly within his private sphere.

Id. at paras. 35-36.

49. *Hachette Filipacchi Associés v. France*, App. No. 71111/01, para. 46 (Eur. Ct. H.R. June 14, 2007), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=818894&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>. The Court further

B. The Accuracy of Facts

1. Facts Reported by Journalists

In order to enjoy the protection of Article 10, the facts published or broadcasted must not only be newsworthy, but must also be accurate, since misrepresentation of reality can damage reputations. Journalists must therefore take all necessary steps to verify the truth of allegations. In *Pedersen and Baadsgaard v. Denmark*,⁵⁰ the Court dealt with the defamation convictions of two journalists who strongly criticized a police investigation of a murder. The journalists alleged that certain named and photographed police officials suppressed important evidence during the investigation. The Court underlined the “ordinary journalistic obligation to verify a factual allegation”⁵¹ and stated that “special grounds are required before the media can dispense with their ordinary obligation to verify factual statements that defame private individuals.”⁵² Pointing out the shortcomings and bias of the journalists’ presentation, the Court supported the Danish Supreme Court’s finding that the “applicants lacked a sufficient factual basis for the allegation,”⁵³ despite the fact that the topic was considered “of serious public interest.”⁵⁴

The Court has affirmed this position repeatedly in cases related, for instance, to false allegations of corruption of public officials,⁵⁵ failure to verify a patient’s allegations of malpractice

added that “[t]he death of a close relative and the ensuing mourning are a source of intense grief and must sometimes lead the authorities to take the necessary measures to ensure that the private and family lives of the persons concerned are respected.” *Id.*

50. App. No. 49017/99, para. 79 (Eur. Ct. H.R. Dec. 17, 2004), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=709500&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

51. *Id.* at para. 78.

52. *Id.*

53. *Id.* at para. 92.

54. *Id.* at para. 71.

55. See *Stângu and Scutelnicu v. Romania*, App. No. 53899/00, (Eur. Ct. H.R. Jan. 31, 2006), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html>

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committed by a plastic surgeon,⁵⁶ or violations of the right to the presumption of innocence.⁵⁷

&documentId=791926&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649 (finding a lack of good faith and factual basis of allegations of corruption of a senior police officer and his wife, a judge, although the article was published within the framework of the broader debate of corruption in the Romanian society).

56. See *Verdens Gang and Aastad Aase v. Norway*, 2001-X Eur. Ct. H.R. 441, 444 (refusing to consider the appeal of a conviction of a periodical and journalist for defamation, as the Court was not satisfied that the newspaper took sufficient steps to fulfill its obligation to verify the truth of the allegation in question).

57. See, e.g., *A. v. Norway*, App. No. 28070/06, (Eur. Ct. H.R. Apr. 9, 2009), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=849169&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (finding a violation of the applicant's right to protection of reputation following the publication in a newspaper of two articles on an investigation of a murder alleging that he was the main suspect, considering his former convictions for murder and assault, and mentioning sufficient elements to identify him). The Court underlined that "[t]here can be little doubt that the disputed publication entailed a particularly grievous prejudice to the applicant's honour and reputation that was especially harmful to his moral and psychological integrity and to his private life" and that it was "therefore not satisfied that the national courts struck a fair balance between the newspaper's freedom of expression under Article 10 and the applicant's right to respect for his private life under Article 8." *Id.* at paras. 73-74. Additionally *Constantinescu v. Romania*, 2000-VIII Eur. Ct. H.R. 25., concerned the conviction of a Romanian national for criminal defamation after a journalist reported his comments, as the president of a teachers' trade union, declaring that three teacher members of the previous trade-union leadership refused to return money belonging to the union and that a criminal complaint had been lodged against them for being "*delapidatori*" (receivers of stolen goods). *Id.* at 33. The Romanian courts found defamatory intent, reasoning that while making his remarks in the presence of journalists, the Romanian national should have been aware that the prosecution dropped the charges against the three teachers. *Id.* at 34. Although the Court mentioned that the context in which these comments were made "was within a debate on the independence of the unions and the functioning of the courts, and was thus of public interest," it considered that the applicant "had a duty to react within limits fixed, *inter alia*, in the interest of 'protecting the reputation or rights of others,' including the presumption of innocence." *Id.* at 43. The Court pointed out that "the term '*delapidatori*,' which refers to persons found guilty of the offence of fraudulent conversion, was of a kind to offend the three teachers because they had not been convicted by a court. The Court considered that

2. Journalists' Reliance on External Sources

The Court has developed a different approach when the information is not directly gathered by journalists, but instead comes from reliable sources. However, this increased latitude given to journalists has encountered some resistance from a minority of the Court. The Court usually admits that journalists may rely on external sources of information. In *Colombani v. France*,⁵⁸ a reporter and newspaper director for the French newspaper *Le Monde*, who were convicted by the French criminal courts for insulting a foreign head of state after the publication of an article alleging the involvement of the entourage of the Moroccan royal family in the traffic of hashish, appealed to the European Court.⁵⁹ The newspaper reporter relied on a report by the Geopolitical Drugs Observatory (OGD) that the European Court had previously requested in the wake of Morocco's application for membership in the European Union. Acknowledging that the information contained in the report "was not disputed and its account of the allegations in issue could legitimately be regarded as credible,"⁶⁰ the Court pointed out that "it was reasonable for *Le Monde* to rely on the OGD's report, without needing to check for itself the accuracy of the information [the report] contained"⁶¹ and opined more broadly that "the press should normally be entitled, when contributing to public debate on matters of legitimate concern, to rely on the content of official reports without having to undertake independent research."⁶²

"the applicant could . . . have expressed his criticism—and thus contributed to free public debate of union affairs—without using the word '*delapidatori*.'" *Id.* In the end, only the author of the remarks was convicted, and the journalist who reported the remarks was not affected by the criminal charges. However, the European Court has drawn lines in this case transposable to journalists, who should consider the presumption of innocence as a crucial legitimate interest of the state entering within the scope of the exceptions to Article 10(2).

58. 2002-V Eur. Ct. H.R. 25.

59. *Id.* at 32-34.

60. *Id.* at 43.

61. *Id.* at 44.

62. *Id.* at 43-44.

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The reputation of the underlying source seems to be an important yardstick. For instance, the Court has determined that journalists do not have an obligation to check the veracity of official documents such as pre-trial records⁶³ or information published in a serious magazine.⁶⁴ In contrast, journalists cannot rely on information included in the press release of a political party without verifying the accuracy of the information.⁶⁵

The judgment in *Bladet Tromsø and Stensaas v. Norway*⁶⁶ has raised even more controversy. This case arose from defamation proceedings following the publication of articles alleging that certain seal hunters carried out their activities using illegal hunting methods.⁶⁷ The articles relied on a report (the “Lindberg report”) and statements issued by Odd F. Lindberg, who was appointed by

63. See generally *Selistö v. Finland*, App. No. 56767/00, para. 60 (Eur. Ct. H.R. Nov. 16, 2004), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=707763&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (arising from the conviction of a journalist for defamation following the publication of two articles alleging that a patient died in a hospital due to the surgeon’s alcohol consumption the night preceding the operation). The articles in question relied on the pre-trial records for their factual bases. *Id.* The European Court held that, because “the depicted events and quotations . . . were derived from the police’s pre-trial record, which was a public document[,] . . . no general duty to verify the veracity of statements contained in such documents can be imposed on reporters and other members of the media, who must be free to report on events based on information gathered from official sources.” *Id.* at 60.

64. See *Radio France v. France*, 2004-II Eur. Ct. H.R. 119, 152 (noting that the dissemination of information that relies on “a detailed article, backed up by documentary research, and an interview, to be published in a weekly magazine whose standing as a serious publication is not open to doubt”).

65. See *Standard Verlagsgesellschaft mbH (No. 2) v. Austria*, App. No. 37464/02, para. 42 (Eur. Ct. H.R. Feb. 22, 2007), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=813864&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (holding that a newspaper that had relied on a summary of an expert opinion provided in a press release of a political party “should have consulted this opinion itself in order to comply with the obligation of journalistic diligence instead of relying without any further research on the Socialist Party’s press release”).

66. 1999-III Eur. Ct. H.R. 289.

67. *Id.*

the Ministry of Fisheries as seal hunting inspector.⁶⁸ The Lindberg report was kept confidential by the Ministry, since it contained allegations of offenses.⁶⁹ It must be noted that prior to this position, Lindberg was a freelance journalist who had published many articles in the newspaper at issue, *Bladet Tromsø*, about his visits on seal hunting vessels.⁷⁰

The Court implemented a two-step analysis in order to determine whether there were “any special grounds in the present case for dispensing the newspaper from its ordinary obligation to verify factual statements that were defamatory of private individuals.”⁷¹

First, the Court assessed “the nature and degree of the defamation at hand.”⁷² It considered that, despite the shocking and serious nature of the accusations,⁷³ “the potential adverse effect of the impugned statements on each individual seal hunter’s reputation or rights was significantly attenuated by several factors.”⁷⁴ One factor was that such statements “could be understood by readers as having been presented with a degree of exaggeration.”⁷⁵ Another factor was that even though the statements did not mention these individuals by name, they were potentially identifiable.⁷⁶

68. *Id.* at 299-301.

69. *Id.* at 299.

70. *Id.* at 335 (Palm, Fuhrmann, and Baka, J.J., dissenting).

71. *Id.* at 325.

72. *Id.*

73. Notably, these shocking accusations included “that seals had been skinned alive and that furious hunters had beaten up Mr. Lindberg and threatened to hit him with a gaff.” *Id.* at 325.

74. *Id.* at 325-26.

75. *Id.* at 325.

76. The Court considered that “the criticism was not an attack against all the crew members or any specific crew member” and noted that “while *Bladet Tromsø* publicised the names of the ten crew members whom Mr. Lindberg had exonerated, it named none of those accused of having committed the reprehensible acts.” *Id.* The Court could potentially have considered that they were easily identifiable by deduction. This issue was part of the criticisms laid down in the dissenting opinion mentioned *infra* notes 83-84 and accompanying text.

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Second, the Court determined “the extent to which the newspaper could reasonably regard the Lindberg report as reliable with respect to the allegations in question.”⁷⁷ Despite the potential bias implied by the report’s author, who had previously authored several articles in the same newspaper,⁷⁸ the Court found that the “trustworthiness of the Lindberg report” allowed it to determine that “the report had been drawn up by Mr. Lindberg in an official capacity as an inspector appointed by the Ministry of Fisheries.”⁷⁹ The Court also considered the existence of “grounds in the present case for dispensing the newspaper from its ordinary obligation to verify factual statements that were defamatory of private individuals.”⁸⁰ As a result, it held that “the press should normally be entitled, when contributing to public debate on matters of legitimate concern, to rely on the contents of official reports without having to undertake independent research.”⁸¹ The European Court has therefore relied on a purely “external” presumption of validity, determined here by the fact that the information is stamped as “official,” without requiring an assessment of an “internal” presumption of validity. In this case, the internal presumption would stem from the fact that the author of the report published articles in the same journal on the same topic before.

The standards set forth by the European Court have established a mountain of protection that is too high for those targeted by defamatory statements to climb. As such, several members of the Court have resisted the adoption of these standards. The three judges dissenting in *Bladet Tromsø* criticized the majority’s application of its two-step analysis, emphasizing both the weakness of the assessment of the harm caused by the

77. *Id.*

78. *Id.* at 326 (“The Court does not attach significance to any discrepancies, pointed to by the Government, between the report and the publications made by Mr Lindberg in *Bladet Tromsø* one year before in quite a different capacity, namely as a freelance journalist and an author.”).

79. *Id.*

80. *Id.* at 325.

81. *Id.*

defamatory statements⁸² as well as the “unconvincing . . . treatment of the question concerning the ‘reasonableness’ of the paper’s reliance on the Lindberg report.”⁸³ The dissent found it was not an “official report” and that the newspaper knew it was not official when it relied on it because it postponed publication due to the report’s discussion of allegations of wrongdoing. Additionally, the fact that Mr. Lindberg, having published several articles on the same issue, “did not have the traditional profile of a Ministry inspector” was further evidence that the newspaper knowingly took “the risk of exposing itself to legal action by publishing the articles without taking any steps whatsoever to check the veracity of the claims being made.”⁸⁴

The dissent therefore raised serious doubts regarding the standard of external presumption of validity. The presumption enables journalists to avoid sufficient verification of serious allegations that potentially affect another’s reputation because they are labeled as “official,” regardless of the overall objectivity of the underlying information. According to a former European Court judge, it reflects an “excessive sensitivity” and grants an “over-protection in respect of interferences with freedom of expression as compared with interferences with the right to reputation.”⁸⁵

III. DISSEMINATION OF OPINIONS AND THE RIGHT TO REPUTATION

As mentioned above, the European Court held in *Lingens* that “the truth of value-judgments is not susceptible of proof,”⁸⁶ recalling the words of Justice Powell that “[u]nder the First Amendment there is no such thing as a false idea.”⁸⁷ When it comes to the dissemination of ideas, the standard of conduct for

82. *Id.* at 331 (Palm J., Fuhrmann, J., and Baka, J., dissenting) (arguing “that the Court does not give sufficient weight to the reputation of the seal hunters”).

83. *Id.*

84. *Id.*

85. Loucaides, *supra* note 23, at 156.

86. *Lingens v. Austria*, 103 Eur. H.R. 11, 28 (1986).

87. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

journalists is different from the standard applicable to the dissemination of facts, although the public interest focus of Article 10 remains highly relevant.

A. Freedom of Journalists to Disseminate External Ideas

1. The Freedom not to Distance from the
Content of a Quotation

Journalists, widely recognized as the main vehicle for the dissemination of information, cannot, as a matter of principle, be held responsible for any damage to reputation that results from reporting ideas. As the Court stated in *Thoma v. Luxembourg*,⁸⁸ “[a] general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press’s role of providing information on current events, opinions and ideas.”⁸⁹ As a result, journalists are not required to counterbalance statements that potentially abridge the reputations of others.

This standard applies to defamatory statements and even to some of the most questionable ideas. *Jersild v. Denmark*⁹⁰ gives a strong indication of the degree of freedom enjoyed by journalists. This case arose from the conviction of a Danish journalist who interviewed members of an extreme-right group of young people that aided and abetted the dissemination of racist statements.⁹¹ Maintaining that this interview was broadcast “as part of a serious Danish news programme and was intended for a well-informed audience,”⁹² the Court held that:

News reporting based on interviews, whether edited or not, constitutes one of the most

88. 2001-III Eur. Ct. H.R. 69.

89. *Id.* at 88.

90. 19 Eur. Ct. H.R. 25 (1994).

91. *Id.*

92. *Id.*

important means whereby the press is able to play its vital role of “public watchdog”. . . [and the] punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.⁹³

When it comes to the dissemination of facts by the press, the distinction between the legal treatment of official and non-official sources of information is critical; however, there is no such distinction concerning the dissemination of ideas. While the *Jersild* judgment hinted that “particularly strong reasons” might potentially justify the imposition of responsibility, this exception seems narrow, pointing out that in this case, it was “undisputed that the purpose of the applicant in compiling the broadcast in question was not racist.”⁹⁴ Therefore, the significant latitude journalists enjoy when reporting value judgments might end where they acquiesce, endorse, or support the contentious statements.

2. The Limits of the Freedom not to Distance from the Content of a Quotation

The limits of this freedom were discussed recently in *Lindon, Otchakovsky-Laurens and July v. France*.⁹⁵ This case arose from the publication of the novel *Le Procès de Jean-Marie Le Pen* (“Jean-Marie Le Pen on Trial”) which is based on the real-life murder of a young North African man and the subsequent murder trial of a Front National militant.⁹⁶ The book alleges the

93. *Id.*

94. *Id.* at 26.

95. *Lindon, Otchakovsky-Laurens and July v. France*, Applications Nos. 21279/02 and 36448/02, para. 14 (Eur. Ct. H.R. Oct. 22, 2007), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=824752&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

96. *Id.* at paras. 10-11.

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responsibility of the Front National, a far-right party, and more specifically focuses on its leader, Jean-Marie Le Pen, who appeared in the book under his real name and was described as “the chief of a gang of killers” and likened to Al Capone.⁹⁷ According to the Paris Court of Appeal, several passages of the book exceeded the boundaries of freedom of expression, and thus the author and publisher were found guilty of defamation.⁹⁸

After the conviction by the criminal court, the newspaper *Libération* published a petition signed by almost one hundred contemporary writers who questioned the conviction and, as part of its text, reproduced *in extenso* some of the contentious passages.⁹⁹ Because of the newspaper’s reproduction of these defamatory passages, the director of the newspaper was also found guilty of defamation by French courts, which explained that “[t]he polemical aim of a text cannot absolve it from all regulation of expression.”¹⁰⁰ Following their convictions in the French courts, the director of the newspaper, the author, and publisher of the novel appealed to the European Court, claiming a violation of Article 10 of the Convention.¹⁰¹

The Court found that the convictions and penalties imposed on the author and the publisher by French courts were neither unfounded nor disproportionate because the contentious statements overstepped the permissible limits of freedom of expression.¹⁰² With regard to the responsibility of the newspaper director, the Court recognized that the petition “was published in a context of information and ideas imparted on a matter of public

97. *Id.* at paras. 14, 18.

98. *Id.* at paras. 16-18. An appeal to the Court of Cassation was subsequently dismissed. *Id.* at para. 20.

99. *Id.* at para. 21.

100. *Id.* at para. 25 (citing the *Court d’Appel de Paris*’ judgment). The Court further justified its denial of the director’s “[defense] of good faith” on grounds that “[t]he authors of the text [at] issue had no other aim than that of showing their support for Mathieu Lindon by repeating with approval, out of defiance, all the passages that had been found defamatory by the court, and without even really calling into question the defamatory nature of the remarks.” *Id.*

101. *Id.* at para. 31.

102. *Id.* at paras. 57-60.

interest.”¹⁰³ However, it determined that the newspaper did not act in good faith when it published its column “repeating those allegations and remarks with approval, den[ying] that the extracts were defamatory in spite of a finding to that effect.”¹⁰⁴ It found “that it was not necessary to reproduce them in order to give a complete account of the conviction of the first two applicants and the resulting criticism.”¹⁰⁵

This decision faced strong resistance from four dissenting judges who wrote, *inter alia*, that the newspaper’s director “could not seriously be criticised for informing the public about the protest movement that had emerged following the judgment . . . nor could he be criticised for failing to correct, by comments of his own, the allegations regarded as defamatory.”¹⁰⁶ The dissenting judges rightly pointed out that doing otherwise would contradict the fundamental principle that journalists should not have “to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation.”¹⁰⁷ The dissenters warned that such a stance is “not reconcilable with the press’s role of providing information on current events, opinions and ideas.”¹⁰⁸

B. Dissemination by Journalists of their Own Ideas

In *Lingens*, the Court stated that “[w]ilst the press must not overstep the bounds set, *inter alia*, for the ‘protection of the reputation of others,’ it is nevertheless incumbent on it to impart information and ideas on political issues just as on those in other

103. *Id.* at para. 62.

104. *Id.* at para. 65.

105. *Id.* at para. 66.

106. *Id.* at para. III(3) (Rozakis, Bratza, Tulkens, and Šikuta, J.J., dissenting).

107. *Id.*

108. *Id.* Beyond the dissent, the good faith criterion discussed in this judgment provides an indication of what is expected of journalists when they disseminate ideas, an issue that has given rise to an abundant amount of case law. See *supra* notes 55-57 and accompanying text for additional examples of how the Court has used the good faith criterion when evaluating the conduct and intent of journalists.

areas of public interest.”¹⁰⁹ Therefore, although they enjoy great latitude because ideas do not require proof, journalists do not abandon their general duty to comply with basic standards of professional conduct when they impart value judgments.¹¹⁰ In this respect, the freedom of the press is restricted in two ways: by the nature of the person targeted and through the content of the idea imparted.

1. Limitations on the Individuals Targeted

The freedom of the press to impart value-judgments varies with the nature of the individual whose reputation is at stake. The European Court has restricted journalists’ latitude when it comes to private figures, while relaxing its scrutiny for public ones, especially politicians.

As early as 1986, the Court pointed out that “[f]reedom of the press . . . affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders,”¹¹¹ and therefore “[t]he limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual.”¹¹² According to the Court, the rationale for such differentiation lies in both the necessity of open debate on public issues as well as the conscious choice of the politician who “inevitably and knowingly lays himself open to close scrutiny of his every word and deed . . . and . . . must consequently display a greater degree of tolerance.”¹¹³

109. *Lingens v. Austria*, 103 Eur. Ct. H.R. 11, 26 (1986).

110. *See supra* notes 38-39 and accompanying text.

111. *Lingens*, 103 Eur. Ct. H.R. at 26.

112. *Id.*

113. *Id.*; *see also* *Oberschlick v. Austria* (No. 2), 1997-IV Eur. Ct. H.R. 1266, 1275 (citing *Lingens* in its decision). In a subsequent case, the Court more precisely stated that “in choosing their profession, [the politicians] laid themselves open to robust criticism and scrutiny; such is the burden which must be accepted by politicians in a democratic society.” *Ukrainian Media Group v. Ukraine*, App. No. 72713/01, para. 67 (Eur. Ct. H.R. Mar. 29, 2005), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=722307&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

The issue of the identification of the category of public figures has been discussed by the Court in *Janowski v. Poland*.¹¹⁴ This case arose from the conviction of a journalist who verbally insulted municipal guards who were acting in an official capacity. Although this case did not expressly concern the issue of freedom of the press, the European Court noted that “it cannot be said that civil servants knowingly lay themselves open to close scrutiny of their every word and deed to the extent to which politicians do,” and therefore they should not “be treated on an equal footing with [politicians] when it comes to the criticism of their actions.”¹¹⁵ Although the criticism cannot be as intense as it could be for politicians, the Court has suggested that a justified criticism of public servants would be within the realm of freedom of the press; however, the criticism would be subject to a certain level of scrutiny.¹¹⁶

It must be noted that the Court has not limited *ratione personae*, the public figures falling under the scope of Article 10, to national figures alone; it has also included those involved at the regional¹¹⁷ and local¹¹⁸ levels, as well as foreign heads of state.¹¹⁹

114. 1999-I Eur. Ct. H.R. 187.

115. *Id.* at 201. In this case, the Court upheld the conviction of a journalist who did not act as such, and determined that “civil servants must enjoy public confidence in conditions free of undue perturbation if they are to be successful in performing their tasks and it may therefore prove necessary to protect them from offensive and abusive verbal attacks when on duty.” *Id.*

116. *See id.* The *Janowski* Court pointed out that “[i]n the present case the requirements of such protection do not have to be weighed in relation to the interests of the freedom of the press or of open discussion of matters of public concern since the applicant’s remarks were not uttered in such a context.” *Id.* Therefore, this has led to increased criticisms of civil servants regarding the performance of their duties.

117. *See, e.g.,* Standard Verlagsgesellschaft mbH (No. 2) v. Austria, App. No. 37464/02, (Eur. Ct. H.R. Feb. 22, 2007), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=813864&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (concerning the Regional Governor of Carinthia, Austria).

118. *See, e.g.,* Długolecki v. Poland, App. No. 23806/03 (Eur. Ct. H.R. Feb. 24, 2009), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&>

2. Limitations on the Content of Ideas Imparted

“The limits of permissible criticism [being] narrower in relation to a private citizen than in relation to politicians or governments”¹²⁰ have resulted in greater freedom for journalists to express value judgments about politicians than about private citizens. Journalists, therefore, can use “a degree of exaggeration, or even provocation,”¹²¹ “strong, polemical, sarcastic language,”¹²² or “immoderate statements”¹²³ when writing about politicians. This stance corresponds with the U.S. Supreme Court’s *New York Times Co. v. Sullivan* decision, in which the Court stated that “against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,” protected First Amendment speech “may well include

documentId=847661&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649 (concerning the defamation of a mayor).

119. *See, e.g., Colombani v. France*, 2002-V Eur. Ct. H.R. 25, 32-34 (concerning an insult to the King of Morocco). The Court, however, pointed out “that the general public, including the French public, had a legitimate interest in being informed of the European Commission’s views on a problem such as drug production and trafficking in Morocco, a country which had applied for admission to the European Union and which, in any event, enjoyed close relations with the member States, particularly France.” *Id.* at 43. This assertion indicates that a minimum connection is necessary between the foreign public official and the domestic public debate.

120. *Tammer v. Estonia*, 2001-I Eur. Ct. H.R. 263, 280.

121. *Stoll v. Switzerland*, App. No. 69698/01, para. 148 (Eur. Ct. H.R. Dec. 10, 2007), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=826926&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>; *Lindon, Otchakovsky-Laurens and July v. France*, App. No. 21279/02 and 36448/02 at para. 62 (Eur. Ct. H.R. Oct. 22, 2007), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=824752&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

122. *Ukrainian Media Group v. Ukraine*, App. No. 72713/01, para. 67 (Eur. Ct. H.R. Mar. 29, 2005), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=722307&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

123. *Długolecki*, App. No. 23806/03 at para. 37.

vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”¹²⁴

To the extent that value judgments are supported with a “sufficient factual basis,”¹²⁵ journalists enjoy significant latitude while imparting opinions about public figures. For instance, the press was allowed to label the political activism of a former Slovakian Minister who was aligned with a far-right party as “fascist” insofar as such a statement “contained harsh words, but was not without a factual basis” and was made “in good faith and in pursuit of the legitimate aim of protecting the democratic development of the newly established State.”¹²⁶ Likewise, the right to reputation should not prevent journalists from using irony and metaphors. For example, journalists were allowed to use the phrase “Bonnie & Clyde” to describe a fugitive couple flying from Austria to Brazil when one of the two protagonists, also a member of the Austrian Parliament, was suspected of offenses of aggravated fraud and fraudulent conversion.¹²⁷

124. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

125. *Ukrainian Media Group*, App. No. 72713/01 at para. 42 (explaining that “the proportionality of the interference may depend on whether there exists a sufficient factual basis for the impugned statement”).

126. *Feldek v. Slovaki*, 2001-VIII Eur. Ct. H.R. 85, 109.

127. *Wirtschafts-Trend Zeitschriften-Verlagsgesellschaft mbH. (No. 3) v. Austria*, Application Nos. 66298/01 and 15653/02, paras. 44-47 (Eur. Ct. H.R. Dec. 13, 2005), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=790931&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (discussing the details of a case where the owner and publisher of a magazine appealed a conviction for defamation against Mrs. G., the cohabité of an Austrian politician who was facing criminal charges, when the publication referred to Mrs. G. as “Bonnie,” suggesting that she was involved in the criminal activity). The Court considered that “[g]iven the article’s content and ironical style and the fact that the term ‘Bonnie’ was always used together with its correlative ‘Clyde’ . . . the average reader would have understood ‘Bonnie and Clyde’ as a synonym for a couple on the run.” *Id.* at para. 44. However, the Court added that “Mrs. G., by accompanying Mr. R., a member of parliament whose criminal proceedings were a subject of great public interest, in his escape, had entered the public arena and she, therefore, had to bear the consequences of her decision.” *Id.* at para. 47. Thus, the Court reversed the publishing company’s conviction on the grounds that it was “not based on sufficient reasons for the purposes of Article 10.” *Id.* at para. 45.

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In contrast, freedom of the press cannot shield journalists from spreading unjustified insinuations,¹²⁸ or from using gratuitously insulting language. This principle applies with even greater force when journalists refer to matters of the private lives of public figures.¹²⁹ In *Tammer v. Estonia*, the Court dealt with the conviction of a journalist for the offense of insult under the Estonian Criminal Code.¹³⁰ During an interview, the journalist described a female public figure who worked with and then married the former Prime Minister of Estonia as “[a] person breaking up another’s marriage . . . [and] an unfit and careless mother deserting her child.”¹³¹ The Court determined that such remarks “amounted to value judgments couched in offensive language, recourse to which was not necessary in order to express a ‘negative’ opinion [and] that the applicant could have formulated his criticism . . . without resorting to such insulting expressions.”¹³²

Interestingly, weighing the right to reputation against the freedom of the press implies that the Court will take into consideration the specific reputation of the private figure on a case-by-case basis. For instance, in *Oberschlick v. Austria (No. 2)*, a journalist described Mr. Haider, then leader of the far-right Austrian political party FPÖ as “‘Idiot’ instead of ‘Nazi.’”¹³³ The journalist was found guilty of defamation in Austria, but the European Court held that the contentious word “idiot” did not “constitute a gratuitous personal attack as the author provided an objectively understandable explanation for [it] derived from Mr. Haider’s speech, which was itself provocative.”¹³⁴ The Court further added

128. *Stoll v. Switzerland*, App. No. 69698/01, para. 148 (Eur. Ct. H.R. Dec.10, 2007), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=826926&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (concerning insinuations of anti-Semitism against a diplomat).

129. *See, e.g., Tammer v. Estonia*, 2001-I Eur. Ct. H.R. 263, 281 (holding that the speech of a journalist was not protected when it consisted of abusive comments about the personal life of an Estonian public figure).

130. *Id.* at 268.

131. *Id.* at 269.

132. *Id.* at 281.

133. *Oberschlick v. Austria (No. 2)*, 1997-IV Eur. Ct. H.R. 1266, 1270.

134. *Id.* at 1276.

that although “calling a politician a *Trottel* in public may offend him,”¹³⁵ this word in the present case, “does not seem disproportionate to the indignation knowingly aroused by Mr. Haider.”¹³⁶ Therefore, the same statement is not necessarily considered as damaging to the right to reputation from one public figure to another and the polemical dimension of a politician may affect his protection.¹³⁷

135. *Id.*

136. *Id.* For two other cases related to Mr. Haider, see *Wirtschafts-Trend Zeitschriften-Verlags GmbH v. Austria*, App. No. 58547/00, (Eur. Ct. H.R. Oct. 27, 2005), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=788629&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>, and *Unabhängige Initiative Informationsvielfalt v. Austria*, App. No. 28525/95, (Eur. Ct. H.R. Feb. 26, 2002), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=698049&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>. In *Lindon*, the dissenting judges noted as well that

the criticism . . . for not having carried out a “basic verification” appears to us to be at odds with the facts and the reality. It is clear in our view that a sufficient factual basis could easily be derived from Mr[.] J.-M. Le Pen’s various convictions throughout his political career, particularly for the following offences: “trivialisation of crimes against humanity, making allowances for atrocities;” “apologia for war crimes;” . . . “anti-Semitism, incitement to racial hatred;” . . . “incitement to hatred or racial violence.” . . . In addition, it may reasonably be argued that Mr[.] Jean-Marie Le Pen’s speeches and opinions inciting and provoking hatred and violence, for which he has been convicted, may have encouraged, and indeed prompted, militants to commit acts of violence.

Lindon, *Otchakovsky-Laurens and July v. France*, Application Nos. 21279/02 and 36448/02, para. II(5) (Eur. Ct. H.R. Oct. 22, 2007) (Rozakis, J., Bratza, J., Tulkens, J., and Šikuta, J., dissenting), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=824752&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

137. As mentioned by a former judge of the European Court, the conflicting rights “must be implemented and survive in harmony through the necessary compromises, depending on the facts of each particular case.” LOUCAIDES, *supra* note 23, at 156.

CONCLUSION

Beyond the debate it could generate on an emerging right to human dignity against media excess, distinguishable from the right to privacy, an analysis of the balance of the right to reputation and the freedom of the press under Article 10 of the Convention has established that freedom of the press implies not only rights, but also “carries with it duties and responsibilities.”¹³⁸ Specifically, it has provided that “the safeguard afforded by Article 10 to journalists is subject to the proviso that they act in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.”¹³⁹

The standards of conduct and ethics drawn by the jurisprudence of the European Court set forth the fundamental rules to be followed by the profession, but explicitly privilege a genuine press against media that sacrifice “the basic ethics of journalism . . . for the commercial gratification of an immediate scoop.”¹⁴⁰ The Court has often noted the need for journalists to act in good faith in accordance with the ethics of journalism, and has strongly admonished those who engage in “primitive, fourth-rate journalism”¹⁴¹ and activities conducted for “the sole purpose . . . to satisfy the curiosity of a particular readership [and that] cannot be deemed to contribute to any debate of general interest to society.”¹⁴² By setting forth and enforcing these specific rules and parameters, the European Court of Human Rights has established itself as the guardian of the democratic values of the Convention, the same

138. *Cumpănă and Mazăre v. Romania*, App. No. 33348/96, para. 102 (Eur. Ct. H.R. Dec. 17, 2004), <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=709499&portal=hbk&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

139. *Id.*

140. *Bladet Tromsø and Stensaas v. Norway*, 1999-III Eur. Ct. H.R. 289, 337 (Palm, Fuhrmann, and Baka, J.J., dissenting).

141. *Oberschlick v. Austria* (No. 2), 1997-IV Eur. Ct. H.R. 1266, 1279 (Matscher, J., dissenting).

142. *Von Hannover v. Germany*, 2004-VI Eur. Ct. H.R. 41, 70.

values that the press is deemed to preserve by contributing “to an exchange of ideas worthy of the name.”¹⁴³

143. *Oberschlick*, 1997-IV Eur. Ct. H.R. at 1279 (Matscher, J., dissenting).