



# UNDER THE ECHR

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# THE FREEDOM OF EXPRESSION UNDER THE ECHR

## PLAN:

### 1. Introduction

### 2. Art. 10 ECHR

- general considerations
- the principle of protection
- the structure
- the right to freedom of expression
- the duties
- the system of restrictions

### 3. An example: freedom of expression, press and reputation

# 1. THE NATIONAL LEVEL(S)

1. protection in almost all European countries;

2. general principle associated with citizens' rights;

3. possibility to have and express opinions;

4. clear distinction between freedom of expression and freedom of the press (traditionally associated with the printed press) ?

5. general need to balance freedom of expression with other rights

# 1. INTRODUCTION: THE CONVENTIONAL BACKGROUND

The Convention for  
the Protection of  
Human Rights and  
Fundamental  
Freedoms (ECHR)

\* self-executing  
international treaty

\* integration

\* binding effect

\* individuals: derive  
rights / invocability

\* priority:  
conventional text and  
jurisprudence

\* living instrument

\* subsidiarity

\* the margin of  
appreciation.

# 1. A COMPARISON

## **ECHR, art. 10**

**1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.** This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary

## **CFREU, art. 11**

**1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.**

2. The freedom and pluralism of the media shall be respected.

# CONVENTION OR CHARTER (ECHR / CFREU) ?

## Links:

<https://www.echr.coe.int/Pages/home.aspx?p=press/factsheets&c=>

[https://www.echr.coe.int/Documents/Guide Art 10 ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_10_ENG.pdf)

<https://fra.europa.eu/en/eu-charter/article/11-freedom-expression-and-information>

## Issues:

Scope

Level of protection



# 1. INTRODUCTION: THE CONVENTIONAL BACKGROUND

## *Article 51 CFREU - Field of application*

1. **The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.**

! national legislation implementing EU law; national legislation interfering with EU law; national authorities enforcing EU law

## *Article 52 CFREU Scope and interpretation of rights and principles*

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, **the meaning and scope of those rights shall be the same as those laid down by the said Convention.** This provision shall not prevent Union law providing more extensive protection.

### **Consistent interpretation, minimum standard**

**! Freedom of expression in the EU is nowadays protected also at a secondary law level through recent directives, Council decisions and resolutions on specific matters as broadcasting, licensing or internet (Audiovisual media service Directive 2010/13/EC, General Data Protection Regulation n. 2016/679, Council Decision 2006/515/EC promoting cultural diversity and expression)**

(ECHR / CFREU) ?

1. Member States X claims to enforce Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and restricts Mr. X's right to distribute information and content via internet. Can Mr. X complain against the national act restricting his right ?

2. Mr. Y is a policeman in Member State X. He gets fired for having disclosed classified information. He pretends to have exercised his right to impart information and claims that art. 11 of the Charter has thus been breached. Advise.

## 2. ART. 10 ECHR: GENERAL CONSIDERATIONS

right in itself / right indispensable for the exercise of other rights /  
right potentially prejudicial to the exercise of other rights;

individual right / convivial right;

democratic right by excellence;

tight connection between freedom of expression and democracy;

liberal conception



## 2. ART. 10 ECHR: THE PRINCIPLE OF PROTECTION

1. broad protection;

2. any expression, with  
few content-based  
restrictions;

3. limits imposed by  
art. 17 ECHR  
(prohibition of the  
abuse of rights);

4. states must justify  
any interference in  
any kind of expression  
(negative / positive  
obligations)

## 2. ART. 10 ECHR: THE PRINCIPLE OF PROTECTION



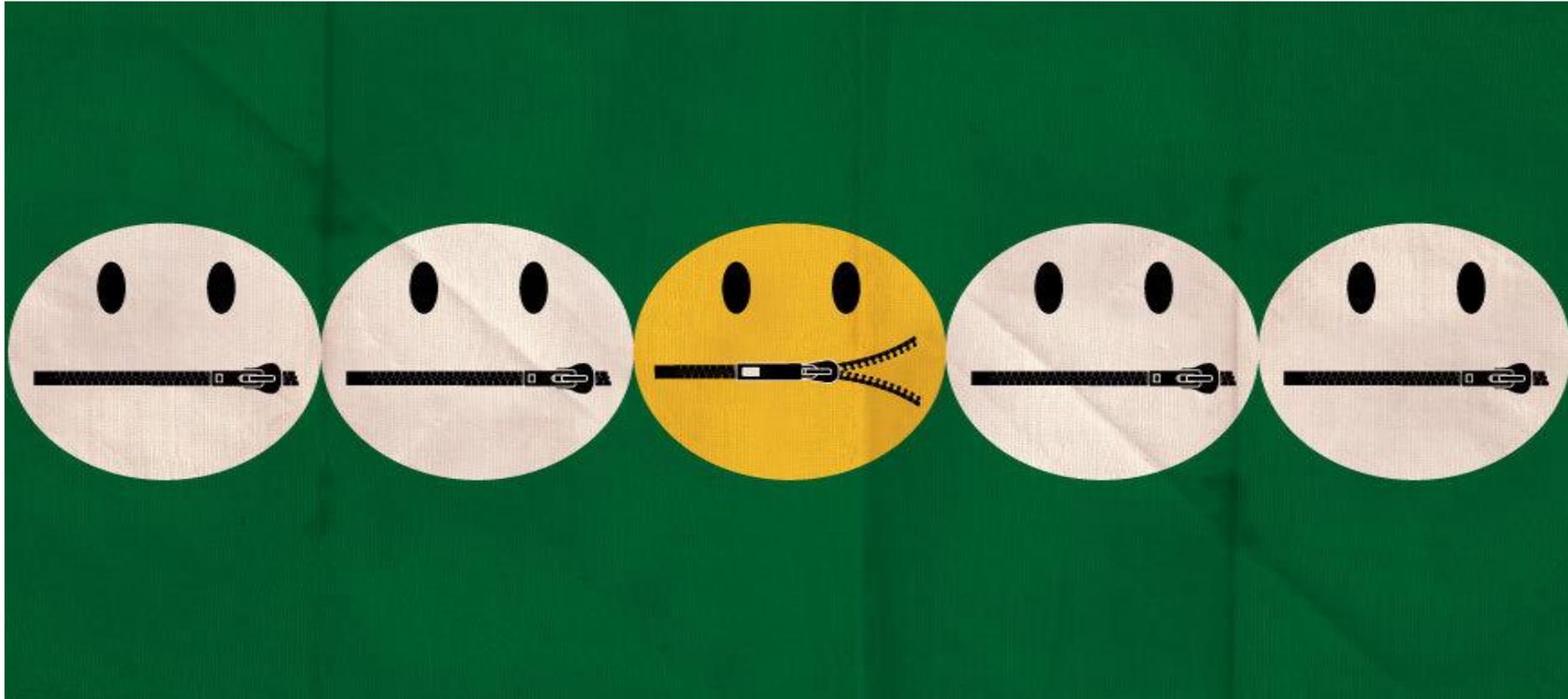
negative / positive obligations; material (substantial) / procedural obligations; vertical / horizontal effect

Article 10 ECHR: also a horizontal effect

The positive obligations of the States

- **The right to freedom of expression/information applies horizontally**, to the relations between individuals (e.g. employee / private employer, landlord / tenant, student / professor in private school);
- **The States have a positive obligation to protect the individuals against all interference in their freedom of expression, even from other private individuals;**
- **The States must therefore put into practice a system of adequate procedural guarantees:**
  - *Ozgür Gundem v Turkey*: national authorities to take appropriate measures to inquire and protect in case of repeated acts of violence against a journalist;
  - *VGT Verein Gegen Tierfabriken*: the state's responsibility may be at stake if national law allows for the violation of the freedom of expression (even by a private company).

## 2. ART. 10 ECHR: THE STRUCTURE



2 paragraphs:

§ 1: defines the freedoms protected;

§ 2: stipulates the circumstances in which a state may legitimately interfere with the exercise of the freedom of expression.

## 2. RIGHT TO FREEDOM OF EXPRESSION: COMPONENTS; TYPES OF PROTECTED SPEECH; TYPES OF UNPROTECTED SPEECH

### COMPONENTS:

- FREEDOM TO HOLD OPINIONS
- FREEDOM TO IMPART INFORMATION AND IDEAS
- FREEDOM TO RECEIVE INFORMATION AND IDEAS

! ACCESS TO INFORMATION: recent broader interpretation of the notion of “freedom to receive information” covering a right of access to information (*Roșianu v. Romania*).

# QUIZ

*Which of these situations do you think that are covered by art. 10?*

The dismissal of a civil servant or a State official on political grounds

The applicants' dismissal from their positions as, respectively, a tax inspector and a prosecutor, following the application to them of special domestic legislation which imposed screening measures on the basis of their former employment with the KGB

The successful measures taken by the prison administration to prevent a serial killer from publishing his autobiography

An applicant who claimed never to have made the remarks attributed to him

The right to vote in elections or referendum



## 2. TYPES OF PROTECTED SPEECH

- ❖ words, written or spoken, pictures, images, actions, cultural heritage, display and use of different symbols;
- ❖ substance / form;
- ❖ not only the positive, favorable or indifferent information, but also the one that shocks, hurts or worries;
- ❖ primary information and processed information;
- ❖ political discourse: reinforced protection;
- ❖ satirical expression: special protection;
- ❖ other discourses covered: the lawyer's exercise of defense rights, the academic discourse; the research of the historical truth [cf. the right to vote].
- ❖ the negative freedom of expression
  - (*K. v. Austria*)



## 2. TYPES OF UNPROTECTED SPEECH

### INCITEMENT TO VIOLENCE

- an intentional and direct use of wording to incite violence and real possibility that violence occur
- (*Leroy v. France*: “We have all dreamt of it ... Hamas did it”)

### HOLOCAUST DENIAL AND REFERENCES TO NAZI IDEOLOGY

- (*D.I. v. Germany*: the gas chambers in Auschwitz were fakes built in the first post-war days paid by the German tax payers)



## 2. TYPES OF UNPROTECTED SPEECH

### HATE SPEECH AND RACISM

directed towards different minorities:  
*Norwood v. United Kingdom*: “Islam out of Britain – Protect the British people”

- **!** the difficulty of drawing the boundary between an expression that may “offend, shock or disturb”, which is protected under art 10 ECHR, and hate speech.
- ECtHR: a set of identification criteria that qualify hate speech: the context and the intention of the speech, the status of the perpetrator, the form and impact of the speech;



## 2. HATE SPEECH AND RACISM

**broader approach:** analyses the facts of the case under Art. 17 ECHR;

- *M'Bala M'Bala v. France*: the conviction of Dieudonné M'Bala M'Bala for his show in Paris for public insults directed at persons of Jewish origin or faith).
- The ECtHR affirmed that the factual circumstances could not allow to qualify the show as satirical or provocative, but rather “demonstration of hatred and anti-Semitism with support for Holocaust denial”.
- the applicant had sought to deflect Article 17 from its real purpose by using his right to freedom of expression for ends which were incompatible with the letter and spirit of the Convention. The claim is inadmissible according to art 17 ECHR prohibiting the abuse of rights.

**narrower approach:** analyses the facts of the case through the lenses of Art 10 (2) ECHR, evaluating the restrictions imposed - a detailed balancing exercise between freedom of expression and the legitimate objectives that could lead to its limitations;



## 2. HATE SPEECH AND RACISM

*Féret v Belgium*: a Belgian member of Parliament and chairman of the political party Front National, who distributed during the election campaign leaflets that, according to Belgian courts, could amount to incitement to racial discrimination. The ECtHR did not find any violation of art 10 ECHR as the limitations imposed by Belgian law were justified by the interests of preventing disorder given that the resonance of political slogans during electoral context are higher.

## 2. NUANCES



### HATE SPEECH AND RACISM

- *Féret v Belgium*: a Belgian member of Parliament and chairman of the political party Front National, who distributed during the election campaign **leaflets** that, according to Belgian courts, **could amount to incitement to racial discrimination**. The ECtHR did not find any violation of art 10 ECHR as the limitation imposed by Belgian law were justified by the **interests of preventing disorder given that the resonance of political slogans during electoral context are higher**.
- *Jersild v Denmark*: A journalist was convicted for a documentary including a footage dedicated to a racist group active in Denmark. Such conviction, according to the ECtHR, was in violation of art 10 ECHR as **the behavior of the journalist could not be qualified as aimed at propagating racist views and ideas, but at informing the public about a social issue**.

## 2. ART. 10 ECHR: THE DUTIES

“The exercise of these freedoms, since it carries with it duties and responsibilities ...”

may be subject to restrictions

Idea unique in the ECHR

HOWEVER

Not a separate circumstance automatically limiting the freedom of expression of individuals belonging to certain categories that carry with them duties and responsibilities

**evolution** (**conservative approach**, giving states strong powers vs. **a more liberal one**, where states enjoy less discretion)

**Engel and Others v. the Netherlands:** a ban on soldiers' publication and distribution of a paper criticising some senior officers was found by the Court to be a justified interference with the freedom of expression. However, the Court also held that “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.”

**Rommelfanger v. the Federal Republic of Germany:** states have the positive duty to ensure that the exercise of **the freedom of expression by a civil servant is not subject to restrictions which would affect the substance of this right.**

**Present orientation:** any national laws or other regulations imposing **absolute and unlimited loyalty or confidentiality restrictions** on particular categories of **civil servants (e.g. those employed by the intelligence services, army, members of the judiciary,** would violate Article 10.

Such restrictions may be adopted by the member states only where they do not have a general character, but are limited to particular categories of information whose secrecy must be examined periodically, to specific categories of civil servants or only to some individuals belonging to such categories, and where they are temporary.

## 2. ART. 10 ECHR: THE SYSTEM OF RESTRICTIONS

2. **The exercise of these freedoms**, since it carries with it duties and responsibilities, **may be subject to** such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

1. **“The exercise of these freedoms ... may be subject to”**

Any form of interference with the freedom of expression may only be applied to **a particular** exercise of this freedom.

2. **The core of the right to freedom of expression may never be touched**

3. **Public authorities have only the possibility and not the obligation** to order and/or enforce a restrictive or punitive measure in respect of the exercise of the right to freedom of expression.

4. **The legal standard: in any borderline case, the freedom of the individual must be favourably balanced against state’s claim of overriding interest** (*The Sunday Times v. The United Kingdom*).

## 2. ART. 10 ECHR: THE SYSTEM OF RESTRICTIONS

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such **formalities, conditions, restrictions or penalties** as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

### 2. The interference: “formalities, conditions, restrictions or penalties”

**State’s interference: any form of interference** coming from any authority exercising public power and duties or being in the public service, such as courts, prosecutors’ offices, police, any law enforcement body, intelligence services, central or local councils, governmental departments, army’s decision-making bodies, or public professional structures ...

- e.g. criminal conviction (a fine or imprisonment), an order to pay civil damages, prohibition of publication or of publication of one’s picture in the newspaper, confiscation of publications or of any other means through which an opinion is being expressed or information transmitted, refusal to grant a broadcasting license, prohibition to exercise the journalistic profession, a disciplinary penalty, a court’s or other authority’s order to reveal journalistic sources and/or sanctioning for not doing so

**Test: The Court examines and decides in each particular case whether interference exists, looking at the restrictive impact on the exercise of the right to freedom of expression of the specific measure adopted by the national authorities**

## **2. ART. 10 ECHR: THE SYSTEM OF RESTRICTIONS**

### THE THREE-PART TEST

\* Also used in cases concerning  
Art. 8, 9, 11

### **3. The three-part test**

**The interference is prescribed by law**

**The interference pursues a legitimate aim**

**The interference is necessary in a  
democratic society**

# 2. ART. 10 ECHR: THE SYSTEM OF RESTRICTIONS

## THE THREE-PART TEST

### 1. IS THE INTERFERENCE PRESCRIBED BY LAW?

#### Any interference must rely on national legal provisions:

- a written and public law adopted by the national parliament;
- the law has to be public, accessible, predictable and foreseeable:

cf. **Petra v. Romania**: “the domestic provisions applicable to the monitoring of prisoners’ correspondence ... leave the national authorities too much latitude [and] did not satisfy the requirement of accessibility. [...] The Romanian law did not indicate with reasonable clarity the scope and manner of exercise of the discretion conferred on the public authorities”;

cf. **Gaweda v. Poland**: a law which gives the courts the power to deny registration of publications if those were *in conflict with reality* is not formulated with sufficient precision to enable the applicant to regulate his conduct

# 2. ART. 10 ECHR: THE SYSTEM OF RESTRICTIONS

## THE THREE-PART TEST

### 2. DOES THE INTERFERENCE PURSUE A LEGITIMATE AIM?

**Exhaustive list of the possible grounds for restricting freedom of expression**

**Test** – so as to lawfully enforce a legal provision which would in any way interfere with the freedom of expression:

1. identify the value or interest protected by the provision;
2. check if that value or interest (that must be real and not a mere and uncertain possibility) is among those enumerated by Art. 10 § 2.

A civil claim against a journalist accused of damaging one's reputation	National security
The seizure of an obscene book	Reputation or rights of others
An injunction against a newspaper for publishing classified info	Morals

## 2. ART. 10 ECHR: THE SYSTEM OF RESTRICTIONS



THE THREE-PART TEST

3. THE INTERFERENCE IS NECESSARY IN A DEMOCRATIC SOCIETY

THE TEST OF PROPORTIONALITY:

**Was the aim proportional to the means used to reach that aim?**

“**Aim**” = refers to the values mentioned in Art. 10 § 2

“**Means**” = refers to the interference

“**Necessary in a democratic society**” = equates with “satisfying a pressing social need” / “proportional”

The proportionality test must consider the appropriateness of the measure to achieve its stated aim and if less intrusive measures exist.

## 2. ART. 10 ECHR: THE SYSTEM OF RESTRICTIONS

THE THREE-PART TEST

### 3. IS THE INTERFERENCE IS NECESSARY IN A DEMOCRATIC SOCIETY?

SUBSIDIARITY AND MARGIN OF  
APPRECIATION

- the first to assess the existence of a pressing social need are the national courts;
- the ECtHR is empowered to give the final ruling on whether a restriction is reconcilable with the freedom of expression as protected by Art. 10;
- a “margin of appreciation” is recognised to the States vis-à-vis the assessment of a restriction to the freedom. Through the margin of appreciation, the ECtHR manages the difference between the signatories States. This margin is **wider** in areas involving **moral** choices, and **narrower** in others such as **political speech or criticism of the judiciary**.

**! European standards offer freedom of expression a higher level of protection than national law and case law**

# QUIZ

Under Article 10 of the Convention, the High Contracting Parties have a certain margin of appreciation in assessing whether and to what extent an interference with the right to freedom of expression is necessary.

While the Contracting States have a certain margin of appreciation in assessing whether a pressing need exists, where freedom of the press is at stake this margin of appreciation is in principle restricted.

The Court has regard to whether there exists a European consensus when examining the national margin of appreciation in respect of the justification for general measures.

### 3. FREEDOM OF EXPRESSION AND PRESS

“  
high level of protection  
afforded to the freedom of  
expression, in particular  
towards the press, despite the  
fact that Art. 10 does not  
explicitly mention the  
freedom of the press.”



# THE PRESS AS PUBLIC WATCH DOG: *LINGENS V. AUSTRIA* (FREEDOM OF THE PRESS BALANCED AGAINST THE RIGHT TO REPUTATION)

In October 1975, following general elections in Austria, **Mr Lingens published two articles criticizing the Austrian Federal Chancellor, Mr Bruno Kreisky, who had won the elections.** The criticism focused on a **political move of the chancellor, who had announced a coalition with a party led by a person with a Nazi background,** and on the chancellor's systematic efforts to sustain former Nazis politically. The chancellor's behaviour was characterised as **"immoral", "undignified", and proving "the basest opportunism"**. Following a private prosecution brought by the chancellor, the Austrian courts found **these statements to be insulting** and sentenced the journalist to a **fine**. The national courts also found that the journalist **could not prove the truth of his allegation of "basest opportunism"**.

Before the Strasbourg Court, the Austrian Government claimed that the applicant's conviction was aimed at protecting the chancellor's reputation.



**THE PRESS AS PUBLIC WATCH DOG: *LINGENS V. AUSTRIA*  
(FREEDOM OF THE PRESS BALANCED AGAINST THE RIGHT TO  
REPUTATION)  
WAS THE INTERFERENCE NECESSARY IN A DEMOCRATIC SOCIETY?**

**Politicians must show greater tolerance of criticism by the media:**

“freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention. The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance”.

**The Court did not exclude the protection of politicians' reputation, but**

“in such cases the requirements of such protection have **to be weighed in relation to the interests of open discussion of political issues**”.

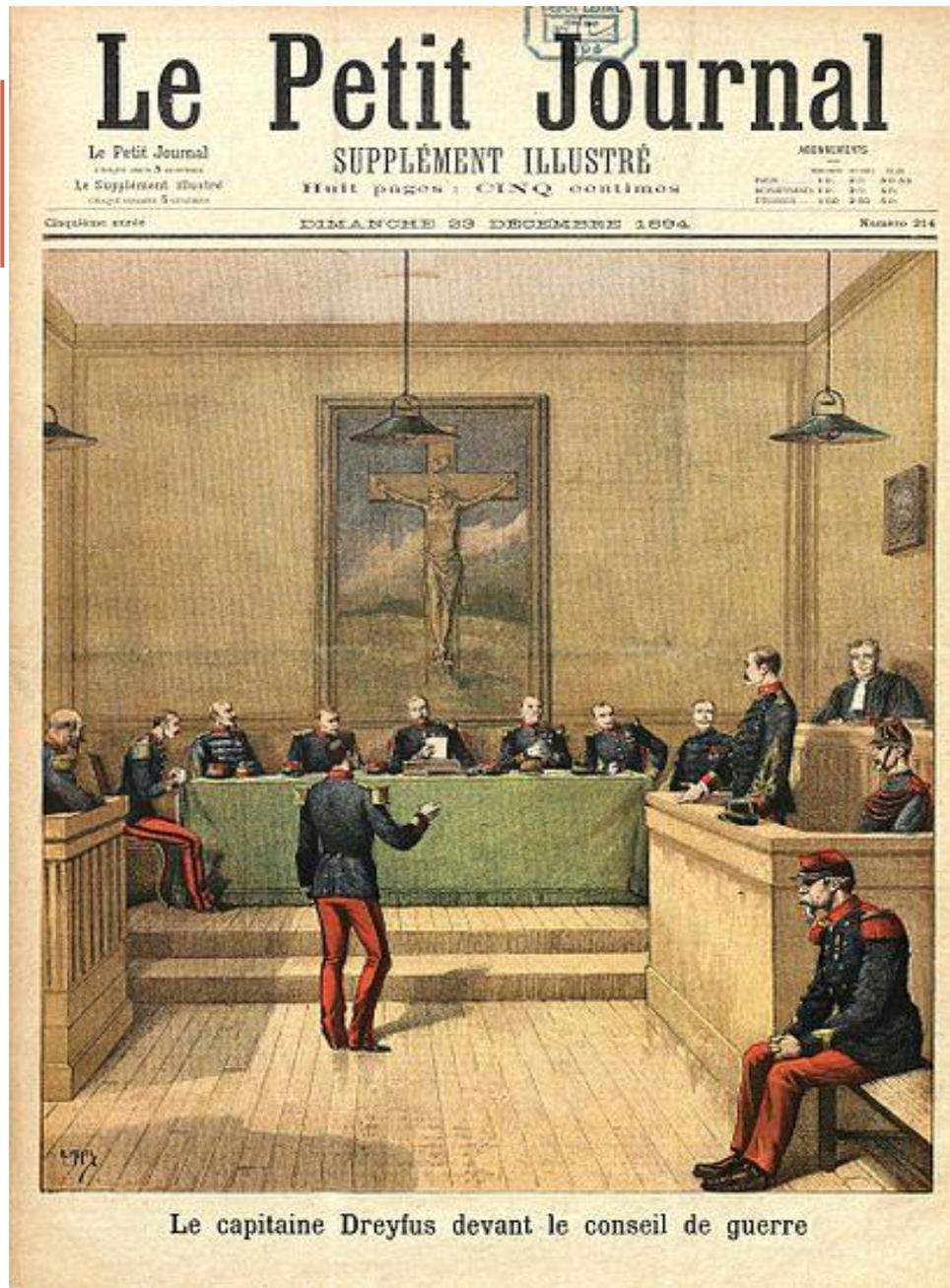
**THE PRESS AS PUBLIC WATCH DOG: *LINGENS V. AUSTRIA*  
(FREEDOM OF THE PRESS BALANCED A  
GAINST THE RIGHT TO REPUTATION)  
WAS THE INTERFERENCE NECESSARY IN A DEMOCRATIC SOCIETY?**

**The impact of the applicant's conviction upon the freedom of the press is relevant:**

[a]s the Government pointed out, the disputed articles had at the time already been widely disseminated, so that although the penalty imposed on the author did not strictly speaking prevent him from expressing himself, it nonetheless amounted to a kind of censure, which would be likely to discourage him from making criticisms of that kind again in future ... **In the context of political debate such a sentence would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, a sanction such as this is liable to hamper the press in performing its task as purveyor of information and public watchdog.**

**\* strong protection where matters of public interest are debated: e.g. problems in local community, functioning of a school, environment**

**\*\* value judgments must not be subject to any proof requirement; an element of the freedom of press is the publication of rumours and allegations that journalists are not able to prove**



## FREEDOM OF EXPRESSION AND REPUTATION

“legitimate aim” of protecting the “reputation and rights of others”

- the “legitimate aim” most frequently used by national authorities to restrict freedom of expression;
- often invoked to protect politicians and civil servants against criticism;
- language: severe and harsh criticism, as well as colourful expressions, are accepted, as they draw attention to the issues under debate;
- distinction between facts and opinions, but the value judgments must have a sufficient factual basis;

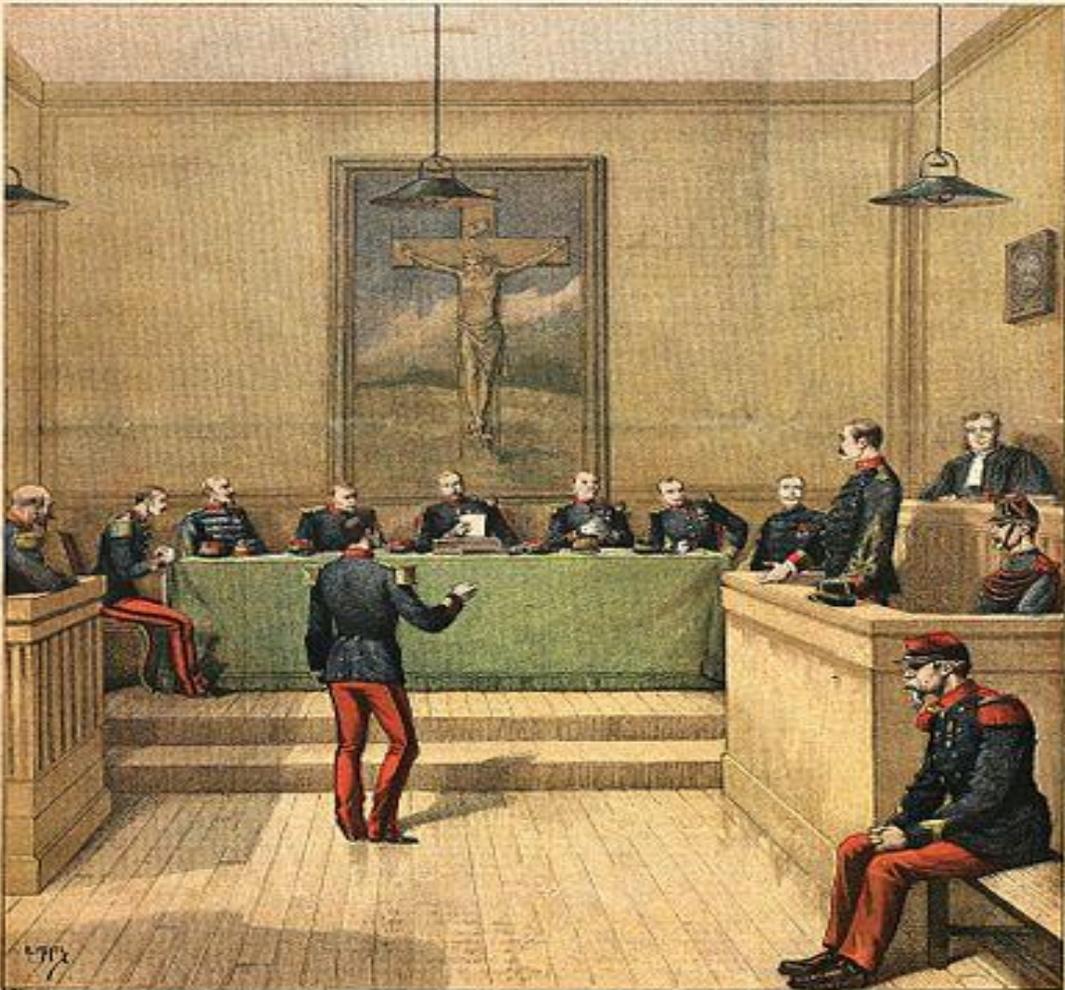
# Le Petit Journal

Le Petit Journal  
1880-1881  
Le Supplément Illustré  
Chaque semaine 5 centimes

SUPPLÉMENT ILLUSTRÉ  
Huit pages: CINQ centimes

AGENCE  
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BOULVARD DES FILLES-DU-CALVAIRE  
N° 100

Dimanche 29 Décembre 1894



Le capitaine Dreyfus devant le conseil de guerre

## FREEDOM OF EXPRESSION AND REPUTATION

- **freedom of expression balanced against private life:** *Axel Springer AG v. Germany* (criteria: the contribution to a debate of general interest; how well-known the person being reported on is and the subject of the report; the person's prior conduct; the method used to obtain the information; the veracity, content, form and repercussions of the report; the penalty imposed);
- **proportionality and sanctions**

# FREEDOM OF EXPRESSION. LEVEL OF PROTECTION

