

FREEDOM OF EXPRESSION IN BROADCASTING

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ABSTRACT

Broadcasting is the most important source of information and the media in a democratic society. The right of freedom of expression considers both the right of the public to receive utmost diversity of information in broadcasting and the right of broadcasters not to be interfered by politics or commercial intervention. Governments and dominant commercial broadcasters have tried to control broadcasting because of its richness as a source of information and news and its effectiveness. As a matter of fact, sometimes the public broadcaster operates as an agent of government rather than serving the public interest. Consequently, broadcasting can be a state cartel in some countries. In this context, governments have controlled private broadcasting granting the license while commercial broadcasters have tried to monopolize the broadcasting sector. Therefore, it should be established a set of standards in order to prevent that broadcasting becoming a means of government control or prevent commercial broadcasters from becoming extremely dominant.

Key words: Access to information; Blasphemy; Censorship; Criminal libel; Defamation; Freedom of expression; Freedom of information; Journalism; Journalists; Judges; Media; Obscenity; Politicians; Press; Private life.

ÖZET

Radyo ve televizyon yayıncılığı, demokratik bir toplumda, en önemli haber kaynağı ve kitle iletişim aracıdır. İfade özgürlüğü hakkı; hem radyo ve televizyon yayıncılığında toplumun çeşitli kaynaklardan haber edinme hakkını içermektedir hem de radyo ve televizyon yayıncılarının ticari ve siyasi engellemelere maruz kalmadan yayın yapmalarını sağlayacak tedbirleri öngörmektedir. Hükümetler ve nüfuzlu ticari radyo ve televizyon kuruluşları, radyo ve televizyon yayıncılığını haber ve bilgi alma zenginliğinden ve toplum üzerindeki etkisinden dolayı denetim altında tutmaya çalışmaktadırlar. Gerçek şu ki, bazı ulusal yayın kuruluşları kamu menfaatine hizmet etmekten çok hükümetin bir temsilcisi olarak faaliyette bulunmaktadırlar. Bu nedenle de radyo ve televizyon yayıncılığı devletin ticari kuruluşu konumuna bürünebilmektedir. Bu bağlamda, bazı hükümetler, radyo ve televizyon kuruluşlarının yayın izini ellerinde bulundurmaları suretiyle, ticari radyo ve televizyon kuruluşlarına, nüfuzlarını kullanarak, özel radyo ve televizyon yayıncılığının kontrolünü kendi ellerinde tutmayı başaramamışlardır. Bu nedenle, radyo ve televizyon yayıncılığının hükümetin kontrolünde bulunan bir araç haline dönüşmesini önlemek veya ticari yayın kuruluşlarının yayıncılık sektöründe gereğinden fazla egemen olmasını engellemek

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amacıyla radyo ve televizyon yayıncılığına ilişkin düzenleyici hukuk kuralları konulması gerekmektedir.

Anahtar Kelimeler: Bilgi alma, ifade özgürlüğü, radio ve televizyon yayıncılığı, hükümetler, media, politikacılar, özel yaşam

1. Freedom of Expression

Free access to information and ideas is an essential factor of a democracy and compulsory in allowing public to participate in decision-making. The extent of freedom of expression reflects on astonishing or agitating information in order to ensure tolerance and broadmindedness of a democratic society. (Wadham & Griffiths & Rigby, 2001:24-35; Clayton & Tomlinson, 2001: 15.1-15.287)

The positive freedom of expression is defined in article 10(1) of the European Convention and its restrictions are explained in article 10(2). While applying these restrictions, the European Court of Human Rights will take into consideration the facts and the circumstances existing in the particular case in order to adjudicate the interference to freedom of expression. (Beatson & Cripps, 2002: 225-238; Van Dijk & Van Hoof , 1998: 293-694)

In addition, the Article 10(1) requires to meet 'positive obligation' from member states besides preventing them from imposing restrictions on freedom of expression. In *Fuentes Bobo v Spain (Application No. 39293/98, 29 February 2000)*, the domestic employment tribunals hold that it could not be held responsible for the applicant's dismissal as the relationship between the applicant and the employer was governed by private rather than public law. The European Court of Human Rights rejected this argument for the reason that the state has a positive obligation to protect individuals from interferences with their right to freedom of expression even by private persons.

2. Access to Information

Access to information is the primary obligation to ensure freedom of information in a democratic society. Institutions and public servants that establish governance should develop a positive political background of government in an open society. Otherwise it is not likely to resolve the problems derived from opposing free flow of information in a reserved governing system. (Wadham- Griffiths- Rigby, 2001: 36-50; Curran- Seaton, 2002: 287-301)

Access to information should comprise the right to be informed of all events which are of interest to society. Governments should change their perceptions with the intention of providing free flow of information. Thus, public should have access to a broad range of high-quality content and services freely on television. They should also facilitate broadcasters from other Member States to access news without difficulty. (Beatson- Cripps, 2002: 325-348; Nitsche, 2001: 157-176)

Customers will embrace new services and technical devices as long as easy access to remarkable content of quality is allocated. (EU Monitoring and Advocacy Program Network Media Program, 2005 : 78-86)

Access to the networks is essential for cultural diversity and media pluralism. They should carry out their fundamental role of distributing content and audiovisual services beside other services. The revision of the regulatory framework for electronic communications should consider the links between content and networks. (Goldberg- Prosser- Verhulst, 2003: 103-108)

The European Broadcasting Union underlines the importance of a European information society for the evaluation of the 'Television Without Frontiers Directive' which is the source of the regulation of audiovisual regulatory substance in Europe; and also the electronic communications regulatory framework called the Telecommunications package. Directives are related by the amendment of the regulatory structure for electronic communications,

which covers set of connections. Digital technology should be used to ensure the access to a broad range of quality content for all types of customers, with reinforcing pluralism and freedom of information while enlarging diversity of broadcasting industries in Europe. (EU Monitoring and Advocacy Program Network Media Program, 2005: 106-116; Goldberg- Prosser- Verhulst, 2003: 42-75)

3. Media and Journalism

The media has the function to convey information of public interest as a source of information and public supervisor which grants privilege in a democratic society. The Article 10 of the European Convention tolerates certain extent of provocation in press freedom and also protects the rights of informants who provide confidential sources to the press. (Wadham- Griffiths- Rigby, 2001: 36-50; Curran- Seaton, 2002: 238-316, 264-286; Beatson- Cripps, 2002: 225-274)

The press has a right and duty to impart information in a certain extent of exaggeration and provocation on public interest. Reporters need to work in suitable conditions. Therefore, a regulatory structure should be established to facilitate their role so as to publish their articles in the public interest without any interruption of censorship and accusation. (Wacks, 1995: 21-47; Goldberg-Prosser- Verhulst, 2003 : 42-55)

Journalists have a responsibility to take professional approach at their work and to report fairly, truthfully and in good faith using credible sources of information in order to provide objectivity and to operate in the public interest. They are subjected to attacks and harassments due to reporting corruptions and political scandals which jeopardize the position of governments and public officials. (Prager & Oberschlick v Austria (1995) 21 EHRR 1; Curran- Seaton, 2002: 317-371)

News reporting based on interviews requires special protection because of its value in imparting information effectively in public interest. Reporters have right to protect the secrecy of their sources in order to provide the free flow of information to the media and ensure the security of journalists. However, the information will be disclosed if it is crucial for a criminal investigation and is ordered by the court. (Nicol- Millar- Sharland, 2001: 178-188; Robertson-Andrew, 2002: 423-468; Murphy, 2000: 26-36)

Journalists have right to protect their sources of information in order to avoid the pressure which affects the free flow of information. Therefore, journalists have right not to reveal their sources unless it is requisite for a criminal investigation or for a criminal offense in condition that the information can not be obtained otherwise; and also public interest prevail over the freedom of expression. (Wacks, 1995: 124-143; Beatson- Cripps, 2002: 275-288)

Regulatory authorities over the media or broadcast should not be subject to the government and its political control. The license applications of a broadcast channel should be made on the basis of pre-specified provisions in favor of the public right to be informed. In addition, the authorities of broadcast regulatory bodies should be restricted relating to licensing and complaints.

Technological changes require new policies and regulations which promote cultural diversity and pluralism at the national and international levels. Therefore, Member States should take regulatory measures to ensure wide range of private media. (Curran- Seaton, 2002: 317-371; Goldberg & Prosser & Verhulst, 2003: 1-55)

4. Private Life

Member States have a positive obligation to ensure the effective protection of the right to respect for private life so as to protect an individual from the acts of other private parties and to prevent from committing crime against privacy (*Von Hannover v Germany (2005) 40 EHRR 1*). The media right to freedom of expression should be prescribed by law in order to realize the legitimate aim while interfering the right to respect for private life. In this process, provisions must be carried out within the state's margin of appreciation.

Freedom of expression may not only be applied to information or ideas that are considered as inoffensive but also to those that disturb or shock which require the demands of tolerance as a reflexion of democratic society. This freedom is restricted by the exceptions defined in Article 10(2) of the European Convention of Human Rights which must be interpreted strictly.

In *Bergens Tidende v Norway*, The European Court of Human Rights recalls the fundamental role that the press accomplishes in a democratic society. The duty of the press is to impart information on all matters of public interest while beware not to exceed certain limits regarding the reputation and rights of others and paying attention to avoid the disclosure of confidential information. In addition, journalistic freedom also covers a large degree of exaggeration or provocation. The national margin of appreciation is restricted by the interests of a democratic society in enabling the press to implement its vital role by imparting information of serious public concern. As a result, the European Court of Human Rights rejected that the interest of surgeon in protecting his professional reputation prevail over the public interest in the freedom of the press to impart information on matters of legitimate public concern and it concluded that there has been a violation of freedom of expression. (Nicol & Millar- Sharland, 2001:10- 31)

5. Politicians and Judges

Both private and public reputations of politicians are protected under the European Court of Human Rights but the protection on the public reputation is limited where the press is acting as a supervisor on the subject matter of public interest. (Beatson- Cripps, 2002: 87-104)

Unlike private life, politicians and public officials should tolerate criticism in a larger extent. In *Leander v Sweden (1987) 9 EHRR 433*, The European Court of Human Rights held that the right to freedom to receive information interdict a Government from hampering information that others want to disclose. Article 10 of the European Convention does not grant the individual a right of access to a record enclosing information on his personal position or to impose an obligation on the Government to impart such information to the individual. (Nicol & Millar & Sharland, 2001: 10-31; Beatson- Cripps, 2002: 87-104)

In *Lingens v Austria (App. No. 9815/82, 8 July 1986) 8 EHRR 407*, the European Court of Human Rights accepted that the protection of the reputation of a politician was a legitimate aim. Although it highlighted that the limits of criticism of a politician in his public life is more flexible than private life of individuals. The European Court of Human Rights stressed that a politician exposes himself to close examination by both journalists and the public. Therefore, he must tolerate the situation. Freedom of the press contributes to form an opinion on the ideas and acts of political leaders. The limits of criticism against a politician are much larger according to a private individual. Therefore, while protecting the reputation of a politician, the extent of criticism must be considered rather widely. (Robertson- Andrew, 2002: 592-596)

Judges have right to protect their reputations against media. In *Prager and Oberschlick v Austria (1995) 21 EHRR 1*, the European Court of Human Rights accepted that the press is one of the resources that judges carry out their

duties in compliance with the democratic intend. It also pointed out that judges must enjoy public confidence. Hence, they must be protected from arguments, particularly for the reason that they have the duty of discretion that prevents them from replying to criticism. (Nicol- Millar- Sharland, 2001: 121-141; Beatson- Cripps, 2002: 123-138)

6. Defamation

Defamation is a false statement which impairs someone's reputation and such a publication with fault that is broadcasted as a result of negligence or malice. Any legal persons such as editors or media organizations whose rights have been interfered with defamation have right to complain; as well as ordinary persons, corporations and non governmental organizations may apply for the defamation issue to the European Court of Human Rights. Prior restraint such as anticipatory injunction in defamation cases is exceptional because of legal and practical reasons. If the defendant presents a defense of justification, privilege or fair comment will not be granted by the Government. (Wacks, 1995 : 89-92; Price- Duodu, 2004 : 19-39)

However, the European Court of Human Rights especially scrutinizes interferences in the case of censorship before publication such as threats of civil or criminal proceedings or anticipatory injunctions to the media since it prevents the dissemination of ideas and information. The European Court of Human Rights has also recognized the chilling effect of high levels of damages on freedom of speech. In addition, final injunctions, awards of damages and sanctions in criminal proceedings may infringe freedom of expression. (Murphy, 2000: 99-104; Jones, 1998: 244-258)

7. Criminal Libel

Libel is a published or broadcast defamatory statement or false which harms the reputation of an individual. The defamatory statement is about someone who is exclusive to one or more persons and the material must be distributed to someone other than the offended party. (Robertson- Andrew, 2002: 485-490)

The European Court of Human Rights has been involved in the conviction of journalists for offences of criminal libel. In *Lingens v Austria (1986) 8 EHRR 407*, the European Court of Human Rights refused an argument that such penalty imposed a kind of censure which did not prevent the journalist from expressing himself and not discourage him from making this kind of criticisms again. The European Court of Human Rights pointed out that such a sentence would be likely to discourage journalists from contributing to public debate which affects the political life of society and in consequence is liable to impede the press in carrying out its duty as source of information and public supervisor.

8. Obscenity and Blasphemy

Obscenity is a word, act or expression that is indecent or offensive. The explanation of obscenity differs from culture to culture. Censorship is often used to restrain matters that are obscene under these explanations but not restricted to pornographic material. The concept of obscenity can be exercised as a political device in order to restrict freedom of expression. The legitimate aim concerning obscene speech is the protection of morals. The interference has included seizure or forfeiture of the criminal matter and conviction conducted by a fine or imprisonment. (Robertson- Andrew, 2002: 189-197)

The European Court of Human Rights indicated that the protection of the rights of others might be subject when the obscene matter was accessible through presentation to the general public without satisfactory notices. (Nicol-Millar- Sharland, 2001: 112-113)

Blasphemy is a disgrace offered to God in words and disrespectful words or signs addressed to in accordance with God. The interference included consequent prosecution of published blasphemous speech, the seizure and forfeiture of a film before its exhibition and the prevention of distribution of a video by the refusal to categorize it.

Both the seizure and the refusal to certify the film prevented the expression reaching audience and amounted to a prior control which is more difficult to justify even though in both cases the European Court of Human Rights concluded that such interferences were justifiable. In *Gay News Ltd and Lemon v United Kingdom*, The European Court of Human Rights concluded that the law of blasphemous libel was certain to be prescribed by law. The blasphemy was not essential factor of the offence. It was pointed out that the offence of blasphemy can not lend itself to define legal definition and the law was reachable to the applicants and that the interpretation was estimated with appropriate legal advice and found justified the protection of the rights of others.

Obscene and blasphemous speeches are authorized because of their ability to shock and offend. The prohibition of blasphemous speech is the reason of preventing attacks from the religion of individuals. In *Handyside v United Kingdom (1976) 1 EHRR 737*, The European Court of Human Rights stated that freedom of expression is not only applicable to information and ideas but also to those that offend, shock or disturb the state or any sector of the population which are the reflection of pluralism, broad-mindedness and tolerance of a democratic society.

Obscene and blasphemous speeches result from artistic field rather than political or commercial fields. In *Muller v Switzerland (1988) 13 EHRR 212*, the European Court of Human Rights decided that it is not likely to find a

identical concept of morals in the legal and social orders of the member states. The existing jurisprudence provides rational guidance to help out English courts when they are prosecuted by the obscenity and the blasphemy fields.

RECOMMENDATIONS

Some suggested recommendations regarding the content of the article are as follows:

- i.** Member States should establish positive provisions to ensure pluralism of the opinions in broadcasting and also they should guarantee to access information unless there is an actual and imminent danger that threatens national security.
- ii.** Member States must ensure the effective protection of the right to respect for private life in order to protect an individual from the acts of private bodies such as newspapers or television stations.
- iii.** Journalists should never be required to reveal their sources unless it is necessary for a criminal investigation or the defense of a person accused and they are ordered by a court provided that the information cannot be obtained elsewhere and public interest outweighs the harm to freedom of expression from disclosure.
- iv.** Control of media and monopolies must be restricted as they impede democracy and plurality and diversity of media.
- v.** Regulatory bodies should be independent of political control. Processing of license applications should be transparent and decisions about competing applications should be made on the basis of pre-established criteria in the interest of the public right to be informed. In addition, the authorities of regulatory bodies should be limited relating to licensing and complaints.

vi. Regulatory bodies should be cautious while restricting harmful or illegal content of broadcast not to restrain positive potential of new technologies.

vii. Digital technology should be used to ensure the widest possible access to a broad range of quality content, to strengthen pluralism and freedom of information while advocating the development and diversity of broadcasting industries across Europe.

viii. Member states must convey certain television and radio programs and services which are of particular importance to society. Otherwise it is likely that private broadcasters could abuse their dominant position and may unjustifiably restrict choice of customers by giving priorities to other programs and services.

ix. Member states should provide consumers with access to a diverse range of content and services with the highest possible quality and at a reasonable price in digital environment in order to create an open television market and to encourage market competition.

x. The Frontiers Directive should consider access to information, cultural diversity and media pluralism while removing obstacles to the internal market.

xi. Journalists have a responsibility to take professional approach at their work and to report fairly, impartially and in good faith using credible sources of information in order to provide objectivity and to operate in the public interest.

xii. Editorial independence should be guaranteed by law and may take decision freely what to broadcast instead of government, regulatory or commercial bodies.

xiii. Prior censorship on any information conveyed must be prohibited by law and should never be required for a broadcast content.

xiv. The reputation of a person should only be protected if the person offended is a private individual, judge or a public servant.

xv. Public service broadcasting should guarantee universal access and undertake to serve all regions and cultures. In addition, it must be governed by an independent governing body whose self-government is ensured by law.

xvi. Member states should survive public service broadcasting and sustain its development according to the new communication technologies and services. In addition, they should create advisory programming committees in order to reflect the needs of the different groups in society.

xvii. Broadcasters should never be required to transmit particular broadcasts for the government which may damage broadcasting independency.

xviii. Member States should support the facility of modern information technologies in order to protect diversity and to improve access to information.

xix. Sanctions on commercial broadcasters should be imposed only by an independent body and the decisions should be published and accessible.

xx. Government should make new regulations to strengthen and protect the freedom of the press in legal and financial fields; and also it should support the press companies which are financially weaker than others and take financial measures on this matter.

xxi. Profession associations and institutions- such as Journalists Association, Journalists Trade Union, Press Advertisement Institution and Press Council- must be powered so as to be effective in the amendments of the provisions and to strike the balance and reduce the interferences made by the Government.

xxii. The diversity and transparency should be provided in broadcasting legislation and should be formed a self-regulatory system for commercial broadcasters in order to develop their independence.

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