Freedom of Expression in the European Context

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1. Introduction

1.1. What and why?

This presentation is dedicated to show the basic arguments around the freedom of expression given in the European Convention for the Protection of Human Rights and Fundamental Freedoms[1]. Freedom of expression, often dubbed as the right to free speech, protects various forms of communicating activities; from oral speech, writing and press to satellite-broadcasting and propagation through the Internet. Traditionally, four distinct reasons have been invoked to defence the freedom of expression[2];

1. *To seek the Truth*. The free communication of ideas and notions is indispensable for people to approach to the Truth. Imagine, for example, any scientific research would be impossible if one could not write and read thesis freely. The Truth has its own value, and it serves greatly the total welfare of the society.
2. *To enhance self-fulfilment*. Expressing one's opinion and receiving other's make a profound feeling of satisfaction. One can cultivate his/her ideas through free discussions and enjoy his/her own improvement. It means, say, the freedom of expression is a basis of personal well-being.
3. *To ensure democracy*. Free speech is the necessary assumption of the democratic process. Each candidate expresses his/her own policy and tries to persuade the electorate. Each voter also expresses the opinion to others. By doing so, people judge what the most desirable policy is.
4. *To prevent the collapse of the government.* Free flow of information prevents the government from abusing the power to harm the people. In a free society, the government is instantaneously criticised by the public when it did something wrong. Free speech plays a role as a watchdog against the Leviathan.

Historically, the concept of the freedom of expression has developed along a complicated path. It is helpful to view the history here.

1.2. Historical development

Freedom of expression in the modern sense was established in the late 18th century as one of the most significant right among the first generation rights[3]. It firstly appeared in the Article 12 of the Bill of Rights of Virginia State in 1776, which declared that the freedom of speech and press is one of the powerful fortresses for liberty. It was inherited to the Article 11 of the *Declaration of the Rights of Men and Citizens* of France, which provided that the free communication of thoughts and

1 Signed on 4th November 1950; it came into force since 3rd September 1953.
2 E. Barendt, *Freedom of Speech* (2005), OUP, Oxford, pp. 6-22.
3 辻村みよ子『比較憲法』/ M. Tsujimura, *Hikaku Kempo* (2003), Iwanami Shoten, Tokyo, pp. 100-116.

opinions is one of the most precious rights of men, and that every citizen can speak, write, press freely subject to the limitation by law. Olympe de Gouge also published the *Declaration of the Rights of Women and Female-Citizens* in 1791. She declared that women shall have the right to stand upon a speech platform as well as upon a gallows. Every woman shall be given the freedom of speech, de Gouge said, because she need to confess the true relation between her child and her husband. In the same year, 1791, the Constitution of the USA was amended, and the First Amendment prohibited the Congress to make any legislation that abridges the freedom of speech or of press. The ping-pong of notions across the Atlantic Ocean founded the basic conception of the freedom. In this period, the freedom of expression was conceived as the freedom to send a message. Namely, *senders'* freedom. The legislators presupposed relatively simple meaning of the freedom; e.g., the prohibition of censorships by the government.

In the 19th century, the social condition of each state changed dramatically. More and more people got literacy and started to enjoy public information. Mass-media established its position as an information industry, and began to sought extreme news to satisfy its customers, regardless of their quality. At this stage, senders and receivers of information were separated. Mass-media send, and mass-people receive. An interest of the senders could not always be harmonised with that of general public. The freedom of expression conflicted with reputation, privacy, dignity and other values. It required to be reconsidered from the aspect of the receivers' rights.

The experiences of 20th century were very ambivalent. On one hand, there appeared totalitarian States, where the freedom of expression was so severely restricted that democracy in those countries did not work; Firstly Fascist, then Communist States On the other hand, racism prevailed all over the world in this century. During the two World Wars, each nation propagated racist ideas decorated by terribly distorted Philology, Biology, Anthropology and Social Darwinism. They caused a series genocidal acts by both governmental officials and private citizens. Some armed conflicts after the WW2, e.g. in Yugoslavia and Rwanda, were also accompanied of propagation of racists thoughts, which resulted the so-called *ethnic cleansing*. Today the ceaselessly increasing number of immigrants is nurturing serious antagonism between ethnic groups in some western countries. When on considers about the freedom of expression as a contemporary topic, one cannot think simply the interests of individuals – mere senders' and receivers' rights – but one must take the relationship between the speech and whole democratic society into account.

2. International Documents

2.1. Universal Declaration of Human Rights

Soon after the WW2, the General Assembly of the United Nations adopted the Universal Declaration of Human Rights. The Article 19 was allocated to the freedom of expression. It declared that "[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Here the freedom of expression is combined with the freedom of thought, and receivers' freedom is also protected.

There is no statement on the legitimate and acceptable limitation of the freedom in the Article itself, but Article 29 proclaimed, though in a negative form, that the freedom can be restrained by such limitations "as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." This text suggests that there are three necessary conditions for the limitation of human rights; 1) the limitation must be

prescribed by law; 2) the limitation must be aimed at the protection of other's rights or democratic values; 3) and the allegedly protected rights and values must be due and just.

2.2. European Convention

Two years after the Declaration, the text of the European Convention for the Protection of Human Rights and Fundamental Freedoms was fixed in November of 1950. It came into force in 1953 as the first regional and comprehensive international human rights codification. Article 10 of the Convention was devoted to the freedom of expression.

Article 10 includes two paragraphs. Paragraph 1 declared that everyone has the right to freedom of expression, much alike the Article 19 of the Universal Declaration, but differentiated in two points; 1) the drafting Committee of the Convention inserted a sentence concerning the licensing system; 2) the freedom of thought was separated from the freedom of expression, and the former was combined with freedom of religion and conscience in the Article 9.

Paragraph 2 provided for the acceptable limitation on the freedom of expression. Its basic idea was taken from the Article 29 of the Universal Declaration, although the Convention prescribed more precisely. The restriction must be prescribed by law; The restriction must be based on such a legitimate purpose as “the interests of national security, territorial integrity or public safety”, “the prevention of disorder or crime”, “the protection of health or morals”, “the protections of the rights and freedoms of others”, “preventing the disclosure of information received in confidence”, or “maintaining the authority and impartiality of the judiciary.” And the restriction must be within such extent as “necessary in a democratic society.”

3. Interpretation of the Text

3.1. The definition of “expression”

In the constitutional arguments in the United States, the freedom of speech under the First Amendment has been argued from two aspects. On one hand, the have been vast volume of discussions about whether a certain conduct can be regarded as a *speech*. Expression one's idea on a serious political matter or on an academic question in a public forum may be undoubtedly a *speech* to be protected by the Constitution. Then, how about commercial advertisements by corporations? Can *speech* include such acts as publishing a pornography purely for a monetary purpose? In *Barnes* case[4] in 1991, it was disputed whether a nude dancing show should be covered by the First Amendment.

The Article 10 of the European Convention was written more cautiously than the First Amendment in that point, using the words “information and ideas” instead of “speech.” *Markt Intern*[5] was the case brought before the European Court concerning the scope of free expression. In that case, a German editor was prosecuted for the breach of the German fair trade law, because he wrote a critical article against an English firm on a bullet distributed to the business circle. The Court judged that:

> ... It is clear that the article in question was addressed to a limited circle of trades people and did not directly concern the public as a whole; however, it conveyed information of

4 *Barnes v. Glen Theatre, Inc.,* 501 US 560 (1991). The Supreme Court admitted that a dancing can be an expressive conduct, but the law banning public nudity had no unconstitutionality. The law prohibited nudity not because of the message in the conduct, but because it could harm the social order and morality.

5 *Markt Intern and Beermann v. Germany*, 12 EHRR 161 (1989).

> a commercial nature. Such information cannot be excluded from the scope of Article 10(1) which does not apply solely to certain types of information or ideas or forms of expression...[6]

The judgement established the principle that every kind of expression is protected under the Article 10 regardless of its political or commercial nature, or of its supposed receivers. This position was reaffirmed in the subsequent *Casado Coca* case[7]. But it does not mean that each type of expression should be respected equally to the same extent. In principle, the State has more *margin of appreciation* in restricting commercial expression than in the case of political one. The Court told in *Markt Intern* that:

> Such a margin of appreciation is essential in commercial matters and, in particular, in an area as complex and fluctuating as that of unfair competition. Otherwise, the European Court of Human Rights would have to undertake a re-examination of the facts and all the circumstances of each case[8].

For the conclusion of *Markt Intern*, the Court decided that there was no violation of Article 10 in the case, saying that "the European Court of Human Rights should not substitute its own evaluation for that of national courts in the instant case, where those courts, on reasonable grounds, had considered the restriction to be necessary."[9]

3.2. Necessity for a Democratic Society

Article 10(2) of the European Convention requires that the limitation on the freedom of expression must be founded on a legitimate aim and the intensity is somehow "necessary for a democratic society." It suggests that even when a government oppresses the freedom with one of the legitimate reasons enumerated in the paragraph, it cannot be justified if the measure is so extreme that it is beyond the necessity.

In 1976, the *Handyside*[10] case was brought before the European Court. The applicant *Handyside* intended to publish an English version of a textbook for schoolchildren, originally published in 1976 and circulated widely throughout other western countries. The book contained huge amount of morally and sexually indecent information for children, according to the British authority's view. The applicant was prosecuted for the breach of the Obscene Publication Act and sentenced to be fined. One of the main point in the European Court was whether such total restriction of expression could be justified as "necessary for a democratic society." The Court told as followings:

> ...[W]hilst the adjective 'necessary', within the meaning of Article 10(2), is not synonymous with 'indispensable', neither has it the flexibility of such expression as 'admissible', 'ordinary', 'useful', 'reasonable', or 'desirable'.Nevertheless it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context.
>
> Consequently, Article 10(2) leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator and to the bodies, judicial amongst

6 *Ibid.*, para 26.
7 *Casado Coca v. Spain*, 18 EHRR 1 (1994).
8 *Supra.*, para 33.
9 *Ibid.*, para 37.
10 *Handyside v. United Kingdom*, 1 EHRR 737 (1976).

> others, that are called upon the to interpret and apply the laws in force[11].[parenthesis skipped]

In this case, the European Court introduced the notion of *pressing social need*, but the assessment was primarily entrusted to each national authority though it should be ultimately subject to the supervision by the European Court. Later in 1988, the Court clarified the idea of *necessity*, summarising the precedents. The Court held that:

> [T]he notion of necessity implies that the interference corresponds to a pressing social need and, in particular, it is proportionate to the legitimate aim pursued; in determining whether an interference is "necessary in a democratic society", the Court will take into account that a margin of appreciation is left to the Contracting States[12].

According to the statement, when the Court reviews an interference by a State on the freedom, the Court must 'determine whether the reasons adduced to justify the interferences at issue are "relevant and sufficient."'[13] Relevance, sufficiency and proportionality are the suggested standards in judging the necessity of a limitation.

The standard of *necessity in a democratic society* suggests that political expressions are entitled to a special protection. In *Lingens* case[14], where a journalist had been sentenced criminally guilty by Austrian court for writing defamatory articles on a politician, the European Court told that:

> Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention[15].

This judgement clearly showed that "speech involving political issues and political figures serves a central role in the functioning of democratic societies", and therefore "arguments that a restriction of such discussion is necessary in such a society will be harder to maintain."[16]

The *necessity* requirement also signifies that the sanctions to the unjustifiable behaviours should be reasonable and proportionate, too. In *Miloslavsky* case[17], the European Court held that an award for defamation must bear reasonable relationship of proportionality to the injury to reputation suffered, and therefore the original judgement by the UK court, which had imposed £1 500 000 to the applicant, constituted a violation of Article 10.

4. Conflicts with other values

An expression is, unlike a mere thought or conscience, an external and social conduct. It inevitably affects other members of the society in good or bad ways and, possibly causes some results. If used properly, a free speech could become the best weapon against the social injustice. However, it could also be used as the most effective means to harm innocent citizens and mislead the whole society. That is why the Article 10(2) of the European Convention enumerated a number of acceptable reasons for the restriction of the freedom. In this chapter, we will see the cases where the freedom

11 *Ibid.*, para 48.
12 *Olsson v. Sweden*, 11 EHRR 259 (1988).
13 *Ibid*.
14 *Lingens v. Austria*, 8 EHRR 40 (1986).
15 *Ibid.*, para 42.
16 M. Janis (et al.), *European Human Rights Law* (3rd ed.) (2008), OUP, Oxford, p.262.
17 *Miloslavsky v. United Kingdom*, 20 EHRR 44 (1995).

of expression made conflicts with other rightful values. In each case, the State authority had established a restriction on the freedom for one or more reasons mentioned in the Article 10(2), and the legitimacy of the restriction was disputed before the European Court of Human Rights.

4.1. Private interests

4.1.1. Defamation

Article 12 of the Universal Declaration of Human Rights provides that:

> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon *his honour and reputation*. Everyone has the right to the protection of the law against such interference or attacks. [emphasis added]

The right to honour and reputation undoubtedly constitutes a part of human rights and fundamental liberty, though European Convention does not include texts which directly mention it. Defamatory speech compete with this legitimate interest. The Article 10(2) of the Convention permits State parties to restrict the freedom of expression with a purpose "for the protection of the reputation or rights of others." However, the degrees of the acceptable protection vary according to the public nature of the topic.

As we already saw in *Lingens* case in the previous chapter, public figures such as statesmen are less protected against defamatory criticism by mass media. In that case, the Court also told that:

> The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt Article 10(2) enables the reputation of others – that is to say, of all individuals – to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues[18].

This attitude has been kept in the successive cases. In *Lindon* case[19] in the last year, the Court repeated exactly same sentences.

Civil servants other than statesmen are subject to the same limitation. According to the judgement of the Court in *Throgeirson* case[20], where an alleged defamation against policemen were disputed,

> The actions of civil servants should continually be subject to scrutiny and debate and be open to criticism. However, since they had no means of replying, it was not permissible to accuse them, without legitimate cause, of criminal conduct[21].

Even when the targeted persons are not themselves public figures, the free speech prevails over the reputation if the topic is of public concern. In *Bladet Tromsø* case[22], where the behaviour of certain seal-hunters were inaccurately attacked by a newspaper, the Court held that seal-hunting was such a matter of public debate in the Norway that the imposition of liability on the newspaper constituted a

18 *Lingens*, *supra*, para 43.
19 *Lindon, Otchakovsky-Laurens and July v. France*, Applications nos. 21279/02 and 36448/02 (2007)
20 Thorgeirson v. Iceland, 47 EHRR 370 (1991).
21 *Ibid.*, para 61.
22 *Bladet Tromsø and Stensaas v. Norway*, 29 EHRR 125 (1999).

violation of the freedom of expression.

Public concern does not necessarily mean a matter of purely political things. The practice of a private corporation can also be recognised as *public,* if the corporation has great influence over the society. Not only journalists and press, but also private citizens have the right to impeach the unjustifiable conducts by private companies. *Steel and Morris* case[23] showed the principle. In that case, the applicants, the members of London Greenpeace were prosecuted for distributing defamatory pamphlets publicly against McDonald's. The European Court decided:

> The Court must weigh a number of factors in the balance when reviewing the proportionality of the measure complained of. First, it notes that the leaflet in question contained very serious allegations on topics of general concern, such as abusive and immoral farming and employment practices, deforestation, the exploitation of children and their parents through aggressive advertising and the sale of unhealthy food. The Court has long held that "political expression", including expression on matters of public interest and concern, requires a high level of protection under Article 10.
>
> The Government have pointed out that the applicants were not journalists, and should not therefore attract the high level of protection afforded to the press under Article 10. The Court considers, however, that in a democratic society even small and informal campaign groups, such as London Greenpeace, must be able to carry on their activities effectively and that there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment[24]. [parenthesis skipped]

However, it does not mean that private companies could enjoy as less protection as politicians. The Court also told that:

> The Court further does not consider that the fact that the plaintiff in the present case was a large multinational company should in principle deprive it of a right to defend itself against defamatory allegations or entail that the applicants should not have been required to prove the truth of the statements made. It is true that large public companies inevitably and knowingly lay themselves open to close scrutiny of their acts and, as in the case of the businessmen and women who manage them, the limits of acceptable criticism are wider in the case of such companies. However, in addition to the public interest in open debate about business practices, there is a competing interest in protecting the commercial success and viability of companies, for the benefit of shareholders and employees, but also for the wider economic good. The State therefore enjoys a margin of appreciation as to the means it provides under domestic law to enable a company to challenge the truth, and limit the damage, of allegations which risk harming its reputation[25].[parenthesis skipped]

4.1.2. Privacy and confidential information

Article 8 of the European Convention, together with Article 12 of the Universal Declaration, ensure the right to respect for private and family life, home and correspondence. The rights to be hidden from public view and to be kept alone are deduced from the privacy right. Today, more and more press entities are competing to seek scandals of well-known people so much that often the freedom

23 *Steel and Morris v. United Kingdom*, 41 EHRR 125 (2005).
24 *Ibid.*, para 88-89.
25 *Ibid.*, para 91.

of expression of the media collide with the right to privacy of the objects of popular curiosity. A borderline, which divides the acceptable debates required for a transparent society and the excessive scandalmongers, is demanded here.

The European Court's case laws have shown the principle that the borderline should be determined in accordance with two elements; 1) the public status of the figure; 2) the objectively-recognisable purpose of the publication. In *Editions Plon* case[26], the legitimacy of publication on the former French President Mitterand's medical affairs was disputed. The Court admitted "the public's rights to be informed about any serious illness suffered by the head of state", and therefore held that the value of free speech prevailed over that President's privacy. In contrast with it, the Court stressed the privacy of a public figure (the Princess of Monaco) in *Von Hannover v. Germany* case[27]. This case was distinguishable from the *Editions Plon* because the Princess herself did not exercise any function of the state although she was a kind of public figure. The Court stated:

> ...the publication of the photos and articles in question, the sole purpose of which was to satisfy the curiosity of a particular readership regarding the details of the applicant's private life, cannot be deemed to contribute to any debate of general interest to a society despite the applicant being known to the public...[28]

Stoll case[29] involved the collision between the freedom of expression and the protection of confidential correspondence. In this case, a letter faxed from the Swiss ambassador in the United States to the Federal Department of Foreign Affairs in the home country was somehow leaked out and published by a newspaper, which was fined for the conduct. The European Court told as followings.

> On this subject the Court agrees with the applicant that the information contained in the paper written by the Swiss ambassador to the United States was of a kind that raised matters of public interest. The articles were published in the context of a public debate about compensation due to Holocaust victims for unclaimed assets lodged in Swiss banks, a matter which had been widely reported in the Swiss media and had deeply divided public opinion in Switzerland, particularly as the discussions about the assets of Holocaust victims and Switzerland's role in the Second World War had, in late 1996 and early 1997, been very heated and had an international dimension. The Swiss ambassador in Washington was to play an important role in the forthcoming discussions.
>
> Publication of the document in question revealed, among other things, that the persons dealing with the matter had not yet formed a very clear idea as to Switzerland's responsibility and what steps the Government should take.
>
> In that context, the Court acknowledges also that the public had a legitimate interest in receiving information about the officials dealing with such a sensitive matter and their negotiating style and strategy[30]. [parenthesis skipped]

From the judgement, it can be concluded that even confidentiality of letters might be subject to the freedom of expression when it is seriously concerned for the democratic debate and public interest.

26 *Editions Plon v. France*, 42 EHHR 36 (2004).
27 *Von Hannover v. Germany*, 40 EHHR 1 (2004).
28 *Ibid.*, para 65.
29 *Stoll v. Switzerland*, Application no. 69698/01 (2006)
30 *Ibid.*, para 49.

4.1.3 Hate speech

The free speech can also be exploited to incite ethnic and religious hatred, intentionally or subconsciously. Some States have made legislations which criminalise these *poisonous speeches*. Janis, Kay and Bradley pointed out that "the European experience with racist regimes in the twentieth century has resulted in an acute sensitivity to the dangers f expression denigrating ethnic or religious groups."[31] Sometimes the sensitivity cannot be compatible with the freedom of expression, though there can be find a sort of gap between anti-Semitic cases and the others.

In *Jersild v. Denmark* case, a Danish journalist was criminally punished for aiding and abetting three youths to make racist remarks against African-Danish people on his interview for a TV programme. According to the Danish penal statute, "[a]ny person who, publicly or with the intention of disseminating it to a wide circle of people, makes a statement, or other communication, threatening insulting or degrading a group of persons on account of their race, colour, national or ethnic origin or belief" should be punishable. The European Court decided that the provision of the penal statute violated Article 10 of the European Convention because the limitation of the journalist's freedom could not be justified as *necessary in a democratic society*; news reporting through interviews was an important means of informing the public.

In contrast, in *Witzsch*[32] case, where the so-called Holocaust denial was disputed, the Court clearly stated that:

> The Court observes that the general purpose of Article 17 is to make it impossible for individuals to take advantage of a right with the aim of promoting ideas contrary to the text and the spirit of the Convention. The Court, and previously, the European Commission of Human Rights, have found that the freedom of expression guaranteed under Article 10 of the Convention may not be invoked in conflict with Article 17, in particular in cases concerning Holocaust denial and related issues...
> Abuses of freedom of expression is incompatible with democracy and human rights and infringes the rights of others[33].

In the Court's view, the applicant had "denied the victims' extremely cruel and unique fate and accordingly disparaged the dignity of the deceased", and the applicant's discourse "ran counter to the text and the spirit of the Convention." And therefore "he cannot, in accordance with Article 17 of the Convention, rely on the provisions of Article 10 as regards his statements at issue."[34]

4.2. Collective public interest

4.2.1. National security and public safety

Article 10(2) of the European Convention permits the States to restrict the freedom of expression on the basis of "the interests of national security or public safety." They are so broad terms that we need cautious interpretation here. Historically, totalitarian States have often exploited "the national security or public safety" as the excuse to suppress the speeches undesirable for their dictatorships. Since 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"[35], *security* or *safety* are not to be an easy defence. However, the European Court

31 Janis et al., *supra*, p.287.
32 *Witzsch v. Germany*, Decision of 13th December 2005 (Admissibility Decision)
33 *Ibid.*
34 *Ibid.*
35 *Zana,* below, para 51.

has shown a deferential attitude in some cases concerning military affairs.

In Zana case[36], the applicant was prosecuted for dissemination of a separatist propaganda against the individuality of Turkey by making a speech about the Kurdish matter at a meeting of a political party, and sentenced for a certain fine and 2-years imprisonment. The European Court assessed each of the speaker's social status, the content of the speech, the preceding expressions made by the speaker, and whole circumstances of the terrorism affairs. Then it held that:

> In those circumstances the support given to the PKK – described as a "national liberation movement" – by the former mayor of Diyarbakır, the most important city in south-east Turkey, in an interview published in a major national daily newspaper, had to be regarded as likely to exacerbate an already explosive situation in that region.
>
> The Court accordingly considers that the penalty imposed on the applicant could reasonably be regarded as answering a "pressing social need" and that the reasons adduced by the national authorities are "relevant and sufficient"; at all events, the applicant served only one-fifth of his sentence in prison[37].

In *Grigoriades*[38], a Greek officer was punished for his sending a letter criticising the army to his commander. The European Court acknowledged that Article 10 of the Convention "does not stop at the gates of army barracks", though it concluded that restriction on the freedom could be acceptable if there is "a real threat to military discipline, as the proper functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining it."[39]

By contrast, *Vereinigung Demokratisher Soldaten Österreichs* case[40] showed relatively liberal position. In this case, the European Court held that even such magazines as critical to the Austrian army should be permitted the distribution in the military base, since they did not "recommend disobedience or violence, or even question the usefulness of the army."[41]

The possible key concept which could explain the Court's attitude is the existence of so-called *clear and present danger*[42], which has been developed in the constitutional tradition in the United States[43]. In *Observer and Guardian*[44], where the publication of the memoir of former British intelligence officer was disputed, the European Court admitted that the restriction on the publication before the memoir itself got available and popular abroad could be justified, though the "continuation of the restrictions after July 1987 prevented newspapers from exercising their right and duty to purvey information, already available, on a matter of legitimate public concern."[45] Unless there exists a certain clear and present danger, the restriction can be no more legitimate.

4.2.2. Health and morals

False information on health matters could, if unlimitedly distributed, cause serious social panics. In southern African continent, there is a widespread belief that intercourse with a virgin could cure the AIDS, which result in a huge number of sexual crimes[46]. In 2003, when the terrible infectious

36 *Zana v. Turkey*, ECHR no.69/1996/688/880 (1997).
37 *Ibid.*, para 60-61.
38 Grigoriades v. Greece, 27 EHRR 464 (1997).
39 *Ibid.*
40 *Vereinigung Demokratisher Soldaten Österreichs and Gubi v. Austria*, 20 EHRR 56 (1994).
41 *Ibid.*
42 Janis et al., *supra*, p.281.
43 This test was formulated by J. Holmes in *Shrenck v. United States*, 249 U.S. 47 (1919).
44 *Observer and Guardian v. United Kingdom*, 14 EHHR 153.
45 *Ibid.,* para 69.
46 B. Phillips, "Baby rapes shock South Africa" (11th December 2001), in *BBC News*.

disease SARS hit the continental Asia, rumours spread as fast as the virus and confused people to take rational measures, though sometimes the rumour helped sanitary activities[47]. Consequently, the European Convention allows the States to control expressions from the viewpoint of health.

Hertel v. Switzerland[48] was the case in which the restriction from the health viewpoint was disputed. The applicant wrote an article insisting the hazardous effect against the human health of the foods prepared by microwave ovens, with some extreme expressions like "[microwave ovens are] worse than the Dachau gas chambers". The article was criticised by other scientists[49], and the manufacturers issued an civil litigation against the author on the basis of Unfair Competition Act and Criminal Code. The domestic court admitted the applicant's liability and prohibited him from making such kind of speech. The European Court held it constituted a violation of Article 10 of the Convention, stating that:

> ...the Swiss courts prohibited the applicant from stating that food prepared in microwave ovens was a danger to health and led to changes in the blood of those consuming it that indicated a pathological disorder and presented a pattern that could be seen as the beginning of a carcinogenic process, and from using the image of death in association with microwave ovens.
>
> The Court cannot help but note a disparity between that measure and the behaviour it was intended to rectify. That disparity creates an impression of imbalance that is materialised by the scope of the injunction in question. In that regard, although it is true that the injunction applies only to specific statements, it nonetheless remains the case that those statements related to the very substance of the applicant's views. The effect of the injunction was thus partly to censor the applicant's work and substantially to reduce his ability to put forward in public views which have their place in a public debate whose existence cannot be denied. It matters little that his 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[50].

Moral health is more controversial problem. Every State has its own standard of moral taboo, which is strongly affected by the State's historical, cultural and religious background. In well-known *Handyside* case, the European Court showed a deferential attitude for it, judging that:

> In particular, it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them.[51]

This judgement established the basic principle for the restriction on the freedom of expression from

47 T. Crampton, "Secret of SARS control:Follow those rumours" (5th June 2003), in *International Herald Tribune*.
48 *Hertel v. Switzerland,* 28 EHRR 534.
49 The manufacturers submitted to the court a private expert's report by Professor M. Teuber of the Food Research Institute of the Zürich Federal Institute of Technology. *Ibid,* para 21.
50 *Ibid.*, para 49.
51 *Handyside v. United Kingdom*, 1 EHHR 737 (1976), para 48.

the moral viewpoint. The judgement of *Wingrove* case[52], where a blasphemous expression was at the issue, showed the principle more clearly.

> ..a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion...
>
> Moreover, as in the field of morals, and perhaps to an even greater degree, there is no uniform European conception of the requirements of "the protection of the rights of others" in relation to attacks on their religious convictions. What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterised by an ever growing array of faiths and denominations. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements with regard to the rights of others as well as on the "necessity" of a "restriction" intended to protect from such material those whose deepest feelings and convictions would be seriously offended[53].

However, the restrictive power of the State is not unlimited. The European Court exercised the judicial supervision in *Open Door* case[54], where the applicants (Open Door and Dublin Well Women) had been charged for counselling pregnant women to travel abroad to obtain an abortion and thus prohibited such activities by the Irish Court. The European Court admitted the restriction was set on a justifiable moral value, namely the right to life of the unborn children, but concluded that “the restraint imposed on the applicants from receiving or imparting information was disproportionate to the aims pursued”.

5. Conclusion

Finally, we need turn back to the purpose of the presentation. The given presentation topic is that:

> What margin of appreciation do States enjoy in guaranteeing the freedom of expression under Article 10? Are there any difficulties with this approach?

As we have seen so far, the margin of appreciation has been interpreted quite variably within the field of freedom of expression. Roughly speaking, the more the expression has political and democratic value, the narrower margin the State enjoys. The European Court does not rely on easy categorisation; in each case, the Court examines the concrete circumstances under which the restriction on freedom of expression was made, and then determines the legitimate width of the margin.

The problem exists, in my humble opinion, for the legislators. The consideration on margin of appreciation and the *necessity* test are judged from the Pan-European point of view. The domestic legislators and administrators cannot tell confidently a measure as valid until the European Court shows its final view. It can be applied for any other European Human Rights clauses, but the variability in the freedom of expression makes it even more chaotic.

52 Wingrove v. United Kingdom, 24 EHRR 1 (1997).
53 *Ibid.*, para 58.
54 *Open Door Counselling v. Ireland*, 15 EHRR 442 (1995).

6. Summary and materials

What: the right to express one's thought and opinions without governmental restriction[55]

Why: 1) truth, 2) self-fulfilment, 3) democracy, 4) collapse of government

History:

1776 Virginia Bill of Rights §12 → 89 Droits de l'Homme et Citoyens §11 → 91 First Amendment

1949 Universal Declaration §19 (freedom) + §29 (limitation) → 1950 European Convention §10

Scope: "it 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 the State or any sector of the population" (*Handyside*). Commercial expressions are also protected (*Markt*)

Acceptable limitations:

1) prescribed by the law, 2) legitimate aims, 3) necessary for a democratic society

Necessity → pressing social need (*Handyside*); proportionate, relevant and sufficient (*Olsson*)

Political speeches should be *inter alia* highly respected (*Lingens*)

vs. Defamation: depends on the democratic position of the target; politicians less protected

vs. Privacy: the target's social status & the purpose of the publication; "public concern"

vs. Religious or ethnic dignity: anti-Semitism are excluded from the scope of Article 10

vs. National security: clear and present danger

vs. Health and moral: States enjoy the broad *margin*, but are subject to *proportionality* test

Universal Declaration of Human Rights (1948) Article 19:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Convention for the Protection of Human Rights and Fundamental Freedoms (1950) Article 10:

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 or for the protections 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.

55 Garner (eds.), *Black's Law Dictionary* (7th ed.) (1999), West Publishing, St. Paul, p.675.