毀謗、表達自由與歐洲人權公約

Defamation, Free Expression and The European Convention on Human Rights

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中文摘要

本文探討歐洲人權公約第十條所規範之表達自由權與毀謗罪兩者之衝突。而研究方法則是採用案例研究之方法，本文以歐洲人權委員會之決定與歐洲人權法院之判決為基礎，研究這兩個歐洲人權機構如何平衡表達自由權與個人權益之衝突。

本文首先介紹歐洲人權公約之內涵。其次將可能構成毀謗之言論分為針對六個主體，即法官、政治人物、警察、軍隊、個人及宗教，以分析歐洲人權機構是否針對不同主體之意見表達而認定其享有不同程度之保障。再者，本文亦探討何謂毀謗言論之適當賠償問題。本文分別就各案件加以評述，文中亦論述歐洲人權機構漸漸給予表達自由權更多之保護，即歐洲人權機構逐漸修改其看法，而將過去認為是毀謗的言論，認定為屬於表達自由權之保障範疇，以增進表達自由權之保障，但是歐洲人權機構依然認為法官享有較少之表達自由權，而針對宗教之言論亦較不易受保護。

有關各案例之推論方法，本文認為歐洲人權機構過度依賴「判斷餘地原則」及強調「表達意見者之責任與義務」，此二方法已限縮表達自由權之保障。然而歐洲人權機另一方面以「價值判斷」之方法突破限制，擴張表達自由權之保障，本文認為此為歐洲人權機構在方法論上之重大貢獻。

I. PRELIMINARY REMARKS

The European Convention for the Protection of Human Rights and Fundamental Freedoms[1] establishes not only the world's most successful system of international law for the protection of human rights, but one of the most advanced forms of any kind of international legal process. The Convention is the first international agreement ever to allow individuals to submit petitions concerning human rights issues against their own countries in an international tribunal. In contrast to the traditional view that looked upon individuals as objects of international law, it enables individuals to be regarded as subjects of international law[2] and leads human rights protection towards an international path, specifically towards international judicial protection.

Before Protocol No. 11 to the Convention became effective three institutions participated in the proceedings of examining cases: the European Commission of Human Rights[3], the European Court of Human Rights[4], and the Committee of Ministers. The Commission and the Court, arguably the world's most powerful international human rights bodies, were established to ensure the observance of the engagements undertaken by the contracting States. The Commission had four functions: first, as a filter, examining the admissibility of cases; secondly, as a mediator, trying to secure a friendly settlement; thirdly, as a fact-finder, writing reports; and finally, as an interpreter, presenting cases to the Court. The Court, judging whether cases were in violation of the Convention, played the most important role as the final

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213 U.N.T.S. 221; E.T.S. 5; U.K.T.S. 71 (1953); Council of Europe, Collected Texts (Council of Europe, 1995), pp. 13-36. The European Convention for the Protection of Human Rights and Fundamental Freedoms was signed on 4 November 1950 and came into force on 3 September 1953. Hereafter cited as "the Convention", "the European Convention", or "the European Convention on Human Rights".

See Mark Janis, "Individuals as Subjects of International Law", 17 *Cornell International Law Journal* 61 (1984). He suggests that, as international law is not properly "inter-national," we continue using the word international but understand "nation" to mean not only the national state also the individuals who are the nationals of the state.

Hereafter cited as "the Commission" or "the European Commission".

Protocol No. 11 to the Convention has significantly changed the control mechanism of the Convention. The European Commission on Human Rights was abolished after 31 October 1999. The old European Court of Human Rights ceased to exist when the new permanent European Court of Human Rights was inaugurated on 1 November 1998. Within this essay, the permanent European Court of Human Rights established by Protocol No. 11 is cited as "the new Court" or "the permanent Court". When the Commission and the Court are both mentioned, they are cited as "the Strasbourg institutions" (as the Commission and the Court seat in Strasbourg) or "the institutions of the Convention".

interpreter of the Convention. The Committee of Ministers, although a political organ which is not established by the Convention but by the statute of the Council of Europe, also had a role in judicial decision-making.

If the Commission held cases to be inadmissible, such a decision was final, since no appeal was provided. On the other hand, an admissible case in which the parties had reached no friendly settlement might be referred to the Court by the Commission, by the contracting States concerned and by the individual or non-governmental organisation who had submitted the petition. However, if cases were not brought to the Court, the Committee of Ministers had to decide the question concerned by a 2/3 majority. The Committee of Ministers, although it had far fewer chances than the Court to decide cases, actually had judicial power.

The process and the structure of the permanent Court under Protocol No. 11 can be summarised as follows. The new Court sits in Committees, Chambers, and a Grand Chamber. Whereas an inter-state case is directly examined by a seven-judge Chamber for the decisions on both admissibility and merits, an individual application is first assigned to and prepared by a Judge Rapporteur, then referred to a three-judge Committee for the determination of admissibility. If a case is not held to be inadmissible, which needs a unanimous decision by the three judges, the individual application will be referred to a Chamber, which will decide on both admissibility and merits. A Chamber may try to reach a friendly settlement between the parties. If no friendly settlement is reached, a judgment should be given. Nonetheless, before it renders its judgment, a Chamber may relinquish jurisdiction to the Grand Chamber, consisting of seventeen judges, where a case raises a question affecting the interpretation of the Convention or its Protocols, or where the Chamber's decision may be inconsistent with a previous judgment of the new Court. However, if one of the parties objects, a case can not be relinquished. There will still be a possibility of rehearing the case before the Grand Chamber, "if the case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance."[5] The rehearing application should be made at the request of any party within three months from the date of a Chamber's judgment, and a panel of five judges of the Grand Chamber will consider whether or not to refer the case.

Article 10 of the European Convention on Human Rights[6] reads:

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[5] Article 43 of the Convention.

[6] For the subject of the European Convention on Human Rights generally, see, among others, Irene Maier (ed.),

> 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.
>
> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[7]

This essay reviews how and where the European Commission and Court of Human Rights draw the legitimate boundaries between the guarantee of the right to freedom of expression and the protection of the rights and reputation of others. Its examination focuses on cases where potentially defamatory statements were made concerning six subjects: judges, politicians, the police, the armed forces, general individuals, and religion. It also reviews the Strasbourg institutions' opinion on proper award in defamation litigation. The chosen cases include two parts: judgments, which the Court has made and decisions, which the Commission decided as "manifest ill-founded" since, although they were decisions on admissibility, merits had been presented.

II. JUDGES

Protection of Human Rights in Europe - Limits and Effects (C. F. Müller Juristischer Verlag, 1982); Franz Matscher and Herbert Petzold (eds.), *Protecting Human Rights: The European Dimension* (Carl Heymanns Verlag KG, 1988); M. Delmas-Marty *et al* (eds.), *The European Convention for the Protection of Human Rights. International Protection versus National Restriction* (Kluwer Academic Publisher, 1992); R. S. J. Macdonald, F. Matscher and H. Petzold (eds.), *The European System for the Protection of Human Rights* (Nijhoff, 1993); R. Beddard, *Human Rights and Europe* (3rd ed., Cambridge University Press, 1995); and Karen Reid, A *Practitioner's Guide to the European Convention on Human Rights* (Sweet & Maxwell, 1998).

It has to be noted that Protocol No. 11 to the Convention, which came into force on 1 November 1998, inserts the heading of Article 10 as "Freedom of Expression" not "The Right to Freedom of Expression".

First I shall consider conflicts between the freedom of the press and the rights and reputation of judges. The institutions of the Convention have found that criticisms of the impartiality of lay judges employed by government and critical accounts of the behaviour of judges in court were defamatory. However, in a recent case the Court leaned towards the freedom of the press by referring to a "value-judgment" approach.

In *Barfod*[8], the applicant wrote a magazine article about a judgment given by a professional judge and two lay judges employed by a local government in Denmark. That judgment upheld the local government's decision to tax Danish nationals working on US bases in Greenland. In his article the applicant alleged that the two lay judges were disqualified under the Danish Constitution and questioned their ability to decide impartially in a case brought against their employer. The applicant was fined because he could not prove the truth of his allegation.

The Court ruled that the interference with the applicant's freedom of expression was prompted by one factor, namely the applicant's statement that the two lay judges "did their duty" meaning that they cast their votes as employees of the local government rather than independently and impartially. The Court considered that no breach of Article 10 could be established for the following reasons. First, referring to the Greenland High Court's ruling that the words, "did their duty", represented "a serious accusation which is likely to lower [the judges] in public esteem,"[9] the Court was satisfied that the interference with the applicant's freedom of expression was not intended to restrict his right to criticise publicly the composition of the High Court. In the Court's view, it was quite possible to question the composition of the High Court without attacking the two lay judges personally. Secondly, the Court held that since the applicant did not prove his accusations against the lay judges, he had to be considered to have based his accusations on the mere fact that the lay judges were employed by the local government. Therefore, the Court found that the State's legitimate interest in protecting the reputation of the two lay judges was not in conflict with the applicant's interest in participating in free public debate on the question of the structural impartiality of the High Court.[10] Thirdly, the Court could not accept the applicant's argument that his accusations of the two lay judges ought to be seen as part of political debate which set very wide limits for legitimate criticism. The Court found that the applicant's statement was

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8 *Eur. Court HR, Barfod v. Denmark judgment of 22 February 1989, Series A no. 149.*

9 *Ibid.*, para. 32.

10 *Ibid.*

not a criticism of the reasoning in the judgment but rather a defamatory accusation against the lay judges personally.[11]

It could be argued that the applicant's statement was not necessarily a defamatory accusation against the lay judges. The applicant in fact criticised the composition of the court, i.e. two lay judges presiding in a court, which was supposed to be impartial and independent, to decide a case where their employer was a defendant. Whenever a judge finds for his or her employer there is inevitably a suspicion that this was because of the relationship between employee and employer, and this reason alone would be sufficient to cast doubt upon a judge's impartiality and independence. Criticism of a judgment could be directed not only at the reasoning employed but also at the composition of the court that formed the decision. It is therefore difficult to make a distinction between the "personal attack" on the two judges and the complaint about the improper constitution of the court. Although criticism of a court's composition could be interpreted as an attack on the judges, it would not necessarily be reasonable to prosecute a writer solely because he used harsh words. As Robertson and Merrills have argued, "*Barfod* seems a harsh decision because in writing his article the applicant, though careless, was really guilty of nothing more than over-enthusiasm."[12]

Being the ultimate arbiters on the application of laws, judges are certainly worthy of respect. Nevertheless, the judiciary, like other democratic institutions, must be open to thorough public scrutiny; judges are generally obliged to tolerate a high degree of criticism concerning matters of public interest. The Commission's report[13] insisted:

> Even if the article in question could be interpreted as an attack on the integrity or reputation of the two lay judges, the general interest in allowing a public debate about the functioning of the judiciary weighs more heavily than the interest of the two judges

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[11] *Ibid.*, para. 35.

[12] A. H. Robertson and J. G. Merrills, *Human Rights in Europe. A Study of the European Convention on Human Rights* (3rd ed., Manchester University Press, 1993), pp. 153-4.

[13] The Commission decided that there was a violation of Article 10. According to Yourow's view, the reason for the differences between the Commission and the Court may be explained by the generally younger, less conservative, and less judicial membership of the Commission. The members of the Court, in contrast, tended to be older, more conservative, and more judicially experienced. Judges like Fitzmaurice, Sorenson, and Barnhardt, among others, are international lawyers whose temperament and background incline them to respect state discretion. See H. C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Martinus Nijhoff Publishers, 1996), p. 131.

in being protected against criticism of the kind expressed in the applicant's article.[14]

Indeed reputation of the two lay judges could have been protected by allowing a freer debate on their judicial conduct, not by placing a restriction on the writer's freedom of expression which would prevent other comments. The Court should have given greater weight to the fact that to penalise people for making comments critical of the judiciary will deter others from expressing their views on judicial behaviour, and will thereby inhibit free expression on aspects of the legal system.[15] The outcome of the case should have been the opposite.

Critical accounts of judges' behaviour in the courts were once regarded as defamatory. In *Prager and Oberschlick v. Austria*[16], the applicants published an article which alleged that "the Viennese judges treat every accused at the outset as if he had already been convicted"[17] and attributed to a judge who brought a defamation action against them a "bullying" and "contemptuous"[18] attitude in the performance of his duties. The article was based on the writer's own experience of attending some trials, the statements of lawyers and legal correspondents, and surveys carried out by university researchers. One of the judges brought a defamation action and was awarded damages against the applicants.

The Court relied on three reasons to find for the defendant Government. First, the Court found that some of the accusations made in the article were extremely serious. The Court concluded that the article had "accused the persons concerned of having, as judges, broken the law or ... of having breached their professional obligations."[19] Therefore it had not only damaged their reputation, but also undermined public confidence in the judiciary. The second reason lay in the applicants' failure to establish that their allegations were true or that their value-judgments were fair. Thirdly, the Court also found that Mr. Prager did not claim to have acted in good faith or conform to the ethics of journalism since he had not attended any criminal trial before the judge who brought the lawsuit and had not given the judge any opportunity to respond to his allegations.

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14 *Eur. Commission HR, Application No. 11508/85 report of 16 July 1987, para. 71.*

15 David Pannick, "Article 10 of the European Convention on Human Rights", (1993-94) 4 *King's College Law Journal* 44, 48.

16 *Eur. Court HR, Prager and Oberschlick v. Austria judgment of 26 April 1995, Series A no. 313.*

17 *Ibid*, para. 36.

18 *Ibid*

19 *Ibid*

However, it has to be noted that the Court's judgment in *Haes and Gijsels v. Belgium*[20] seemed to mark a departure in its attitude to defamation cases involving judges. The applicants published five articles in their magazine describing a controversial divorce suit in which the custody of children was awarded to the father, who had been accused of abusing the children. In their articles they criticised the judges in charge of the case for rejecting all medical and psychiatric reports unfavourable to the father. The articles accused the judges of bias, lack of independence, and extreme-right-wing sympathies. In a defamation action brought by the judges, the applicants were ordered to pay damages for non-pecuniary loses and to publish this judgment in their magazine and six daily newspapers.

The European Court explained the reason why the courts deserved protection:

> The Courts — the guarantors of justice, whose role is fundamental in a State based on the rule law — must enjoy public confidence. They must accordingly be protected from destructive attacks that are unfounded, especially in view of the fact that judges are subject to a duty of discretion that precludes them from replying to criticism.[21]

The European Court ruled that the applicants could not be accused of having failed in their professional obligations since the articles that they had written contained a mass of detailed information which was based on thorough research of their own and on the opinions of several experts. The Court also found that although the applicants' comments were without doubt severely critical, they appeared proportionate to the matters alleged. While the Court ruled that the tone of the articles was polemical and even aggressive, it stressed that Article 10 also protected the form in which information was conveyed. In the Court's view, "journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation."[22] The Court considered that the applicants' allegations amounted to an opinion whose truth, by definition, was not susceptible of proof. Therefore the verdict in the libel action constituted a breach of Article 10.

The applicants had also alleged that one of the judges was the son of an important person who was convicted in 1948 of collaboration with the wartime Belgian Government which

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[20] Eur. Court HR, Haes and Gijsels v. Belgium judgment of 24 February 1997, *Reports of Judgments and Decisions* 1997-I.

[21] *Ibid*, para. 37.

[22] *Ibid*, para. 46.

went along with Nazi regime.[23] In this connection, the Court found that "it is unacceptable that someone should be exposed to opprobrium because of matters concerning a member of his family."[24] The Court held that the imposition of a penalty was justifiable because of that allusion by itself.

The above reasoning suggests that criticism of a judge simply because of his birth into a particular family would not be protected. Whereas the opinion of the Court on this point should not be taken to mean that a journalist can never question a judge's impartiality because of his origin, this kind of criticism could not be sustained without further supporting facts.

The significant differences between *Prager and Oberschlick* and *Haes and Gijsels* were whether the applicants observed ethical standards of their profession and whether their critical accounts constituted value-judgments. While it is quite reasonable to require a journalist to conform to the ethics of journalism, the Court did not set out the details of journalists' ethics or explain the extent to which a journalist should follow them. Nor did the Court clearly state the criteria for distinguishing truth from value-judgment. In *Haes and Gijsels* the Court ruled that value-judgment was not susceptible of proof; nonetheless, in *Prager and Oberschlick* the Court required the applicants to establish that their value-judgments were fair. The Court seems to have ruled that a value-judgment, although not susceptible of proof as to its truth, still has to be fair.

The *Haes and Gijsels* judgment suggests that it would be unacceptable for those who criticised judges to be punished. *Haes and Gijsels* has established that a journalist's comments about judges should be protected if the journalist has complied with the standards of the profession. It is submitted that this conclusion is a fair balance between protection of the freedom of the press and the rights and reputation of judges. On the one hand, any criticism of a judge should be based on fair value-judgments and compliance with professional ethics: biased or groundless criticism of a judge can easily damage his or her reputation. On the other hand, criticism of judges will not damage the rule of law; indeed it may, by identifying defects in the legal system, promote the cause of justice.[25] For the citizen to keep a critical eye on the exercises of judicial power it is essential that fewer limits be imposed on the publication of opinions concerning those activities of the judiciary which are of public concern. Those who sit in judicial office must face criticism, even if that criticism is harsh. The judge must be

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23 *Ibid*, para. 19.

24 *Ibid*, para. 45.

25 David Pannick, *Judges* (Oxford University Press, 1987), p. 128.

subject to public scrutiny, particularly from the press that acts as a medium of the public.

While the *Haes and Gijsels* judgment stated that criticism of judges by journalists does not necessarily constitute as defamatory remarks, this does not seem to be the case for criticisms made by judges. The following case suggests that a judge may not make public comments or serious criticisms concerning judges or the judiciary. In *Hans-Christian Leiningen-Westerburg v. Austria*[26], the applicant was a presiding judge in a criminal trial arousing great public interest. After the end of the trial, the applicant spoke to a journalist, who did not make any note or recording of their conversation. The journalist then published a book, the last chapter of which reported the following comments allegedly made by the judge. The applicant said that never had so many people tried to intervene in a case. Furthermore, he claimed that another judge, who also sat as a presiding judge in that case, was open to bribery. The applicant said that "the judiciary is a whore", by which he meant that a man like the defendant in that case was even protected by the judiciary. Because of these comments, the applicant received a disciplinary reprimand.

The Commission dismissed the application mainly because of the margin of appreciation enjoyed by the defendant Government. It considered three factors in coming to its decision. First, the Commission noted that the applicant's remarks about his colleague being open to bribery went beyond normal criticism and were liable to undermine the credibility of the judiciary. Secondly, the Commission considered that when the applicant made the remarks in a conversation with a journalist, he ought to have been aware of the risk that they would be published. Thirdly, the Commission also noted that a reprimand was the mildest sanction possible.

It might be important to note that the applicant judge's comments were made in a conversation of which no record was made at the time. The applicant should have been reprimanded, but only if the published views were really his own. It was therefore imperative that the Commission discovered the facts before it found for the Austrian authorities. This decision should not lead to a conclusion which denies the judge the right to freedom of expression. The judge has to be loyal to the institution and function of the judiciary; but the judiciary is the servant not of the state, but of the law.[27] Imposing discipline on a judge should be very careful. Any disciplinary measure imposed on a judge could itself be a threat to the

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[26] *Eur. Commission H. R., Application No. 26601/95 decision of 20 January 1997, 88-A D & R 5.*

[27] Henry G. Schermers, *Active or Hyper-Active European Courts?* (Centre for the advanced Study of European and Comparative Law, University of Oxford, 1997), p. 9.

authority and impartiality of the judiciary, since it might have a chilling effect on the judge.

III. POLITICIANS

In two early cases concerning defamation actions brought by politicians, the Strasbourg institutions decided in favour of the defendant states, whereas in recent cases they have found for the applicants mainly by deciding that their statements merely contained value-judgments.

In *X. v. Federal Republic of Germany*[28], the applicant was fined for his strong criticism of a mayor, whom he accused of fraud and handling stolen goods. There was regrettably no opportunity to understand why the Commission justified the restriction.

All the other cases reviewed related to the defamation provisions in Austrian Criminal Law which required a person to prove that what he said was true. However, this requirement was only upheld in the earliest of those cases. In *Peter Michael Lingens & Gerd Leitgeb*[29], the applicants published an article which alleged that an Austrian MP had lied when he said that he knew of a case where an association had incited an enterprise to dismiss employees for the purpose of political propaganda. That article was published after the MP had continually stated that he knew of the case but refused to reveal the name of the corporation.

The Commission observed that the obligation to publish only what could be proven as true in Austrian Criminal Law only applied to "allegations of an objectively defamatory character."[30] The Commission accepted that the defamation regulations in the Austrian Penal Code were a necessary restriction. The Commission also noted that the applicants did not limit their criticism "to an expression of their opinion that the MP had to cover the untruthfulness of his original statement."[31] In other words, "they presented their opinions in the form of objective information."[32] The Commission therefore concluded that the convictions were not disproportionate.

On the other hand, in all of the other four cases the Court held that there were violations of Article 10. Three of these cases concerned the conflict between the freedom of the press

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28 *Eur. Commission HR, Application No. 6988/75 decision of 29 September 1975, 3 D & R 159.*
29 *Eur. Commission HR Application No. 8803/79 decision of 11 December 1981, 26 D & R 171.*
30 *Ibid*, p. 181.
31 *Ibid*, p. 182.
32 *Ibid*

and the rights and reputation of politicians. In *Lingens*[33], the applicant criticised a politician for protecting former SS members for political reasons, and for his accommodating attitude towards former Nazis, his lack of tact in dealing with the victims of the Nazis, and his immoral and undignified behaviour after a general election when he was preparing to form a government with another party. In *Oberschlick*[34], the applicant published the full text of his application for the prosecution of a politician. The politician had suggested in a television programme that the family allowances for Austrian women should be increased by 50 per cent, but that those paid to immigrant mothers should be reduced by 50 per cent, views which the applicant believed corresponded to those of the Nazis. In *Oberschlick (No. 2)*[35], the applicant called a politician an "idiot" rather than a "Nazi", for the reason that in a public gathering the politician had made a speech glorifying the role of the "generation of soldiers" who had taken part in the Second World War. The politician had said that all soldiers, including the German army, had fought for peace and freedom, and that people should not differentiate between "bad" and "good" soldiers of that generation, but should rather be grateful to all of them for having founded democratic society. He also expressed the view that only those who had risked their lives in that war were entitled to enjoy freedom of opinion. The final case concerned a conflict between politicians. In *Schwabe*[36], the applicant, a politician, issued a press release when a colleague, who had been convicted of negligently causing bodily harm and abandoning the victim of a traffic accident whilst under the influence of alcohol, was asked whether he should resign. The press release, based on an article that had appeared a year earlier, referred to a car accident that had occurred more than twenty years ago involving a politician from different party who was then Transport Minister. It emphasised that that party obviously had different moral standards. In all four cases the applicants were fined.

Because the opinions of the Court in these cases were similar, only their common features are reviewed. The Court pointed out that a politician, who inevitably and knowingly laid his every word and deed open to close scrutiny by both journalists and the public at large, must display a greater degree of tolerance, especially when he himself made public statements that

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33 *Eur. Court HR, Lingens v. Austria judgment of 8 July 1986, Series A no. 103.*

34 *Eur. Court HR, Oberschlick v. Austria judgment of 23 May 1991, Series A no. 204.*

35 Eur. Court HR, Oberschlick v. Austria (No. 2) judgment of 1 July 1997, *Reports of Judgments and Decisions* 1997-II.

36 *Eur. Court HR, Schwabe v. Austria judgment of 28 August 1992, Series A no. 242-B.*

were susceptible of criticism.[37] A politician was certainly entitled to have his reputation protected, even when he was not acting in his private capacity, but the requirements of that protection had to be weighed against the interests of open discussion of political issues.[38]

The Court noted that the statements made by the politicians in these cases tended to arouse strong reactions. In the Court's view, the applicants' statements might be considered polemical and might have chosen a special form, but their remarks did not constitute gratuitous personal attacks. The Court believed that penalties like those imposed in these cases would be "likely to deter journalists from contributing to public discussion of issues affecting the life of the community" and were "liable to hamper the press in performing its task as purveyor of information and public watchdog."[39] The Court ruled that the applicants' criticisms were "value-judgments" in the exercise of their freedom of expression. In the Court's view, a careful distinction had to be made between facts and value-judgments: "the existence of facts could be demonstrated, whereas the truth of value-judgment was not susceptible of proof."[40] Accordingly, the Court found that the requirement to prove the truth of statements could not be fulfilled and therefore infringed the right to freedom of opinion.

The Court has granted extensive freedom of expression to those, including journalists and politicians, who criticise politicians.[41] The Court's recent judgments seem to establish that most criticisms of the politicians, no matter what their form and content, can be regarded as "value-judgment" or "opinion". The Court's judgments have enhanced the protection of free debate on political issues. As Macdonald has argued, there is nevertheless a question: "if value-judgments are protected, the question arises as to when does an expression of opinion turn into mere abuse falling outside the protection of the Convention?"[42] It might be doubtful whether *all* opinions are entitled to absolute protection. It is of great importance that the Strasbourg institutions are willing to assess whether the classification of criticisms as facts or as value-judgment by the national authorities is correct.[43] However, the Court has still not

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37 *Ibid*, para. 29.

38 *Ibid*

39 *Ibid*, para. 44.

40 *Ibid*, para. 46.

41 In a recent case, *Dalban v. Romania*, while the Defendant State is a new member of the Convention, the Court still insists that political expression should be protected. See Eur. Court HR, Dalban v. Romania judgment of 28 September 1999, *Reports of Judgments and Decisions* 1999.

42 R. St. J. Macdonald, "Politicians and the Press", in R. St. J. Macdonald, F. Matscher and H. Petzold (eds.), *The European System for the Protection of Human Rights* (Nijhoff, 1993), p. 367.

43 P. van Dijk and G. J. H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd

given a clear statement of the criteria for distinguishing statements of fact from value-judgments.

It must also be noted that when deciding the cases which involved conflicts between journalists and politicians the Court did not require a value-judgment to be fair or place emphasis on the professional ethics of journalism. It seems that the Court allows more extensive freedom of expression to the journalist when commenting on affairs concerning politicians than on other subjects. Whereas the politician has to put up with more criticism, such criticism should not be completely groundless. Their professional obligations are basic requirements that journalists must follow.

Nonetheless, in a case in which the defendant in a criminal case was a politician, the Court held the view that a journalist should limit his comments on a particular politician in order not to interfere with impartiality of the judiciary. In *Worm v. Austria*[44], the applicant was a journalist working for a periodical dealing mostly with politics. A former Austrian Vice-Chancellor and Minister of Finance was convicted of making false statements as a witness because he wrongly stated that certain amounts of money had been put at his disposal by another person when in fact they had been transferred from anonymous bank accounts operated by his wife and himself. He then faced criminal proceedings concerning charges of tax evasion. While the proceedings were ongoing, the applicant wrote an article which described the proceedings and concluded that the case permitted no other interpretation than that the politician was evading taxes. The applicant was convicted of put illegal pressure on criminal proceedings. Mr. Worm had investigated into and reported on the cases concerning the former Vice-Chancellor for several years.

In regard to the relationship among politicians, journalists and the judiciary, the Court explained:

> [T]he limits of acceptable comment are wider as regards a politician as such than as regards a private individual. However, public figures are entitled to the enjoyment of the guarantees of a fair trial set out in Article 6, which in criminal proceedings include the right to an impartial tribunal, on the same basis as every other person. This must be borne in mind by journalists when commenting on pending criminal proceedings since the limits of permissible comment may not extend to statements which are likely to

ed., Kluwer Law International, 1998), p. 572.

[44] Eur. Court HR, Worm v. Austria judgment of 29 August 1997, *Reports of Judgments and Decisions* 1997-V.

prejudice, whether intentionally or not, the chances of a person receiving a fair trial or to undermine the confidence of the public in the role of the courts in the administration of criminal justice.[45]

The most remarkable feature of the reasoning of the Court was that it granted a margin of appreciation to the Vienna Court of Appeal. The Court found that the Austrian court had considered the applicant's article in its entirety and had adduced sufficient reasons to convict the applicant. First, the Austrian court had considered whether the applicant's article was objectively capable of influencing the outcome of the pending proceedings. It found that the applicant had not merely carried out a critical psychological analysis: his comments made an unfavourable assessment of the former minister's replies at trial. Secondly, the Austrian court held that the applicant's long-standing involvement in the cases concerning the former minister reinforced the impression gained from the wording of the article that he had written it with the intention of influencing the outcome of the proceedings.[46] Thirdly, in the Court's view, the judgment of the Austrian court did not to restrict the applicant's right to inform the public in an objective manner about the development of the trial.

In addition, the Court did not share the view of the Commission that the passage in the applicant's article which implied that the former minister was evading taxes merely described a state of suspicion. The Court ruled that the applicant's view was stated in absolute terms, so that the impression was conveyed to the reader that a criminal court could not possibly do otherwise than convict the former minister.[47]

The Court's conclusion seemed to mean that among the interests of journalists, politicians and the judiciary, the authority and impartiality of the judiciary goes at the top, the freedom of the press in the middle and the rights of the politician at the bottom. However, it might be argued that this conclusion was not completely right and that the reasoning on which it was based was not entirely convincing. First, it was not reasonable to rule that because the applicant had followed cases concerning the former minister for several years, he intended to influence the result of the judgment. The applicant was a journalist who dealt mostly with politics and it was possible that the cases concerning the former minister involved political corruption. It was quite reasonable for the applicant to follow the cases and this did not

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45 *Ibid*
46 *Ibid*, para. 51.
47 *Ibid*, para. 52.

provide any reason to believe that his intention was to influence the outcome of the case. Secondly, the Court has continually emphasised the important role of the press in a democratic society. The Court has also stated that it is only necessary to prohibit a publication if it appears absolutely certain that it will present a threat to the authority of the judiciary.[48] It is hard to see how an article written by a journalist who had professionally reported on the political issue could have an unreasonable influence on the result of the judgment concerned. Since an important feature of the present case was that the former minister had been convicted of making false statements as a witness, it could be argued that the conclusion in the applicant's article was not an attempt to influence the outcome of the case but the expression of a reasonable suspicion about what the former minister had done. This judgment seemed to draw back from protecting the right to freedom of expression, particularly freedom of the press. It might well be argued that the Court should have reached the opposite conclusion.

IV. POLICE OFFICERS

This section turns to the conflict between the protections of the freedom of the press and the rights or reputation of another type of subject, the police officer. The case that will be examined is *Thorgeir Thorgeirson v. Iceland*[49]. From 1979 to 1983, there were many allegations of police brutality in Iceland. In one of those cases accusations made by a Mr. Jonsson led to the prosecution of three members of the Reykjavik police, two of whom were acquitted and one convicted. That case gave rise to a great deal of discussion and led the applicant to publish two articles on police brutality in a daily newspaper. The articles claimed that the police were "beasts in uniform" and that their behaviour encompassed "bullying, forgery, unlawful actions, superstitions, rashness and ineptitude." He was found guilty of defamation of unspecified members of the Reykjavik Police Force.

In examining whether it had been necessary to convict the applicant, the Court first rejected two arguments made by the defendant Government. In the first place, the Court was not able to accept that the statements in the applicant's articles lacked objective and factual bases. The Court observed that the applicant's first article took "the Jonsson case," the result and influence of which were not disputed, as its starting point. The Court also noted that

[48] See *Eur. Court HR, the Sunday Times v. the United Kingdom (No. 1) judgment of 26 April 1979, Series A no. 30*, para. 55.

[49] *Eur. Court HR, Thorgeir Thorgeirson v. Iceland judgment of 25 June 1992, Series A no. 239.*

although the factual elements in the applicant's articles were constructed by reference to "stories", "rumours", or "public opinion", it had not been established that this "story" in the applicant's articles was altogether untrue and entirely invented. In the Court's view, the applicant was only reporting what was being said by others about police brutality. The Court therefore ruled that when the applicant was requested to prove the truth of his statements, he was faced with "an unreasonable, if not impossible, task."[50]

Nor was the Court convinced by the other contention of the Government, which argued that the aim of the applicant's articles was to damage the reputation of the Reykjavik Police Force as a whole. The Court pointed out that the applicant assumed that "comparatively few individuals were responsible,"[51] so his criticisms did not aim either to attack all the members or any specific member of the police. The Court ruled that the applicant's main purpose was to urge the Minister of Justice of Iceland to set up an independent and impartial body to investigate allegations of police brutality. Having regard to the articles' purposes and impact, the Court found that the language used by the applicant, although strong, was not excessive. The Court accordingly concluded that the restriction was not necessary in a democratic society.

It can be observed from this judgment and from those discussed in the previous two sub-sections that the Court has tried to protect the freedom of the press in reporting matters of public interest. Although it did not explicitly say so, the Court seemed to regard the applicant's remarks as value-judgments, which has been a strong argument for the protection of the freedom of the press. It should also be noted that in this case the Court again failed to emphasise the professional standards of the journalist. It does not seem to be convincing that the Court only emphasised journalists' professional standards in relation to their criticism of judicial activities. Moreover, when it said that the applicant was only reporting what was being said by others, the Court seemed to rule that there was no need to prove whether a statement was true if it only repeated other people's allegation. There was, however, a risk of encouraging people to defame others by conveying information appearing in other written materials. The Court should have clearly ruled that a reasonable value-judgment or fair opinion did not constitute a defamation of the public authorities.

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50 *Ibid*, para. 65.

51 *Ibid*, para. 66.

V. ARMED FORCES

Two cases are examined to see whether critical remarks of a writer and a soldier on the army can be regarded as defamatory. In *X. v. Austria*[52], the applicant published two articles which stated that "what the boys in the army learn is not discipline but shameful, corpse-like obedience, not good manners but vulgar expressions"[53] and that "pacifists feel that in an institution designed to teach the technique of mass murder there is no good; all is evil."[54] The applicant was fined for libelling the Austrian Army.

Without giving any particular reason, but asserting that the provisions of the Austrian Penal Code represented measures necessary for the protection of the reputation of others, the Commission was convinced that these provisions had not been applied "in a manner contrary to the Convention and in particular to Article 18."[55] The Commission concluded that the Austrian authorities were within their margin of appreciation and that there was no violation of Article 10.

The Commission did not examine whether the applicant's writings contained defamatory statements against the Austrian Army. It might not be correct to hold that a public institution possesses personal honour. In any case, it would be hard to establish that the army, as an institution, had been defamed. Moreover, it should be noted that this decision was made in 1960. In its more recent decisions the Court has emphasised that a value-judgment is not susceptible of proof. As we have seen above, in some cases the Court has found that the defamation provisions of Austrian Criminal Law requiring a person to prove that what was said was true violated Article 10. It might be expected that if a similar case goes to Strasbourg the new Court will give a violation decision.

It has to be noted that in *Grigoriades v. Greece*[56] the Court found that a soldier's critical remarks on the army should be allowed. The applicant was a probationary reserve officer who claimed that because he discovered abuses committed against conscripts he came into conflict with his superiors. A disciplinary penalty was imposed on the applicant. Afterwards, while he

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[52] *Eur. Commission HR, Application No. 753/60 decision of 5 August 1960, 3 Yearbook of European Convention on Human Rights 310.*

[53] *Ibid*, p. 312.

[54] *Ibid*

[55] *Ibid*, p. 318.

[56] Eur. Court HR, Grigoriades v. Greece judgment of 25 November 1997, *Reports of Judgments and Decisions* 1997-VII.

was facing a criminal charge for not returning to his unit after a period of leave had expired, the applicant wrote a letter to his commanding officer in which he claimed, among others things, that "the army is an apparatus opposed to man and society and, by its nature, contrary to peace."[57] The letter was seen only by the commanding officer and another fellow officer. The applicant was sentenced to three months' imprisonment for insulting the army.

The Court expounded that "Article 10 does not stop at the gates of army barracks."[58] The right to freedom of expression "applies to military personnel as to all other persons within the jurisdiction of the Contracting States."[59] Whereas the Court ruled that the letter included strong and immoderate remarks, it noted that these remarks were "in a general and lengthy discourse critical of army life and the army as an institution."[60] The Court also noted that the letter was not disseminated to a broader audience and did not contain any insults against either the commanding officer or other persons. Accordingly, the Court found that the conviction could not be necessary in a democratic society.

It is worth noting that the Court did not refer to the duties and responsibilities of the soldier. Rather, it emphasised that the right to freedom of expression should not stop at the gates of army barracks. This view seems to suggest that the Court has started to raise the soldier's freedom of expression to the same degree as that of the ordinary citizen. This admirable approach deserves to be followed by the permanent Court in order to protect free expression within the army.

The Court's judgment seems to denote that a soldier's free expression would be guaranteed as long as his criticism is directed to the institution itself but not the personnel. It is worth attaching importance to Judge Jambrek's concurring opinion. The Judge emphasised that there was difference between opinions and factual claims, and State institutions did not possess "personal honour" to be protected as a personality right.[61] Thus, a soldier's opinion on the army should be protected no matter what its form is since in fact there is no possibility that the army institution itself would be insulted. On the other hand, while it is indeed necessary to prohibit soldiers from making personal attacks or insults on superior officers or other persons, this judgment should not be an indication that a soldier has no right to express his own views

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57 *Ibid*, para. 14.
58 *Ibid*, para. 45.
59 *Ibid*
60 *Ibid*, para. 47.
61 *Ibid*, concurring opinion of Judge Jambrek, paras. 2-3.

on personnel of the army through reasonable channels, which should be provided by the army itself.

When the Court stressed the view that only two persons had seen the letter it appeared to state that the soldier's free expression could only be protected when it was uttered in private. If a person can exercise his free expression only under an extreme restrained situation it will hardly be considered as a right. It is hoped that the reason why the Court stressed the view was due to the case's special situation but not the Court's fixed principle.

VI. GENERAL CITIZENS

This part examines conflicts between the freedom of expression and the rights and reputation of ordinary citizens. In an unpublished case[62], the Commission decided that the conviction of the applicant for making insulting remarks about another person was necessary in a democratic society. However, there was no opportunity to learn the reasoning of the Commission.

In *Fermín Bocos Rodriguez v. Spain*[63], the applicant was imprisoned for criminal defamation because he was the editor of a magazine that had published two articles naming the possible perpetrators of a murder. While the Spanish Constitutional Court held that the applicant was not liable on account of the information contained in the articles, it attached importance to the facts that the applicant had failed to check the authenticity of the information and had authorised publications without ascertaining their sources. The Commission decided that the Constitutional Court was within its margin of appreciation because it had struck a fair balance.

The core issue in this case was the professional standards that applied to the journalist. Whereas it was reasonable to require an editor to follow his professional obligations, the applicant should not have been penalised *simply* because he did not check the authenticity of the information or because he authorised publications without ascertaining their sources. Only when the allegations in the articles were found to be defamatory should the applicant have been penalised. It might therefore be argued that the Commission was not correct not to focus

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[62] *Eur. Commission HR, Application No. 8262/78 decision of 3 October 1979, unpublished.* See Council of Europe, *Digest of Strasbourg Case-Law Relating to the European Convention on Human Rights*, (update to vol. 3, Part 2, 10.2.7., Carl Heymanns-Verlag KG, 1995), p. 472.

[63] *Eur. Commission HR, Application No. 28236/95 decision of 12 April 1996, 85-B D & R 141.*

on this point.

However, in two recent cases, *Bladet Tromsø and Stensaas v. Norway*[64] and *Nilsen and Johasen v. Norway*[65], the Court found for the applicants and there were violations of Article 10. In *Bladet Tromsø and Stensaas* the first applicant was a limited liability company publishing a daily newspaper and the second was its editor. Between 12 April 1988 and 20 July 1988, the applicants published 26 articles on Mr. Lindberg's report whose information based on his on board a seal-hunting vessel named *Harmoni*. The report alleged a series of violations of Norwegian seal hunting regulations and made allegations against five named crewmembers. The crewmembers instituted defamation proceedings against the applicants and claimed that certain statements in the report and reproduced by the applicants be declared null and void, which was sustained by Norwegian courts.

The Court's judgment relied on four main reasons. First, the applicants published almost a daily basis the different views, including the newspaper's own comments, those of the Ministry of Fishers, the Norwegian Sailors' Federation, Greenpeace and, above all, the seal hunters during the relevant period of time. Secondly, the Court noted that the expressions of the applicants consisted of "factual statements" not "value-judgments". They did not emanate from the newspaper itself but were based on or were directly quoting from the report, which the newspaper had not verified by independent research. Thirdly, as regards the nature and degree of the defamation, the Court observed that, whilst the applicants' statements implied reprehensible conduct, they were not particular serious. Some statements could be regarded as having been presented with a degree of exaggeration. The applicants, while published the names of some crewmembers, named none of those accused of having committed the reprehensible acts. Fourthly, in the view of the Court, the press should normally be entitled, when contributing to public debate on matters of legitimate concern, to rely on the contents of official reports without having independent research. Otherwise, the vital public-watchdog role of the press may be undermined.

In *Nilsen and Johasen*, the applicants were police officers and representatives of police associations whose statements were found defamatory toward a researcher, Mr. Bratholm, who was a professor of criminal and procedural law and published several books on police brutality.

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64 Eur. Court HR, Bladet Tromsø and Stensaas v. Norway judgment of 20 May 1999, *Reports of Judgments and Decisions* 1999.

65 Eur. Court HR, Nilsen and Johasen v. Norway judgment of 25 November 1999, *Reports of Judgments and Decisions* 1999.

After Mr. Bratholm's books were published the applicants were interviewed and expressed, among others, the following views: "Mr. Bratholm's report was pure misinformation intended to harm the police"; "Until the opposite has been proved I would characterise this as a deliberate lie" and "There must be other ulterior motives. It appears as if the purpose has been to undermine confidence in police". These views were found as defamatory and the applicants therefore complained that their rights to freedom of expression were unjustified interfered.

The Court emphasized that any restriction on a speech aimed at countering allegations of police misconduct called for a strict scrutiny since it formed part of the same debate. On one hand the Court ruled that the applicants' accusing Mr. Bratholm of deliberate lie exceeded the limits of permissible criticism. The Court on the other hand found that other statements intended to convey the applicants' own opinions and were thus rather akin to value-judgments. In the Court's view, "in weighing the interests of free speech against those of protection of reputation under the necessity test in Article 10 §2 of the Convention, greater weight should be attached to the plaintiff's own active involvement in a lively public discussion." The statements at issue were directly concerned with the plaintiff's contribution to that discussion. A degree of exaggeration should be tolerated in a context of such a heated and continuing public debate of affairs of general concern, where on both sides professional reputations were at stake. The Court accordingly concluded that there was a violation of Article 10.

It can be observed from the above two cases that the Court wishes to establish a free market of ideas. Both sides of those who contribute to a public debate are important to free speech and deserve equal protection. A factual judgment by citing others' ideas and a value judgment expressing one's own views should both be protected.

VII. RELIGIONS

This section's arguments focus on two points. One is when freedom of expression, particularly literary and artistic expression, should be limited for the protection of religious feelings. The other is whether criminal convictions for blasphemous libel can be regarded as necessary in a democratic society. In all the three cases that will be reviewed below the institutions of the Convention found for the defendant Governments. Their conclusions indicate clearly that the Strasbourg institutions do not intend to become involved in the conflicts between the right to freedom of expression and the protection of the rights and reputation of religions.

In *X. Ltd. and Y. v. the United Kingdom*[66], in their magazine the applicants carried a poem, *The Love That Dares To Speak Its Name*, which was written by a professor whose work had already been much anthologised.[67] According to the decision of the House of Lords, the poem "purported to describe in explicit detail acts of sodomy and fellatio with the body of Christ immediately after His death and ascribe to him during His lifetime promiscuous homosexual practices with the Apostles and other men."[68] In a private prosecution, the applicants were convicted of blasphemous libel and fined.

The Commission first observed that if religious feelings deserved to be protected then it was necessary in a democratic society to define offensive attacks, and even to punish them in criminal proceedings, provided that the provisions comply with the principle of proportionality. The Commission held that the offence of blasphemous libel in British common law was proportionate to the aim pursued because the offence was one of strict liability incurred "irrespective of the intention to blaspheme and irrespective of the intended audience and of the possible avoidability of the publication."[69]

However, it might be argued that since this prosecution was brought by an individual, there was some doubt about whether the conviction of the applicant was justified by a pressing social need, which the Strasbourg institutions have held to be a necessary requirement for limits on free expression. As Pannick argues, this decision indicates a fundamental failure to understand that freedom of expression in relation to literature cannot be impeded just because the contents of the material may offend others.[70]

The other two cases concerned prior restraints on films that expressed their authors' views on religion. In *Otto-Preminger Institute v. Austria*[71], the applicant association proposed to show a film named "Council in Heaven". This film included following scenes. "The God of the Jewish religion, the Christian religion and Islamic religion as an apparently senile old man prostrating himself before the devil with whom he exchanges a deep kiss."[72] "The Virgin

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66 *Eur. Commission HR, Application No. 8710/79 decision of 7 May 1982, 28 D & R 77.*

67 See The International Committee for the Defence of Salman Rushdie and his Publishers, *The Crime of Blasphemy - Why it Should be Abolished* (The International Committee for the Defence of Salman Rushdie and his Publishers, 1989), p. 19.

68 *Application No. 8710/79*, above n. 66, p. 78.

69 *Ibid*

70 David Pannick, above n. 15, p. 49.

71 *Eur. Court HR, Otto-Preminger Institute v. Austria judgment of 20 September 1994, Series A no. 295-A.*

72 *Ibid*, para. 22.

Mary permitting an obscene story to be read to her and the manifestation of a degree of erotic tension between the Virgin Mary and the devil."[73] Jesus Christ was portrayed as "a low grade mental defective."[74] All of them applauded the devil. The association distributed an information bulletin to its thousands of members and announced the dates and times of the film's showing in many display windows. To comply with a local Act, an age limit was also included in these bulletins. After the film had been shown at a private session in the presence of a duty judge, an application for the seizure of the film was granted. A trial court subsequently ordered the forfeiture of the film.

The Court stated that whoever exercises rights and freedom undertakes "duties and responsibilities," especially in the context of religious opinions and beliefs. Although it held that the legitimate purpose of the court orders was to protect the rights of others, the Court stated that as in the case of "morals," it was not possible to discern throughout Europe a uniform conception of the significance of religion in a society.[75] The Court held that it was not possible to arrive at a comprehensive definition of what constituted a permissible interference with the exercise of the right to freedom of expression where such expression was directed against the religious feelings of others.[76] A certain margin of appreciation was therefore left to the national authorities.

The Court first noted that, although admittance to the cinema was subject to a fee and an age-limit, the film had been widely advertised. In the Court's view, the proposed screening of the film must be considered an expression sufficiently "public" to cause offence.[77] The Court held that it could not disregard the fact that Roman Catholicism was the religion of the greatest majority of Tyroleans, among whom it was proposed to screen the film. The Court concluded that the seizure of the film had not overstepped the margin of appreciation and that the forfeiture — even though it meant that the film could never be shown — was not disproportionate to the legitimate aim pursued.

In *Wingrove v. the United Kingdom*[78], the applicant's idea for his eighteen-minute video, *Visions of Ecstasy*, "derived from the life and writings of St Teresa of Avila, the

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[73] *Ibid*
[74] *Ibid*
[75] *Ibid*, para. 50
[76] *Ibid*
[77] *Ibid*, para. 54.
[78] Eur. Court HR, Wingrove v. the United Kingdom judgment of 25 November 1996, *Reports of Judgments and Decisions* 1996-V.

sixteenth-century Carmelite nun and founder of many convents, who experienced powerful ecstatic visions of Jesus Christ."[79] The video film portrayed "a female character astride the recumbent body of the crucified Christ engaged in an act of an overtly sexual nature."[80] Mr. Wingrove's application for a classification certificate was rejected by the British Board of Film Classification.

The Court placed great emphasis on the safeguard provided by the high threshold of profanity required by English blasphemy law and on the margin of appreciation enjoyed by the contracting States in the sphere of religion. It ruled that there was not enough common ground among the member States of the Council of Europe to support the conclusion that blasphemy law was itself "unnecessary" in a democratic society. The Court observed that it was the manner of expressing views not the hostile views themselves that English blasphemy law sought to control. The extent of the insult to religious feelings had to be significant for it to be blasphemous libel. Furthermore, the Court found the English authorities to be within their margin of appreciation. In the Court's view, the high standard of profanity safeguarded against arbitrariness and the refusal to classify the film was an understandable consequence of the fact that its distribution would infringe the criminal law. The Court also noted that it was the nature of the video recordings that once they became available on the market they could be distributed in many ways and thereby escape the authorities' control. The Court concluded that there was no violation of Article 10.

The reasoning of the Strasbourg institutions in this field has been based on three elements: the duties and responsibilities attached to those who exercise the right to freedom of expression, the margin of appreciation enjoyed by national authorities and the impossibility of establishing a European consensus on religious morality. This reasoning shows that the institutions do not wish to be involved in controversial religious issues and its results imply that literary and artistic expressions have to give way to the protection of religious feelings. This creates a dilemma for those who wish to criticise religious beliefs. As Warbrick has argued, if they claim their expression is "art", it will enjoy only limited protection; if they claim it is on a matter of public interest, they will be told that they are not making a worthwhile contribution.[81]

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79 *Ibid*, para. 8.

80 *Ibid*, para. 61.

81 Colin Warbrick, "*'Federalism' and Free Speech — Accommodating Community Standards: the American Constitution and the European Convention on Human Rights*", in Ian Loveland (ed.), *Importing the First*

The core issues in the above cases were whether the British law of blasphemous libel which protects only Christians can be regarded as necessary in a democratic society and where the boundary should be drawn between the protections of free expression and of religious feelings. With regard to blasphemous libel, it is a common law offence which may be defined as "the publication of any writing concerning God or Christ, the Christian religion, the Bible or some sacred subject using words which are scurrilous, abusive or offensive and which tend to vilify the Christian religion and therefore have a tendency to lead to a breach of the peace."[82] In *Wingrove*, the Court ruled that there was no sufficient common ground among the member States of the Council of Europe to conclude that blasphemy law was itself "unnecessary" in a democratic society. Although the common law of Blasphemy has not been shown to be unnecessary, it gives rise to a number of restrictions which do not seem to be justified by a pressing social need to restrict freedom of expression. The common law of blasphemy may be criticised in several ways. First, since it is a common law offence, blasphemous libel is quite uncertain. Certainty is necessary in the criminal law in a democratic society. Secondly, the law's emphasis on "scurrilous", "abusive" and "offensive" forms of expression is illogical and arbitrary.[83] A law which penalises a person irrespective of his intention and of the intended audience cannot be accepted as proportionate to the pursuit of the protection of the rights or reputation of others. No one should be convicted if he or she does not intend to defame others, even if the subject is religion. There can therefore be no justification for a law of blasphemy which is grounded simply in the claim of people to be protected from what shocks them.[84] Thirdly, it can be argued that to privilege only Christianity is discriminatory. Indeed, it is surprising that a restraint which operates to protect only the rights of Christians passes the requirement of being necessary in a democratic society.[85] Article 14 of the Convention requires that the enjoyment of the rights and freedoms set forth shall be secured without discrimination on the basis of religion. Blasphemous libel

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Amendment. Freedom of Speech and Expression in Britain, Europe and the USA (Hart Publishing, 1998), p. 189.

82 See Simon Lee, "First Introductory Paper", in Commission of Racial Equality, *Law, Blasphemy and the Multi-faith Society* (Commission of Racial Equality, 1990), p. 6.

83 The International Committee for the Defence of Salman Rushdie and his Publishers, *The Crime of Blasphemy - Why it Should be Abolished* (The International Committee for the Defence of Salman Rushdie and his Publishers, 1989), pp. 3-8.

84 C L Ten, *Mill On Liberty* (Clarendon Press, Oxford, 1980), p. 139.

85 See Cases and Comment, [1997] *European Human Rights Law Review* 178, 184-5.

may not comply with this requirement. It might also be argued that it is contradictory for the Court to endorse the legitimacy of blasphemous libel on one hand but emphasise that pluralism, tolerance and broadmindedness are the essence of a democratic society on the other. A law that protects only one particular religion is very difficult to justify in a multicultural society.

As Levy has argued, whatever the law of blasphemy means in a British court, outside of that court blasphemy is an offence that is no longer prosecuted. The law ticks away as if it were a time bomb that no longer detonates. Yet it is no dud; it is merely dormant and may go off again one day.[86] In 1949 Lord Denning stated that the reason for the law of blasphemy was that it was thought that a denial of Christianity was liable to shake the fabric of society, which was founded upon the Christian religion. There is no such danger to society now and the offence of blasphemy is a dead letter.[87] Moreover, three British associations — JUSTICE[88], Helsinki Watch,[89] and the National Council for Civil Liberties[90] (LIBERTY) — have expressed their support for the abolition of the crime of blasphemy. A good way to secure the protection of free expression for all the British people may be to seek the abolition of blasphemous libel by the British Parliament.

In drawing the line between the protections of the right to freedom of expression and of religious faiths, the Court seems to attach importance to the possible publicity of showing the films. Whereas the film that the Otto-Preminger Institute wished to show might have had a public character because of its advertisements, this publicity could be limited in *Wingrove*. The Court may not have been right to rule that once a video was available it became uncontrollable. That may be true in theory, but in practice it is doubtful whether the video would be viewed by many people. The alleged blasphemous material was reasonably avoidable by anyone likely to be offended.[91] As the Commission has noted, the distribution of

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86 Leonard W. Levy, *Blasphemy. Verbal Offense against the Sacred, from Moses to Salman Rushdie* (The University of North Carolina Press, 1993), p. 550.

87 Quoted from Richard Webster, *A Brief History of Blasphemy. Liberalism, Censorship and "The Satanic Verses"* (The Orwell Press, 1990), p. 24.

88 Justice, *Freedom of Expression and the Law* (Justice, 1990), p. 18.

89 Helsinki Watch, *Restricted Subjects. Freedom of Expression in the United Kingdom* (Human Rights Watch, 1991), p. 63.

90 Conor Foley, Cathy Bryan and Jonathan Hardy, Freedom of Expression and Human Rights (National Council for Civil Liberties, Report 8, 1994), p. 34.

91 Sandy Ghandhi and Jennifer James, "The English Law of Blasphemy and the European Convention on Human Rights", [1998] *European Human Rights Law Review* 430, 446.

the video would be more limited and less likely to attract publicity because first, the applicant's film was a video, not a feature film and second, it was unusually short and the parts which were deemed blasphemous were much shorter than the scenes which were criticised in the film *Council in Heaven* in *Otto-Preminger Institute*. It might be argued that the English Board could have limited the video's audience by giving it an "18" certificate. If the Court's opinion can stand, then we must accept that all forms of artistic expression, once distributed, will go beyond the regulation of national authorities. The real issue in *Wingrove* — that certain Christians might be outraged by the video — could not be a sufficient reason for prohibiting the showing of the film.[92]

When balancing between free expression, particularly artistic expression, and religious faith, the possible extent of the publicity of an artistic creation should not be the most important consideration. In *Otto-Preminger Institute* and *Wingrove,* the Court failed to emphasise that social developments have often followed from the expression of ideas that cause offence or outrage to established thought. It should be recalled that the Court itself has consistently held that the right to freedom of expression is applicable not only to information or ideas that are favourably received, but also to those that "offend, shock or disturb." Although the films concerned would have been shocking or offensive to most of the residents to whom they were intended to be shown, they deserved the protection of being able to be shown. History has told us that penalising dissenting or minority views in the context of religion can be a danger to society. Aspect of the freedom of expression with which those cases were concerned was artistic expression, which the Court did not seem to value very highly.[93] The Court has lost sight of the irreducible nature of cultural freedom by accepting the religious intolerance of a dominant religion.[94] In the name of "religious peace" artistic

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92 Section 12 (4) of the British Human Rights Act 1998 provides that when considering whether to grant any relief the court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material. Section 13 (1) of the same Act also requires that if a court's determination of any question arising under this Act might affect by a religious organisation of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right. These might lead to a further emphasis on the protection of artistic, literary and religious expressions in the United Kingdom.

93 Eva Brems, *The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, (1996) 56 Heidelberg Journal of International Law 240, 284.

94 Emmanuel Decaux, "Cultural Rights: Universal, Indivisible, and Legally Enforceable Individual Rights", in Council of Europe, *8th International Colloquy on the European Convention on Human Rights* (Council of Europe, 1996), p. 42.

expression receives subordinate protection. As Boyle maintains, tolerance, understanding, acceptance, and respect for the diversity of faiths and beliefs cannot be secured by the threat of criminal prosecution and punishment.[95] Numerous religions must co-exist in a spirit of tolerance and mutual respect.[96] Freedom of religion can only be fully ensured if all faiths are treated equally before the law. The essential arguments should be that in a democratic society no religion should have a superior status and no artistic expression should be prohibited simply because there is a possibility of outraging certain people who hold a specific religious belief.

VIII. AWARDS IN DEFAMATION LITIGATION

When a defamation action succeeds and damages are awarded, there is a question whether the award of compensation is proportionate to the damage caused by the defamatory statement. In *Tolstoy Miloslavsky v. the United Kingdom*[97], the applicant wrote a pamphlet which contained defamatory statements about Lord Aldington. This pamphlet was distributed to many people in the school where Lord Aldington was Warden, to both Houses of Parliament, and to the press. After libel proceedings the applicant was ordered to pay £1.5 million damages, approximately three times as much as the largest amount ever awarded by an English libel jury.

The Court noted that, although the applicant accepted that "if the jury were to find libel, it would have to make a very substantial award of damages,"[98] this did not mean that the jury was free to make any award that it thought fit. The Court held that "an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered." In addition, the Court was of the opinion that granting an almost limitless discretion to a jury failed to provide a satisfactory means of assessment and that the jury should be told that any award they made had to be proportionate to the damage that the plaintiff had suffered. Having regard to "the size of the award and the lack of adequate and effective safeguards at

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95 Kevin Boyle, "Foreword", in The International Committee for the Defence of Salman Rushide and his Publishers, *The Crime of Blasphemy - Why it Should be Abolished* (The International Committee for the Defence of Salman Rushdie and his Publishers, 1989).

96 Emmanuel Decaux, "Replies of the Rapporteurs", in Council of Europe, *8th International Colloquy on the European Convention on Human Rights* (Council of Europe, 1996), p. 105.

97 *Eur. Court HR, Tolstoy Miloslavsky v. the United Kingdom judgment of 13 July 1995, Series A no. 323.*

98 *Ibid*, para. 49.

the relevant time against a disproportionately large award,"[99] the Court found the award to be a violation of Article 10.

It is submitted that the Court was quite right to rule that there should be a "reasonable relationship of proportionality" between an award of damages and the injury caused. A possible question which remains is how to decide whether an award is reasonable. Further decisions by the new Court will be necessary to decide this point.

IX. CONCLUDING REMARKS

It can be observed that the Strasbourg institutions have been taking a more liberal concept on the protection of the right to freedom of expression. They tend to give more protection to those who express their views as the Commission and the Court have found more violations of Article 10. Non- violation view in several fields has been changed. On the other hand, the Strasbourg institutions do not intend to become involved in the conflicts between the right to freedom of expression and the protection of the rights and reputation of religions. Neither did they offer sufficient free expression protection to the judge. More favour views toward free expression in these two fields need to be done by the new Court.

When balancing between free expression and the rights and reputation of others the Strasbourg institutions have often applied the "duties and responsibilities" and "margin of appreciation" approaches. By using these two approaches the Strasbourg institutions narrow the right to freedom of expression in some respects. Nevertheless, the value-judgment approach is a unique reasoning used by the Strasbourg organs in defamation cases. The institutions have tried to apply this approach to different subjects to extend the right to freedom of expression. It is argued that the Strasbourg institutions by referring to the "value-judgment" approach tend to grant more protection of the right to freedom of expression on this subject.

[99] *Ibid*, para. 51.