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The Right of the Public to be Properly Informed under Article 10 of the European Convention on Human Rights

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The Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") guarantees everyone the right to freedom of expression. According to Article 10 of the Convention this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority. According to the jurisprudence of the European Court of Human Rights ("the Court") the right to receive information contained in Article 10 refers to information which others wish to communicate and it does not impose an obligation on others to provide information. Consequently, the Court found it difficult to derive from the Convention a general right of access to state-held information. Difficult but not impossible - as a recent admissibility decision in the case *Sdružení Jihočeské Matky v. Czech Republic*[1] has demonstrated. This case concerned a refusal by Czech authorities to give the applicant, an ecologist Non-Governmental Organization, access to certain administrative documents, namely documents and plans regarding a nuclear power station. Although the Court explicitly recognized that the refusal by Czech authorities to grant requested access constituted an interference with the right to receive information , it nevertheless decided that there had not been a breach of Article 10 and declared the application manifestly ill-founded, as in the Court's opinion the interference satisfied the requirements set forth in paragraph 2 of Article 10.

This recent turn in the Court's interpretation of the right to receive information under Article 10 of the Convention is important not only because the Court is believed to have recognized an independent right to receive documents held by public authorities, which does not rely on any other Convention rights or interests.[2] It may also provide us with an interesting opportunity to view another crucial in regard to the Court's interpretation of freedom of expression notion for what it is - the right of the public to be properly informed. Finally, there is no need to expect the right of the public to be properly informed to constitute a human right proper and its function as an abstract concept construed in order to conceptualize the complex dialectic of the public behind the right of freedom of expression can be appreciated. Moreover, some interesting conclusions regarding future interpretations of

1 Decision of the European Court of Human Rights 10 July 2006, *Application 19101/03*, *Sdružení Jihočeské Matky v. Czech Republic.*

2 W. Hins, D, Voorhoof, Access *to State-Held Information as a Fundamental Right under the European Convention on Human Rights*, European Constitutional Law Review, Vol. 3, 2007, p. 123-126.

this notion can be made, on the basis of the fact that it is viewed separately from individual right of access to information.

We shall begin with a general overview of this concept and its origins in the Court's interpretation. It was as early as in the judgment in the famous case *Sunday Times v. the United Kingdom*[3] in which the judges were faced with the question of whether the newspaper could be restrained from publishing a full report about the thalidomide affair, which criticized the law and the level of compensation offered by the responsible drug company, that the court recognized that Article 10 of the Convention guarantees not only the freedom of the press to inform the public but also the right of the public to be properly informed. By referring to the right of the public to be properly informed, the Court introduced a certain understanding of freedom of expression, which is especially significant in the context of paragraph 2 of Article 10 of the Convention. According to paragraph 2 of Article 10 the exercise of this freedom, since it carries with it duties and responsibilities, may be subject to such formalities, conditions or restrictions as are prescribed by law, are necessary in a democratic society, and have an aim or aims that is or are legitimate under Article 10 paragraph 2. In order to establish whether the restriction imposed on the applicant by British authorities was necessary in a democratic society for maintaining the authority of the judiciary, the Court recalled that freedom of expression constitutes one of the essential foundations of democratic society and it is applicable to the information or ideas that offend, shock or disturb the State or any other sector of the population. Moreover freedom of expression constitutes one of the essential foundations of democratic society also in the sense that the courts cannot operate in vacuum – although they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere. Consequently, not only do the media have the task of imparting information and ideas that are of public interest, the public also has the right to receive them.

3 Judgment of the European Court of Human Rights 26 April 1979, *Application no. 6538/74, Sunday Times v. The United Kingdom.*

As we can see – the Court established the character of freedom of expression as essentially democratic (pluralism of the information and ideas that are expressed or imparted is a corollary of pluralism of the information and ideas that are received) and public (information that is of public interest is understood as information that the public has the right to receive). The Court observed that in the present case the families of numerous victims who were unaware of some legal circumstances had a vital interest in knowing all the underlying facts and the various possible solutions. They could be deprived of this information only if it appeared absolutely certain that its diffusion would have presented a threat to the authority of judiciary. As a consequence in the final remarks the Court concluded that the interference complained of did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression within the meaning of the Convention. It is certainly significant how in the Court's reasoning it is the public interest in freedom of expression that needs to be outweighed by a sufficiently pressing social need, not the private autonomy of those whose freedom of expression is protected.

This interesting dialectic of private autonomy and public interest is obviously made possible by recognition of the specific function of the press in democratic society. As the Court stated in another famous judgment concerning freedom of press, in the case of *Observer and Guardian v. the United Kingdom*[4], not only does the press have the task of imparting information and ideas on matters of public interest – the public also has the right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog". Interestingly enough, the Court in the aforementioned *Sunday Times v. The United Kingdom* case just after introducing the concept of the public's right to receive information and ideas (of public interest) as a corollary of the task of the media to impart them, refereed to its judgment in case of *Kjeldsen, Busk Madsen and Pedersen v. Denmark* [5] regarding Article 2 of Protocol No. 1 to Convention which provides that no person shall be denied the right to education and in the exercise of any functions which the state assume in relation to education and to teaching, it shall respect the right of parents to ensure such

4 Judgment of the European Court of Human Rights 26 November 1991, *Application no. 13585/88*, *Observer and Guardian v. the United Kingdom.*

5 Judgment of the European Court of Human Rights 7 December 1976, *Application no. 5095/71; 5920/72; 5926/72*, *Kjeldsen, Busk Madsen and Pedersen v. Denmark.*

education and teaching in conformity with their own religious and philosophical convictions. In this judgment the Court stated that the right set out in the second sentence of Article 2 corresponds to a responsibility closely linked to the enjoyment and the exercise of the right to education. Clearly, freedom of the media seems to be interpreted by the Court as a corollary of the right of the public to be properly informed and consequently seems to be more of a special public responsibility imposed on the media than a right.[6]

However, one can not overlook the judgments such as the judgment in case *Guerra v. Italy*[7], in which the Court refused to interpret Article 10 as conferring an actual right to receive information, in particular from the relevant authorities, on members of local population who had been or might be affected by an industrial or other activity representing a threat to the environment. In this judgment the Court clearly stated that: in cases concerning restrictions on freedom of the press it has on a number of occasions recognized that the public has the right to receive information as a corollary of the specific function of journalists, which is to impart information and ideas on matters of public interest. When read in the light of the Court's conclusion that freedom to receive information cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion, it may seem that the Court actually regards the right of the public to receive information as a corollary of the freedom of the media. On the basis of what has been established earlier though, it becomes clear that the public who has the right to receive information is a necessary personalization of the public interest in freedom of expression and manifestation of the character of freedom of expression as one of the essential foundations of democratic society.

All those notions may seem quite obvious and even pertaining the conception in which the role of individual citizen is a passive one, namely to receive information and ideas that the media choose to impart, and the mass media function as an intermediary and carrier of the

6 C. J. Hamelink, *Communication Rights and the European Information Society*, [in:] J. Servaes (ed.) *European Information Society: A Reality Check*, Bristol, 2003, p. 131-132.

7 Judgment of the European Court of Human Rights 19 February 1998, *Application no. 116/1996/735/932*, *Guerra v. Italy.*

public interest to be informed.[8] However, especially in the light of the aforementioned admissibility decision in the case *Sdružení Jihočeské Matky v. Czech Republic*, in which the Court recognized the interference with the applicant's right to receive information without the media functioning as an intermediary, one must consider the democratic potential of the notion of "the right of the public to be properly informed" instead of focusing on how it does not correspond with the changes in the mass media's perception of its function, and especially the public's perception of the function of the media.

In this context it may be particularly enlightening to examine the reasoning of the Court in some cases concerning the conflict between the protection of private life and freedom of expression. In the case *Van Hannover v. Germany*[9] the applicant, who was the eldest daughter of Prince Rainier III of Monaco, stated that she had spent more than ten years in unsuccessful litigation in the German courts trying to establish her right to the protection of her private life. Interestingly, in regard to the fact that the applicant did not complain of an action by the State, but rather of the lack of adequate State protection of her private life and her image, the Court stated that the boundary between the State's positive and negative obligations under Article 8 of Convention does not lend itself to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole - protection of private life has to be balanced against the freedom of expression guaranteed by Article 10 of the Convention.

Consequently, in the cases in which the Court had to balance the protection of private life against freedom of expression, it has always stressed the contribution made by photos or articles in the press to a debate of general interest. As the applicant in the present case exercised no official function and the photos and articles related exclusively to details of her private life, the Court observed that it was clear that they made no such contribution.

8 N. Helberger, *The "right to information" and digital broadcasting – About monsters, invisible men, and the future of European broadcasting regulation*, Entertainment Law Review, Vol. 17, 2 (2006), p. 5-6.

9 Judgment of the European Court of Human Rights 24 June 2004, *Application no. 59320/00, Van Hannover v. Germany.*

Moreover, the Court considered that the public did not have a legitimate interest in knowing where the applicant was and how she behaved generally in her private life, even if such a public interest exists, as does a commercial interest of the magazines in publishing these photos and these articles. Here, the Court not only distinguished between any interest of the public and a legitimate interest of the public (the right of the public to be properly informed) but also referred to the commercial interest of the magazines in publishing certain photos and articles, which does not necessarily coincide with the right of the public to be properly informed either. Consequently, this judgment can be viewed as recognizing certain distance between the right of the public to be properly informed and the right of the press to impart information. This is a vitally important position in view of increasing commercialization of the media and commodification of information.

What then constitutes a legitimate interest of the public? As the Court noted in the fairly recent case *Selistö v. Finland*[10], regarding the applicant who was convicted for defamation after publishing articles presenting an alarming picture about issues of patient safety, from the point of view of the general public's right to receive information about matters of public interest there should be justified grounds supporting the need to conduct public discussion about the matter. Moreover, the Court's judgment in the case *Thorgeir Thorgeirson v. Iceland*[11] shall be recalled, which concerned the applicant who published two articles on police brutality and was convicted for defamation. In this case the Government tried to demonstrate that the wide limits of acceptable criticism in political discussion did not apply to the same extent in the discussion of other matters of public interest. In the opinion of the Government the issues of public interest raised by the applicant's articles could not be included in the category of political discussion, which denoted direct or indirect participation by citizens in the decision-making process in a democratic society. However, the Court observed that there is no warrant in its case-law for distinguishing, in the manner suggested by the Government, between political discussion and discussion of other matters of public concern. Also, it is important to note that even in commercial context some statements may be

10 Judgment of the European Court of Human Rights 16 November 2004, *Application no. 56767/00, Selistö v. Finland.*

11 Judgment of the European Court of Human Rights 25 June 1992, *Application no. 13778/88, Thorgeir Thorgeirson v. Iceland*

regarded not as "purely" commercial but also as participation in a debate affecting the general interest, for example, over public health as in the case *Hertel v. Switzerland*[12].

In the context of commodification of information it should be also noted that according to the Court's well established case-law, Article 10 protects not only the substance of ideas and information but also the form in which they are conveyed. In the case *Jersild v. Denmark*[13]the Court stated that news reporting based on interviews, whether edited or not, constitutes one of the most important means whereby the press is able to play its vital role of "public watchdog". Therefore the punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so. Moreover the Court emphasized that the methods of objective and balanced reporting may vary considerably, depending among other things on the media in question concluding that it is not for the Court, nor for the national courts, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists. This line of reasoning is especially important because it was applied by the Court in multiple cases regarding the prohibition of publication of pictures of persons suspected of committing a crime, for example in a recent case *Verlagsgruppe News GmbH v. Austria*[14] concerning the prohibition to accompany a report on pending investigations of tax evasion with a picture of the person suspected of committing this crime. As the case was not concerned with a restriction on the contents of reporting but with the prohibition to accompany a report with a picture of the person concerned, the public interest to have the information on the proceedings for tax evasion pending against the suspected accompanied by his picture had to be weighed against the interest of this person to have his identity protected. Consequently, the Court had to examine: the position of the applicant (What is his relation to the right of the public to be properly informed? Does he have the duty to impart information and ideas on all matters of public interest?), the position of the suspect (Is he a public figure?)

12 Judgment of the European Court of Human Rights 25 August 1998, *Application no. 25181/94, Hertel v. Switzerland*

13 Judgment of the European Court of Human Rights 23 September 1994, *Application no. 15890/89, Jersild v. Denmark.*

14 Judgment of the European Court of Human Rights 14 December 2006, *Application no. 10520/02*, *Verlagsgruppe News GmbH v. Austria.*

and the nature and subject matter of the article at issue (Did the article report on a matter of public interest?). The court concluded that there is very little scope for an absolute prohibition to publish a public person's picture in an article contributing to the public debate and that in the present case the interference of Austrian authorities was not proportionate to the legitimate aim pursued.

In regard to the substance of information that the public has the right to receive, it shall be noted that as early as in the case *Handyside v. the United Kingdom*[15] the Court stated that freedom of expression is applicable not only to information or ideas that are favourably received or regarded as a matter of indifference, but also those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness, without which there is no democratic society. Accordingly, in the judgment in the case *Sener v. Turkey*[16] the Court observed that sufficient weight needs to be given to the public's right to be informed of a different perspective, irrespective of how unpalatable that different perspective may be for the domestic authorities. Also a systematic censorship of school-books constituted, in the Courts view in the case *Cyprus v. Turkey*[17], a denial of the right to freedom of information.

Finally, although there is no doubt that, as the Court observed in the case *Erdoğdu v. Turkey*[18], freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political readers, it is essentially just that – the means to the realization of the right of the public to be properly informed (the public interest in freedom of expression) and ensuring the proper functioning democracy.

15 Judgment of the European Court of Human Rights 7 December 1976, *Application no. 5493/72, Handyside v. the United Kingdom*

16 Judgment of the European Court of Human Rights 18 July 2000, *Application no. 26680/95*, *Sener v. Turkey.*

17 Judgment of the European Court of Human Rights 10 May 2001, *Application nr 25781/94*, *Cyprus v. Turkey.*

18 Judgment of the European Court of Human Rights 15 June 2000, *Application nr 28723/94*, *Erdoğdu v. Turkey v. Turkey*