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The European Court of Human Rights and the Freedom of Expression

JEAN-FRANÇOIS FLAUSS*

INTRODUCTION

A. Freedom of Expression: A Complex Freedom

Both the doctrine and the judges of the European Court of Human Rights (the "Strasbourg Court" or "court") seem to derive pleasure from the complexity inherent in the right to freedom of expression guaranteed by Article 10 of the European Convention on Human Rights ("Convention").[1] This complexity stems from several factors, including the text of Article 10 itself.[2] The text defines several components of the "right to freedom of expression," including the freedom to express one's opinion, the freedom to communicate information, and the freedom to receive information.[3] In

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* Professor at the University of Paris II (Panthéon-Assas). This Article was originally written in French and delivered as a conference paper at a symposium held by the Center for American Law of the University of Paris II (Panthéon-Assas) on January 18–19, 2008. For the French version of this Article, see Jean-François Flauss, *La Cour européenne des droits de l'homme et la liberté d'expression*, *in* LA LIBERTÉ D'EXPRESSION AUX ÉTATS-UNIS ET EN EUROPE 97 (Élisabeth Zoller ed., 2008). Many thanks to Patrice Van Hyle—B.A. University of Wisconsin–Milwaukee, M.A. Institute of French Studies at New York University—for her translation.

1. Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 221, 230 [hereinafter European Convention on Human Rights]. *See generally* MALCOLM NATHAN SHAW, INTERNATIONAL LAW 321 (5th ed. 2002); Françoise Tulkens, Judge at the European Court of Human Rights, Freedom of Expression and Information in a Democratic Society and the Right to Privacy Under the European Convention on Human Rights: A Comparative Look at Articles 8 and 10 of the Convention in the Case-Law of the European Court of Human Rights, Presentation Before the Council of Europe Conference on Freedom of Expression and the Right to Privacy (Sept. 23, 1999), *available at* http://www.coe.int/t/dghl/standardsetting/media/DOC/DH-MM(2000)007_en.asp.

2. Article 10 provides that

> 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 the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

European Convention on Human Rights, *supra* note 1, at art. 10.

3. *Id.*

other words, the Convention upholds several "freedoms of speech," not just one. The second factor of complexity is its cross-border character, even though the Strasbourg Court and the previous Commission have succeeded in limiting the extraterritorial effect of their sphere of control relative to Article 10.[4]

However, the main reason for this complexity is undoubtedly the notion of "duties and responsibilities" set forth in Article 10(2). This provision is unique in the Convention. It does not appear in any other Article of the Convention, and is most notably absent from the Articles containing restrictions clauses. The obligation of the person possessing the right to freedom of speech to take into consideration his or her "duties and responsibilities" was written into the Convention not only to take account of the distinctive identity of the freedom of speech, but also to prevent the irresponsible and dangerous use of democracy.[5]

Finally, the complexity found within the right to freedom of expression owes much to the jurisprudence of the Strasbourg Court. The case law is the work not only of the Grand Chamber but of all the chambers. In the absence of sufficient coordination among the different chambers as well as systemized harmonization by the Grand Chamber, the imperative to achieve a level of cohesiveness in European jurisprudence is not strong. It is perhaps even less so given that the method of control used by the Strasbourg Court is pragmatic and empirical in nature.

Beyond guiding principles, litigation surrounding freedom of speech is similar to a branching case-study tree (far removed from the method of categorization practiced by the United States Supreme Court).[6] Under these conditions, an author could rightly evoke the image of "a tightrope walker using democratic society as his point of reference yet whose characteristics are defined by the court in reality on a case-by-case basis through its legal case law."[7]

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4. *See* Ben El Mahi v. Denmark, App. No. 5853/06 (Eur. Ct. H.R. Dec. 11, 2006), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number) (concluding that infringing other rights guaranteed by the Convention derived from freedom of speech are not deemed within the competence of the European Court because the injured parties do not fall within the jurisdiction of a signatory member state according to the terms of Article 1); Bertrand Russell Peace Found. v. United Kingdom, App. No. 7597/76, 14 Eur. Comm'n H.R. Dec. & Rep. 117, 123–24 (1978) (concluding that member states were under no affirmative obligation to ensure protection against infringements of freedom of speech when the latter is exercised across an international border).

5. Csaba Pákozdy, *Les effets de la deuxième guerre mondiale dans la jurisprudence de la Cour Européenne des Droits de l'Homme sur la liberté d'expression*, *in* L'HISTOIRE EN DROIT INTERNATIONAL 365 (Péter Kovács ed. 2004).

6. *See* Daniel A. Farber, *The Categorical Approach to Protecting Speech in American Constitutional Law*, 84 IND. L.J. 917 (2009); Elisabeth Zoller, *The United States Supreme Court and the Freedom of Expression*, 84 IND. L.J. 885 (2009).

7. PIERRE-FRANÇOIS DOCQUIR, VARIABLES ET VARIATIONS DE LA LIBERTÉ D'EXPRESSION EN EUROPE ET AUX ÉTATS-UNIS 4 (2007).

B. Freedom of Speech: A Valued Freedom

1. The Sources of Inspiration Behind the Promotion of This Freedom

Judged by the yardstick of time, the policy of the court within the domain of freedom of expression demonstrates support for the values of the "open society" promulgated by Karl Popper.[8] The attachment to this ideological stance has grown stronger since the middle of the 1980s, notably with the presence inside the court of judges elected on account of "new European democracies." The judges, often having diplomas from American universities and sometimes even academic experience overseas, have promoted the legal precedents set by the United States Supreme Court relating to "freedom of expression" to a preferential source of inspiration.

In actuality, express references to the case law of the United States Supreme Court date back, at least within various separate opinions, before the expansion of the jurisdiction of the Strasbourg Court.[9] But over the last decade, the attention paid by European judges to American legal precedent has become more insistent.[10] The influence of American law on certain aspects of European case law with respect to "freedom of speech" is obvious. However, it manifests mostly in an indirect and discreet manner.[11] For the time being, it is only by exception that the Strasbourg Court refers to a United States Supreme Court ruling within the very text of its own ruling.[12]

2. The Tools of Promotion

i. The Doctrine of Procedural Guarantees Inherent in Substantial Rights

The Strasbourg Court's recognition that procedural guarantees are inherent in substantial rights protected by the Convention emerges from a well-established policy of stare decisis. However, it is only recently that the court handed down a decision explicitly regarding the level of procedural guarantees arising from Article 10(1) of the Convention. In this case, the Grand Chamber established a link of equivalence between

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8. *See generally* KARL R. POPPER, 1 THE OPEN SOCIETY AND ITS ENEMIES (1945) (suggesting that the values of "open society" include the virtues of the widest debate possible, the importance of nonconformist ideas, and opinions which are regarded as a factor of progress in democratic society and as a guarantee of the authenticity of a democratic society).

9. For pioneering opinions referencing U.S. law, see Observer & Guardian v. United Kingdom, 216 Eur. Ct. H.R. (ser. A) at 61 (1991) (Morenilla, J., concurring in part and dissenting in part); Groppera Radio AG v. Switzerland, 173 Eur. Ct. H.R. (ser. A) at 36 (1990) (Pettiti, J., dissenting); Barthold v. Germany, 90 Eur. Ct. H.R. (ser. A) at 32 (1985) (Pettiti, J., concurring).

10. *See, e.g.*, Sürek v. Turkey (No. 1), 1999-IV Eur. Ct. H.R. 353, 394 (Bonello, J. dissenting).

11. *See* Jean-François Flauss, *La présence de la Jurisprudence de la Cour Suprême de États-Unis D'Amérique dans le Contentieux Européen des Droits de l'Homme*, 62 REVUE TRIMESTRIELLE DE DROITS DE L'HOMME 313, 314–15 (2003) (Belg.); *see also* Antoine Masson, *De la possible influence de W.O. Holmes sur la conception de la liberté d'expression dans la Convention européenne de droits de l'homme*, 83 REVUE DE DROIT INTERNATIONAL COMPARÉ 232, 233–48 (2006) (Belg.).

12. *But see* Appleby v. United Kingdom, 2003-VI Eur. Ct. H.R. 189, 194–95.

the levels of procedural protection offered by Articles 6 and 10.[13] But the choice upholding the procedural guarantees of Article 6 to constitute a maximum standard in the domain of freedom of expression has been criticized: "[W]hat can normally be tolerated from the point of view of due process according to the fair-trial rules laid down in Article 6 may not be acceptable when it is a matter of verifying whether an interference with freedom of expression is 'necessary in a democratic society.'"[14]

ii. The Doctrine of Affirmative Obligations

As in litigation relative to other rights upheld by the Convention, the doctrine of the state's "affirmative obligations" was employed in view of the horizontal effect of freedom of speech.[15] The guarantees of Article 10 can be invoked within the framework of individual relations: the State has the obligation to protect the freedom of expression against attacks coming from private individuals.[16] Such a requirement is based on the state's affirmative obligation established in Article 1 of the Convention.[17] However, attributing a horizontal effect to the freedom of speech, via the protection of private obligations, is not systematically practiced by the Strasbourg Court.[18]

Relying on the doctrine of affirmative obligations is also justified by the court's desire to increase the degree of protection afforded to the freedom of speech. In this way, the Strasbourg Court can place an affirmative obligation on the state that is both material and procedural.[19] When the doctrine of affirmative obligations is invoked for the purpose of new, material components of the freedom of speech, the court adopts a moderate attitude. Thus, while it has recognized an ideological association's official right to broadcast a message of protest regarding certain breeding practices of animals destined for human consumption on a Swiss television station,[20] the court has categorically refused to grant the right to broadcast religious messages over public and private radio in Ireland.[21] Likewise, it has rejected recognizing a right, based on Article

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13. *See* Steel v. United Kingdom, 2005-II Eur. Ct. H.R. 1, 38 ("The lack of procedural fairness and equality therefore gave rise to a breach of Article 10 in the present case.").

14. Perna v. Italy, 2003-V Eur. Ct. H.R. 333, 360 (Conforti, J., dissenting).

15. *See* Fuentes Bobo v. Spain, App. No. 39293/98, 31 Eur. H.R. Rep. 1115 (2001); *see also* Patrick Morvan, *A Comparison of the Freedom of Speech of Workers in French and American Law*, 84 IND. L.J. 1015, 1023, 1026–27 (2009).

16. *See* Shabanov v. Russia, App. No. 5433/02 (Eur. Ct. H.R. Dec. 14, 2007), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number); *Fuentes Bobo*, 31 Eur. H.R. Rep. at 1115.

17. *See* VgT Verein Gegen Tierfabriken v. Switzerland, App. No. 24699/94 (Eur. Ct. H.R. June 28, 2001), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

18. *See Perna*, 2003-V Eur. Ct. H.R. at 360 (Conforti, J. dissenting).

19. Özgür Gündem v. Turkey, 2000-III Eur. Ct. H.R. 1, 21 (holding that in failing to either adequately protect a pro-Kurdish newspaper or investigate criminal activity directed against the paper, the Turkish government failed to meet its positive obligation to ensure the newspaper's freedom of expression).

20. *VgT Verein Gegen Tierfabriken*, App. No. 24699/94.

21. Murphy v. Ireland, 2003-IX Eur. Ct. H.R. 1, 31 (holding that the Radio and Television Act of 1988 did not, by proscribing the broadcast of religious and political advertisements, unreasonably limit the applicant's freedom of expression).

10 of the Convention, to access information to be used against public authorities, while nevertheless indirectly protecting this right through Article 8.[22]

3. The Doctrine of "Discretionary Powers"

Serving as standards, or as a form of control of the "necessity" of restrictive measures introduced or tolerated by states relative to the freedom of expression, "discretionary powers" are by definition a means of favoring—*in casu* (in case of extreme necessity)—the Strasbourg Court's freedom of assessment and, consequently, authorizing its possible manipulation. A praetorian construction, "discretionary powers" are subject to the context of the matter to settle, but also depend on the various personalities of the judges involved.[23] The multiplicity of variables analyzed in order to balance restrictions placed on the freedom of expression effectively offers the European judge wide powers of flexibility in terms of the interests at issue, especially within the framework of a jurisprudential and jurisdictional policy based on the "special case." Nevertheless, there is a strong tendency—which has grown over the years—to reduce or even neutralize the member states' discretionary powers.

From the outset, it should be clarified that a policy aiming to reduce discretionary powers does not follow a linear projection. The return to broader discretionary powers within a particular scenario is conceivable. But structurally, discretionary powers tend to diminish and in some instances even disappear altogether once the court deems that the basic values of a democratic society are at stake.[24] From this, it follows logically that as the court pays an increasing amount of attention to these basic values, European control becomes more thorough. The passage from "certain discretionary powers" to "restricted discretionary powers" is a tangible sign of such a reduction in the Strasbourg Court's powers.[25]

C. Freedom of Speech: A Fundamental Freedom

Litigation surrounding the freedom of speech contributed significantly to the overall development of European jurisprudence throughout the 1960s. In its position as "the crossroads of freedom," freedom of speech is often a participating player in litigation

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22. *See* Guerra v. Italy, 1998-I Eur. Ct. H.R. 210, 226.

23. This issue causes certain judges to note that "it is difficult to ascertain what principles determine the scope" of the Strasbourg Court's discretionary powers in litigation over the freedom of speech. *See* Wingrove v. United Kingdom, 1996-V Eur. Ct. H.R. 1937, 1966 (Lõhmus, J., dissenting).

24. For a detailed demonstration in this context, see Patrick Wachsmann, *Une certaine marge d'appréciation: Considérations sur les variations du contrôle européen en matière de liberté d'expression*, in LES DROITS DE L'HOMME AU SEUIL DU TROISIÈME MILLÉNAIRE: MÉLANGES EN HOMMAGE À PIERRE LAMBERT 1015 (2000).

25. For an example of an apparent contradiction in applying broad control, see Radio France v. France, App. No. 53984/00 (Eur. Ct. H.R. Mar. 30, 2004), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number) (recognizing that although a member state's discretionary power is limited, France's imposition of a unique penalty for defamation fell within that power).

concerning other rights—such as political rights, the freedom of assembly, the freedom to demonstrate, and the freedom of association.[26] Considered one of the primordial conditions for the progress of democratic society, freedom of speech has historically benefited from this fundamental assumption of democratic society.[27] This qualification has not formally bestowed freedom of speech with a hierarchical standing above other freedoms guaranteed by the Convention, but it has underscored the close link between freedom of speech and democratic society. In fact, freedom of expression is not only a subjective right of the individual against the State, but is also an objective fundamental principle for life in a democracy. That is, it is not an end unto itself, but a means toward the establishment of a democratic society; freedom of speech is necessary for the full development of social democratic ideals.[28] But, correlatively, the demands of democratic society necessitate a proper channeling of freedom of speech.[29]

I. FREEDOM OF EXPRESSION AND THE FULL DEVELOPMENT OF SOCIAL DEMOCRATIC IDEALS

According to the famous language repeatedly invoked by the Strasbourg Court, a "democratic society" is based on pluralism, tolerance, and open-mindedness[30]—in short, an entire set of cardinal values. While it is natural that these values permeate the exercise of freedom of expression, the latter comprises a vehicle that concomitantly concretizes these same values. An essential element of "democratic" society, according to the Strasbourg Court's jurisprudence, is the existence of public confidence in public institutions and authorities.[31] Yet, confidence cannot exist without transparency. It is not surprising, then, that freedom of expression has been utilized in the democratic control of public powers.

A. Freedom of Expression Employed to Promote the Values of Democratic Society

Following the example of American law, the Strasbourg Court is fundamentally preoccupied with safeguarding, and if necessary, extending, the public space available for free and open discussion integral to democracy.[32] This concern has become a guiding principle of the court's jurisprudential policy, resulting in a structural promotion of the right to discussion and debate. It also explains the attention paid to protecting the manner of expression. Finally, and perhaps most importantly, it constitutes the determining factor behind provisions relating to the exercise of freedom of expression that are more or less incompatible with rule of law imperatives.

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26. For an illustration, see Socialist Party v. Turkey, 1998-III Eur. Ct. H.R. 1233, 1255 ("The protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association as enshrined in Article 11.").

27. *See* Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) (1976).

28. *See infra* Part I.

29. *See infra* Part II.

30. *See Handyside*, 24 Eur. Ct. H.R. at 23.

31. *See* De Haes v. Belgium, 30 Eur. Ct. H.R. 198 (1997).

32. For a detailed discussion, see Patrick Wachsmann, *Participation, Communication, Pluralismé*, 13 L'ACTUALITÉ JURIDIQUE DROIT ADMINISTRATIF (SPECIAL ISSUE) 165 (1998) (Fr.).

1. Promotion of the Right to Discussion and Debate

"The devil is in the details." Although overused in the legal world, this adage perfectly characterizes the "manipulation" that the Strasbourg Court has resorted to in order to import two key notions that can contribute to the public forum of free discussion—by enhancing the ability to discuss. At issue are the two notions of "general interest or public debate" and "value judgment."

i. Stretching the Notion of a "General Interest or Public Debate"

The extent of the state's recognized power of restriction is structurally dependent upon the contribution the speech or message makes to a general interest or public debate. The existence of a general interest debate leads *ipso facto* to a strengthening of European control. The same goes for political discourse—the Strasbourg Court, in effect, refuses to distinguish between political discussion and discussion of other matters of public concern or to establish any form of hierarchical ranking.[33] Moreover, political controversy contributes by its very nature to general interest debates.[34] Since the court places general debate at the heart of "democratic society," it is also seemingly disposed to granting it additional attention in cases where general debate has the capacity to favor the progress of democratic society.[35] The evolution of European jurisprudence is characterized by a manifest tendency to stretch the notion of what constitutes a general interest debate. The very sectoral and/or local character of the issue being debated does not constitute a reason for disqualification from the category.[36] But the broadening of the concept of a general interest debate is demonstrated, above all, by extending beyond its natural borders. In this context, the court bases its analysis on the mixed character of the message—for example, when it partially deconstructs commercial or professional language.

Initially, commercial or professional messages, especially those in the form of advertisements, were not considered to belong to the category of general interest debates.[37] At that time, a contingent of judges declared themselves very much in favor of an approach to this type of litigation that was based upon the right of competition.

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33. *See* Thorgeirson v. Iceland, 239 Eur. Ct. H.R. (ser. A) at 27 (1992).

34. *See* Filatenko v. Russia, App. No. 73219/01 (Eur. Ct. H.R. Dec. 6, 2007), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number) (finding that the opinions and information disseminated during electoral campaigns falls *ipso facto* within the category of general interest debates).

35. *See* Giniewski v. France, App. No. 64016/00 (Eur. Ct. H.R. Jan. 31, 2006), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

36. See Boldea v. Romania, App. No. 19997/02 (Eur. Ct. H.R. Feb. 15, 2007), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number) (stating that a debate held during a meeting of a university department faculty on the incidence of plagiarism in scientific publications was attributable to several department colleagues).

37. *See* Jacubowski v. Germany, 291 Eur. Ct. H.R. (ser. A) 3, 13–15 (1994); Casado Coca v. Spain, 285 Eur. Ct. H.R. (ser. A) 3, 20 (1994); Markt Intern Verlag GmbH v. Germany, 165 Eur. Ct. H.R. (ser. A) at 19–21 (1989).

More recently, the court has found that commercial or professional language that pertains to the realm of public health issues constitutes a general interest debate.[38] At the same time, the court recognizes that the advertising dimensions of professional publications may contribute to general interest debates as well as contribute general advertising information to the public.[39] Taking into account this dual-sided aspect of a commercial message is even more obvious when it has political connotations, particularly those emanating from environmental or "green" organizations.[40] On a grand scale, environmental criticisms of economic and/or commercial practices are considered general interest debates. In fact, the court expressly recognizes the general interest served by the right to freely disseminate information and ideas regarding the activities of powerful business corporations, particularly multinational companies.[41] It has expressed the opinion that the strategy of a private company could in fact comprise an issue of general interest.[42]

The expansion of the concept of a general interest debate is further shown by the evolution of the terminology used by the Strasbourg Court. In fact, alongside the *stricto sensu* general interest debate, there is also European jurisprudence's recognition of *lato sensu* general interest debates, or those that are in reality public interest debates, but of less importance. Such is the case when the court makes reference to "a problem the public ha[s] an interest in being informed about."[43] Additional hurdles need to be crossed when the court evokes the notion of a quasi general interest debate.[44]

In summary, the legal category of general interest debates is comprised of several stages ranging from the crescendo of a general interest debate of extreme importance[45] to a debate of lesser public interest.

ii. The Extensive Approach to the Concept of a "Value Judgment"

The distinction between a declaration of fact and a value judgment occupies an essential place in the Article 10 jurisprudence of the Strasbourg Court. Indeed, while the reality of the first can be proven, the second does not lend itself to a demonstration

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38. Hertel v. Switzerland, 1998-VI Eur. Ct. H.R. 2298, 2330.

39. For an application of this concept to medical information, see Stambuk v. Germany, App. No. 37928/97 (Eur. Ct. H.R. Oct. 17, 2002), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

40. *See* Vgt Verein Gegen Tierfabriken v. Switzerland, App. No. 24699/99 (Eur. Ct. H.R. June 28, 2001), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

41. Steel v. United Kingdom, 2005-II Eur. Ct. H.R. 1, 36–37.

42. Goodwin v. United Kingdom, 1996-II Eur. Ct. H.R. 483.

43. Tøngsbergs Blad A/S v. Norway, App. No. 510/04 (Eur. Ct. H.R. Mar. 1, 2007), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number) (assessing the public's need for information regarding a well-known industrialist's disregard for a housing regulation).

44. *See* Karhuvaara v. Finland, 2004-X Eur. Ct. H.R. 259, 261 ("[T]he contested articles did not have an express bearing on political issues and were not of great public interest . . . .").

45. *See, e.g.*, Mamère v. France, App. No. 12697/03 (Eur. Ct. H.R. Nov. 7, 2007), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

of its accuracy.[46] In other words, the choice of whether a statement constitutes a declaration of fact or a value judgment is a deciding factor in determining the level of protection afforded to comments that have been expressed—a value judgment will benefit from wide protection, almost absolute, as long as the opinion put forward is not devoid of any factual basis and was made in good faith.[47] For the purpose of ensuring maximum protection of the freedom of expression, especially in the domain of political discourse or general interest debates, European judges are increasingly prone to opt for an expansive reading of the notion of a value judgment.[48] In actuality, the Strasbourg Court gives the impression of wanting to erase the operative interest of the distinction between the two determinations of law. On the one hand, the court considers value judgments to have the reputation of being less important within the framework of a lively political debate. On the other hand, the court identifies an intermediate category: the remark that without a value determination cannot be likened *stricto sensu* to a factual declaration. In such a case, it is a matter of the obviously not unreasonable interpretation given the factual basis of the contentious allegation.[49]

In part, the extensive approach to the concept of a value judgment must be tied to the lack of confidence that is behind the practice of courts in certain European countries, both Eastern and Western. This is shown by their tendency to favor a deliberately restrictive conception of a value judgment[50] or by their pure and simple ignorance of the distinction between the two notions.[51] If the flexibility of the concept of a value judgment is undeniably at the service of social democratic ideals, then its use

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46. Lingens v. Austria, 103 Eur. Ct. H.R. (ser. A.) 11, 28 (1986).

47. *See* Brasilier v. France, App. No. 71343/01 (Eur. Ct. H.R. Apr. 11, 2006), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number); Jerusalem v. Austria, 2001-II Eur. Ct. H.R. 69, 84; De Haes v. Belgium, 1997-I Eur. Ct. H.R. 198, 235–36.

48. *See, e.g.*, Lepojic v. Serbia, App. No. 13909/05 (Eur. Ct. H.R. Nov. 6, 2007), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number); Ferihumer v. Austria, App. No. 30547/03 (Eur. Ct. H.R. Feb. 1, 2007), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number); Paturel v. France, App. No. 54968/00 (Eur. Ct. H.R. Dec. 22, 2005), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

49. Lombardo v. Malta, App. No. 7333/06 (Eur. Ct. H.R. Apr. 24, 2007), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

50. *See* Karman v. Russia, App. No. 29372/02 (Eur. Ct. H.R. Dec. 14, 2007), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number); Krasulya v. Russia, App. No. 12365/03 (Eur. Ct. H.R. Feb. 22, 2007), http://www.echr.coe.int/echr (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number); Feldek v. Slovakia, 2001-VIII Eur. Ct. H.R. 85, 109.

51. Gorelishvili v. Georgia, App. No. 12979/04 (Eur. Ct. H.R. June 5, 2007), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

is not always the most coherent. A good example of this is the favor accorded by the court to the freedom of historical debate.[52]

2. The Importance Given to Freedom of the Manner of Expression

As to be expected amidst the "pluralism, tolerance, and open-mindedness" inherent in democratic society, "freedom of expression . . . is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb."[53] Extending this theme, which has been repeated ad nauseam for four decades, the Strasbourg Court very soundly recognizes the right to the expression of opinions that may be considered outlandish in nature.[54] Freedom within the realm of choice of language and manner of expression is evident by the official recognition of the right to shock.[55] It remains to be seen whether the right to shock is limited to controversies rooted in contemporary debates, as the court seems to imply,[56] or whether it is perhaps necessary to admit that the right to shock is generally applicable whenever it concerns a matter of general interest. In any case, the court has clearly favored defending shocking language and free expression within the world of artistic creation.[57]

The right to exaggeration and provocation constitutes an inherent component of political discourse. As a consequence, polemic[58] and sarcastic[59] language is tolerated

52. Giniewski v. France, App. No. 64016/00 (Eur. Ct. H.R. Jan. 31, 2006), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number) (noting that contentious remarks qualifying as a value judgment can legitimately be understood as resting upon unestablished historic fact); Lehideux v. France, 1998-VII Eur. Ct. H.R. 2864, 2883–84 (noting that a publication containing a value judgment on Philippe Pétain's policy during World War II concealed well-established historic facts regarding the Holocaust).

53. Hertel v. Switzerland, 1998-VI Eur. Ct. H.R. 2298, 2329.

54. *Id.* at 2332 ("It matters little that [the] opinion is a minority one and may appear to be devoid of merit since, in a sphere in which it is unlikely that any certainty exists, it would be particularly unreasonable to restrict freedom of expression only to generally accepted ideas.").

55. *See, e.g.*, *Giniewski*, App. No. 64016/00 (protecting the freedom of expression in the context of a publication charging the Catholic Church, or at least its hierarchy, with responsibility in the genocide of the Jewish population by Nazi Germany).

56. *See id.*

57. *See* Vereinigung Bildender Künstler v. Austria, App. No. 68354/01 (Eur. Ct. H.R. Jan. 25, 2007), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number). This judgment, handed down with only a one-vote majority, specifies that exaggeration, distortion of reality, and provocation (in cases where applied to theater scenes having risqué sexual connotations) are components of satire, a recognized form of artistic expression and social commentary. Ruling in such a way, the Strasbourg Court distanced itself considerably from the attitude it had formerly adopted with regard to artistically obscene messages. *See* Müller v. Switzerland, 133 Eur. Ct. H.R. (ser. A) at 22–23 (1988).

58. *See* Lopes Gomes da Silva v. Portugal, 2000-X Eur. Ct. H.R. 101 (analyzing a publication that described a local candidate in a municipal election as being "grotesque" and "buffoonish" as well as "an incredible mixture of crude reactionaryism . . . , fascist bigotry[,] and coarse anti-Semitism").

59. *See* Katrami v. Greece, App. No. 19331/05 (Eur. Ct. H.R. Dec. 6, 2007)

and even fully accepted. Moreover, as is frequently recalled by the court, "in the domain of political discourse, the invective often touches upon a personal note; these are the occupational hazards of the game of politics and part and parcel of the open debate of ideas, the guarantors of a democratic society."[60] That is to say, using excessive and/or extreme language is broadly understood to be accepted, particularly in discussions of political issues.[61] The same basically applies, although maybe not entirely, to militant discussions that are not strictly political—primarily to environmentalist discourse.[62]

The court did, however, establish a system of boundaries to the freedom and manner of expression. The first boundary relates to the object of the discourse and determines whether the language is, by its very nature, illicit.[63] The second boundary concerns the purpose of the discourse and suggests that sensationalism is not a legitimate purpose.[64] Finally, the third boundary is concerned with the effects of the language. This boundary prevents the right to ridicule from leading to the gratuitous insult of others. The liberal attitude adopted by the court with regard to a speaker's right to exaggeration and provocation—to the extent that it ends up validating manifest abuses of freedom of speech (for example, by legitimizing a right to insult)—is sometimes considered as bordering on laxity. One might certainly agree with the Strasbourg Court that language such as "beasts in uniform," "wild beasts in uniform," and "sadistic brutes" uttered against police officers suspected of brutality falls short of the threshold of an insult.[65] On the contrary, the court considered the use of extremely pejorative terms—including vulgar double entendres and sexual references—against an archbishop, who had proposed banning a film he considered profane and blasphemous, insulting.[66]

The debate over the existence of a right to insult was fueled by litigation initiated by Austria in connection with the penal suppression of scathing criticisms made against political members and sympathizers of a far-right ideological movement. Calling a

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http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number) (analyzing the use of the word "clown" to describe an elected official).

60. Sanocki v. Poland, App. No. 28949/03 (Eur. Ct. H.R. July 17, 2007), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

61. In this way, certain expressions such as "mayor thief," Dąbrowski v. Poland, App. No. 18235/02 (Eur. Ct. H.R. Dec. 19, 2006), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number), or "pollution mayor," Desjardin v. France, App. No. 22567/03 (Eur. Ct. H.R. Nov. 22, 2007), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number), were deemed acceptable in light of the determining law factor.

62. *See* Steel v. United Kingdom, 2005-II Eur. Ct. H.R. 3, 88.

63. *See infra* Part II.A.

64. For a recent and solemn reminder, see Stoll v. Switzerland, App. No. 69698/01 (Eur. Ct. H.R. Dec. 10, 2007), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

65. Thorgeirson v. Iceland, 239 Eur. Ct. H.R. (ser. A) at 17 (1992).

66. *See* Klein v. Slovakia, App. No. 72208/01 (Eur. Ct. H.R. Dec. 31, 2006), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

forefront leader of a far-right political party an "idiot" is not characteristically polemical, according to the court, even though the term was openly used in place of "Nazi," a taboo term in Austria.[67] Based implicitly on Article 17 of the Convention,[68] the right to insult is limited to adversaries of democratic society. When all is said and done, it resembles a legitimate response to the provocative behavior of the implicated political leader.[69] Moreover, the court does nothing more than adhere to the guiding principle of free speech litigation, namely the principle of reciprocity between the "offender" and the "offended."[70]

However, the right of retaliation, or reprisals, or both, on the part of the "offended" person is not unconditional, even if it manifests in the response of a political figure within the framework of a polemical debate.[71] In a fairly recent case, the court maintained its liberal approach toward the freedom of expression of political adversaries, "enemies" of the Convention. Notwithstanding the defamatory nature of the use of the term "Nazi" in Austria, the court allowed the phrase "closet Nazi" to be uttered against a political leader whose position was very much in line with a party of the extreme right and who was suspected of having pro-national-socialist sympathies.[72] In the absence of a decision on point, the matter of a possible variation in the intensity of the right to insult dependent upon the ideological stance of "enemies" of democratic society remains open.

In view of the Strasbourg Court's jurisprudential policy supporting the free formulation of language and speech, commentary regarding the dignity of the information or expression is needed. Inquiry seems all the more legitimate as the court pays closer attention to the protection of a person's dignity. In these conditions, can the manner of one's expression be presented in an overly excessive form? There does not seem to be sufficient consensus on this matter, as evidenced by the strong reactions of

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67. Oberschlick v. Austria (No. 2), 1997-IV Eur. Ct. H.R. 1266, 1270. *But see id.* at 1279 (Matscher, J., dissenting) (stating that the term used is an insult hurled for the purpose of ridicule).

68. Article 17 of the Convention states, "Nothing in this Convention may be interpreted as implying . . . any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention." European Convention on Human Rights, *supra* note 1, at art. 17.

69. *See* Sylvie Peyrou-Pistouley, *L'extension regrettable de la liberté d'expression à l'insulte*, 35 REVUE TRIMESTRIELLE DE DROITS DE L'HOMME 593 (1998) (Belg.).

70. For an application of this principle within a different context, see generally Nilsen v. Norway, 1999-VIII Eur. Ct. H.R. 57 (the virulent response from professional police associations as a rejoinder to polemical comments made, bordering on insult, denouncing incidences of abuse and police brutality; the exaggeration of the insinuation legitimizes the vehemence of the retort). *See also* Arbeiter v. Austria, App. No. 3138/04 (Eur. Ct. H.R. Jan. 25, 2007), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

71. Walb v. Austria, No. 24773/94 (Eur. Ct. H.R. Mar. 21, 2000), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number) (stating that the use of the term "Nazi journalism" by a member of Parliament to describe a newspaper was particularly stigmatizing in light of the Austrian context).

72. Scharsach v. Austria, 2003-XI Eur. Ct. H.R. 125.

the minority judges in *Vereinigung Bildender Künstler v. Austria.*[73] Without a doubt, the figures implicated were "known" and some of them even "notorious." But, for this reason alone, must they be deprived of the protection of their dignity? In reality, the court, without being totally indifferent to this concern, did not wish to openly make the matter a priority within its case law.[74]

3. The Revocation of Freedom of Speech Provisions that Contradict Rule of Law Imperatives

While it may be the case that the Strasbourg Court has not condemned the principle behind preventive systems of government,[75] it has done its best to contain prior restraint or authorization by subjecting them to scrupulous and rigorous control. However, the court has also been intent on neutralizing, with varying intensity, those forms of government power considered excessive and belonging to a bygone era. Disposed toward penalizing attacks against the inalienable rights protected by the Convention, the court is generally reserved with regard to penal sanctions used to suppress the abusive exercise of rights guaranteed by the Convention. This is extremely noticeable when the freedom at stake is the freedom of expression. In light of the nature of their mission, their professional activity, or both, those holding public office either benefit from specific protection or are hindered by particular constraints. If the court has not called into question the principle behind these derogatory adjustments vis-à-vis the exercise of freedom of expression, it has set out to undermine them.

i. Hostility Toward Excessive Systems of Government

At the beginning of the 1990s, when the Strasbourg Court declared that the French tax administration's right of preemption in relation to costly real estate transfers was in opposition to the Convention, it highlighted the excessive character of this procedure which, in its eyes, resembled a prerogative belonging to a police state.[76] Since then, there has been a tendency in European jurisprudence to systematically challenge legal systems allowing infringements of rights guaranteed by the Convention when those systems are viewed as excessive forms of government.[77] In such a way, the court condemned the French system of prior restraint applied to foreign publication, which accorded significant discretionary power to the Minister of the Interior without

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73. Vereinigung Bildender Künstler v. Austria, No. 68354/01 (Eur. Ct. H.R. Jan. 25, 2007), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

74. For an indirect consideration of this matter see Filipacchi v. France, No. 71111/01 (Eur. Ct. H.R. June 14, 2007), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

75. Observer & Guardian v. United Kingdom, 216 Eur. Ct. H.R. (ser. A) at 30 (1991) ("Article 10 of the Convention does not in terms prohibit the imposition of prior restraints on publication, as such.").

76. *See* Hentrich v. France, 296 Eur. Ct. H.R. 3, 19–20 (1994).

77. *See also* Patrick Wachsmann, *De la qualité de la loi à la qualité du système juridique*, *in* 2 LIBERTÉS, JUSTICE, TOLÉRANCE: MÉLANGES EN HOMMAGE AU DOYEN GÉRARD COHEN-JONATHAN 1688, 1690 (2004).

sufficient legislative checks in place to safeguard the procedural demands of the Convention.[78] The court determined that, by its nature, "[s]uch legislation appears to be in direct conflict with the actual wording of Article 10(1) of the Convention, which provides that the rights set forth in that Article are secured 'regardless of frontiers.'"[79] The court now considers this system anachronistic. "Although the exceptional circumstances in 1939, on the eve of the Second World War, might have justified tight control over foreign publications, the argument that a system that discriminated against publications of that sort should continue to remain in force would appear to be untenable."[80] The court reserved a similar fate for the French system of offenses committed against a foreign head of state.[81] The criticisms addressed against this system, grounded in Article 10 of the Convention and more generally in the notion of a democratic society, are as equally disparaging as those previously directed against the foreign publications system. First and foremost, they underscore the extraordinary protections granted to foreign heads of state, which forbid any criticism of them and prevent the journalist, contrary to ordinary defamation law, from proving the truth of his or her allegations.[82] Now, according to the court, such a privilege is completely archaic: it "cannot be reconciled with modern practice and political conceptions."[83]

ii. Reservations Toward Penal Suppression

Generally speaking, the Strasbourg Court has shown itself to be quite guarded about authorizing sanctions in the domain of freedom of speech. For example, it has been reluctant to authorize pecuniary or other civil sanctions likely to have a dissuasive or exorbitant effect in light of the limited financial resources of the convicted person.[84] Playing a kind of balancing act, the court has developed a neutralizing jurisprudential policy vis-à-vis civil sanctions, notably those declared on grounds of defamation.[85] Occasionally, the court even challenges the very principle behind the civil conviction.[86]

Sometimes the court's reservations toward penal sanctions turn into outright hostility and a thinly disguised attitude of distrust. Fundamentally, it is opposed to penal sanctions involving prison sentences.[87] By exception, the court admits the

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78. Assoc. Ekin v. France, 2001-VIII Eur. Ct. H.R. 323, 347–48.

79. *Id.* at 346.

80. *Id.*

81. Colombani v. France, 2002-V Eur. Ct. H.R. 25.

82. *Id.* at 36–37.

83. *Id.* at 44.

84. *See* Steel v. United Kingdom, 2005-II Eur. Ct. H.R. 3.

85. For detailed examples, see Emmanuel Dreyer, *Observations sur quelques applications récentes de l'article 10 de la Convention européenne (janvier 2006–janvier 2007)*, 71 REVUE TRIMESTRIELLE DE DROITS DE L'HOMME 615, 633–35 (2007) (Belg.).

86. *See* Brasilier v. France, No. 71343/01 (Eur. Ct. H.R. Apr. 11, 2006), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number) (where plaintiff was fined one franc for damages as symbolic gesture); *see also* Giniewski v. France, App. No. 64016/00 (Eur. Ct. H.R. Jan. 31, 2006), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

87. *See, e.g.*, Kannellopoulou v. Greece, No. 28504/05 (Eur. Ct. H.R. Oct. 11, 2007), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-

conventionality of a custodial sentence "where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence."[88] In other words, handing down a prison sentence is seen as *ultima ratio*, and is tolerated only when the punished behavior is unbearable because it denies fundamental principles of pluralist democracy.[89]

The Strasbourg Court's attitude toward penal sanctions not involving prison sentences is less black and white. Most recently, the court's jurisprudence has confirmed the view that monetary fines imposed through penal channels do not conflict with the demands of Article 10 of the Convention, at least in principle.[90] Again, it becomes appropriate *in casu* to offset the dissuasive effect inherent in any penal sanction with the imposition of a low fine. By ruling in this way, the Grand Chamber distances itself from the more liberal view shared by certain chambers of the court. In fact, these chambers tend to consider, more or less openly according to the case, that any penal sanction must be disallowed, whether in the form of a monetary fine[91] or a prison sentence.[92] As a consequence, the state must be satisfied merely with civil law remedies.[93] Such an option rests on a partial neutralization of Article 10(2) of the Convention, stipulating that the exercise of freedom of expression can be subject to legal sanctions without specifying the penal or civil nature of the sanctions.

iii. Mistrust of Specific Privileges and Constraints Applicable to Public Office Holders

Although the potential is great within the system of government immunity to completely free its beneficiaries from having to respect the duties and responsibilities incumbent upon speakers pursuant to Article 10(2) of the Convention, the Strasbourg

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hand column, and search for the application number) (stating that the sentencing of the plaintiff to a prison sentence, even a suspended sentence, constitutes a disproportionate punishment for the crime within the framework of Article 10); Erbakan v. Turkey, No. 59405/00 (Eur. Ct. H.R. July 6, 2006), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number) (stating that the nonenforcement of a prison sentence is not an attenuating circumstance for the defendant state).

88. Cumpana v. Romania, 2004-XI Eur. Ct. H.R. 63, 95 (2004).

89. Karatepe v. Turkey, No. 41551/98 (Eur. Ct. H.R. July 31, 2007), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

90. Stoll v. Switzerland, No. 69698/01 (Eur. Ct. H.R. Dec. 10, 2007), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

91. *See* Falakaoglu v. Turkey, No. 11461/03 (Eur. Ct. H.R. Dec. 19, 2006), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number); Selisto v. Finland, No. 56767/00 (Eur. Ct. H.R. Nov. 16, 2004), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

92. Erdal Tas v. Turkey, No. 77650/01, Eur. Ct. H.R. (Dec. 19, 2006), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

93. Kannellopoulou v. Greece, No. 28504/05, Eur. Ct. H.R. (Oct. 11, 2007), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

Court has endeavored, via the channel of a person's right to trial guaranteed by Article 6(1), to reduce the field of application of immunity, while remaining careful not to undermine its substance. While the obligation of political and/or constitutional loyalty (akin to a kind of super duty of confidentiality) required at times of certain public office holders has not been ruled as being in opposition to the Convention, it has on the other hand been seriously limited by the Strasbourg Court's jurisprudence. In contrast, the attitude of the court clearly appears favorable to a possible limitation of the duty of political confidentiality placed on government officials.

a. Reducing the Field of Application of Government Immunity

According to the Strasbourg Court, it is lawful for states to establish absolute civil jurisdictional immunity guaranteeing legal authorities—notably members of the government—freedom of speech in the public arena.[94] The issue of immunity, however, is strictly limited to the exercise of one's political mandate. Civil jurisdictional immunity for members of government is no longer an "implicit limitation" on the right to sue in court, as this protection—once ensured by Article 6(1) of the Convention—has been removed. The right to trial enters into full effect when immunity is invoked as cover for language or actions not strictly tied to the performance of one's government functions.[95] Thus, defamatory or offensive remarks made by a senator during a political quarrel or in connection with political activity are not considered to fall within the performance of one's government mandate. The same goes for insulting remarks made during an electoral meeting. In passing, it should be noted that the court displays particular mistrust toward political organs when they are called upon to decide the legitimacy of invoking government immunity.[96] In fact, the court makes clear that in the event of such a scenario, its control must become especially rigorous.

Considering the resolution upheld in *A. v. United Kingdom*,[97] immunity should not cover negative comments made inside of Parliament even if they are only repeating those already made within government walls. Likewise, it is not to be applied to positions taken in the media in anticipation of negative comments made later by Parliament.

b. Weakening the Obligations of Political Loyalty

Recently, the Strasbourg Court was led to endorse disciplinary action taken against a German military officer for having breached his duty of confidentiality vis-à-vis the constitution.[98] The court's manner of ruling was based specifically on the fact that the

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94. *See* Zollman v. United Kingdom, 2003-XII Eur. Ct. H.R. 361, 376–81; A. v. United Kingdom, 2002-X Eur. Ct. H.R. 119, 138–45.

95. *See* Cordova v. Italy (*Cordova II*), 2003-I Eur. Ct. H.R. 267, 273–79; Cordova v. Italy (*Cordova I*), 2003-I Eur. Ct. H.R. 231, 242–49.

96. *Cordova I*, 2003-I Eur. Ct. H.R. at 248; De Jorio v. Italy, App. No. 73936/01 (Eur. Ct. H.R. June 3, 2004), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

97. 2002-X Eur. Ct. H.R. at 119.

98. *See* Erdel v. Germany, App. No. 30067/04 (Eur. Ct. H.R. Feb. 13, 2007),

reserve officer belonged to a political party (classified as extreme right) and was suspected of a breach of loyalty against the democratic and constitutional order of the Federal Republic.

While in essence this decision of inadmissibility cannot be regarded as totally negligible, it must certainly not be understood as calling into question the court's jurisprudential policy of weakening the obligations of political loyalty incumbent upon state officials. Moreover, the court itself is careful *in casu* to remove any hint of contradiction with the principle handed down in the famous *Vogt v. Germany* decision.[99] In that case, the court was quick to defend its stigmatization and, indeed, condemnation on multiple accounts of the obligation of political loyalty placed on German civil servants. It judged as unacceptable the overly absolute character of such an obligation and bemoaned the fact that it "is owed equally by every civil servant, regardless of his or her function and rank."[100] The court continued: "It implies that every civil servant, whatever his or her own opinion on the matter, must unambiguously renounce all groups and movements which the competent authorities hold to be inimical to the Constitution. It does not allow for distinctions between service and private life . . . ."[101]

For the court, this obligation appeared even more unacceptable since it constituted, in light of history, a uniquely German characteristic and, furthermore, because the obligation should be scrutinized with more or less rigor depending on the particular country. Under these conditions, the right of states to force on their civil servants the duty of political loyalty risks being akin to setting up a smokescreen. For proof of this, it is necessary to refer to the ruling upheld some years later in *Wille v. Liechtenstein*.[102] In order to justify his decision not to nominate the President of the Administrative Court to any future public office, Liechtenstein's head of state invoked the individual's disregard of his duty of political and constitutional loyalty. This argument was swept aside by the court, which instead focused its analysis on the punitive and dissuasive character of the prince's correspondence with the plaintiff.[103] The *Wille* ruling dramatically confirms that defending the right of political expression of state officials has led the Strasbourg Court to indirectly protect rights not guaranteed by the Convention in the matter of the exercise of one's public duties, such as the right of admission or the right of renewal.

Curiously, the mistrust shown by the court toward the state imposing the obligation of political and/or constitutional loyalty on civil servants (as long as they do not defend ideologies of the far right) has not been extended, at least in current European jurisprudence, to the oaths of constitutional loyalty that are often required of civil servants and politicians.[104]

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http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

99. 323 Eur. Ct. H.R. (ser. A) (1995).

100. *Id.* at 28.

101. *Id.*

102. 1999-VII Eur. Ct. H.R. 279.

103. *Id.* at 300–04.

104. *See, e.g.*, McGuinness v. United Kingdom, 1999-V Eur. Ct. H.R. 481.

c. Conditionality of the Duty of Political Confidentiality

The court has expressly recognized states' authority to impose on civil servants a duty of confidentiality to their employers.[105] At first glance, its case law can be understood as favoring defenses of the duty of confidentiality incumbent upon civil servants, since the pertinent litigation is generally punctuated by determinations of nonviolation of Article 10. But in reality, it is fitting to at least distinguish between the two purposes for the duty of confidentiality: professional and political.

Now, in a similar scenario, the court has justified the duty of political confidentiality by virtue of considerations connected to the defense or promotion of democracy. Political impartiality of the administration is considered the guarantor of the proper functioning of the democratic system. The court endorsed the strict duty of political neutrality imposed on the United Kingdom relating to various categories of government officers in the service of local authorities by granting considerable weight to the legitimacy of the goal sought by litigation regulation, namely safeguarding the proper functioning of the democratic system of decentralization. In fact, if the obligation of political neutrality is conceived in the interest of local elected representatives, it is also and may be above all conceived in the interest of citizens, and more generally of the public.[106] For its part, the court now recognizes the validity of the obligation of political neutrality and has applied it to members of police forces in Hungary.[107] According to the court, it is perfectly legitimate for a state committed to the path of democratic consolidation to adopt as its goal "to depoliticise the [police service] and thereby to contribute to the consolidation and maintenance of pluralistic democracy."[108] To the degree that only contracting states that have experienced a "particular history" can invoke *a priori* this legitimization, it amounts to saying that the freedom of speech of police officers is not subject to the same standard of protection in all the member states of the Council of Europe.

B. Freedom of Expression in the Service of Democratic Control

Convinced of the inadequacies of democratic control exercised by representatives of the electoral body, and in any event openly hostile to the development of a control of public powers based on direct democracy methods, the Strasbourg Court has deliberately favored the media's role as a force of opposition. Journalists and the entire media generally have been promoted to the rank of vanguard (according to the Marxist meaning of the term) of democratic control.[109] Thus, the consideration paid to the fourth estate greatly contributes logically to a lessening of the protection from criticism afforded to public institutions and their officials. But the promotion of journalistic expression results above all in an increase in the power of the public's right to

105. De Diego Nafria v. Spain, App. No. 46833/99 (Eur. Ct. H.R. Mar. 14, 2002), http://www.echr.coe.int/echr (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

106. *See* Ahmed v. United Kingdom, 1998-VI Eur. Ct. H.R. 2356.

107. *See* Rekvényi v. Hungary, 1999-III Eur. Ct. H.R. 423.

108. *Id.*

109. *See* Thorgeirson v. Iceland, 239 Eur. Ct. H.R. (ser. A) (1992).

information. In the name of the imperative of transparency, European jurisprudence reduces the reach of government confidentiality (public secrets).

1. The Privileged Protection of Journalistic Expression

Taking into consideration the eminent role held by the press,[110] primarily its contribution toward open debate within the game of politics, the court has assigned to the press the role of "watchdog" over democratic society.[111] It is precisely this mission which explains and justifies the increased level of protection accorded to the freedom of journalistic expression, which resembles at times a veritable privilege. It is understandable how such an extremely benevolent attitude adopted by the court with regard to journalists' freedom of expression could be viewed as placing the media outside of the law.[112] Within the court, the highly valued protection of journalistic freedom of expression has never really been challenged as such. On the other hand, the very degree of this heightened status has been a constant bone of contention.[113]

For a long time, promoting the protection of journalistic expression might have appeared to have taken on a monopolistic aspect. Now, assuming that such an assertion was true at a certain time in history, it must of course at present be put into proper perspective. In fact, the role of "watchdog" over democratic society is no longer the sole prerogative of the media,[114] but could also be regarded as belonging to bloggers engaged in amateur journalistic activity.[115] Thus, for the purpose of allowing journalists "necessary breathing room" (according to the terminology of the U.S. Supreme Court),[116] the Strasbourg Court has deemed it appropriate not only to ensure the protection of the confidentiality of journalistic sources but also to reduce the reach of journalistic duties.

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110. *See generally* Castells v. Spain, 236 Eur. Ct. H.R. (ser. A) (1992).

111. *Thorgeirson*, 239 Eur. Ct. H.R. at 27.

112. Jean Morange, *La protection de la réputation ou des droits d'autrui et la liberté d'expression*, *in* 2 LIBERTÉS, JUSTICE, TOLÉRANCE: MÉLANGES EN HOMMAGE AU DOYEN GÉRARD COHEN-JONATHAN, *supra* note 77, at 1247, 1250–63.

113. For examples of the antagonistic points of view developed by Judges Meyer and Walsh, see Goodwin v. United Kingdom, 1996-II Eur. Ct. H.R. 483, 506, 510–11. *See also* Stoll v. Switzerland, App. No. 69698/01 (Eur. Ct. H.R. Dec. 10, 2007), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number) (Zagrebelsky, J., dissenting).

114. *See* Vides Aizsardzības Klubs v. Latvia, App. No. 57829/00 (Eur. Ct. H.R. May 27, 2004), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number) (extending the prerogative to environmental defense groups).

115. DOCQUIR, *supra* note 7, at 89.

116. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 771 (1985); *see also* N. Y. Times Co. v. Sullivan, 376 U.S. 254, 271–72 (1964) (stating that the law must tolerate occasional erroneous statements if "the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive'") (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

i. Protecting the Confidentiality of Journalistic Sources

As the cornerstone of freedom of the press, the protection of journalistic sources is indispensable to performing the role of "watchdog" over democratic society.[117] Consequently, protecting journalistic sources constitutes a "crucial public interest"; any limits on the confidentiality of journalists' sources must undergo the most scrupulous examination by the Strasbourg Court.[118] The journalist cannot be summoned to divulge his/her sources of information and does not risk penal (or other) charges for having revealed information transmitted to him or her that is kept secret by law.[119]

For the court, this system of exorbitant protection guarantees the public's control, through the intermediary of the press, over the functioning of public institutions, primarily that of the justice system. In its most recent jurisprudence, the court took another significant step, at least symbolically, toward promoting the protection of journalistic sources. It declared that "the right of journalists to not disclose their sources should not be considered as a simple privilege granted to them depending on the legality or illegality of their sources, but as an actual attribute of the right to information . . . ."[120]

ii. Lessening Journalistic Obligations

The assessment of the "duties and responsibilities" of journalists takes into account the potential impact of the means of communication employed. It is much more rigorous for television and radio journalists than for their colleagues who work in the written press.[121] However, this difference in treatment does not curtail the overall

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117. Goodwin v. United Kingdom, 1996-II Eur. Ct. H.R. 483, 500.

118. Roemen v. Luxembourg, 2003-IV Eur. Ct. H.R. 87, 101.

119. Dupuis v. France, App. No. 1914/02 (Eur. Ct. H.R. June 7, 2007), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number) (discussing a case in which journalists relied on secret sources to report about government wiretapping of journalists' phones and stating that "it is necessary to take the greatest care in assessing the need, in a democratic society, to punish journalists for using information obtained through a breach of the secrecy of an investigation or a breach of professional confidence when those journalists are contributing to a public debate of such importance and are thereby playing their role as 'watchdogs' of democracy"); *see also* Dammann v. Switzerland, App. No. 77551/01 (Eur. Ct. H.R. Apr. 25, 2006), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number); Ernst v. Belgium, App. No. 33400/96 (Eur. Ct. H.R. July 15, 2003), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number); Roemen v. Luxembourg, 2003-IV Eur. Ct. H.R. 87; Fressoz v. France, App. No. 29183/95 (Eur. Ct. H.R. Jan. 21, 1999), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

120. Tillack v. Belgium, App. No. 20477/05 (Eur. Ct. H.R. Nov. 27, 2007), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

121. Radio France v. France, 2004-II Eur. Ct. H.R. 119, 152–53 (citing Jersild v. Denmark, 298 Eur. Ct. H.R. (ser. A) at 23 (1994) (stating that "[i]n considering the 'duties and responsibilities' of a journalist, the potential impact of the medium concerned is an important

tendency of European jurisprudence to reduce journalistic "duties and responsibilities."[122] This is particularly evident when journalistic material is about political actors. The reference to "duties and responsibilities" then becomes purely rhetorical.[123] However, even beyond this example, the lessening of journalistic obligations is noticeable whether it concerns the obligation "to provide accurate and reliable information"[124] or to respect the journalistic code.

a. Lessening the Obligation to Provide Trustworthy Information

The obligation to check the accuracy of published factual statements is far from systematically enforced. The court seems to accept that information taken from official sources (official reports or documents, even those not made public) is presumed to be exact and credible.[125] It also exempts the journalist from establishing the accuracy of information disseminated in cases where the journalist is publishing the various viewpoints of players in a controversy.[126] This reasoning rests on a more general right. "It is not for this Court . . . to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists."[127] Consequently, the court refuses to place the burden of the duty of objectivity on journalists with respect to information, remarks, and writing that are merely being quoted—as long as the journalist does not claim the material as his own.[128] But, this type of authorization is likely to create a kind of immunity for the journalist that would not be granted if the remarks reported were ascribable directly back to him or her.[129] Since malicious intent is difficult to prove, using quotations can be employed in some cases for purposes of concealment.

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factor and it is commonly acknowledged that the audiovisual media have often a much more immediate and powerful effect than the print media . . . .")).

122. *Id.*

123. Yannick Galland, *Les obligations des journalistes dans la jurisprudence de la Cour européenne des droits de l'homme*, 52 REVUE TRIMESTRIELLE DE DROITS DE L'HOMME 853, 862 (2000) (Belg.).

124. *Radio France*, 2004-II Eur. Ct. H.R. at 151.

125. *See* Selisto v. Finland, App. No. 56767/00 (Eur. Ct. H.R. Nov. 16, 2004), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number); Bladet Tromsø v. Norway, 1999-III Eur. Ct. H.R. 289, 325–27.

126. *See Selisto*, App. No. 56767/00; *Bladet Tromsø*, 1999-III Eur. Ct. H.R. at 323–24.

127. Jersild v. Denmark, 298 Eur. Ct. H.R. (ser. A) at 23 (1994); *see also* Bergens Tidende v. Norway, 2000-IV Eur. Ct. H.R. 371, 403.

128. *Cf.* Pedersen v. Denmark, App. No. 49017/99 (Eur. Ct. H.R. Dec. 17, 2003), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number) (holding that, since the journalist-applicants took a position on the veracity of a source, they had given the impression that the source was being truthful and did not leave the truth of the source's statements up to the viewer to decide, thereby incurring liability for libel).

129. *See* Verlagsgruppe News GmbH v. Austria, App. No. 76918/01 (Eur. Ct. H.R. Dec. 14, 2006), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number); Thoma v. Luxembourg, 2001-III Eur. Ct. H.R. 67, 88.

b. Lessening the Obligations to Respect the Journalistic Code of Ethics

The court has formally manifested a great respect for the Journalistic Code of Ethics and Practice. However, the actual consideration of rules governing the practice of journalism follows a jurisprudential policy that is still in a relatively uncertain and sometimes even erratic state. It seems that the court leans toward remedial usage of the journalistic code, that is to say, according it real effect (indeed decisive effect) when the journalist has demonstrated compliance with rules ratified by professional charters.[130] On the other hand, an obvious disregard for the journalistic code is not sufficient in and of itself to validate an observance of nonviolation of the Convention.[131] Moreover, in a seemingly paradoxical manner, the court has had to hide behind the methodological autonomy of the profession in order to downplay the obvious disrespect of code rules.[132]

The relatively distorted attitude of the court regarding the journalistic code of ethics can be partially explained. In fact, a rigorous application of the rules governing the practice of journalism would compel the court to review a section of its case law and most certainly decisions like the *Jersild* case.[133] But as of late, the court has apparently been more disposed toward paying greater attention to code rules. It has admitted this by making reference to the principle of the evolving interpretation of the Convention, by noting that ensuring respect for the journalistic code of ethics has taken on heightened importance in today's democratic society.[134] In addition, for the first time it seems, the court has been won over by the position of a private journalistic-code-of-ethics organization to "observe a number of shortcomings in the form of published articles."[135] It remains to be seen if the change in the court's attitude will take lasting hold as minority judges think (and fear) it will.[136]

2. The Right to Criticize Government Officials and Public Institutions

In a democratic system, the acts and omissions of government—whether exercising an executive or administrative function—must be placed under the attentive watch not only of legislative and judicial authorities, but also of the press and public opinion.[137] For the court, the freedom of speech, notably the element of the right to information, constitutes a preferred means of exercising this control. However, the extent of the

130. *See, e.g.*, Lopes Gomes da Silva v. Portugal, 2000-X Eur. Ct. H.R. 101.

131. *See* Cumpănă v. Romania, 2004-XI Eur. Ct. H.R. 63, 93.

132. *See* Bladet Tromsø v. Norway, 1999-III Eur. Ct. H.R. 289, 324–25.

133. *See* Jersild v. Denmark, App. No. 15890/89 (Eur. Ct. H.R. Sept. 23, 1994), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

134. Stoll v. Switzerland, App. No. 69698/01 (Eur. Ct. H.R. Dec. 10, 2007), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

135. *Id.*

136. *See id.* (Zagrebelsky, J., dissenting).

137. Castells v. Spain, App. No. 11798/85 (Eur. Ct. H.R. Apr. 23, 1992), http://www.echr.coe.int/echr (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

right to criticize cannot always conform to one unique standard. European jurisprudence has had to consider the generally limited capacity of government officials to reply to criticism. It has also had to take into consideration the working demands of each public institution under fire.

i. The Right to Criticize Civil Servants

European jurisprudence has consistently reiterated the point that the standard applicable to the right to criticize political officials is not transferable to attacks against mere civil servants.[138] Nevertheless, it seems more disposed now than in the past toward allowing criticism of the actions and behaviors of state officials.

At first, the new court gave the impression that it wanted to ensure civil servants a high degree of protection: "What is more, 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."[139] At the time, this position could have been considered, in light of the particular case in question, as severely limiting the freedom of speech of critics since it did not put into play the principle of reciprocity (the harsh remarks made by the plaintiff had been in retort to a municipal official's abuse of authority). The apparent lack of coherence of the right upheld was sharply criticized by one of the minority judges: "A regime which considers the verbal impertinence of an individual more reprehensible than illicit excesses by public officers is one that has . . . pulled the scale of values inside out."[140]

In its recent case law, however, the Strasbourg Court has given more importance to protecting the right of freedom of expression.[141] The court clearly aims to adjust the degree of protection enjoyed by the civil servant in relation to the duties performed; the higher the level of responsibility, the more the right to criticize must be safeguarded. Of additional importance, it intends to take into evaluation any professional failings or wrongdoings attributable to the civil servant. All in all, the court seems to be returning to finding a balance that it rejected in the *Janowski* case. In any event, a civil servant's protection is diminished when the criticism concerns involvement in militant political activity, even where the criticisms are severe and provocative.[142]

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138. *See, e.g.*, Pedersen v. Denmark, 2004-XI Eur. Ct. H.R. 105, 139; Thoma v. Luxembourg, 2001-III Eur. Ct. H.R. 67, 84.

139. Janowski v. Poland, App. No. 25716/94 (Eur. Ct. H.R. Jan. 21, 1999), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

140. *Id.*

141. *See* Mamère v. France, App. No. 12697/03 (Eur. Ct. H.R. Nov. 7, 2006), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

142. *See generally* Hrico v. Slovakia, App. No. 49418/99 (Eur. Ct. H.R. July 20, 2004), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number) (regarding a judge who appeared on the Social Christian Party's slate of parliamentary candidates); Perna v. Italy, App. No. 48898/99 (Eur. Ct. H.R July 25, 2001), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number) (regarding a

ii. The Right to Criticize the Justice System

The "judiciary power" as outlined by Article 10(2) of the Convention has a broad scope. It covers "the justice system or the judiciary element of power" but also "judges acting in their official capacity."[143] The imperatives of a well-administered justice system legitimize protection "against destructive attacks that are essentially unfounded, especially in view of the fact that judges who have been criticised are subject to a duty of discretion that precludes them from replying."[144] But inversely, a satisfactorily functioning justice system is hardly conceivable without the attentive watch of public opinion fully informed by the press.

Initially, reconciling these two requirements within the context of control based on the existence of the state's restricted discretionary powers seemed relatively chaotic, indeed incoherent.[145] If recent case law has not eliminated all the risks of contradiction inherent in the "special case" method, it has nevertheless manifested a structural tendency toward reinforcing the protection of the freedom of speech. This tendency can be illustrated by jurisprudential developments relative to a lawyer's right to criticize even though they require first determining if the critical remarks were made inside or outside of the courtroom.

In the first scenario, inside the courtroom, the freedom of expression enjoyed by a lawyer, while not limitless, is quite extensive as long as it does not take the form of offensive or abusive remarks. In fact, harsh criticism of the prosecution can be used strategically by a lawyer but is not considered justification for a civil conviction, or even a low fine. *In casu*, the court is careful to specify that the freedom of expression exercised against a prosecutor is broader than that directed against a judge.[146] But, this reservation did not prevent the court from confirming its attachment to the lawyer's full right to freedom of expression in the courtroom despite the fact that the criticism applied to the court or at least to some of its members.[147]

The freedom of expression enjoyed by a lawyer outside of the courtroom is definitely subject to less protection, but may be in the process of being strengthened. Certainly, the court would like to avoid the situation whereby lawyers use their right to freedom of expression as a procedural strategy inside the court.[148] In any case, the most

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judge known for his membership in the Italian Communist Party).

143. Sunday Times v. United Kingdom, App. No. 6538/74 (Eur. Ct. H.R. Apr. 26, 1979), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

144. Prager v. Austria, App. No. 15974/90 (Eur. Ct. H.R. Apr. 26, 1995), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

145. *See* Wachsmann, *supra* note 24, at 1027.

146. Nikula v. Finland, 2002-II Eur. Ct. H.R. 291, 310–11.

147. Kyprianou v. Cyprus, App. No. 73797/01 (Eur. Ct. H.R. Dec. 15, 2005), http://www.echr/coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number). In the *Kyprianou* case, the discourteous comments made by the lawyer were solely about the manner in which the judges were leading the criminal hearing. *Id.* Moreover, the court convicted the lawyer of contempt of court and sentenced the lawyer to prison without the guarantees of a fair trial. *Id.*

148. *See* Schöpfer v. Switzerland, 1998-III Eur. Ct. H.R. 1042, 1053. In *Schöpfer*, the lawyer called a press meeting to criticize the handling of a case in which he was involved and, more generally, to vehemently denounce the way in which the cantonal justice system functioned. *Id.*

recent case law shows a slight shift in the court's position. In fact, it allows for a lawyer actively involved in a criminal case to acquire, through the intermediary of the media, information relative to the case and even to criticize the action of the public prosecutor.[149]

In addition, the court has sought to guarantee lawyers, in the absence of involvement in the case, a right to freely criticize decisions made by the court, particularly where the main reason for suppressing criticism is to satisfy the judges' egos.[150]

iii. The Right to Criticize the Military

Although nonviolent displays of hostility toward the military and armed forces must be tolerated in a democratic society, the court nevertheless has ruled that the temporary police detention of two pacifist demonstrators who slightly disturbed an important military ceremony did not contradict Article 10.[151] This decision must not lead to confusion, however. It does not deliberately attempt to curb the free expression of pacifist opinions, but is rather an overall choice in jurisprudential policy, in this case, the display of less sensitivity toward freedom of speech due to other considerations coming into play, such as the maintenance of public order.[152] Any other reading of this jurisprudence would make one think that the court might follow a relatively paradoxical line of conduct since, for more than a decade, it has adopted a rather protective attitude toward the freedom of speech. The court's attitude, vis-à-vis military officers critical of the army, speaks volumes about the duty of political confidentiality to which the officers could be subjected.

According less weight than it previously had to respect for military discipline,[153] the Strasbourg Court went on to partially liberate the political expression of military officers, primarily that of draftees.[154] It considered that freedom of the press must also be allowed to reside within the barracks as long as it was devoid of blatant antimilitary designs or those of revolutionary unrest.[155] As a consequence, the military authorities' power over internal matters does not apply to critical publications, even satirical

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149. *See* Foglia v. Switzerland, App. No. 35865/04 (Eur. Ct. H.R. Dec. 13, 2007), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number). Because of its benign character, calling into question the public prosecutor's office was not deemed likely to undermine the public's confidence in the justice system. *Id.* As for the divulging of information, according to the court, it can be viewed as fulfilling the public's right to receive information regarding activities carried out by judicial authorities. *Id.*

150. Amihalachioaie v. Moldova, 2004-III Eur. Ct. H.R. 197, 207–08.

151. Chorherr v. Austria, App. No. 13308/87 (Eur. Ct. H.R. Aug. 25, 2003), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

152. *See* Steel v. United Kingdom, 1998-VII Eur. Ct. H.R. 2719, 2743.

153. *See* Engel v. Netherlands, App. No. 5100/71 (Eur. Ct. H.R. June 8, 1976), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

154. Vereinigung Demokratischer Soldaten Österreichs v. Austria, 302 Eur. Ct. H.R. (ser. A) at 13–19 (1994).

155. *Id.*

publications making demands or launching reform proposals.[156] This is because they do not call into question the duty of obedience, or the military establishment as a whole. The reinsertion of freedom of expression and of the press into the barracks goes even further. In fact, the court made states responsible for circulating an informational magazine critiquing the functioning of the military, provided that comparable magazines (uncritical or hardly critical) also benefit from official circulation.[157]

Taken literally, the court's jurisprudence gives the impression of guaranteeing a right to "collective insult" within the context of "symbolic speech" in accordance with the meaning attributed to these words by the United States Supreme Court.[158] Reading the dissenting opinions expressed by the minority judges in *Grigoriades v. Greece*,[159] the court sacrificed military discipline for the benefit of an aggravating interpretation of the freedom of expression. Such a conclusion is not totally without basis but it seems it is too radical. In *Grigoriades*, the violation of Article 10 was based on the almost confidential nature of a letter of criticism (which was, in reality, an antimilitaristic diatribe using particularly violent terms) written by the plaintiff. The plaintiff had been drafted by the army, but held the rank of sub-Lieutenant.[160] Thus, there was an absence of real impact that the letter might have had on military discipline. In contrast, infringement of freedom of speech would not have been established if the remarks directed against the army had managed to reach a larger audience. *In casu*, the letter had been addressed only to the unit commander and to a petty officer. Since the dissenting opinions dwell on an extremely disruptive and illogical interpretation of the Convention's orientation, the court would have prepared a bed of anarchy and antidemocratic subversion inside the army.

3. Increasing Protection in Cases of Divulging "Public Secrets"

"Press freedom assumes even greater importance in circumstances in which State activities and decisions escape democratic or judicial scrutiny on account of their confidential or secret nature."[161] In support of this statement, the Strasbourg Court consulted the soft law of the Council of Europe, in this case Resolution 1551/2007, regarding the fairness of legal proceedings in cases of espionage or divulgence of government secrets.[162] The court quoted the position of the Inter-American Commission on Human Rights when evaluating these cases: "The disclosure of State-held information should play a very important role in a democratic society, because it enables civil society to control the actions of the Government to which it has entrusted the protection of its interests."[163] Although the court has not systematically sacrificed committed interests in protecting government secrets to strengthening extreme freedom

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156. *Id.*

157. *Id.*

158. United States v. O'Brien, 391 U.S. 367, 376 (1968).

159. 1997-VII Eur. Ct. H.R. 2575, 2597–98 (Freeland, J., dissenting).

160. *See id.* at 2580–82.

161. Stoll v. Switzerland, App. No. 69698/01 (Eur. Ct. H.R. Dec. 10, 2007), http:/www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

162. *Id.*

163. Claude-Reyes v. Chile, 2006 Inter-Am. Ct. H.R. (ser. C) No. 151 (Sept. 19, 2006).

of expression, it undeniably has followed a policy of eroding "public secrets" with the enhanced promotion of, and regard for, the public's right to information.

i. Judiciary Secrets

Recently, European litigation challenging the protection of the confidentiality of judicial proceedings has, for the most part, originated in France. The Strasbourg Court's condemnation of the ban on publishing information from penal proceedings arose in a civil lawsuit. The claim was motivated by the ban's absolute and general nature and, as a result, by its nondiscriminatory character since such a ban does not apply to penal proceedings initiated following a public prosecutor's requisitioning or by simple complaint.[164] In this instance, the argument made to protect implicated individuals is relegated to the background in light of the sufficient protection assured by other mechanisms of French law. Even more fundamental is the fact that the existence of public control over the proceedings in question is considered as adding to the ban's effectiveness.

The issue of unconventionality raised against the ban on the use and reproduction of elements in a case file, and consequently against the ban on infringing court secrecy,[165] is also in response to the recurring preoccupation of the court with satisfying the public's right to information about the proper functioning of the penal justice system. This concern is held not only by the court, but is shared by the Committee of Ministers of the Council of Europe in its recommendation "on the provision of information through the media in relation to criminal proceedings."[166] This recommendation, to which the court refers, addresses the dissemination of information by the media related to penal proceedings. For these two institutions, the only legitimate reason for confidentiality is the protection of the presumption of innocence of the suspect or accused individual. The fact remains that the court's decision in *Tourancheau v. France* to uphold a criminal law banning the publication of official court proceedings and the listing of charges at public hearings[167] is based on a strict protection of the presumption of innocence and runs counter to the previously mentioned jurisprudence.[168]

At first glance, *Tourancheau* disputes the validity of case law relating to the protection of journalistic sources, since it states no opposition to a journalist mentioning the contents of said indictment papers and court documents without citing his/her sources. In summary, the case (decided by a one-vote majority) provides an

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164. *See* Du Roy v. France, 2000-X Eur. Ct. H.R. 205, 215.

165. *See* Dupuis v. France, App. No. 1914/02 (Eur. Ct. H.R. June 7, 2006), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

166. COMM. OF MINISTERS, COUNCIL OF EUR., RECOMMENDATION NO. R (2003) 13 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON THE PROVISION OF INFORMATION THROUGH THE MEDIA IN RELATION TO CRIMINAL PROCEEDINGS (2003), *available at* http://www.cra.ba/en/broadcast/reports/default.aspx?cid=2673.

167. Tourancheau v. France, App. No. 53886/00 (Eur. Ct. H.R. Nov. 24, 2005), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

168. *See Du Roy*, 2000-X Eur. Ct. H.R. at 222 (Costa, J., dissenting).

additional example, in detail, of the extremely limited coherence of European jurisprudence in the domain of freedom of expression.

ii. National Security Secrets

Before the fall of the Berlin Wall, the European Commission of Human Rights favored the protection of military secrets even if the breach was attributable to a civilian.[169] The Strasbourg Court, in turn, treated the disclosure of defense secrets by career military officers with comparable severity. In fact, while considering information classified as military secrets to be protected by Article 10 of the Convention, the court refused to grant military personnel the right to divulge said information on the grounds that the information never was secret or was no longer a secret.[170] But the court's increased safeguarding of the freedom of expression will weaken the protection of national security secrets. The court will rule that the publication or dissemination of information covered by military confidentiality rendered the latter unenforceable. Noting that confidential information, once disseminated (even if illegally), is by definition no longer a secret, the court has given preference to the freedom of speech of the disseminating individuals over the state interest in secrecy. It ruled accordingly about an English court's ban on publication even though the information, the work of a former secret service agent, had already reached bookshelves in the United States.[171] The same decision prevailed, in a similar context, to measures enacted to confiscate and withdraw from circulation a periodical publishing a study of the Netherlands' internal secret service.[172]

iii. Diplomatic Confidentiality

The position, adopted recently by the court, protecting the confidentiality of diplomatic documents[173] will be primarily viewed, without a doubt, as diminishing both journalists' freedom of expression and the public's right to information. In fact, it appears that the Grand Chamber adopts a stance completely opposite of the chamber's in order to determine the nonviolation of Article 10.[174] Contrary to the chamber, the Grand Chamber lends decisive importance to two considerations. First, the negative repercussions that it believes arise from publishing confidential information concerning the government's handling of foreign policy. Second, the sensational form of the

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169. *See* Jean-François Flauss, *L'incidence du droit européen sur l'exercice de la liberté d'expression des fonctionnaires en uniforme, in* LA LIBERTÉ D'EXPRESSION DES FONCTIONNAIRES EN UNIFORME 55, 62 n.3 (Roseline Letteron ed., 2000).

170. *See* Hadjianastassiou vs. Greece, 252 Eur. Ct. H.R. (ser. A) at 18–19 (1992).

171. *See* Observer & Guardian v. United Kingdom, 216 Eur. Ct. H.R. (ser. A) at 33–35 (1991).

172. *See* Verenigung Weekblad Bluf! v. Netherlands, 306 Eur. Ct. H.R. (ser. A) at 3 (1995).

173. *See* Stoll v. Switzerland, App. No. 69698/01 (Eur. Ct. H.R. Dec. 10, 2007), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

174. *See* Stoll v. Switzerland, App. No. 69698/01 (Eur. Ct. H.R. Apr. 25, 2006), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

publication of this confidential information. On the other hand, both the chamber and Grand Chamber agree about the applicable principles. They agree, for the most part, that while the confidentiality of diplomatic reports is justified, *a priori*, it is not to be protected at any price. In addition, both express the view that the media's role of criticism and control applies to the sphere of foreign policy. In other words, in the name of Article 10, the court reserves the right to monitor the exercise of diplomatic duties.

II. THE DEMANDS OF DEMOCRATIC SOCIETY AND THE CHANNELING OF FREEDOM OF EXPRESSION

Democratic society is tolerant but not inert. As a militant democracy, society must defend its basic principles. Consequently, it also has the duty to fight against abuses, committed in the exercise of freedom of speech, that openly target democratic values. If freedom of expression occupies a primordial place within the body of rights and freedoms guaranteed by the Convention, it still must simultaneously coexist with other concurrent, and at times conflicting, rights and freedoms.

A. Prohibited Speech and Language in Light of the Values of Democratic Society

A refusal to grant the protection afforded by Article 10 of the Convention can be based on an appeal to Article 17.[175] In practice, the pure and simple forfeiture of freedom of expression is rarely imposed by the Strasbourg Court.[176] European judges prefer using the scale rather than the sword of justice. That is to say, the court is inclined to read the restriction clause of Article 10(2) through the lens of Article 17, thereby enabling it to refuse the protection of contentious language without making use of the "guillotine" provision. The principle itself of "condemnation" of language contrary to the values of the Convention is fully accepted. On the other hand, its application *in casu* is not the most rigorous. The court has demonstrated a relatively understanding attitude toward outright adversaries of democratic society.

1. Revisionist Language

In extension of the European Commission's human rights jurisprudence,[177] the Strasbourg Court decided upon the existence of a category of clearly established historical events whose denial or revision does not, by virtue of Article 17, come under the protection of Article 10.[178] To this end, the following indelible "notorious historical

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175. *See supra* note 68.

176. *See* Sébastian Van Drooghenbroeck, *L'article 17 de la Convention européenne des droits de l'homme est-il indispensable?*, 46 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 541, 542 (2001) (Belg.).

177. Patrick Wachsmann, *La jurisprudence récente de la Commission européenne des droits de l'homme: de négationnisme*, *in* LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME: DÉVELOPPEMENTS RÉCENTS ET NOUVEAUX DÉFIS 103 (Jean-François Flauss & M. de Salvia eds., 1997).

178. *See, e.g.*, Chauvy v. France, 2004-VI Eur. Ct. H.R. 205, 229 (noting, in an aside, that the Holocaust belongs "to the category of clearly established historical facts"); Garaudy v.

truths" have been enumerated thus far: the Holocaust, Nazi persecution of Jews, the Nuremburg trials, and crimes against humanity committed during World War II. The inability to dispute these "notorious historical truths" is as much a matter of their reality as it is of their magnitude and gravity. In order to justify the application of Article 17, vis-à-vis revisionist language, the court does not lean solely upon the denial of a "notorious historical truth," but also points simultaneously to the disregard shown toward fundamental values of the Convention. "The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order."[179] However, it is also true that the court sometimes makes reference to abuses of the freedom of speech that are incompatible with democracy and human rights.[180] The use of the forfeiture clause is indicative, for all intents and purposes, of a hardening of policy.[181] In other words, it likely removes any doubt about the existence of the court's possible complacency with respect to revisionism by omission.[182]

2. Language of Intolerance or Hate Speech

European jurisprudence very clearly "condemns" any form of hate speech in principle. In *Jersild v. Denmark*, the Strasbourg Court affirmed that "Article 10 . . . should not be interpreted in such a way as to limit, derogate from or destroy the right to protection against racial discrimination under the UN Convention."[183] More recently, the court has explained that "remarks aimed at inciting racial hatred in society or propagating the idea of a superior race can not claim any protection under Article 10 of the Convention";[184] that "expressions that seek to spread, incite or justify hatred based on intolerance, including religious intolerance, do not enjoy the protection afforded by Article 10";[185] and finally that the protection granted by Article 10 does not apply to "concrete words constituting hate speech that might be offensive to individuals or groups."[186]

France, 2003-IX Eur. Ct. H.R. 369 (stating that, under Article 17, historical descriptions that negative the Holocaust are not protected by Article 10); Lehideux v. France, 1998-VII Eur. Ct. H.R. 2864, 2879 (describing the applicants' text as "present[ing] certain historical facts in a manifestly erroneous manner").

179. *Garaudy*, 2003-IX Eur. Ct. H.R. at 397.

180. *See* Witzsch v. Germany, App. No. 7485/03 (Eur. Ct. H.R. Dec. 13, 2005), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

181. *See* Michel Levinet, *La fermeté bienvenue de la Cour européenne des droits de l'homme face au négationnisme*, 59 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 653 (2004) (Belg.).

182. *See, e.g.*, *Lehideux*, 1998-VII Eur. Ct. H.R. at 2864.

183. Jersild v. Denmark, 298 Eur. Ct. H.R. (ser. A) at 20 (1995).

184. Aksoy v. Turkey, App. No. 28635/95 (Eur. Ct. H.R. Oct. 10, 2000), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

185. Gündüz v. Turkey, 2003-XI Eur. Ct. H.R. 257, 275.

186. Erbakan v. Turkey, App. No. 59405/00 (Eur. Ct. H.R. July 6, 2006), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

The court tends to maintain a syncretic and extensive view of hate speech. Hate speech is not limited solely to the domain of racial or religious discrimination. It was defined in 1997 by the Committee of Ministers of the Council of Europe. According to that definition, hate speech encompasses "all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination, and hostility against minorities, migrants, and people of immigrant origin."[187] In other words, banning hate speech as thus outlined is a breeding ground for the proliferation of crimes of opinion, or at least leads to an exacerbation of political correctness. In particular, it is lamentable that the Committee of Ministers, using its own unique logic, showed restraint by neglecting to explicitly envisage manifestations of intolerance committed on the part of minorities against the majority of the population.

Statistically, up until the present, the forfeiture of protection afforded by Article 10 has been declared only rarely in cases where comments have fallen within the definition of hate speech.[188] Under such circumstances, the decisions made by the court in this context merit all the more attention. For example, a British citizen's display of a poster in his house window with the following text: "Islam out of Britain—Protect the British People" and accompanied by a photo of the World Trade Center in flames[189] qualified as religious hate speech.[190] According to the court, the words and images appearing on the poster constituted an attack against all Muslims in the United Kingdom. Because of its generality and vehemence, such an attack against a religious group is incompatible with the values proclaimed and protected by the Convention—namely, tolerance, social peace, and nondiscrimination. The same reasoning was used toward fundamentally anti-Semitic speech, akin to hate speech directed against an ethnic group.[191]

The refusal to protect hate speech is generally based on an application of the restriction clause of Article 10(2), read expressly or impliedly through the lens of Article 17.[192] However, the Strasbourg Court's aversion to hate speech does not stop it,

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187. COMM. OF MINISTERS, COUNCIL OF EUR., RECOMMENDATION NO. R (1997) 20 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON "HATE SPEECH" (1997), *available at* http://www.coe.az/pfddoc/committee_of_ministers/Rec%20No.%20R%20(97)%2020%20(e).pdf.

188. For an inventory of pertinent cases, see LA LIBERTE D'EXPRESSION EN EUROPE: JURISPRUDENCE RELATIVE A L'ARTICLE 10 DE LA CONVENTION EUROPEENNE DE DROITS DE L'HOMME (Conseil de l'Europe ed., 3d ed. 2006).

189. Norwood v. United Kingdom, 2004-XI Eur. Ct. H.R. 343, 347.

190. *Id.* at 349.

191. *See* Ivanov v. Russia, App. No. 35222/04 (Eur. Ct. H.R. Feb. 20, 2007), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

192. *See* Garaudy v. France, 2003-IX Eur. Ct. H.R. 375; *see also* Karatepe v. Turkey, App. No. 41551/98 (Eur. Ct. H.R. July 31, 2007), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number) (dealing with religious hate speech); Seurot v. France, App. No. 57383/00 (Eur. Ct. H.R. May 18, 2004), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number) (dealing with hate speech); Osmani v. Former Macedonia, 2001-X Eur. Ct. H.R. 389 (dealing with ethnic hate speech).

depending on the context, from allowing Article 10 to come into play and, even in some cases, from finding a violation of the provision.[193] It happened thus in three well-known cases whose doctrine has been widely debated.

In *Jersild v. Denmark*,[194] notwithstanding the obviously heinous character of remarks made on the topic of the ban against racial discrimination (among other things, comments were made comparing the physical traits of people of African origin with those of the great primates living on the same continent), the court gave priority to the defense of the freedom of expression with the justification that the words were not actually said by the plaintiff, a journalist condemned for having allowed their dissemination in a televised report.

In *Gündüz v. Turkey*,[195] contentious remarks stigmatizing and calumniating people born of parents not married according to a specific religious tradition (to be precise, not married according to the law of the Koran), though religious hate speech, were excused by the court when they were said live by a religious dignitary during a televised program.

In *Erbakan v. Turkey*,[196] the speech in question demonstrated religious intolerance by calling upon voters to identify themselves based upon the criteria of religious affiliation. The speech called for the rejection of nonbelievers, that is to say non-Muslims and nonpracticing Muslims, in a society where the principle of a secular state prevailed constitutionally. Taking into consideration the reduced impact of this electoral speech and the long delay before the government acted, the court downplayed its significance. The importance thus given to the context can be decisive, perhaps even more so in litigation involving language of violence.

3. Language of Violence

Incitement to violence, insurrection, or armed resistance cannot be tolerated in a democratic society. The situation whereby it is inserted into the context of political struggle for the purpose of defending the rights of a national minority has no absolving value.[197] Thus, any kind of speech or language supporting the possibility of the use of force for secessionist ends will be considered language inviting violence.[198] Recently, the court had the opportunity to explicitly state what it meant by incitement to violence. It clarified the matter by defining incitement as not only a direct call to violence but

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193. *See* Mario Oetheimer, *La Cour européenne des droits de l'homme face au discours de haine*, 69 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 63, 74–75 (2007) (Belg.).

194. 298 Eur. Ct. H.R. (ser. A) (1994).

195. 2003-XI Eur. Ct. H.R. 257.

196. App. No. 59405/00 (Eur. Ct. H.R. July 6, 2006), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

197. *See* Zana v. Turkey, 1997-VII Eur. Ct. H.R. 2533, 2548–49.

198. *But see* Yazar v. Turkey, App. No. 42713/98 (Eur. Ct. H.R. Sept. 23, 2004), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number) (holding that, because the speech was determined to not have as its aim inciting violence or armed resistance, the state had not violated Article 10 of the Convention).

also occurring through more indirect and diffuse means.[199] For example, remarks that have the potential to awaken animal instincts and strengthen deeply entrenched prejudices resulting in deadly violence can be considered inciting violence. In fact, in "this context, the reader can get the impression that recourse to violence is a necessary and justifiable measure of self-defense in the face of an aggressor."[200]

The identification of remarks as those inciting violence does not lead the court to *ipso facto* restrict the freedom of expression of the authors of such statements. It simply confers more extensive discretionary powers to national authorities in order to implement limitations on the exercise of freedom of speech.[201] The court was (and seems again) divided on the proper way to assess the existence of an incitement to violence. The disagreement principally revolves around the role that context should play in the matter. Some judges are of the opinion that too much emphasis is placed on context already. They would rather give priority to the content itself of the contentious text.[202] Other judges, who favor increased protection of freedom of expression, are anxious to accord more weight to the context than to the text[203] and propose attaching decisive importance to the actuality or imminence of a risk of violence.[204] The prominence given to context is nevertheless likely to produce the opposite effect.[205]

The fact remains that the suppression of incitement to violence is particularly monitored by the court whenever the publication or message in question takes the form of a work of art, even if it enjoys only limited distribution.[206] In such a scenario, the court is led to empty the language of its venom or, at the very least, to weaken its tone.[207] When the incitement to violence is not disseminated by its author, the third

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199. Dogan v. Turkey (No. 3), App. No. 4119/02 (Eur. Ct. H.R. Oct. 10, 2006), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

200. *Id.*

201. *See* Sürek v. Turkey (No. 1), 1999-IV Eur. Ct. H.R. 353, 382 (requiring that the reasoning for interference be "relevant and sufficient").

202. For an example of this argument, see Karatas v. Turkey, 1999-IV Eur. Ct. H.R. 81, 120–21 (Wildhaber, J., dissenting).

203. *See e.g.*, Sürek v. Turkey (No. 4), App. No. 24762/94 (Eur. Ct. H.R. July 8, 1999), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number) (Palm, Tulkens, Fischbach, Casadevall & Greve, JJ., concurring).

204. *See id.*

205. *See* Hogefeld v. Germany, App. No. 35402/97 (Eur. Ct. H.R. Jan. 20, 2000), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number) (declaring the application inadmissible after considering the applicant's background in evaluating the statements at issue).

206. *See* Alinak v. Turkey, App. No. 40287/98 (Eur. Ct. H.R. Mar. 29, 2005), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number) (finding a violation when the work was a novel with limited mass appeal).

207. *But see* Küçük v. Turkey, App. No. 28493/95 (Eur. Ct. H.R. Dec. 5, 2002), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number) (deciding the government's interference was not in proportion to its legitimate objective); *Karatas*, 1999-IV Eur. Ct. H.R. at 109–10 (finding a violation where the work was artistic in nature and had a small audience).

parties who serve as messengers are bound by the duty of objectivity with respect to comments reported. In any case, this was the position taken most recently by the court regarding the publication by an organ of the press of statements signed by detainees claiming to be members of a terrorist group and calling for the demolition of prisons through violent action.[208] In *Falakaoğlu v. Turkey*, those responsible for publishing the statements were not connected in any way personally, but by the same token, they did not distance themselves enough from the statements either.[209] Now, according to the court's decision, the right to communicate information cannot be used as an alibi or pretext to disseminate statements from terrorist groups.

B. Enforceable Individual Rights to Freedom of Expression

In the absence of a clause resolving the conflict between rights established by the text of the Convention itself, European judges may be tempted to resort to the preemptive elimination of the conflict by using the technique of disqualification—the infringement caused by the freedom of speech is placed outside the field of the targeted concurrent right. In the opposite scenario, where the conflict is crystallized, the court will usually choose to weigh the freedom of expression against the concurrent or competing right. In some exceptions, the court will opt to use its right to organize the rights in a hierarchical order. In conclusion, the freedom of expression, notwithstanding its status as a highly valued freedom, is far from systematically receiving preferential protection.

1. Concurrent Rights Enjoying Strengthened Enforceability

i. The Right of Ownership

Confrontations between the right of freedom of expression and the right of ownership make use of the court's option to organize rights into a hierarchical order. Without resorting to the technique of weighing respective interests against each other in an attempt to protect both rights, the Strasbourg Court clearly gives precedence to the second over the first.[210] In this case, it deems that the state is not obliged to take measures to counteract the action of the owner of a private commercial center who had prohibited access to environmentalists wanting to gather signatures at the center's entrance and aisles in support of a petition against the construction of a sports complex in the vicinity. The court considered that the restriction limiting freedom of expression was limited to a specific geographic area. In particular, the restriction did not apply to the premises of merchants or service providers installed inside the commercial center.

In support of the defense of their freedom of expression, the plaintiffs invoked, in a very substantial manner, pertinent American and Canadian case law. This jurisprudence, favorable to recognizing the notion of "private spaces almost public in

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208. *See* Falakaoğlu v. Turkey, App. No. 22147/02 (Eur. Ct. H.R. Jan. 31, 2007), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

209. *Id.*

210. *See* Appleby v. United Kingdom, 2003-VI Eur. Ct. H.R. 185.

nature," is reproduced in the "In fact" section of the Strasbourg's Court's ruling.[211] Although the court takes this case law into consideration, it deems nevertheless, using an almost commonplace or trivial methodology, that the jurisprudence invoked was not sufficiently well-established. Above all, it highlights the fact that the Unites States Supreme Court refrained from upholding, at the federal level, the existence of a right to free expression within private commercial malls.[212] Does that mean that in the opposite case, the Strasbourg Court would have admitted the presence of a "sufficiently emerging consensus" favoring the manner claimed by the plaintiffs for exercising their freedom of expression and that, consequently, it would not have dismissed a reading of Article 10 of the Convention on Human Rights in light of United States federal law?

ii. Protection of Religious Convictions

In order to "condemn" offensive speech or language ridiculing others' religious convictions (or language considered as such), the Strasbourg Court bases its decisions on the "protection of rights of others"[213] and, more specifically, on defending the actual guarantee of diversity of opinions and beliefs. Indeed, in extreme cases, it resorts to specific methods to deny or oppose religious beliefs that can end up dissuading believers from openly expressing their beliefs and exercising their right to freedom of religion.[214] Now, if this justification is undeniably valid for religious convictions held by the minority, it is treated with caution when the religious sentiments at stake are held by the majority and with still more caution when held by the ultra majority.

The importance given to the defense of religious convictions has also been criticized on the ground that the court tended, more or less admittedly, to inscribe morality into the "protection of the rights of others."[215] In order to distinguish between lawful and unlawful antireligious speech with regard to the Convention, the court relies on two determinations. First of all, it deems that protecting the rights of others creates for the speaker "an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement on their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs."[216] It further specifies that the propagation of doctrines antagonistic to the faith of believers must be tolerated, except in cases where injurious attacks are made against sacred symbols or objects of religious veneration.[217] This distinguishing

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211. *See id.* at 194–96.

212. *See* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980).

213. Otto-Preminger-Institut v. Austria, 295 Eur. Ct. H.R. (ser. A) at 6, 12, 19 (1994).

214. *See id.* at 19.

215. Patrick Wachsmann, *La religion contre la liberté d'expression: sur un arrêt regrettable de la Cour européenne des droits de l'homme*, 6 REVUE UNIVERSELLE DES DROITS DE L'HOMME 441 (1994).

216. *See, e.g.*, Giniewski v. France, App. No. 64016/00 (Eur. Ct. H.R. Jan. 31, 2006), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

217. *See* Tatlav v. Turkey, App. No. 50692/99 (Eur. Ct. H.R. May 2, 2006), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number); İ.A. v. Turkey, 2005-VIII Eur. Ct. H.R. 249, 257–58.

criterion is not totally convincing to the extent that it is without doubt not actually operative for religions that dogmatically or intellectually are unfamiliar with, or refuse to recognize, the dissociation ruling upheld by the court. But, perhaps, it is at least as convincing, if not more so, than proposals attempting to limit the protection of other people's religious sentiments to only serious[218] insults or those going beyond a "reasonable limit."[219]

In view of the apparent priority given the protection of religious convictions over freedom of expression, European jurisprudence has managed to worry those in favor of a secular democratic society.[220] The same type of concern could also be fed by the difference in treatment upheld by the court with respect to antireligious and antisecular speech; the first gets less protection than the second. In short, the duty of believers and nonbelievers to display tolerance is asymmetrical. In actuality, there is not reciprocity in the matter. Moreover, unlike the protection of religious sentiments that is assured alternatively or conjointly on the basis of Articles 9(1) and 10(2) of the Convention, the protection of nonreligious convictions (atheists, agnostics, or other) is only possible by virtue of Article 10(2). In addition, the court gives the impression of showing benevolence with respect to remarks aimed at discrediting nonbelievers as long as the antisecular language does not fall within the category of hate speech based on religious intolerance.[221] In other words, if secular defamation is widely allowed by the court in a constitutionally secular country, it should, logically speaking, be even more so in a state that does not have this characteristic, namely—within all the member states except France.

The attention paid by the court to protecting minority religious beliefs also reveals a difference in treatment. Specifically, a duty of precaution was imposed on "antisectarian" movements when descending into the arena of public debate. Said movements "must show a greater degree of tolerance vis-à-vis criticisms formulated by opponents regarding their objectives and methods employed in the debate."[222] A similar obligation has not been, up until the present anyway, imposed on "sectarian movements," and even more generally, on minority religious groups. It is apparently only in the case of political debate that this duty of precaution weakens.[223] Would the

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218. *See, e.g.*, Otto-Preminger-Institut v. Austria, 295 Eur. Ct. H.R. (ser. A) at 3, 24 (1994) (Palm, Pekkanen & Makarczyk, JJ., dissenting).

219. Wingrove v. United Kingdom, 1996-V Eur. Ct. H.R. 1937, 1966 (Lohmus, J., dissenting).

220. *See İ.A.*, 2005-VIII Eur. Ct. H.R. at 260–61 (Costa, Cabral Barreto & Jungwiert, JJ., dissenting).

221. *See* Nur Radyo Ve Televizyon Yayıncılığı A.Ş. v. Turkey, App. No. 6587/03 (Eur. Ct. H.R. Nov. 27, 2007), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number) (commenting that the court is to measure remarks by whether they encourage violence or hatred against nonbelievers); Gündüz v. Turkey, 2003-XI Eur. Ct. H.R. 257, 275 (finding that defending a religious view without calling for violence to establish it is not hate speech).

222. Paturel v. France, App. No. 54968/00 (Eur. Ct. H.R. Dec. 22, 2005), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

223. *See* Jerusalem v. Austria, 2001-II Eur. Ct. H.R. 69. In *Jerusalem*, the antisectarian language was declared to be within the framework of a political assembly by a person having an elective mandate. Moreover, the "psycho-sect" specifically challenged by name had ties with a

difference in treatment (even if minor) established between antireligious and antisecular speech combine with a difference in treatment within antireligious speech or language in accordance with the religious convictions at stake? In other words, would there be some religions better protected or more worthy of protection than others? At first glance, the question seems wacky or maybe even tactless. However, the fact remains that this question would be perfectly relevant if the court did not have to apply the *Giniewski*[224] standard identically to all religious faiths without distinction, and not only to those which practice repentance.

2. Concurrent Rights Enjoying Only Limited Enforceability

i. The Right to One's Reputation

There is no provision in the Convention that expressly guarantees a right to one's reputation. This explains why it has been treated as a component of "protecting the rights of others" and, as such, has been legitimately restricted. A detailed study of the jurisprudence of both the former and new court would highlight the preference given to freedom of expression in cases where it conflicts with the preservation of the reputation of others. The preference accorded to freedom of expression appears indifferent to the identity of the individuals who would try to protect their reputation or honor. Everyone or everything is on the same playing field, regardless of whether they are employers,[225] employees (for example, seal hunters),[226] doctors (particularly surgeons),[227] politicians,[228] or businesses.[229]

This orientation, sometimes akin to a kind of bias, has often been criticized in doctrinal scholarship.[230] By exception, it seems, the court purposely based the superior status accorded to freedom of expression on the existence of a hierarchy (or at least of a hierarchical system). "[T]he Court cannot find that the undoubted interest of Dr R. in protecting his professional reputation was sufficient to outweigh the important public interest in the freedom of the press to impart information on matters of legitimate

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political party. *Id.* at 76–83.

224. Giniewski v. France, App. No. 64016/00 (Eur. Ct. H.R. Jan. 31, 2006), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

225. *See* Fuentes Bobo v. Spain, App. No. 39293/98, 31 Eur. H.R. Rep.1115 (2001); Fressoz v. France, App. No. 29183/95 (Eur. Ct. H.R. Jan. 21, 1999), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

226. *See* Bladet Tromsø v. Norway, 1999-III Eur. Ct. H.R. 289, 297–99.

227. *See* Kanellopoulou v. Greece, App. No. 28504/05 (Eur. Ct. H.R. Oct. 11, 2007), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number); Selistö v. Finland, App. No. 56767/00 (Eur. Ct. H.R. Nov. 16, 2004), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number); Tidende v. Norway, 2000-IV Eur. Ct. H.R. 371, 379.

228. Dalban v. Romania, 1999-VI Eur. Ct. H.R. 221, 229–30.

229. Steel v. United Kingdom, 2005-II Eur. Ct. H.R. 1, 8–13.

230. *See, e.g.*, Gérard Cohen-Jonathan, *Abus de droit et libertés fondamentales*, *in* AU CARREFOUR DES DROITS: MELANGES EN L'HONNEUR DE LOUIS DUBOUIS 517 (2002); Morange, *supra* note 112.

public concern."[231] Usually, the preference given to freedom of expression comes after weighing the two conflicting rights against each other: protecting the reputation of others weighs systematically less than defending the right guaranteed by Article 10(1) of the Convention. Thus, individuals have become hostages of the legitimate public interest attached to any general interest debate.

The overprotection conferred to the right of freedom of expression vis-à-vis the protection of the reputation of others is, in any case, well on the way to being lessened (indeed modified) as seen in some very recent jurisprudence of the Strasbourg Court. The court's change in attitude is all the more noticeable because it applies to the reputation of a particularly controversial politician who occupies a position on the political checkerboard described as extremist.[232] The decision is all the more unprecedented (and unexpected even) because it does not make the protection of the reputation of a political figure dependent upon the nature of his or her political ideas (i.e., "good" or "bad" ideas)—the position expressed in the partially dissenting opinion of the minority Judges Rozakis, Bratza, Tulkens, and Šikuta.[233] The enhanced prestige of the protection of the reputation of others is an objective clearly stated by several judges whose goal is not only to fight against abuses of the mass media, but also, and perhaps above all, to include an actual right to one's reputation in the Convention, which has a similar status to that of freedom of expression.[234] Indeed, it seems paradoxical that the Convention explicitly protects rights of lesser importance (such as that of respect for one's correspondence), but marginalizes one of the main components of such a fundamental human value as a person's dignity.[235]

Likewise, it seems curious and even incongruous that the court, so ready to engage in a more or less unchecked use of the doctrine of "living law" in certain cases, has never established respect for one's reputation in independent fundamental law. Textually, the protection of one's reputation is only one admissible ground for restricting the freedom of expression. But this technical consideration (indeed this obstacle) is far from being a determining factor as it concerns, among other things, the manipulative interpretation of Article 4 of the Convention wrought by the court that concluded on the applicability of Article 14.[236] Upholding a right to protect one's reputation is legitimate not only due to its fundamental importance in democratic society, but also due to the transformation of the press, which has become, above all, a business activity concerned about profitability and driven by the opinion that it is answerable only to itself. Moreover, in its latest jurisprudence, the court for the first

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231. *Tidende*, 2000-IV Eur. Ct. H.R. at 404.

232. Lindon v. France, App. Nos. 21279/02 & 36448/02 (Eur. Ct. H.R. Oct. 22, 2007), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application numbers).

233. *Id.* (Rozakis, Bratza, Tulkens & Šikuta, JJ., dissenting in part).

234. *See id.* (Loucaides, J., concurring).

235. The right to one's reputation and honor is recognized both by Article 12 of the Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948), and Article 17 of the International Covenant on Civil and Political Rights. International Covenant on Civil and Political Rights art. 17, Dec. 16, 1966, 999 U.N.T.S. 171, 177.

236. *See* Schmidt v. Germany, 291 Eur. Ct. H.R. (ser. A) at 24, 32 (1994).

time clearly established the right to the protection of one's reputation as a component of the right to respect for one's private life.[237]

ii. The Right to Respect for One's Private Life

The increased protection accorded by European jurisprudence to respect for the reputation of others can be inserted within a more general movement to reinforce the protection of one's private life and chiefly focused upon the intimacy of private life.[238] But for all that, the freedom of expression is far from being systematically sacrificed in the balancing act practiced by European human rights judges. The determining factor of reconciliation between the two antagonistic rights resides in the contribution that the publication or message makes to a general interest debate.[239]

To the extent that the notion of "general interest" or "public interest" debate is relatively flexible,[240] the court is in a position to rule differently depending on the particular circumstances of each case. Freedom of expression wins out when suppression of the attack on the political figure's privacy is based not on common law, but on a specific provision protecting the official functions performed by the figure.[241] Protecting the intimacy of the private life of political figures gives way since the details of the private life at issue are not completely separable from the public function exercised.[242] The same is true when the details of the private life of a political leader, such as his or her financial status, interfere with the performance of his or her public functions.[243] Such a conclusion was at the same time upheld relative to the tax situation of an important leader in the world of economics.[244] The conclusion was based on the reasoning that contribution of this tax information belonged to a general interest debate and would have belonged to it even if the economic leader concerned had not been a person "known" by the general public.[245] Moreover, even for anonymous people, the

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237. Pfeifer v. Austria, App. No. 12556/03 (Eur. Ct. H.R. Nov. 15, 2007), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number) (Loucaides, J., dissenting).

238. *See* Dreyer, *supra* note 85, at 639; Patrick Wachsmann, *Le droit au secret de la vie privée*, *in* LE DROIT AU RESPECT DE LA VIE PRIVÉE AU SENS DE LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME 151 (Fréderic Sudre ed., 2005).

239. Hannover v. Germany, 2004-VI Eur. Ct. H.R. 41, 69.

240. *See supra* Part I.A.1.

241. *Cf.* Karhuvaara v. Finland, 2004-X Eur. Ct. H.R. 259, 270–77.

242. *See* Éditions Plon v. France, 2004-IV Eur. Ct. H.R. 39. In *Éditions*, the state of the health of a former deceased head of state, protected by medical confidentiality, became a question of general interest due to the passage of time: "the more time that elapsed, the more the public interest in discussion of the history of President Mitterand's two terms of office prevailed over the requirements of protecting the President's rights with regard to medical confidentiality." *Id.* at 72.

243. *See* Krone Verlag GmbH v. Austria, App. No. 34315/96 (Eur. Ct. H.R. Feb. 26, 2000), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

244. *See* Fressoz v. France, App. No. 29183/95 (Eur. Ct. H.R. Jan. 21, 1999), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

245. *See* Verlagsgruppe News GmbH v. Austria (No. 2), App. No. 10520/02 (Eur. Ct. H.R.

protection of the intimacy of one's private life is relegated to the background from the moment they are regarded as having made themselves known.[246]

Inversely, the court gives precedence to the right to privacy when the message or publication is considered not to make any contribution to a general interest or public debate. Such is the case when contentious remarks relate strictly to the private life of a political figure without any connection to his or her political mandate.[247] Similarly, the publication of a judge's personal notes used to prepare for his hearing before a government investigative commission, which was to be made public and broadcast on television anyway, seems outside the realm of a public interest debate. The information provided in such a document strictly concerns the personal domain.[248] The fact that dissemination of the content of the judge's notes was likely to squelch public curiosity was deemed totally irrelevant.[249] In any case, the existence of a general or public interest debate is not structurally linked to the notoriety of the person whose private life is revealed. In fact, the court refuses to subscribe to the distinction made by Germany's Constitutional Court between "absolute" and "relative" figures in contemporary history and rejects the view that protecting the private details of a person from the first category should be limited to publicly inaccessible places.[250]

CONCLUSION

A panoramic approach to the Strasbourg Court's jurisprudence relative to freedom of expression leads us to conclude the existence of two lines of force: on the one hand, the structural promotion of the freedom of expression and, on the other hand, the category-specific adjustment of said freedom. A more detailed reading reveals distortions, indeed discrepancies, that are detrimental to the intelligibility and authority of European jurisprudence. Judicial security, to which the court is so attached, is not systematically guaranteed in freedom of expression litigation. Certainly, in part, these observed or observable discrepancies are only provisional: they are due to the varying methods of assessment used by the chambers of the court, which have not yet been coordinated by the Grand Chamber, or are due also to temporary time delays between the position of the Grand Chamber and that of one of the other chambers. But these discrepancies can prove to be much less contingent. To this end, it would suffice as a starting point to refer to the extent of control exercised by the court based on the grounds upheld by the national judge.

Dec. 14, 2006), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

246. *See* News Verlags GmbH v. Austria, 2000-I Eur. Ct. H.R. 157, 175–76.

247. Tammer v. Estonia, 2001-I Eur. Ct. H.R. 263, 277–82 (ruling that a conviction for using discourteous terms against the wife of a political leader in reference to her conjugal and family life did not violate Article 10 of the Convention).

248. Leempoel v. Belgium, App. No. 64772/01 (Eur. Ct. H.R. Nov. 9, 2006), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number).

249. *See* Prisma Press v. France, App. No. 66910/01 (Eur. Ct. H.R. July 1, 2003), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application number) (regarding the publication of pictures in a similar context).

250. Hannover v. Germany, 2004-VI Eur. Ct. H.R. 41, 72.

Sometimes it acts at the fourth level of jurisdiction, while at other times it favors the ancillary character of European control. The choice in favor of one or another modality is the cause of debate within the court.[251]

Among the rights protected by the European Convention, the right to freedom of expression is without doubt one of the most sensitive to the political and ideological stances of the judges themselves. A radioscopy of their individual opinions would highlight the particular affinities of each of the judges. The fact remains that, *in corpore*, they resolutely adhere to an asymmetrical jurisprudential policy. Adversaries of the values of the Convention are far from being treated identically. Whether for historical reasons or in order to conform to current trends, the court endeavors above all to combat far-right extremism, which it correctly views as presenting the biggest threat to values protected by the Convention. Nevertheless, bad-intentioned or disgruntled minds might be tempted to link the court's relative moderation with respect to far-left extremism to old political sympathies of some judges.

Although not specific to litigation revolving around the freedom of expression, the court's appeal to the soft law of the Council of Europe has had particular import on freedom of expression litigation for some years. It can most likely be explained by the total convergence of existing views on numerous points against racism and xenophobia held by the court, the Parliamentary Assembly, the Committee of Ministers, and the European Commission. Thus, proceeding in such a way, the court contributes to the effectiveness of purely declaratory or "recommendatory" norms.

By virtue of its richness as well as its anteriority, the body of case law elaborated by the Strasbourg judge for nearly forty years has served as a source of inspiration for the Luxembourg judge, without the latter automatically adhering to the methodology of control upheld by the Strasbourg Court.[252] Outside the European framework, this jurisprudence has not necessarily been accepted as a reference model to follow or one to blindly transpose. In any case, on occasion, some of its elements have been taken into consideration, either explicitly or implicitly, by other international courts monitoring respect for and compliance with human rights, such as the African Human Rights Commission or the Inter-American Court of Human Rights.[253]

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251. Lindon v. France, App. Nos. 21279/02 & 36448/02 (Eur. Ct. H.R. Oct. 22, 2007), http://www.echr.coe.int/echr/ (click "case-law" then "HUDOC," select "decisions" on the left-hand column, and search for the application numbers) (Rozakis, Bratza, Tulkens & Šikuta, JJ., dissenting in part).

252. *See* Case C-274/99, Connolly v. Comm'n, 2001 E.C.R. I-1617 (opinion of Jorabo Colomer, Advocate General).

253. *See* GERARD COHEN-JONATHAN & J.F. FLAUSS, LE RAYONNEMENT INTERNATIONAL DE LA JURISPRUDENCE DE LA COUR EUROPÉENNE DES DROITS DE L'HOMME 124–26, 163 (2005).