RESTRICTION TO THE EXPRESSION OF OPINIONS OR DISCLOSURE ON INFORMATION ON DOMESTIC OR FOREIGN POLICY OF THE STATE

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Introduction

In a free society there should be no issue of internal or external politics which would not be open for free public discussion, especially in the press. Freedom of discussion, especially concerning controversial and difficult problems is the best means of reaching rational decisions by the state agencies, decisions that would have social support. Day-to-day practice is often different, however, and a vast sphere of domestic and foreign policies of state are beyond public knowledge. Less public still are actions and deeds of individual state officials. Concealing the truth and punishing both officials and even journalists for leaks and publishing of such secrets concerning human rights violations is part of the practice in Western democratic countries.

The greatest potential danger to human rights is posed by the police and security institutions. Courts, as we can see from a case-law of the Court and the Commission, could serve as just a one of protective institutions. A court decides on a precisely defined issue basing on facts established during the proceedings; on application and interpretation of the law in a concrete case involving usually two parties only. Under the separation of powers doctrine, courts cannot control domestic and foreign policy of the state. It is a role of the parliament where quite often, in parliamentary democracy, the majority's principal purpose is to maintain the Cabinet in power. Sometimes also courts "contribute" to abuse of human rights in the domain of domestic policy when they try to punish journalists too critical to their agenda. The situation gets more complicated still, especially for domestic courts, when authors of such publications are radical journalists or activists of extremely radical political or social groups.

There are not too many cases before the Court concerning the subject of this paper. Important here is that the Strasbourg case-law has contributed a lot to protect civil liberties and political rights in that very sensitive field where interests of states, public opinion and of the individual are involved and not so infrequently contradictory. The real challenge is how to transfer those legal standards elaborated during the last over thirty years and focused on Western democratic states into the law and practice of new democratic states of Central and Eastern Europe.

Information and ideas protected

In the context of freedom of information in the field of domestic and foreign policy, the Court reiterates several times the test elaborated in 1976 in the Handyside case, where it was pointed out that this freedom:

Is also applicable to “information” or “ideas” that offend, shock or disturb the state or any section of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society” [para. 49].

The Court also added several times that:

it must be remembered that Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed ... [recently in the case of De Haes and Gijsels, concerning expression of ideas of the way of functioning of the judiciary - para. 48].

Scope of and limits to restrictions

The primary aim of Article 10 is of course to protect everyone’s freedom of expression. In order to ensure the enjoyment of this freedom, the Court established a test of strict interpretation of any of the limitations mentioned in Article 10 (2). In the Sunday Times (1) case of 1977, the Court said that:

Strict interpretation means that no other criteria than those mentioned in the exception clause itself may be at the basis of any restrictions, and these criteria, in turn, must be understood in such a way that the language is not extended beyond its ordinary meaning.

In the case of exception clauses ... the principle of strict interpretation meets certain difficulties because of the broad meaning of the clause itself. In nevertheless imposes a number of clearly defined obligations on the authorities... [paras. 194-195].

In other words, the Court introduced a legal standard that in any borderline cases, the individual’s freedom is to be favourably balanced against states’ claims of overriding interests. While deciding in such cases the Convention organs at first test whether or not the interference was in “in accordance with law”. Only when the question as to this accordance can be answered, there is further examination whether the interference could be considered as “necessary in a democratic society” for one of the purposes specified in Article 10.

While deciding the Sunday Times (1) case, the Court stated (and then repeated in several other judgements, as e.g. in the Malone case) the required characteristics of any type of domestic laws (written and unwritten, constitutional, statutory or administrative) in any field, i.e. concerning national security and public order as well. There are two major requirements:

Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules in a given case. secondly, a norm cannot be regarded as al. “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able in the circumstances, the consequences which given action may entail [para. 49].

This means that notice (accessibility) and precision (foreseeability) are required for legality to the extent that they are reasonable and adequate in a given set of circumstances. In 1984 in the already mentioned case of Malone v. UK, the Court said that the phase “in accordance with the law”

does not merely refer back to domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention. ... The phrase thus implies ... that there must be a measure of legal protection in domestic law against arbitrary interference’s by public authorities with the rights safeguarded... Especially where a power of the executive is exercised in secret, the risks of arbitrariness are evident... [para. 67].

In any circumstance, said the Court in the Malone and in the Leander cases, in sectors affecting national security or fighting with organised crime, where the clause of foreseeability cannot be exactly the same for the effectiveness of national security or police investigations, the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and conditions on which public authorities are empowered to interfere with the freedoms protected under the Convention. In the later case the Court said that:

In assessing whether the criterion of foreseeability is satisfied, account may also be taken of instructions or administrative practices which do not have the status of substantive law, in so far those concerned are made sufficiently aware of their contents [para. 51].

In that case the Court answered the question whether the use of information kept in a secret police-register when assessing a person's suitability for employment on a post of importance for national security interfered with the applicant's right to respect for his private life. The Court stated that:

Where the implementation of the law consists of secret measures, not open to scrutiny by the individuals concerned or by the public at large, the law itself, as opposed to the accompanying administrative practice, must indicate the scope to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference [para. 50].

Legitimate aim when necessary in a democratic society

This clause is used in most cases to examine if there was a "pressing social need" to restriction imposed by a state in circumstances of a given case. In cases concerning Article 10, this legal concept must always tie to one of more specific clauses envisage in paragraph 2 of this provision. From perspective of domestic and foreign state policy there are involved: "interests national security", "territorial integrity", "public safety", "prevention of disorder or crime", "preventing the disclosure of information received in confidence", and "maintain the authority of the judiciary". The balancing of any of these interests and freedom of expression is not left to the national authorities without assessment of the Court. As it said in the case of Klass and Others:

The Contracting Parties [does not] enjoy unlimited discretion ... the Contacting States may not ... adopt whatever measures they deem appropriate [para. 49].

It means that the final judicial decision in any case on freedom of information must depend on its specific circumstances. The more the case will concern the nature of the freedom of expression the more serious reasons before interference on the part of public authorities must exist. According to case-law developed by the Commission and the Court under Article 10, it is more difficult for the Member States to meet the proportionality requirement than one of the legitimate aim requirements. The Court stated that exception must be narrowly interpreted and the necessity for restricting that freedom for one of the purposes listed in envisaged in Article 10 (2) must be convincingly established [the case of Barthold v. Germany, para. 58].

That standard is very important for protection of the freedom of press. In the case of the Observer and Guardian the Court underlined:

Whilst it must not overstep the bounds set, *inter alia*, in the "interests national security", or for and "maintain the authority of the judiciary", it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" [para. 59 (b)].

For understanding the question of "pressing social need" in the context of domestic and foreign policy of the state in the case of the Observer and Guardian it seems to me necessary to mention here partly dissenting opinion of Judge Welsh. Judge Welsh, unlike the majority, was in opinion that there was also a breach of Article 10 in respect of the first period of issued injunction. He said that:

It appears to me that for the purposes of Article 10 ... the publication of "revelations" cannot be restrained without at least an allegation of their truth by the moving party. If ... the Government simply "admits the truth" for the purposes of the case the application to restraint becomes moot. Sufficient of the allegations by Mr Wright had already become public to enable the truth of otherwise of the to be ascertained. The identification of Mr Wright as the source did not affect the issue.

Even if the truth of the principal allegations is to be assumed, namely that the Security Service agents had indulged in illegal activities, that had already been publicly aired in a manner which left no doubt that Mr Wright ... was at lest one source of the allegations. ...

It is clear that the matters the applicants had wished to deal with were of great interest to the public and perhaps even of concern. The public interest invoked by the Government appears to be equated Government policy. ... the main objective of the proceedings was to act as a deterrent to those who in the future might be tempted to reveal secrets gained from their work as agents or members of the Security Service. That, however, is not a consideration which can justify the application of the restrictions on the press permitted by Article 10 (2). The relief sought against the applicants, as distinct from Mr Wright, has not been shown to have been, in all the circumstances, necessary in the democratic society which is the United Kingdom [paras. 4 – 5].

A year later, in 1992, the Court decided in the case of Thorgeirson v. Iceland. The applicant, a journalist, was convicted for defamation in respect of two articles which he published reporting alleged police brutality. As established the Court:

The applicant was essentially reporting what was being said by others about police brutality. He was convicted partly because of failure to justify what was considered to be his own allegations, namely that unspecified members of the Reykjavik police had committed a number of acts of serious assault resulting in disablement of their victims, as well as forgery and other criminal offences ... In so far as the applicant was required to establish the truth of his statements, he was, in the Court's opinion, faced with an reasonable, if not impossible task.

The Court is also not convinced by the Government's contention that the principal aim of the applicant's articles was to damage the reputation of the Reykjavik police as a whole. ... As stated in the first article, the applicant assumed that "comparatively few individuals [were] responsible" and that an independent investigation would hopefully show that a small minority of policemen were responsible... [So,] his principal purpose was to urge the Minister of Justice to set up an independent and impartial body to investigate complaints of police brutality. ...

The articles bore, as was not to fact disputed, on a matter of serious public concern. It is true that both articles were framed in particularly strong terms. However, having regard to their purpose and the impact which they were designed to have, the Court is of the opinion that the language used cannot be regarded as excessive.

Finally, the Court considers that the conviction and sentence were capable of discouraging open discussion of matters of public concern [paras. 65-68].

Deciding by eight votes to one that in the case of Thorgeirson has been a violation of Article 10, the Court upholds that there is no warrant in the case-law for distinguishing, in the manner suggested by the Government, between political discussion and discussion of other matters of political concern [para 64].

The Thorgeirson case shows that it is difficult to a journalist to initiate a public debate on one of the most important problem in civil liberties field, i.e. police brutality in police stations. Journalists usually are not able to present hard evidence when they are not direct victims of that brutality. But much harder is to initiate debate on more important domestic question, on negative aspects of functioning of the judiciary when that criticism focuses on concrete judges. All those difficulties and the way the Court defends freedom of expression represents the case of De Haes and Gijsels v. Belgium. The judgement was adopted few months ago, in February 1997. The applicant published five articles in which they criticised judges of the Antwerp Court of Appeal at length an in virulent terms for having, in a divorce suit, warded custody of the children to the father, Mr X, a notary; two years earlier the notary's wife had lodged a criminal complaint accusing him on incest and abusing the children, but in the outcome it had been ruled that there was no case to answer. The applicants accused the judges and Advocate-General of marked bias and cowardice and additionally two of

judges of pronounced extreme-right-wing sympathies. The applicants were found guilty in criminal proceedings of having made unproved the private life of the judges and Advocate-General.

The Court noted at first that the applicants in the case of De Haes and Gijsels

cannot be accused of having failed in their professional obligations by publishing what they had learned about the case. It is incumbent on the press to impart information and ideas of public interest. ... This was particularly true in the instant case in view of seriousness of the allegations, which concerned both the fate of young children and the functioning of the system of justice in Antwerp. The applicants, moreover, made themselves quite clear in this regard when they wrote in their article ... "It is not for the press to usurp the role of the judiciary, but in this outrageous case it is impossible and unthinkable that we should remain silent" ... [para. 39].

The Court reiterates that a careful distinction needs to be made between facts and value judgements. The existence of facts can be demonstrated, whereas the truth of value judgements is not susceptible of proof ... [para 42].

Although Mr De Haes and Mr Gijsels' comments were without doubt severely critical, they nevertheless appear proportionate to the stir and indignation caused by the matters alleged in their articles ... [para. 48].

The Court held by seven votes to two that there was a breach of Article 10.

Judicial injunction for a sensitive publication

The legal measure uses by Member States to prevent from impart information sensitive to domestic or to foreign policy is a motion to issue to get a judicial temporary injunction for publication. Such injunction was imposed in the UK in relation to the book *Spycatcher,* the memoirs of Mr Peter Wright, a retired British secret service officer. Two newspapers, theObserver and Guardian gave some detail information from the book had been published in Australia. However a part of the book had been published also in the UK in other books and in television interviews. The *Spycatcher* included an account of allegedly illegal activities of the British security service. The Government obtained injunctions from the court, which prevented from publishing further *Spycatcher's* details about the allegedly illegal activities. The another yet newspaper, the Sunday Times, began to publish extracts from the book. The proceeding by the Attorney General against the Sunday Times (2) was instituted. The legal reason to initiate this case was a contempt of court. At that time the book was published also in the USA, and no attempt was undertaken by the Government to prevent its import to the UK. The last fact was decisive for the Court. It stated that before the publication in the USA, British authorities, having regard to their appreciation, were entitled to consider it necessary to protect the national security from disclosure. However after the publication the Court concluded unanimously that the interference had not been "necessary" and both the applicants (the Observer and Guardian as well as the Sunday Times) were victims of a violation of Article 10.

Four years later, in 1995, the Court dealt with the similar case of Vereniging Weekblad Bluf! v. the Netherlands. In that case editors of radical left magazine received an internal report had been written six years before and focused on officers of the Secret Service (BND). The editors decided to publish that report. The director of the BND informed the public prosecutor about the intention to publish it. In his opinion it would violate the criminal law. Despite injunction and short arrest of three people involved in, the editors of applicant magazine decided to reprint it and to distribute it. Instituted against them criminal investigation was finally dropped. The magazine had applied to the court for the return of the confiscated copies of the original print run. The Dutch Supreme Court refused finally the request on the grounds that it was likely that the criminal proceedings would lead to an order to withdraw the magazine from circulation. In referring to national security, the magazine disclosed information whose secrecy was necessary to the interests of the state. Lastly, in that court opinion, the seizure and withdrawal from circulation could not be equated with imposing a condition

of “prior authorisation”, even though the public could not acquitant itself with the opinions and ideas contained in the printed matter.

The staring point of the Court was slightly different than in the OG case. The Court noted that:

The Court cannot accept the argument that Article 10 precludes ordering the seizure and withdrawal from circulation of printed matter ordering the seizure and withdrawal from circulation of printed matter other than in criminal proceedings. National authorities must be able to take such measures solely in order to prevent punishable disclosure of a secret without taking criminal proceedings against the party concerned, provided that national law affords that party sufficient procedural safeguards. ... [para. 32].

The Court recognises that the proper functioning of a democratic society based on the rule of law may call for institutions like the BVD which, in order to be effective, must operate in secret and be afforded the necessary protection. In this way a State may protect itself against the activities of individuals and groups attempting to undermine the basic values of a democratic society [para. 35].

Because of the nature of the duties performed by the internal security service, whose value is not disputed, the Court, like the Commission, accepts that such an institution must enjoy a high degree of protection where the disclosure of information about its activities is concerned [para 40].

After unauthorised dissemination of the magazine situation however changed. The court took that fact into consideration whether it was necessary further seizure of the magazine. The Court said that it was not under Article 10 because:

the information in question was made accessible to a large number of people, who were able to turn to communicate it to others. Furthermore, the events were commented on by the media. That being so, the protection of the information as a State secret was no longer justified and the withdrawal of issue no. 267 of Bluf! No longer appeared necessary to achieve the legitimate aim pursued. It would have been quite possible, however, to prosecute the offenders [para. 45].

The Court did not share the applicant opinion that account had to taken of its manifest intention of contributing, by publishing the material, to the public debate then under way in the Netherlands on the BVD’s activities.

Duties and responsibilities of representatives and civil servants

Civil servants, especially high-ranking officials have the general duty to observe a certain degree of discretion. This was position of the Commission in an application against Norway where a high-ranking official with a history of psychiatric disturbance claimed that his transfer to another Government post after he had publicly accused the state of subjecting him to surveillance constituted a violation of Article 10. Domestic courts rejected the accusation. The commission pointed out that:

It would diminish the Ministry’s prestige and credibility both internally and externally to leave a person that gave the impression of being mentally deranged as Head of that Division... [No. 9401/81, D.R. 27 p. 228].

Similar decision the Commission reached in the British case where the applicant - a civil servant in a “politically restricted post” and at the same time an elected County Councillor. He had been invited to participate in a TV program and been refused permission from his office superior. Nevertheless he participated in that program dealing with matters relating to his work in the civil service. In effect the applicant was subjected to disciplinary action. It that case the Commission pointed out that:

The protection of diversity of opinion from persecution is a fundamental aspect of the democratic societies in which human rights as contained in the Convention are protected. ...

Elective representative has a special role to play in the functioning of a democratic society and it is to be expected that they may frequently be called upon to give public comment trough the media. ...

[However] where an individual who is an elected representative also has another job which imposes duties and responsibilities by virtue of its nature, both sets of responsibilities must be weighed in any given circumstances. In circumstances where these responsibilities at the expenses of the other. Usually the assessment of such conflicting responsibilities is a personal matter. However, where, as here, the exercise of freedom of expression involves a responsibility on behalf of the individual towards the state in respect of his knowledge gained through his employment in a sensitive Ministry, Article 10 of the Convention allows for the possibility that a national authority may legitimately make its own assessment of such conflicting responsibilities, if it is necessary in a democratic society for one of the purpose of Article 10, paragraph 2 to do so. [No. 10293/83, D.R. 45 p. 41].

The Commission also decided that disciplinary measures against a judge who distributed leaflets containing political comments on some criminal cases do not violated Article 10, in the light of judges' special duties and responsibilities under this provision.

In the Castells case, a senator was convicted for threatening the security of the country by attempts to discredit its democratic institutions. He published an article accusing the Government of taking part in right-ring armed groups' attacks and murders of Basques. Spanish courts were not convinced what was the reason to institute a criminal case against the applicant. As the Court noted, in one of judgement it appeared the object of the interference h not to protect public order and national security, but in ad been fact to preserve the respondent Government's honour. The applicant's offers to establish evidence that the facts recounted by him were true and well-known were declared by domestic courts inadmissible on the ground that the defence of truth could not be pleaded in respect of insults directed at the institutions of the nation. The Court held that there was a violation of Article 10 and argued that:

Mr Castells did not express his opinion from the senate floor, as he might have done without fear of sanctions, but chose to do so in a periodical. That does not mean, however, that he lost his right to criticise the Government.

In this respect, the pre-eminent role of the press in a State governed by the role of law must not be forgotten ...

Freedom of press ... gives politicians the opportunity to reflect and comment on the preoccupations of public opinion, in thus enables everyone to participate in the free democratic debate which is the very core of the concept of a democratic society ... [para 43].

The Court noted that under Article 10:

limits of permissible criticism are wider with regard to the Government than in relation to ... a politician. In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion. Furthermore, the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying... [para. 46].

In that way the Court rejected the Government claims that the applicant carried out his "duties" and "responsibilities" as the member of Parliament, overstepping the normal limits of political debate, trying to destabilise a democratic system during the very critical moment just after adoption a constitution in 1977.

The concept of "duties" and "responsibilities" is not of course empty. The best example gives us the case of Hadjianastassiou v. Greece. An officer was convicted by the martial court for having disclosed information on minor importance but classified as secret. He disclosed on a given weapon and of corresponding technical knowledge capable of causing considerable damage to national security. The applicant argued that a routine technical study based entirely on his own documentation could not be regarded as demaging to national security. The applicant's conviction in the appeal court was, however, based on the disclosure of "general information" which military interests required to be

kept secret; the experts appointed by the appeal court had concluded prior to its decision that, although the two studies had employed different methods, none the less "some transfer of technical knowledge had inevitably occurred" [para. 44-45].

The Court unanimously decided in the Hadjianastassiou case that there has not been a violation of Article 10. It argued that:

It is .... necessary to take into account the special conditions attaching to military life and the specific "duties" and "responsibilities" incumbent on the members of the armed forces ... The applicant as an officer at the K.E.T.A. in charge of an experimental missile programme, was bound by an obligation of discretion in relation to anything concerning the performance of his duties.

... the Greek military courts cannot be said to have overstepped the limits of the margin of appreciation which is to be left to the domestic authorities in matters of national security. Nor does the evidence disclose the lack of a reasonable relationship of proportionality between the means employed and the legitimate aim pursued [para. 46-47].

Access to employment in the public sector

It is understandable that in some departments of public administration, at first those sensitive from the point of view of domestic and foreign policy, the Member States should have a margin of appreciation in appointing and dismissing members of personnel. As it was mentioned civil servants share duties and responsibilities mentioned in Article 10 (2) what directly influences their freedom to impart information and ideas. That rises two questions: the right of a candidate's to public post to access to information collected on him by secret and other state services on the one hand and a list of those posts where special requirements of "political correctness" should be fulfil on the other hand.

There is one case concerning the question of right to receive information. In the caseof Leander v. Sweden the applicant was dismissed as a carpenter from a public museum because he was regarded as security risk. The applicant demanded to have access to his personal file in order to clarify possible inaccuracies. The authorities rejected to his demand. The Court decided that in that case there was not violation of "freedom to receive information" under Article 10 because access to employment in public sector is not protected by the Convention. The court said that although Article 10

basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. ... [It does not however], in circumstances such those of the present case, confer on the individual right to 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 [para. 74].

Ten years later, in April 1997, two Swedish lawyers referred the Leander case back to the Court asking for a new trial. According to evidence they presented the Government had allegedly lied on the central facts. One of the lawyers stated: "in view of the fact that Mr Leander lost by four votes against three and the Swedish judge was aware of the lies, we ask for a new trial. I do think – not in the least regarding that the Government's later claim that the European Court and the Commission has said that there are no problems with the Swedish personnel control system – it's necessary that a trial is based on the true merits of the case."

What is also odd in the Leander case is the low rank of the post he occupied. It is hard to imagine that others than strictly professional abilities should be required in the circumstances of this case. It was the opposite. The Court accepted similar approach for several years in German cases concerning conformity with the Convention of the *Berufsverbot* law and practice. According to the *Berufsverbot* policy every civil servant must swear allegiance to the Constitution and its values. Those expressed the far-right and far-left political affiliations were refused to get permanent civil service employment, including that as a schoolteacher (the Glasenapp and the Kosiek cases). After 1989, when Germany is not anymore a frontier state with the communist block, the Court reached an

opposite conclusion in the Vogt case. In 1987 Mrs Vogt was fired from the school were she had been worked since 1979 because she was an activist of the German Communist Party, she refused to dissociate herself from that party and it meant for superiors that she failed to comply with the duty owed by every civil servant to uphold the free democratic system within the meaning of the Constitution. The Court said in this case that:

Although it is legitimate for a State to impose on civil servants, on account of their status, a duty of discretion, civil servants are individuals and, as such, qualify for the protection of Article 10 of the Convention [para. 59].

The Court understands the Government's arguments calling the history of Germany and that the country wished to avoid a repetition of those experiences by funding its new State in the idea that it should be a "democracy capable of defending itself". On the other hand a string thing was that:

it is owed equally by every civil servant, regardless of his or her function and rank. It implies that every civil servant ... must unambiguously renounce all groups and movements which the competent authorities hold to be inimical to the Constitution. It does not allow for distinctions between service and private life... [para. 59].

The Court noted as well in the Vogt case that there is not the same strict requirement in other member States and that even that in different Länder there exists different approach to this duty.

Public order

In the case of Engel and Others v. the Netherlands, the Court did not find a violation of Article 10 in prohibition issued on soldiers' publication and distribution of a paper criticising some senior officers. It this case the Court said that in the concept of "public order" is involved:

the order that must prevail within the confines of a specific social group ... in the case of the armed forces, disorder in the group can have repercussions on order in society as a whole [para. 98].

The proper functioning of an army is hardly imaginable without legal rules designed to prevent servicemen from undermining military discipline, for example by writings. ... [Dutch law] is based on this legitimate requirement and does not in itself run counter to Article 10 ... [para. 100].

The Court acknowledged however that this provision protects also the rights of servicemen when concluding

There was no question of depriving them of their freedom of expression but only of punishing the abusive exercise of that freedom on their part. Consequently, it does not appear that this decision infringed Article 10 (2). [para. 101]

Almost 20 years later, in 1994, the Court found violation of the Article 10 in the very similar case to the Engel one. It was the Austrian case of Vereinigung Demokratischer SoldatenÖsterreichs and Gubi. The authorities prohibited distributing to servicemen a private periodical critical to the military administration. At the same time other private and governmental periodicals were distributed to military conscripts. The Government argued that applicants' periodical threatened to the country's system of defence and to the effectiveness of the army. The applicant association maintained that the Government was gradually implementing most of the reforms proposed by the magazine. The Court agreed with the applicant and concluded that:

None of the issues of *der Igel* submitted in evidence recommended disobedience or violence, or even question the usefulness of the army. Admittedly, most of the issues set out complaints, put forward proposals for reforms or encourage the readers to institute legal complaints of appeals proceedings. However, despite the often polemical tenor, it does not appear that they overstepped the bounds of what is permissible in the context of a mere discussion of ideas, which must be tolerated in the army of a democratic State just as it must be in the society that such army serve" [para. 38].

Conclusions

The European standard concerning restriction of freedom of the press when "interests of national security" are involved is behind the one elaborated by the US Supreme Court under the First Amendment in cases such as New York Times Co. Ltd. v. The U.S. (1971), Nebraska Association v. Stuart (1976) or U.S. v. The Progressive (1979). There it is required that very strict conditions – "all but totally absolute" –be satisfied before prior restraints can be imposed on the publication of information on matters related to national security.

On the other hand we have had a quite contrary standard of totalitarian states of the Soviet block. Until autumn of 1989 everything was prohibited there with the exception of for the things which were clearly accepted by the authorities. In extreme cases, all that was not compulsory was prohibited. After the fall of Communism police forces seemed to be deeply socially discredited and compromised; that, however, for a short while only. Under the slogans of struggle against growing crime, usually the very same people and with the same brutal methods can now act without any substantial difficulties. In some of the new Member States journalists who write about these practices would pay for it with their lives. There are of course variations in the situation in newly admitted countries. Hopes for improvement are weakened by the fact that the basic instrument for protection of human rights - the courts - suffers in those countries from a deep structural collapse. The courts are independent but not effective, their sentences are treated with disregard especially when they may conflict with the interests of state bureaucracy.

Lacking as yet are cases from new democratic countries, admitted to the Council of Europe after 1989. Applications lodged with the Commission and already declared admissible show that such cases will add new important perspectives concerning protection of freedom of information *vis a vis* domestic and foreign policy of the Member States.