

# Outlawing hate speech in democratic States: the case against the inherent limitations doctrine concerning Article 10 (1) of the European Convention on Human Rights\*

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## ABSTRACT

When compared to the domestic legal systems of states parties to the European Convention on Human Rights (ECHR), the material scope of the freedom of expression under Article 10 ECHR is relatively far-reaching. This wide scope provides also a risk of abuse. At the same time is the ECHR based on the concept of a democratic society. In a democratic society, which is based on the rule of the majority, minorities are in particular need of protection. This includes a need to outlaw uses of the freedom of expression which target minorities in a way which is not based on the exercise of human rights but on hatred. In this article it is shown that such hate speech can be outlawed under the standard model of limitations offered by the European Convention on Human Rights or by the abuse of rights clause of Article 17 ECHR. It is not necessary to rely on inherent limitations of the material scope of the freedom of expression in order to effectively protect all members of a democratic society against hate speech.

**Keywords:** European Convention on Human Rights. Free Speech. Hate Speech. Inherent Limitations.

## 1. INTRODUCTION

The terrorist attacks in France in early 2015<sup>1</sup> and the adoption of a law targeting foreign NGOs in Russia,<sup>2</sup> which is thought to be aimed at restricting contacts between Russians and Western ideas (and which was followed a short time later by similar efforts in China<sup>3</sup>), have brought the importance of the human right to freedom of expression in a democratic society to the attention of a wider audience. But there had been also incidents of support for the terrorists' views among school students in France in the wake of the attacks.<sup>4</sup> In Germany, an exhibition of caricatures by artists who in the past

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1 For an overview over the events in Paris see e.g. BBC, Charlie Hebdo attack: Three days of terror, <http://www.bbc.com/news/world-europe-30708237>, 14 January 2015. All links are active as of 2 June 2015.

2 Council of Europe, Parliamentary Assembly, Russia's new law on 'undesirable' foreign NGOs endangers the right of free expression, say PACE co-rapporteurs, <http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=5628&lang=2&cat=135>, 29 May 2015.

3 BELKIN, Ira; COHEN, Jerome. Will China close its doors? *New York Times*. Available in: <http://www.nytimes.com/2015/06/02/opinion/will-china-close-its-doors.html?action=click&pgtype=Homepage&module=opinion-c-col-right-region&region=opinion-c-col-right-region&WT.nav=opinion-c-col-right-region>. Access on: 1 June 2015.

4 SCHECHNER, Sam; LANDAURO, Inti. French Police Question 8-Year-Old Over Remarks on Terror Attacks. *Wall Street Journal*. Available in: <http://www.wsj.com/articles/>

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had drawn a caricature of the current president of Turkey<sup>5</sup> has led to increased security measures<sup>6</sup> already before a similar event in Texas was attacked by terrorists linked to the Islamic State in spring 2015.<sup>7</sup> A clear statement for free speech and against terrorism in the form of a parade car at the upcoming carnival parade in Cologne was stopped after concerns by citizens.<sup>8</sup> But it is not enough to shout slogans after a terrible crime been committed against people who work in the media. If one happens to agree with their views or not, it is important to understand the function of journalism in a free and democratic society and to protect free speech adequately at all times.

The fact that significant parts of the population seem to favor an interpretation of the freedom of expression which not only limits the use of this right but appears to narrow even the scope of this important right in the first place. This is not to be confused with the possibility of limiting the freedom of expression, for example by prohibiting insults. This can be done under paragraph 2 of Article 10 of the European Convention on Human Rights<sup>9</sup> (ECHR).

The idea of inherent limitations of the material scope of the freedom of expression is hardly new. At times this can be understood as just a sort of clarification of what is covered by that freedom's material scope and what now. With regard to Article 5 of the German Basic Law, the *Grundgesetz*,<sup>10</sup> Germany's Federal Constitution,

the German Federal Constitutional Court<sup>11</sup> explained that freedom of expression covers verbal expressions, but not necessarily actions.<sup>12</sup>

## 2. A WIDE MATERIAL SCOPE

With regard to Article 10, there appears on first sight to be no such limitation of the material scope of the human right. Article 10 (1) ECHR protects every form of communication ("jede Form der Kommunikation"<sup>13</sup>). Statements protected under Article 10 ECHR can "offend, shock or disturb".<sup>14</sup> On 29 April 2014 the European Court of Human Rights decided in the case of *Salumäki v. Finland*<sup>15</sup> "that freedom of expression is subject to the exceptions set out in Article 10 § 2 of the Convention."<sup>16</sup> The Court did not say that the right contained in paragraph 1 is subject *only* to the limitations allowed for in paragraph 2, but normally it would

french-police-question-8-year-old-boy-over-remarks-about-terrorists-1422559248>. Access on: 29 Jan. 2015.

5 Markus C. Schulte von Drach, Erdoğan als Kettenhund —Von der Leine gelassen. *Süddeutsche Zeitung*. Available in: <<http://www.sueddeutsche.de/politik/erdoan-als-kettenhund-von-der-leine-gelassen-1.2205902>>. Access on: 5 Nov. 2014.

6 FFH. *Nach Anschlag in Texas*: Hanau hält Karikaturen-Ausstellung für sicher. Available in: <<http://www.ffh.de/news-service/ffh-nachrichten/nController/News/nAction/show/nCategory/rheinmain/nId/57486/nItem/nach-anschlag-in-texas-hanau-haelt-karikaturen-ausstellung-fuer-sicher.html>>. Access on: 4 May 2015.

7 SOICHET, Catherine; PEARSON, Michael. *Garland, Texas, shooting suspect linked himself to ISIS in tweets*. CNN.com. Available in: <<http://edition.cnn.com/2015/05/04/us/garland-mohammed-drawing-contest-shooting/>>. Access on: 5 May 2015.

8 DPA; KNA. Karneval stoppt „Charlie Hebdo“-Motivwagen. *Frankfurter Allgemeine Zeitung*. Available in: <<http://www.faz.net/aktuell/gesellschaft/koeln-karneval-stoppt-charlie-hebdo-motivwagen-13396890.html>>. Access on: 29 Jan. 2015.

9 Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, European Treaty Series No. 5, Available in: <<http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>>.

10 Grundgesetz [Basic Law], Bundesgesetzblatt [Federal Gazette] 1949, pp. 1 *et seq.*

11 With regard to the free speech clause in the German Federal Constitution see Bundesverfassungsgericht [Federal Constitutional Court], in: 85 Entscheidungen des Bundesverfassungsgerichts, pp. 1 *et seq.*, at p. 15 and Bundesverfassungsgericht [Federal Constitutional Court], in: 99 Entscheidungen des Bundesverfassungsgerichts, pp. 185 *et seq.*, at p. 187. Of course these results cannot be transferred completely from Article 5 (1) Basic Law to Article 10 (1) of the European Convention on Human Rights, but they give a certain indication on the understanding of freedom of expression by a significant part of the European legal community.

12 Bundesverfassungsgericht [Federal Constitutional Court], Case No. 1 BvR 1745/06, Decision of 8 June 2010, Leitsatz 2, reprinted in: 64 Neue Juristische Wochenschrift 2010, pp. 47-49, at p. 47; on this decision which concerned protests in front of an abortion clinic see also Stefan Muckel, Abtreibungsgegner demonstrieren vor Arztpraxis, in: 42 Juristische Arbeitsblätter (2010), pp. 759-760, who highlights that the decision refers to the form ("Form") (*ibid.*, p. 760), in which the freedom of expression is used and who follows the court's emphasis (see the decision of the Federal Constitutional Court mentioned earlier in this footnote, at p. 48) that the key question of the case is whether true statements - as opposed to opinions - are covered by the material scope of the freedom of expression (Muckel, *supra*, this note, at p. 760). That this is even a question under German law might be explained by the fact that the German term used for freedom of expression, "Meinungsfreiheit", literally translates as "freedom of opinion" (precisely: "opinion's freedom": "Meinung" means opinion, "Freiheit" freedom and the letter "s" indicates the genitive of the word prior to it).

13 GRABENWARTER, Christoph. *Europäische Menschenrechtskonvention*. 3rd ed. Munich: C.H. Beck, 2008. p. 254.

14 REID, Karen. *A Practitioner's Guide to the European Convention on Human Rights*. 3. ed. London: Thomson; Sweet & Maxwell, 2007. p. 344.

15 European Court of Human Rights, *Salumäki v. Finland*, Application no. 23605/09, Judgment of 29 April 2004.

16 *Ibid.*, para. 41.

seems that this would go without saying: if a certain behavior falls within the material scope of a right, the right can only be limited in accordance with the norm in which it is guaranteed. This is the general structure of many of the rights contained in the ECHR. In the case of the freedom of expression, however, there has long been the idea that there could be inherent limitations of this right, meaning that while the material scope is affected not all manners in which the right is exercised are protected and that this limitation does not have to be based on paragraph 2 of Article 10 ECHR. But may there actually be inherent limitations? to rights under the ECHR? After all, Article 18 ECHR seems to exclude this possibility. In this article, the case law on Article 10 ECHR will be analyzed in order to search for the possibilities at the disposal of states to restrict already the material scope of Article 10 ECHR. This article only looks at the material scope of the freedom of expression under Article 10 (1) ECHR. Limitations, which fall under Article 10 (2) ECHR, will only be dealt with briefly here before looking at the core of the question posed here.

Peter Baehr considers the freedom of expression to amount to a “principal right”,<sup>17</sup> meaning that it is “necessary for a dignified human existence and [...] therefore should receive absolute protection”.<sup>18</sup> This view could be misunderstood in the sense that all types of expressions, for example the publication of child pornography, would be permitted in principle. While other rights which “are necessary for a dignified human existence”,<sup>19</sup> such as the right to life<sup>20</sup> and the prohibition of slavery,<sup>21</sup> ought to be unlimited, the protection of the rights of others can require that a more narrow understanding of the freedom of expression. In the context of the European Convention on Human Rights, such a more narrow definition can be achieved by restricting the freedom of expression within the context of Article 10 (2) ECHR. The question then is if the state can also invoke limitations which are already inherent to the freedom of expression. In other words, can there be forms of speech (in the widest sense of the term), which are not covered by the material scope of Article 10 (1) ECHR? Can it be assumed that there are

implied - unwritten - limitations already on the level of the scope of the norm which can narrow the applicability of the right under Article 10 (1) ECHR?

Especially journalistic uses of free speech rights can be protected even if they are unpleasant. In *Karhuvaara and Iltalehti v. Finland*,<sup>22</sup> the Court had also clarified that the freedom of expression covers the right to report on private issues of public persons if there is a “legitimate public interest”.<sup>23</sup> The necessary degree of public interest can vary.<sup>24</sup> In that case, the ECHR found that while not a “matter of great public interest”<sup>25</sup> was concerned, “at least to some degree, a matter of public interest was involved in the reporting”.<sup>26</sup>

In general, the material scope of the freedom of speech is wider than the scope of comparable rights under national constitutions.<sup>27</sup> The state is said to have a “margin of appreciation in formulating linguistic policies, taking into account particular historical and cultural circumstances”.<sup>28</sup> But it has to be kept in mind that, as is the case in general, this margin of appreciation is not unlimited. For example in a case against Turkey the Court found that the state had exceeded the limits of an acceptable margin of appreciation when forbidding the use of Kurdish<sup>29</sup> as this constitutes “a disproportionate hindrance when done in election settings”.<sup>30</sup> In its judgment in the case of *Şükran Aydın and others v. Turkey* the Court emphasized that “Article 10 encompasses the freedom to receive and impart information and ideas in any language that allows persons to participate in the public exchange of all varieties of cultural, political and social information and ideas”.<sup>31</sup> But this is a question relating to the margin

17 BAEHR, Peter R. *The Role of Human Rights in Foreign Policy*. 2. ed. Basingstoke: Macmillan Press, 1996. p. 10.

18 *Ibid.*

19 *Ibid.*

20 *Ibid.*

21 *Ibid.*

22 European Court of Human Rights, *Karhuvaara and Iltalehti v. Finland*, Application No. 53678/00, Judgment of 14 November 2004, para. 40.

23 MOWBRAY, Alastair. *Cases and Materials on the European Convention on Human Rights*. 2. ed. Oxford: Oxford University Press, 2007. p. 643.

24 European Court of Human Rights, *Karhuvaara and Iltalehti v. Finland*, Application No. 53678/00, Judgment of 14 November 2004, para. 45.

25 *Ibid.*

26 *Ibid.*

27 GRABENWARTER, Christoph. *Europäische Menschenrechtskonvention*. 3rd ed. Munich: C.H. Beck, 2008. p. 253.

28 HARRIS, David et al. *Law of the European Convention on Human Rights*. 3. ed. Oxford: Oxford University Press, 2014. p. 615.

29 European Court of Human Rights, *Şükran Aydın and others v. Turkey*, Applications Nos. 49197/06, 23196/07, 50242/08, 60912/08 and 14871/09, Judgment of 22 January 2013, para. 52.

30 HARRIS, David et al. *Law of the European Convention on Human Rights*. 3. ed. Oxford: Oxford University Press, 2014. p. 615.

31 European Court of Human Rights, *Şükran Aydın and oth-*

of appreciation enjoyed by the state,<sup>32</sup> which means that the state has to take some kind of action. This distinguishes this issue from the question of inherent limitations, which is the subject of this research.

Freedom of expression also has to be able to allow shocking effects in order to transport a message.<sup>33</sup> In terms of the material scope, Article 10 ECHR is noteworthy for making a distinction between the expression of facts and the expression of opinions not in the context of the material scope of the norm but with regard to the possibility of the state to restrict this particular freedom.<sup>34</sup> Stating facts is said to be always covered by Article 10 ECHR<sup>35</sup> - regardless of the truthfulness of the statements.<sup>36</sup> As far as the material scope of the norm is concerned, the content of the statement is irrelevant.<sup>37</sup> The Court is sometimes said to have “adopted an expansive attitude towards the interpretation of the ECHR”<sup>38</sup> at times it is controversial whether the Court might go too far in its interpretation of the Convention.<sup>39</sup> But is the aforementioned wide interpretation of Article 10 ECHR sustainable? Does it really follow from the norm that all kinds of statements are protected under Article 10? After all, there has been some debate as to the question whether some content might not be covered by the material scope of the norm in the first place.

### 3. NARROWING THE SCOPE THROUGH IMPLIED LIMITATIONS?

But can the wide scope of the norm be reduced already within the context of Article 10 (1) ECHR or

*ers v. Turkey*, Applications Nos. 49197/06, 23196/07, 50242/08, 60912/08 and 14871/09, Judgment of 22 January 2013, para. 52.

32 *Ibid.*

33 REID, Karen. *A Practitioner's Guide to the European Convention on Human Rights*. 3. ed. London: Thomson; Sweet & Maxwell, 2007. p. 344.

34 Christoph Grabenwarter, *Europäische Menschenrechtskonvention*. 3. ed., C.H. Beck, Munich (2008), p. 254; see also European Court of Human Rights, *Barthold v. Germany*, Application No. 8734/79, Judgment of 25 March 1985, para 42.

35 GRABENWARTER, Christoph. *Europäische Menschenrechtskonvention*. 3. ed. Munich: C. H. Beck, 2008. p. 254.

36 *Ibid.*

37 *Ibid.*

38 MOWBRAY, Alastair. *Cases and Materials on the European Convention on Human Rights*. 2. ed. Oxford: Oxford University Press, 2007. p. 282.

39 LETSAS, George. *A Theory of Interpretation of the European Convention on Human Rights*. Oxford: Oxford University Press, 2007. p. 3.

only through paragraph (2) of this article? One might be tempted to conclude from the judgment in *Radio France v. France*,<sup>40</sup> to give one prominent example, that this might indeed be the case, as the European Court of Human Rights refers to the observation of obligations, such as journalistic standards, as “duties and responsibilities”,<sup>41</sup> which the court describes as being “inherent in the exercise of the freedom of expression”.<sup>42</sup> The use of the term “inherent”<sup>43</sup> in the context of the “exercise of”<sup>44</sup> a right contained in the Convention implies that this is an issue which is located in Article 10 (1) ECHR, in the material scope of the right. The Court seems to say that the scope of the right which is protected under Article 10 (1) ECHR is subject to unwritten limitations already outside the context of Article 10 (2) ECHR. This view is troubling, as it could give states *carte blanche* to outlaw certain forms of expression without regard to the protections offered through the *Schranken-Schranken* in Article 10 (2) ECHR. In all fairness, the Court continues by clarifying its view and saying that

“journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation [and that] a general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press’s role of providing information on current events, opinions and ideas”.<sup>45</sup>

Nevertheless seems to be there some space for inherent, unwritten, limitations of the rights under Article 10 (1) ECHR which fall outside the realm of Article 10 (2) ECHR.<sup>46</sup>

The idea is worrying as there is a risk of abuse in any such unwritten system. But there might be a way to find a legal basis for such limitations elsewhere in the Convention.

40 European Court of Human Rights, *Radio France v. France*, Application No. 53984/00, Judgment of 30 March 2004.

41 *Ibid.*, para. 37.

42 *Ibid.*

43 *Ibid.*

44 *Ibid.*

45 *Ibid.*, with reference to earlier case law.

46 European Court of Human Rights, *Gündüz v. Turkey*, Application No. 35071/97, Judgment of 4 December 2003, para. 40; European Court of Human Rights, *Jersild v. Denmark*, Application No. 15890/89, Judgment of 23 September 1994, para. 35 (with references to the earlier case law of the former European Commission of Human Rights, albeit with a spelling mistake in the name Kühnen, although the links provided in the HUDOC version of the *Jersild* judgment are working correctly).

But before this is discussed in more detail, it might be helpful to understand what inherent limitations are not. Inherent limitations are not the same as prior restraint.<sup>47</sup> For example, in the United Kingdom it is currently being debated if the television regulator Ofcom should check television broadcasts before the actual broadcasting.<sup>48</sup> From the perspective of free speech rights, such an approach is troubling as

“a system of pre-publication censorship, by its very existence, has been thought to instill a particularly chilling caution in potential speakers [and] prior restraint imposes a particular injury on news media who are prevented from reporting information of current interest.”<sup>49</sup>

“The[...] restrictions [in Article 10 (2) ECHR] must be narrowly interpreted and the need for the restriction must be convincingly established. The right to freedom of expression is therefore subject to duties and responsibilities, the extent of which will vary according to the context”,<sup>50</sup>

but these “duties and responsibilities”<sup>51</sup> find their normative locus in paragraph 2 of Article 10 ECHR and domestic law which complies with Article 10 (2) ECHR -- not in paragraph 1 of Article 10 ECHR.

“In principle, Article 10 will protect the right to express oneself in a way which may be seen as offensive, shocking or disturbing, reflecting the need in a democratic society for pluralism, tolerance and broadmindedness. However, certain forms of expression, such as offensive racist statements may not be protected by Article 10 at all.”<sup>52</sup>

The wide material scope of Article 10 (1) ECHR makes it difficult to exclude expressions from the ma-

terial scope due to the content. Hate speech,<sup>53</sup> as in the aforementioned case against Denmark, though, might fall under Article 17 ECHR, an abuse of rights clause according to which the Convention does not protect acts which aim at the destruction of human rights. The European Convention on Human Rights was born in the early days of the Cold War and with the horrors of German tyranny and World War II fresh in the minds of the drafters. While the Convention aims at protecting human rights and the democratic society — a term often found in the Convention — in which they are exercised, it is also clear that the democracy in question is one which is willing to defend itself against those who oppose this form of governance. The democratic society envisaged by the drafters has to be a defensive democracy, which is also evidenced by Article 15 ECHR.<sup>54</sup>

In situations where Article 17 is applicable, this fact has been considered when deciding whether the interference was justified.<sup>55</sup> This is a problem of paragraph 2, rather than paragraph 1, of Article 10 ECHR. But the Court has been open to the idea of excluding some issues from the material scope of Article 10 ECHR:

“In the *Gündüz* case the ECtHR holds that there is no doubt that, like any other remark directed against the Convention’s underlying values, expressions that seek to spread, incite or justify hatred based on intolerance, do not enjoy the protection afforded by Article 10 of the Convention.”<sup>56</sup>

This exclusion, though, is not based on an inherent aspect of paragraph 1 of Article 10 ECHR but on Article 17 ECHR.<sup>57</sup>

In so far one could think that there can be limitations of the right to free speech which are inherent to

47 On the issue of prior constraint see the instructive partly dissenting opinion of Judge De Meyer in European Court of Human Rights, *Observer and Guardian v. United Kingdom*, Application No. 13585/88, Judgment of 26 November 1991.

48 TRAVIS, Alan. Theresa May’s plan to censor TV shows condemned by Tory cabinet colleague. *The Guardian*. Available in: <<http://www.theguardian.com/world/2015/may/21/mays-plan-to-censor-tv-programmes-condemned-by-tory-cabinet-colleague>>. Access on: 21 May 2015.

49 JANIS, Mark W.; KAY, Richard S.; BRADLEY, Anthony W. *European Human Rights Law: Text and Materials*. 3. ed. Oxford: Oxford University Press, 2008. p. 314, references omitted.

50 LEACH, Philip. *Taking a Case to the European Court of Human Rights*. 2. ed. Oxford: Oxford University Press, 2005. p. 321, reference omitted

51 *Ibid.*

52 *Ibid.*, p. 321, references omitted; European Court of Human Rights, *Jersild v. Denmark*, Application No. 15890/89, Judgment of 23 September 1994, para. 35; but see also GRABENWARTER, Christoph. *Europäische Menschenrechtskonvention*. 3. ed. Munich: C. H. Beck, 2008. p. 254 *et seq.*, with further references.

53 **On hate speech and the material scope of Article 10 (1) ECHR see in more detail** RAINEY, Bernadette; WICKS, Elizabeth; OVEY, Clare. *The European Convention on Human Rights*. 6. ed. Oxford: Oxford University Press, 2014. p. 440 *et seq.*

54 On Article 15 ECHR see e.g. KIRCHNER, Stefan. Human Rights Guarantees during States of Emergency: The European Convention on Human Rights. 3:2 *Baltic Journal of Law and Politics*. 2010. p. 1-25. Available in: <[http://www.degruyter.com/dg/viewarticle.fullcontentlink.pdfeventlink/\\$002fj\\$002fbjlp.2010.3.issue-2\\$002fv10076-010-0008-6\\$002fv10076-010-0008-6.pdf?t:ac=j\\$002fbjlp.2010.3.issue-2\\$002fv10076-010-0008-6\\$002fv10076-010-0008-6.xml](http://www.degruyter.com/dg/viewarticle.fullcontentlink.pdfeventlink/$002fj$002fbjlp.2010.3.issue-2$002fv10076-010-0008-6$002fv10076-010-0008-6.pdf?t:ac=j$002fbjlp.2010.3.issue-2$002fv10076-010-0008-6$002fv10076-010-0008-6.xml)>.

55 GRABENWARTER, Christoph. *European Convention on Human Rights: Commentary*. Oxford: Oxford University Press, 2014. p. 254.

56 *Ibid.*

57 *Cf. ibid.* On Article 17 ECHR in the context of Article 10 ECHR see REID, Karen. *A Practitioner’s Guide to the European Convention on Human Rights*. 3. ed. London: Thomson; Sweet & Maxwell, 2007. p. 344.

Article 10 ECHR - but even the *obiter dictum* in *Jersild v. Denmark* does not necessarily require such a view. Article 10 ECHR in itself is not sufficient to explain why some expressions should be excluded already from the material scope of the norm (not to forget, in many such cases a limitation under Article 10 (2) ECHR will likely be possible<sup>58</sup>). Indeed, it would be troubling if the Court, let alone national authorities,<sup>59</sup> were to place itself in a position in which it were to decide without any further legal basis, which expressions (and opinions thus expressed) would be protected – not even if it were to base such a decision on the view of an overwhelming majority, because “[t]he moralistic preferences of the majority as to what liberties people should be free to enjoy cannot constitute a legitimate aim for interfering with a Convention right.”<sup>60</sup> Such an approach is also unnecessary as Article 17 ECHR already provides for a sufficient corrective and hence a legal basis for such a restriction of the material scope of the right protected in Article 10 (1) ECHR. Therefore existing limitations outside paragraph 2 of Article 10 ECHR are not based on Article 10 ECHR itself but find their legal basis in Article 17 ECHR, they are therefore not inherent to Article 10 ECHR.

But how can this be squared with the aforementioned judgment in *Radio France v. France*? After all, merely ignoring journalistic standards, while capable of falling afoul of the test used by the Court in this case, does not have to bring the journalist in question in a situation where his or her work, shoddy as it may be, would trigger the applicability of Article 17 ECHR. Here the Court seems to impose a higher standard on journalists. It remains to be seen, however, if the same approach would still be upheld today, at a time when everybody with an internet connection can be a journalist, publisher or operate an online radio or TV station. Journalists play an important role for the defense of democracy and high journalistic standards are desirable. At the end of the day, though, in a free and democratic society, with a free press and free access to information, it should be the consumers of information rather than a court or other form of authority, which decides which standards it wants to uphold. Free speech whi-

ch violates the rights of others can be regulated under paragraph (2) of Article 10 ECHR. It is not necessary, and indeed opens the door to abuse and uncontrollable restrictions of free speech rights, to establish unwritten limitations under the header of paragraph (1) of that norm. It would also run counter to the systematic structures of Articles 8 *et seq.* ECHR.

#### 4. FINAL CONSIDERATIONS

“Human rights are [...] a means to a greater social end”,<sup>61</sup> therefore human rights do not only have a subjective but also an objective function. They protect the individual against the State, the weak against the strong, but they also serve a greater good beyond the interests of the individual. Article 10 (1) ECHR cannot be subjected to inherent limitations and there is no unwritten exception to Article 18 ECHR. Although not all national legal systems of the states which have ratified the European Convention on Human Rights have the same material scope in their domestic free speech laws, the ECHR’s wide scope can only be balanced against the rights of others under paragraph 2 of Article 10 ECHR. The existing system created under Article 10 (2) ECHR in decades of case law is sufficient to ensure the protection of the rights of others against abuse under the cover of Article 10 (1) ECHR. By utilizing Article 10 (2) ECHR appropriately, a more widespread acceptance of the wide scope of Article 10 (1) ECHR can be gained in society as a whole. This means that journalists have to understand the scope of their rights as well as that of the rights of others and the balancing approach employed by the courts. But balancing rights against each other is not enough to explain the special function of journalism in a free and democratic society. For a better acceptance of journalistic rights among all members of society it is essential that the particular function of journalism in a free and democratic society is understood by all. At the end of the day, everybody benefits from a free and democratic society. Free speech has an important role to play in safeguarding it.

When talking about limiting the work of the media it has to be kept in mind that “the right of freedom of speech [i]s one of the essential foundations of a de-

58 GRABENWARTER, Christoph. *Europäische Menschenrechtskonvention*. 3. ed. Munich: C. H. Beck, 2008. p. 255.

59 See LETSAS, George. *A Theory of Interpretation of the European Convention on Human Rights*. Oxford: Oxford University Press, 2007. p. 122.

60 *Ibid.*, p. 122 *et seq.*

61 DAVID, P. Forsythe, *Human Rights in International Relations*. Cambridge: Cambridge University Press, 2000. p. 3.

mocratic society”.<sup>62</sup> This function places a high burden on the state when it comes to justifying restrictions. The state should not take the case law of the European Court of Human Rights as a pretext to introduce restrictions which are not based on Article 10 (2) ECHR or, in extreme cases, on Article 17 ECHR. Especially the use of the latter norm will require caution in order to avoid abusing the abuse of rights clause of the Convention. In no case may the overall purpose of the ECHR, the effective protection of human rights, be ignored.

“Freedom of expression is [...] one of the key pillars on which an effectively functioning democracy rests.”<sup>63</sup> But even if the right protected by Article 10 (1) ECHR is used in an attempt to undermine the fundament of human rights and democracy on which free European states are built, it is not necessary to seek solutions *contra legem* by inventing unwritten exceptions to Article 10 (1) ECHR. Rather, both Article 10 (2)<sup>64</sup> and Article 17 ECHR can be used — and are sufficient — to defend democracy. It is the task of the European Court of Human Rights to ensure that states do not overreach and violate human rights in an attempt to protect democracy. The European Court of Human Rights should modify its hate speech jurisprudence seen in cases such as *Gündüz v. Turkey*<sup>65</sup> and *Jersild v. Denmark*<sup>66</sup> accordingly. Doing so would not make it harder for states to outlaw hate speech but it would provide a solid legal basis under the ECHR for doing so.

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