

On “Balancing” and “Social Watchdogs”

SEVEN

The European Court of Human Rights as a Norm Entrepreneur for Freedom of Expression

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The European Court of Human Rights (ECtHR, or the “Strasbourg Court”) has significantly contributed to the development of European standards related to freedom of expression and information, and to the domestication and internalization of these standards by national actors and institutions—to the emergence of international norms. To explain the ECtHR’s contribution, this chapter adopts Martha Finnemore’s and Kathryn Sikkink’s three-stage process of a norm’s “life cycle”: norm emergence through a norm entrepreneur, followed by a norm cascade and norm internalization.¹

THE EUROPEAN COURT OF HUMAN RIGHTS AS A NORM ENTREPRENEUR

Finnemore and Sikkink might not have envisaged the ECtHR as a norm entrepreneur within the meaning of their theoretical framework, which largely refers to private actors and organizations of civil society.² This concept typically would apply to nongovernmental organizations that frequently submit substantial third-party interventions to the court.³ However, the court cannot be compared

with a domestic legislator or adjudicator as a mere addressee, or recipient, of norm entrepreneurship, either. In the inchoate post-Westphalian network of states and nonstate entities, national and international law, as well as “hard law” and “soft law,” the ECtHR can best be described as a “transnational” court, without which norms may not have regionalized on pan-European level.⁴ As such, the ECtHR infers norms in the form of rules and principles based on the human rights codified in the European Convention on Human Rights (ECHR) and on the rights entrusted to the court’s supervision.⁵ Particularly relevant for the purposes of this chapter is ECHR Article 10, which protects freedom of expression.

However, the Strasbourg Court’s norms on freedom of expression cannot be fully understood without knowing the limits of the court’s norm entrepreneurship. It is inherent in international human rights conventions that they are subsidiary to the national protection of human rights.⁶ The ECHR is no exception. Article 35(1) provides that the Strasbourg Court may only deal with an application after all domestic remedies have been exhausted. In other words, the convention states are initially responsible for securing human rights. The court’s task is thus not to take the place of the national authorities but rather to *review*, under the ECHR, the decisions they have rendered.⁷

As an international court, the Strasbourg Court grants a certain margin of appreciation to the domestic authorities. This is because the domestic authorities might be in a better position to assess the factual circumstances of a case (for example, if they conclude that a particular expression threatens national security)⁸ or to make normative evaluations concerning issues that require knowledge of local sensitivities (for example, where “morals,”⁹ the right to respect for private life¹⁰ or “religious feelings”¹¹ of members of a particular community are at stake). Unfortunately, the Strasbourg Court’s case law on the breadth of the margin of appreciation is not always consistent.¹² In any case, even where states enjoy a margin of appreciation, the exercise of their discretion goes hand in hand with the court’s supervision.¹³ In particular, the margin of appreciation is limited where restrictions on speech relating to a matter of public concern are at issue.¹⁴

The more this margin of appreciation is limited, the stricter the scrutiny the ECtHR applies with regard to the legal and factual circumstances of an application. A narrow margin of appreciation therefore leads to a higher degree of harmonization of norms on a pan-European level; a broad margin of appreciation maintains fragmentation of norms. The margin of appreciation is thus not only the determining factor for the Strasbourg Court’s norm entrepreneurship within the theoretical framework of Finnemore and Sikkink but also the

fulcrum for the difference between universalism and pluralism of human rights protection in Europe.

REGIONAL NORMS ON FREEDOM OF EXPRESSION

The regional norms enacted by the ECtHR concern the theoretical foundation, the “balancing” methodology, and the doctrine of freedom of expression.

Theory

In the seminal decision *Handyside v. United Kingdom*, the ECtHR established, and has since reiterated: “Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to [ECHR Article 10(2)], it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society.’”¹⁵

In cases following *Handyside*, the court replaced the term “development of every man” with “each individual’s self-fulfilment.”¹⁶ The Strasbourg Court has thus positioned its freedom of expression theory¹⁷ on both the consequentialist argument from democracy¹⁸ and the liberal argument from individual autonomy and self-fulfillment.¹⁹ In the court’s jurisprudence, the argument from democracy becomes most visible in cases involving criticism of public figures and other contributions to matters of public importance (as will be evident in the section on doctrine).

Methodology

Once the Strasbourg Court has established that there has been an interference with freedom of expression, the court “balances” freedom of expression with conflicting rights and interests on an ad hoc basis. According to Article 10(2) of the ECHR, interferences with freedom of expression are allowed if such limitations are prescribed by law (principle of legality), pursue a legitimate aim (principle of legitimacy), and are necessary in pursuit of this aim (principle of proportionality). In particular, where conflicting human rights are at stake, such as freedom of expression and the right to respect for private life, the

Strasbourg Court does not afford dominance to freedom of expression but treats it as a right with value equal to the human rights of others.²⁰

Doctrine

Most important for legal practice are the contributions of the Strasbourg Court to the development of substantive pan-European freedom of expression norms. A few non-exhaustive examples should be highlighted here, distinguished as the scope and content of freedom of expression, on the one hand, and the limits thereof, on the other hand.

First, the ECtHR regularly emphasizes the importance of contributions on matters of public concern to a democratic society. The more a publication pertains to a matter of public concern, the stronger the protection it deserves in the balancing exercise. Although the Strasbourg Court has never expressly defined what “public interest” actually is, its case law provides a broad range of precedents. It involves not only speech on political matters²¹ and matters of public administration,²² but also, for example, on businesses,²³ criminal offenses and their prosecution,²⁴ the protection of animals,²⁵ historical debates,²⁶ and sports-related issues.²⁷

The ECtHR has also significantly contributed to pan-European standards on the right of access to information, although such a right is not expressly included in ECHR Article 10. To be sure, the court is still reluctant to conceptualize freedom of information as an intrinsic right, that is, as a right of access to information to be granted without the applicant having to demonstrate a particular interest in, or purpose of doing something with, the information that is requested.²⁸ This is different in the European Union, where Article 42 of the EU Charter of Fundamental Rights and—with some reservations—Article 15(3) of the Treaty on the Functioning of the European Union grant such an unconditional right.

However, after some evolutionary steps,²⁹ the Grand Chamber clarified the court’s principles of access to information in the 2016 decision *Magyar Helsinki Bizottság v. Hungary*. Accordingly, ECHR Article 10 does not, in principle, “confer on the individual a right of access to information held by a public authority nor oblige the government to impart such information to the individual.” But such a right or obligation may arise, inter alia, “in circumstances where access to the information is instrumental for the individual’s exercise of his or her right to freedom of expression, in particular ‘the freedom to receive and impart information’ and where its denial constitutes an interference with that right.”³⁰ This is the case if the gathering of the information is a relevant

preparatory step for contribution to a public debate, the information itself is of public interest, and the applicant is a journalist or an organization contributing to the discussion of public affairs.³¹

This leads to another set of pan-European freedom of expression norms, namely those concerning the privileged protection of the journalistic media. The court regularly emphasizes that “although the press³² must not overstep certain bounds, regarding in particular protection of the reputation and rights of others, its duty is nevertheless to impart—in a manner consistent with its obligations and responsibilities—information and ideas on all matters of public interest. Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of ‘public watchdog.’”³³

Freedom of expression and media freedom are overlapping concepts, but they are not coextensive.³⁴ In subjective terms, freedom of expression applies to everyone, whereas media freedom only protects “the media” (as we will discuss later, in the “Outlook” section). In objective terms, media freedom affords particular privileges to the media that do not apply to freedom of expression in general: the media speech privilege and the protection of the media as an institution. The media speech privilege includes the idea that a person or institution, by virtue of being media and acting as media, is governed by a different set of factors concerning the intensity of protection when issuing a publication, compared to freedom of expression afforded to private individuals or to nonmedia entities. The fact that an impugned statement is “media speech,” rather than speech by any other individual or institution, adds to the burden of justifying its restrictions.³⁵

In addition, media freedom provides privileged protection to the media that goes beyond protection of media publications. This institutional protection of the media guarantees rights that are not directly related to the content of a publication or the way in which it is presented but are related to the media in its news gathering, editorial, or distribution processes, or even to the mere existence of an independent media. The institutional protection of the media includes, for example, the independence of public broadcasters,³⁶ the protection of journalistic research and investigation,³⁷ and the confidentiality of journalistic sources³⁸ and journalistic communication.³⁹

The media thus has a right to keep its sources confidential. But to what extent are the sources themselves protected, especially those who expose misconduct at their workplace? The court has already exercised considerable norm entrepreneurship on the protection of such whistle-blowers. Since its seminal 2008 decision in *Guja v. Moldova*, the court has established several factors to be

taken into account when balancing the interests of the public in receiving information, the whistle-blower's freedom of expression interest, and the public or private⁴⁰ employer's interest in keeping information confidential. These factors are the extent to which the information is of public concern; whether the whistle-blower was the only person, or part of a small group of people, who were aware of the occurrences at their workplace; whether any other effective means to remedy the wrongdoing was available to the whistle-blower; the accuracy of the information disclosed; whether the damage inflicted upon the employer's interest outweighs the interest of the public in having the information revealed; whether the sanction was proportionate; and the motive behind the actions of the reporting employee or civil servant.⁴¹

But the court's norm entrepreneurship is not limited to the content of freedom of expression; it necessarily includes norms on the limits thereof. This is the case, for example, with regard to "hate speech." The court regularly justifies prohibitions of attacks on the underlying values of the ECHR—equality, anti-discrimination, tolerance, and democracy—or even excludes such speech from ECHR Article 10 protection altogether by virtue of Article 17. Such attacks may consist of expressions of racism, anti-Semitism, or Islamophobia.⁴² This jurisprudence reflects the idea that free speech should not be granted to those who aim to eliminate the freedom of others. In short, intolerance should not be tolerated.⁴³

Related to this point is another pan-European norm established by the ECtHR that limits the exercise of freedom of expression: the court regularly finds laws prohibiting the denial of the Holocaust to be justified.⁴⁴ This doctrine is met with a refusal in U.S. scholarship, where robust skepticism about what is perceived as "governmentally declared truths" prevails.⁴⁵ However, according to the Strasbourg Court, the denial of the Holocaust is not only to be considered a negation of a clearly and legally established historical fact but also an incitement to hatred against the Jewish community, and it may thus legitimately be interfered with by virtue of the "rights of others" justification in ECHR Article 10(2).⁴⁶

Finally, the ECtHR has significantly contributed to European norms on the protection of privacy as a limit to freedom of expression. For the ECtHR, the fact that speech relates to a public figure is, as such, not sufficient to grant strong freedom of expression protection, because not all speech on public figures is necessarily speech on a matter of public concern. Since its seminal decision in *von Hannover v. Germany (no. 1)*,⁴⁷ involving tabloid reporting on the private life of the Princess of Monaco, the ECtHR has regularly expressed its repugnance for sensational and lurid news "intended to titillate and entertain, which

[is] aimed at satisfying the curiosity of a particular readership regarding aspects of a person’s strictly private life,” serving only to “entertain” and not to “educate.”⁴⁸

NORM CASCADE AND NORM INTERNALIZATION

According to Finnemore and Sikkink, a norm cascade occurs when norms reach a “tipping point,” or critical mass of state endorsements. This process can be followed by a norm internalization, in which norms “become so widely accepted that they are internalized by actors and achieve a ‘taken-for-granted’ quality that makes conformance with the norm almost automatic.”⁴⁹ The “cascading” and “internalization” of ECtHR norms is, in the first place, provided for in the ECHR itself. According to Article 46(1), the convention states “undertake to abide by the final judgment of the court in any case to which they are parties.” In the case of a violation of the ECHR, the court may afford just satisfaction to the injured party (Article 41). The judgment’s enforcement is supervised by the Committee of Ministers (Article 46[2]).

The cascading and internalization of the Strasbourg Court’s decisions is thus largely a top-down promulgation of norms, forcing the convention states to readjust their standards of balancing freedom of expression with conflicting rights. This has worked both ways: it has led partly to stronger freedom of expression protection and partly to stronger protection of conflicting rights, in particular the right to respect for private life, as detailed in Article 8, with its subcategories of privacy and reputation.⁵⁰

An example of stronger freedom of expression protection is the development of the “qualified privilege” defense in the English tort of defamation. Before 1999, a publisher who could not prove the truth of a defamatory statement had a qualified privilege defense only if they were under a public or private duty to report certain information to another individual who had a personal interest in the information concerned (the duty and interest test).⁵¹ This excluded statements that were made to the general public, such as by newspaper or broadcasting.⁵² In 1998, the British Parliament adopted the Human Rights Act (c42), incorporating into UK law the rights contained in the ECHR. In 1999, the House of Lords then issued the seminal decision in *Reynolds v. Times Newspapers*. In *Reynolds*, Lord Nicholls explained, “Freedom of expression will shortly be buttressed by statutory requirements. Under . . . the Human Rights Act 1998, expected to come into force in October 2000, the court is required, in relevant cases, to have particular regard to the importance of the right to freedom of expression. The common law is to be developed and applied in a manner

consistent with article 10 [of the ECHR], and the court must take into account relevant decisions of the [ECtHR].”⁵³ With a view to this “new legal landscape,” as Lord Steyn put it, Lord Nicholls established ten non-exhaustive criteria to balance freedom of expression with the right to respect for one’s reputation, including the extent to which the subject matter is a matter of public concern and the steps taken by the publisher to verify the information.⁵⁴

Although *Reynolds* was still a far cry from the robust free speech protection afforded by the U.S. Supreme Court in *New York Times Co. v. Sullivan*,⁵⁵ it significantly expanded the qualified privilege defense for the media against defamation claims,⁵⁶ thus expanding the media’s freedom of expression protection.⁵⁷ The internalization of ECtHR norms thus did occur both indirectly, through legislative changes, namely the adoption of the Human Rights Act 1998, and directly, through a national court adjusting its decisions. Although section 4 of the 2013 Defamation Act subsequently codified the qualified privilege defense and abolished the “*Reynolds* defense,” *Reynolds* will remain influential on the interpretation of section 4.⁵⁸

An example of stronger protection for rights conflicting with freedom of expression relates to the right to privacy. Before the enactment of the Human Rights Act 1998, English law lacked an express privacy tort. However, since 1998, English courts have significantly expanded the equitable claim for “breach of confidence” to accommodate the ECHR Article 8 right to respect for privacy, thus restricting the media’s right to report on the private lives of celebrities.⁵⁹ Similarly, the ECtHR’s *von Hannover (no. 1)* decision on privacy protection of public figures induced German courts to abandon the concept of a “public figure par excellence.” Just as with the *Reynolds* defense, the internalization of ECtHR norms took place through national courts adjusting their decisions.

But the court’s persuasive authority goes beyond the ECHR’s contracting states. Domestic supreme courts and international adjudicators are in a constant judicial dialogue when interpreting the provisions of the constitutions or human rights treaty they supervise. This dialogue includes informal personal interchanges, institutionalized discourses, and references in judicial decisions. Informal personal interchanges may take place in the academic sphere, for example, within the framework of conferences and guest lectureships, such as the Global Constitutionalism Seminar at Yale Law School. “Institutionalized discourses” involve public forums expressly dedicated to the exchange on constitutional and human rights-related matters. For example, the Council of Europe’s Venice Commission, which mainly consists of judges and academics, advises Council of Europe member states on democracy, human rights, and the rule of law.⁶⁰ An example of intercontinental judicial dialogue was the June 2016

workshop involving the ECtHR and the African Court on Human and Peoples’ Rights (ACtHPR).⁶¹

Such judicial dialogue eventually manifests itself in references in judicial decisions. For example, the Inter-American Court of Human Rights (IACtHR), when deciding on privacy issues or on conflicts between freedom of the media and religious freedom, regularly refers to the Strasbourg Court.⁶² In turn, the Inter-American Court’s approach to freedom of access to information seems to serve as a role model for the increasingly generous ECtHR case law on freedom of information.⁶³ The ACtHPR frequently refers to the ECtHR⁶⁴ and also to the IACtHR.⁶⁵

Finally, domestic supreme courts or constitutional courts also frequently refer to each other, including to the U.S. Supreme Court.⁶⁶ However, these references are not necessarily mutual, and often are one-sided. More recently established courts are more likely to refer to seasoned courts than vice versa. The reason for this is arguably that more traditional courts are often located in more maturely developed democracies, that they naturally possess a larger body of case law, and that they operate with more refined legal doctrines.⁶⁷ This would explain, for example, the early German Federal Constitutional Court references to the U.S. Supreme Court, the ACtHPR references to the IACtHR, and references by both the African Court and the Inter-American Court of Human Rights to the European Court.

Most significant, however, has been the introduction of human rights into the legal order of the European Union and its predecessors by the European Court of Justice (now known as the Court of Justice of the European Union, or the “Luxembourg Court”). When introducing human rights protection into the system of European economic integration, the Luxembourg Court has regularly referred to the ECHR and the case law of the ECtHR.⁶⁸ Long before the EU Charter of Fundamental Rights entered into force in 2007, the court developed case law on, for example, freedom of expression,⁶⁹ freedom of assembly,⁷⁰ freedom of the press,⁷¹ freedom of broadcasting,⁷² and media pluralism⁷³ by reference to ECHR Article 10 and/or the case law of the ECtHR. Regrettably, the Luxembourg Court’s human rights jurisprudence has never reached the analytical depths of the Strasbourg Court’s.⁷⁴

NORM “ANTIPRENEURS”

According to Alan Bloomfield, emerging norms may struggle to establish themselves due to the contestation, conflicts, or competition of “antipreneurs.”⁷⁵ This

phenomenon applies no less to the ECtHR than to the “classical” norm entrepreneurs as envisaged by Finnemore and Sikkink, albeit under different circumstances. The main antipreneurs against norms generated by the ECtHR are the convention states themselves. This seems to confirm the realist school of thought, according to which states’ material interests or “hard power” will determine whether norms emerge, are consolidated, and are internalized. However, one has to be careful to avoid an overly simplified dichotomy along the lines of “ECtHR versus convention states.” Instead, it is suggested that one should distinguish more carefully between an “internal contestation” and an “external contestation.”

An internal contestation is to be understood as a contestation, conflict, or competition within the system itself. Within the system of the norm entrepreneurship of the ECtHR, an internal contestation takes place, first, within the court proceedings. The convention states are the respondents to applications from people, organizations, or groups claiming to be the victim of a human rights violation. Within this system, the states inevitably struggle for the maintenance of the status quo, a finding of a nonviolation of human rights. But this does not mean that the states contest norm entrepreneurship of the ECtHR as such. On the contrary, in scenarios such as *von Hannover (no. 1)*, in which two conflicting human rights are at stake, the convention state even argues for the adoption of a norm in favor of the human right the convention state sees itself defending (in the *von Hannover* case, freedom of expression). If the Strasbourg Court decides against the state—that is, if it finds a human rights violation—the convention state has the right to ask for a referral to the Grand Chamber, just as the applicant would have if the court had found a nonviolation (ECHR Article 43). This contestation of the ECtHR’s norm entrepreneurship takes place within the system provided by the ECHR itself and thus should not give rise to any concerns.

Furthermore, even criticism following a final ECtHR decision should be regarded as internal contestation, if it remains within the boundaries of a reasonable public or academic debate. For example, the *von Hannover (no. 1)* decision and the subsequent abolition of the “public figure par excellence” in German legal doctrine have, to put it mildly, not been universally welcomed in German media law scholarship.⁷⁶ However, the obligation of Germany to implement the court’s decision has never been called into question. And even the announcement by domestic supreme courts of “red lines,” or core aspects of domestic public policy that have to be considered when implementing ECtHR decisions,⁷⁷ can be regarded as a judicial dialogue that operates within the system provided by the convention.

In contrast to an internal contestation, an external contestation of the ECtHR’s norm entrepreneurship puts the system as such into question. Clearly, such an external contestation has not yet taken place with regard to a norm related to freedom of expression, but it would not be inconceivable, either. Moreover, the external contestation of other norms may have a devastating effect on the cascade and internalization of freedom of expression–related norms as well, which is why a few non-exhaustive examples for external contestations shall be identified here.

An external contestation would be the refusal of a convention state to implement a decision of the ECtHR. For example, the execution of ECtHR judgments by states has reached an all-time low in recent decisions by the Russian Constitutional Court to refuse to implement ECtHR judgments found to be in violation of the Russian constitution.⁷⁸ Another external contestation consists of the announcement of measures that would openly contradict the convention. An example would be President Erdoğan’s vow to reinstate the death penalty in Turkey,⁷⁹ which would be incompatible with the convention.⁸⁰ The ultimate external contestation is the threat to withdraw from the convention altogether. Unfortunately, the United Kingdom itself, which ranks among its ancestry some of the greatest champions of liberty, frequently flirts with this option.⁸¹ Calls for withdrawal from the ECHR have been particularly vocal since the Strasbourg Court declared the blanket ban on British prisoners’ right to vote contrary to the ECHR,⁸² and following the court’s prohibition on deporting suspected terrorists to countries where they would face human rights violations.⁸³

These examples should not conceal the fact that convention states have largely been compliant with the court’s decisions, although the Strasbourg Court’s formal enforcement mechanisms—apart from expulsion from the Council of Europe—are limited.⁸⁴ However, the influence of the convention will ultimately depend on the convincing force of the ECtHR’s judgments, the political will within the convention states to implement them, and the extent to which the system of mutual respect and peer pressure makes convention states abide by the rules.

OUTLOOK

The Strasbourg Court’s “mission” as norm entrepreneur for freedom of expression is far from being accomplished, and it is unlikely that it ever will be. The Internet, in particular, has brought up new questions for which the court still has to develop principled answers. The following two questions are certainly

among those in which the ECtHR's norm entrepreneurship will be much in demand.

As has been demonstrated, the ECtHR grants privileged protection to the journalistic media. This raises the question as to what the "media" actually is. To what extent does this concept also encompass publishers who have not undertaken journalistic education and who are not affiliated to a news organization, such as bloggers? The Strasbourg Court has never provided a succinct definition of its notion of media. However, the court's more recent case law suggests a functional, rather than formal, understanding of media. The freedoms and privileges of the media do not apply only to professional journalists, as is suggested by the court's earlier case law and by Council of Europe documents.⁸⁵ Rather, the court's more recent decisions, including the judgment in *Magyar Helsinki Bizottság v. Hungary*, mentioned previously, indicate that the court extends the media's privileges, and also its enhanced duties and responsibilities, to anyone who regularly contributes to matters of public concern and abides by certain standards of conduct, such as nongovernmental organizations and other "social watchdogs."⁸⁶ However, a clarification of the court's principles in this regard, particularly with a view to the requirements that have to be fulfilled in order to qualify as a public or social watchdog, would be desirable.

Another challenge to the court's norm entrepreneurship concerns the liability of Internet intermediaries. Articles 12–15 of the EU's e-commerce directive provide certain immunities for Internet intermediaries—access providers and host providers—that merely disseminate third-party information. However, since the EU is not a member to the ECHR,⁸⁷ the Strasbourg Court may not scrutinize the correct interpretation of the e-commerce directive, but it may give a ruling on whether the outcome of a domestic court's application of those provisions was reconcilable with ECHR Article 10.

In *Delfi v. Estonia*, for instance, the court decided that a news portal may be held liable for readers' insulting contributions to its comments section. The court identified the following aspects as relevant for its analysis: the context of the comments, the liability of the actual authors of the comments, the measures applied by the applicant company to prevent or remove defamatory comments, and the consequences of the domestic proceedings for the applicant company.⁸⁸ Yet the Joint Concurring Opinion to *Delfi* remarked that the court "should have stated more clearly the underlying principles leading it to find no violation of [ECHR] Article 10," having left "the relevant principles to be developed more clearly in subsequent case law."⁸⁹ This is certainly true for the liability not only of news portals but also of online social media platforms in which people comment on topics that have not been brought up by the service provider (such as

Facebook, Twitter, and so forth).⁹⁰ Whichever path the Strasbourg Court takes, norm antipreneurship complaining about either “collateral censorship”⁹¹ or the lack of protection of personality rights online will be unavoidable.

NOTES

This contribution builds on, and further expands, ideas I developed in my book *Media Freedom as a Fundamental Right* (Cambridge: Cambridge University Press, 2015).

1. Martha Finnemore and Kathryn Sikkink, “International Norm Dynamics and Political Change,” *International Organization* 52, no. 4 (1998): 887–917, at 895.
2. Finnemore and Sikkink, “International Norm Dynamics,” 899–901.
3. According to the European Convention on Human Rights (ECHR), Article 36. As an example, see *Magyar Helsinki Bizottság v. Hungary* (2016), application no. 18030/11, para. 104–116.
4. See Jan Oster, *European and International Media Law* (Cambridge: Cambridge University Press, 2017), 20–22.
5. On the distinction between “rules” and “principles,” see Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), 22–31.
6. For further references, see Jan Oster, *Media Freedom as a Fundamental Right* (Cambridge: Cambridge University Press, 2015), 118.
7. *Handyside v. United Kingdom* (1976), application no. 5493/72, para. 49–50; *Sunday Times v. United Kingdom* (no. 1) (1979), application no. 6538/74, para. 59.
8. Compare *Sürek v. Turkey* (no. 1) (1999), application no. 26682/95, para. 61; *Şener v. Turkey* (2000), application no. 26680/95, para. 40; *Erdoğan v. Turkey* (2000), application no. 25723/94, para. 62.
9. *Handyside v. United Kingdom*, 48; *European Commission on Human Rights, Hoare v. United Kingdom* (1997), application no. 31211/96, para. 1.
10. *Mosley v. United Kingdom* (2011), application no. 48009/08, para. 108.
11. See, for instance, *Otto-Preminger-Institut v. Austria* (1994), application no. 13470/87, para. 50; *Wingrove v. United Kingdom* (1996), application no. 17419/90, para. 58; *İ.A. v. Turkey* (2005), application no. 42571/98, para. 25.
12. See Steven Greer, “‘Balancing’ and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate,” *Cambridge Law Journal* 63, no. 2 (2004): 412, 425; Helen Fenwick and Gavin Phillipson, *Media Freedom under the Human Rights Act* (Oxford: Oxford University Press, 2006), 82–86; Ignacio de la Rasilla del Moral, “The Increasingly Marginal Appreciation of the Margin-of-Appreciation Doctrine,” *German Law Journal* 6, no. 7 (2006): 611; Valya Filipova, “Standards of

- Protection of Freedom of Expression and the Margin of Appreciation in the Jurisprudence of the European Court of Human Rights,” *Coventry Law Journal* 17, no. 2 (2012): 64; and Oster, *Media Freedom as a Fundamental Right*, 119–123.
13. See, for example, *Éditions Plon v. France* (2004), application no. 58148/00, para. 42; *Egeland and Hanseid v. Norway* (2009), application no. 34438/04, para. 48.
 14. See, for instance, *Lingens v. Austria* (1986), application no. 9815/82; *Flux v. Moldova* (no. 1) (2006), application no. 28702/03, para. 32.
 15. *Handyside v. United Kingdom*, para. 49. This principle is reiterated in, among many other decisions, *Sunday Times v. United Kingdom* (no. 1), para. 65; *Lingens v. Austria*, para. 41; and *Axel Springer AG v. Germany* (no. 1) (2012), application no. 39954/08, para. 78.
 16. See, for instance, *Lindon, Otchakovsky-Laurens and July v. France* (2007), application nos. 21279/02 and 36448/02, para. 45; *Frankowicz v. Poland* (2008), application no. 53025/99, para. 38.
 17. See Oster, *Media Freedom as a Fundamental Right*, 13–23.
 18. See, in particular, Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (New York: Harper Brothers, 1948); Meiklejohn, “The First Amendment Is an Absolute,” *Supreme Court Review* (1961): 245; Robert H. Bork, “Neutral Principles and Some First Amendment Problems,” *Indiana Law Journal* 47, no. 1 (1971): 1; Cass R. Sunstein, “Free Speech Now,” *University of Chicago Law Review* 59 (1992): 255, 263; and James Weinstein, “Participatory Democracy as the Central Value of American Free Speech Doctrine,” *Virginia Law Review* 97, no. 3 (2011): 633.
 19. See Vincent Blasi, “The Checking Value in First Amendment Theory,” *American Bar Foundation Research Journal* (1977): 521, 545; C. Edwin Baker, “Scope of the First Amendment Freedom of Speech,” *UCLA Law Review* 25 (1978): 964, 996; Thomas M. Scanlon, “Freedom of Expression and Categories of Expression,” *University of Pittsburgh Law Review* 40 (1979): 519, 533; Martin H. Redish, “The Value of Free Speech,” *University of Pennsylvania Law Review* 130 (1982): 591, 593; Robert C. Post, “Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse,” *University of Colorado Law Review* 64 (1993): 1109; Vanessa Moore, “Free Speech and the Right to Self-Realization,” *UCL Jurisprudence Review* 12 (2005): 95; and C. Edwin Baker, “Autonomy and Hate Speech,” in *Extreme Speech and Democracy*, ed. Ivan Hare and James Weinstein (Oxford: Oxford University Press, 2009), 139.
 20. See *Hachette Filipacchi Associés (“Ici Paris”) v. France* (2009), application no. 12268/03, para. 41; *Mosley v. United Kingdom*, para. 111; and *Von Hannover v. Germany* (no. 2) (2012), application nos. 40660/08 and 60641/08, para. 106.
 21. See, for instance, *Lingens v. Austria* (1986), para. 42; *Feldek v. Slovakia* (2001), application no. 29032/95, para. 74; and *Gutiérrez Suárez v. Spain* (2010), application no. 16023/07, para. 26.

22. See, for example, *Thorgeir Thorgeirson v. Iceland* (1992), application no. 13778/88; *Nilsen and Johnsen v. Norway* (1999), application no. 23118/93, para. 44; and *Kasabova v. Bulgaria* (2011), application no. 22385/03, para. 56.
23. See, for example, *Steel and Morris v. United Kingdom* (2005), application no. 68416/01.
24. See, for instance, *White v. Sweden* (2006), application no. 42435/02, para. 29; and *Salumäki v. Finland* (2014), application no. 23605/09, para. 54.
25. See, for example, *Bladet Tromsø and Stensaas v. Norway* (1999), application no. 21980/93; *PETA Deutschland v. Germany* (2012), application no. 43481/09, para. 47; and *Animal Defenders International v. United Kingdom* (2013), application no. 48876/08, para. 102.
26. See, for example, *Feldek v. Slovakia*, para. 80; and *Karsai v. Hungary* (2009), application no. 5380/07, para. 35.
27. See, for example, *Société de Conception de Presse et d’Edition et Ponson v. France* (2009), application no. 26935/05, para. 55.
28. See Oster, *European and International Media Law*, 59–64.
29. See *Leander v. Sweden* (1987), application no. 9248/81; *Matky v. Czech Republic* (2006), application no. 19101/03; *Társaság a Szabadságjogokért v. Hungary* (2009), application no. 37374/05; *Youth Initiative for Human Rights v. Serbia* (2013), application no. 48135/06; and *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria* (2013), application no. 39534/07.
30. *Magyar Helsinki Bizottság v. Hungary* (2016), para. 156, 161, and 166.
31. *Magyar Helsinki Bizottság v. Hungary*, para. 158.
32. The court extends the protection afforded to the press to audiovisual media; see *Jersild v. Denmark* (1994), application no. 15890/89, para. 31; and *Radio France and others v. France* (2004), application no. 53984/00, para. 33.
33. *Axel Springer AG v. Germany* (no. 1), para. 79; *von Hannover v. Germany* (no. 2), para. 102. See also, for example, *Sunday Times v. United Kingdom* (no. 1), para. 65; *Bladet Tromsø and Stensaas v. Norway*, para. 62; and *Times Newspapers Ltd. v. United Kingdom* (nos. 1 and 2) (2009), application nos. 3002/03 and 23676/03, para. 40.
34. See Oster, *Media Freedom as a Fundamental Right*, 48.
35. Oster, *Media Freedom as a Fundamental Right*, 48–51.
36. See, for example, *Manole and others v. Moldova* (2009), application no. 13936/02, para. 98.
37. See, for example, *Cumpănă and Mazăre v. Romania* (2004), application no. 33348/96, para. 96; and *Dammann v. Switzerland* (2006), application no. 77551/01, para. 52.
38. See, for example, *Goodwin v. United Kingdom* (1996), application no. 17488/90, para. 39; and *Sanoma Uitgevers B.V. v. Netherlands* (2010), application no. 38224/03, para. 50.

39. See, for example, *Roemen and Schmit v. Luxembourg* (2003), application no. 51772/99, para. 57; and *Nagla v. Latvia* (2013), application no. 73469/10, para. 95.
40. See *Heinisch v. Germany* (2011), application no. 28274/08.
41. *Guja v. Moldova* (2008), application no. 14277/04. See also, for example, *Bucur and Toma v. Romania* (2013), application no. 40238/02, para. 101.
42. See, for example, *Norwood v. United Kingdom* (2004), application no. 23131/03, p. 4; *Pavel Ivanov v. Russia* (2004), application no. 35222/04, p. 4; *Nachova and others v. Bulgaria* (2005), application nos. 43577/98 and 43579/98, para. 145; *Timishev v. Russia* (2005), application nos. 55762/00 and 55974/00, para. 56; *Leroy v. France* (2009), application no. 36109/03, para. 27; and *Aksu v. Turkey* (2012), application nos. 4149/04 and 41029/04, para. 44.
43. See Karl Popper, *The Open Society and Its Enemies* (1945; repr. London: Routledge, 2002), chapter 7, note 4.
44. *Lehideux and Isorni v. France* (1998), application no. 55/1997/839/1045, para. 47; *Garaudy v. France* (2003), application no. 65831/01.
45. See, for example, Russell L. Weaver, Nicholas Delpierre, and Laurence Boissier, “Holocaust Denial and Governmentally Declared ‘Truth’: French and American Perspectives,” *Texas Tech University Law Review* 41 (2009): 495; and Steven G. Gey, “The First Amendment and the Dissemination of Socially Worthless Untruths,” *Florida State University Law Review* 36 (2008): 1. On the “distrust of government” as a free speech rationale, see Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge: Cambridge University Press, 1982), 81, 148, 162–163.
46. *Lehideux and Isorni v. France*, para. 47; *Garaudy v. France*.
47. *Von Hannover v. Germany* (no. 1) (2004), application no. 59320/00.
48. *Mosley v. United Kingdom* (2011), para. 114 and 131. See also, for example, *Hachette Filipacchi Associés (“Ici Paris”) v. France*, para. 40; *MGN Ltd. v. United Kingdom* (2011), application no. 39401/04, para. 143; *Alkaya v. Turkey* (2012), application no. 42811/06, para. 35.
49. Finnemore and Sikkink, “International Norm Dynamics,” 895, 901, 904.
50. On reputation as a subcategory of ECHR Article 8, see *Chauvy and others v. France* (2004), application no. 64915/01, para. 70; *Radio France and others v. France* (2004), application no. 53984/00, para. 31; and *Print Zeitungsverlag GmbH v. Austria* (2013), application no. 26547/07, para. 31.
51. *Toogood v. Spyring* [1834] 1 CR M & R 181. Also see, for instance, *Davies v. Snead* [1870] LR 5 QB 608; *Adam v. Ward* [1917] AC 309 (334); *Turner v. MGM* [1950] 1 All ER 449; *Blackshaw v. Lord* [1984] QB 1; and *Regan v. Taylor* [2000] 1 All ER 307.
52. See, for example, *London Artists v. Littler* [1968] 1 All ER 1075.
53. *Reynolds v. Times Newspapers Ltd.* [2001] 2 AC 127, 200.

54. Reynolds v. Times Newspapers Ltd., 205.
55. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
56. It has never been expressly clarified whether only the professional media or also private individuals may invoke the Reynolds defense. The explanatory notes to the Defamation Act 2013 (para. 33) now express that the public interest defense in section 4 shall also apply to private individuals. See also Hourani v. Thomson and others [2017] EWHC 432 (QB), para. 165.
57. See also Jameel v. Wall Street Journal Europe [2006] UKHL 44.
58. See, for example, Economou v. de Freitas [2016] EWHC 1853 (QB), para. 160; Alastair Mullis and Andrew Scott, “Worth the Candle? The Government’s Draft Defamation Bill,” *Journal of Media Law* 3 (2011): 1, 4–5; and Mullis and Scott, “Tilting at Windmills: The Defamation Act 2013,” *Modern Law Review* 77 (2014): 87, 90.
59. See Campbell v. MGN [2004] UKHL 22; and OBG Ltd. and others v. Allan and others [2007] UKHL 21.
60. Council of Europe, Venice Commission, <http://www.venice.coe.int>.
61. “European Court of Human Rights and African Court Start Week-Long Joint Workshop to Exchange Judicial Experiences in Arusha,” African Court of Human and People’s Rights, June 23, 2016, <http://en.african-court.org/index.php/news/press-releases/item/83-european-court-of-human-rights-and-african-court-start-week-long-joint-workshop-to-exchange-judicial-experiences-in-arusha>.
62. See, for example, Inter-American Court of Human Rights, “Advisory Opinion on Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism,” [1985] OC-5/85, para. 69; Ivcher-Bronstein v. Peru, [2001] Case 11.762, para. 152; Herrera-Ulloa v. Costa Rica, [2004] Case 12.367, para. 113 and 126; and Eduardo Andre Bertoni, “The Inter-American Court of Human Rights and the European Court of Human Rights: A Dialogue on Freedom of Expression Standards,” *European Human Rights Law Review* (2009): 332, 348–352.
63. See Magyar Helsinki Bizottság v. Hungary, para. 146, referring to the seminal Inter-American Court of Human Rights case on access to information, Claude Reyes et al. v. Chile, [2006] Case 12.108.
64. See, for example, African Court on Human and People’s Rights, Alex Thomas v. United Republic of Tanzania (2015), application no. 005/2013, para. 97; Actions pour la Protection des Droits de l’Homme (APDH) v. the Republic of Côte d’Ivoire (2016), application no. 001/2014, para. 64; Wilfred Onyango Nganyi and 9 others v. United Republic of Tanzania (2016), application no. 006/2013, para. 136. See also African Commission on Human and Peoples’ Rights, Huri-Laws v. Nigeria (2000), application no. 225/98, para. 41.
65. See, for example, Alex Thomas v. United Republic of Tanzania (2015), para. 98.

66. See, for example, the reference to *Palko v. Connecticut*, 302 U.S. 319, 327 (1937) (Cardozo J) in the seminal decision on freedom of expression in German Federal Constitutional Court, “Lüth,” [1958] Case no. 1 BvR 400/51; Supreme Court of Canada, *R. v. Morgentaler*, [1988] 1 S.C.R. 30, referring, inter alia, to *Roe v. Wade*, 410 U.S. 113 (1973), and to German Federal Constitutional Court, “Abortion decision,” [1975] Case no. 1 BvF 1, 2, 3, 4, 5, 6/74.
67. See Luís Roberto Barroso, “Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse,” *Boston College International & Comparative Law Review* 35 (2012): 331, 343–344; and Oster, *Media Freedom as a Fundamental Right*, 5–6.
68. *Nold v. Commission*, Case C-4/73 (1974), para. 13.
69. *The Society for the Protection of Unborn Children Ireland Ltd. v. Grogan and others*, Case C-159/90 (1991), para. 31.
70. *Schmidberger v. Austria*, Case C-112/00 (2003), para. 20.
71. *Familiapress v. Heinrich Bauer Verlag*, Case C-368/95 (1997), para. 25–26.
72. *ERT v. DEP and others*, Case C-260/89 (1991), para. 41; *TV 10 SA v. Commissariaat voor de Media*, Case C-23/93 (1994), para. 24.
73. *Stichting Collectieve Antennevoorziening Gouda and others v. Commissariaat voor de Media*, Case C-288/89 (1991), para. 23; *Commission v. Netherlands*, para. 30, Case C-353/89 (1991).
74. See, for example, *Google Spain SL and Google Inc. v. AEPD and Costeja González*, Case C-131/12 (2014), where the court—unlike the advocate general—did not even mention the EU Charter of Fundamental Rights, Article 11 (“Freedom of Expression”).
75. Alan Bloomfield, “Norm Antipreneurs and Theorising Resistance to Normative Change,” *Review of International Studies* 42, no. 2 (2016): 310.
76. For English-language scholarship, see, for example, Dieter Dörr and Eva Aernecke, “A Never Ending Story: *Caroline v. Germany*,” in *The Right to Privacy in the Light of Media Convergence*, ed. Dieter Dörr and Russell L. Weaver (Berlin: de Gruyter, 2012), 114–124, which also provides further references to literature in German.
77. See, for example, German Federal Constitutional Court, [2004] Case 2 BvR 1481/04 “Görgülü”; and House of Lords, *R. v. Special Adjudicator ex p. Ullah*, [2004] UKHL 26, para. 20 (per Lord Bingham of Cornhill).
78. See Natalia Chaeva, “The Russian Constitutional Court and Its Actual Control Over the ECtHR Judgement in *Anchugov and Gladkov*,” *EJIL:Talk!* (blog), *European Journal of International Law*, April 26, 2016, <https://www.ejiltalk.org/the-russian-constitutional-court-and-its-actual-control-over-the-ecthr-judgement>

- in-anchugov-and-gladko/; and “Russia: Constitutional Court Backs Selective Justice,” *Human Rights Watch*, April 19, 2016, <https://www.hrw.org/news/2016/04/19/russia-constitutional-court-backs-selective-justice>.
79. See Hanna Yusuf, “Erdoğan Vows to Reinstate Death Penalty as Referendum Opponents Face ‘Attacks and Imprisonment,’” *Independent*, March 19, 2017, <http://www.independent.co.uk/news/world/politics/recep-tayyip-erdo-an-death-penalty-turkey-referendum-merkel-nazi-vote-a7638151.html>.
 80. Article 1 of Protocol no. 6 to the convention (“Abolishing the Death Penalty in Peacetime”); Article 1 of Protocol no. 13 (“Abolishing the Death Penalty in all Circumstances”).
 81. See, for example, Will Worley, “Theresa May ‘Will Campaign to Leave the European Convention on Human Rights in 2020 Election,’” *Independent*, December 29, 2016, <http://www.independent.co.uk/news/uk/politics/theresa-may-campaign-leave-european-convention-on-human-rights-2020-general-election-brexit-a7499951.html>.
 82. Article 3 of the First Protocol to the ECHR; *Hirst v. United Kingdom (no. 2)* (2005), application no. 74025/01.
 83. *Othman (Abu Qatada) v. United Kingdom* (2012), application no. 8139/09.
 84. Bernadette Rainey, Elizabeth Wicks, and Clare Ovey, *The European Convention on Human Rights*, 6th ed. (Oxford: Oxford University Press, 2014), 64. On the ECHR’s “control system,” see the 14th Protocol to the ECHR (Council of Europe Treaty Series no. 194).
 85. See *Sürek and Özdemir v. Turkey* (1999), application nos. 23927/94 and 24277/94, para. 63; *Şener v. Turkey* (2000), application no. 26680/95, para. 42; *Wizerkaniuk v. Poland* (2011), application no. 18990/05, para. 68; *Kaperzyński v. Poland* (2012), application no. 43206/07, para. 70; Council of Europe, Recommendation no. R (2000) 7 on the right of journalists not to disclose their sources of information, the appendix of which states, “For the purposes of this Recommendation . . . the term ‘journalist’ means any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication”; and Recommendation CM/Rec(2011)7, “On a New Notion of Media,” appendix, para. 38.
 86. See *Fatullayev v. Azerbaijan* (2010), application no. 40984/07, para. 95; *Růžový panter, o.s. v. Czech Republic* (2012), application no. 20240/08; *Braun v. Poland* (2014), application no. 30162/10; *Magyar Helsinki Bizottság v. Hungary*, para. 164. For a general overview and reference to the academic debate, see Oster, *European and International Media Law*, 9–12.
 87. See Court of Justice of the European Union, Opinion 2/13.

88. *Delfi AS v. Estonia* (2015), application no. 64569/09, para. 143.
89. *Delfi AS v. Estonia*, Joint Concurring Opinion of Judges Raimondi, Karakas, De Gaetano, and Kjølbros, para. 8.
90. See *Delfi AS v. Estonia*, para. 116.
91. See *Delfi AS v. Estonia*, Joint Dissenting Opinion.