OSLO STATSADVOKATEMBETER

Høyesteretts ankeutvalg
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INNKOMMET
[illegible] 2012
HØYESTERETT

Deres ref.:	Vår ref.:	Dato:
2012/1069	10/152-101	7. september 2012

ANKETILSVAR

TIL

HØYESTERETTS ANKEUTVALG

Norsk Rikskringkasting AS
Norsk Redaktørforening
Norsk Presseforbund
Aftenposten AS
AS Dagbladet
Verdens Gang AS
Dagsavisen AS
TV2 AS
Mediehuset Nettavisen AS
P4 Radio Hele Norge AS
Fædrelandsvennen AS
Bergens Tidende AS
Avisen Vårt Land AS
Bladet Nordlys AS
Stavanger Aftenblad AS
Morgenbladet AS
Klassekampen AS
Utrop AS (advokat Ane Stokland)

mot

Den offentlige påtalemyndighet v/ Oslo statsadvokatembeter

Norsk rikskringkastning m fl., i det følgende omtalt som pressen, erklærte 6. juni 2012 anke over Borgarting lagmannsretts kjennelse av 24. mai 2012.

Anken er rettidig og gjelder, så vidt en forstår, saksbehandlingen og lovanvendelsen. Pressen anfører at lagmannsrettens forståelse og anvendelse av EMK artikkel 10 er feil. Det hevdes også at det hefter feil ved lagmannsrettens saksbehandling. Lagmannsretten har, etter pressens oppfatning, ikke foretatt en konkret prøving av hvorvidt en nektelse av innsyn/tilgang til det konkrete materialet er et inngrep i ytringsfriheten eller en krenkelse av EMK artikkel 10.

Anken er en videre anke, og Høyesteretts kompetanse er i utgangspunktet begrenset etter straffeprosessloven § 388 til å prøve lagmannsrettens generelle lovtolkning og saksbehandling. Det er imidlertid lagt til grunn at Høyesterett også kan prøve den konkrete anvendelsen av EMKs artikler, jf. Rt. 2007 s. 404 avsnitt 40.

Påtalemyndigheten bestrider at det hefter feil ved lagmannsrettens kjennelse. Lagmannsretten har foretatt en korrekt vurdering av hva som kan utledes av EMK art 10 og betydningen av dette for den konkrete saken. Etter påtalemyndighetens oppfatning hefter det heller ingen feil ved lagmannsrettens saksbehandling. Slik påtalemyndigheten leser kjennelsen har lagmannsretten foretatt en konkret prøving av pressens begjæring om tilgang til straffesaksdokumenter i avsluttet straffesak både i relasjon til straffeprosessloven § 28 og EMK art 10. Som en del av denne prøvingen har lagmannsretten vurdert om avslag på innsyn etter straffeprosessloven § 28 er et inngrep i retten til ytringsfrihet etter EMK artikkel 10 nr. 1.

Etter påtalemyndighetens oppfatning kan det, uavhengig av gradering, ikke utledes et informasjonskrav til straffesaksdokumenter etter EMK art 10. Et avslag på innsyn/tilgang på grunn av manglende rettslig interesse er dermed ikke et inngrep i relasjon til EMK art 10 nr 1, selv om det er pressen som spør og saken har hatt stor offentlig interesse. Så lenge et avslag på innsyn/tilgang til materialet etter reglene i strpl. § 28 ikke er et inngrep i ytringsfriheten, er det etter påtalemyndighetens syn ikke nødvendig å vurdere om det foreligger en krenkelse i relasjon til EMK art 10 nr. 2.
Påtalemyndigheten er enig i lagmannsrettens avgjørelse og tiltrer dennes begrunnelse. Under henvisning til det som anføres i dette tilsvaret og påtalemyndighetens tidligere inngitte prosesskrift, vil påtalemyndigheten nedlegge påstand om at pressens anke forkastes.

En vil for øvrig bemerke følgende:

<u>Påtalemyndighetens saksbehandling</u>

Foranlediget av det som er uttalt av Høyesteretts ankeutvalgs flertall i kjennelse av 16. mars 2012 i avsnitt 30, der det fremholdes at påtalemyndighetens saksbehandling kan "oppfattes som en trenering av en begjæring", vil en bemerke: Fra september 2010 arbeidet politiadvokat Line Nyvoll Nygaard med spørsmålet om gjenopptagelse av straffesaken mot Arne Treholt. Det er ikke lenger personer i aktiv tjeneste ved PST som har detaljerte og konkrete kunnskaper om hele Treholt-saken. Dette forutsatte at hun måtte sette seg inn i saken fra bunnen av. Dokumentmengden i saken er svært betydelig og utgjør anslagsvis 10 – 12.000 dokumentsider. I tillegg kommer lydmaterialet som utgjør lydopptak fra rettsforhandlingene som gikk fra 25. februar 1985 til 8. mai s.å.. Disse som i dag er lagret digitalt, må i dag gjennomhøres i "sanntid". Selv en gjennomgang av deler av dette ble derfor

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tidkrevende. Undertegnede som etter riksadvokatens ordre skulle avgi uttalelse til Gjenopptagelseskommisjonen, hadde ikke behandlet saken siden domfelte trakk sin anke til Høyesterett i 1986. Dette innebar at så vel Nygaard som undertegnede i lange perioder frem til juni 2011 arbeidet på heltid med gjenopptagelsesspørsmålet.

Da innsynsbegjæringen innkom 17. februar 2011, arbeidet så vel Nygaard som undertegnede på heltid med gjenopptagelsessaken. I tillegg kom det praktiske problem at Gjenopptagelseskommisjonen også hadde bruk for det samme materialet som oss, samt at forsvarer også skulle ha tilgang til dette.

PST meddelte derfor i brev av 4. mars 2011 at denne begjæringen skulle stilles bero. Dette var utelukkende begrunnet i praktiske og arbeidsmessige hensyn. Som det fremgår av mindretallet i Høyesteretts ankeutvalg, var intensjonen at PST skulle påbegynne arbeidet med å ta stilling til innsynsbegjæringen når Gjenopptagelseskommisjonen hadde truffet sin avgjørelse i saken. En viser for øvrig til mindretallets uttalelse i ankeutvalgets kjennelse (avsnitt 36).

Påtalemyndigheten tar likevel selvsagt til etterretning at ankeutvalgets flertall har lagt til grunn at påtalemyndigheten reelt sett har gitt et avslag.

<u>Beskrivelse av lydmaterialet</u>

Ingen av de domstoler som har behandlet spørsmålet om innsyn, har hørt det aktuelle lydmaterialet. Som nevnt pågikk forhandlingene i perioden 25. februar til 9. mai 1985. Store deler av forhandlingene gikk for lukkede dører, jf. Dl. § 125.

Det ble ført 70 vitner og tiltaltes forklaring gikk over flere dager. Tre av vitnene var utlendinger. En stor del av vitnene ga forklaring for lukkede dører. Flere vitner forklarte seg dels for åpne og dels for lukkede dører. Det samme var tilfellet for tiltalte. Videre ble det dokumentert et betydelig antall dokumenter ved opplesning. Fire sakkyndige gjennomgikk og vurderte det materialet som påtalemyndigheten hevdet var kompromittert til fremmede stater.

Graderingsnivået på de opplysninger som ble meddelt under hovedforhandlingen var varierende og dekket samtlige graderingsformer. Det alt vesentlige var gradert etter dagjeldende sikkerhetsinstruks med graderingsnivå fra "Hemmelig" til "Begrenset". Noe materiale var gradert i henhold til dagjeldende beskyttelsesinstruks med gradering "Strengt fortrolig" eller "Fortrolig".

For samtlige som forklarte seg for lukkede dører var det gitt fritak for taushetsplikt overensstemmende med bestemmelsen i strpl. § 117. Dette var nødvendig av hensyn til det bevisforbud som er angitt i denne bestemmelsen. En viser for øvrig til bestemmelsens 2. ledd.

Som i enhver straffesak var vitner og sakkyndige innkalt med utgangspunkt i straffesakens dokumenter. Det er således en nær sammenheng mellom de avgitte muntlige vitneforklaringer og de underliggende saksdokumenter. Dette innebærer derfor at de forklaringer som ble avgitt for lukkede dører, er knyttet til disse graderte dokumenter, og i mange tilfeller er spørsmålsstillingen i vitneeksaminasjonen forankret i graderte dokumenter. Dette gjelder i særlig grad de sakkyndige og avhøret av disse, men også i stor grad vitner fra utenrikstjenesten og forsvaret.

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Opptakene fra hovedforhandlingen gir en vesentlig større informasjonsmengde og detaljeringsnivå enn det som fremkommer i selve dommen. Det fremgår av det forhold at opplesning av selve dommen tok ca. 12 timer, mens rettsforhandlingene strakk seg over 8 uker. Som nevnt ovenfor må lydfilene høres i "sanntid" og en gjennomhøring vil derfor ta like lang tid som selve hovedforhandlingen, og må i mange tilfeller sammenstilles med underliggende saksdokumenter.

Påtalemyndigheten vil derfor poengtere at selve avgraderingsspørsmålet og vurderingen nødvendigvis må bli en tidkrevende prosess. En avgradering uten å ha gjennomgått materialet, er uforsvarlig og i strid med sikkerhetslovens bestemmelser, jf. særlig § 2 og § 12 (Lov av 20. mars 1998 nr. 10).

Inndeling av lydmaterialet

Opptakene fra lagmannsretten faller i 2 atskilte deler:
a) Vitneprov og forklareringer for åpne dører
b) Forklareringer avgitt for lukkede dører i medhold av Dl. § 125

Opptaksmaterialet som faller inn under kategori a, reiser generelle og viktige spørsmål som er knyttet til pressen og allmennhetens tilgang til dokumenter i avsluttet straffesak. Høyesterett har i avgjørelsene i Rt 2006 s 568, jfr Rt 1989 s 1282 fastslått at lydopptakene er en del av saksdokumentene i straffesaken. Det vises til lagmannsrettens kjennelse s 5. Det bør her bemerkes at dersom pressen ikke gis innsyn i disse deler av materialet, vil det være unødvendig å ta stilling til de særskilte spørsmål som knytter seg til de vitneprov som er avgitt for lukkede dører og inneholder materiale som ble ansett for gradert i 1985.

Lydopptak av forklaringer gitt for åpne dører

Påtalemyndigheten vil her vise til lagmannsrettens kjennelse og tiltrer dennes begrunnelse.: Lagmannsretten har på s. 6 og 7 grundig gjennomgått lovforarbeider og annet relevant rettskildemateriale. Som fremhevet av lagmannsretten var spørsmålet også fremme i forbindelse med endring av Grunnloven § 100 i 2004. Man uttalte da at grunnlovfesting av offentlighetsprinsippet ikke burde omfatte påtalemyndighetens virksomhet i saker som behandles etter rettspleielovene. En viser til s. 7 første avsnitt i kjennelsen. Som lagmannsretten legger påtalemyndigheten til grunn at gjeldene rett etter norske regler er klar. En viser til kjennelsen s 5 – 8. Spørsmålet er således hvorvidt EMK art. 10 og praksis fra EMD medfører en endring i forhold til norske regler.

Det bør her bemerkes at en oppfatter de ankende parters anførsler dit hen at man gjør gjeldende at EMK art. 10 skal danne et direkte hjemmelsgrunnlag og at norske domstoler skal prøve saken direkte mot denne bestemmelse. Da lydopptakene utgjør en del av straffesakens dokumenter, vil problemstillingen derfor være knyttet til en generell innsynsrett i straffesaksdokumenter i en avsluttet straffesak.

En ytterligere konsekvens av den ankende parts syn, dersom de gis medhold i at avslag på innsyn/tilgang til opptakene er et inngrep etter EMK art 10 nr 1, vil være at domstolene som skal forestå den endelige rettsanvendelse i saken, også må gjennomgå og vurdere det omstridte materialet konkret i forhold til art. 10 nr 2 i EMK. Dette vil i så fall måtte gjøres i enhver sak der pressen anmoder om dokumenter i avsluttet straffesak.

Den tradisjonelle forståelse av EMK art. 10 har vært knyttet til det å motta og meddele ytringer, jfr. ordlyden i art. 10 nr. 1. Spørsmålsstillingen nå er knyttet til krav om å få informasjon som ikke ønskes meddelt av den som besitter de aktuelle opplysninger, og som

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det heller ikke er hjemmel for å utlevere etter reglene i straffeprosessloven. Med andre ord et krav om utlevering av informasjon og om en nektelse utgjør et inngrep i ytringsfriheten. Lagmannsretten behandler spørsmålet fra s. 8. Påtalemyndigheten slutter seg til lagmannsrettens argumentasjon, herunder også de generelle synspunkter om forholdet mellom norsk lovgivning og fortolkningen av EMK.

Pressen påberoper seg *Tarsasag* og *Kenedi* fra 2009 til støtte for det syn at rettstilstanden i EMD nå er endret. En leser ikke dommene slik. For de første er de begrenset til de helt konkrete omstendigheter i begge saker. For det andre er det vesentlig for å forstå EMDs tilnærming at ungarske myndigheter ikke hadde imøtegått klagernes anførsler om at artikkel 10 faktisk var anvendelig. For det tredje er formuleringene som pressen påberoper seg vanskelig å tolke dit hen at EMD med dette har åpnet opp for en ny forståelse av EMK artikkel 10 nr 1.

I 2004 avsa EMD dom i *Sirbu m. fl. mot Moldova*. Dommen er sentral idet den direkte berører den relevante problemstilling. Den synes å være i direkte motstrid med pressens tolking av artikkel 10 (og pressens tolking av rekkevidden av Tarsasag og Kenedi). Det sies i avsnitt 18 i dommen:

> *The Court reiterates that freedom to receive information, referred to in paragraph 2 of Article 10 of the Convention, "basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him" (see the Leander v. Sweden judgment of 26 March 1987, Series A no. 116, p. 29, § 74). That freedom cannot be construed as imposing on a State, in circumstances such as those in the present case, positive obligations to disclose to the public any secret documents or information concerning its military, intelligence service or police.*

Denne uttalelsen er vektlagt i litteraturen som et eksempel på at artikkel 10 ennå ikke er tolket så langt som pressen i vår sak ønsker. En viser her til følgende fremstillinger: Eric Barendt: Freedom of Speech (2. ed.) s108-113, Harris, O'Boyle & Warbrick: "Law of The European Covention on Human Rights (2.ed.) s 446-448), Van Dijk, Van Hof mfl. "Theory and Practice of the European Convention on Human Rights (4.ed): s 786-787. Kopier av henvisningene er vedlagt.

Det har formodningen mot seg at EMD mente å utvide den generelle anvendelsen av artikkel 10 i og med *Tarsasag* og *Kenedi* når det fem år tidligere var avsagt en slik avgjørelse. Hadde EMD ønsket å imøtegå *Sirbu*-dommen, ville den sagt det.

Etter vårt syn er det derfor ikke noe grunnlag for å hevde at EMD har endret praksis i tråd med den vidtgående fortolkning som pressen trekker ut av spesielt *Tarsasag*-saken. Etter påtalemyndighetens syn foreligger det ingen motstrid mellom EMK art 10 og gjeldende norsk lovgivning om innsyn/tilgang til straffesaksdokumenter. Det anføres at det ikke kan utledes et informasjonskrav til dokumenter i avsluttet straffesak av EMK art 10. Et avslag på innsyn/tilgang til lydopptakene er derfor ikke noe inngrep i ytringsfriheten i EMK art 10 nr 1.

Under ingen omstendighet kan det hevdes at det er etablert noen klar ny rettstilstand i kjølvannet av Tarsasag-saken slik de ankende parter hevder. I et slikt tilfelle må man anvende de generelle tolkninsprinsipper som det er redegjort for i lagmannsrettens kjennelse fra s. 10 og avgjørelsen i Rt. 2005 s. 568.

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Påtalemyndigheten vil derfor gjøre gjeldende at anken må forkastes.

Lydopptak av forklaringer gitt for lukkede dører

Som en subsidiær anførsel vil en gjøre gjeldende at forklaringer som ble avgitt for lukkede dører, må behandles etter andre regler som kommer i tillegg til de rettsregler som er anført ovenfor.

De ankende parter synes her å hevde at domstolene etter norsk lov etter egen diskresjon kan offentliggjøre gradert materiale som er fremlagt for domstolene i forbindelse med en straffesak.

For samtlige forklareringer der dørene ble begjært lukket, er hjemmelsgrunnlaget knyttet til Dl. § 125 slik den lød før lovendringen i 1994. Det bør her bemerkes at retten ga taushetspålegg etter dagjeldende Dl. § 130 i kjennelse av 6. mars 1985. For alle som avga forklaring bak lukkede dører ble det gitt forklaringer som falt inn under bevisforbudet i Strpl. § 117 som har slik ordlyd:

> Retten må ikke ta imot vitneforklaring om noe som holdes hemmelig av hensyn til rikets sikkerhet eller forhold til fremmed stat, hvis ikke Kongen gir tillatelse.
>
> Dersom ikke tillatelsen bestemmer noe annet, skal vitnesbyrdet bare meddeles retten og partene i møte for stengte dører og under pålegg om taushetsplikt.

Denne bestemmelsen innebærer at Kongen kan gi fritak for taushetsplikten, men loven fastslår utvetydig at forklaringen bare kan gis for lukkede dører med mindre særskilt tillatelse til det motsatte er bestemt, jf. bestemmelsens annet ledd. Slik tillatelse er ikke gitt. Det synes å fremstå som helt selvmotsigende at domstolen i ettertid skulle kunne avgradere materialet etter egen skjønnsmessig vurdering av behovet for fortsatt hemmelighold uavhengig av det samtykke som ble gitt og som kun ga tillatelse til at vitnet kunne føres for lukkede dører.

I sin ytterste konsekvens vil risikoen for spredning bli uakseptabel for utstederen av opplysningene. Dersom den dømmende rett først har lagt til grunn at § 117 kommer til anvendelse, kan ikke en senere dommer omgjøre denne beslutning etter begjæring fra f. eks en tredje part. Avgraderingskompetansen må stadig ligge hos utstederen av den graderte informasjonen. En viser her til sikkerhetsloven § 11, 3. ledd og forskrift om informasjonssikkerhet F0107.2001 nr 744 § 2-11. Dette er regler som er videreført fra den tidligere sikkerhetsinstruks.

For fullstendighetens skyld bør det nevnes at domstolen selvsagt står fritt til å vurdere om betingelsene i § 117 foreligger når vitnet skal føres. Med andre ord om hvorvidt det aktuelle vitneprov faller inn under bestemmelsen i § 117. Domstolen kan f. eks. være av den oppfatning at opplysningene rent faktisk ikke er å anse som "hemmelige", jf. Bjerke/Keiserud I, s 448. Dette innebærer ikke at domstolen står fritt. Dersom det oppstår uenighet mellom påtalemyndigheten og domstolen om slike spørsmål, må påtalemyndigheten vurdere frafall av vitnet og i sin ytterste konsekvens å frafalle tiltalen. Det bør her bemerkes at slike spørsmål alltid skal behandles for lukkede dører, jf. Dl § 126. Dersom først vitnet blir ført for lukkede dører, kan ikke domstolen ensidig endre forutsetningen for at samtykket ble gitt. Dette følger også av lovens ordlyd som anvender formuleringen "holdes hemmelig" og ikke "bør holdes hemmelig". Dette tilsier at det er det forvaltningsorganet som har gitt den graderte informasjonen (eksempelvis Utenriks-, Forsvars eller Justisdepartementet) som med endelig virkning bestemmer spørsmålet om fortsatt gradering.

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Etter påtalemyndighetens syn må en ved en eventuell avgradering følge de prosedyrer som følger av sikkerhetsloven, jf. § 2, 4. ledd, der denne lov er gitt anvendelse for domstolene. Dette innebærer at den korrekte, men også praktiske fremgangsmåte, vil være at de ulike myndigheter (Justisdepartementet/ PST, Forsvarsdepartementet og Utenriksdepartementet) gis anledning til å gjennomgå materialet og gi sin uttalelse til spørsmålet om fortsatt gradering. Påtalemyndigheten vil så oversende disse, samt sin tilrådning til Borgarting lagmannsrett, slik at denne domstol eventuelt kan oppheve det gitte taushetspålegg som ble gitt av domstol i 1985.

Denne prosedyre vil rimeligvis ta en del tid, men er nødvendig dersom sikkerhetsloven skal etterleves.

For ordens skyld vil en understreke at en avgradering av straffesaksdokumenter ikke uten videre innebærer at dokumentene blir offentliggjort. Dette vil måtte følge de regler som gjelder generelt for straffesaker, jf. det som er uttalt ovenfor.

Oslo, 7. september 2012

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Freedom of Speech

Second Edition

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to allow a particular group to march, engages free speech. Arguably, it is also implicated when an editor refuses to publish a reply to a feature critical of the person claiming it or to publish an article adopting a particular view. But in that event the issue is more complicated, first, because the recognition of reply and access rights would engage editorial freedom, and secondly, because the editor can invoke space constraints: a newspaper cannot publish everything sent to it. In other circumstances it may be plain that the government was not targeting speech. For instance, requests for public assistance to help a claimant attend a meeting or to disseminate his message can properly be turned down to protect social security or other funds; positive rights are not denied in this situation in order to inhibit speech. The same point often applies to decisions rejecting financial support for research or exhibitions; they may be taken for legitimate, non-speech reasons.[116]

Characterization of *freedom* of speech, therefore, may entail some consideration how far the challenged decision engages *speech*, the issue considered earlier in this chapter.

7. Access to Information

This section concerns a particular type of positive right, which on one view falls under freedom of speech or expression: the right asserted by individuals, or by the media, to acquire information, generally known as 'freedom of information'. Associated with the freedom are claims to attend public meetings and events for information-gathering. Freedom of information is now frequently protected in Western democracies by specific statutes.[117] They are enacted to enable citizens to acquire official information which may be of particular concern to them, for example, medical records or discussions concerning planning policy, or which enables them to assess the wisdom of government policies and so participate fully in public discourse. The argument for freedom of information and open government is indeed very similar to one of the principal positive justifications for the free speech principle: the importance of freedom of speech for an active democracy. The negative free speech argument from suspicion of government also supports the case for freedom of information;[118] we rightly distrust government when it keeps information from us, unless there is an extremely strong argument for secrecy. Further, it is correctly pointed out that freedom of speech may be of little value, and certainly in some contexts its exercise will be ineffective, unless the speaker has acquired enough information about political matters to participate in public discourse on equal terms with politicians and officials. The case for 'a right

[116] See s. 8 below for further discussion.

[117] e.g. Freedom of Information Act 1966 (USA); Freedom of Information Act 1982 (Australia Cth); Freedom of Information Act 2000 (UK).

[118] See ch. 1, s. 2 above for these arguments.

to know' as an aspect of freedom of speech has a long and respectable ancestry,[119] and is supported by some commentators now.[120]

Though the argument is attractive, it should not be accepted, at least without major qualification. What is at issue is the meaning and scope of *freedom* of speech, and in particular whether it covers a constitutional right of access to information from public authorities. One difficulty is that the right would be claimed when in the nature of things there is no willing speaker. Recognition of a right of access would impose a constitutional duty on government or other authority to provide information it did not want to disclose. The government may not, of course, claim a free speech right not to reveal confidential information; it is not entitled to the protection of the First Amendment or other free speech clause. But there would still be something odd in upholding a free speech claim against an unwilling speaker. Another problem is that courts would be required to formulate the scope of constitutional information rights, for example, to determine exactly what information is covered, whether access to it should be free, and whether the authority was in breach if it was not supplied within, say, three weeks. They are understandably reluctant to do this. These matters are much better resolved by legislation or administrative regulations. Nor is it persuasive to argue that without freedom of information speakers are unable to exercise their free speech rights effectively. That proves much too much. The same is true of claims to a certain level of education, to travel, and to a reasonable standard of living, which are clearly not covered by freedom of speech.

A right to receive information and ideas may be explicitly covered by freedom of expression clauses, as it is in Germany and under the ECHR. Alternatively, courts may infer recipient rights from a general freedom of speech clause, as in the United States. These rights have ample content without bringing freedom of information under their umbrella. For instance, the right to receive information, in Germany *Informationsfreiheit*, may be asserted where a speaker has voluntarily supplied information, but is reluctant or unable to protect his constitutional rights. For instance, the intended recipient of imported magazines seized on arrival in the jurisdiction may be in a much better position to initiate litigation than the foreign publisher or author.[121] In these circumstances, the right to receive information is, like freedom of speech itself, primarily a liberty; its protection does not appear to pose difficulties for free speech theory.

The case for freedom of information is a powerful one, and it may be strengthened by the free speech arguments mentioned in the preceding paragraphs.

[119] See J. Milton, *Areopagitica: A Speech for the Liberty of Unlicensed Printing* (1644) in *Prose Writings* (Everyman, 1958), 145, and J. Madison, quoted in T. I. Emerson, 'Legal Foundations of the Right to Know' (1976) 54 *Washington Univ Law Quarterly* 1.

[120] Emerson, ibid.; P. Bayne, 'Freedom of Information and Political Free Speech', in T. Campbell and W. Sadurski (eds.), *Freedom of Communication* (Aldershot: Dartmouth, 1994), 199, 204–7.

[121] See *Lamont* v. *Postmaster-General* 381 US 301 (1965) (successful challenge to federal statute requiring addressees of communist propaganda by post to request delivery in writing) and 27 BVerfGE 71 (1969) (successful constitutional complaint brought when literature imported from East Germany confiscated).

So the link between freedom of expression and freedom of information is undeniable.[122] But that does not mean that the latter is covered by the former, so that courts should derive positive rights of access to information directly from a free speech clause. At most, respect for the fundamental values of freedom of expression may require government to enact freedom of information legislation, the scope of which would be subject to review by the courts to ensure that it is compatible with the former, as well as with other constitutional rights, for example, personal privacy. Even when an individual has an exceptionally strong interest in acquiring particular information, a court is more likely to recognize a (constitutional) access right on the basis of privacy, rather than the right to free expression.

United States courts have hesitated to recognize non-statutory, positive information rights. Their existence has been frequently asserted in challenges to the constitutionality of prison regulations prohibiting press interviews with particular prisoners. In two companion cases the majority of the Supreme Court rejected an argument that journalists had access rights to jails in order to interview prisoners.[123] There are obvious objections to allowing all members of the public free access to prisons to interview prisoners or their warders, and the Court majority refused to grant the press any privileges in this context.[124] The question whether there is a First Amendment *right to gather* information was answered in another prison case, *Houchins* v. *KQED*.[125] A Californian broadcasting station argued it was entitled to enter a state prison to inspect and take photographs of that part of the jail where a prisoner had recently committed suicide. The majority of the Court denied the existence of an access right to government information or to information in its control, distinguishing between this claim and the right to communicate information once it had been obtained. Speaking for the three dissenters, Stevens J. considered entry to the prison necessary to protect the public's right to be informed about the conditions there. But that view proves too much, for its acceptance might have led to the pressing of novel First Amendment claims, for example, to attend Cabinet meetings or witness army exercises; press admission to these occasions would equally enhance public knowledge. However, there is one situation where not only in the United States, but also in England and other common law systems, both the media and the general public do enjoy positive rights: access to legal proceedings. This topic is considered in Chapter IX below.[126]

An unusual positive information right was upheld by three members of the US Supreme Court in the plurality opinion in *Board of Education* v. *Pico*.[127] In their view, and probably that of Blackmun J., the right of school students to receive

[122] Sir A. Mason, 'The Relationship between Freedom of Expression and Freedom of Information', in *Freedom of Expression and Freedom of Information*, 225.

[123] *Pell* v. *Procunier* 417 US 817 (1974); *Saxbe* v. *Washington Post* 417 US 843 (1974).

[124] For further discussion of these points, see ch. XII, s. 3(iii) below.

[125] 438 US 1 (1978).

[126] S. 4.

[127] 457 US 853 (1982).

information and ideas would be violated by a high school board's decision to remove books from the library on the ground that their content was 'anti-American', 'plain filthy', or in some other way offensive. The difficulties in formulating this novel First Amendment right, and correlative duty on the school authorities, were pointed out by the four dissenters. Would not the recognition of such a right also require the authorities to provide books for the library on the students' request, and could a clear line be drawn between a right to receive ideas in the form of library books and a right to be taught subjects which the students find of particular interest? Another difficulty was pointed out in Rehnquist J.'s dissent. The plurality derived the students' right to receive ideas from the speaker's First Amendment right to transmit them. But no author or publisher has a right that a school purchase his book for its library, or that any public library buy it for that matter. It would be bizarre to uphold a positive right to receive information where the speaker, in this case the author, has none. The alternative basis for the students' recipient rights—that the books contributed to the effective exercise of their own free speech rights—is no easier to sustain. As Rehnquist J. said, the state did not deprive them of access to the books; the claim was that they had to be provided in the *school library*. If that claim is acceptable, it is hard to see any ground for denying, say, the existence of a First Amendment right to have public libraries provided by the state at places reasonably accessible to the public or a constitutional right to read official information in readily available booklets.

The *Informationsfreiheit* specifically covered by Article 5 of the German Basic Law does not confer any constitutional title to acquire information from public authorities. The text makes it plain that the freedom is only to receive information from generally available sources (*aus allgemein zugänglichen Quellen*), and plainly that does not cover government information which has not been publicly released. As is the case with the freedom of expression also protected in the first sentence of Article 5, the freedom of the recipient is fundamentally a negative right, or in Hohfeldian terms a bare liberty: it does not impose duties on the state to provide information or to ensure its provision by others. The German Administrative Court has left open the question whether in some circumstances the press might have a constitutional right of access to information under the separate *Pressefreiheit* provision in Article 5(1), while rejecting a claim by a journalist to participate in special railway journeys which would have enabled him to become better informed about transport plans.[128] The Court indicated, however, that the exclusion of a particular journalist on the basis of the content of his articles might have raised difficulties under Article 5, in conjunction with the Article 3 prohibition of arbitrary discrimination.

The approach to the character of *Informationsfreiheit* taken by both courts and commentators in Germany is similar to the cautious approach of the US Supreme Court to the recognition of positive information rights. But the Karlsruhe Court

[128] 47 BVerwGE 247 (1974).

has ruled that the recipient's interests, protected by the freedom of information, must be independently weighed by ordinary courts. Thus, in its leading case in this area,[129] the Court upheld a constitutional complaint brought against the confiscation of literature imported from the (then) German Democratic Republic supporting the proscribed West German Communist Party, because the lower court had not considered the readers' interest in informing themselves from this source. It is where the sender of the information is outside Germany that recipient rights are most likely to be invoked, for the supplier would often not be in a position effectively to assert his freedom to speak. That happened in another important case on *Informationsfreiheit*, where the Court held that it covered the freedom to erect a satellite dish for the receipt of television programmes (from Turkey) and ruled that the ordinary courts had not taken full account of the interest of immigrants in watching programmes from their country of origin.[130]

The ECHR explicitly covers the right to receive information in Article 10(1). But in contrast to both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights,[131] it does not cover the right *to seek* information. In a number of cases the European Court has rejected freedom of information claims based on freedom of expression, while recognizing them, to some extent, on the basis of Article 8, guaranteeing the right to respect for private and family life.[132] In *Gaskin* v. *UK*,[133] for example, the Court held that the applicant's rights under that Article had been violated when he was denied access to records held by a local authority concerning decisions it had taken about his care as a child; procedures should be in place to review whether he could be given information without violating anyone else's confidentiality. It is much better to use the privacy right, rather than freedom of expression, as a ground for upholding positive information rights; the case for their recognition is most compelling when the information is of particular concern to the applicant and can be related to his private or family life. Positive free speech rights would not distinguish access to that information from, say, a claim to see general government policy documents.

8. Freedom of Speech and Government Subsidies

To what extent is freedom of speech engaged when government or another public body funds a health programme, research, or the arts? A public subsidy or programme typically imposes constraints on recipients, sometimes requiring them not to engage in activity incompatible with the objects of the programme, which

[129] 27 BVerfGE 71 (1969). [130] 90 BVerfGE 27 (1994).
[131] Art. 19 of both instruments.
[132] *Leander* v. *Sweden* (1987) 9 EHRR 433; *Guerra* v. *Italy* (1998) 26 EHRR 357.
[133] (1989) 12 EHRR 36.

might include advocacy of such activity. On one view, free speech rights are not at issue at all in this context: the government is not under any legal obligation, say, to fund the arts, so if it does provide financial support, it is entitled to do it on its own terms. The greater power not to fund includes the lesser power to impose conditions on the fortunate recipients of its bounty. Equally, if there is no free speech right to claim support from a government unwilling to support the arts in general or, say, postmodern installation art exhibitions, it might follow that no such right would be infringed if funding is unavailable for exhibitions displaying work which is indecent or 'contrary to good taste'. This conclusion is perhaps inevitable if it is assumed that freedom of speech is never more than a negative liberty, protected only against active government regulation or interference. It was the view taken by Scalia J. in his concurring judgment in a leading United States case, *National Endowment for the Arts (NEA)* v. *Finley*.[134] He held that the First Amendment was not even engaged when artists challenged provisions in federal legislation requiring the Chairperson of the National Endowment for the Arts to take into account decency standards and respect for the diverse beliefs and values of the public when he assessed applications. Rejection of an application for arts funding on the ground of indecency should not, in Scalia J.'s view, be treated as an abridgement of freedom of speech.

At first glance this argument may appear sound enough. But suppose a government, angry at the predominantly radical views of modern artists, amends legislation to debar from eligibility for funding all artists whose work satirizes government or its political policies, say, concerning the war in Iraq. Or it might make it a condition of receipt of research funding that recipients do not publish their work in the relevant area, without prior submission to an official for clearance—in other circumstances, a clear prior restraint on speech.[135] Alternatively, funding might be conditional on a commitment by beneficiaries not to speak or write at all on the subject of the research, or on any matter of public concern, conditions requiring them in effect to surrender their freedom of speech. Arguably, in the absence of any judicial control, government would be free to use its considerable funding powers to skew public debate by, say, ensuring that only those whose views are congenial to it are free to publish their work or secure funding in the first place. For these reasons, some American commentators contend that allocation decisions should be subject to much the same degree of free speech scrutiny as the imposition of criminal penalties and other regulation of speech.[136] Owen Fiss, for example, has argued that it is the responsibility of government to use its funding

[134] 524 US 569 (1998).
[135] See ch. IV below for prior restraints.
[136] Among the vast literature, see D. Cole, 'Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech' (1992) 67 *New York Univ Law Rev* 675; M. H. Redish and D. I. Kessler, 'Government Subsidies and Free Expression' (1996) 80 *Minnesota Law Rev* 543; O. M. Fiss, *The Irony of Free Speech* (Cambridge, Mass.: Harvard UP, 1996), ch. 2, and 'State Activism and State Censorship' (1991) 100 *Yale Law Jo* 2087.

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LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Second edition

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demonstrated that such views 'exclusively or preponderantly' served as the relevant factor to bring Article 10 into play.[15]

II. POSITIVE OBLIGATIONS

The positive obligation to protect freedom of expression and to prevent encroachments on its guarantee requires the horizontal application (*Drittwirkung*) of Article 10 in the relations of private persons. While refraining from formulating a general theory on positive obligations and the **extent to which the Convention can** be applied to relations between private persons,[16] **the Court has consistently recognized** that states must ensure that private individuals **can effectively exercise their right** of communication among themselves.[17] The notion of positive obligations is of special importance to issues of access to information, which will be examined separately.

In determining whether a positive obligation to act exists in a particular situation, 'regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual'.[18] The ambit of the state's positive obligation varies, depending on considerations of distributive justice and the equitable allocation of resources required for different administrative tasks.[19] Relevant factors are: the kind of the expression rights at stake; their public interest nature; their capacity to contribute to public debates; the nature and scope of restrictions on expression rights; the availability of alternative venues for expression; and the weight of countervailing rights of others or the public.[20]

A state's positive obligation has been held to apply in a variety of contexts. The requirement that private employees refrain from making statements or divulging information may be stipulated in an employment contract. A breach of such a duty of loyalty may result in suspension or dismissal. According to the Commission, the enforcement of such legal consequences with the assistance of the competent national authorities does not amount to an 'interference by public authority' within the meaning of Article 10(1). In *Rommelfanger v FRG*,[21] a physician employed by a Catholic hospital was dismissed because of his views about abortion. The Commission considered that the requirement to refrain from making statements on abortion in conflict with the church's opinion was not unreasonable, as the issue of abortion was of crucial importance to the church. It found no interference within the meaning of Article 10(1) on the ground that the positive obligation imposed on the state did not go beyond the requirement of protecting employees from any unreasonable compulsion impairing the very essence of their freedom of expression.

The case of *Rommelfanger* can be compared with the later case of *Fuentes Bobo v Spain*.[22] There, the applicant was laid off by the Spanish television company (TVE) because of his criticism of its management, which was made during a radio programme. In response to a government argument that TVE was a private legal person, the Court found that by virtue of its positive obligation, it was incumbent on the Spanish government to safeguard

[15] *Ibid*. See also *Pitkevich v Russia No 47936/99* hudoc (2001) DA (dismissal of a judge because of her activities irreconcilable with the judicial post, rather than of her expression of religious views).

[16] *VGT Verein gegen Tierfabriken v Switzerland* 2001-VI; 34 EHRR 159 para 46.

[17] See Clapham, *Human Rights in the Private Sphere*, 1993, p 231. On positive obligations under the Convention, see above, p 18.

[18] *Ozgur Gundem v Turkey* 2000-III; 31 EHRR 1082 para 43.

[19] *Appleby v UK* 2003-VI; 37 EHRR 783 para 40. [20] Id, paras 42–3, and 47–9.

[21] *No 12242/86* hudoc (1989) DA. See also *Carrillo and Burgoa v Spain No 11142/84*, (1986) unreported.

[22] Hudoc (2000).

freedom of expression from threats stemming from private persons, so that the app cant's lawful dismissal constituted an interference with his freedom of expression.

Clearly, the concept of positive obligations under Article 10 assumes great importar in relation to any violence or threats of violence directed by private persons against otl private persons, such as the press, exercising free speech. In *Özgür Gündem v Turke*; the Court held that Turkey was under a positive obligation to take investigative and p: tective measures where a pro-PKK newspaper, and its journalists and staff, were expos to a campaign of violence and intimidation by private individuals, including killin assaults, and arson attacks. Despite the numerous requests for protection by the nev paper applicant, the Turkish government failed to take adequate or effective steps. Su an omission was considered to warrant the fear that the concerted campaign of violer was tolerated, if not approved, by state officials.[24] In the *Özgür Gündem* case, Turkey su mitted that the applicant and its staff supported the PKK and acted as its propaganda to The Court held that even if this was proven to be true, this did not justify the omission positive steps to undertake effective investigations and protection.

In *Appleby v UK*,[25] the Court rejected a claim that Article 10 imposed a positive ol gation to secure a 'freedom of forum' for the exercise of freedom of expression. The app cants, who were campaigners opposed to an application for planning permission, set stands at the entrance of a privately owned shopping mall, which was originally bu by a public corporation. They displayed posters, warning the public of the likely loss an open space, and sought signatures to present to the council. They were prevented security guards from collecting signatures. The applicants contended that the disput shopping centre functioned as a town centre, providing venues for public services a facilities. They argued that in some states of the United States the authorities must ensu individual persons access to privately owned shopping centres to enable them to exerc free speech rights. The Court did not endorse this line of reasoning. In its view, Article does not bestow any freedom of forum. Still, the Court did not foreclose the possibil that a positive obligation may arise for a state to regulate property rights where the bar access to property prevents any effective exercise of freedom of expression, or stultif the essence of this freedom, as in the case of a corporate town. The Court's reasoning w swayed by the limited nature of the restrictions and the availability of alternative mea: such as obtaining individual permission for a stand, distributing leaflets on public acc paths, or door-to-door calling.

III. ACCESS TO INFORMATION

Unlike its counterparts in the International Covenant on Civil and Political Rig] (ICCPR)[26] and EU law,[27] Article 10 has yet to be recognized by the Court as providi a basis for the right of access to information. It has consistently rejected the view tl Article 10(1), which includes the phrase 'freedom ... to receive ... information', can read to guarantee a *general* right of access to information.[28] Instead, its approach l been to deal with complaints of denial of access to information under Article 8.[29]

[23] 2000-III; 31 EHRR 1082 paras 42–6. See also *Fuentes Bobo v Spain*, id, para 38.

[24] *Özgür Gündem v Turkey* 2000-III; 31 EHRR 1082 para 41. [25] 2003-VI; 37 EHRR 783.

[26] Article 19 of the ICCPR clearly recognizes the right of the citizens to seek information.

[27] The right of access to documents has been established as a fundamental right: Case C-58/94, *Netherla v Council* [1996] ECR I-2169, paras 34–7, Case T-105/95, *WWF UK v Commission* [1997] ECR II-313 para 55, Peers, 21 YEL 385 (2002); and Arai-Takahashi, 24 YEL 27 at 53–69 (2005).

[28] See eg, *Leander v Sweden* A 116 (1987); 9 EHRR 433 and *Gaskin v UK* A 160 (1989); 12 EHRR 36 PC.

[29] See eg, *Gaskin v UK*, *ibid*, and *McGinley and Egan v UK* 1998-III; 27 EHRR 1 Com Rep.

Leander v Sweden,[30] the applicant applied for a temporary post of museum technician at the Naval Museum, which was adjacent to a naval base designated as a restricted military security zone, but he was informed that he was denied the post for security reasons. He challenged the security procedure that was followed and sought to obtain reasons for the decision against him under, *inter alia*, Article 10. The Court held that 'Article 10 does not, *in circumstances such as those of the present case*, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual'. This reasoning was followed in *Gaskin v UK*,[31] which concerned the refusal to grant an applicant access to his child-care records.

In *Guerra v Italy*,[32] the erstwhile Commission did endorse the right of access to information under Article 10, relying on teleological interpretation. There, the local authorities failed to provide residents with sufficient information on a potential health hazard arising from a chemical factory. The Commission stressed the interdependent nature of the protection of the environment, public health, and the well-being of individuals. The right to information under Article 10 was considered vital for preventing potential violations of the Convention in the event of serious environmental pollution. Further, the scope of positive obligations under Article 10 was interpreted as going beyond the general duty to make environmental information accessible to the public. It was considered broad enough to cover more *specific* duties, such as the duties 'to collect, process and disseminate information which... is not directly accessible and which cannot be known to the public unless the public authorities act accordingly'.[33] The Commission averred that the 'right of effective access' to the relevant information on environmental and health hazards must be accorded unless there is an overriding public interest in maintaining confidentiality of the information.[34] The Commission's dynamic approach was corroborated by the Parliamentary Assembly of the Council of Europe, which adopted a resolution expressly recognizing 'public access to clear and full information' as a 'basic human right'.[35] While not expressly spelling it out, the Commission suggested that the general rule ought to be open access to information, with the onus on a government to establish the necessity of confidentiality. The Commission's reasoning could be deployed to justify claims for access to information affecting national security, and information held by medical and welfare authorities.

However, the prospect of such dynamic interpretation was dampened by the Court in the *Guerra* case when it confined the freedom to receive information under Article 10(2) to the negative duty on the government not to interfere with communication of information among individuals *inter se*.[36] In the subsequent case of *Sirbu v Moldova*,[37] the Court followed the same reasoning. It held that the freedom to receive information under Article 10(1) '*basically* prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him', and that this freedom 'cannot be construed as imposing on a State, *in circumstances such as those of the present case*, positive obligations to disclose to the public any secret documents or information concerning its military, intelligence service or police'. It remains to be seen whether this dictum might suggest the possibility, albeit slim, of inferring the right of access to

[30] A 116 (1987); 9 EHRR 433 para 74, emphasis added. See also paras 81 and 85 Com Rep.
[31] A 160 (1989); 12 EHRR 36 para 52 (finding of a violation of Article 8).
[32] 1998-I; 26 EHRR 357 para 43 Com Rep. [33] Id, para 49. [34] Id, para 51.
[35] Resolution 1087 (1996) of the Parliamentary Assembly of the Council of Europe, para 4; *Guerra v Italy* 1998-I; 26 EHRR 357 Com Rep para 44.
[36] *Guerra v Italy*, id, para 53. [37] Hudoc (2004) para 18, emphasis added.

information and the corresponding positive duty of states to impart information *in other circumstances*.[38]

IV. ODIOUS EXPRESSION AND THE RELATIONSHIP BETWEEN ARTICLES 10 AND 17

The drafters of the Convention intended to provide an institutional framework based on liberal democratic values to overcome the extremism of Nazism and fascism and to set a counterbalance against a looming threat of Stalinist communism. In view of these considerations, it is understandable that some European states are wary and sceptical of the ability of democracy to resist the risk of racist propaganda and manifestations leading to totalitarian dictatorship and massive human rights abuses.[39] The case law reveals a variety of values which have been considered egregiously offensive and contrary to the 'constitutional paradigm' of the Convention. Apart from typical examples of (neo-)Nazism,[40] fascism, racism, anti-Semitism, and communism, the recent cases address Islamic fundamentalism[41] and Kurdish nationalism involving discussions of hatred and an incitement to violence.[42]

In a very early case dealing with the dissolution of the German communist party, the Commission argued that the examinations of complaints under Article 17[43] would dispense with the need to analyze a case under Article 10(2).[44] This approach suggests that issues of restrictions on free speech could be subsumed under Article 17. As a corollary of this, the exercise of free speech by certain individuals would fall outside the scope of protection of Article 10 on the mere basis of their membership to a group espousing anti-Convention values. Such an implication would be squarely at variance with the 'constitutionally' entrenched status of free speech in the Convention's order. It would also suggest inherent limitations, which must be rejected under Article 10.

Another feature emerging from the earlier case law of the Commission was that if national authorities justified the contested measures by reference to the need to address issues of racial discrimination or to suppress other anti-Convention values, there was a presumption in favour of their decisions.[45] In a Belgian case which involved a criminal conviction of an applicant who participated in the publication of a work justifying the Nazi atrocities against the Jewish population, the Commission was satisfied that the criminal conviction was proportionate to its legitimate purpose.[46]

However, the development of the case law demonstrates a more finely-tuned approach based on a closer appraisal of the proportionality of specific measures, which has the effect of bolstering press freedom. The Court has held that racist remarks must be examined

[38] See Van Dijk and Van Hoof p 787.
[39] Lester, in Macdonald, Matscher, and Petzold, eds, *The European System for the Protection of Human Rights* 1993, Ch 18, p 474.
[40] See, eg, *KPD v FRG No 250/57*, 1 YB 222 at 224 (1957); and *H, W, P and K v Austria No 12774/87*, 62 DR 216 at 220–1 (1989).
[41] See eg, *Kalaç v Turkey* 1997-IV; 26 EHRR 552 para 28; *Refah Partisi (the Welfare Party) v Turkey* 2003-II paras 94 and 123 GC (incompatibility of sharia with democracy); *Yanasik v Turkey No 14524/89*, 74 DR 14 (1993).
[42] See eg, *Surek v Turkey (No 1)* 1999-IV paras 61–5 GC; *Gündüz v Turkey No 59745/00* hudoc (2003) DA; and *Medya FM Reha Radyo ve Iletişim Hizmetleri AŞ v Turkey No 32842/02* hudoc (2006) DA.
[43] See below, p 648. [44] See *KPD v FRG No 250/57*, 1 YB 222 at 224 (1957).
[45] See, in particular, *H, W, P and K v Austria No 12774/87*, 62 DR 216 (1989) (neo-Nazi activities); and *Purcell v Ireland No 15404/89*, 70 DR 262 (1991) (the ban on live interviews with spokespersons of a terrorist organization). See also the argument submitted by Denmark in *Jersild v Denmark* A 298 (1994); 19 EHRR 1 para 29.
[46] *T v Belgium No 9777/82*, 34 DR 158 at 170–1 (1983).

THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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In the *Steel and Morris* Case members of a small campaign group had accused McDonald's of abusive and immoral farming and employment practices, deforestation, exploitation of children and their parents through aggressive advertising and the sale of unhealthy food. McDonald's had lodged a claim for defamation. According to the Court it was not in principle incompatible with Article 10 to place on the campaigners in libel proceedings the onus of proving to the civil standard the truth of defamatory statements. The State 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. In that case, however, it is essential, in order to safeguard the countervailing interests of free expression and open debate, that a measure of procedural fairness and equality of arms is provided for. Because the campaigners had no access to free legal aid, the Court held that there was no correct balance between the need to protect the campaigners' rights to freedom of expression and the need to protect McDonald's rights and reputation.[66]

In this regard, the question of whether freedom of expression implies the right of reply or rectification also deserves attention. This question has not been clarified until now.[67] An affirmative answer seems to have been implied by the Commission, but in the case concerned it did not reach an explicit decision on this point, because in the Commission's opinion the arguments advanced constituted an insufficient ground for the decision that the defendant State was responsible for the impugned publication by the daily papers concerned.[68] Here, too, a complicating issue is that of the *Drittwirkung* of Article 10 and also that of the liability of the State – which is the only party against which a complaint may be brought in Strasbourg – for violation of Article 10 by private parties.[69] Indeed, the publications involved will usually originate from a private party and the publication of the reply or rectification will have to be effected in most cases by a private party as well. From Article 10 might then be derived an obligation on the part of the State to create a legal obligation to publish the reply or rectification and to provide for a remedy, either on the ground of a civil claim to that effect or in combination with a criminal conviction for insult. Such an obligation of publication would not constitute an unlawful interference with the freedom of expression laid down in Article 10 for the person on whom it would be imposed, since the justification might be found in the restriction ground 'protection of the reputation or rights of others'.

As far as positive obligations are concerned it is still not clear whether – and if so, to what extent – the freedom to receive information entails an obligation on the part of the authorities to impart information. At first sight the judgment in the *Leander* Case provides an answer in the negative. The competent authorities refused to appoint Mr Leander as a museum technician at the Naval Museum, adjacent to a Naval base, on the basis of secret information. With regard to the refusal to reveal the information to the applicant the Court held as follows: "the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual."[70]

In the *Gaskin* Case, which concerned the failure to grant a person unimpeded access to his case record which had been drawn up while he was in child-care, the Court reached the same conclusion.[71] However, the considerations of the Court were expressly based on the specific circumstances of the case and moreover the Court used the word 'basically' ('*essentiellement*' in the French text). In the *Sirbu* Case the Court took the position that the freedom to receive information "cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to disclose to the public any secret documents and information concerning its military, intelligence service or police."[72] Here again, the Court is relying on the specific circumstances of the case and its conclusion is confined to highly sensitive information.

Consequently, there still seems to be some room to argue that the freedom of expression may entail a duty on the part of the authorities to impart information of public interest. An interpretation to that effect is contained in a resolution of the Consultative (Parliamentary) Assembly of the Council of Europe, a document which is not legally binding, but which may be taken to indicate a trend in the legal opinion within the Contracting States or at least some of them. This resolution sets forth with respect to the right to freedom of expression: "This right shall include freedom to seek, receive, impart, publish and distribute information and ideas. There shall be a corresponding duty for the public authorities to make available information on matters of

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66. Judgment of 15 February 2005, para. 95.
67. Within the framework of the UN a special convention was concluded on this in 1953: the Convention on the International Right of Correction, 435 UNTS, p. 191.
68. Appl. 1906/63, *X v. Belgium* (not published).
69. In Appl. 4515/70, *X and the Association of Z v. the United Kingdom*, Coll. 38 (1972), p. 86 (88), which concerned complaints about the BBC, the Commission expressly left the question of State liability open. See, however, Appl. 6586/74, *X v. Ireland* (not published), where the Commission took the view that the restraint upon staff expressing their views is a common feature of many working situations arising from the relationships of the people concerned and not from written regulations for which the State could be held responsible.
70. Judgment of 26 March 1987, para. 74.
71. Judgment of 7 July 1989, para. 56.
72. Judgment of 15 June 2004, para. 18.

public interest within reasonable limits and a duty for mass communication media to give complete and general information on public affairs."[73]

A comparable matter concerns the question of whether the right to receive information calls for pluriformity in imparting information, which then has to be guaranteed by the authorities, for instance by making grants to persons and institutions imparting information, where this is necessary for such pluriformity.[74] In the *Vereinigung Demokratischer Soldaten Österreichs and Gubi* Case the Austrian army had been distributing free of charge its own publications and publications of private associations of soldiers in all the country's barracks, but had refused to distribute *Der Igel*, a magazine published by the first applicant. The Court held that this difference in treatment considerably reduced the chances of *Der Igel* to increase its readership among service personnel and as a result constituted a violation of Article 10.[75] Having regard to this judgment and the fact that the Court regards pluralism as being of particular importance as far as the press is concerned,[76] it is evident that the authorities, once they proceed to subsidise or in any other way support persons and institutions imparting information, have the duty to do so without discrimination.

14.3.7 RELATION TO OTHER CONVENTION RIGHTS

Article 10 has often been invoked in close connection with other articles of the Convention.

In *K v. Austria* the applicability of Article 10 and Article 6 coincided. The applicant claimed that his obligation to testify in a criminal procedure implied an obligation to testify against himself, contrary to Article 6,[77] and that the imposition of a fine and detention for his refusal to give evidence constituted a breach of Article 10. In deciding whether the interference of Article 10 could be regarded as 'necessary' the Commission took into account the principle of a fair trial embodied in Article 6. It concluded that there had been a violation of Article 10 and that, therefore, it was unnecessary to consider the complaint under Article 6 separately.[78]

[73] Res. 428(1970), Council of Europe, Cons. Ass., Twenty-First Ordinary Session (Third Part), 22-30 January 1970, Texts Adopted.

[74] In its decision on Appl. 6452/74, *Sacchi*, D&R 5 (1976), p. 43 (50), the Commission held as regards its previously given opinion that Art. 10(1) does not rule out a government monopoly for TV broadcasts: "the Commission would not now be prepared purely and simply to maintain this point of view without further consideration". However, it did not answer the question.

[75] Judgment of 19 December 1994, paras 39-40.

[76] See, *inter alia*, judgment of 7 December 1976, *Handyside*, para. 49; judgment of 24 November 1993, *Informationsverein Lentia and Others*, para. 38.

[77] See also *supra* 14.3.3.

[78] Report of 13 October 1992, paras 41-57. Strictly speaking the Commission concluded (para. 57) that Art. 6 had not been violated, but this conclusion would seem to be inaccurate since it cannot be deduced from the preceding arguments. Due to a friendly settlement the case was struck off the list by the Court, judgment of 2 June 1993.

The *Nikula* Case concerned a lawyer who had been convicted for insulting a public prosecutor while defending her client during a court session. The Court made a connection with Article 6 and held that the right to a fair trial implies a free and even heated exchange of views between the parties. It is the task of councel to defend the interests of his client fervently. Only in exceptional situations will there be a pressing social need for a restriction of the freedom of expression of councel during a court session.[79] In the *McVicar* Case the Court concluded in relation to Article 6(1) that the applicant had not been prevented from presenting his defence to a defamation action effectively in the High Court, nor were the proceedings made unfair, by reason of his ineligibility for legal aid. Therefore, there was no interference with the applicant's right to freedom of expression.[80] The same applied for the exclusion of evidence. The Court found the rules in this respect clear and unambiguous. The applicant and his legal representative could have taken steps earlier in the proceedings which might have had a bearing on the decision to exclude that evidence, but failed to do so. The exclusion had been ordered following detailed analysis by the trial jude and Court of Appeal of the competing interests at stake and the balance which had to be struck between those interests on the facts of the applicant's case.[81]

Since correspondence, telephone and similar means of communication, protected in Article 8, also constitute means for the expression of an opinion, there is a close connection between that article and Article 10. This connection was put forward in the *Silver* Case, which concerned the right of detainees to respect for their correspondence. Both the Commission and the Court took the view that in the examination of the complaints with respect to Article 8, the freedom of expression via correspondence had already been dealt with at such length that a separate examination with regard to Article 10 was not necessary.[82] However, in the subsequent *McCallum* Case, also concerning the correspondence of a detainee, the Commission took a somewhat different approach by stating that "where interference is alleged in the communication of information by correspondence, Article 8 is the *lex specialis* and no separate issues arise under Article 10."[83] This appears to be too general a statement, since the aim of the two articles is not identical: in Article 8 the main point is the protection of the private character of the means of communication referred to, while in Article 10 its

[79] Judgment of 21 March 2002, *Nikula*, para. 55.

[80] In the *Steel and Morris* Case, however, the lack of free legal aid led to a breach of the obligation of the authorities to protect the freedom of expression; judgment of 15 February 2005, para. 95.

[81] Judgment of 7 May 2002, paras 74-77.

[82] Report of 11 October 1980, para. 428; judgment of 25 March 1983, para. 107. See also the judgment of 20 June 1988, *Schönenberger and Durmaz*, para. 71.

[83] Report of 4 May 1989, para. 63. The claim under Article 10 was not pursued before the Court. The Commission had taken the same position in Appl. 8383/78, *X v. Federal Republic of Germany*, D&R 17 (1980), p. 227 (228-229).