

Media Law

Teaching Material

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INTRODUCTION

In the twentieth century, freedom of expression and information is generally considered as one of the essential principles of a democratic society and one of the basic conditions for its progress and for the development of every man and woman. This freedom consists of the freedom of opinion, freedom to impart and receive information and ideas of public interest.

Even though freedom of expression and information is the principle, there is also an assortment of legislation (and jurisprudence applying this legislation) restricting the freedom of expression and the media. These include national security, public safety, protection of crimes, independence of judiciary, the right to privacy, public morality, public health, protection of the young and information deemed secret. Such restrictions must fulfill the requirements prescribed by law, legitimate aim and necessities in a democratic society. These measures and regulations are to be understood as function of a pluralistic media landscape in the promotion of freedom of expression and information and the right of the public to be properly informed on matters of public interest. All these issues, especially the legal framework of the relationship between a democratic society and media freedom will be the focus of the training course material. In addition, the issue of state interference and the legal problems with regard to freedom of expression and information will be analyzed. This being the general framework, the course is designed to discuss particularly: the justification of freedom of expression, article 29 of FDRE Constitution with article 19 of ICCPR (but the best interpretation from ECHR), the media (meaning, type and nature), Freedom of the Mass Media and Access to Information Law, the broadcasting law and other laws related to the media. This extensive emphasis on Ethiopian law has to be mixed with the rich experience and case law of other legal systems such as the European Court of Human Rights.

Course Objectives

The main objective of the course is to familiarize students with the meaning and extent of freedom of expression as well as the legitimate restrictions upon its exercise. However, specifically students should be able to:

- Understand the legitimate aims
- Have good judgment as to whether the restrictions are necessary in a democracy.
- Understand the essence of democracy and the level of tolerance and broadmindedness required by it.
- Identify classifications of speech, the value of these to a democratic society and the related level of protection accorded to each type of speech.
- Get to know both theory and experience of well-developed democracies in the interpretation of the freedom and the regulation of media.
- Analyze the existing regulatory environment in Ethiopia for media such as press law and broadcasting proclamations, with the aim of building a democratic society and a responsible, informative as well as pluralistic media.
- Know the meaning, nature and type of media in general and the media in Ethiopia in particular.

CHAPTER ONE

FREEDOM OF EXPRESSION

Chapter Objectives

After completion of this chapter, students will be able to:

- Discuss and understand freedom of expression and its philosophical foundations;
- Discuss and understand why the state and society should give protection to speech;
- Discuss and understand the legitimate restrictions on freedom of expression;
- Discuss and understand the interpretation of the freedom and limitations on the media;
- Determine the boundaries of limitations on free speech;
- Understand the type of speech and the relative protection forwarded to each in accordance to their importance;
- Identify the relationship between freedom of expression and other freedoms.

1.1. INTRODUCTION

The fundamental questions this chapter raises are: why should society and state give protection to speech? Why, if we value free speech, should we limit it? As these are theoretical questions they will be addressed accordingly. The practical question that follows is ‘how do legal systems interpret and enforce freedom of expression and its restrictions?’ Since our adjudication history is very young, we have to rely on jurisdictions having similar structure of rights.

The Constitution of Federal Democratic Republic of Ethiopia under article 9 provides: “All international agreements ratified by Ethiopia are an integral part of the law of the land”. Article 13 also states that: “the fundamental rights and freedoms specified in this chapter (chapter 3, on fundamental rights and freedoms) shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights,

International Covenant on Civil and Political Rights and international instruments adopted by Ethiopia.” This guarantees that all human right provisions, including freedom of expression, would be interpreted according to those instruments. Article 10 of the European Convention on Human Right is more or less similar with Article 19 of the ICCPR (the court refers to it in *Muller v Switzerland* (1988), para.27.) for the purpose of this course but without ignoring some minor differences on freedom of information.

Accordingly, one can use the interpretation of Article 10 by the European Court of Human Rights for Article 19 of ICCPR. ‘ECHR has considerable influence outside Europe in that its provisions are consulted in construing similar provisions of the International Covenant on Civil and Political Rights...’ as Sandra Coliver stated. It has to be noted that the ICCPR is ‘...not as extensively or authoritatively interpreted as those mandated by Article 10 of the ECHR’. Thus, the robust case- law of the European court of Human Rights (the Court) makes it very attractive for transplanting higher standards of freedom.

That is why the main focus of this chapter is the philosophical foundations of freedom of expression and the jurisprudence of the European Court of Human Rights (‘the European Court’). This material hopes to give a comprehensive analysis of all *relevant* case law in the media law field. However, it also intends to draw on jurisprudence from other jurisdictions. It does not intend to deal with international human right instruments as they are already covered by constitutional law, African human right law and human right courses. The focus here is only on extensive interpretation of the freedom based on the freedom.

1.2 MEANING AND JUSTIFICATIONS OF FREEDOM OF EXPRESSION

1.2.1 Justifications for Protection

1. Mill's argument from truth

The argument from truth is the predominant and most durable of the underlying rationales for the protection of speech. Today it is most commonly associated with John Stuart Mill, who in his book *On Liberty* argued that suppression of opinion was wrong, because it is only by the 'collision of adverse opinions' that truth is discovered or confirmed. This argument had been advanced two centuries earlier by Milton. The rationale was taken up by Justice Holmes in *Abrams v US* who asserted that all truths were relative and that they can only be judged 'in the competition of the market'. Holmes concluded that 'the best test of truth is the power of the thought to get itself accepted in the competition of the market'. This argument for the protection of freedom of expression posits that freedom of expression is not an end in itself but a means of identifying and accepting truth. The argument involves skepticism both of the state and of accepted beliefs and 'acknowledged truths'. This truth or 'marketplace of ideas' rationale for freedom of expression extends not only to political speech, but also to the ideas of philosophy, history, the social sciences, the natural sciences, other branches of human knowledge and commercial speech. However, it is of little or no application to obscene speech or personal abuse which often contains no factual assertions.

2. Democratic Self-governance

This argument is associated, particularly in the United States, with Alexander Meiklejohn. His view was that the main purpose of protecting freedom of expression was to protect the rights of citizens to understand matters of political concern so as to enable them to participate meaningfully in the democratic process. Meiklejohn stated that "the-principle of the freedom of speech springs from the necessities of the program of self-government. It is not a Law of Nature or Reason in the abstract. It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage."

This rationale explains the importance placed on political speech by amongst others, the European Court. However, the disadvantage with the rationale, and the reason why, by itself, it is insufficient to justify the extensive protection of freedom of expression is that it potentially excludes large areas of expression that are traditionally considered important, such as artistic and literary expression.

3. Self-fulfillment

While Mill's argument from truth and Meiklejohn argument from self-governance justify the protection of freedom of expression as a means to an end, freedom of expression can also be an end itself. Under this theory, freedom of expression is protected not just to create a better government and not merely to discover the truth, but to 'enlarge the prospects for individual self-fulfillment' or to allow 'personal growth and self-realization'. In the words of Justice Thurgood Marshall of the US Supreme Court in *Procunier v Martinez*: '[Freedom of expression] serves not only the needs of the polity but also those of the human spirit — a spirit that demands self-expression.' His rationale is of broadest application, embracing the protection of expression such as obscenity which would not receive protection under either of the two other rationales.

4 .The Relevance of the Rationales for Protecting Freedom of Expression

All the three rationales for protecting freedom of expression have been recognized in US and Canadian law e.g., *Invin Toy v Quebec* and most recently by the House of Lords in *R v Secretary of State for the Home Department, ex parte Simms*, where Lord Steyn stated:

Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognized that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfillment of individuals in society. Secondly, in the famous words of Holmes J (echoing John Stuart Mill) 'the best test of truth is the power of the thought to get itself accepted in the competition of the market': *Abrams v US* Holmes J dissent. Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information

and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.

The European Court has also made reference to the underlying rationales for protecting the right to freedom of expression. In one of the first major judgments on Article 10, the Court stated:

Freedom of expression constitutes one of the essential foundations of a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to 'information and ideas' that are favorably received or regarded as inoffensive but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of pluralism, tolerance and broad mindedness without which there is no 'democratic society'. (Handyside v UK)

This quotation encapsulates two of the three main theoretical rationales for the protection of expression: (i) freedom of expression enables citizens to participate effectively in a democracy; and (ii) freedom of expression is an integral aspect of each citizen's right to self-development and fulfilment.⁸ The third rationale — namely Mill's argument from truth, which is closely linked to the utilitarian tradition in moral philosophy — has been less influential in the jurisprudence of the European Court than in the US and Canadian Supreme Courts.

1.2.2 Analysis of Justifications for Limitations

1. Boundaries of the Debate

The topic of free speech is one of the most contentious issues in liberal societies. If the liberty to express oneself is not highly valued, as has often been the case, there is no problem: freedom of expression is simply curtailed in favor of other values. Free speech becomes a volatile issue when it is highly valued because only then do the limitations

placed upon it become controversial. The first thing to note in any sensible discussion of freedom of speech is that it will have to be limited. Every society places some limits on the exercise of speech because speech always takes place within a context of competing values. In this sense, Stanley Fish is correct when he says that there is no such thing as free speech. Free speech is simply a useful term to focus our attention on a particular form of human interaction and the phrase is not meant to suggest that speech should never be interfered with. As Fish puts it, “free speech in short, is not an independent value but a political prize”. No society has yet existed where speech has not been limited to some extent. As John Stuart Mill argued in *On Liberty*, a struggle always takes place between the competing demands of liberty and authority, and we cannot have the latter without the former: All that makes existence valuable to anyone depends on the enforcement of restraints upon the actions of other people. Some rules of conduct, therefore, must be imposed—by law in the first place, and by opinion on many things which are not fit subjects for the operation of law.

The task, therefore, is not to argue for an unlimited domain of free speech; such a concept cannot be defended. Instead, we need to decide how much value we place on speech in relation to the value we place on other important ideas: “speech, in short, is never a value in and of itself but is always produced within the precincts of some assumed conception of the good” (Fish). In this sub-section, we will examine some conceptions of the good that are deemed to be acceptable limitations on speech. We will start with the harm principle and then move on to other more encompassing arguments for limiting speech.

Before we do this, however, the reader might wish to disagree with the above claims and warn of the dangers of the “slippery slope.” Those who support the slippery slope argument warn that the consequence of limiting speech is the inevitable slide into censorship and tyranny. Such arguments assume that we can be on or off the slope. In fact, no such choice exists: we are *necessarily* on the slope whether we like it or not, and the task is always to decide how far up or down we choose to go, not whether we should step off the slope altogether. It is worth noting that the slippery slope argument can be

used to make the opposite point; one could argue with equal force that we should never allow any removal of government intervention because once we do we are on the slippery slope to anarchy, the state of nature, and a life that Hobbes described in *Leviathan* as “solitary, poor, nasty, brutish, and short”.

Another thing to note before we engage with the harm principle is that we are in fact free to speak as we like. Hence, freedom of speech differs from some other forms of freedom of action. If the government wants to prevent citizens engaging in certain actions, riding motor bikes for example, it can limit their freedom to do so by making sure that such vehicles are no longer available. For example, current bikes could be destroyed and a ban can be placed on future imports. Freedom of speech is a different case. A government cannot make it impossible to say certain things. The only thing it can do is punish people *after* they have said, written or published their thoughts. This means that we are free to speak or write in a way that we are not free to ride outlawed motorbikes. This is an important point; if we insist that legal prohibitions *remove* freedom then we have to hold the incoherent position that a person was not free at the very moment she performed an action. The government would have to remove our vocal chords for us to be un-free in the same way as the motorcyclist is not free.

A more persuasive analysis of freedom of speech suggests that the threat of a sanction makes it more difficult and potentially more costly to exercise our freedom. Such sanctions take two major forms. The first, and most serious, is legal punishment by the state, which usually consists of a financial penalty, but can stretch occasionally to imprisonment. The second threat of sanction comes from social disapprobation. People will often refrain from making public statements because they fear the ridicule and moral outrage of others. For example, one could expect a fair amount of these things if one made racist comments during a public lecture at a university. Usually it is the first type of sanction that catches our attention but, as we will see, John Stuart Mill provides a strong warning about the chilling effect of the latter form of social control.

We seem to have reached a paradoxical position. We started by claiming that there can be no such thing as a pure form of free speech: now we seem to be arguing that we are, in fact, free to say anything we like. The paradox is resolved by thinking of free speech in the following terms. I am, indeed, free to say what I like, but the state and other individuals can sometimes make that freedom more or less costly to exercise. This leads to the conclusion that we can attempt to regulate speech, but we cannot prevent it if a person is undeterred by the threat of sanction. The issue, therefore, boils down to assessing how cumbersome we wish to make it for people to say certain things. The best way to resolve the problem is to ignore the question of whether or not it is legitimate to attach penalties to some forms of speech. We have already suggested that all societies do (correctly) place some limits on free speech. If the reader doubts this, it might be worth reconsidering what life would be like with no prohibitions on libelous statements, child pornography, advertising content, and releasing state secrets. The list could go on. The real problem we face is deciding where to place the limits, and the next sections of the essay look at some possible solutions to this puzzle.

2. The Harm Principle and Free Speech

a) John Stuart Mill's Harm Principle

Given that Mill presented one of the first, and still perhaps the most famous liberal defense of free speech, I will focus on his claims in this essay and use them as a springboard for a more general discussion of free expression. In the footnote at the beginning of Chapter II of *On Liberty*, Mill makes a very bold statement: “If the arguments of the present chapter are of any validity, there ought to exist the fullest liberty of professing and discussing, as a matter of ethical conviction, any doctrine, however immoral it may be considered.”

This is a very strong defense of free speech; Mill tells us that *any* doctrine should be allowed the light of day no matter *how* immoral it may seem to everyone else. And Mill does mean everyone: If all mankind minus one were of one opinion, and only one person

were of the contrary opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind.

Such liberty should exist with every subject matter so that we have “absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral or theological”. Mill claims that the fullest liberty of expression is required to push our arguments to their logical limits, rather than the limits of social embarrassment. Such liberty of expression is necessary, he suggests, for the dignity of persons. This is as strong an argument for freedom of speech as we are likely to find. But as already noted above, Mill also suggests that we need some rules of conduct to regulate the actions of members of a political community. The limitation he places on free expression is “one very simple principle,” now usually referred to as the Harm Principle, which states that “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”

There is a great deal of debate about what Mill had in mind when he referred to harm; for the purposes of this chapter he will be taken to mean that an action has to directly and in the first instance invade the rights of a person (Mill himself uses the term rights, despite basing the arguments in the book on the principle of utility). The limits on free speech will be very narrow because it is difficult to support the claim that most speech causes harm to the rights of others. This is the position staked out by Mill in the first two chapters of *On Liberty* and it is a good starting point for a discussion of free speech because it is hard to imagine a more liberal position. Liberals find it very difficult to defend free speech once it can be demonstrated that its practice does actually invade the rights of others.

If we accept the argument based on the harm principle we need to ask “what types of speech, if any, cause harm?” Once we can answer this question, we have found the appropriate limits to free expression. The example Mill uses is in reference to corn dealers; he suggests that it is acceptable to claim that corn dealers starve the poor if such a view is expressed through the medium of the printed page. It is not acceptable to

express the same view to an angry mob, ready to explode, that has gathered outside the house of the corn dealer. The difference between the two is that the latter is an expression “such as to constitute...a positive instigation to some mischievous act,” namely, to place the rights, and possibly the life, of the corn dealer in danger. As Daniel Jacobson notes, it is important to remember that Mill will not sanction limits to free speech simply because someone is harmed by the statements of others. For example, the corn dealer may suffer severe financial hardship if he is accused of starving the poor. Mill distinguishes between legitimate and illegitimate harm, and it is only when speech causes a direct and clear violation of rights that it can be limited. The fact that Mill does not count accusations of starving the poor as causing legitimate harm to the rights of corn dealers suggests he wished to apply the harm principle sparingly. Other examples where the harm principle may apply include libel laws, blackmail, advertising blatant untruths about commercial products, advertising dangerous products to children (e.g. cigarettes), and securing truth in contracts. In most of these cases, it is possible to make an argument that harm has been committed and that rights have been violated.

b) Mill's Harm Principle and Pornography

There are other instances when the harm principle has been invoked but where it is more difficult to demonstrate that rights have been violated. Perhaps the most obvious example of this is the debate over pornography. As Feinberg notes in *Offense to Others: the Moral Limits of the Criminal Law* most attacks on pornography up to the 1970's were from social conservatives who found such material to be immoral and obscene; (Feinberg notes that there is no necessary link between pornography and obscenity; pornography is material that is intended to cause sexual arousal, whereas something is obscene when it causes repugnance, revulsion and shock. Pornography can be, but is not necessarily, obscene). In recent times the cause against pornography has been joined by some feminists who have maintained that pornography degrades, endangers, and harms the lives of women. This argument, to have force, must distinguish between pornography as a general class of material (aimed at sexual arousal) and pornography that causes harm by depicting acts that violently abuse women. If it can be demonstrated that this latter

material significantly increases the risk that men will commit acts of physical violence against women, the harm principle can legitimately be invoked.

When pornography involves young children, most people will accept that it should be prohibited because of the harm that is being done to persons under the age of consent. It has proved much more difficult to make the same claim for consenting adults. It is hard to show that the actual people who appear in the books, magazines, films, videos and on the internet are being physically harmed, and it is even more difficult to demonstrate that harm results for women as a whole. Very few people would deny that violence against women is abhorrent and an all too common feature of our society, but how much of this is caused by violent pornography? One would have to show that a person who would not otherwise rape or batter females was caused to do so through exposure to material depicting violence to women.

Andrea Dworkin has attempted to show that harm is caused to women by pornography, but it has proven very difficult to draw a conclusive causal relationship. If pornographers were exhorting their readers to commit violence and rape, the case for prohibition would be much stronger, but they tend not to do this, just as films that depict murder do not actively incite the audience to mimic what they see on the screen. Remember that Mill's formulation of the harm principle suggests only speech that *directly* harms the rights of others in an illegitimate manner should be banned; finding such material offensive, obscene or outrageous is not sufficient grounds for prohibition. Overall, it seems very difficult to mount a compelling case for banning pornography (except in the case of minors) based on the concept of harm as formulated by Mill.

The evidence on rape is difficult to decipher. On the one hand, it seems that a significant number of rapes are not reported. On the other hand, some studies have shown that a number of men reported for rapes have been falsely accused. What does seem to be reasonably clear, at least in the USA, is that the increased consumption of pornography over the last 20 years has coincided with a marked reduction of violent crime against

women, including rape. Such statistics do not settle the issue but they do make it more difficult to use the harm principle as the main reason for limiting pornography.

c) Mill's Harm Principle and Hate Speech

Another difficult case is hate speech. Most European liberal democracies have limitations on hate speech, but it is debatable whether these can be justified by the harm principle as formulated by Mill. One would have to show that such speech violated rights, directly and in the first instance. A famous example of hate speech is the Nazi march through Skokie, Illinois. In fact, the intention was not to engage in political speech at all, but simply to march through a predominantly Jewish community dressed in storm trooper uniforms and wearing swastikas (although the Illinois Supreme Court interpreted the wearing of swastikas as “symbolic political speech”). It is clear that most people, especially those who lived in Skokie, were outraged and offended by the march, but were they harmed? There was no plan to cause physical injury and the marchers did not intend to damage property.

The main argument against allowing the march, based on the harm principle, was that it would cause harm by inciting opponents of the march to riot. The problem with this claim is that it is the harm that could potentially be done to the people speaking that becomes the focal point and not the harm done to those who are the subject of the hate. To ban speech for this reason, i.e., for the good of the speaker, tends to undermine the basic right to free speech in the first place. If we turn to the local community who were on the wrong end of hate speech we might want to claim that they could be psychologically harmed, but this is more difficult to demonstrate than harm to a person's legal rights. It seems, therefore, that Mill's argument does not allow for state intervention in this case. If we base our defense of speech on the harm principle we are going to have very few sanctions imposed on the spoken and written word. It is only when we can show direct harm to rights, which will almost always mean when an attack is made against a specific individual or a small group of persons, that it is legitimate to impose a sanction. One response is to suggest that the harm principle can be defined in a less stringent manner than Mill's formulation. This is a complicated issue that we cannot delve into here.

Suffice it to say that if we can, then more options might become available for prohibiting hate speech and violent pornography.

There are two basic responses to the harm principle as a means of limiting speech. One is that it is too narrow; the other is that it is too broad. This latter view is not often expressed because, as already noted, most people think that free speech should be limited if it does cause illegitimate harm. George Kateb, however, has made an interesting argument that runs as follows. If we want to limit speech because of harm, then we will have to ban a lot of political speech. Most of it is useless, a lot of it is offensive, and some of it causes harm because it is deceitful, and because it is aimed at discrediting specific groups. It also undermines democratic citizenship and stirs up nationalism and jingoism, which results in harm to citizens of other countries. Religious speech according to Kateb, is even worse than political discourse; he claims that a lot of religious speech is hateful, useless, dishonest, and ferments war, bigotry and fundamentalism. It also creates bad self-image and feelings of guilt that can haunt persons throughout their lives. Pornography and hate speech, he claims, cause nowhere near as much harm as political and religious speech. His conclusion is that we do not want to ban these forms of speech and the harm principle, therefore, casts its net too far. Kateb's solution is to abandon the principle in favor of almost unlimited speech.

This is a powerful argument, but there seem to be at least two problems with the analysis. The first is that the harm principle would actually allow religious and political speech for the same reasons that it allows pornography and hate speech, namely that it is not possible to demonstrate that such speech does cause direct harm to rights. It's doubtful that Mill would support using his arguments about harm to ban political and religious speech. The second problem for Kateb is that if we accept he is right that such speech does cause harm in the sense of violating rights, the correct response is surely to start limiting political and religious speech. If Kateb's argument is sound he has shown that harm is more extensive than we might have thought; he has not demonstrated that the harm principle is invalid.

3. The Offense Principle and Free Speech

a) Joel Feinberg's Offense Principle

The other response to the harm principle is that it does not reach far enough. One of the most impressive arguments for this position comes from Joel Feinberg, who suggests that the harm principle cannot shoulder all of the work necessary for a principle of free speech. In some instances, Feinberg suggests, we also need an *offense principle* that can act as a guide to public censure. The basic idea is that the harm principle sets the bar too high and that we can legitimately prohibit some forms of expression because they are very offensive. Offending someone is less serious than harming someone, so the penalties imposed should be less severe than those for causing harm. As Feinberg notes, however, this has not always been the case and he cites a number of instances in the U.S. where penalties for sodomy and consensual incest have ranged from twenty years imprisonment to the death penalty. These are victimless crimes and hence the punishment has to have a basis in the supposed offensiveness of the behavior rather than the harm that is caused.

Such a principle is difficult to apply because many people take offense as the result of an overly sensitive disposition, or worse, because of bigotry and unjustified prejudice. At other times some people can be deeply offended by statements that others find mildly amusing. The fury over the Danish cartoons brings this starkly to the fore. Despite the difficulty of applying a standard of this kind, something like the offense principle operates widely in liberal democracies where citizens are penalized for a variety of activities, including speech that would escape prosecution under the harm principle. Wandering around the local shopping mall naked, or engaging in sexual acts in public places are two obvious examples. Given the specific nature of this section, we will not delve into the issue of offensive behavior in all its manifestations, and we will limit the discussion to offensive forms of speech. Feinberg suggests that a variety of factors need to be taken into account when deciding whether speech can be limited by the offense principle. These include the extent, duration and social value of the speech, the ease with which it can be avoided, the motives of the speaker, the number of people offended the intensity of the offense, and the general interest of the community at large.

b) Pornography and the Offense Principle

How does the offense principle help us deal with the issue of pornography? Given the above criteria, Feinberg argues that books should never be banned because the offensive material is easy to avoid. If one has freely decided to read the book for pleasure, the offense principle obviously does not apply, and if one does not want to read it, it is easily avoidable. And if one is unaware of the content and should become offended in the course of reading the text, the solution is simple—one simply closes the book. A similar argument would be applied to pornographic films. The French film *Bais-Moi* was in essence banned in Australia in 2002 because of its offensive material (it was denied a rating which meant that it could not be shown in cinemas). It would seem, however, that the offense principle outlined by Feinberg would not permit such prohibition because it is very easy to avoid being offended by the film. It should also be legal to advertise the film, but some limits could be placed on the content of the advertisement so that sexually explicit material is not placed on billboards in public places (because these are not easily avoidable). At first glance it might seem strange to have a more stringent speech code for advertisements than for the thing being advertised; the harm principle would not provide the grounds for such a distinction, but it is a logical conclusion of the offense principle.

What of pornography that is extremely offensive because of its violent or degrading content? In this case the offense is more profound: simply knowing that such films exist is enough to deeply offend many people. The difficulty here is that bare knowledge, i.e., being offended by merely knowing that something exists or is taking place, is not as serious as being offended by something that one does not like *and* that one cannot escape. If we allow that films should be banned because some people are offended, even when they do not have to view them, logical consistency demands that we allow the possibility of prohibiting many forms of expression. Many people find strong attacks on religion, or TV shows by religious fundamentalists deeply offensive. Hence, Feinberg argues that even though some forms of pornography are profoundly offensive to a lot of people, they should still be permitted.

c) Hate Speech and the Offense Principle

Hate speech causes profound and personal offense. The discomfort that is caused to those who are the object of such attacks cannot easily be shrugged off. As in the case of violent pornography, the offense that is caused by the march through Skokie cannot be avoided simply by staying off the streets because the offense is taken over the bare knowledge that the march is taking place. As we have seen, however, bare knowledge does not seem sufficient grounds for prohibition. If we examine some of the other factors regarding offensive speech mentioned above, Feinberg suggests that the march through Skokie does not do very well: the social value of the speech seems to be marginal, the number of people offended will be large, and it is difficult to see how it is in the interests of the community. These reasons also hold for violent pornography.

A key difference, however, is in the intensity of the offense; it is particularly acute with hate speech because it is aimed at a relatively small and specific audience. The motivations of the speakers in the Skokie example seemed to be to incite fear and hatred and to directly insult the members of the community with Nazi symbols. Nor, according to Feinberg, was there any political content to the speech. The distinction between violent pornography and this specific example of hate speech is that a particular group of people were targeted and the message of hate was paraded in such a way that it could not be easily avoided. It is for these reasons that Feinberg suggests hate speech can be limited. He also claims that when fighting words are used to provoke people who are prevented by law from using a fighting response, the offense is profound enough to allow for prohibition. If pornographers engaged in the same behavior, parading through neighborhoods where they were likely to meet great resistance and cause profound offense, they too should be prevented from doing so. It is clear, therefore, that the crucial component of the offense principle is the avoidance of the offensive material. For the argument to be consistent, it must follow that many forms of hate speech should still be allowed if the offense is easily avoidable. Nazis can still meet in private places, or even in public ones that are easily bypassed. Advertisements for such meetings can be edited (because they are less easy to avoid) but should not be banned.

4. Democracy and Free Speech

a) Democratic Citizenship and Pornography

Very few liberals take the Millian view that only speech causing direct harm should be prohibited; most support some form of the offense principle. Some are willing to extend the realm of state interference further and argue that hate speech should be banned even if it does not cause harm or unavoidable offense. The reason it should be banned is that it is inconsistent with the underlying values of liberal democracy to brand some citizens as inferior to others on the grounds of race or sexual orientation. The same applies to pornography; it should be prevented because it is incompatible with democratic citizenship to portray women as sexual objects, who are often violently mistreated. Rae Langton, for example, starts from the liberal premise of equal concern and respect and concludes that it is justifiable to remove certain speech protections for pornographers. She avoids basing her argument on harm: "If, for example, there were conclusive evidence linking pornography to violence, one could simply justify a prohibitive strategy on the basis of the harm principle. However, the prohibitive arguments advanced in this article do not require empirical premises as strong as this...they rely instead on the notion of equality".

Working within the framework of arguments supplied by Ronald Dworkin, who is opposed to prohibitive measures, she tries to demonstrate that egalitarian liberals such as Dworkin, should, in fact, support the prohibition of pornography. She suggests that we have "reason to be concerned about pornography, not because it is morally suspect, but because we care about equality and the rights of women". This is an approach also taken by Catherine McKinnon. She distinguishes, much like Feinberg, between pornography and erotica. Erotica might be explicit and create sexual arousal, neither of which is grounds for complaint. Pornography would not come under attack if it did the same thing as erotica; the complaint is that it portrays women in a manner that undermines their equal status as citizens: "We define pornography as the graphic sexually explicit subordination of women through pictures or words that also includes women dehumanized as sexual objects, things, or commodities; enjoying pain or humiliation or

rape; being tied up, cut up, mutilated, bruised, or physically hurt; in postures of sexual submission or servility or display; reduced to body parts, penetrated by objects or animals, or presented in scenarios of degradation, injury, torture; shown as filthy or inferior; bleeding, bruised or hurt in a context which makes these conditions sexual”.

Langton agrees and concludes that “women as a group have rights against the consumers of pornography, and thereby have rights that are trumps against the policy of permitting pornography...the permissive policy is in conflict with the principle of equal concern and respect, and that women accordingly have rights against it”. Because she is not basing her argument on the harm principle, she does not have to show that women are harmed by pornography. For the argument to be persuasive, however, one has to accept that permitting pornography does mean that women are not treated with equal concern and respect.

b) Democratic Citizenship and Hate Speech

To argue the case above, one has to dilute one's support for freedom of expression in favor of other principles, such as equal respect for all citizens. This is a sensible approach according to Stanley Fish. He suggests that the task we face is not to arrive at hard and fast principles that govern all speech. Instead, we have to find a workable compromise that gives due weight to a variety of values. Supporters of this view will tend to remind us that when we are discussing free speech, we are not dealing with speech in isolation; what we are doing is comparing free speech with some other good. For instance, we have to decide whether it is better to place a higher value on speech than on the value of privacy, security, equality, or the prevention of harm.

It is suggested early in this section that to begin from a principle of unregulated speech is to start from a place that itself needs to be vigorously defended rather than simply assumed. Stanley Fish is of a similar temperament and suggests that we need to find a balance in which “we must consider in every case what is at stake and what are the risks and gains of alternative courses of action”. Is speech promoting or undermining our basic values? “If you don't ask this question, or some version of it, but just say that speech is

speech and that's it, you are mystifying—presenting as an arbitrary and untheorized fiat—a policy that will seem whimsical or worse to those whose interests it harms or dismisses”.

In other words, there have to be reasons behind the argument to allow speech; we cannot simply say that the First Amendment or Article 29 says it is so, therefore it must be so. The task is not to come up with a principle that always favors expression, but rather, to decide what is good speech and what is bad speech. A good policy “will not assume that the only relevant sphere of action is the head and larynx of the individual speaker” (Fish). Is it more in keeping with the values of a democratic society, in which every person is deemed equal, to allow or prohibit speech that singles out specific individuals and groups as less than equal? The answer, according to Fish, cannot be settled by simply appealing to a pre-ordained ideal of absolute free speech, because this is a principle that is itself in need of defense. Fish's answer is that, “it depends. I am not saying that First Amendment principles are inherently bad (they are inherently nothing), only that they are not always the appropriate reference point for situations involving the production of speech”. But, all things considered, “I am persuaded that at the present moment, right now, the risk of not attending to hate speech is greater than the risk that by regulating it we will deprive ourselves of valuable voices and insights or slide down the slippery slope towards tyranny. This is a judgment for which I can offer reasons but no guarantees”.

Hence, the boundaries of free speech cannot be set in stone by philosophical principles. It is the world of politics that decides what we can and cannot say, guided but not hidebound by the world of abstract philosophy. Fish suggests that free speech is about political victories and defeats. The very guidelines for marking off protected from unprotected speech are the result of this battle rather than truths in their own right: “No such thing as free (non-ideologically constrained) speech; no such thing as a public forum purged of ideological pressures of exclusion”. Speech always takes place in an environment of convictions, assumptions, and perceptions i.e., within the confines of a structured world. The thing to do, according to Fish, is to get out there and argue for one's position.

We should ask three questions according to Fish: “[g]iven that it is speech, what does it do, do we want it to be done, and is more to be gained or lost by moving to curtail it?” He suggests that the answers we arrive at will vary according to the context. Free speech will be more limited in the military, where the underlying value is hierarchy and authority, than it will be at a university where one of the main values is the expression of ideas. Even on campus, there will be different levels of appropriate speech. Spouting off at the fountain in the center of campus should be less regulated than what a professor can say during a lecture. It might well be acceptable for me to spend an hour of my time explaining to passers-by why Manchester United is such a great football team but it would be completely inappropriate (and open to censure) to do the same thing when I am supposed to be giving a lecture on Thomas Hobbes. A campus is not simply a “free speech forum but a workplace where people have contractual obligations, assigned duties, pedagogical and administrative responsibilities”. Almost all places in which we interact are governed by underlying values and hence speech will have to fit in with these principles: “[r]egulation of free speech is a defining feature of everyday life”. Thinking of speech in this way removes a lot of the mystique. Whether we should ban hate speech is just another problem along the lines of whether we should allow university professors to talk about football in lectures.

c) Paternalistic Justification for Limiting Speech

Although Stanley Fish takes some of the mystique away from the value of speech, he still thinks of limitations are largely in terms of other regarding consequences. There are arguments, however, that suggest speech can be limited to prevent harm being done to the speaker. The argument here is that the agent might not have a full grasp of the consequences of the action involved (whether it is speech or some other form of behavior) and hence can be prevented from engaging in the act. Arguments used in the Skokie case would fit into this category. Most liberals are wary of such arguments because we are now entering the realm of paternalistic intervention where it is assumed that the state knows better than the individual what is in his or her best interests.

Mill, for example, is an opponent of paternalism generally, but he does believe there are certain instances when intervention is warranted. He suggests that if a public official is certain that a bridge will collapse, he can prevent a person crossing. If, however, there is only a danger that it will collapse the person can be warned but not coerced. The decision here seems to depend on the likelihood of personal injury; the more certain injury becomes, the more legitimate the intervention. Prohibiting freedom of speech on these grounds is very questionable in all but extreme cases (it was not persuasive in the *Skokie* case) because it is very rare that speech would produce such a clear danger to the individual.

Hence we have exhausted the options that are open to the liberal regarding limitations on free speech and one cannot be classed as a liberal if one is willing to stray further into the arena of state intervention than already discussed. Liberals tend to be united in opposing paternalistic and moralistic justifications for limiting free expression. They have a strong presumption in favor of individual liberty because, it is argued, this is the only way that the autonomy of the individual can be respected. To prohibit speech for reasons other than those already mentioned means that one has to argue that it is permissible to limit speech because of its unsavory content, or as Feinberg puts it, one has to be willing to say that “[i]t can be morally legitimate for the state, by means of the criminal law, to prohibit certain types of action that cause neither harm nor offense to any one, on the grounds that such actions constitute or cause evils of other kinds.”

Acts can be “evil” if they are dangerous to a traditional way of life, because they are immoral, or because they hinder the perfectibility of the human race. Many arguments against pornography take the form that such material is wrong because of the moral harm it does to the consumer. Liberals oppose such views because they are not overly interested in trying to mold the moral character of citizens.

5. Back to the Harm Principle

We began this examination of free speech with the harm principle; let us end with it and assess whether it helps us determine the proper limits of free expression. The principle

suggests that we need to distinguish between legal sanction and social disapprobation as means of limiting speech. As already noted, the latter does not ban speech but it makes it more uncomfortable to utter unpopular statements. J.S. Mill does not seem to support the imposition of legal penalties unless they are sanctioned by the harm principle. As one would expect, Mill also seems to be worried by the use of social pressure as a means of limiting speech. Chapter III of *On Liberty* is an incredible assault on social censorship, expressed through the tyranny of the majority, because it produces stunted, pinched, hidebound and withered individuals: “everyone lives as under the eye of a hostile and dreaded censorship...[i]t does not occur to them to have any inclination except what is customary”. He continues:

the general tendency of things throughout the world is to render mediocrity the ascendant power among mankind...at present individuals are lost in the crowd...the only power deserving the name is that of masses...[i]t does seem, however, that when the opinions of masses of merely average men are everywhere become or becoming the dominant power, the counterpoise and corrective to that tendency would be the more and more pronounced individuality of those who stand on the higher eminences of thought.

With these comments, and many of a similar ilk, Mill demonstrates his distaste of the apathetic, fickle, tedious, frightened and dangerous majority.

It is quite a surprise, therefore, to find that he also seems to embrace a fairly encompassing offense principle when the sanction does involve social disapprobation:

Again, there are *many* acts which, being directly injurious only to the agents themselves, ought not to be legally interdicted, but which, if done publicly, are a violation of good manners and, coming thus within the category of *offenses* against others, may rightly be prohibited.[original emphasis]

Similarly, he states that “The liberty of the individual must be thus far limited; he must not make himself a nuisance”. In the latter parts of *On Liberty* Mill also suggests that distasteful persons can be held in contempt, that we can avoid such persons (as long as

we do not parade it), that we can warn others against the persons, and that we can persuade, cajole and remonstrate with those we deem offensive. These actions are legitimate as the free expression of those who happen to be offended as long as they are done as a spontaneous response to the person's faults and not as a form of punishment.

But those who exhibit cruelty, malice, envy, insincerity, resentment and crass egoism are open to the greater sanction of disapprobation as a form of punishment, because these faults are wicked and are other-regarding. It may be true that these faults have an impact on others, but it is difficult to see how acting according to malice, envy or resentment *necessarily* violates the rights of others. The only way that Mill can make such claims is by expanding his argument to include an offense principle and hence give up on the harm principle as the *only* legitimate grounds for interference with behavior. Overall, Mill's arguments about ostracism and disapprobation seem to provide little protection for the individual who may have spoken in a non-harmful manner but who has nevertheless offended the sensibilities of the masses.

Hence we see that one of the great defenders of the harm principle seems to shy away from it at certain crucial points and it is unlikely that a defense of free speech can rest on the principle alone. It does, however, remain an elementary part of the liberal defense of individual freedom.

Liberals tend to defend freedom generally, and free speech in particular, for a variety of reasons beyond the harm principle; speech fosters authenticity, genius, creativity, individuality and human flourishing. Mill tells us specifically that if we ban speech the silenced opinion may be true, or contain a portion of the truth, and that unchallenged opinions become mere prejudices and dead dogmas that are inherited rather than adopted. These are empirical claims that require evidence. Is it likely that we enhance the cause of truth by allowing hate speech or violent and degrading forms of pornography? It is worth pondering the relationship between speech and truth. If we had a graph where one axis was truth and the other was free speech, would we get one extra unit of truth for every extra unit of free speech? How can such a thing even be measured? It is certainly

questionable whether arguments degenerate into prejudice if they are not constantly challenged. Devil's advocates are often tedious rather than useful interlocutors. None of this is meant to suggest that free speech is not vitally important; this is, in fact, precisely the reason we need to find good arguments in its favor. But sometimes supporters of free speech, like its detractors, have a tendency to make assertions without providing compelling evidence to back them up.

In a liberal society, we have found that the harm principle provides reasons for limiting free speech when doing so prevents direct harm to rights. This means that very few speech acts should be prohibited. The offense principle has a wider reach than the harm principle, but it still recommends very limited intervention in the realm of free speech. All forms of speech that are found to be offensive but easily avoidable should go unpunished. This means that all forms of pornography and most forms of hate speech will escape punishment. If this argument is acceptable, it seems only logical that we should extend it to other forms of behavior. Public nudity, for example, causes offense to some people, but most of us find it at most a bit embarrassing, and it is avoided by a simple turn of the head. The same goes with nudity, sex, and coarse language on television. Neither the harm nor the offense principles as outlined by Mill support criminalizing bigamy or drug use, nor the enforcement of seat belts, crash helmets and the like.

Some argue that speech can be limited for the sake of other liberal values, particularly the concern for democratic equality; the claim is not that speech should always lose out when it clashes with other fundamental principles that underpin modern liberal democracies, but that it should not be automatically privileged. To extend prohibitions on speech and other actions beyond this point requires an argument for a form of legal paternalism that suggests the state should decide what is acceptable for the safety and moral instruction of citizens, even if it means limiting actions that do not cause harm or unavoidable offense to others. It is up to the reader to decide if one of these positions is persuasive. It has certainly been the practice of most societies, even liberal-democratic ones, to impose some paternalistic restrictions on behavior and to limit speech because it causes offense. As we have seen, even Mill seems to back away somewhat from the harm principle.

Hence the freedom of expression supported by the harm principle as outlined in Chapter One of *On Liberty* and by Feinberg's offense principle is still a possibility rather than a reality. It is also up to the reader to decide if it is an appealing possibility.

1.3. INTERPRETATION OF FREEDOM OF EXPRESSION AND ITS RESTRICTIONS

This section examines the general principles of the ECHR as they are relevant to media law. The reason, as stated in the introduction, is its similarity with Article 19 of ICCPR which is recognized by FDRE Constitution and ratified as well by Ethiopia. That is why its rich jurisprudence is very important and widely accepted for interpretation of human rights in general and freedom of expression in particular. The main focus of this section, thus, is Article 10 ECHR, which concerns the right to freedom of expression, but it also briefly discusses related protections like Articles 6(1) concerning reporting of judicial proceedings, Article 8 ECHR and the right to respect for privacy, Article 14's prohibition on discrimination in relation to other Convention rights, Article 15's restrictions in the time of war and Article 17 concerning restrictions on activities subversive of Convention rights. First, we outline some general principles applicable to the interpretation of the Convention.

1.3.1 Principles of Interpretation of the ECHR

The ECHR is an international treaty, and therefore it is interpreted in accordance with public international law principles of which the main source is the Vienna Convention on the Law of Treaties 1969. Although the Vienna Convention is not retrospective and therefore does not expressly apply to the 1950 European Convention on Human Rights and Freedoms, it is generally understood to encapsulate the prior principles of public international law on the interpretation of treaties (see *Fothergill v Monarch Airlines Ltd*). The principles of interpretation developed by the European Court represent a significant departure from common law canons of construction.

1. The Teleological Approach

The basic principle of interpretation applied by the European Court is one grounded in a 'teleological approach' which reflects the Vienna Convention. Article 31(1) of the Vienna Convention provides that: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its objects and purpose."

The objects and purpose of the ECHR have been described as 'the protection of human rights', and the maintenance and promotion of 'the ideals and values of a democratic society'. The teleological principle permits the meaning of the Convention rights to adapt and change according to the evolving social norms of the member states. The European Court has noted that the Convention is: 'A living instrument which ... must be interpreted in the light of present day conditions.'

This dynamic approach to interpretation means that the older a decision of the Court or Commission, the greater the care that is needed to consider whether changing conditions have undermined its basis. Although there is no formal doctrine of precedent under the Convention, consistency of approach is recognized as desirable in the interests of legal certainty.

2. The Principle of Effectiveness

The Court in *Ariico v Italy* asserted that '... the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective'. So any conditions imposed on the exercise of rights must not 'impair their very essence and deprive them of effectiveness'. Thus the Court must focus on the realities of the situation. This principle of effectiveness has led the European Court to impose positive obligations on states in certain circumstances.

3. Recourse to Other Human Rights Instruments

The European Court is increasingly examining other human rights instruments, emanating from both the Council of Europe and other international organizations, to

assist in the interpretation of the ECHR. In the media law context, the European Court took into account the Council of Europe's Convention on Transfrontier Television when assessing whether Switzerland's refusal to grant a company a license to receive and retransmit programmes from a satellite was 'necessary in a democratic society'. In *Goodwin v UK* the Court drew on a resolution of the European Parliament. In *Jersild V Denmark*, it examined the International Covenant on the Elimination of All Forms of Racial Discrimination when deciding the extent to which racist speech was afforded protection by Article 10 ECHR.

1.3.2. THE LAW OF THE ECHR: FREEDOM OF EXPRESSION

Article 10 of the ECHR provides:

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.

Article 10(1) sets out the positive freedom, while Article 10(2) sets out the limitations on that freedom. The Court has stated that, when adjudicating on Article 10 cases, the Court is faced:... not with a choice between two conflicting principles, but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted ... It is not sufficient that the interference belongs to that class of the

exceptions listed in Article 10(2) which has been invoked; neither is it sufficient that the interference was imposed because its subject-matter fell within a particular category or was caught by a legal rule formulated in general or absolute terms: the Court has to be satisfied that the interference was necessary having regard to the facts and circumstances prevailing in the specific case before it.

The importance of freedom of expression has constantly been emphasized. In one of the first major judgments on Article 10, the Court stated:

Freedom of expression constitutes one of the essential foundations of a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to 'information and ideas' that are favorably received or regarded as inoffensive but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of pluralism, tolerance and broad mindedness without which there is no 'democratic society' (*Handyside v UK* (1976)).

1.3.2.1 Article 10(1): The freedom

1. Who Benefits from the Right?

The first sentence of Article 10(1) provides that '*Everyone* has the right to freedom of expression' (emphasis added). Those able to claim the protection of the right include legal as well as natural persons. As far as natural persons are concerned, there is no class of person to which the *prima facie* right has been held not to apply. Thus, members of the armed forces, civil servants and lawyers benefit from the protection of Article 10(1), although their status is likely to be relevant in determining whether a restriction is justified under Article 10(2).

2. Which Activities are Covered by the Right?

The right guaranteed by Article 10 protects more than simply expression in the sense of public communications of opinion. It expressly includes, but is not limited to, the right to hold opinions and to receive information and ideas, as well as the right to impart them.

The European Court has avoided defining exactly which activities are covered by Article 10(1), though the arguments of contracting states that a particular type of activity is not expressive are usually unsuccessful. Governments have unsuccessfully contended that Article 10 was not applicable in *Glaserapp v Germany* and *Leander v Sweden*. Both of these cases concerned the state's refusal to recruit the applicants to civil service posts because of their extremist political opinions (both right wing and left wing). However, although Article 10 was held to be engaged by the state's refusal to recruit individuals because of their political views, the infringement was held to be justified pursuant to Article 10(2). In *Ahmed v United Kingdom*, where the applicants challenged regulations restricting the political activities of local government officers in 'politically restricted posts', it was common ground that Article 10(1) was engaged; again, however, the Court found that the infringement was justified. More recently, the United Kingdom Government unsuccessfully contended that Article 10 did not apply to non-peaceful protests where the two of the applicants physically impeded the activities of others. The right to freedom of expression has been held, in certain circumstances, to include the negative right not to speak or to remain silent.

Furthermore, in *Autronic AG v Switzerland* the Court said: 'Article 10 applies not only to the content of information but also to the means of transmission or reception since any restriction imposed on the means necessarily interferes with the right to receive or impart information.' The Privy Council drew on this authority to find that a state monopoly on the provision of telecommunications interfered with the rights of would-be competitors. As Lord Cooke said: 'Some significant hindrance to a would-be competitor's freedom is normally inherent in any requirement that he provides to his customers certain services only if permitted and on terms laid down by a monopolist.'

3. *The Right to Receive Information*

Article 10 includes the right to receive as well as to impart information. This means that 'victims', who have standing to bring proceedings before the European Court, or in domestic proceedings, can potentially include newspaper readers or television viewers. A good example of the European Court recognizing the right of individuals to receive

information is where the Court ruled that an injunction, imposed by Irish courts, which effectively restrained staff at the applicants' clinics from imparting information to pregnant women concerning abortion facilities outside Ireland, by way of non-directive counseling, was contrary to Article 10. The Court permitted the applicants contesting the injunction to include two women of child-bearing age (who were not pregnant) as they belonged to a class of women of child-bearing age which might be adversely affected by the injunction because it prevented them from receiving information about abortion services in the United Kingdom.

4. To which types of expression does Article 10 apply?

The right to freedom of expression in Article 10(1) is not limited on the basis of the content of the particular expression at issue. The Court has confirmed that it extends to opinions and ideas that are viewed as offensive by the state or by a proportion of the state's population. It applies to commercial and artistic speech as well as to speech the primary purpose of which is political. Expression includes words both spoken and written, the display or dissemination of pictures and images, and also certain forms of conduct (for example, a peaceful march or demonstration, the purpose of which is to communicate a political message. The Court has held that Article 10(1) applies even where the expression consists of light music and commercials transmitted by cable. The protection of Article 10(1) also applies to expression regardless of the medium by which it is conveyed, whether by newspapers, cinema, television, radio or the Internet.

Article 10(1) is likely to extend to symbolic speech or expressive conduct such as flag burning. Its protection has extended to an expulsion order which was specifically intended to restrict the freedom of expression of an individual. The only potential limit on the type of expression covered by Article 10(1) is expression that is anti-democratic in its sentiment such as concerning expression in support of terrorists or hate speech.

5. The special position of the media

The European Court has recognized that the press and other media have a special place in a democratic society as 'purveyor of information and public watchdog', and thus

restrictions directed against such organizations tend to be scrutinized very -closely. The freedom of expression guaranteed by Article 10 includes centrally freedom of the press. The media receives particularly strong protection under Article 10 because it has a duty to impart, in a manner consistent with its obligations and responsibilities, information and ideas on all matters of public interest. This journalistic freedom allows a degree of exaggeration, or even provocation. Article 10 has also been held to include the protection of informants who provide confidential sources to the press, since without such information the press could not perform its vital role as a 'public watchdog'. This protection is part of the Article 10 rights of both the press and the source. Both parties would be victims of an interference with their right to impart and receive information if disclosure was ordered.

Article 10 requires deference to the media as to the methods of objective and balanced reporting; the Court in *Jersild v Denmark* stated that it is not for the courts, whether domestic or European: "... to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists. In this context the Court recalls that Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed."

6. 'Interference by a public authority'

In most cases this is not an issue. Interferences with the right to freedom of expression include, in civil proceedings, a damages award, the imposition of an injunction, an order to disclose a source, and seizure or destruction of material. In the criminal field, interferences include convictions, fines and the length of a custodial sentence. An expulsion from a country together with a ban on re-entry constitutes interference.

Interference by a public authority' includes restrictions upon freedom of expression which are imposed by a private body which is exercising public law functions. For example, in *Wingrove v United Kingdom*, the British Board of Film Classification refused to grant a certificate for a video, which effectively led to a ban on the distribution of that video. While the Board is a private body, it is designated under s. 4 of the Video Recordings Act

1984 as the authority responsible for the issue of certificates for videos. It was treated by the Court as a public authority. In some circumstances, a state's failure to prevent or control interferences with freedom of expression *by private parties* can give rise to an interference with an applicant's right to freedom of expression by the state because its 'positive obligation' to protect freedom of expression is engaged. It is to this matter which we now turn.

7. The positive obligation

Article 10(1) ECHR does not simply prevent states from imposing restrictions on freedom of expression; it imposes a positive obligation on the state to facilitate the exercise of that right. The extent of this positive obligation is at present unclear. The recent case of *Fuentes Bobo v Spain* further develops the concept to ensure the protection of the right to freedom of expression. The applicant was a producer at a state television company (TVE). He was dismissed as a result of voicing offensive and insulting criticism of senior management of TVE in two radio programmes. The applicant complained to the domestic employment tribunals that his dismissal was unfair. On appeal, the Spanish courts held that the applicable employment legislation afforded no remedy. The Spanish Government argued that it could not be held responsible for the applicant's dismissal, as the relationship between the applicant and the employer was governed by private rather than public law. The Court rejected this argument because the state has a positive obligation, in certain circumstances, to protect individuals from interferences with their right to freedom of expression even by private persons. The Court concluded that domestic legislative provisions which had failed to afford a remedy should themselves be regarded as an interference with the applicant's right to freedom of expression, for which the state was responsible.

8. Access to Information

Article 10 ECHR includes the right to *receive* as well as to impart information. However, the European Court has not interpreted this as requiring a state to provide access to information. In *Leander v Sweden*, the Court held, in relation to the state's refusal to reveal secret information:

The right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual.

The same approach was adopted in *Gaskin v United Kingdom*, where the applicant complained that he had been refused access to a case record relating to him created when he was a minor and held by a local authority. The Court found that there had been no violation of Article 10. However, in both *Leander and Gaskin*, the information sought related to a specific individual and its disclosure could not be said to be in the public interest.

The European Commission has recently held that Article 10 places states not only under an obligation to make environmental information accessible to the public, but also under a positive obligation to collect, process and disseminate information which, by its very nature, is not directly accessible and which cannot be known to the public unless the authorities act accordingly. However, the European Court refused to adopt the same approach and concluded that Article 10 was not applicable in the circumstances of the case. The Court concluded that the failure to supply such information was a violation of the right to respect of family life protected by Article 8.

If, however, the state supports the dissemination of certain materials, it is not permitted to discriminate between types of publication on the basis of the publication's content. This issue was addressed in a case against Austria, where the Court concluded that the failure of the state to distribute *Der Igel* to Austrian soldiers while distributing other magazines for soldiers was a violation of Article 10.

9. *Licensing of broadcasting, television and cinema*

The third sentence of Article 10(1) provides that broadcasting, television and cinema may be subject to a licensing system. The European Court has stated that the purpose of the third sentence is:

To make it clear that states are permitted to regulate by a licensing system the way in which broadcasting is organized in their territories, particularly in its technical aspects ... Technical aspects are undeniably important, but the grant or refusal of a license may also be made conditional on other considerations, including such matters as the nature and objectives of a proposed station, its potential audience at a national, regional or local level, the rights and needs of a specific audience and the obligations deriving from international legal instruments. This may lead to interferences whose aims he will legitimate under the third sentence of paragraph 1, even though they do not correspond to any of the aims set out in paragraph 2. The compatibility of such interferences must nevertheless be assessed in the light of the other requirements of paragraph 2. (*Infonnationsverein Lentia and others v Austria*)

Therefore, while the state has a considerable degree of autonomy in its licensing system, any restriction must comply with the requirements of Article 10(2).

1.3.2.2. Article 10(2): The Limitations

1. *Introduction*

In *Sunday Times v United Kingdom*, the Court set out the issues which arise when considering whether an infringement of the right to freedom of expression meets the Article 10(2) conditions:

- (a) Is the restriction on freedom of expression 'prescribed by law'?
- (b) Does the restriction have a legitimate aim?
- (c) Is the restriction 'necessary in a democratic society'?
- (d) Is the restriction within the state's 'margin of appreciation'?

If any of these questions are answered in the negative, the restriction on freedom of expression is a violation of Article 10. The general principles are analyzed below.

2. '**Prescribed by Law**'

The requirement that a restriction must be 'prescribed by law' ensures that any restriction on the right to freedom of expression must satisfy the requirements of the rule of law. In the British context, a permissible restriction must, as a minimum, be authorized by or pursuant to statute, statutory instrument, by a common law rule or by EU legislation. Restrictions authorized by government circulars, with no statutory underpinning, will lack a sufficient legal basis to be 'prescribed by law'. In *R v Advertising Standards Authority*, the Administrative Court held at the permission stage that the British Codes of Advertising and Sales Promotion had sufficient statutory underpinning and were sufficiently clear, precise and accessible for their requirements to be 'prescribed by law'. However, a legal basis for a restriction is not in itself sufficient. Restrictions must also be reasonably precise and accessible. The European Court has held that:

... the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. [Further], a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able — if need be with the appropriate advice — to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. (*Silver v UK*)

The need for foreseeability is of particular importance in relation to Article 10 because vague or imprecise laws have the tendency to 'chill' legitimate expression. In the USA, vague statutes impinging on the right to freedom of speech are invariably struck down as unconstitutional because of their chilling effect on protected speech.¹¹ In practice, however, the Court has been very reluctant to find that an interference with an applicant's right to freedom of expression is not 'prescribed by law'. It might be thought that common law systems, in which the precise scope of a rule of law may have to be drawn from the *ratios* of several judicial decisions, are more likely than civil law systems to fail

to satisfy the requirement of precision. However, in *Steel and others v UK*, the Court concluded that even the notoriously obscure conditions under which a police constable's power of arrest for breach of the peace arises, were defined with sufficient precision at common law to meet the requirements of Article 10(2) even though there was a conflict of judicial authority.

One example where the Court found the domestic law lacking is *Herczegfalvy v Austria*, which concerned interference with the correspondence of mental patients. The person interfering with the correspondence had an unfettered discretion as to whether, and if so when, to do so. The Court concluded from this that the interference was not 'prescribed by law'. More recently, in *Hashman and Harmp v UK*, the Court found that binding over orders requiring persons to be 'of good behavior' were insufficiently precise to be regarded as 'prescribed by law'.

3. Legitimate Aim

The requirement that the restriction must have a legitimate aim simply means that the purpose of the interference with the freedom of expression must be one of the aims listed in Article 10(2). This long list is intended to be exhaustive. However, a number of the permitted aims, such as 'the prevention of disorder' and the 'protection of the rights of others', are inherently broad. (See, e.g., *Ahmed and others v United Kingdom*, where the Court concluded that ensuring the effectiveness of a system of local political democracy was included in the concept of 'rights of others'.) The Court has, in general, not sought to go behind the purpose for which a particular restriction is said to be imposed. In *Observer and Guardian v United Kingdom*, for example, the Court accepted that the Government had applied for an interlocutory injunction to restrain publication of extracts from *Spycatcher* in order to protect national security. The fact that the book was widely available throughout the world (including the USA and Australia) did not affect the Court's willingness to believe that the restriction had been imposed for a legitimate purpose. The real question was whether the restriction was 'necessary in a democratic society'. The Court concluded that the injunction against the newspapers failed the test of

necessity in so far as it prevented publication when the book was widely available elsewhere.

4. Necessary in a Democratic Society

The third, and by far the most important, requirement is that every restriction must be 'necessary in a democratic society'. This means that it must correspond to 'a pressing social need' and be proportionate to meet that need. The European Court has explained that 'necessary' is not synonymous with 'indispensable', but it does not have the flexibility of such expressions as 'useful', 'reasonable' or 'desirable'.

The necessity of a restriction must be 'convincingly established'. In the vast majority of cases, the question whether a violation is established depends on whether the restriction imposed is necessary and proportionate. The Court has adopted a number of approaches to the issue of proportionality: if the need could be achieved by less restrictive means, the restriction will fail the test for proportionality; if the measure is unsuitable for achieving the legitimate objective, the measure will fail the test for proportionality. An example of the doctrine of proportionality in operation is the case of *Barthold v Germany* which concerned a ban on veterinary surgeons advertising their services. The applicant was prohibited from repeating various remarks he had made in a newspaper interview about the lack of emergency veterinary services as a result of the profession's unwillingness to work unsociable hours. The Court concluded that the ban was disproportionate because it risked '... discouraging members of the liberal professions from contributing to public debate on topics affecting the life of the community if even there is the slightest likelihood of their utterances being treated as entailing, to some degree, an advertising effect'. The Court recognized that the state had a legitimate aim in protecting the rights of other veterinary surgeons from unfair competition but the restrictions, as drafted, were overbroad as they extended to discussion of matters of public concern. The Court acknowledged the 'chilling effect' of such broad restrictions on veterinary surgeons' speech.

5. *Margin of Appreciation*

The final element of the Court's analysis of restrictions on freedom of expression is the 'margin of appreciation', which refers to the latitude allowed to member states in their observance of the Convention. The Court has held that the 'margin of appreciation':

goes hand in hand with European supervision, whose extent will vary according to the case. Where ... there has been an interference with the exercise of the rights and freedom guaranteed in paragraph (1) of Article 10, the supervision must be strict, because of the importance of the rights in question; the importance of these rights has been stressed by the Court many times. The necessity for restricting them must be convincingly established. (*AutronicAG v Switzerland*)

The extent of the 'margin of appreciation' varies depending on the subject matter. The margin has tended to be broad in cases concerning obscenity, blasphemy, national security, the protection of morals and commercial speech; whereas in cases of political expression the European Court has applied stricter scrutiny. The Court's use of the margin of appreciation has been described as 'illustrating a disappointing lack of clarity'.

6. *Factors relevant to the test of necessity in Article 10(2) Categories of expression*

The case law in Strasbourg has tended to deal specifically with three main classes of expression — political, artistic and commercial — with political expression receiving the most protection. However, care should be taken not to apply this threefold classification too rigidly, because the expression at issue may fall within more than one category. One such example of expression that fell into more than one category was *Hertel v Switzerland*, which concerned newspaper articles detailing the alleged dangers of microwave ovens. The manufacturers of microwaves sued under the Unfair Competition Act. The Government sought to argue that the expression in question was commercial in nature, and therefore the state should be afforded a wide margin of appreciation. The Court rejected this contention as the expression was not purely commercial but was part of a debate affecting the public interest over public health.

(a) Expression on matters of general public Concern

The European Court attaches the highest importance to the protection of political expression, which it has defined expansively to include speech on matters of general public concern. The court has viewed expression concerning litigation (*Sunday Times*), alleged police malpractice (*Thorgeirson*), the alleged cruelty to seals inflicted by hunters (*Bladet Tromsø*), the practice of cosmetic surgeon (*Bergens Tidende*), and even comments on quality of local veterinary services (*Barthold*) to be expressions on matters of public concern worthy of strong protection. The limits of permissible criticism depend, to some extent, on the identity of the person being criticized. Restrictions on public criticism will be more closely supervised when those criticized are politicians.

But, although the European Court has said that politicians should not expect to escape criticism, it has also emphasized the importance of not restricting their own freedom of speech. In *Castells v Spain*, the Court drew attention to the importance of the rights of politicians, especially members of opposition parties: In [a] democratic system the actions or omissions of the government must be subject to close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion. Furthermore, the dominant position which the government occupies makes it necessary to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.

It is particularly important to have a free flow of opinions and information during the run-up to elections (see *Bowman v United Kingdom*). Where, however, the expression is directed at the undermining of democracy and human rights themselves, the state is not required by Article 10 to confer the same protection as it would be obliged to provide in the case of orthodox political expression. This has been applied in particular to expression by extreme left-wing and neo-Nazi groups. Even in this context, however, the more recent case law from Strasbourg suggests that the collapse of communism in Eastern Europe has meant that it is no longer so necessary to impose restrictions on the speech of communist sympathizers. (See, e.g., *Vogt v Germany*, which concerned with

dismissal of a teacher on the ground that she was a member of the communist party. This was held to be a violation of the Convention by the Court of Human Rights.)

(b) Commercial expression

Though it is now clear that Article 10(1) extends to cover commercial expression, the European Court has frequently invoked the margin of appreciation to justify restrictions on such expression. It has held that consumer protection is a legitimate justification for a ban on false and misleading advertising. In *Casado Coca v Spain*, the Court went further and held that a near complete ban on advertising by lawyers, even when truthful and accurate, was permissible in order to maintain confidence in the proper administration of justice and the dignity of the legal profession. In view of the wide divergences of approach to this question between contracting states, national authorities and courts were best placed to determine how to strike the balance between these legitimate purposes and the public right to receive information about the provision of legal services.

The Court's jurisprudence in this area is less developed than that of the US Supreme Court, which provides protection for truthful and accurate commercial speech except in relation to 'sinful' but lawful products or services such as alcohol, tobacco and gambling. The distinction between the jurisprudence can, at least partially, be explained by the difference in the underlying rationales for the protection of freedom of expression by the two legal systems. The jurisprudence of the US, but not of the European Court, has accepted that one of the justifications for the protection of expression is the pursuit of truth (including truth as to the quality of various products or services).

(c) Artistic expression

Artistic expression has been less well-protected in Strasbourg than either political or commercial expression. Although the Court has consistently held that Article 10 extends to artistic expression, including the public exchange of cultural and social information of all kinds, the protection afforded to this type of expression has been minimal. The Court has permitted states a wide 'margin of appreciation' in this field, particularly in relation to expression which has the potential to offend religious or moral sensibilities. In *Otto-*

Preminger-Institut v Austria, the applicants complained about the seizure and confiscation of a film which, in the view of the Austrian authorities, was likely to offend religious feelings. The Court upheld the state's action, even though the film was shown only in private to members of a film club who had been fully informed of its theme and content. Other cases in which interference with expression has been upheld by the Court include *Miiller v Switzerland*, which concerned a conviction for obscenity and confiscation of paintings which were shown in an exhibition of contemporary art'; and *Handy side v United Kingdom*, which concerned a ban on *The Little Red Schoolbook* in England and Wales even though this book was widely available throughout Continental Europe (and, indeed, in Scotland where a prosecution under Scots obscenity law had failed).

(D) Duties and responsibilities of the applicant

Article 10(2) provides that the exercise of the right to freedom of expression carries with it 'duties and responsibilities'. This phrase is occasionally invoked by governments when seeking to limit the right to freedom of expression of a particular class of individuals, such as members of the armed forces and civil servants. It is difficult to define what this phrase adds, as the identity of the applicant is taken into account by the Court when deciding whether a particular restriction is 'necessary in a democratic society' and within the state's 'margin of appreciation'. The 'duties and responsibilities' of certain classes of applicants are enhanced — for example, journalists because of their role as 'public watchdog'.

Recently the Court has played down this phrase and has emphasized that regardless of an applicant's particular status, they are still 'individuals' who benefit from the full protection of the Convention. In *Bladet Tromso and Stensaas v Norway*, the Court interpreted the phrase 'duties and responsibilities' as meaning that the freedom of expression of journalists was subject to the proviso that they were acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.

(E) The medium of the expression

The European Court has considered the medium of the expression when deciding whether a given restriction is legitimate. For example, in relation to television and radio, which have a very wide potential audience, the state is likely to find it easier to justify a restriction than with a medium with a small potential audience, such as a film show in a licensed sex shop. The Court has taken into account the difficulty of controlling the circulation of videos once they have been put into circulation when deciding on Draconian restrictions on the blasphemous video, *Visions of Ecstasy (Wingrove v United Kingdom)*.

F) Prior restraint or ex post facto sanction

The Court has made clear that Article 10 is engaged whether the restriction imposed is a prior restraint or a sanction imposed after publication. However, it will be more difficult to justify prior restraints (e.g., injunctions) than subsequent punishment (e.g., committal for contempt of court) or civil liability (e.g., damages for defamation). In *Observer and Guardian v United Kingdom*, the Court held:

The dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication for even a short period may well deprive it of all its value and interests.

In his dissenting judgment in *Wingrove v United Kingdom*, Judge de Meyer went further, taking the view that all prior restraints are unacceptable interferences in the field of freedom of expression. This view has never commanded majority support from the Court. A near absolute ban on prior restraints exists in the USA: see, e.g., *New York Times v United States*; *Washington Post v United States* (1971).

1.4. OTHER RIGHTS OF PARTICULAR IMPORTANCE TO MEDIA LAW

There are a number of other Convention Articles that may be relevant in deciding whether restrictions on freedom of expression are permissible. All these rights are also recognized by ICCPR and FDRE Constitution as well.

1. Article 6(1): Reporting of judicial proceedings

Article 6(1) is concerned with the right to a fair trial. The starting position is that a fair trial requires a public trial because a public trial 'protects litigants from the administration of justice in secret' and it maintains public confidence in the judicial system. However, the right to a public hearing is not unqualified; Article 6(1) expressly permits some restrictions on the reporting of judicial proceedings:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where, publicity would prejudice the interests of justice.

The scope of Article 6(1) has given rise to a great deal of case law. It applies to all criminal proceedings, and to all ordinary civil litigation between private parties including tort, contract, restitution, family law and employment law. Article 6(1) also applies to most licensing decisions (license to run a public house terminated as a result of the applicant's conviction for keeping a brothel)) and professional disciplinary tribunals (concerning suspension of the applicant by the disciplinary board of the Architects' Association for canvassing custom)). The Court has held that prison disciplinary proceedings, although within the ambit of Article 6(1), can be conducted inside a prison without public or media access for 'reasons of public order and security'. However, such

exclusion is not permissible in ordinary criminal proceedings. While Article 6(1), unlike Article 10, does not require that any restriction or interference be 'necessary in a democratic society', the Court in *Campbell and Fell* considered the restrictions under a similar proportionality analysis.

A litigant may waive his or her right to a public hearing, provided this waiver does not run counter to any important public interest. The media have unsuccessfully asserted their right to attend a criminal hearing. In *Atkinson, Crook and The Independent v UK*, the Commission rejected an application under Article 10 brought by two journalists complaining about the decision of a trial judge to hold sentencing proceedings in camera. The Commission rejected the applicant's argument that the state could not restrict a person from receiving information that others wish to impart to him, because the rights of the defendant and the interests of justice also had to be taken into account.

2. Article 8: The right to respect for private life

Article 8 concerns various privacy rights, of which the right to respect for private life is relevant to media law. An individual's right to respect for private life can potentially conflict with the media's right to freedom of expression under Article 10. Article 8 provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

As with Article 10, the first paragraph of Article 8 asserts the positive right, namely the right to respect for private life, while the second paragraph sets out how and when restrictions on that positive right can be justified. The methodology of Article 8 is the same as Article 10, and therefore the first stage is to identify an interference with the

right. If such an interference exists, first, it must be 'in accordance with the law', which is identical in meaning to the Article 10 requirement that the interference is 'prescribed by law'; secondly, the interference must achieve a legitimate aim; and, thirdly, the interference must be 'necessary in a democratic society' and within the state's 'margin of appreciation'.

In the media law context, invasions of privacy are likely to be perpetrated by private bodies such as newspapers and television stations rather than by the state. However, as discussed above in relation to Article 10, states have a positive obligation to ensure the effective protection of the right to respect for private life. The concept of a positive obligation in relation to protection of this right is more developed than the Article 10 jurisprudence. The Court has stated that the positive obligation will extend to requiring action to protect an individual from the acts of other private parties:

The Court recalls that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the state to abstain from such interference: in addition to this primarily negative obligation, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.

The European Court has yet to apply the concept of positive obligations under Article 8 in the media law context, where it will need to balance the effective protection of the right to respect to private life with the media's conflicting right to impart information and the right of the public to receive such information.

3. Article 14: The right not to be discriminated against

The ECHR's discrimination provision is not freestanding but is limited to those rights embodied in the Convention and the Protocols. To invoke Article 14, it is necessary to show that the facts in question fall 'within the ambit' of one or more of the Convention rights. Article 14 ECHR provides:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 14 sets out a number of categories of prohibited discrimination, but it is clear from the use of words 'such as' and 'other status' that these categories are not closed. Article 14 does not prohibit all kinds of differential treatment, merely differential treatment which has 'no reasonable justification'. The existence of such justification depends on the aim and effect of the measure in question, and whether the measure is proportionate to the aim that is sought to be realized. One example of discrimination in the media law field where one would have expected the European Court to have recourse to Article 14 is an Austrian case, which concerned the failure of the state to distribute *Derlgel* to Austrian soldiers while distributing other magazines for soldiers. The Court concluded that there was a violation of Article 10, because the state was not permitted to discriminate between types of publication on the basis of the publication's content. However, the Court reached this conclusion without recourse to Article 14.

Other areas of media law where Article 14 may be relevant include the criminal law of blasphemy, which explicitly discriminates against non-Christian religions.

4. Article 15: Restrictions in time of war or other public emergency threatening the life of the nation

Article 15 permits the suspension of various Convention rights in times of war and other public emergencies threatening the life of the nation. Article 15 provides:

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep] the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

This Article may be relevant to reporting on wars and, arguably, the Northern Ireland conflict. Despite the language of Article 15(1) restricting it to measures that are 'strictly required', the Court has recognized a margin of appreciation for the contracting state in assessing whether such an emergency exists and, if so, what steps are necessary to overcome it. Van Dijk and van Hoof, contend that the exceptions provided for in Article 15 can never be applicable to the 'freedom to hold opinions' contained in Article 10, since an exception to that right can in no circumstances be 'strictly required' in the sense of Article 15(1).

5. Article 17: Restrictions on activities subversive of Convention rights — the problem of hate speech

Article 17 permits restrictions on those who seek to destroy the Convention rights of others and has been invoked in relation to prosecutions for hate speech. Article 17 ECHR provides:

Nothing in this Convention may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention, any measures taken pursuant to Article 17 must be proportionate to the threat to the rights of others.

Discussion Questions

1. Discuss MILL'S argument 'from truth' and pinpoint the critiques on this argument.
2. Distinguish between 'democratic self governance' and 'self fulfillment' principles of freedom of expression.
3. Which one of the three theoretical rationales or principles is most appropriate to justify freedom of speech/expression? Discuss why?
4. What is Mill's 'harm' principle and what is its problem?
5. What does the harm principle contribute in controlling pornography and hate speech?
6. Distinguish between Mill's harm principle and Feinberg's offense principle and argue their respective merits and demerits.
7. What is the significance of prohibition of pornography to equality and the rights of women?
8. From the overall discussions of the theoretical rationales of freedom of expression, provide your positions should freedom of speech be restricted or otherwise.
9. Discuss the meaning of expression/speech, their type and degree of protection afforded to each of them based on the case law of ECHR.
10. Discuss restrictions on freedom of speech, the tests they should fulfill and the boundaries that determine whether they violate the freedom or not.

CHAPTER 2

MEDIA

Chapter Objectives

After completion of this chapter, students will be able to:

- Understand what is media in general,
- Understand the evolution of different types of media
- Understand and analyze the functions of media in democratic societies,
- Understand the regulation of Global communications,
- Understand the role of International Telecommunication Union (ITU) in regulation of communications,
- Understand and analyze the history/evolution and development of media in Ethiopia,
- Understand and analyze the evolution of print and electronic medias in Ethiopia,
- Understand and analyze the manner of regulation of the media during the three regimes starting from Haile Selassie-I,
- Compare and contrast the existence of private media during these three regimes.
- Understand and analyze the extent of freedom extended to the media during these regimes,
- Appreciate the role of media in democratic transformation in Ethiopia.

2.1. Meaning and Functions of Media

In the broadest sense of the term, media is a channel through which a message travels from a source to a receiver. Specifically, media refers to the main means of mass communication (especially television, radio, and newspapers) regarded collectively. The word **media** comes from the Latin plural of **medium**. The traditional view is that it should therefore be treated as a plural noun in all its senses in English. In practice, in the sense ‘television, radio, and the press collectively’, it behaves as a collective noun (like **staff** or **clergy**, for example), which means that it is acceptable in Standard English for it

to take either a singular or a plural verb. According to YourDictionary.com, the definition of Mass Media is those means of communication that reach and influence large numbers of people, especially newspapers, popular magazines, radio, and television.”

Mass Media goes along with Information and Communication Technology in this day and age so as to mold a new-fangled way of life to the majority living in this global generation. Mass Media are those media that are created to be consumed by immense number of population worldwide and also a direct contemporary instrument of mass communication. Nonetheless, Mass Media is considered as the fourth estate of the society as well. It is the fourth branch of the government, the voice and weapon of the people and the society as whole.

Then again, by and large when we speak about Mass Media, we immediately perceive that these are communications media that reach the mass of people. From Audio recording and reproduction like records, tapes, cassettes, cartridges, CDs, to Broadcasting Media such as Radio, Television, Cable, to Film or Motion Pictures whether in Cinema or in DVDs, and the Digital Media, the Internet, Mobile Phones, Satellite, and ultimately the Publishing or Print Media which includes Books, Newspapers, Magazines and the run-of-the-mill marvelous Video games.

There are two partners in mass media communication, the dispatcher and the receiver. The dispatcher could be an organization under the auspices of government or under the private ownership that gathers information, news etc. and impart to receiver. On the other hand, there is the public or specific group who receives information and resides in a given locality or could be found in a global scale.

Functions of Media

1. **Surveillance:** We learn about innovations, discoveries, accidents, assassinations, revolutions and natural disasters as soon as they happen. Such function can be further divided in to two main types;

- a. **Warning:** occurs when the media informs us about threats from hurricane, volcanoes, economic depression, inflation or military attack. These warning can be immediate (a TV station interrupts a program to broadcast a tornado warning) or long term or chronic threats when for example a newspaper can have serious headlines about pollution or unemployment.
 - b. **Instrumental:** is transmission of information that is useful in everyday life of the community. This could be whether report for tomorrow or advertising time and place of a movie premiere.
2. **Attitude change:** The average individual spends some time of his day watching TV, listening to radio or reading a newspaper. These media are capable of altering the perception of the individual or community. For example, many people who watched the debate between Kennedy and Nixon changed their voting intention. This act of influence is highly successful on children as they are keen to learn anything new.
3. **Entertainment:** The media provides us entertainment news and programming on sports, music, theater, movies and games like chess or crossword.

2.2 History of Communication Media

Before dealing with the media as one means of communication, it is important to understand communication in general, its origin and various means or technologies.

2.2.1 Communication

INTRODUCTION

Communication is the process of sharing ideas, information, and messages with others in a particular time and place. Communication includes writing and talking, as well as nonverbal communication (such as facial expressions, body language, or gestures), visual communication (the use of images or pictures, such as painting, photography, video, or film), and electronic communication (telephone calls, electronic mail, cable television, or

satellite broadcasts). Communication is a vital part of personal life and is also important in business, education, and any other situation where people encounter each other.

Businesses are concerned with communication in several special ways. Some businesses build and install communication equipment, such as fax (facsimile) machines, video cameras, CD players, printing presses, personal computers, and telephones. Other companies create some of the messages or content that those technologies carry, such as movies, books, and software. These companies are part of the media or telecommunications industries. Organizational communication is important in every business. People in organizations need to communicate to coordinate their work and to inform others outside the business about their products and services (these kinds of communication are called advertising or public relations).

Communication between two people is an outgrowth of methods developed over centuries of expression. Gestures, the development of language, and the necessity to engage in joint action all played a part. While other animals use a limited range of sounds or signals to communicate, humans have developed complex systems of language that are used to ensure survival, to express ideas and emotions, to tell stories and remember the past, and to negotiate with one another. Oral (spoken) language is a feature of every human society or culture. Anthropologists studying ancient cultures have several theories about how human language began and developed. The earliest language systems probably combined vocal sounds with hand or body signals to express messages. Some words may be imitative of natural sounds. Others may have come from expressions of emotion, such as laughter or crying. Language, some theorists believe, is an outgrowth of group activities, such as working together or dancing.

Over 6,000 languages and major dialects are spoken in the world today. As some languages grow, others disappear. Languages that grow also evolve and change due to class, gender, profession, age group, and other social forces. Most languages also have a written form. The oldest records of written language are about 5000 years old. However,

written communication began much earlier in the form of drawings or marks made to indicate meaningful information about the natural world.

INTERPERSONAL COMMUNICATION: In every society, humans have developed spoken and written language as a means of sharing messages and meanings. The most common form of daily communication is interpersonal—that is, face-to-face, at the same time and in the same place.

The most basic form of interpersonal communication is a dyad (an encounter or conversation between two people). Some dyads exist over a long period of time, as in a marriage or partnership. Communicating well in a dyad requires good conversational skills. Communicators must know how to start and end the conversation, how to make themselves understood, how to respond to the partner's statements, how to be sensitive to their partner's concerns, how to take turns, and how to listen. Together, these abilities are called communication competence. Shyness or reluctance to interact is called communication apprehension. Persuasion is the process of convincing others that one's ideas or views are valuable or important.

Communication may also occur in small groups, such as families, clubs, religious groups, friendship groups, or work groups. Most small-group interaction involves fewer than ten people, and the communicators need the same communication skills as in a dyadic conversation. However, additional factors called group dynamics come into play in a small group. A group may try to work toward a consensus, a general sense of understanding or agreement with others in the group. Groupthink may occur, in which a group reaches consensus so quickly that its members mistakenly ignore other good ideas. Small-group members may experience disagreement or even conflict. Some members may be more persuasive than others and form sides, or cliques, within the group.

Interpersonal communication occurs with larger groups as well, such as when a speaker gives a talk to a large crowd (a political candidate giving a speech at a campaign rally, or a teacher lecturing to a large class). However, the audience can respond in only limited

ways (such as with applause, nodding, whistles, boos, or silence). The speaker usually wants to be persuasive or informative, so the words chosen and the style of delivery or performance are very important. A speaker who wants to reach an even larger audience than the people who can physically hear the speech in one place must use communication technology or media to get the message across distance and even time.

COMMUNICATION AT A DISTANCE

From the earliest times, people have needed to communicate across distance or over time. Since the beginnings of writing, communication media have allowed messages to travel over distance and time. A communication medium is a means for recording and transporting a message or information. The word medium comes from the Latin word *medius*, meaning middle or between. It is a channel or path for sending a message between communicators. A single channel—such as radio, or a book, or the telephone—is called a medium; media is plural, meaning more than one medium.

Early societies developed systems for sending simple messages or signals that could be seen or heard over a short distance, such as drumbeats, fire and smoke signals, or lantern beacons. Messages were attached to the legs of carrier pigeons that were released to fly home (this system was used until World War I, which started in 1914). Semaphore systems (visual codes) of flags or flashing lights were employed to send messages over relatively short but difficult-to-cross distances, such as from hilltop to hilltop or between ships at sea. In the early 1790s the French scientist and engineer Claude Chappe persuaded the French government to install a system of towers that used semaphore signals to send visual telegraphs along approved routes throughout the country. The system was copied in Great Britain and the United States.

Some ancient societies, such as the Roman or Byzantine empires, expanded their territorial control far beyond their original boundaries, and traded with distant neighbors. To hold on to their far-flung territories, they needed two technologies that have remained closely tied ever since: transportation and the ability to record information. Recorded

messages had to be carried easily; therefore, lightweight forms of recording (such as papyrus or animal skins) were desirable.

2.2.2. Paper and Printing

The first lightweight medium was papyrus, an early form of paper used by the Egyptians that was made from grasses called reeds. Later, in the 2nd century ad, the Chinese wrote on silk fabric instead of wood, and developed paper made from silk fibers. (Today paper made from cotton or linen fibers is still called rag paper.) From as early as the 2nd century bc, Europeans wrote on thin layers of tanned and scraped animal skins called parchment or vellum, with quill pens made from bird feathers. Parchment is not as light as papyrus but is very durable; many parchment manuscripts and books from the Middle Ages still exist. The Arabs brought papermaking to Europe from China in the 11th century ad. Paper gave European merchants, who traveled across the continent, a portable and inexpensive way to keep records.

Until the 1400s in Europe, all documents were handwritten. Copyists and editors called scribes recorded commercial transactions, legal decisions and pronouncements, and manuscript copies of religious books—many scribes were monks working in monasteries. By the 15th century, however, the need arose for an easier way to duplicate documents. In Asia, block printing had already been developed by Buddhist monks in China in about the 8th century (see Prints and Printmaking). A similar technique was later used in the 15th century by Europeans to make illustrations for printed books.

An early version of movable type was first developed in China around 1045, and was independently developed by Koreans in the 13th century ad. In 1450 the German printer Johannes Gutenberg perfected movable metal type and introduced the first reliable system of typesetting, a key invention in the development of printing. With movable type, a raised, reversed image of each letter can be hand-set, word by word, into a frame that holds the pieces together. The raised letters are inked; a sheet of paper laid over them and pressed down on the letters with a screw-driven press, creating a correct image of the

text. When enough copies are printed, the letters can be taken apart and reused. The technique made printing numerous copies of textual material much easier, and the number of printing shops grew dramatically over the next century.

As more books became available, more people learned to read. Books were printed in the local, or vernacular languages as well as classical Greek and Latin. With literacy came exposure to new ideas; some historians believe that the 16th-century Protestant Reformation (a revolution in the Christian church that divided it into factions) might not have occurred if European thought had not been prepared by ideas introduced and circulated in printed books. Printers published other things besides books, including newspapers, pamphlets, and broadsides (sheets of paper printed on one or both sides). These cheaper works helped spread news throughout Europe and, in the 17th and 18th centuries, throughout the British colonies in America.

During the Industrial Revolution of the late 18th and early 19th centuries, printing technologies evolved rapidly. The steam-powered press was invented in Germany in the 19th century, and the rotary press, which prints images onto a continuous sheet of paper from a rotating drum, was introduced in the United States in 1846. The Linotype typesetting machine was patented by the German-born American inventor Ottmar Mergenthaler in 1884. It permitted typesetters to set text by typing on a keyboard rather than hand-setting each letter individually. Together, the Linotype machine and the rotary press transformed the speed of printing. These so-called hot-metal or letterpress printing technologies dominated the industry until the 1950s, when phototypesetting and photo-offset printing were introduced.

Photocopying was another technology that made document duplication easier. Invented by American physicist and inventor Edwin Land in the 1950s, photocopying transfers an image from one sheet of paper to another very rapidly. A more recent advance is computer typesetting and printing. Computers and word-processing and graphics software are used today to set type and compose pages on the screen just as they will look in the final print, in either black and white or color. Page layouts can also be transmitted

digitally (numerically coded into electronic pulses) via fax machines, computer modems, telephone networks, and satellite systems to other locations for editing, redesign, or printing.

The spread of computer-based word processing and graphic design has led to the growth of desktop publishing. Today almost anyone can publish newsletters, newspapers, or magazines for medium-sized audiences. Business communication has been transformed by computer and information technologies: letters, memos, reports, or other documents can be transmitted almost anywhere at the speed of light. Early advocates of business computers predicted the paperless office, an office where paper would be made obsolete by computer technology. Experience, however, has shown that the ease of copying, printing, and document transmission made possible by computer technology has produced more demand for paper, not less.

2.2.3. Radio

The telegraph and telephone were systems for distance communication that sent electrical signals through wires. The earliest system for sending electrical signals through the air via electromagnetic waves was called wireless, and later radio. Radio technology was based on the discoveries of James Clerk Maxwell. In 1864 he proposed a theory that electromagnetic signals did not need wires to be transmitted, but could be carried on electromagnetic waves. He demonstrated that light, electricity, and heat are all part of a band of radiant energy we now call the radio or electromagnetic spectrum.

The Italian electrical engineer Guglielmo Marconi was the first person to invent a true wireless radio. In 1895 he built a system that could send and receive a signal at a distance of close to 3 km (close to 2 mi). He moved to England, and by 1899 the British Marconi Company had sent signals across the English Channel. In 1901 Marconi received the Morse code signal for the letter S sent across the Atlantic Ocean to Canada.

Marconi's radio system used a spark-gap technology that could transmit only simple on-off signals—so radio signaling used an on-off system like Morse code. This type of radio technology is called radiotelegraphy. Wireless was especially valuable for ships in distress, so that other ships could be dispatched to save their passengers and crews in times of emergency.

In 1901 the Canadian-born American physicist Reginald Fessenden patented an alternator that would use continuous waves instead of on-off spark-gap signals. This system could also send signals much farther and with much less background noise, so it could carry the sound of the human voice. This new approach to radio was called radiotelephony. On Christmas Eve and New Year's Eve in 1906, Fessenden produced the first radio broadcasts from Brant Rock, Massachusetts, which were picked up as far away as New York and by ships in the Atlantic. Another American, Lee De Forest, is best known for his invention of the triode vacuum tube, called the Audion, which amplified radio signals so that musical concerts, dramatic performances, and speeches could be heard clearly over the radio.

Radio technology improved rapidly throughout the 20th century. The first breakthrough was the invention of the cat's-whisker receiver, or crystal set, which used a silicon crystal and a small metal wire to detect radio waves clearly. Later improvements were made in the valves, or tubes, such as De Forest's Audion, which amplified the signal once it was received. Radio transmissions initially used amplitude modulation (AM) to superimpose audio signals onto radio waves. The invention of frequency modulation (FM) radio provided much more sensitive and clear radio transmission and reception. Tuners became more sensitive, and more broadcast signals were sent over the air at different frequencies. In the 1950s and 1960s radio manufacturers began replacing the bulky and heat-generating vacuum tubes in radios with transistors, and radios became smaller.

In the United States, the first regularly scheduled public broadcasts were made in 1920 from station KDKA in Pittsburgh, Pennsylvania. Other stations were soon established across the country, and companies like the Radio Corporation of America (RCA) and

Westinghouse, which owned many stations, formed radio networks that would produce and share programming. Radio programming soon filled the airwaves. Competitors using the same frequencies jammed each other's signals.

Eventually the radio industry asked the federal government to intervene in their disputes over frequencies and signal power. The Federal Radio Commission (FRC) was created in 1927 and was given the task of allocating frequencies to different users. However, the FRC was somewhat an ineffective body until the Communications Act of 1934, when it was renamed the Federal Communications Commission (FCC) and given a budget and a staff. FCC rulings had the power of law, and the agency was responsible for issuing licenses to radio broadcasters for particular bandwidths, frequencies, and signal powers. License holders had to demonstrate that they operated their radio stations “in the public interest, convenience, and necessity”.

Most large cities and many small towns have a number of local radio stations, on both the AM and the FM frequencies. Other radio frequencies are used for other purposes, especially television. Certain frequencies are used to relay wireless telephone calls across small defined geographic areas called “cells”. In the United States, some frequencies are dedicated to citizens-band (CB) radio, which long-distance truck drivers use to check on road conditions, report problems, or just to chat. Special frequencies are devoted to emergency use, such as police, fire, or emergency medical dispatching, or to aviation radio. An important part of the radio spectrum is shortwave, which can carry radio signals around the world. International shortwave broadcasts are very popular.

2.2.4 Television

Just as inventors had sought ways to transmit sound using electromagnetic waves, they worked to develop similar methods for transmitting pictures. By the first decade of the 20th century, the basic ideas of television technology were understood, although it took several more decades to work out the necessary improvements in existing technology.

Two pioneers independently created the first workable television systems—American inventor Philo T. Farnsworth and Russian-born American engineer Vladimir K. Zworykin. Farnsworth used an electronic camera he called an image dissector to transmit a picture of a dollar sign in 1927. He patented aspects of his system, and developed his television further in the 1930s, but lost his financial backing when World War II (1939-1945) began.

In 1923 Zworykin first demonstrated an electronic television camera he called the iconoscope. At the time, he was working for Westinghouse Electronic Corporation, but Zworykin moved to RCA when David Sarnoff, vice president of RCA, became interested in his invention. Sarnoff supported the development of the iconoscope when RCA obtained the rights to Westinghouse's radio research projects in 1930.

In 1932 RCA was transmitting 120-line pictures, and by 1935 had a 343-line image. The first television sets were offered for sale in the United States in 1938, although they had been available in England for two years before that. Standards for television broadcasting and television receivers were put in place by the FCC in 1939; in 1941 the commission accepted industry recommendations for television technology standards that are still in place today. RCA started the first regularly scheduled television programming on July 1, 1941, in New York City.

World War II put television technology on “hold.” After the war, however, technical improvements and American prosperity created a great demand for radio and television systems. At the end of the war, only six television stations were broadcasting in the United States (in New York City; Washington, D.C.; Chicago, Illinois; Philadelphia, Pennsylvania; Schenectady, New York; and Los Angeles, California), and for only a few hours each day. By 1948, 34 stations were broadcasting television signals in 21 major cities, and about 1 million television sets had been sold. By the end of the 1950s television was on the air almost everywhere in the country. The FCC set aside channels for public or educational television to ensure quality programming and to reach remote

communities. Three national television networks emerged—NBC, then owned by RCA; CBS; and ABC.

Since the 1950s many improvements have been made in television technology, particularly the introduction of color television in the 1960s. Image reception has become clearer, and screens have become larger. Most televisions can now receive stereo sound. The widespread growth of cable television since the 1960s has introduced many new channels and types of programming into American homes. And today direct-broadcast-satellite (DBS) services allow individual households to receive hundreds of channels carried by satellites directly into their homes.

There is no doubt that television has been one of the most important communication technologies in history. Televisions are switched on an average of seven hours a day in American households. Debates continue about the medium's effects on children, culture, education, politics, and community life. Critics say that television feeds a constant stream of simplified ideas and sensationalistic images, that it has a negative effect on political campaigns and voting patterns, that it destroys local cultures in favor of a bland national culture, and that it has encouraged the growth of an uncritical and passive audience. Defenders say that television provides a great deal of high-quality educational and cultural programming, and that it is the major source of national and international news and information for most U.S. citizens. Television can be a very effective teaching tool in the classroom and at home. And, as the Canadian writer Marshall McLuhan pointed out, perhaps nothing has been more responsible for creating the global village—the sense that we can see and hear events anywhere in the world as they happen and so can feel more connected to other places.

2.2.5 Computers

The earliest computers were machines built to make repetitive numerical calculations that had previously been done by hand. By the 1890s calculating machines were used to tabulate the U.S. Census with a punched-card system invented by Herman Hollerith.

Electromechanical calculators were being built by the 1930s, especially by a new company called the International Business Machines Company (IBM). The first truly electronic memory and processors were built by John Vincent Atanasoff in 1939 at the Iowa State College, and the first fully functioning electronic computers, a series of ten called Colossus, were built by the British Secret Service during World War II to help them crack the Germans' secret military codes. The first general-purpose electronic computer in America, called the Electronic Numerical Integrator and Computer (ENIAC), was introduced at the University of Pennsylvania in 1946. Two of its inventors, American engineers John Presper Eckert, Jr., and John Mauchly, moved on to build the first electronic computer for commercial use, the UNIVAC, at the Remington Rand Corporation.

While computers continued to improve, they were used primarily for mathematical and scientific calculations, and for encoding and deciphering encoded messages. Computer technology was finally applied to printed communication in the 1970s when the first word processors were created. These machines had a single purpose and were not what would be considered full computers, but they added computer processing to typewriters to make writing and changing text significantly easier.

In 1975 the first microcomputer was introduced, which had the power of many larger machines but could fit onto a desktop. This miniaturization was accomplished by using new microprocessor technologies, which compressed the memory and processing power of many hundreds and then thousands of circuits onto tiny chips of materials called semiconductors. The invention was soon followed by the introduction of the first word-processing software in 1978, which enabled people to use the computer to write and change text and graphics.

At the same time that computers were becoming faster, more-powerful, and smaller, networks developed for interconnecting computers. In the 1960s the Advanced Research Projects Agency (ARPA) of the U.S. Department of Defense, along with researchers working on military projects at research centers and universities across the country,

developed a network called the ARPANET for sharing data and mainframe computer processing time over specially equipped telephone lines and satellite links. The network was designed to survive the attack or destruction of some of its parts and continue to work.

Soon, however, scientists using the ARPANET realized that they could send and receive messages as well as data and programs over the network. The ARPANET became the first major electronic-mail network; soon thousands of researchers all over the world used it. Later the National Science Foundation (NSF) helped connect more universities and nonmilitary research sites to the ARPANET, and renamed it the Internet because it was a network of networks among many different organizations.

Today the Internet is the foundation of computer networks in the United States. It is interconnected by both wire and over-the-air microwave and satellite telephone lines. Commercial online service providers—such as America Online, CompuServe, and the Microsoft Network—sell Internet access to individual computer users and companies. Smaller networks of computers, called Local Area Networks (LANs), can be installed in a single building or for a whole organization. Wide Area Networks (WANs) can be used to span a large geographical area. LANs and WANs use telephone lines, computer cables, and microwave and laser beams to carry digital information around a smaller area, such as a single college campus. In turn, they can interconnect to the Internet. Computer networks can carry any digital signals, including video images, sounds, graphics, animations, and text.

Since the 1970s personal computers have transformed American business, education, and entertainment. The typical home or business computer today has many times the computing power of a single early mainframe. People can use computers to design graphics and full-motion video, compose music, send electronic mail, make airline or hotel reservations, or search the Library of Congress over the World Wide Web. They can play games and even visit electronic rooms or parties to talk to other people. These

activities are made possible by multimedia computer programs that employ still and motion pictures, sounds, graphics, and text together.

Computers are used in all aspects of business and education. Self-instructional computer programs help people learn new information or skills. Some programs are simulations, which imitate tasks that require the learner to perform in certain ways, and give the learner feedback about that performance. For example, airline pilots sharpen their flying skills in computer-generated flight simulators, which exactly duplicate the experience of flying in different types of aircraft.

2.2.6. The Impact of Communication Technology

Since the time of writing, communication technologies have had a major influence on society. The Canadian historian Harold Innis wrote that communication technologies were the key elements in the development of all the great ancient societies: Egypt was transformed by papyrus and written hieroglyphics; ancient Babylonia used cuneiform writing, impressed indelibly into clay tablets to develop a great economic system; the ancient Greeks' love of the spoken word led them to perfect public speaking, persuasive rhetoric, drama, and philosophy; for administering their empire, the Romans developed an unparalleled system of government that depended on the Roman alphabet; and of course paper and the printing press extended new ways of thinking across Europe and paved the way for the European Renaissance and the Protestant Reformation. Later Marshall McLuhan (a student of Innis's) argued that radio, movies, and television had just as much impact, if not more, on modern society as printing. The difference between these media is that while printing encourages logical thinking that lays out ideas one step at a time, electronic media disrupt logical, linear thinking. Electronic media create the sense of experiencing everything at once, in no particular order and disconnected from the sources of the messages.

Most observers agree that communication media and technologies have contributed to a society that is changing very rapidly. Three key issues have arisen in the tide of this rapid

change: individual privacy, coverage of politics in the media, and the availability of information.

(A) Privacy

New communication and information technologies have enabled many organizations and people to collect, organize, and sell information about other people and organizations, both quickly and cheaply. The easy availability of personal information makes banking, education, health care, and sales much more convenient for both consumers and sellers. Credit card and automated teller machine (ATM) systems would be impossible without large databases of information available on demand. Scanners in the supermarket rapidly and accurately record every item that passes over them, making grocery checkouts faster and error free. Companies maintain huge mailing lists of customers that record not only their names, addresses, and phone numbers, but also major recent purchases, credit ratings, and demographic information (such as sex, age, income, and educational level) that helps the companies identify target markets for specific products.

The negative side to all this shared information is that there is little control over who sees or uses this personal information. Medical records are shared not only by doctors' offices and hospitals but are regularly made available to insurance companies as well. Auto insurance companies obtain information about traffic violations from state and local police departments. Credit report errors occur often and can be very damaging to a person's financial situation. Many Americans worry that having so much of their personal information available to so many others may hurt their privacy.

(B) Coverage of Politics

Some researchers believe that media news coverage of campaigning has hurt the political process in the United States. They cite the declining rates of voter participation and negative public opinions about politics and politicians as evidence that despite the coverage, Americans know less about politics, and therefore are more susceptible to political manipulation than ever before. Other researchers think that the media, especially

newspapers and television, have helped educate Americans about the political process, and have made them more critical and careful voters.

The penny press (the first newspapers available to mass audiences because they cost just a penny), public education, and public libraries are uniquely American inventions that were meant to ensure that Americans could educate themselves about important issues and events, and so be able to make political decisions. Today, however, most cities have only one newspaper (and therefore no competing points of view in the press); public education is experiencing unprecedented financial difficulties and lack of public confidence, and governments are cutting library budgets to the minimum. In this climate, many researchers are concerned that Americans may not have access to reliable information, although some believe that more citizens will turn to the Internet and the World Wide Web as sources of information about key issues.

(C) Information Equity

Another concern among researchers studying changes in society is the growing gap between the information rich (people with easy access to information) and the information poor (people with less access to information). As new technologies and communication services emerge, the service companies would like to find receptive—and paying—audiences. Newspapers, radio, and television were for many years the major sources of day-to-day information, and they were very inexpensive for the audience. Broadcast signals could be received free of charge, and daily newspapers supported themselves mainly with advertising so that per-copy prices stayed low. AT&T provided “universal service at affordable prices” so that most people could afford local telephone service.

The media today, however, are charging more than ever for their products and services. More households pay for cable television than settle for over-the-air, or free, television. Local telephone rates have gone up since the breakup of AT&T in the 1980s (although long-distance services, with many competing providers, have become cheaper). Newspaper circulation has declined, and magazine subscriptions and book prices have

increased sharply. Online services (Internet service providers) charge customers by the hour to connect to their networks. Communication equipment is more sophisticated, and costs more, than in the past; even the prices of computers, which have become vastly more powerful in the past few years, have stayed about level. In short, people who can afford more and better services may become more informed than people who cannot afford them. Some researchers think that the differences between the information rich and poor may have negative social consequences.

2.2.7. Regulation of Global Communication: International Telecommunications Union (ITU)

On 24 May 1844, Samuel Morse sent his first public message over a telegraph line between Washington and Baltimore, and through that simple act, ushered in the telecommunication age.

Barely ten years later, was telegraphy available as a service to the general public. In those days, however, telegraph lines did not cross national borders. Because each country used a different system, messages had to be transcribed, translated and handed over at frontiers, then re-transmitted over the telegraph network of the neighboring country.

Given the slow and unwieldy nature of this system, many countries eventually decided to establish arrangements which would facilitate interconnection of their national networks. However, because such arrangements were managed by each country at a national level, setting up telegraph links often required a huge number of separate agreements. In the case of Prussia, for example, no less than fifteen agreements were required for the link between the capital and the frontier localities bordering other German States. To simplify matters, countries began to develop bilateral or regional agreements, so that by 1864 there were several regional conventions in place.

The continuing rapid expansion of telegraph networks in a growing number of countries finally prompted 20 European States to meet to develop a framework agreement covering

international interconnection. At the same time, the group decided on common rules to standardize equipment to facilitate international interconnection, adopted uniform operating instructions which would apply to all countries, and laid down common international tariff and accounting rules.

On 17 May 1865, after two and a half months of arduous negotiation, the first International Telegraph Convention was signed in Paris by the 20 founding members, and the International Telegraph Union (ITU) was established to facilitate subsequent amendments to this initial agreement. Today, some 140 years later, the reasons which led to the establishment of ITU still apply, and the fundamental objectives of the organization remain basically unchanged.

Following the patenting of the telephone in 1876 and the subsequent expansion of telephony, the International Telegraph Union began, in 1885, to draw up international legislation governing telephony. With the invention in 1896 of wireless telegraphy — the first type of radio communication — and the utilization of this new technique for maritime and other purposes, it was decided to convene a preliminary radio conference in 1903 to study the question of international regulations for radiotelegraph communications. The first International Radiotelegraph Conference held in 1906 in Berlin signed the first International Radiotelegraph Convention, and the annex to this Convention contained the first regulations governing wireless telegraphy. These regulations, which have since been expanded and revised by numerous radio conferences, are now known as the Radio Regulations.

The year 1920 saw the beginning of sound broadcasting at the improvised studios of the Marconi Company, and in 1927, the International Radio Consultative Committee (CCIR) was established at a conference held in Washington D.C. The International Telephone Consultative Committee (CCIF, set up in 1924), the International Telegraph Consultative Committee (CCIT, set up in 1925), and the CCIR were made responsible for coordinating the technical studies, tests and measurements being carried out in the various fields of telecommunications, as well as for drawing up international standards.

The 1927 International Radiotelegraph Conference also allocated frequency bands to the various radio services in existence at the time (fixed, maritime and aeronautical mobile, broadcasting, amateur and experimental), to ensure greater efficiency of operation in view of the increase in the number of radio communication services and the technical peculiarities of each service.

At the 1932 Madrid Conference, the Union decided to combine the International Telegraph Convention of 1865 and the International Radiotelegraph Convention of 1906 to form the International Telecommunication Convention. It was also decided to change the name of the Union to International Telecommunication Union. The new name, which came into effect on 1 January 1934, was chosen to properly reflect the full scope of the Union's responsibilities, which by this time covered all forms of wire line and wireless communication.

In 1947, after the Second World War, ITU held a conference in Atlantic City with the aim of developing and modernizing the organization. Under an agreement with the newly created United Nations, it became a UN specialized agency on 15 October 1947, and the headquarters of the organization were transferred in 1948 from Bern to Geneva. At the same time, the International Frequency Registration Board (IFRB) was established to coordinate the increasingly complicated task of managing the radio-frequency spectrum; the same year, the Table of Frequency Allocations, introduced in 1912, was declared mandatory.

In 1956, the CCIT and the CCIF were merged to form the International Telephone and Telegraph Consultative Committee (CCITT), in order to respond more effectively to the requirements generated by the development of these two types of communication.

The following year was marked by the launch of the first artificial satellite, Sputnik-1, and the beginning of the space age. In 1963, the first geostationary communications satellite (Syncom-1) was put into orbit following the suggestion, made by writer Arthur C. Clarke in 1945, that satellites could be used for the transmission of information.

In order to meet the challenges of new space communications systems, in 1959 CCIR set up a study group responsible for studying space radio communication. In addition, an Extraordinary Administrative Conference for space communications was held in 1963 in Geneva to allocate frequencies to the various space services. Subsequent conferences made further allocations and put in place regulations governing the use, by satellites, of the radio-frequency spectrum and associated orbital slots. In 1992, allocations were made for the first time to serve the needs of a new kind of space service using non-geostationary satellites, known as Global Mobile Personal Communications by Satellite (GMPCS). The same year, spectrum was identified for IMT-2000, the ITU-developed next-generation global standard for digital mobile telephony. IMT-2000 now harmonizes incompatible mobile systems while providing a technical foundation for new, high-speed wireless devices capable of handling voice, data and connection to online services such as the Internet.

In 1989, the Plenipotentiary Conference held in Nice recognized the importance of placing technical assistance to developing countries on the same footing as its traditional activities of standardization and spectrum management. To this end, it established the Telecommunication Development Bureau (BDT) to step up efforts being made to improve communications in the developing regions of the world.

At the same time, against a background of increasing globalization and the gradual liberalization of world telecommunication markets, the Nice Plenipotentiary Conference initiated a re-evaluation of the Union's structures, operation, working methods and the resources allocated to enable it to achieve its objectives. The conference established a committee of experts whose task was to make recommendations on changes which would ensure that the Union continued to respond effectively to the needs of its members. In 1992, a plenipotentiary conference, known as the Additional Plenipotentiary Conference, took place in Geneva and dramatically remodeled ITU, with the aim of giving it greater flexibility to adapt to today's increasingly complex, interactive and competitive environment.

As a result of the reorganization, the Union was streamlined into three Sectors, corresponding to its three main areas of activity Telecommunication Standardization (ITU-T), Radio communication (ITU-R) and Telecommunication Development (ITU-D). The new system also introduced a regular cycle of conferences to help the Union rapidly respond to new technological advances.

The Kyoto Plenipotentiary Conference in 1994 adopted the first-ever strategic plan for ITU, which advocated a more client-oriented approach and programme of activities centered on the changing roles, needs and functions of ITU members.

In addition, the Kyoto conference established the World Telecommunication Policy Forum (WTPF), an ad hoc meeting which encourages the free exchange of ideas and information on emerging policy issues arising from the changing telecommunication environment. The first WTPF was held in Geneva in 1996 on the theme of global mobile personal communications by satellite, the second in Geneva in 1998, on trade in telecommunication services, the third in 2001, also in Geneva, on Internet Protocol (IP), and the fourth will be held in 2009 in Geneva on the topic of convergence.

2.3. Mass Media in Ethiopia

2.3.1. History of Ethiopian Mass Media

History illustrates the persistence over more than two thousand years of the Abyssinian literary tradition, a phenomenon otherwise unknown in Africa, since other early scripts and language, notably those of Egypt, fell out of use and were forgotten long before the dawn of modern history. Moreover, Ethiopia has long enjoyed, thanks to the church, a certain degree of popular literacy.

The printing of Ethiopian works in Europe dates back to within a century of the invention of printing. In 1513, The Book of Psalms and the Songs of Songs which is Solomon's were printed in Geez, in Rome. In 1548, a translation of The New Testament in to Geez was published in Rome. Early in the seventeenth century, according to the historian

Elaine Sarcream, Portuguese missionaries were printing religious books within Ethiopia. And in the latter half of the nineteenth century, the earliest verified printing ventures centered on the Ethiopian Red Sea Port of Massawa. With this brief introduction to the Ethiopian mass media, we will see the evolution and development of print and electronic media and its regulation since its evolution.

Print Media

In October, 1863, the first printing press was introduced in to East Africa in Emperor Thewodros's time. Lorenzo Biancheri, a Lazarist Father, who had been appointed apostolic vicar of Abyssinia, brought to Massawa a small printing press and a sort of Amharic type cart. Father Biancheri called himself "Printer of His Majesty Emperor Theodros" and published an Amharic catechism which appeared in 1864. In 1879, a second printing effort was made in Keren, an Amharic- Geez grammar was printed by Lazarist missionaries. In 1885, the Swedish Evangelical Mission established their first small press at Monkallo, near Massawa, and later in 1895, transferred to Asmara. Ethiopian literature consists primarily of religious writings, in the first instance of free translation from Greek Syriac, and Arabic text. Where the writings are original, they tend to be either exposition of traditional beliefs and rituals of the church, eulogies of saints, or expression of pious fantasy or religious themes.

These publications, however, did not have much permanent impact on the development of journalism in Ethiopia through the use of the written word. Hand written manuscripts are ancient, and the early printing efforts indicate how long it has played a role in Ethiopian history.

The development of modern periodicals can be traced only to the last years of the nineteenth century or the first years of the twentieth century. Before the advent of modern mass communications, news was first made public by an Awaj Negari (Official Herald) stationed on a high tower in the capital in Addis Ababa. The awaj - as an institution which has played persistent historical roles through a lengthy period of Ethiopia's past,

embodied significant concepts, functional and symbolic elements as well as methods and techniques of communication.

The development of modern journalism began in Ethiopia with the introduction of modern or formal education, during the last years of Emperor Menelik's eventful reign (1889-1913). Next to the Adowa war with Italy, the most important modern event in the Ethiopia of Menelik was the development of communications. The reign of Menelik is especially interesting in that it is a prime example of a country and time in which a ruler, for whatever motive, recognized the value of communications and communication technology.

The beginning and expansion of modern publications in Ethiopia was directly connected with the setting up of printing presses. The establishment of the printing press was a necessary prerequisite for the publication of newspapers, magazines, etc.

Father Bernard, a Franciscan missionary, is generally credited with publishing the first duplicated publication *Bulletin de la Leprosie de Harar* in French and Amharic, which first appeared at Harar in 1890. The publication was mainly to win support for the campaign against leprosy. It continued until 1905 and Father Bernard purchased a small printing press from the French firm of Raguneot and expanded his operations. And his publications began appearing in the French language under the title *Le Semeur d'Ethiopie* (The Sower of Ethiopia). Though mainly in French, it occasionally included special items in Amharic.

Just before the turn of the century, the first Amharic newspaper, if it can be so called, was a handwritten sheet produced every week by Blatta Gabre Egziabher. He was an Eritrean patriot and was imprisoned by the Italians at Nakhura, a hostile barren island off the coast of Massawa. He later joined Menelik after the battle of Adowa becoming a kind of court satirist. Fifty copies of each issue of his newspaper were printed and the paper was an important manifestation of the times as it emphasized the need for unity, strength and modernization and aroused considerable interest in court circles. Blatta Gabre Egziabher

was said to be highly critical of the feudal officials around Menelik. It is no wonder that he had long lost royal favor by the time of his death in 1914.

In 1902, the first real Amharic newspaper was issued in Addis Ababa by a Greek business-man called Andres E. Kavadia. This completely Amharic newspaper was called Aimro (intelligence), a name which was given by Menelik himself. It was a four page weekly and its earliest issues were written by hand and had a circulation of only 24 copies. A few months later, Kavadia obtained a duplicating machine and its circulation eventually reached 200 copies. Many of these publications were poorly written and even less appealing in appearance. Their range of subject matter was restricted, and circulation was necessarily limited to the immediate area of publication. The mimeograph and the small private printing presses were manually operated and were the most sophisticated means of publication in general use.

In 1921, Ras Tefari Mekonen founded a printing press on what is now the campus of Addis Ababa University, then the Genete Leul Palace and it was named after him, as the Tefari Makonen Press, and most of the equipment was hand operated and with Amharic and French type face and imported from Germany. This printing press was soon given the name “Berhannena Salam” (Light and Peace), later to become the largest printing establishment in Ethiopia. At this time “Aemro” was undergoing one of its long periods of suspension, and the only news paper appearing with any regularity was the French – language bi-weekly “courier d’ Ethiopie”.

In 1923, four additional printing presses were obtained from Europe. And a year later in 1924, when Ras Tefari Mekonen the Regent and heir Apparent, returned from a tour of Europe, the first issue of a new weekly newspaper- Berhannena Selam(light and peace) was established. It was printed on the press of the same name and edited by Gebre Kiristos Tekle Haymanot, a native of Axum who had been educated at the Swedish Mission at Asmara. Each Thursday two horsemen distributed 500 copies of the journal throughout Addis Ababa. In the same year Kavadias resumed publication of Aemro which was produced on the government press.

Berhannena Selam was a special propaganda machine and important lobbyist for Ras Tefari Mekonnen who later became Emperor Haile Selassie I. Using the newspaper, priests in their daily teaching and government officials in their speeches, had to praise Tefari Mekonnen and tell others of his greatness and kindness, wisdom and leadership, and that he had no comparison in his time. Berhannena Salam helped Haile Selassie in his peaceful transition from Regent and Heir Apparent to His Majesty Emperor of Ethiopia. The communications media were fully controlled by the government in order to advance its objectives under the protection of a very stable government. Haile Selassie was always very keen to use the media, the modern news media as well as the traditional channel. Propaganda was always an important weapon in the Emperor's rule, and he had used this instrument of rule with undeniable effectiveness.

The other important factor concerning the Ethiopian mass media in the past was the nature and method of censorship in Ethiopia. Though freedom of speech and freedom of the press were provided for in the constitution, subsequent legislation placed strong limits on the press. All branches of the mass media had been under strict government control. The daily newspapers as well as the radio had always tended to exclude pieces that had anything to do with highly controversial matters.

Modern newspapers as well as the development of journalism in Ethiopia were a post-1941 phenomenon. The printing presses, which were abandoned or damaged by the retreating Italians were turned on and started production. One of the first periodicals to be published after the country's liberation in 1941 was the Daily News Bulletin. Published by the government, it was mainly distributed to members of foreign embassies that were established in the capital in the 1940s. It appeared in English and French and it was still being printed as late as the early 1970s.

Sendek Alamachin (Our Flag) was established to celebrate the 1941 victory over the Italians. It was inspired by Banderachin (our Banner) the field paper of the liberation forces and was a popular weekly and bilingual publication for several years, appearing in Amharic and Arabic.

The two popular and official newspapers that existed after 1941 were Addis Zemen and The Ethiopian Herald. Addis Zemen (New Era) started as an Amharic weekly newspaper and was established in 1941, while The Ethiopian Herald was established in 1943, also as a weekly. These two newspapers are always considered to be the nation's most influential dailies. They were published as Ethiopia's first dailies in 1958, when the inaugural meeting of the United Nations Economic Commission for Africa took place in the Assembly Hall of the Ethiopian Parliament. The other important newspapers in the development of journalism in Ethiopia were L’Ethiopie d’ Aujourd’hui and Yezareitu Ethiopia (Ethiopia Today) originally in 1952 as a combined French-Amharic weekly. Since 1965, it has been published wholly in Amharic. Two other influential newspapers in Eritrea established after reunion were Hibret (Unity) since 1956 and Ethiopia in 1961 published in Tigrigna and Amharic respectively.

The first private newspapers, the Voice of Ethiopia and Ye Ethiopia Dimitse, were in circulation from the mid-fifties to the early sixties. They were published by the National Patriotic Association though the Ministry of Information was responsible for overall supervision. Later, magazines like Addis Reporter and Mennen came as bilingual publications in Amharic and English. They were popular among the elites in the capital. The magazines focused on arts, social affairs and to a limited extent on criticism of government policies.

Radio Broadcast

The broadcast media, in particular radio was first established in 1935 at Akaki town in south-eastern part of Addis Ababa. The time coincided with the Italian invasion of the country. To prevent the use of the station by the Italian invaders, Ethiopian soldiers wrecked the installations immediately before the arrival of fascist troops in Addis Ababa. The fascist, however, installed and expanded radio services for dissemination of their propaganda. When the Italian invaders were forced out of the country by the liberation forces, they dismantled the broadcasting facilities in order to prevent Ethiopian citizens from listening to any news broadcasts or programs. A radio station left behind by the Italians was the only transmitting station fitted with 7.5 kilowatt short-wave equipment.

This was restored and put in to operation. Gradually radio transmission facilities and programming were expanded. Radio has been the mass effective medium of communications in Ethiopia, as it is in most developing countries. The mountain terrain of most of Ethiopia has always been difficult and expensive in the expansion of printed media and natural barriers to internal communications.

The spoken word, the radio broadcast, is the most important channel of communication. In fact, Ethiopian radio appears to be unique in Africa in not having been established by a colonial power. Broadcasting has been used as an instrument of unification, to help overcome the internal linguistic and ethnic divisions which geography has perpetuated over Ethiopia's long history of independence.

Actually, normal and regular radio broadcasting began in Ethiopia in 1941, after the Ethiopian victory over the Italian Fascists. When the government broadcast began, the program was simply a daily news bulletin, music and government announcements. With a total power of 10w, a staff of seven including technicians, prepared four hours of programming per day from a single impoverished studio.

A Press and Information Department had been established in the Ministry of Pen, in 1942, and took over program responsibility. Ten years later the department was transferred to the Ministry of Finance. It was in 1959 that the Ministry of Information began receiving an annual budget, although it was not officially gazetted until 1964.

In 1960, with the existing antennas and the two short Wave transmitters, it was possible for the first time to start international broadcast transmissions to Europe, West Africa and the Middle East. The modest programming schedule of 1941 had meanwhile developed into domestic programs of news, views and music conducted in Amharic, Somali, English and Arabic. In the early 1940s, for instance, Radio Ethiopia's broadcasts could hardly scale the surrounding hills of the city. But, after the new facilities installed in 1960, Radio Addis Ababa as the Voice of Ethiopia, was enabled to transcend the limits of its home service program and introduce regular transmission of programs in French and

English to West and North-West Africa and Western Europe; in Arabic to North Africa and the Middle East, and in Swahili to East and Central Africa.

Before 1966, the facilities of Radio Ethiopia included: a medium-band station of 100 kilowatts operating on 6185 kilocycles; a 41-meter band of 100 kilowatts operating at 7290 kilocycles, and a 41 meter band of 10 kilowatts at a frequency of 9610 kilocycles all in Addis Ababa; a medium-band station of 50 kilowatts on a frequency of 940 kilocycles in Asmara, and a medium-band station of 100 kilowatts operating at 840 kilocycles in Harar. But, in 1966 with the inauguration of three new high-power, medium-wave transmitters in Addis Ababa, Asmara and Harar, Radio Ethiopia took a giant step forward in the quality and reception of its domestic service. Their combined power increased Ethiopia's medium wave capability 250-fold. Moreover, for the first time Radio Ethiopia began originating broadcast signals from provincial centers as well as from the capital city. It used to broadcast 18 hours a day in nine languages. In anticipation of this broadened scope, the name of the service was changed in 1956 from the original 'Radio Addis Ababa' to 'Radio Ethiopia'.

In early 1970 the government estimated that its radio broadcasts were reaching an audience of approximately 5 million persons, or roughly 20 percent of the total population. The number of receivers in use was estimated at 500,000.

Another facility which was developed in Ethiopia during the 1960s was Radio Voice of the Gospel (RVOG) which also played a vital role in the Ethiopian mass communication service. Owned and operated by the Lutheran World Federation, Radio Voice of the Gospel was given a franchise to build and operate a Christian Radio Station in Addis Ababa in 1959. The station was officially opened in 1963. Legally, the station came under the jurisdiction of the Ethiopian Ministry of Information and in practice the Ethiopian Broadcasting Service maintained a liaison officer to keep the station informed of government policy concerning broadcast coverage of current events.

RVOG's principal priority was broadcasting internationally. It used two 100w. Short-wave transmitters beamed to other parts of Africa, Ceylon (Sri Lanka), China, India and the Middle East. Short segments of English and Amharic were also broadcasted by one of these transmitters, using a non-directional antenna, for Ethiopian audiences in the more distant parts of the empire. It also used a 1kw medium-wave transmitter to serve local Ethiopian audiences in Amharic, English and French. Although RVOG depended for the bulk of its programming on feeder studios, it produced daily news programs in a dozen languages from its own studios in Addis Ababa. RVOG was nationalized in 1977 and was later called the International (External) Service of Voice of Revolutionary Ethiopia.

TELEVISION

November 2, 1964 was the day of Ethiopia's first television broadcast. The installation of equipment in Addis Ababa's New City Hall had been completed in the record time of 19 days, utilizing vidicon cameras and a single studio. This was done not only because Ethiopia needed to catch up with the rest of the world in the development of its information services, but also because television was a potent medium of education and an important tool in shaping Haile Selassie's personality cult. Besides, it was the time that the Organization of African Unity was established in Addis Ababa.

Eth. Birr 600,000 (about US Dollars 250,000) was spent in setting up the Ethiopian Television Service. The annual running cost was estimated at Eth. Birr 500,000. Revenue for the service used to come from advertising and the government.

When the Ethiopian Television was established, through the British firm Thomson Television International, Ethiopia had got Eth. Birr 500,000 loan from a British Bank for the purchase of equipment. The original installation was completed by Thomson Television International, which also provided assistance in the selection of equipment, hiring of expatriate personnel and getting the station on the air. It also recruited key personnel on the spot to work with enthusiasm, although inexperience. Nevertheless, the staff learned rapidly on the job and after its first months of trial-and-error experience, began turning out highly acceptable, live, local programming and locally filmed news

sequences. Subsequently, three members of the program staff and three of the engineering staff attended 16-week courses at the Thomson Foundation in Scotland.

At the beginning, television programming was burdened with a preponderance of foreign filmed material. Gradually, the proportion of locally produced, live material has been increased. At that time, the most significant programming change was the introduction of educational television in October 1965, although it no longer exists. When television started, Addis Ababa had about 500 sets. Two years later in 1966, this had been expanded tenfold to over 5,000. As the years went by television sets increased rapidly, but there was a notable shortage of spare parts and technicians.

Educational Mass Media

The Educational Mass Media Centre, which has been established by the Ministry of Education, has also played an important role in the development of mass communications in Ethiopia. When educational television did finally start in Ethiopia, in 1965, its scale was modest. The idea was to equip the Ethiopian Ministry of Education to harness the potentialities of educational technology for multiplying the effectiveness of Ethiopia's very limited educational resources. In October 1965, the educational service went on the air. Two programs were broadcast daily to fifteen secondary schools in Addis Ababa. Since recording facilities were not available, programs had to go out live; and not having its own studios, Education Television had to use the Ministry of Information's small studio. These production conditions were far from ideal, but enthusiastic reactions from students and teachers alike during that first year persuaded the Ministry of Education to further strengthen the effort. Educational television came into systematic use in Ethiopia before educational radio, though radio had, of course, been in general use for many more years than television.

Media during the Derg Regime

The difference between the past and the Derg time was mainly in content. But there had never been any drastic change or improvement. Once, the Media Committee of the Ten Year Development Plan commented as there were no major differences between

newspapers of the then time and the newspapers forty years back. This was the same for the broadcasting media. It was still backward, monotonous and unbalanced in its content. Inefficient and slow reporting, a lack of interesting news and analysis, and insufficient technical means needed for the proper functioning of newspapers, all helped explain why the Ethiopian press was not considered a significant social institution compared with the press of other developing countries. It was very far from being a quality press and lacks skill and creativity. All newspapers carry lengthy editorials on the second page and it was normally the reflection of government and party policy.

During the time of Derg, there were other new newspapers, of which the dominant one was Serto Ader (Worker). It was the official organ of the Central Committee of the Workers' Party of Ethiopia. It was established in 1979 and was published weekly on Thursdays and had a circulation of 200,000 copies. Although its analysis and emphasis on important national and international issues was sometimes sound and useful for its readers, it lacked simplicity and becomes monotonous and highly ideological and full of Marxist and Leninist propaganda.

The front page of Serto Ader, normally covers the editorial column and carries reports on important issues of the week, whereas the third page usually contains a theoretical column, where important theoretical issues, particularly the teachings of Marxism-Leninism were elaborated. Serto Ader was sold and distributed only through party structures, party committees and 'discussion forums' in different government and private organizations, and was not available from news agents and distributors.

Abiotawi Police was a fortnightly police newspaper, which has existed since 1961. It is published by the Ethiopian Police Headquarters and once had a circulation of 100,000. Due to its sensational crime reporting, through the years it has won quite a good number of readers.

Tatek was a weekly Army newspaper and had a circulation of 28,000 copies. It was established in 1957 and was published by the Information and Public Relations

Department of the Armed Forces. It was mainly distributed among the members of the Armed Forces.

Meskerem was a Marxist Leninist theoretical journal of the central committee of the Workers' Party of Ethiopia. It came in to being in 1981 and had a circulation of 117,000. Its purpose was to spread the Marxist –Leninist ideology.

Radio Ethiopia, which was called Voice of Revolutionary Ethiopia, in its two national and international services, used to transmit over 166 hours week in nine languages over three radio stations.

The National Service had two regional radio stations, one in Asmara with 50 kilowatt medium wave and the other in Harar with 100kilowatt medium waves. The main National service used to broadcast from Addis Ababa in three short-wave transmitters each 100 kilowatt power. It had seven production and broadcast studios.

The National Service was broadcasting in five languages, Amharic, Oromiffa and Tigrina from Addis Ababa; Amharic, Tigrina and Tigre from Asmara; and Oromiffa and Somali from Harar. The two regional stations in Asmara and Harar, although they broadcast with the general objective and program content of the National Service, give special attention and emphasis on the particular situation in their respective areas.

To sum up, information, guidance and entertainment are considered among the most important functions of Ethiopian press. Lack of priorities, shortage of skilled manpower, financial constraints, too much ideological emphasis and propaganda, the political sensitivity and confusion, particularly during the Derg Regime have generally retarded press development in the country.

2.3.2. The Ethiopian Mass Media Today

(A) Broadcast Media

Radio

Currently, Radio Ethiopia (National Service) operates five 100KW short wave transmitters and two 50KW medium-wave transmitters and six 100KW medium wave transmitters. The short-wave transmission covers almost the entire population of the country. The medium wave transmission covers 70 percent of the national territory. Radio Ethiopia transmits programs from Addis Ababa, Harrar, Metu, Bahir Dar, Dessie, Bale Robe and Arba Minch stations in eight local languages - Amharic, Oromiffa, Tigrigna, Somali, Afar, Harari, Nuer and Agnuak. The total estimated number of receivers in use in Ethiopia in 2002 was 15.2 million. It is believed that this number has increased significantly.

On the other hand, English, Arabic, and French programs constitute the external service. English language broadcasting service is available both in national and external services. In addition, relay stations have been built and are operational in Bahir Dar, Arba Minch, Dessie and Robe enabling Radio Ethiopia to cover about 70 percent of the country in medium wave. With the large rate of illiteracy, the majority of the people prefer to tune to radio for the latest information. Total number of employees in Ethiopia Radio is 618. Out of whom journalists and technicians are 342 and the supporting staffs are 276. Ethiopia Radio receives domestic news and information primarily by assigning its own reporters and from regional bureaus, ENA and WIC.

Frequency Modulation Broadcast (FM) started transmitting programs in June 2000. It was established under Radio of Ethiopia, and its service is on the air for 18 hours a day. The FM 97.1 station mainly focuses on urban issues. The transmission is 2.5kw and confined to Addis Ababa and nearby towns. Currently, there are two more stations in the capital owned by private broadcasters based on the first official issuance of license by Ethiopian Broadcast Agency. Radio Fana was founded in November 1994 and broadcasts

its programmes in four local languages: Amharic, Afan Oromo, Afar and Somali. Its transmission can be tuned in all over the country on SW1 and SW2 and on MW in the capital.

There are number of regional radio broadcasts on air. These include the Amhara Region Mass Media Agency which was established in 2001, the Voice of Revolutionary Woyane in Tigry region, Harari Community Radio, Dire Dawa FM 106.1, Debub FM100.9 by Southern Nations, Nationalities and Peoples state Media Agency and Addis Abeba Mass Media Agency. Internationally, daily transmissions from the Voice of America in Amharic, Oromiffa and Tigrigna languages, and Radio Deutsche Welle in Amharic are received throughout the country.

Television

When television initially began service in 1964, it was only possible to serve a limited number of residents in Addis Ababa with the help of some 500 TV sets. ETV expanded in the 1980s and it currently has 26 transmitters across the country, with all the studios located in Addis Ababa. It began to broadcast via satellite to reach distant areas of the country and to receive and re-broadcast live international programs in 1980.

ETV was providing service in two languages only (Amharic and English) until 1991. However, since 1991, the station is transmitting news and programs in four languages (Amharic, Oromiffa, Tigrigna and English). Transmission coverage of ETV until 1992 was not more than 30 percent of the total area of the country. But with the installation of nine additional transmitters its coverage is now 53 percent of the country. ETV has also installed its second channel (ETV2) for Addis Ababa and its environs in 2001 and it is currently being used by Addis Ababa Mass Media Agency. The language services prepare their own programs, and some domestic news is also fed by two national agencies-ENA and WIC. ENA (Ethiopian News Agency) was established in 1942 and now it is networked by computers with 15 main branch offices and 22 sub-stations. WIC (Walta Information Center) was established in 1993 and now has 16 branches with computer network. . ETV broadcasting is financed from annual license fees (for TV sets),

government subsidy, advertising and program sponsorship. It produces 70 percent of its programs locally and imports the rest from abroad. Advertising is playing a larger role than previously in all media and it occupies almost 15 percent of ETV programs.

(B) Print Media

The Ethiopian press reaches a much smaller public than the broadcast media. Newspaper readers are to be found mostly among the elite and urban population representing about 17 percent of the total population of the country. Press coverage for the remaining 83 percent living in rural areas is severely hampered by high rate of illiteracy. High cost of printing and poor communication between towns and rural areas are also additional factors. Hence, the number of newspaper circulation in the country is still below 2 per 1000 which is lower than the minimum standard set by UNESCO more than 40 years ago.

Currently, there are only three dailies in Ethiopia: the Daily Monitor (private), Addis Zemen and the Ethiopian Herald (government). The last two government newspapers are published by the Ethiopian Press Agency and, in addition to news, feature stories and regular columns, their content include official texts and official announcements. The private press was banned during the military regime. It is only after the change of government in 1991 and the legal recognition of freedom of the press under proclamation No. 34/1992 that a sizable number of newspapers and magazines started to appear in Addis Ababa.

The period after 1991 has been given a unique place in the history of Ethiopian journalism. This is so because of two reasons among others. The first is that pre-publication censorship was outlawed. Accordingly, the institutional procedure to get permission for publication and circulation was banned and the institution executing such process was also abolished. Secondly, press ownership which had been monopolized by government and party for years was permitted to private citizens.

During this period, the first private newspaper – Iyyita – was started to be published in January 1992. It was a weekly paper published and circulated on Wednesday focusing on general issues. Here, general issues refer to economic, social and political issues together. Following Iyyita, more than 630 newspapers and 130 magazines had taken press license, from which 401 newspapers and 130 magazines have been published and circulated in the period after the press proclamation to February 2005. Among these, some of them relinquished before a month or half a year and only few others survived for years. Even though the number vary from time to time about 80 newspapers on average were being published monthly, for example in February 2005 there were 83. According to the Department of Press Licensing and Supervision in the then Ministry of Information, among these newspapers 5 belonged to government, 4 were papers of political parties, 8 were owned by religious institutions and the remaining 66 were published by private individuals. From the private ones, Tomar can be noted as the oldest established on November 30, 1986 E.C. From 66 newspapers right before the May 2005 election, 32 focused on issues of general interest such as economic, social and political while 34 focused on issues of special interest of which 12 were on sport and the rest focusing on arts, business & advertisement and religion. However, after the 2005 disputed election, the number of newspapers has greatly reduced.

Discussion Questions

1. Discuss the concept of communication media.
2. Discuss the modalities of media communications.
3. Briefly discuss the factors contributed to the rapid development of:
 - i. Paper and print media,
 - ii. Electronic media
 - a. Radio
 - b. Television
 - c. The computer
4. Discuss the impacts of communication technologies in the evolution and development of mass media.
5. Discuss the major contributions obtained from communication media and technologies.
6. Discuss and analyze the regulation of global communication: allocation and regulation of radio waves. In your discussion, consider the jurisdiction, the applicable law and the role of ITU.
7. Discuss and analyze the issues regulated by ITU.
8. Briefly describe the development of mass media in Ethiopia from Mennelik II to the Derg regime.
9. Describe and analyze the nature and method of censorship during the imperial and Derg Regimes.
10. Discuss and analyze the analysis and emphasis covered by the Ethiopian mass media during the last three regimes with comparisons.
11. Evaluate the freedom Ethiopian mass media today have in view of international media principles.
12. Discuss two most significant measures taken by the EPRDF government on the Ethiopian mass media, which can be taken as the corner stone' for the development of the present mass media in Ethiopia.

CHAPTER 3

THE PRESS UNDER ETHIOPIAN LAW

Chapter Objectives

After successful study of this chapter, students are expected to achieve the following core objectives:

- Understand the regulation of press under Ethiopian laws,
- Understand the core principles of freedom of press in international conventions and national laws contexts,
- Understand the elements of press as enshrined in international and national laws: Understand the manner of regulation, registration and licensing of the press,
- Understand and analyze the law on Access to Information and understand Classified Information in other Jurisdictions to compare and contrast with the exempted information under the Ethiopian Access to information proclamation,
- Understand and analyze the responsibilities, restrictions and penalties of the press as are provided under the 2004 Criminal Law, Freedom of the Mass Media and Access to Information Law/Proc. No. 590/2008, and other laws

3.1. Principles of Press Freedom under the FDRE Constitution

The FDRE Constitution provides for the guarantee of freedom of expression under democratic rights section in article 29.

Article 29: Right of Thought, Opinion and Expression

1. *Everyone has the right to hold opinions without interference.*
2. *Everyone has the right to freedom of expression without any interference. This right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice.*

3. . *Freedom of the press and other mass media and freedom of artistic creativity is guaranteed. Freedom of the press shall specifically include the following elements:*
 - (a) *Prohibition of any form of censorship.*
 - (b) *Access to information of public interest.*
4. . *In the interest of the free flow of information, ideas and opinions which are essential to the functioning of a democratic order, the press shall, as an institution, enjoy legal protection to ensure its operational independence and its capacity to entertain diverse opinions.*
5. . *Any media financed by or under the control of the State shall be operated in a manner ensuring its capacity to entertain diversity in the expression of opinion.*
6. *These rights can be limited only through laws which are guided by the principle that freedom of expression and information cannot be limited on account of the content or effect of the point of view expressed. Legal limitations can be laid down in order to protect the well-being of the youth, and the honor and reputation of individuals. Any propaganda for war as well as the public expression of opinion intended to injure human dignity shall be prohibited by law.*
7. . *Any citizen who violates any legal limitations on the exercise of these rights may be held liable under the law.*

This provision of the constitution reaffirms press freedom as it already was exercised. Nevertheless, there are some reservations noted by some stakeholders like ARTICLE 19 (XIX). Leaving aside those related with broadcasting, XIX has some concerns about the way Article 29 (3) (b) and 29 (6) are phrased. Article 29 (3) (b) guarantees “access to information of public interest.” According to XIX:

“It does not define “public interest” and it will presumably be up to the authorities, at least in the first instance, to decide on what information is of public interest and what is not. This term is susceptible to wide interpretation, creating a window for potential abuse and denial of access to information._

It is recognized under international law that access to information is a fundamental component of the right to freedom of expression. There should be a strong presumption in favor of access to information subject only to clearly defined exceptions established by law. Any limitation on this right must meet the conditions imposed by Article 19(3) of the ICCPR.... In particular, such limitations must be clearly and narrowly defined. The term 'public interest' does not meet this standard. Furthermore, what the authorities deem to be of public interest is not a legitimate limitation to the right of access."

The other concern of XIX is on Article 29 (6). This provision prohibits "any propaganda for war as well as the public expression of opinion intended to injure human dignity." This Article has vague phrases like 'human dignity', as commented by XIX, and it goes on:

"While the former is consistent with Article 20(1) of the ICCPR, the latter prohibition appears to go beyond what is permitted under international law. Article 20(1) of the ICCPR provides for the prohibition by law of war propaganda. Protection for reputation, as provided for by defamation laws, is an extremely complex area of law....There is a great risk that a simple, vague constitutional provision of this sort will be abused.

For example, much legitimate political campaigning will be intended to injure human dignity. The exposure of corrupt practices may also be said to fall foul of this constitutional rule, even though it is of some public importance."

The same sub-article also states that in order to protect the well being of the youth and, the honor and reputation of individuals, limitations can be imposed by law. Even though the goals are legitimate limitations on press freedom, according to XIX, "...these provisions fail to place conditions on the scope of these limitations, which is necessary to ensure that they are not abused. In particular, they should be required to be necessary in a democratic society for protecting these interests. In this regard, the Constitution fails to conform to international standards."

These are legitimate concerns raised by XIX. Without the necessity of amending the provision, the Constitution itself provides a solution for the gaps identified above.

Article 13 (2) states:

The fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia.

This provision provides the necessary guarantee against abuse in interpreting the provision by the authorities. It is clear that the legislature and the courts must consult those international instruments and their standard while interpreting or applying Article 29 and also any other law that has something to do with freedom of the press since it is made mandatory by the Constitution itself which is the supreme law of the land, according to Article 9.

3.2 Regulation, Registration and Licensing of Press

The Proclamation to Provide for the Freedom of the Press (No. 34/1992) was adopted based on the Transitional Charter of Ethiopia. Even though a new Constitution was adopted in 8 December 1994 (in force from 21 August 1995), the press law has not been changed until now. But recently, a new law “Freedom of Mass Media and Access to Information Proclamation” has been enacted but part of it (part III on freedom of information) will be in force one year after publication. Discussion on this will be provided in a latter section however, the following discussion based on the previous law is important as it shows the issues regarding press freedom based on the discussion and standards in chapter one. it also serves as a point of comparison between the two press laws so that students can see their difference and the changes the latter brought about.

The proclamation, in its preamble, recognizes the importance of the press in democracy in the following words:

“...free press not only provides a forum for citizens to freely express their opinion, but also plays a prominent role in the protection of individual and

peoples' rights and the development of democratic culture as well as in affording citizens the opportunity to form balanced views on various topical issues and to forward their opinion on the directions and operations of government.”[Emphasis added]

Even though this recognition of the ‘prominent’ role of the press is a positive start the meaning of the phrase ‘balanced views’ is controversial. A balanced view may refer to many different and even opposite views. It depends on the perspective from which we are looking. What is balanced for the state may not work for portion of citizens or the press. A little more than ‘that balance’ or extreme views against the state or anything may not be welcomed and this might be an indication as to the intention of the state and also what is coming in the provisions of this proclamation.

Definitions, Registration and Licensing

Article 2 provides definitions of press and journalists.

1. *“Press” means any establishment of mass media such as newspapers, magazines, periodicals, journals, pamphlets... pictures, films, cartoons, books...”*

This definition is too broad and includes small scale outlets such as pamphlets in any small number. This means, the proclamation and its licensing, process, responsibilities and penalties apply on them.

2. *“journalist” means any person who is engaged as an editor, reporter, cartoonist, graphic artist, photographer, cameraman or technician exercising such professional activity as seeking, receiving or disseminating news and information.*

This definition does not include columnists or freelance writers. The Amharic version (the binding version in case of conflict with the English one) includes a phrase that says “who also respects the ethics of the profession”. This means, if some journalist violates some rule of the profession then he/she is no more a journalist. This has a far reaching

consequence because first, the state is interfering in matters of the profession and second, it can take away the status of being a journalist when it feels there is unethical conduct.

Article 3 is ground-breaking in that it abolishes any “censorship of the press and any restriction of similar nature...”

Article 4 (1), Purpose of the press:

Press stands for the pursuit of fundamental freedom, democracy, justice, equality and for the acceleration of social and economic development.

On the face of it, this provision seems to advance a positive and agreeable aim. It triggers a thought such as why do we need press if it does not promote or ‘stand for’ one or all of these ideals. The problem is it is wide open for abuse and if one goes deeper, it seems to lose any meaning at all. There are a number of perspectives or theories (also practices) of democracy, justice, equality, social and economic development that are different and even opposite to each other. To mention some general perspectives of all of them, there are liberal, libertarian, communitarian, socialist and communist but there are also a number of mixtures of them. The state may advocate one of them and require all press to do so. This provision is also open for abuse in that the state may take punitive measures by claiming a press did not advance these prescribed objectives.

Article 5 extends the right to engage in press activities to any Ethiopian. That being commendable, it depends on what requirements are imposed for registration and licensing procedures. According to international practice, technical requirements for registration of the press do not undermine freedom of the press as long as they fulfill the following conditions:

- o there is no discretion to refuse registration, once the requisite information has been provided;
- o the system does not impose substantive conditions upon the media;
- o the system is not excessively onerous; and
- o the system is administered by a body which is independent of government.

Coming back to the press law, Article 6 requires anyone who wants to carry out press activity to be registered. This being simple, Article 7 (1) provides for a requirement of license to be obtained from the Ministry of Information or regional Information Bureau, as the case may be, by providing the following information:

- a. the name of the proprietor of the press;
- b. the editor-in-chief and the deputy editor-in-chief of the press;
- c. the type of the press activity;
- d. the address of the head office of the press;
- e. the name of the press; and
- f. the name and address of the publisher.

According to Article 7 (4), whenever there is change in the above information, the press must inform such change to the licensing authority. When we consider this requirement in terms of the international standard, they don't seem to be problematic. Without going further though, there are two problems; one being these licensing requirements apply to small print outlets like pamphlets just as they do to large and regular press. The second is, as indicated by international practice, the licensing authorities are not independent but rather are part of government. The proclamation seems to address the second problem since it provides in Article 7 (2) that the authorities should give the license within 30 days from the date of application by the press. If they fail to do so, the provision continues, the license is deemed to have been given. That appears to avoid any abuse by these authorities but it is not clear why it should take 30 days to acquire a license. Sub-article 5 provides for renewal of the license annually and without any precondition *but* upon payment for such renewal and "...unless suspended or cancelled by an order of the court..." The amount to be paid is not determined, thus it is left for the authorities to do so and that could be abused. This provision also gives an indication to the possibility of suspension or cancellation of license but it is not indicated how and why under the proclamation. All these seem to be manageable until one reaches to the back of the proclamation. Article 23 (2) states:

Where any press is found to have contravened the provisions of Articles 6 and 7 of this proclamation; the proprietor, the publisher or the editor-in-chief of the press

shall be punishable with imprisonment not exceeding two (2) years or with fine not exceeding Birr ten thousand (Birr 10,000).

The amount 10,000 Birr is equivalent to 1,000€ or a little more. The big question is why? There is no answer except a crude one; for failure to register or for failure to get a license. Not only that the fine is extremely high considering the ‘wrong’ (when most democracies abolished such system, let alone to punish for it harshly) but attaching a criminal penalty to such simple technical failure sends the message that press is a dangerous activity to be seriously regulated by government. In addition to that, it has nothing to do with freedom of the press which the preamble promised to advance.

Right of Reply

Article 9 (1): Where any information or matter concerning any person is reported in a press, such person shall have the right to reply in the press in which the reported appeared.

The second paragraph also provides that the opportunity for reply has to be given “in due time to make a reply proportionate to the report”. It is clear that the right is very wide in this provision because it allows a person to respond to a material that is about him/her, that refers to him/her in any way or critical of that person. In addition, it does not matter whether the report on the press is a matter of fact or of opinion. Basically right of reply is pure interference in editorial independence, but to make up for that it can be designed to redress certain harm caused by the press on the right of an individual. This provision is far from providing such a balance and totally puts the pressure on the press.

3.3. Freedom of Information

Freedom of information is considered to be an important component of freedom of expression by many democracies and international human right organizations such as XIX (ARTICLE 19). In a way, it is also an important part of the principle of democracy because at the heart of freedom of information are transparency and accountability. The

Constitution guarantees for freedom of information in Article 29(3) (b), as we have already seen. It also obliges (under Article 12, 1) government that all its conduct and affaires must be transparent. Considering such constitutional guarantees and also international experience, freedom of information needs to be addressed in a separate legislation instead of one provision in the press law.

This being the case, Article 8 (1) provides:

Any press and its agents shall, without prejudice to rights conformed by other laws, have the right to seek, obtain and report news and information from any government source of news and information. [Emphasis added]

(Bear in mind that this provision is still in force)

This provision doesn't seem to provide for freedom of information held by government. It looks as though it allows the press to only get and report information and news from government sources of news and information like news agencies and public relation offices, not more than that. Such approach is similar in outcome with ECHR which allows the press to seek and impart information that is already there or available by public authorities.

Nevertheless, when we read it against the limitations provided under sub-Article 3, it appears to be intended to allow more information than outlined above. The limitations include: information declared secret by House of Representatives, Council of Ministers and other laws; information from court hearing in camera (unless the court decides otherwise); information on pending case and information private to a victim of crime without his/her consent. If these are the only exceptions, a large amount of information under authorities seems to be free to be acquired by the press. However, there is no guarantee that it would be read like this even though Article 19 of the proclamation imposes a duty on government officials to cooperate with the press. Still, the authorities like Council of Ministers, are left with indefinite margin to say whatever is secret. There are no conditions provided under which secrecy is determined and which other laws provide for secrecy of what information and for what aim is not clearly outlined. Other

than that, court reporting is totally prohibited. It is strange to see that for a hearing in camera there is an exception (the court may decide otherwise) and none at all for a regular case pending in court. Without going far, the Constitution guarantees for a public trial under Article 20 (the rights of persons accused) except for cases where there is an overriding interest to protect privacy, public morals and national security.

Article 8 (4) guarantees against disclosure of journalistic sources and also lists out the exceptions. The exceptions, most importantly, are provided in paragraph (b) as follows:

The court may order the publisher or editor of the press to disclose his source of information in the case of a crime committed against the safety of the state or of the administration established in accordance with the Charter [Constitution] or of the national defense force, constituting a clear and present danger, or in the case of proceedings of a serious crime, where such source does not have any alternative and is decisive to the outcome of the case.

These exceptions seem to be framed in a manner consistent with international standard, for example ECHR, but what constitutes ‘clear and present danger’ is left for the courts to define.

3.4. Responsibilities of Press, Restrictions and Penalties

3.4.1. The Press Law

Part four of the press law includes Articles 10 to 14. One can say that this part symbolizes the press law more than any other part. We will summarize this part in relation to its penalty provided under Article 23. Article 10 (1) lays down that every press has to make sure that their product is free from anything that may give rise to criminal and civil liability. The second sub-Article provides some details:

- a. *any criminal offence against the safety of the state or of the administration established in accordance with the Charter or of the national defense force;*
- b. *any defamation or false accusation against any individual, nation/nationality, people or organization;*

- c. *any criminal instigation of one nationality against another or incitement of conflict between peoples; and*
- d. *any propagation for war.*

But “without prejudice to the generality of sub-Article 1” which means the list is not exhaustive and may include others not mentioned here. When a press fails to insure this, its editor, journalist or publisher will be punished by 1-3 years of imprisonment or 50,000 Birr (over 5,000 €) or both, Article 23(1). According to Article 14, this does not affect those criminal and civil liabilities that may arise from those acts of the press. The same provision also provides that the press as an organization has joint liability and damage for civil suit could reach twice the registered capital of that organization. Other responsibilities of the press include:

- o keeping a record of the name and address of authors or editors of every press product (Article 11,1)
- o when penname is used, it has to be indicated in clear manner (Article 11,2)
- o print the name and address of the proprietor, including residence, the editor-in-chief, deputy editor-in-chief and the publisher (Article 12,1)
- o when there is change in the above, declare the same for the substitute (Article 12,3)
- o declare the author and proprietor of any source of news or report (Article 12,2)
- o when it runs any press product for payment, this has to be put under “classified” or such section (Article 12,4)
- o submit two copies of every press to the licensing authorities for free within 24 hours after publication (Article 13)

Failure to indicate the penname specifically and failure to fulfill all or any of the above responsibilities listed in part four would entail punishment of one year imprisonment or 5,000 birr (more than 500€) or both to the owner, publisher or editor; according to Article 23 (3).

Prior Restraint

There is a very fine line between censorship and prior restraint. For this reason it has to be construed very narrowly and exceptionally for serious danger on matters of highly crucial public interest. Article 15 (1) of the press law provides for prior restraint in the following words:

The prosecutor of the Central Government or of a region as the case may be, may where he has sufficient reason to believe that a press is ready to disseminate any illegal press product which may cause serious damage, enjoin the dissemination of such press product.

It is not clear what constitutes “sufficient reason” or “serious damage” i.e. to whom or what interest the damage is directed. But “illegal press product” obviously can cover anything made illegal by law which gives wide possibility to prosecutors to stop publication of press. In an effort that seems to reduce the likelihood of abuse, sub-Article 2 requires the prosecutor to submit the matter to the high court within 24 hours taking the measure and the court has to give its decision within 48 hours of submission, according to Article 16 (2). Article 16 (3) also requires the decision to be executed within 72 hours of submission unless there is appellate order against it. While considering the matter, Article 16 (1) states, the court may concur with the prosecutor and order “confiscation and destruction” of the press product or quash the measure taken by the prosecutor. The order of the court for the destruction of the press does not affect any civil or criminal suit against the press, as provided by Article 16 (4).

Finally, in the last part of the press law, Article 23 (4) forwards another serious warning. It says any person who “...violates or obstructs the implementation of this Proclamation...shall be punishable in accordance with the penal code”. This applies to any violation not covered by the penalty provisions discussed above. This provision makes it sure that any act that violates any part of this proclamation or that is considered to “obstruct” its implementation is to be punished even though it is not clearly provided. This is the vaguest provision in the press law and considering its punitive nature, it is also the most dangerous. There is no clearly defined offence and also punishment. It sums up

the whole proclamation and its punitive orientation rather than facilitating expression. The excessively penalizing provisions, including using the criminal law, indicate that the press law is more suspicious to the exercise of press freedom than encouraging and promoting it. To conclude this section, a concise observation of Ethiopian press law is provided by XIX:

There can be little doubt that the penalty regime in the Ethiopian press law is excessively harsh and that it exerts a serious chilling effect on media freedom. Indeed, it is often described as one of the harshest press laws in the world.

3.4. 2. The Civil Code

The Civil Code of Ethiopia, which followed the model of code napoleon, defines defamation in the part that deals with torts. The principle of defamation is provided by Article 2044 as:

A person commits an offence where by his words, his writings or by any other means he acts in such a way as to make another living person detestable, contemptible or ridiculous and to jeopardize his credit, his reputation or his future.

There are a number of exceptions to this principle but they do not go that far since they have their own exceptions as well. Here is the list of exceptions:

- if the author had no intention of referring to any particular person then there is no defamation committed but this does not apply if he could have reasonably foreseen his writing would cause injury (2045)
- “A person shall not be deemed to have committed an offence where he confined himself to expressing his opinion on matters of public interest, notwithstanding that such opinion inflicts injury on another by bringing him under public obloquy.” However, if the defendant, to his certain knowledge, made charges that are false then this exception does not apply (2046)
- Where a defendant proves the charges he made then he did not commit defamation but if he acted “solely with intent to injure” he will be liable of defamation (2047)

- Speeches in parliamentary debate and legal proceedings are immune to charges of defamation but if someone repeats or reports “with intent to injure”, then he will be liable (2048).

Concerning the press Article 2049 provides justification which says that there is no liability if the press acted “without intent to injure and without gross negligence”. Nevertheless the same press has to publish a “withdrawal and an apology” if the plaintiff wanted so. Another important provision with regard to defamation is Article 2109 and it requires compensation to be paid where:

- (a) the injurious or defamatory charges are that the plaintiff has committed a crime or an offence punishable under the criminal law; or*
- (b) they allege that the plaintiff is incompetent or dishonest in the exercise of his profession; or*
- (c) they allege that the plaintiff, if a business man, is insolvent; or*
- (d) they allege that the plaintiff is suffering from a contagious disease; or*
- (e) they allege that the plaintiff is of low morals.*

This provision, especially a, b and e, substantially reduce the area of public discussion because they do not distinguish the type of person that is the subject of discussion, for example politicians or any public figure and opinions of someone as ‘low moral’ or ‘incompetent’ or criminal are also punished. All provisions on defamation do not consider freedom of the press in any way at all. This law requires the truth and only the truth to be reported and published on any topic of discussion or on anyone. In court, the press has to prove the truth of their writings and that is a test that cannot be fulfilled. Another heavy test that is inescapable is ‘intent to injure’. Any criticism of a public figure falls in to this test. Freedom of opinion is not protected at all since one can only get away by proving the truth of writings. Reporting parliamentary or legal proceedings with ‘intent to injure’ can be punishable. The law seems easy on public interest issues but they have to be true too and if so they cannot be opinions. The press can get away easily by publishing an apology but that is made impossible since they have to prove they did not act with intent to injure and gross negligence. In general the law of defamation is

designed without any consideration of press freedom but rather as some danger society has to be protected from.

3.4.3. The Criminal Code

The Criminal Code as revised in 2004, markedly identifies press related offences in a separate section. The definition of crimes relating to mass media is provided as follows:

- (1) Notwithstanding the provisions of Articles 32-41, the provisions of this Chapter shall apply in the case of crimes relating to the mass media with a view to ensuring freedom of expression while preventing abuse.*
- (2) Crimes relating to the mass media are those which are committed by means of newspapers, books leaflets, journals, posters, pictures, cinemas, radio or television broadcasting or any other means of mass media.*
- (3) The crimes may be committed against the honor of other persons, public or private safety or any other legal right protected by criminal law, and are committed where communication is made to the public through the mass media.*

Article 43 lists out liabilities for crimes committed through the mass media. The list includes journalists, editors and publishers. Sub-Article 5 also warns against any defense by members of the press to be not responsible by stating:

In determining the liability of a person under this Article for the crime committed through the product of mass media, the content of the matter shall be deemed to have been inserted, published or disseminated with his full knowledge and consent. No proof to the contrary may be admitted in such a case.

The special chapter provided for press related offences and also this last presumption against the press show the spirit of the penal code as parallel to the press law discussed above which also imposed a duty on the press to check their publications to be free of anything that give rise to criminal or civil liability. The same spirit seems to be behind the above provision. That being the case, any person outside the press could also be held liable in accordance with Article 44 (1) of the criminal code. This provision is also

important because it lists out the type of offences (not mentioned as press related) that the press could be held liable with.

Without prejudice to the provisions of Article 43, any person who, by contributing as author, originator or publisher, to the product published or diffused through mass media, participates in the commission of crimes: armed rising or civil war (Art 240), treason (Arts. 248-250), espionage (Art. 252) attempted incitement and assistance (Art. 255), provocation and preparation (Art. 257), crimes against humanity (Arts. 269 -274), incitement to disregard military order (Art. 332), disclosure of military secrets (Art 336), breaches of military and official secrecy (Arts. 396 and 397), inciting the public through false rumors (Art 486(b)), or the deliberate disregard for an obligation to maintain secrecy specified by law, shall be criminally liable.

The punishment for the incitement of such offences ranges from three months up to ten years with or without fine and in some cases like incitement for riot it could go more. Other than these, crimes related with press (as defined by Article 42 above) are generally classified as petty offences under Articles 740-47. The purpose of classifying them in petty offences might be to reduce the punitive burden on the press but obviously these should not even be included in the penal code. The range of punishment for such petty offences is one day to three month arrest with or without a fine of one to three hundred birr. But this is not the end of punishment since according to Article 46 the press organization or company as a juridical person is also responsible for crime just as it was under the press law. Article 761 also lists principal cases where confiscation and suspension are applicable. This is defined as withdrawal of license or closing of an establishment and the list in sub-heading b includes press and publication matters.

Article 45 repeats the provision on protection of sources in the press law and the exceptions are also the same; the court can order disclosure for crimes “...against the Constitutional order, National Defense Force or security of the State constituting clear and imminent danger” or in case of a serious crime and there is no alternative source of

information. The last provision in this chapter relating to offences of the press is Article 47 and it deals with immunity as:

The author, publisher or diffuser of a true record or representation, which is correct in form, of public debates or acts of a legislative, administrative or judicial authority the diffusion of which is not expressly prohibited by law or by a specific decision shall not be liable to punishment.

It is clear from this that the position of the criminal law is similar with the defamation provision in the civil code since both give protection or immunity, to be exact, to an author of a true statement. The provision also prohibits a wide area of information that should be public under normal circumstances or by the reason of freedom of information since the secrecy requirement is so open ended that somebody might “specific decision” for it. The punishment, as provided with under Article 435, can be simple imprisonment not exceeding three years or fine the amount of which is not mentioned.

In the chapter on ‘crimes against honor’ Article 607 states as its principle the fact that such crime is punishable irrespective of the position or social status of parties and the determination of punishment takes in to consideration the extent of circulation. Obviously, the presses have large circulation relatively and consequently the punishment will be heavier on them. Article 609 includes juridical persons as punishable with fine and also states this does not stop their members’ punishment. The compensation may include material and moral damages, according to Article 610, the determination of which is left for the courts but it may include the publication of the judgment or part of it. Ironically public officials are immune to such charges in the normal discharge of their duty. Article 612 clearly provides an encroachment in the work of journalists as follows:

The following are not punishable as injury to honor:

- a) considered opinions and well-founded criticism, couched in proper and moderate terms, concerning personal aptitudes or artistic, literary, scientific, professional or social activities, creations or productions; or*
- b) averments, statements or comments uttered or repeated by a public servant or by an advocate or attorney, by an expert or witness, by a journalist or by any other*

person acting in good faith in the discharge of his duties, especially by way of investigations, reports or depositions, in the defense before court or before the administrative authorities, or by way of authorized public information service, where the alleged facts are germane to and remain within the confines thereof and where they are not uttered with express intent to discredit.

This provision provides an unnecessary and sort of paternalist interference to freedom of the press by outlining when the press should criticize and how. Any journalist can be accused of such crime based on his day to day or normal work and it is up to him to provide such proof as “good faith”, “discharge of his duty” or even whether the criticism is “well-founded”. The legislature and also the courts are the judges as to how the journalist is doing his job and that puts the private press on equal footage with highly censored government press for which it was supposed to be a substitute.

Another area the criminal code governs is defamation which is defined by Article 613 and carries up to one year imprisonment or a fine but only up on complaint. This is so irrespective of the truth of the allegation since what matters is the intent to injure. However, the punishment is reduced up to one month when the allegation is false and the defendant knew such fact. A different approach from the civil code is chosen since the truth of the matter and intent to injure is considered more serious crime. But this does not seem to hold since the provision punishes a false allegation made negligently with up to one year or fine. There are interesting exceptions under Article 614.

A person charged with defamation cannot in general plead in defense that he acted without intent to injure, or that he confined himself to repeating even though not believing them, allegations emanating from another, or that it was a matter of common knowledge, or that he uttered suspicions or conjectures.

We can see the same grave danger against freedom of opinion as the one in the civil code here. The code is even blunt as to the impossibility of proving one does not have ‘intent to injure’. As long as the victim feels injured the defendant cannot prove otherwise. Let alone journalists, even an ordinary person should not repeat what he heard from others or

rumors unless he has a proof as to the truth. Such onerous task is imposed in the second sub-Article in these words:

- (2) Where the criminal commits the act by uttering or expressing the truth, or having sufficient ground to believe that it is true, he shall not be liable to punishment if he can prove that*
- a) he did not have the intention to injure the honor or reputation of another; or*
 - b) he acted in the public interest or he was actuated by a higher interest or moral aim.*

Without going in to questioning the necessity of believing only the truth, it is not clear how someone can prove she has “a sufficient ground to believe” something is true. Even though one may prove she acted in the public interest, there is no reason how the law require a separate proof of intending no injury since one excludes the other. Then again we are still in limbo because what constitutes “public interest”, let alone “higher interest or moral aim” is far from being clear. It seems as if journalists are against the ‘public interest’ and they have to prove it all the time but the easiest thing would be to free them from all these heavy burdens. But the code does not look at it that way, here is an indication:

(3) Where the criminal is convicted of calumny, he may in no case exculpate himself by invoking public or higher interest.

It is clear now that the code takes the exception of sub-Article 2 as a substantial benefit for the journalist. But ‘higher interest’ not being clear, one should at least be given the chance of proving herself. The code also insulates public servants from the public and the press in Article 618. When the defamation or calumny is against a public servant on the course of his duty the punishment is cumulative of fine and up to one year for the former and three months for the latter. Sub-Article two provides that this does not free one from being liable on the basis of other provisions relating to injury to honor of the state, foreign states and inter-state institutions.

To conclude this section, Ethiopian law on press freedom has been shown to be severing to the point of becoming an obstacle to freedom. The rules regulating the press are bulky and scattered here and there. The writer only tried to show what can be found under the circumstances but it is hard to tell what other rules might exist concerning the press. This adds up to the unpredictability of press rules as even lawyers, let alone journalists, would have a difficult time to determine what rule govern press activities and where they can be found. The other indicator of the severity of the rules is that they all apply together and they do not cancel each other when it comes to journalists. Given prison sentences, heavy fines and loss of license the application of all laws together makes press activity a dangerous Endeavour. A related problem is the multiplication of ‘offences’, warnings and also penalties. The civil code, the criminal code and the press law had similar warnings and sanctions. For example, if we take defamation it is prohibited and punished in all three laws discussed here. Considering this, it is difficult for journalists to work and progress under such tough legal environment. However, recently a new law of the media and freedom of information is enacted. It is believed to have brought a number of changes but what those changes look like is left for you to determine. The following is a summary.

3.5. What is Classified Information?

(Examination of two jurisdictions)

3.5.1. Official Secrets Act, United Kingdom

The Official Secrets Act of the United Kingdom prohibits the transfer of information deemed sensitive to national security interests. The first Official Secrets Act was passed in 1889, and criminalized the sharing, disclosure, or publication of government information by employees and former employees of the intelligence and security forces. The act also covered the disclosure of information by journalists. The Intelligence Bureau, under the recommendation of the Committee for Imperial Defense, lobbied Parliament for the legislation. The act also codified the gathering of evidence to try an individual on the crime of treason based on espionage or the purveying of sensitive

information. Parliament hurried the bill to passage, but some dissenters noted failings in the act, especially that the act did not grant explicit powers to search someone on suspicion of illegal activity and did not address new advances in technology, such as photography. As tensions heightened in Europe in the years leading up to World War I, Parliament sought to broaden the Official Secrets Act. The newer act addressed some of the concerns raised in 1889 upon passage of the original legislation. The Official Secrets Act of 1911 included provisions criminalizing the sketching or photographing of restricted places, especially military installations. While stipulating expanded criteria for illegal information, the 1911 act contained a few sweeping provisions that remained controversial for nearly 80 years. The Official Secrets Act of 1911 broadened the original act to give the government full discretion over what information would be considered illegal to disclose, and placed lifetime orders of silence on civil servants and security personnel regarding their actions and any confidential knowledge gained during their tenure of service.

The government did set forth some guidelines over the classes of information protected by the Official Secrets Act. Information provided by agents of foreign governments and organizations, security and intelligence forces, intercepted communications, and information related to crime and law enforcement was covered by the act. Opponents of the act cited the broadness of these categories, alleging that any government information or news could be construed to fit the designated categories.

Perhaps the largest controversy surrounding the act was that it gave scant consideration to tests for harm. It stipulated that no motive or proof of intent to cause harm is necessary to prosecute, but that both can be inferred from a defendant's conduct, character, or associations. The law furthermore did not permit a defendant to claim that disclosure of information was in the public interest or that such information was already in the public domain. While criticism of the law subsided during wartime, it began to draw sharp criticism in the 1960s and 1970s from journalists who claimed the act allowed the government to cull the press of embarrassing information and prosecute journalists who used government employees as sources. Other opponents claimed it permitted

government abuses in the intelligence and security forces to go unchecked, and failed to provide information to the public regarding security and terrorist threats.

In 1989, Parliament revisited the Official Secrets Act and replaced the long controversial Section 2 of the 1911 draft. The definition of secrets and information covered by the act was tightened to include only information deemed vital to national security and intelligence interests. Civil servants and military personnel wishing to report fraud and abuses now appeal to intra-government review boards, but are still prohibited from public disclosure of confidential government information, even if gained second-hand. Despite these revisions, the act remains contentious in Britain, especially among journalists who view the 1989 amendment as a negligible victory for freedom of information in the press.

3.5.2. Classified Information in US

Classified information is any data or material that belongs to the federal government and relate to sensitive topics such as military plans or the vulnerabilities of security systems. A number of laws or rules govern the control of classified information and access thereto, as well as the declassification of items no longer sensitive. Thanks to Executive Order 12958, a number of formerly classified documents regarding the Cold War and other critical junctures in U.S. security history are now accessible to the general public.

As defined in the Classified Information Procedures Act (CIPA), passed by Congress in 1980, classified information is any information or material that has been determined by the United States government pursuant to an executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security and any restricted data, as defined in paragraph R of section 11 of the Atomic Energy Act of 1954.

The act names executive orders before legal statutes, because these orders—more than acts of Congress, decisions of the Supreme Court, or other rulings—are among the

principal governing authorities in matters of security classification and access to classified information. In addition to executive orders, there are also other non-parliamentary government directives that present guidelines on classified information and access.

For the present purposes, it is helpful to be a bit more explicit than CIPA, and—using as a basis various executive orders, as well as historical practice—define classified information as materials or data belonging to, controlled by, and/or produced by the federal government, pertaining to intelligence sources or methods of collecting information; cryptology or codes; and the vulnerabilities, capabilities, or planning of systems, installations, or projects that relate to national security. Access to information thus “classified” is restricted on the basis of its relative importance, the consequences that would follow if it were passed to the wrong parties, and the individual’s “need to know” that information.

Laws on classification procedures: An introduction

Federal laws on classification procedures provide for governing authorities who determine what information should be subjected to rules of restricted access. Specifically, Executive Order 12958, discussed below, defines the “original classification authority” as “an individual authorized in writing, either by the President, or by agency heads or other officials designated by the President, to classify information in the first instance.” This governing authority also determines the level of classification, of which are three major ones: confidential, secret, and top secret. (The levels of security clearance are discussed in more detail elsewhere, within the context of security clearance investigations.)

A number of laws govern classified information, but most are not “laws” in the sense that they were duly reviewed by Congress or the Supreme Court; rather, the majority of guidelines in these matters come from executive orders or presidential directives (which are classified), as well as directives from the National Security Council, the director of Central Intelligence, the Department of Defense, and so on. A rare exception to this is CIPA, the Classified Information Act, which came into being through the ordinary

channels of legislative procedure most commonly associated with a republican democracy. Even so, it has often been used to protect the “shadow government” of the security and espionage apparatus.

Classified Information Act (CIPA): Passed by Congress on October 15, 1980, and further amended November 18, 1988. Known in legal circles as a procedural statute, CIPA presents guidelines for the use of classified information by both government and defendant in a legal case. As a procedural statute, it neither adds to nor subtracts from the rights of the defendant or the obligations of the government; rather, it is designed to prevent both sides from unauthorized disclosure of classified information, and to apprise the federal government of any security breach that may result from proceeding with a case. During the Iran-Contra conspiracy trials in 1988, attorneys representing defendants Oliver North, John Poindexter, Richard Secord, and Albert Hakim filed a petition with U.S. District Judge Gerhard A. Gesell, stating that CIPA “imposes burdens on the defense unprecedented in American law.” Because so much of their case rested on classified information, the defense argued, it would be legal suicide to disclose all of that information to the prosecution. CIPA continued to be a theme throughout the proceedings. In July 1989, North’s attorneys filed an appeal stating that Gesell, who established guidelines for compliance with CIPA, nevertheless permitted infringement of North’s constitutional rights. Later, Senate majority leader George Mitchell complained that CIPA was too lenient, because it allowed Thornburgh to put a stop to the trial of Costa Rica Central Intelligence Agency (CIA) station chief Joseph F. Fernandez for his role in Iran-Contra. More than a decade after Iran-Contra, attorneys representing Chinese scientist Wen Ho Lee, accused of stealing secrets from the Los Alamos National Laboratory, attempted to use CIPA in a way different from that of North or Poindexter. Instead of withholding information, they were convinced that the release of highly sensitive data that the government had no desire to reveal publicly was a major reason for the government to avoid vigorous prosecution of Lee on the most serious charges.

Executive Order 12958: The most significant presidential provisions regarding classified information are the executive orders 12958 and 12968, both issued by President

William J. Clinton. The second of these is discussed elsewhere, in the context of security clearances. The first, titled “Classified National Security Information,” was signed on April 17, 1995. According to its opening sentence, the order “prescribes a uniform system for classifying, safeguarding, and declassifying national security information.”

In addition to defining “classification” and the basic levels thereof, as well as types of information that may be classified, the order provides that “If there is significant doubt about the need to classify information, it shall not be classified.” Furthermore, “If there is significant doubt about the appropriate level of classification, it shall be classified at the lower level.” The order prescribes the use of classification markings to distinguish varieties of classified information, and provides for “derivative classification,” or “the incorporating, paraphrasing, restating or generating in new form information that is already classified, and marking the newly developed material consistent with the classification markings that apply to the source information.”

Declassification and Executive Order 13142: Particularly important are the provisions of Executive Order 12958 with regard to declassification, or the removal of restrictions on access to information. Declassification is not to be automatic, “as a result of unauthorized disclosure of identical or similar information.” However, except in specific circumstances, information is to be automatically declassified after 10 years. Those specific circumstances include situations in which national security would be jeopardized by disclosure of the information, as well as instances in which automatic declassification could violate a legal statute. A notable example of such a statute is the Privacy Act of 1974.

Executive Order 13142, signed November 19, 1999, amended 12958 by extending the amount of time until certain types of information can be declassified. Specifically, the order addresses Section 3.4 in the earlier order, which provides for the declassification of information more than 25 years old that has been determined to have historical value in accordance with Title 44, U.S. Code. Whereas the earlier order had provided for declassification within five years, 13142 extended this period for 18 months. As the

Washington Times reported in December 1999, this change angered the American Legion and other veterans' groups eager to search records from the Vietnam era for information regarding prisoners of war (POWs) and others who were missing in action (MIAs).

Post-12958 Declassification Efforts: An August 1998 White House press release called Executive Order 12958 became “the first effort since the end of the Cold War to reassess the balance between open government and the need to maintain secrets vital to national security.” Although critics disputed White House claims as to the extent of the effort, the order did open a vast body of information for declassification. According to the press release, the Interagency Security Classification Appeals Panel established by the order had, in the three years that followed its issuance, reviewed some 96 documents and released 81 of them. Among these were documents from the administrations of presidents Dwight D. Eisenhower, John F. Kennedy, and Lyndon B. Johnson regarding the deployment and possible use of nuclear weapons in Europe; two 1962 letters from Indian Prime Minister Jawaharlal Nehru to Kennedy expressing fears of an impending nuclear war between his nation and China; State Department communications regarding Israeli nuclear capabilities during the June 1967 Six-Day War; and a September 1967 memorandum to Johnson regarding military options available to the North Vietnamese army. Less than 25 years old were documents from the administration of President Gerald R. Ford concerning nuclear weapons programs in South Korea. Some of the latter information remained classified, because disclosure would endanger a source, or because its release would harm U.S. relations with foreign governments.

NSA and NIMA Records: The National Security Agency (NSA) subsequently undertook a review of documents for declassification, a project it named OPENDOOR. As NSA announced in a press release dated April 2, 1996, it had turned over some 1.3 million pages of declassified documents to the National Archives and Records Administration (NARA). Intriguing as the contents were, these documents were far more than 25 years old; rather, they dated from the beginning of World War I to the end of World War II. Among them were a cryptologic study of the 1917 Zimmermann telegram

that precipitated U.S. entry into World War I; information on the Native American “Codetalkers” of World War II; and the captured diary of a Nazi U-boat.

Much more recent were the photographs released by the National Imagery and Mapping Agency (NIMA) in 1996 and again in 2002. These included millions of frames of imagery taken by KH-1 through KH-6 spacecraft, the KH-7 Surveillance Imaging System, and the KH-9 Geospatial Imaging System. Taken between 1963 and 1980, the images from the “Keyhole” satellites included shots of Hanoi and Beijing, Egypt’s Aswan Dam, the Eiffel Tower, and the U.S. Capitol building. Still withheld were numerous images, some dating as far back as 1963 that were still considered too sensitive for release.

NARA, CIA, and the Continuing Task of Declassification: Further information regarding documents released in accordance with Executive Order 12958 is available at the NARA Web site. With the help of teams sent by CIA under a project known as “Remote Archives Capture Project,” NARA had by the early twenty-first century declassified millions of pages of material. Among these were State Department files offering information on Nazi gold from World War II; Kennedy’s tapes of conversations during the Cuban missile crisis of October 1962; the January 1968 incident in which sailors from the U.S.S. *Pueblo* were captured by North Korea; headquarters reports from U.S. military commands in Vietnam and Thailand through 1975; information on POWs and MIAs from Korea and Vietnam; and records of U.S. participation in SALT (Strategic Arms Limitation Talks) negotiations. It was an intriguing collection, but much remained to be processed by historians, scholars and archivists. Some of the processed information may remain classified indefinitely.

According to Michael J. Kurtz, aside from “unique items such as Secret Service records relating to the protection of the President and Internal Revenue Service tax information,” items exempted from release fell into four basic groups: information on atomic energy; intelligence sources and methods; sensitive foreign-relations topics (e.g., U.S. discussions on border disputes between other nations, such as that between India and Pakistan over

Kashmir); and information from foreign governments that the latter had not approved for release.

3.6. The New Mass Media and Freedom of Information Proclamation

This law includes provisions applicable on any kind of mass media such as print, books and broadcast. It also includes provisions related to the right of mass media as well as the right of any person to have access to information held by the authorities. In addition to the introduction, which provides for the aims and goals of the proclamation, it has six parts.

Part I has five articles on the short title, definition, gender references and guarantees provided for freedom of expression. Even if the main focus of the law is print media, it has provisions providing rights and protections applicable to other types of mass media. Examples of such are article 4 concerning freedom of mass media, article 7 regulation of monopoly and part 3 relates to freedom of information, protection of information sources, right of reply, prior restraint, moral damage caused by defamation and speedy hearing of media related cases. Thus, 'publication' under article 2 refers not only to print and broadcast outputs but also any publication other than those.

Terms defined include periodic print, broadcaster, printing press, publisher, distributor and chief editor. These definitions are provided in order to avoid any confusion in enforcing other laws such as the criminal law which are applicable on these persons or activities but were not defined by them. One of the terms used in the proclamation that should not be widely construed is 'government organ'. It refers to federal and regional legislature, executive and judicial organs as well as others established by them and are accountable to them, directly or indirectly subsidized by them including quasi ngos and public enterprises.

Information relates to any documented knowledge, fact or data under government control and document also indicates to any information organized in any form that makes it

visible, audible or readable. Personal information is defined broadly in relation to information made public and refers to any information about an individual, including his or her name.

Article 4 prohibits any form of censorship and provides guarantee to mass media against any administrative measure not supported by clear laws enacted on the basis of the constitution. It also lays obligations, negative and positive, on government organs. Accordingly, government organs have the duty to refrain from being an obstacle to the work of the media in news gathering and imparting or provide suggestion or opinion on any matter or gather public opinion. This duty of government organs and right of the media is supplemented by a positive duty to provide information or conduct press conference in accordance with rules of accreditation.

Under article 5, any Ethiopian has the right to establish mass media organization. Journalists have the right to form their professional association without the consent of their employers. Print and broadcast activities are to be conducted through companies and a company becomes Ethiopian when all its shareholders are Ethiopian. When there are non Ethiopian shareholders in the company it will not be considered as an Ethiopian and the same applies to companies whose financial source is totally from abroad and with foreigner shareholders or association lead by foreigners.

In part two, article 7 for the first time gives full legal recognition and guarantee to the independence or freedom of the editor. It also provides that any procedure or agreement creating inconvenience to this freedom is null and void. Notwithstanding mass media holdings, this provision gives protection and guarantee for editorial independence at any print or broadcast media and there is monetary penalty imposed on owners who violate this duty (art. 45).

Article 7 also stipulates various methods of control on media ownership. The purpose is to make sure the media participate and play its role in a democracy which is possible when it entertains diverse interests and opinions. However, this role of the media would

seriously be hampered if there are media monopolies as a result of overlapping ownership.

The basis of ownership control are effective control on shares, license area and market area but it also takes language as a variable in relation to print media. Based on this, two types of control mechanisms are designed under this article. These are control of concurrent ownership and control of cross media ownership. Article 7(3) in particular governs the print media and a person with effective control in one company is prohibited to own shares that would create effective control for her/him in another company operating in the same area of distribution or concurrent market, with the same language.

Since freedom of expression is not only confined to seeking and receiving information but also includes the freedom to disseminate information, article 8 provides guaranties for distribution of publications. This article prevents distributors from supporting the press they want and suppressing those they don't like using methods such as disparate price or service for different press. Thus, the provision prohibits content based discrimination of the press by distributors.

Under article 9, registration has the following aims:

- a. To insure legal responsibility of the media, registration of their addresses, their publishers address....etc. is necessary.
- b. To avoid repetition of names (titles) and create healthy competition
- c. To insure ownership control, the name and shares of shareholders have to be known; and
- d. To compile information showing the distribution of press outputs.

Since registration has no more aim than these if the concerned authority to whom application is filed does not give registration certificate within the period provided the applicant would be deemed to have registered. In order to ease technical procedure there is no more renewal of registration. However the proclamation is not applicable to media that are not registered or do not provide the information required and therefore enforcement authorities will follow the general provisions of the criminal law.

When changes were made to situations described in the application the publisher has to declare the changes within 15 days, otherwise the certificate can be canceled. Information that has to be described on each print consist names and addresses of publisher, printing press and editor in chief, volume and number, time date and year of publication. In addition, two copies of the print must be deposited at the national library or regional library (bureau of culture) as the case may be within 24 hours after publication.

Part III is all about freedom of information. The aims of this part are: effective and efficient public service, avert corruption, transparent and accountable public administration, rule of law, direct and informed public participation. This part has the constitution's command of transparency to be a regular government procedure as its basis and contains provisions guided by the belief that maximum transparency is the rule while secrecy is the exception limited to a few circumstances clearly known. This freedom is limited only for legitimate aims recognized by law.

The right to information under government control includes such acts as looking at the information, taking notes, acquiring certified print copies and electronic copies. Government organizations may employ a more efficient and cost effective procedure of providing access to information than that provided by the proclamation. Art 13 prescribes the duty of the government organs to publish information for free as many Ethiopians may not afford to pay. Such organs shall publish descriptions of procedure to ask for information, frequently asked questions, organizational structure, duties and responsibilities, name of officials and their responsibilities and type of service provided to the public. The provision also requires public organizations to publish the type of information in their possession, the content of the documents, regulations for employees, manuals, amended and repealed regulations, and addresses of public relations officer.... etc, at least once a year and let them be observed to those requesting and provide copies thereof.

Whenever any organ publicizes policies, decisions or actions of public interest, it shall also publish information related to such and information that is the basis for decisions.

Any judicial or administrative decision and difference of opinion on the decision shall be documented and a copy shall be provided by decision making organs to information seekers. Before implementation of any project, its rational substance and data shall be publicized to those to be affected or to the general public by the concerned public organ. Organs of government are not obliged to create new documents or provide verbal response to requests; rather the information has to be documented and under the possession of the organ at the time of request.

Article 14 sets out procedures to be followed by those seeking information. Requests should be made in writing and forwarded to the public relations officer (pro). It is prohibited to inquire why the applicant needed the information. The payment required to get information is not made to the information itself but to cover the expense incurred to prepare the request form, to gather and organize the information. However individuals unable to pay have the right to get the information for free.

Grounds for refusal to request for information are stipulated in article 27. When the request is too general or not clear and is not corrected even if suggested by PRO; when the request is so bulky that it would disturb the work of the organ or the utilization of personnel and property; or if it is already made public the request can be denied.

The normal duration within which response is to be given for request to information is 30 days. However, the period can be 10 days for information that has to be urgently disclosed because of justifiable public interest and requested by a journalist or when there is grave danger to life or physical security of persons. In addition, the duration can be 60 days if for instance; information has to be gathered from other places or branches.

Information prohibited from disclosure or deemed secret is stipulated under the proclamation. These are:

1. Protection of privacy of individuals (art15)
2. Protection of commercial and financial secret (art16, 17, 18) Economic interest (art 24)

3. Protection of public peace and security, security of individuals, property and witnesses (art 19).
4. Protection of impartiality of judicial process and criminal investigation (art 20&21).
5. Protection of national security (art 22) defense (art 23) cabinet security.
6. Protection of international relations (22(2))
7. Protection of unlimited and open discussions between ministers and civil servants and protection of impartiality of decisions (art 25&23)
8. Protection of law enforcement operations without obstruction (art 25(2)).

If disclosure of prohibitions from art 15-25 advance public interest and its benefit outweighs the harm that may be caused, the information has to be disclosed according to art 26. A decision of an organ to deny information on the basis of art 15-25 can be challenged in court (art 35) and other such denials can be appealed to a superior official or to the ombudsman (art 33&34). Prohibition under art 23 can be provided a certificate by government and such certified information is not reviewable by courts or the ombudsman. The ombudsman is entrusted to regulate implementation of part III and issue a detailed directives guidelines, procedures, forms and explanations.

Among the legal guarantees provided for transparency of information these are pivotal; any information not classified by the proclamation cannot be prohibited just because the authorities deemed it so (art. 15,2), and other than those indicated by this proclamation no other law can provide prohibitions to information (art.15,1). In addition, information shall not be prohibited for the sake of concealing administrative scandal, corruption or incompetence etc. Those who disregard duty of secrecy by disclosing information to expose illegal or harmful activities are protected from administrative and criminal charges. Government official and civil servants who destroy, delete, hide or prohibit documents to purposely prevent disclosure will face serious criminal punishment under article 39. Apart from historical or personal information that do not change through time, information deemed secret by the proclamation is declassified after 25 years.

Part four under article 41 provides for the right of reply. The provisions are detailed and provide for the manner by which the press handle right of reply and corrections. Based on limitations on freedom of expression and in order to prevent clear and present danger against national security, with judicial oversight the prosecutor is empowered to restrain print media or books before publication, according to part five. In addition, moral damage for defamation is made to be up to 100 thousand and the reason is to encourage civil instead of criminal charges for such cases. Part six and seven stipulate expedient judicial mechanisms for criminal charges against the media and they also determine period of limitations to avoid lengthy criminal charges. The proclamation is to have no substantive criminal provisions and imprisonment penalties for violations of its provisions.

Discussion Questions

1. Evaluate freedom of information under the old and the new proclamations
2. Evaluate freedom of information under the new law and the laws of the UK and US
3. On matters of the press, compare and contrast the old and the new law. in particular, consider a) registration and licensing b) information to be disclosed c) editorial independence d) right of reply e) prior restraint f) journalistic freedom
4. Based on the discussion in chapter one on the jurisprudence of ECHR regarding prescribed by law, legitimate aim and necessary in a democratic society, how do you evaluate the restrictions on press freedom in Ethiopia under the civil code, criminal code and the new mass media proclamation?
5. How do you evaluate the new proclamation with regard to other rights affected by freedom of expression based on the ECHR jurisprudence in chapter one?

CHAPTER FOUR

LICENSING AND REGULATION OF ELECTRONIC MEDIA

Chapter Objectives

After successful completion of this chapter, students are expected to achieve the following objectives:

- Realize licensing and regulation of the electronic media in Ethiopia,
- Identify the broadcast licensing and regulation in other standard setting jurisdictions
- analyze the substantive and technical limitations on licensing and regulation of broadcasting, analyze the legitimacy of the restrictions,
- Compare and contrast the present broadcasting service with the previous laws.

INTRODUCTION

The previous chapter has considered the application of the guarantee of freedom of expression to specific subject matter of the press. In this chapter we consider the application of the freedom in connection with prior licensing and subsequent regulation of the broadcast media. As we did in other chapters, we start with the jurisprudence and experience of ECHR. In particular we consider the possible impact of the requirements of procedural fairness under Article 6 ECHR upon the activities of media regulators. With the background of ECHR jurisprudence, we then discuss regulation and license of broadcast in Ethiopia.

4.1. BROADCAST LICENSING AND REGULATION IN EUROPE

The proviso for licensing in Article 10(1)

Article 10(1) ECHR provides:

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.* (Emphasis added)

The third sentence does not exclude licensing of broadcasting and cinemas entirely from the guarantees in the opening two sentences. The Court has explained that the origins of the third sentence were the technical limitations on broadcasting frequencies which made some form of regulation inevitable. Although there are still technical aspects, broadcasting licensing has other functions. It was recognized that the electronic media had the potential for much greater impact than the print media, and licensing controls sought to regulate content. A literal reading of the third sentence of Article 10(1) might suggest that any licensing restrictions were excluded from the Article's guarantees. However, the jurisprudence of the Court has developed so that restrictions imposed by way of broadcasting licensing are compatible with the Convention only if they satisfy two of the requirements for restrictions on freedom of expression in Article 10(2) — they must be prescribed by law and they must be necessary in a democratic society. In effect, the licensing of broadcasting, television and cinema has become a further 'legitimate aim' which restrictions on freedom of expression may pursue. Licensing regimes may still be directed at technical aspects of broadcasting, but they may have wider public interest objectives as well as with restrictions imposed for the other aims (specified in Article 10(2)). They are neither automatically a violation nor automatically valid. In particular, the Government must demonstrate their necessity in a democratic society.

The Court recently had to consider a complaint by a religious organization that it had not been allowed to compete for a national radio license. The complaint was made under Articles 10 and 14. The Court found that both complaints were manifestly unfounded. Technical limitations did still mean that national licenses had to be rationed and the UK had a margin of appreciation as to how to allocate these so as to satisfy as many listeners as possible (*United Christian Broadcasting Ltd v UK* 2000).

In the UK, the provisions of the Broadcasting Acts 1990 and 1996 (in relation to digital program services) provide for the regulation of independent broadcasting services by the

Independent Television Commission and the Radio Authority through the licensing system. General requirements as to standards are prescribed by ss. 6 (television) and 90 (radio) of the 1996 Act. These are incorporated into licenses and include the familiar requirements as to good taste and decency, due accuracy and impartiality in news and politics, as well as respect for religious beliefs. The regulators promulgate codes of guidance and have wide powers of enforcement through notices, fines and ultimately revocation of licenses. In addition, the 1996 Act created the Broadcasting Standards Commission with powers to adjudicate upon complaints as to standards (covering violence, sex, taste and decency) and fair treatment (including unwarranted infringements of privacy).

The general requirements represent long-established standards widely accepted as being in the public interest. They have not been challenged in Strasbourg. They are unlikely to be affected by the arrival of the HRA 1998 in so far as they apply to mass broadcasting accessible by switching on a television or radio. The advent of 'personalized' broadcasting access through use of a password or pin number known only to a consenting adult may, however, make it harder to justify some of them. The phrase 'regardless of frontiers' in the second sentence of Article 10(1) makes it clear that the restrictions on broadcasts which originate abroad will also infringe the guarantee of freedom of expression unless they are prescribed by law and necessary in a democratic society.

4.1.1. Public Service Broadcasting

The existence of publicly owned broadcasters does not infringe Article 10 ECHR, but in one of its most important cases the Court held that the right to freedom of expression was violated if the publicly owned stations had a monopoly on broadcasting from within the state. In *Information Sverlein Lentia and others v Austria* (1993), the Court repeated the fundamental part that freedom of expression played in a democracy and the media's role of imparting information and ideas of general public interest which the public was also entitled to receive. It said: 'Such an undertaking cannot be successfully accomplished

unless it is grounded in the principle of pluralism, of which the state is the ultimate guarantor' (at para. 38). Austria argued that the state monopoly was necessary to guarantee the objectivity and impartiality of the audio-visual media and to achieve a diversity of programmes, balanced programming and impartiality and independence. The Court was not persuaded. It saw state ownership as the most restrictive means of achieving these aims and observed that other European states sought to pursue similar aims by measures which allowed a mix of publicly and privately owned stations to coexist. The working out of a new regime in Austria was protracted. At one stage only two private radio stations were permitted for the Vienna region. In a subsequent case the Court said this was 'surprising', but did not need to rule on whether it was compatible with the Convention since the law allowing this had been declared null and void by the Austrian courts.

4.1.2. Broadcasting Bans

Under the BBC's License Agreement and under the Broadcasting Act 1990, Art. 10(3), the Home Secretary can direct broadcasters not to include any prescribed material in their programmes. Between 1988 and 1994 this power was exercised to prohibit the broadcasting of the voices of anyone who was a member of or a supporter of a number of organizations, including Sinn Fein. Consequently, if Gerry Adams, the President of Sinn Fein was interviewed on the television or radio, his words had to be blanked out and replaced with the voice of an actor and/or subtitles. The domestic legal challenge to these directions by various journalists and TV producers led to the House of Lords decision in *Brind v Secretary of State for the Home Department* [1991]. Having lost in the domestic courts, they pursued their challenge in Strasbourg. However, the European Commission on Human Rights held that their application was inadmissible as manifestly unfounded. It agreed that the broadcasting bans did interfere with the applicants' freedom of expression, but the restrictions were prescribed by law and were pursuing the legitimate aim of combating terrorism. They had a limited effect on the broadcasters' freedoms and the court had recognized the particular difficulties of taking measures against terrorism. For

these reasons, and taking account of the margin of appreciation, it was not reasonably arguable that the Government had failed to show that the measures were necessary in a democratic society. This decision followed a rejection of complaints from Ireland which had sought to argue that similar broadcasting bans in that country were contrary to Article 10 (*Purcell v Ireland*).

Although the particular broadcasting bans thus survived a Convention challenge, the introduction of the HRA 1998 will require a reversal of the principle which the House of Lords set out in *Brind*. That case has come to stand for the proposition that administrative decisions could not be challenged as unlawful on the grounds that they were contrary to the Convention. From 2 October 2000, public bodies are under a duty to act compatibly with Convention rights. Any future broadcasting ban would therefore have to be measured against the demands of Article 10 ECHR in order to assess its lawfulness.

4.1.3. Access to Broadcasting

Article 10 ECHR guarantees a right to impart ideas and opinions, but access to the airwaves is in practice controlled by the broadcasters and anyone who wishes to 'impart ideas or opinions' on television or radio must pass these gatekeepers. Does Article 10 control the way in which they exercise these powers?

In general the answer is 'No'. In a case brought by Jorg Haider against Austria (*Raider v Austria*) the Commission held that Article 10 ECHR does not give a general and unfettered right for any private citizen or organization to have access to the broadcasting media. There may be exceptional circumstances where one political party is excluded from broadcasting facilities to which others are given access. Even here, the Commission has declared inadmissible an application under Article 10 from an independent candidate for the European Parliament who was not allowed to make a party political broadcast (see *Huggett v UK*,; see also *Tete v France*). The Commission recognized that air time was inevitably limited and found that the threshold test used to decide which parties would be allowed a broadcast was compatible with Article 10(2). In the

Raider case, the applicant also complained about the hostile manner in which he had been interviewed. The Commission commented, 'with regard to interviews of politicians, it is in the interests of freedom of political debate that the interviewing journalist may also express critical and provocative points of view and not merely give neutral cues for the statements of interviewed persons, since the latter can reply immediately'.

4.1.4. Advertising Restrictions

Many countries with public broadcasting bodies restrict advertising to commercial channels. In a 1993 case from the Netherlands, the applicant had been fined by the Dutch broadcasting regulator for violating the restrictions on advertising by including incidental references to two products in the course of a children's information program (*Nederlandse Omroepprogramma Stichting v Netherlands*). The Commission accepted that this was 'interference' (and not, as the Government argued, merely an enforcement of the condition on which the licensed program had been permitted to be aired). The Commission thought that the restriction had the legitimate aim of protecting the rights of others, namely the rights of children to be protected from indirect advertisements in TV programmes directed at a young audience. This, incidentally, illustrates the broad and non-technical way in which the Strasbourg organs have interpreted the concept of 'rights of others'. In all the circumstances it considered that the restriction had been proportionate and necessary in a democratic society. It ruled the application to be inadmissible. The applicant also complained that the Dutch attitude to incidental inclusion of product names was much stricter than in other European countries. Dutch audiences would be exposed to programmes made outside the Netherlands but picked up or retransmitted into the Netherlands. Consequently, the applicant argued, it was subjected to restrictions which were discriminatory and contrary to Article 14 ECHR. The Commission rejected this argument as well. It held that the position of a program made or broadcast from inside the Netherlands was not comparable to one from outside.

4.2. MEDIA REGULATORS

There are various contexts in which the media are regulated either in advance of publication (e.g.. the system for classification of videos by the British Board of Classification), or after the event (such as by the Broadcasting Standards Commission, the Press Complaints Commission and the Advertising Standards Authority, as well as through the broadcast licensing system). We considered in other chapters the approach which the ECHR requires to be taken to substantive matters. Here we deal briefly with the procedural issues which might arise under Article 6 ECHR in connection with such regulatory activities.

Article 6: Applicability

Article 6 ECHR applies: 'In the determination of [a person's] civil rights and obligations or of any criminal charge against him. 'These two alternatives 'civil rights and obligations' and 'criminal charge' need to be considered separately.

4.2.1. Civil Cases

For the Article 6 protections to apply, the case must concern a 'civil right', there must be an arguable basis for that right in domestic law (a dispute '*contestation*' in French) and the procedure must lead to the 'determination' of the right.

The phrase 'civil rights or obligations' is an example of an 'autonomous concept', that is a term which is defined and developed by the Court in the context of the Convention and its case law. Whether a dispute concerns a civil right is influenced, but not conclusively resolved, by its categorization in the domestic legal system (*König v Germany*). Ultimately this question must be answered 'by reference to the substantive contents and effect of the right' in issue (at para. 89). Comments about this particular autonomous concept have to be tentative, in part because the Court appears to have shied away from providing a comprehensive definition and in part because its attitude has evolved over time and is still developing. Early cases from the Court referred to the distinction between rights in private law (which were treated as 'civil') and those in public law

(which were not) (*Ringeisen v Austria*). Paradigmatic cases can be identified in this way. Thus, litigation between two private parties (for example, over libel, breach of confidence or copyright) clearly concerns 'civil rights or obligations'. Conversely, disputes of a purely public law character which do not directly affect a private law right are not within Article 6(1) ECHR. On this basis, complaints have been dismissed in relation to the admission or expulsion of aliens, the recruitment or dismissal of civil servants and the validity of election expenses, even though, in the last case, the applicant might have lost his seat and the payments which went with elected office (*Pierr-Bloch v France*). However, disputed public law decisions which decisively affect the relationships of private legal personalities in civil law, may involve the determination of civil rights (see *Ringeisen v Austria*, which concerned an administrative approval of a transfer of land between the applicant and a vendor).

The form or the venue of the dispute is clearly not decisive. In particular, disputes which directly affect pecuniary rights or obligations, or which concern the use of property, are likely to be classified as 'civil'. Of particular significance in the context of the regulation of media activities are cases which have held that the withdrawal of a license to engage in a commercial activity is a 'civil' matter (*Pudas v Sweden* and *Bentham v Netherlands*) and others which have held that refusal of planning permission to develop privately owned land also concerned civil rights (*Fredin v Sweden*). It is likely that the refusal of a BBFC video certificate would concern a civil right in this sense. The Court has held that disciplinary proceedings by a professional body which can lead to the loss of the right to continue in the profession would engage Article 6(1) (*Diennet v France*; *Kingsley v United Kingdom*). Decisions by the Radio Authority or the ITC which might lead to the revocation of a broadcasting license would similarly be likely to involve a 'civil right or obligation'.

In order for Article 6 to apply through the gateway of 'civil rights and obligations', there must also be an arguable basis in domestic law for the right. This in part reflects the principle that Article 6 is concerned with procedural rather than substantive rights,

although the borderline between procedural bars and substantive ineligibility can sometimes be elusive (see, e.g. *Osman v UK*).

Furthermore, the dispute must concern a 'right' rather than a discretionary grant, so that the ability to apply for an *ex gratia* payment would not attract Article 6 procedural protections. Yet here, too firm guidance is difficult. There have been cases where a dispute concerning the initial grant of a government license has been held to be within Article 6 (see *Bentham v Netherlands* -- license to run a petrol station granted then removed on basis of unknown opposition at the time of determination, the applicant continued to trade while an appeal went through the administrative system and then to court; *Jorbedo Foundation of Christian Schools v Sweden* -- extension of license to an existing private middle school to allow it to teach older children). Although these have involved some element of ongoing commercial activity, this is not necessary in principle. On the face of it, therefore, even 'first time' or speculative applications for broadcasting licenses would involve the determination of a civil right, however odd this may look.

Lastly, the proceedings must lead to a 'determination' of the right or obligation. On this basis the Al-Fayed brothers' complaint about the alleged unfairness of inspectors appointed under the Companies Acts was unsuccessful: the inspectors reported to the Department of Trade and Industry but determined nothing (*Fayed v UK*). On the same basis, the Court of Appeal has concluded that the procedure by which a person's name was included on the Department of Health's list of people about whom there are doubts as to their suitability to work with children, did not have to conform with Article 6 ECHR. Although inclusion on the register would be highly detrimental to the prospects of a person gaining employment in a post that involved contact with children, it did not in itself determine anything.

4.2.2. Criminal Charge

Once again the concept of 'criminal' proceedings is autonomous. Here, though, if the domestic system does classify the proceedings as criminal that is determinative. Thus,

unsurprisingly, Article 6(1) ECHR will apply if a broadcaster in the UK is prosecuted for an offence under the Broadcasting Act 1990 (e.g., broadcasting without a license contrary to s. 13), or if a person is charged with an offence under the Video Recordings Act 1984. However, this is not the limit of the applicability of Article 6. Even if domestic law would regard the proceedings as non-criminal, they may involve the determination of a 'criminal' charge for the purposes of Article 6 (*Engel and others v Netherlands*). Contempt proceedings may not be strictly criminal as a matter of domestic law, but since they potentially involve imprisonment and/or substantial fines, they are criminal for the purposes of Article 6 (see *Harman v UK*).

The Court will look at the nature of the conduct in question and the severity of the possible penalty. The fines which the Radio Authority and the ITC can impose can be (and have been) very large. However, there must be doubt as to whether the proceedings which lead to these penalties come within the Strasbourg concept of 'criminal'. It is only licensees who can face these proceedings. Previous cases before the Court have distinguished between regimes which have a general application (e.g., for collection of the community charge or poll tax and penalties for non-payment) which have been held to be 'criminal', and those applying a disciplinary scheme to a particular group, such as prisoners or the armed forces, or civil servants or professionals who face proceedings before their association. None of the latter has been held to involve the 'criminal' procedural protections.

4.2.3. Rights Granted

Assuming that Article 6(1) ECHR applies either because the proceedings concern the determination of a person's civil rights or obligations, or because they involve the determination of a criminal charge, it provides the following guarantees:

- (a) a fair and public hearing;
- (b) within a reasonable time;
- (c) by an independent and impartial tribunal established by law, with;
- (d) judgment to be pronounced publicly.

The judgment must be reasoned, but the duty to give a public hearing is not absolute. Article 6(1) provides that the public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. Article 6(1) underpins the fundamental principle of the rule of law and is to be construed broadly (*Delcourt v Belgium*). Yet the decisions of the European Court indicate that the touchstone, as with the common law duty, is overall fairness, rather than particular technical failings. The case law of the Court under Article 6(1) is extensive, but the following features may be of importance in the context of media regulation.

1 The 'Tribunal'

If not a court, this must exercise essentially judicial functions. The fact that it has other non-judicial, perhaps administrative, functions does not necessarily prevent it being a tribunal (see *Campbell and Fell v United Kingdom*, concerning the disciplinary functions of a prison Board of Visitors), neither does the fact that the members are not professional judges (*Ettl v Austria*). Where a decision affecting civil rights or obligations is taken by a body which does not meet Article 6(1) requirements, the procedure can be saved by a right of appeal or review before a court or tribunal which does. A full reconsideration of the merits may be required (as in *Compte v Belgium* where an appeal to the Court of Cassation against a decision of a medical disciplinary tribunal, on a point of law only, was regarded as insufficient), though not necessarily. The Court has accepted that in certain specialized areas of law, where issues of policy arise, Article 6(1) may be satisfied by a two-stage procedure under which an administrative body reaches a decision, making findings of fact and exercising judgment, which is then subject to an appeal or review on a point of law. In *Bryan v UK*, the Court found that a planning inquiry was procedurally fair, but that the inspector lacked the necessary independence from the Secretary of State. The subsequent judicial review proceedings cured this defect,

however, since the inspector's findings of fact were not disputed and the procedure enabled the applicant to challenge fully the policy decisions in issue.

2 Independence and Impartiality

In considering independence, 'regard must be had, *inter alia*, to the manner of appointment of [the tribunal's] members and to their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence' (three-year terms of office were upheld in *Campbell and Fell*, see para. 80). Appointment by the executive does not, *per se*, deny independence, though a right to dismiss during the appointee's terms of office would do so. In *Zand v Austria* the Commission observed that 'the irremovability of judges during their term of office, whether it be for a limited period of time or for a lifetime, is a necessary corollary of their independence from the Administration and thus included in the guarantees of Article 6(1) of the Convention'. In one of the early Scottish cases under the HRA 1998, an objection to criminal trial by a temporary sheriff, who could be removed from office at any time for any reason by a member of the executive (the Lord Advocate), was upheld.

Impartiality is simply the absence of bias. This may be actual bias, for which the Court applies a subjective test to establish the 'personal conviction of the given adjudicator', or perceived bias ('the lack of the necessary appearance of impartiality'). In the latter case the Court looks for 'sufficient guarantees to exclude any legitimate doubt'. In *Kingsley v UK*, the applicant's license to manage in the gaming industry had been removed following a Gaming Board hearing tainted by an appearance of bias. The Board had already resolved that he was not a 'fit and proper person' to hold a license, which was the issue at the revocation hearing. However, the applicant failed to quash the decision in judicial review proceedings and was denied leave to appeal by the Court of Appeal. Both Courts held that the Board had no power to delegate the revocation hearing to an independent tribunal. The applicant was therefore denied his remedy on grounds of necessity. The European Court held that in this case judicial review was plainly inadequate to cure the defect since 'the concept of full jurisdiction involves that the reviewing court not only considers the complaint but has the ability to quash the impugned decision'.

3 Protections Specific To 'Criminal Charges'

If the proceedings constitute the determination of a criminal charge, Article 6 guarantees certain specific procedural protections in addition to the general requirements of Article 6(1). Thus Article 6(2) provides:

Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

Article 6(3) says:

Everyone charged with a criminal offence has the following minimum rights:

- a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- b. to have adequate time and facilities for the preparation of his defense;
- c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- e. To have the free assistance of an interpreter if he cannot understand or speak the language used in court. ,

In addition, Article 7 prohibits the imposition of retrospective criminal liability or a more severe penalty than prevailed at the time the criminal offence was committed.

A considerable body of case law has elaborated these rights and the specialist books on criminal procedure should be consulted if the proceedings in question are likely to be classified as the determination of a criminal charge.

4.3. Commercial Speech

4.3.1 Introduction

Before examining the jurisprudence of the European Court and the likely impact on domestic law after October 2000, it is important to address certain preliminary questions, including what constitutes commercial speech and to what extent, if any, it should be protected.

1 What Is Commercial Speech?

Numerous definitions have been advanced for 'commercial speech' yet none is entirely satisfactory. Perhaps the dominant view is that commercial speech is speech that is designed to promote the economic interests of individuals or enterprises. The most obvious example of commercial speech is advertising, but, as can be seen from the ECHR case law, it extends beyond advertising to include any means of conveying commercial information to the consumer.

2. Why Protect Commercial Speech?

Commercial speech clearly qualifies as 'speech' or 'expression' on any normal understanding of the words, as it involves the conveying of information and ideas. To exclude commercial speech from protection under Article 10 ECHR would inevitably require courts to draw arbitrary distinctions between it and other kinds of speech. Furthermore, as the US Supreme Court has explained, consumers have an interest in receiving accurate, truthful information about products: As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far than his interest in the day's most urgent political debate . . . When drug prices vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities.

3 Competing Interests

The justifications for restricting commercial speech are generally accepted to be stronger than in the case of political (and possibly artistic) speech. Clearly there is a public interest in forbidding false or misleading claims about products or services. These competing interests of consumer protection and fair competition mean that in every jurisdiction commercial speech is subject to considerable regulation.

4.3.2 ECHR CASE LAW ON COMMERCIAL SPEECH

1 Commercial Speech: General Principles

The leading authority in the ECHR case law on the protection of commercial speech is *Markt Intern Verlag and Klaus Beermann v Germany*. *Markt Intern* grants member states an extremely wide margin of appreciation in regulating and banning commercial speech. The Court was evenly split 9:9, but the President, with his casting vote, concluded that there had been no violation of Article 10 ECHR. The applicants published a bulletin which included an article about the dissatisfaction of a customer who had been unable to obtain the promised reimbursement of a beauty product purchased from a mail-order firm. The bulletin requested further information from its readers as to the commercial practices of the firm. The applicants were restrained by court order from repeating the statements on the grounds that they infringed the German Unfair Competition Act 1909. The German Government again attempted to argue that Article 10 was not engaged because of the commercial nature of the speech (at para. 25). The applicant argued in reply that to restrict the scope of Article 10 to news items of a political or cultural nature would result in depriving a large proportion of the press of any protection.

The Court concluded that the speech, although addressed to trades people rather than the public at large, conveyed information of a commercial nature which was within the ambit of Article 10 ECHR (at para. 26). The majority judgment, however, removed virtually all scrutiny of decisions in this field when it concluded that in the area of commercial matters, and in particular unfair competition, states were permitted a wide margin of appreciation, otherwise the Court would have to undertake a re-examination of the facts

and all the circumstances of the case (at paras 32-33). The Court confined its review to the question whether the measures taken at the national level were justifiable in principle and proportionate. Applying this very deferential approach the Court concluded that it could not be said that the granting of injunctions went beyond the margin of appreciation left to the national authorities, and therefore there was no breach of Article 10 (at paras 36-38).

This approach was cogently criticized by the various dissenting opinions, which considered the majority's decision as an abdication of the Court's role of supervision and as an unwarranted departure from earlier Article 10 jurisprudence requiring that the necessity of any interference with the right to freedom of expression needed to be 'convincingly established' (at p. 176). The dissenting judgments took a different view of the importance of the expression at issue, stating that: It is just as important to guarantee the freedom of expression in relation to the practices of a commercial undertaking as it is in relation to the conduct of a head of government.... In order to ensure the openness of business activities it must be possible to disseminate freely information and ideas concerning the products and services proposed to consumers, (at p. 177).

2 Commercial Speech and Advertising by Professionals

Barthold v Germany, concerned an interview given by a German veterinary surgeon (Mr Barthold) to a local newspaper, in which the vet was critical of the lack of emergency veterinary services at night in Hamburg. He went on to state that his clinic was the only one offering such a service. This interview led to proceedings against Mr Barthold for breaking the rules of professional conduct forbidding advertising and publicity, and for breaching s. 13 of the German Unfair Competition Act 1909. The German courts granted interim and final injunctions requiring him to refrain from repeating the statements on the grounds that the publicity provided exceeded the bounds of objective comment on matters of justified public concern. The Court by a majority found that there had been a violation of Article 10 ECHR. The German Government again sought to argue that Article 10 was not engaged because it did not extend to commercial speech, as this was a

matter relating to the right freely to exercise a trade or profession which was a right not protected by the Convention.

The majority judgment rejected this argument on the grounds that the speech in question included the expression of 'opinions' and the imparting of 'information on a topic of general interest' (at paras 41 -42). Furthermore, the publication in issue was an article written by a journalist and not a commercial advertisement. The majority, however, explicitly refused to decide whether, as a matter of principle, commercial advertising came within the scope of Article 10. They went on to find that the restrictions placed on Mr Barthold, while pursuing the legitimate aim of 'protecting the rights of others', were not 'necessary in a democratic society' because they were so strict as not to be proportionate (at paras 52-59). The Court invoked the fear of the chilling effect when it stated that the very strict rules risked discouraging members of liberal professions from contributing to public debate on topics of public interest, as such comment might be treated as entailing (to some degree) an advertising effect. Judge Pettiti's concurring opinion went further in discussing commercial advertising by the liberal professions, and drew on US jurisprudence to support the general proposition that: Freedom of expression in its true dimension is the right to receive and to impart information and ideas. Commercial speech is directly connected with that freedom ... Even if it were to be conceded that the state's power to regulate is capable of being more extensive in relation to commercial advertising, in my view it nevertheless remains the case that 'commercial speech' is included within the sphere of freedom of expression, (at pp. 407-8)

In *Casado Coca v Spain*, the Court had to examine a near absolute ban on lawyers advertising. The applicant placed an advert in a local newspaper containing only neutral factual information, such as name, address and telephone number. There was nothing in the advert that was untrue, offensive or misleading. Neither did the advertisement criticize any fellow members of the Bar. However, contrary to the Commission's opinion, the Court concluded that there was no violation of Article 10 ECHR. The Commission took the view that the near absolute ban on factual advertising was excessive and not necessary in a democratic society. The Commission opined that such a ban infringed not

only the rights of the applicant, but also the public's right to receive information. The Court again took refuge in the doctrine of margin of appreciation and concluded by a majority of 7:2 that there was no violation of Article 10. Factors that led the Court to reach this view included the limited nature of the sanction, the lack of consensus on legal advertising throughout Europe and the complexity of the issue.

In *Colman v United Kingdom*, the Commission considered the complete ban on advertising by general practitioners which existed, in the UK prior to the relaxation of rules in May 1990. The Commission concluded that the application was admissible, but before the Court could consider the case it was struck out as a result of a friendly statement, whereby the Government made no admission as to a breach of the Convention but agreed to pay the applicant £12,500.

In *Lindner v Germany* the Court had to consider disciplinary action taken against a German lawyer for advertising contrary to the rules of his profession. In concluding that the application was inadmissible, the Court said: ... for the citizen advertising is a means of discovering the characteristics of services and goods offered to him. Nevertheless, it may sometimes be restricted especially to prevent unfair competition and untruthful or misleading advertising. In some contexts, the publication of even objective, truthful advertisements might be restricted in order to ensure respect for the rights of others or owing to special circumstances of particular business activities and professions. Any such restrictions must however be closely scrutinized by the Court, which must weigh the particular requirements of those particular features against the advertising in question. To this end the Court must look at the impugned penalty in the light of the case as a whole. The Court recognized that the regulation of professional advertising was in a state of flux in the member states of the Council of Europe and that there was a wide range of regulations in member states. However, it saw this as further reason for allowing member states a wider margin of appreciation and, especially in light of the modest penalty imposed on the applicant, did not find the restriction disproportionate in the applicant's case.

3. Commercial Speech Critical of Competitors or Products

In *Jacobowski v Germany*, the applicant had been dismissed as an editor of a news agency which issued a press release questioning the applicant's abilities. The applicant, who was planning to set up on his own, was restrained by injunction from sending a mailing to journalists containing newspaper articles critical of his former employer and a letter offering to meet with them to discuss future developments in the media market. The applicant contended that the injunction violated his right to freedom of expression. The Commission unanimously found a violation of Article 10 ECHR. However, yet again the Court adopted a more deferential approach and concluded, by a majority, that there was no violation having recourse to the margin of appreciation. The Court concluded that the injunction banning the distribution of the circular was not disproportionate because the applicant was still permitted to criticize the news agency. As the applicant's circular merely approved and set out passages of various newspaper articles which were already in the public domain, it is hard to agree with the majority decision. The German Court yet again analyzed the matters as unfair competition rather than as relating to the right of freedom of expression, and the European Court refused to criticize such an approach. This conclusion is particularly surprising given the circumstances of the circular, where the applicant had been publicly criticized by the news agency. In *Hertel v Switzerland* the Court considered an injunction obtained by the Swiss Association of Manufacturers and Suppliers of Household Electrical Appliances under the Swiss Federal Unfair Competition Act 1986. Prohibiting the applicant from stating, *inter alia*, that food prepared in microwave ovens was a danger to human health. The applicant, a scientist, had published a research paper in which he concluded that food prepared in microwave ovens 'may' be damaging to human health. The domestic court concluded that the applicant's article unfairly denigrated goods of others by making 'inaccurate, misleading or unnecessarily wounding statements'. The European Court treated the expression in question as concerning a matter of public interest, namely the effects of microwaves on health, rather than as merely commercial speech. This led the Court to apply a more rigorous test of the necessity of the interference, and it concluded that the injunction violated the applicant's right to freedom of expression because it was disproportionate and therefore not 'necessary in a democratic society'. The fact that the applicant's opinion

was a minority one, possibly devoid of merit, was immaterial because the right to freedom of expression is not limited to widely held opinions.

4. Political Advertising

Unfortunately, there is at present, no substantive case law on this issue. In *Amnesty International (United Kingdom) v United Kingdom*, the applicants were prevented by s. 92(2)(a) of the Broadcasting Act 1990 from advertising on the radio in order to raise awareness in the United Kingdom of human rights violations in Rwanda and Burundi. The statutory provision in question provided that licensed radio services must not include 'any advertisement which is inserted by or on behalf of any body whose objects are wholly or mainly of a political nature'. The Radio Authority initially refused to grant an advertising license. This refusal was unsuccessfully challenged in the domestic courts (*R v Radio Authority, ex parte Bull*) and this led to an application to the European Court. However, before the Court ruled on the admissibility of the application, the Radio Authority reversed its decision and allowed the applicants to advertise. As a result of this reversal the application was struck out without any consideration of the substantive arguments advanced under Articles 10 and 14 ECHR.

This lack of consideration will be remedied when the Court hears the case of *VgT Verein gegen Tierfabriken v Switzerland*, which concerns the refusal of commercial television companies to broadcast an advertisement from an animal welfare group exhorting the viewers to 'eat less meat, for the sake of your health, the animals and the environment'. The refusal was on the basis that the commercial in question was of a 'clear political character'. The Court, without a detailed examination of the arguments advanced under Articles 10 and 14, concluded that the complaint raises serious issues of law and fact and declared it admissible. If the applicants are successful in their argument either that the prohibition on political advertising on television is contrary to Article 10, or that the present Swiss domestic regime (which permits advertising by the meat industry encouraging meat consumption but does not permit advertising by groups advocating less meat consumption) is discriminatory under Article 10 read with Article 14, this will have a profound impact on UK advertising law. Given that the expression in question concerns

matters that are indisputably of public concern, it is likely that the Court will apply the more rigorous scrutiny it adopted in *Hertel* and *Barthold* rather than the very deferential approach typified by *Markt Intern* and *Casado Coca*. However, the existence of bans on political advertising on television in a number of member states (including the United Kingdom) may lead the Court to conclude that the ban is within the state's margin of appreciation.

5 Speech by Commercial Organizations on Matters of Public Concern

Although not strictly within the definition of 'commercial speech' set out at the beginning of this chapter, the decision in *Open Door Counselling and Dublin Well Woman v Ireland* is likely to be of relevance in the commercial expression field, particularly when restrictions on truthful advertising are in issue.¹⁰ Open Door Counseling and Dublin Well Woman were Irish organizations that provided non-directive counseling to pregnant women. This counseling included the provision of information about abortion facilities outside Ireland, including their addresses and telephone numbers. The Society for the Protection of the Unborn Child obtained a permanent injunction preventing staff at the clinics from providing such information to pregnant women.

The Court concluded by a majority of 15:8 that the permanent injunction was a violation of Article 10 ECHR. The majority thought that while the Irish state had a legitimate interest in protecting the right to life of the unborn child, this interest did not grant the state an unfettered and unreviewable power to act to protect this interest. While the Irish state enjoyed a considerable margin of appreciation in relation to this type of expression, this margin was not unlimited and measures were not automatically justified where the right to life of the unborn child is at stake. The Court concluded that the expression in question was subject to protection under Article 10 ECHR and that the absolute nature of the injunction was such that it was disproportionate. The Court stated that although the information in question was likely to offend, shock and disturb a significant proportion of the Irish population, this was not sufficient grounds for restricting it, particularly when the expression in question was limited to factual and truthful statements on services which were lawful in other Convention countries and might be crucial to a woman's

health and well-being. The Court, in reaching its decision, further noted that it was not a criminal offence under Irish law for a pregnant woman to travel abroad in order to have an abortion.

4.4. The FDRE Broadcasting Service Law: Proclamation No. 533/2007

Introduction

The law emphasizes that broadcasting service plays a significant role in the political, economic and social development of the country by providing information, education and entertainment programmes to the public. Broadcasting as a conduit of information plays a major role in exercising fundamental constitutional rights such as freedom of expression, freedom of access to information and the right to elect and be elected. It further contributes the existence of a vibrant informed society about all public matters.

In view of these essential benefits that accrue to the public, the parliament has enacted the broadcasting service proclamation which recognizes private broadcasting services which is really important in promoting democratic values. The law generally aims at ensuring the proper utilization of the limited radio wave resources of the country by clearly defining the rights and obligations of persons who undertake broadcasting services.

Under this section, it is tried to describe and discuss the powers and duties of the Broadcasting Authority as established under this proclamation. Broadcasting services: categories of broadcasting services and categories of broadcasting services license is the other issue of discussion. Moreover, conditions on transmission of broadcasting programmes and obligations of licensee are dealt in this section.

4.4.1. Broadcasting Authority: Establishment, Powers and Functions

Art. 4 of the broadcasting service proclamation establish a public authority called the Ethiopian Broadcasting Authority which is accountable to the then Ministry of Information and now to the Office of Government Communications. Art. 6 sets the

objectives of establishing the authority that it shall ensure the expansion of a high standard, prompt and reliable broadcasting services that can contribute to political , social and economic development and regulate same.

The organization of the authority is prescribed under Art. 8 that it shall have;

1. Board
2. Director General
3. The Deputy Director General and other necessary staff.

Article 9 provides for the possible organization and composition of the board. “Members of the board shall be drawn from different institutions and parts of the society and shall be appointed by the Government on the recommendation of the Minister”. The issue in here is it has not exactly determined the number of members of the board, which sections the society is sought to be represented is not exactly determined. It seems to give an opportunity for the executive to abuse the interests of the private sector. Since the powers entrusted to board involves examination and deciding complaints lodged by applicants and licensees, examine and decide on appeals related to broadcasters, the composition should be inclusive of all competing interests.

Art 7 mainly prescribes the powers and duties of the authority. Its power is generally defined that it shall have powers to ensure that the broadcasting service is conducted in a manner that contributes to the social, economic, political and cultural development of the country. This is to mean that it shall exercise all powers with respect to broadcasting services necessary to bring about the aforementioned developments.

To achieve and maintain the above stated objectives, the authority has the power to:

1. Issue, suspend and cancel broadcasting service license,
2. Determine the site and coverage area of a broadcasting station to avoid an overlap with any radio communications;
3. Determine the standard and type of equipments to be used for broadcasting service as well as the capacity of the transmitter;

4. Control illegal transmissions;
5. Plan, permit, and control the use of the radio wave allocated for broadcasting service by the concerned organ and lease same,
6. Decide on complaints arising in relation to broadcasting services;
7. Prescribe standards for broadcasting equipments; issue certificates of compliance to importers of the instruments and supervise their operations;
8. Fix and collect license fees for broadcasting services;
9. Without prejudice to relevant laws and government directives participate, on behalf of the government, in international meetings on matters related to broadcasting services; follow up the implementation of international agreements on broadcasting services to which the country is a party;
10. Conduct study with regard to the development and improvement of the broadcasting services; compile and maintain information related to the services; are the main powers and duties entrusted to the authority.

4.4.2. Broadcasting Services

a. Categories of Broadcasting Services

Broadcasting services are categorized into three as:

1. Public broadcasting services
2. Commercial Broadcasting and
3. Community Broadcasting services

The purpose of categorizing broadcasting services is important to set out the conditions of services and the license requirements.

A public broadcasting service is defined under At. 2/9: as a radio or television transmission established, for the purpose of educating, informing and entertaining the public, in the federal or a regional state to which government budget is allocated in full or in part and is accountable to the federal House of Peoples Representatives or to the regional council.

Any public broadcasting service is expected to provide its services according to the following conditions: its broadcasting services shall enhance the participation of the public through the presentation of government policies and strategies, development, democracy and good governance related programs. This condition aims at mainly promoting policies and development agenda of the government.

As the ownership of public broadcasting service belongs to the public, it is deemed to fairly serve all political parties operating in accordance with the constitution and the electoral laws of the country. All political parties shall be equally treated to access the public broadcast to promote and inform their political programmes without any discrimination. No extra access should be given to the ruling party to access the public broadcast in ways that may contradict with principles of fairness and equal treatment.

Moreover, public broadcasting service is needed to serve as educational and entertainment media, promote unity and equality of the people, promote and enhance the cultures and artistic values of values of the public which constitutes various nations, nationalities and people having their own respective cultural and artistic values.

A commercial broadcasting service as defined under Art. 2/10 is “a radio or television transmission service established for profit by a legal entity with the purpose of informing, educating or entertaining the public.” Acquisition of juridical personality incorporated for profit is a necessary requirement for a commercial broadcasting service license. However the object clause is to derive profit from the services, the ultimate purposes cannot be extended beyond informing, educating or entertaining the target population.

It is *prima facie* truth that a commercial broadcasting service sought to earn as much profit as possible, however, any commercial broadcasting service is legally bound to;

- Provide equal treatment to any community in its license area
- The scope of its transmission of its programmes shall cover the whole area of its license;
- Transmit regional and national news;

These are the obligations of a commercial broadcasting in addition to the profit making objectives of its incorporation or formation.

The third category of broadcasting services, Community broadcasting service, has a different form and purpose. It is defined under Art. 2/11 as “ community broadcasting service is a non-profit radio or television transmission service established by the will and interest of a community and administered and run by the community living in a specific area or who possess a common interest.” As can be perceived from this definition, a community broadcasting service is different from the previous two in form that it does not exist as a business firm, ownership and purpose.

The conditions on which a community broadcasting service operates are provided under Art. 16/4:

1. It should not come with commercial objectives. It shall carryout activities of development, education and good governance needs of the community. A community broadcasting services is expected to mainly engage in promoting the interests of the community.
2. Interests of the community constitute promotion, development and preservation of the language, culture and artistic values. It should aim at creating access to the participation of the community in programmes and issues that affect its interests. Moreover, the community broadcasting service shall provide community centered informative and entertainment programs to promote the information culture and knowledge of the community.

b. Categories of Broadcasting Services License

The Broadcasting service proclamation under Article 17 prescribes eight categories of broadcasting service licenses which is a different issue from categories broadcasting services. The first generally relates to kinds of possible services from the broadcasting organization and the second relates to the categories of licenses that are issued by the authority. The categories of broadcasting service licenses that can be issued by the authority are:

- a. Terrestrial to air free radio broadcasting service,
- b. Terrestrial to air free television broadcasting service,
- c. Satellite radio broadcasting service
- d. Satellite television broadcasting service,
- e. Satellite broadcasting service provided to customers for fee,
- f. Receiving and broadcasting foreign programs to customers for fee,
- g. Cable television broadcasting service provided to customers for fee,
- h. Other broadcasting services to be prescribed by the authority,

Art 18 prescribes that a broadcasting service license shall only be issued to operate a single broadcasting station. No licensee is allowed to operate more than one broadcasting stations possessing a single license.

Broadcasting service license is issued based on the capability of the applicant to implement the proposed broadcasting programme. The authority is empowered to set the criteria which will be used to evaluate whether the applicant possesses a presumable capacity or not. The criteria to be set out shall include at least the following (Art. 21/2):

- a. The reliability and sufficiency of the applicant's financial sources to run the broadcasting service: the applicant is expected to provide evidence that he has adequate financial sources to run the proposed service which must be reliable. No license shall be issued to the applicant if he fails to produce legal evidence that ascertains the financial capacity and source of financing for the proposed service. As a result, the applicant will be dismissed for reasons of unacceptable application.
- b. The capability of equipments and technologies, listed in the applicant's proposal, to render the service: the applicant in his proposal should provide a detailed description of appropriate equipments and technologies and will be issued with a license after their capability is ascertained by experts.
- c. The applicant's organizational capacity, knowledge and experience to render the service: it is necessary that authority must assure that the applicant has proposed

a viable organizational capacity. This can be demonstrated by the number of staff proposed, the level of knowledge, experience they have and relevance.

- d. The contents of the programme submitted by the applicant and social needs covered by the programme and the transmission time allocated for the service are the major criteria for issuing a broadcasting service license. This criterion seems to be impracticable for it would be difficult to provide a detailed content of the programme. The applicant can only generally describe the possible contents of the programme. This criterion poses a danger of censorship which is constitutionally banned.

Failure to comply with the above stated requirements will automatically result in refusal of a broadcasting service license. In this case, the authority is bound to communicate to the applicant the reasons why the application is unaccepted. Any applicant who is denied a license and believes that the decision is subjective may appeal to the board within 14 days from the date of the decision. The board on its part shall render its decision within 20 days from the receipt of the appeal (See Art. 22 for more details).

4.4.3. Prohibitions on Some Person or Institutions

The law does not entitle every person to operate broadcasting services as a right subject to the fulfillment of the stated requirements. Art 23 prescribes the bodies or persons not to be issued with a broadcasting license. Accordingly, the following may not be issued with broadcasting license.

1. A body that is not conferred with a legal personality;
2. Without prejudice to the provisions of other laws regarding foreign nationals of Ethiopian origin:
 - a. An organization not incorporated Ethiopia: a company that does not possess Ethiopian nationality;
 - b. An organization or company in which its capital or its management control held by foreign nationals;

3. An organization of a political organizations or of which a political organization is a shareholder or a member of a political organizations supreme leadership is a shareholder or member of its management at any level;
4. A religious organization;
5. An organization of which its owner or any of its owners or a member of its management is convicted of a serious crime or , by a decision of a court, is deprived of exercising his civil or political rights or has fully or partially lost his legal capacity;
6. An organization of which more than 50% of its capital is held by another organization which carries on the business of printed press or news agency or a person that owns more than 20% of the capital of such organization;
7. An organization applying for a television broadcasting service license while already having a license for television broadcasting service or more than one license for radio broadcasting service;
8. An organization applying for a radio broadcasting service license while having a license for radio broadcasting service in the same area or two licenses in different license areas;

4.4.4. Manners of Transmission and Programming Principles

In the life of journalism, the objectivity of the programmes displayed is a sine qua non for information. The objectivity of the situation would help in establishing information to the society. The broadcasting service proclamation in its Art 30 provides that any programme transmitted shall reflect different and balanced viewpoints to serve the public. This is to mean that any broadcasting programme should be guided with the principles of fairness creating equal access to air all varied viewpoints of the society.

Any broadcasting service programme shall ascertain the accuracy of the content and source. Transmitting accurate information both in content and source is important for the public to convey genuine information. The aspect of programme fairness is impartiality. Broadcasting services firms or institutions shall be guided by the principle of neutrality in

transmitting the information. No personal or institutional stands or views should be transmitted as it hinders the public from receiving impartial, accurate and balanced information. The law hence provides that *“every news shall be impartial, accurate and balanced.”*

The law particularly strictly prohibits that any programme intended for transmission may not:

- a. Violate the dignity and personal liberty of mankind or the rules of good behavior or undermine the belief of others: the broadcasting programme transmission should respect to the inherent and inalienable dignity and liberties of all persons without any discrimination on grounds of race, color, nationality, or any other basis. It shall also promote and entertain the belief of others. All cultures, beliefs and opinions should be equally recognized and transmitted without any bias.
- b. Commit a criminal offense against the state, the constitutionally established government administration or the defense force of the country. Broadcasting programme transmissions should exhibit that information that could be confidential for the state. Spying or disclosing information, which affects the national security is a serious crime punishable under the criminal law.
- c. Maliciously accuse or defame individuals, nation/nationalities, peoples or organizations;
- d. Cause dissension among nationalities or instigate dissension among peoples; or
- e. Incite war

Protection of the well-being of children is the second condition of transmitting broadcasting service programmes(Art. 31). Any programme that corrupts the development of positive thinking, ethical behavior and outlooks of children is against public policies and are strictly prohibited. Radio or television transmission programmes that may corrupt the outlook of children or harm their feelings and thinking or encourage them to undesirable behaviors shall not be transmitted at hours during which children normally watch or listen to such programmes. In views of the Ethiopian social norms, children are presumed not listen or watch to radio or television transmissions from 11:00

o'clock in the evenings up to 5:00 o'clock in the mornings. The prohibition is twofold: the first is that programme transmission possessing immoral content or publicly unacceptable are prohibited from transmission and the second is concerning programme with lawful content intended to address adults which are beyond the analytic depth of children.

4.4.5. Broadcasting Service Transmission and Regulation of Advertisement

As perceived by many of us, advertisement is a situation by which emotionality and sensuality is deeply propounded. Any advertisement is required to be transmitted in a manner that clearly differentiates it from other programmes. Transmission of advertisement shall not be perceived as if it is in the category of other transmissions. Unlike plain truth, the content of advertisements is different and involves exaggeration with a potential of convincing the public about the goods or services advertised. It is the responsibility of the broadcasters to unequivocally differentiate it. "Advertisement shall not also affect the contents of other programmes" commercial advertisers are bound to transmit genuine commercial information to the society. "Commercial advertisements shall be truthful, not misleading and publicize lawful trade activities" (Art.33/2).

The Trade Practice Proclamation under Art 11(1/f) categorizes the transmission of malicious or misleading advertisements as acts of unfair competition subject to the penalties and administrative measures provided in under Art 25 and 26 of this proclamation. "Issuance of any false or misleading commercial statement or notice, concerning goods and services in respect of their quality, quantity, volume, manufacturing process, component, strength, or the time and place of the production of goods or the rendering of services or other similar services." Similarly, the broadcasting service law strictly prohibits that "the transmission of malicious or undermining advertisement on the products or services of others shall be prohibited." Two things are evident that false advertisement: disclosure of facts that do not represent the goods or

services being advertised is strictly prohibited; and discrediting or undermining advertisement is illegal.

Similarly, the Criminal Law on its part addresses discrediting or malicious acts of advertising.

Article 719: Unfair Competition

Whoever intentionally commits against another an abuse of economic competition by means of direct or any other process contrary to the rules of good faith in business, in particular:

- a. by discrediting another, his goods or dealings, his activities of business or by making untrue or false statements as to his own goods, dealings, activities or business in order to derive a benefit there from against competitors; or*
- b. by taking measures such as to create confusion with the goods, dealings or product or with the activities of business of another, is punishable, upon complaint, with a fine of not less than one thousand birr, or simple imprisonment for not less than three months.*

Misleading and confusing commercial advertisings are prohibited according to Article 10(2) (b) and (e) of TPP and Article 719(b) of the criminal code. However, there is no an objective criterion that demarcates between fair advertisings and those misleading and confusing advertising. It has been left to the discretion of judges to be decided on the case-by-case bases. Indeed actual confusion is not a requirement in our law, for example trade mark infringement using advertising is regulated despite the sell rate and value of the plaintiff's product remains the same.

Commercial advertising that falsely discredits ones product or business by comparing with that of its competitors is treated as an unfair act under Article 719(a) and (b) of the criminal code. In our legal system comparative advertising is protected where it is merely found to be true without taking into consideration the intention and connotation of the advertising.

Certain types of products and services are subject to prohibition or restriction because of their sensitiveness to the public health, safety, public morals and security of the public. Cigarette and cigarette related advertisings, advertisings related to narcotic drugs, advertisings of liquor with more than 12% alcoholic contents, advertising s that encourage users to buy medicine which cannot be administered without medical prescriptions and other advertisings prohibited by law shall not be aired in ETV or Ethiopian Radio or any other private broadcasting media. Here the writer is intrigued by the widespread dissemination of traditional medicines advertisings, especially in private newspapers and magazines. Nothing is impossible for these traditional medicine practitioners. They advertise listing the kind of health problems that can be cured by them. Drug Administration and Control Proclamation No.176/99 was promulgated with the purpose to ensure safety, efficacy and quality of drug and so to maintain the proper distribution and use. The proclamation established Ethiopian Drug Administration and Control Authority. One of the stated powers and duties of the authority is to prepare standards of safety, efficacy and quality of traditional medicines; and to evaluate laboratory and clinical studies in order to ensure the safety, efficacy and quality of traditional medicine; and to issue license in order to use traditional medicine in the health service.

Many people noticed that many of traditional medicine practitioners who displayed their license certificate; however, had never seen verification of the authority as to the curing capacity of those medicines, which is in contrast to what the drug administration and control proclamation prescribes. This proclamation under Art 22 state the following about drug related advertisings.

Article 22-Dissemination of Information and Advertising

- 1. No person shall disseminate any drug related information that is meant for professional and the public unless after their usefulness and correctness is verified and approved by the authority.*
- 2. No person shall cause advertising concerning drug whether in writing or in any way which is not in compliance with law of trade or advertisement, or the*

directive issued by the authority, or which is misleading to the public as to their value or effect.

Unfortunately, we have no comprehensive advertising law that is to be complied by drug advertising, but we can resort to “misleading” test of criminal code and TPP under Art 719(a) and 10(2))b) respectively. Art 22(2) of proclamation No.176/99 makes no distinction in its prohibition between print and electronic and other types of media whether it is public or private. In practice, all broadcast media of the country and government owned print media do not accept traditional medicine advertisings. On the other hand, a significant number of private magazines and newspapers advertise traditional medicines. This black and white mode of acceptance of traditional advertising may affect the general interest of the public, particularly those who are not in a position to afford the service of modern health service. Therefore, as soon as possible, the country should adopt the draft advertising law to uniformly govern sensitive areas of public service, such as traditional medicine advertisings.

Advertising time or space, which is allocated to advertising rather than programs or an editorial matter, is another regulated area. All the Ethiopian government owned media agreed that an advertising should not be equal or exceed time or space provided for other programs or editorial matters. The broadcast proclamation prohibits allocation of advertising time for more than 20% of daily transmission of the media, unless it is a commercial advertisements broadcasting station.

Art. 34 of the broadcast service proclamation does not provide with exhaustive list of advertisements. Sub 6 of it provides for the application of other prohibited advertisements by other laws. The criminal law (Art. 847) penalizes advertising for debauchery. “Whoever with a view to encouraging debauchery or satisfying the sexual urge of others, publicly advertises by any means that debauchery may be enjoyed in a particular place, is punishable with fine or arrest.” An advertisement that contravenes to public moral conviction or social principles is prohibited by this criminal provision and is made subject to criminal punishments.

Moreover, the criminal law (Art. 848) prohibits advertisements relating to abortion. Abortion is allowed under narrowly regulated circumstances. In view of the Ethiopian moral and religious principles and values, abortion is contrary to these principles and decency. Abortion is illegal as provided in Art. 545 and following articles, however, considering some carefully justified circumstances; a lawful termination of pregnancy can be carried on according to Art. 551 of the criminal law. However, such kind of allowed abortion should be carried on by a recognized medical institution within the period permitted by the medical profession and with the strictest compliance to the professional ethical rules. Hence, ‘whoever, apart from the cases permitted by law, advertises or offers for sale means or product designed to cause abortion, or publicly offers his services to perform abortion, is punishable with fine or arrest.’ Traditional practices or unregulated acts of abortion endanger health and claim lives, which is against public health policy. Hence, any abortion related advertisement is prohibited and made subject to criminal punishment.

4.4.6. Obligations of the Broadcasting Service Licensees

Broadcasting service licensees are not set free without obligations arising from providing the service. There are certain obligations which must always be observed. These broadcasting service obligations include:

a. Duty of Keeping Programme Records

One of the merits of broadcasting programmes is that they are easy to record. Recording the programme could have two purposes. past programmes could help the future generation as a warehouse of information, knowledge and ideas, secondly, it could help to judge that a programme has been done in line with programme principles of the law or not. It is hence, a duty of broadcasting licensee to “keep the record of every transmitted programme, including news, for thirty days. Where the programme contains a previously recorded programme or film, such programme shall be included in the record in such a way that it is accessible when required” (Art.381). All programme records should be kept in full content with the films and in a manner that makes it accessible to the public. The

period specified under sub is not, however, the maximum time program records are to be kept. “Where a complaint is forwarded against programme before the expiry of 30 days the time specified, the record shall be kept until the case is decided in accordance with the appropriate law.” In this case, the broadcasting licensee bears the responsibility of providing a copy of the programme to the authority or to the organ authorized by law to adjudicate the case at his own expenses.

b. Duty of Transmission of Emergency Governmental Statements

Any broadcasting service licensee is legally bound to transmit emergency statements declared by the federal or a regional state. Transmission of such statements shall be made free of charge. The emergency statements are clearly defined as public declarations relating to the occurrence of an incident that endangers the constitutional order of the state, a natural disaster or an epidemic that threatens public health. Article 41/1 provides that “Any broadcasting service licensee shall transmit, free of charge, emergency statements given by the federal or regional state government due to the occurrence of an incident that endangers the constitutional order of the country, a natural disaster or an epidemic that threatens public health.” These are public matters that involve the interest of everybody or institution in its sphere of service. However, no broadcasting service licensee is bound to transmit other governmental information for free. Sub 2 of the same article provides that “... the right of the broadcasting service licensee to demand payment when transmitting other governmental statements shall be respected.” No government institution is entitled to order a broadcasting service licensee to transmit statements which do not fall in the above stated category.

c. Duty to Respect the Right to Reply

In some circumstances, certain programme transmissions could be with opinions or hard critiques broadcasted against other physical or juridical persons. In such cases, the person or concerned group has a legitimate right to reply against the attacks forwarded on him through the same media. It helps the public or recipients of the information to have two side balanced information to reach at impartial judgment.

Art. 42 hence, provides that “Any broadcasting service licensee shall respect the right of a person to give reply concerning an issue when he alleges that a transmitted program has encroached on his right or failed to be presented properly. Moreover, the broadcaster is bound to clearly transmit the reply in the same manner, at a proportional time and similar time done to the former.

d. Duty To Transmit Election Period Statements

Broadcasting service firms may not prioritize the transmission of certain programmes over election related issues especially during election periods. Any broadcasting service licensee is bound by this to create access and allocate free air time for registered political organization and candidates according to the constitution and electoral law of the country. Political association and candidates are entitled to “publicize their political objectives and programs to the people or transmit statements during election period.” (See Art. 43 sub 1 of the broadcasting service law.)

Any political organization or candidate is entitled to have the access to a broadcasting service to transmit election complain advertisements. The broadcasting service, licensee in this case, may charge fee. However, the fee to be charged for election complains advertisements may not exceed the fee charged for commercial advertisements (Art.43/3).

The other issue in relation to the duty to transmit election period statements is as to who bears the responsibility for the legality of the program or political advertisement features in the broadcasting service. The political party or the concerned individual candidate is responsible for its legality. Please refer to article 43(3&4) of the broadcasting service law.

DISCUSSION QUESTIONS

1. Discuss the principles identified by the ECHR regarding regulation and licensing of broadcast media.
2. Discuss the important principles reflected by ECHR regarding commercial speech.
3. Describe the effects of the existence of public broadcasting service on the freedom necessary for the operation of private broadcasting service.
4. Discuss how private broadcasters get access to the broadcasting service.
5. Explain how impartiality and independence of broadcasting services could be ensured.
6. Some jurisdictions criminally sanction private broadcasters. The Ethiopian criminal law on its parts provides criminal sanctions in this respect. Comment whether such criminal sanction is appropriate or not.
7. Discuss the regulation of commercial speech under our laws as compared with ECHR.
8. Explain the justifications for the need to protect commercial speech.
9. Describe misleading, false and deceptive advertising and the justification for its prohibition.
10. Discuss the principles of advertizing and their place under our broadcasting service and advertising laws.

CHAPTER FIVE

REGULATION OF AUDIOVISUAL MEDIA AND THE INTERNET

Chapter Objectives:

- o Analyze and understand the nature of audiovisual and Internet media
- o Understand mechanisms of regulating such media
- o Analyze the manner of content regulation and classification in audiovisual media.
- o Understand the issues involved in regulating content in the Internet globally
- o Understand the possible mechanisms of Internet governance
- o Identify experience to be drawn for Ethiopia from other jurisdictions

INTRODUCTION

In this chapter, we discuss two specific types of media (audiovisual and Internet) and the application of freedom of expression to their specific nature. As they are relatively new to our jurisdiction, a lot of content and experience is drawn from many jurisdictions but their implication for Ethiopia is indicated whenever necessary without the need to dedicating a section. For example, after identifying the mechanisms of Internet governance used by many states, which one should be used by Ethiopia is easily indicated taking our reality in consideration. The same is true for audiovisual media.

5.1. Horizontal Rating and Classification of Audiovisual Content

Imagine that the latest Harry Potter blockbuster is being filmed. For anyone who doesn't know Harry Potter: Harry is an unusual little boy who is being trained in wizardry at Hogwarts School, where he has all kinds of adventures. He is immersed in the world of magicians, and meets people involved in black magic, trolls, ghosts, dragons, werewolves and many other loathsome, dangerous creatures. It is not only exciting, but also extremely

spine-chilling, as Harry Potter's path is strewn with dead bodies. All of which is sufficient reason to consider who should be allowed to watch this film - in other words, how would it be rated according to rules on the protection of young people?

There is no clear answer to this question; this section explains why not. Firstly, the rating depends on the audiovisual medium involved: a film is shown first in the cinema before being sold on DVD and finally shown on television. At some point, it might even be turned into a video game. The format has an influence on the rating. The same is true of the country in which the film is shown. Different cultures and traditions of youth protection affect the rating of the film.

You can read about the problems that are created for a society that is becoming increasingly global and for ever-converging media when the same product is given different ratings. This is a more serious problem in countries like Ethiopia which have no rating or classification rules but import large quantity of foreign films, and have a rising domestic film industry without oversight. In what follows, we will see how a horizontal rating system can provide a solution based on certain examples.

5.1.1. Introduction

The protection of children and adolescents and concern for their proper physical and psychological development are highly valued notions in most countries. The development of children and young people can be harmed - even considerably damaged - by unsuitable audiovisual content. In order to provide the necessary protection, parents and guardians of minors need to be able to recognize whether audiovisual content is capable of harming those in their care. For this reason, audiovisual content is classified according to various factors related to the protection of minors. Such classification may take the form of a description of a product's content, or of an age restriction or rating. An age rating may be used for various reasons, either as a restriction or as a recommendation. In the former case, the film concerned may only be watched by people above a certain age because it may harm the psychological and physical development of younger children. In the latter

case, a film is recommended only for children of a certain age because it is believed that they can only understand its content from that age onwards. The two may differ, as a film may be completely harmless on the one hand but equally incomprehensible for children on the other.

Age ratings are used in various legal instruments designed to protect young people. These instruments are meant to ensure that the minors concerned are unable to view harmful content. With regard to cinema films, such an instrument would prescribe, for example, the rule that minors below the relevant age limit should be denied entry to the cinema. As far as videos and DVDs are concerned, age controls are imposed in retail outlets and video libraries. For harmful content distributed via digital equipment, technical devices such as filters can be used to protect young people.

Age ratings are often determined on a sector-specific basis, on the grounds that different media have different effects. A tense scene can be much more frightening for a minor in a large, dark cinema than on a TV screen at home, where it can also be switched off at any moment. On the other hand, it is easier to stop young people watching a film in a cinema than on a video or DVD. If minors enjoy unrestricted access to these media, they can watch the potentially harmful scenes as often as they want, so the damage may be multiplied. Furthermore, DVDs may contain additional material (enhanced DVDs) that can justify a different age rating. In many countries, the legislator has therefore deliberately differentiated between the various media, although in some cases these differences are the chance result of the way individual media and associated regulations have gradually developed.

The age rating of a particular film for a specific medium can also have repercussions for other media; for example, a film's cinema classification may serve as a basis for its video classification or for certain time restrictions on TV broadcasts. In such cases, a film's age rating influences its exploitation in the media that form part of the audiovisual product chain - a form of indirect or even explicit cross-media or horizontal classification. Whether it is sensible to transfer age classifications in this way when the audiovisual

content is changed, e.g. edited for broadcast on television, or supplemented with additional material for videos/DVDs, remains an open question.

Furthermore, audiovisual products are, at present, classified at national level, in accordance with the rating system in force in each particular country. This in turn is based on the image of childhood and youth that has developed in individual countries on the basis of prevailing values. The traditions of youth protection are therefore as varied as the cultures themselves; we only have to think of the traditionally liberal attitude of Scandinavian countries to the portrayal of nudity or the highly conservative view of nudity in East Africa or the way in which bullfights are organized and broadcast as a matter of course on the Iberian peninsula. Apart from these traditional cultural or social values, each society also has its own fundamental attitude to education and childhood. For example, if we assume that protecting young people from the media is primarily the responsibility of parents, who give their children access to the media, then informing parents by providing age recommendations and content descriptions may be sufficient to provide young people with such protection. However, if the ability of parents to fulfill this role is in doubt and if it is considered safer to entrust it to the state, age restrictions become binding, for example, and younger children are prohibited from viewing forbidden content.

As a result of this diversity of product categories and national borders, the relevant ratings bodies' assessments of how audiovisual content might harm the development of children and young people can differ tremendously. This heterogeneity is clearly illustrated by the data collected as part of a study commissioned by the European Commission on the practice of classifying films distributed in cinemas, television, video and DVD in the EU and EEA Member States. This empirical study was based on two groups of 60 films each, one comprising European and non-European films which were marketed in all the surveyed countries in cinemas and on video, DVD and television ("global sample"), with the other group comprising only European films that were distributed in most of these countries ("European sample"). If we consider the data for the global sample published in an appendix, it is amazing to see the differences in age

classifications both in terms of variations between individual countries and between different media. For 78% of the films surveyed, there was more than a 6-year difference between the age ratings set by the national rating bodies, while for 23% of the films the ratings varied from the lowest level (open to everyone) to the highest (restricted to over-18s or over-16s). The differences between the ratings given to the different media genres within the same country are also remarkable: 42% of the films surveyed had different classifications. In Finland, the film "American Pie", for example, was prohibited for under-11s in cinemas, unrestricted on video and deemed suitable only for those aged 15 or over on DVD. Comparing the different countries, access to this film was unrestricted in some, but rated 11, 12, 14, 15, 17 and even 18 in others,

In order to evaluate these differences properly, we would need of course to look at the notions of youth protection that form the basis of national age classifications (this is not possible in the present report), since the different ways in which audiovisual content is rated reflect Europe's cultural diversity. However, even without such comprehensive analysis, the numbers themselves provide evidence of the problems caused by differences between youth protection systems. It seems disconcerting when a DVD can only be sold to adults in one country, while across the border the same DVD - which usually contains the identical English-language version - can be acquired by 14-year old children.

For these reasons and also because of the increasing convergence of transmission techniques, national and product related systems for the evaluation of audiovisual content are being increasingly called into question. Interactive games and films that are banned or may only be sold or rented to adults in a particular country can be obtained via the Internet, where there is often no age control. Films distributed via cable or satellite can often be received in countries where, on account of stricter youth protection rules, they must not be shown on television at all, or only at certain times. Video on Demand, the increasing number of TV channels made possible by digitization and the growing capacity of home computers are creating new possibilities in this area. Access via mobile telephone to audiovisual content harmful to minors appears totally impossible to control. While parents and guardians can still deny young people Internet access on home

computers, more and more teenagers own a mobile phone, which they can use anywhere to receive whatever they want. National restrictions designed to protect minors are being rendered completely obsolete by these developments,

Protecting minors from audiovisual content that harms their development nonetheless remains an important objective, the achievement of which should not be jeopardized by technical progress and advancing globalization. There seems little point in trying to prevent children and young people using new technology. New ways of protecting young people from the media are therefore being vigorously sought in all countries. In this context, a frequent topic of discussion is whether horizontal classification of audiovisual content might offer an effective solution. The following section deals with this whole issue.

5.1.2. Horizontal Classification

a) Definition

We should start by considering what we mean by the term "horizontal" in this context since, like many other concepts of this kind, it is not used consistently. Jan Kabel described very informatively the different meanings of the phrase "going horizontal".

In the context of the making of rules: it could refer to the distinction between self-regulation ("horizontal" in the sense of rules made and upheld by private organizations) and (public) law, with the latter being, of course, an exponent of the vertical relationship between government and the governed. In the context of media technology, it could refer to the distinction between rules applicable to all media, calling these general rules apparently horizontal rules, as opposed to technology-specific rules which apply only to a specific medium and which, therefore, in this remarkable terminology, should be called vertical rules. Furthermore, "horizontal" could refer also to general rules, as opposed to specific product (or service) rules. The latter rules, according to the same terminology, should also be called vertical rules. In the same sense, the term could be used to describe cross-sectoral regulation. It should be noted that the aforementioned distinctions not only

apply to the content of audiovisual product, but also to the distribution of audiovisual content and in Ethiopian context, therefore, we are not only referring to audiovisual content made here but also (and more importantly) the huge amount of content imported and distributed from abroad . Finally - yet importantly - these questions are also directly connected with legal policy problems. This refers to the question if it is an issue for determination by political bodies whether certain fields of audiovisual material should be regulated by self-regulation only, by co-regulation or only by law (civil or criminal. or maybe administrative law). For example, in Ethiopia, even if it is not purposely decided, we can only use the criminal law for such regulation as pornography and the like but it is not comprehensive of the types of content that need to be regulated (but that are beyond the ambit of criminal laws) and it is not specific to the audiovisual media.

The debate's underlying goal, however, seems to be far more important than these somewhat Byzantine distinctions. That must be, in Kabel's view, the application of a consistent set of rules, or at least of rules which use the same definitions and the application of which does not lead to conflicting results or different outcomes, but to more or less predictable decisions. "Going horizontal" should therefore be considered as an effort to discover whether there is method in the existing set of audiovisual rules and if not, whether tools could be provided - if necessary - which could contribute to the application of a consistent set of rules.

A horizontal perspective always depends on the viewpoint of the observer. In this chapter, the term "horizontal" is used in the sense of cross-sectoral. In the context of audiovisual media classification, "horizontal classification" therefore means classifying the content of different audiovisual media (e.g. films, videos, DVDs, computer games) on the basis of a common regulatory framework.

b) Examples

Some countries already practice (more or less comprehensive) horizontal classification of audiovisual products. The systems used in Norway and the Netherlands, for example, are briefly described below.

KUkwijzer is a rating system has been used in the Netherlands since November 2001 for the classification of cinema and TV films, videos and DVDs. Computer games and Internet content are not classified, although these markets are monitored. This rating system was developed by an independent group of experts commissioned by NICAM, the Netherlands Institute for the Classification of Audiovisual Media. NICAM itself was founded with government support in 1999 as an independent body representing all public service and commercial TV broadcasters as well as organizations from the film, computer game and video/DVD industry. The aim was to provide consumers, particularly parents, with standardized information about whether an audiovisual product is suitable for children and young people.

KUkwijzer is based on the computer-aided self-classification of products by the supplier. A company employee (the "coder") fills out a questionnaire provided by NICAM and transmits it online to NICAM. The product is then evaluated using a computer program, which works out its rating. Coders are trained by NICAM in order to ensure the information submitted in the questionnaires is as accurate as possible. If in doubt, they can obtain help from an inspection board appointed by NICAM.

The rating produced by the computer comprises an age restriction as well as content descriptions in the form of pictograms. The age categories are: "suitable for all ages", "not recommended for children under 6", "not recommended for children under 12" and "not recommended for children under 16". The pictograms refer to the levels of violence, anxiety, sex, drug/alcohol abuse, language and discrimination contained in the product, with sex, violence and anxiety the most important categories. For each of these categories, each product carries a certain age restriction; the final rating depends on the highest age restriction in any of these categories. The product's overall rating comprises the age classification and up to two pictograms. It appears on all publicity and on the packaging of videos and DVDs, and is visible in the cinema, in advertising spots, on the screen, in program guides, on teletext and in electronic program guides.

This computer-aided self-classification system is not monitored either internally or by the state. NICAM (currently) only checks ratings if it receives a complaint. However, the effectiveness of the whole system is evaluated annually by the Dutch media regulator, the Commissariaat voor de Media (CvdM). It was also assessed at the end of 2002 by an independent group of experts commissioned by the parliament and government. Both investigations concluded that NICAM had been a success and functioned well, and that the system had met the approval of the industry and consumers alike. A number of improvements were also proposed, including recommendations that NICAM itself should randomly monitor the ratings awarded and that the complaints system should be reviewed. Although state bodies are not involved in this classification system, there are certain links between this privately operated system and state regulations on youth protection. Indeed, the state has incorporated NICAM and the Kijkwijzer system into the national regulatory framework. For example, there is a basic rule that film productions that could harm children should not be broadcast on television unless they have been assessed by an independent ratings body. This puts considerable pressure on product suppliers to join NICAM and participate in Kijkwijzer. Other regulations also refer to the Kijkwijzer system: for example, there are certain time restrictions on the TV broadcast of films rated 12 or 16 under the Kijkwijzer system.

In Norway, the Statens Filmtilsyn is responsible for the classification of audiovisual media. This independent body is attached but not directly answerable to the Ministry for Cultural Affairs. All films, videos and DVDs must be registered with the Statens Filmtilsyn before they are distributed. However, registration does not include any form of content evaluation. Cinema films that are to be shown in public must, however, be rated. Possible ratings are "all ages", 7, 11, 15 and 18. If accompanied by their parents, children up to three years below the recommended minimum age may watch a film. Videos and DVDs do not require an age rating in Norway. The distributors themselves may recommend age restrictions or, on a voluntary basis, ask the Statens Filmtilsyn to rate a product or adopt its recommendation for cinema films - this usually occurs at the time of registration. The registration process always includes verification of whether the cover or

accompanying text indicate that the content is pornographic or may involve criminal law in some other way. If so, the video or DVD is checked.

Age restrictions are attached to computer games on a voluntary basis. The Statens Filmtilsyn also provides advice and information to parents and children in relation to Internet content and the new media.

These two examples show that horizontal regulation of audiovisual content is possible, both on a co-regulatory basis and by an independent state body. It is noticeable that neither Internet content nor interactive games are included in either classification system. This may be due to the global structure of the Internet and to the fact that, where interactive games are concerned, content that is harmful to children's development is a relatively new phenomenon. However, the next sections deal with the Internet and regulation of its content (WWW).

5.2. The World Wide Web

In chapter two we have been introduced to different types of media and one of them is computers. There, the focus was on the history, how computers serve as medium for speech and especially in relation to the internet which is a forum provided by networks of computers. Having that in mind, this section provides an introduction to the World Wide Web and how it works. Once we are familiar with the web, then we address the issue of regulation in the next section. A good introduction on topics like this can be found in encyclopedias as they are prepared for the general public so the following is taken from Encarta Encyclopedia 2007.

World Wide Web (WWW), computer-based network of information resources that combines text and multimedia. The information on the World Wide Web can be accessed and searched through the Internet, a global computer network. The World Wide Web is often referred to simply as “the Web.”

The World Wide Web was developed by British physicist and computer scientist Timothy Berners-Lee as a project within the European Organization for Nuclear Research (CERN) in Geneva, Switzerland. Berners-Lee combined several existing ideas into a single system to make it easier for physicists to use data on the Internet. Most important, he added multimedia—the ability to include graphics—to the hyperlink concept found in a previous Internet service known as gopher. Berners-Lee had begun working with hypertext in the early 1980s. An early prototype implementation of the Web became operational at CERN in 1989, and the idea quickly spread to universities in the rest of the world.

Groups at the National Center for Supercomputing Applications at the University of Illinois at Urbana-Champaign researched and extended Web technology. They developed the first browser that was used at many sites, named Mosaic, in 1993. To allow the Web to be accessed from a wide variety of computer systems, researchers built multiple versions of Mosaic. Each version was designed to be used with a specific operating system, the software that controls the computer. Within a year, computer programmer Marc Andreessen had formed a commercial company, Netscape Communications Corporation, to build and sell Web technologies.

The Web uses multimedia, which means that information can be displayed in a wide variety of formats. Users can read text, view pictures, watch animation, listen to sounds, and even explore interactive virtual environments on the Web. A user can move seamlessly from a document or Web page stored on the computer to a document or Web page stored on another computer. The Web offers a place where companies, universities and other institutions, and individuals can display information about their products, services, facilities, or research, or their private lives. Only a small percentage of information on the Web is restricted to subscribers or other authorized users. The majority of Web pages are available to anyone who can access a computer that connects to the Internet. The Web has become a marketplace for many companies selling products or services, and a forum for people to exchange opinions and information. Museums,

libraries, government agencies, and schools post information on the Web to make it available to others.

All communication on the Web is carried out among a set of computers that are interconnected by a computer network. Web technology can be used across an *intranet* (a network within a company or organization) or across the global Internet. As with all communications among computers, computers that comprise the Web employ two types of software: client and server. To make information available, a computer runs a server program. To obtain and display information from a server, a computer user runs a client program. The client contacts a server to request information; the server responds by sending a copy of the requested information. To ensure that the exchange is meaningful, the client and server programs must follow a communication protocol, a set of rules that the two programs use to talk to one another. Like a language, a protocol specifies both the form and meaning of each possible message.

In principle, any computer can run a client or a server. In practice, however, large, powerful computers are usually chosen to run server software, and small personal computers (PCs) are sufficient to run client software. Powerful computers are chosen for server software because they must be able to handle requests for information from millions of people and do so quickly so that users who request information from the server will not experience long delays. PCs, however, are used by a single person to request a Web page. After a user makes a request, the user waits for the information to be displayed. Thus, the client program running on a user's computer only needs to handle one activity at a time. A server, however, must handle simultaneous requests from many clients, possibly millions.

The difference between the Web and the Internet is similar to the difference between a trucking service and a highway system. The Internet corresponds to a highway that allows traffic to flow between computers, and the Web corresponds to a service that uses the highway to move information from one computer to another. Confusion about the difference between the Web and the Internet has arisen because the Web has become

extremely popular and currently accounts for the majority of Internet traffic. However, other services also use the Internet to carry their traffic. For example, the Internet's electronic mail service permits users to send and receive textual messages, and the file transfer service allows a user to transfer a copy of a file from one computer to another.

Although many services use the Internet to carry data from one computer to another, each service follows a separate set of rules that define the messages used in the exchange. The Web uses the Hyper Text Transfer Protocol (HTTP), electronic mail uses the Simple Mail Transfer Protocol (SMTP), and file transfer uses the File Transfer Protocol (FTP). The application programs that users run to access the Internet often blur the distinction among these services. For example, an application program that can send e-mail also allows a user to transfer the contents of a file, and an application program used to access the Web also allows the user to process e-mail.

HOW THE WEB WORKS

To access the Web, a user must have a computer connected to the Internet and appropriate software. The connection between the user's computer and the Internet can consist of a permanent, dedicated connection or a temporary, dial-up connection. A dial-up connection uses a modem to send data over the telephone system to another modem. It offers the lowest cost but requires the user to wait for the connection to be established each time the modem is used. A permanent connection uses a technology such as Asymmetric Digital Subscriber Line (ADSL, also known as DSL), a cable modem, or a dedicated leased circuit. It remains in place and is ready to use at all times. Permanent Internet connections cost more but offer higher capacity—that is, they can send more data at a faster speed.

Two pieces of software are needed to access the Web: (1) basic communication software that a computer uses to transfer data across the Internet and (2) a Web application program known as a browser that can contact a Web site to obtain and display information. Basic communication software, which is usually built into the computer's operating system, allows the computer to interact with the Internet. The software follows a set of protocol standards that are collectively known as TCP/IP (Transmission Control

Protocol/Internet Protocol). Because it is built into the computer's operating system, TCP/IP software remains hidden from users. The software is invoked automatically by application programs that use the Internet.

The second piece of software needed for Web access consists of an application program known as a Web browser. Unlike basic communication software, a browser is directly visible to the user. To access the Web, the user must invoke the browser and enter a request. The browser then acts as a client. The browser contacts a Web server, obtains the requested information, and displays the information for the user.

Information on the Web is divided into pages, each of which is assigned a short identification string that is known as a Uniform Resource Locator (URL). A URL encodes three pieces of information: the protocol a browser should use to obtain the item, the name of a computer on which the item is located, including its domain name, and the name of the item. The domain name indicates whether the site is operated by a commercial or nonprofit business. For example, .com is a commercial site whereas .org is a nonprofit site. Many other domain names exist, including .edu for Web sites established by educational institutions.

In 2001 many other unique domain names were created. They comprised .info for informational sites, .biz for businesses, .name for individuals to register their name for a Web site or for an e-mail address, .museum for museums, .aero for the aviation industry, .coop for business cooperatives such as credit unions and electric coops, and .pro for professionals such as accountants, lawyers, and physicians. As of March 2002, all of these domain name suffixes were operational, with the exception of .pro.

Only the computer name is required in a URL. If the protocol is omitted, a browser assumes "http://," and if the name of an item is omitted, the server chooses a page to send. Thus, the URL addisfortune.com, which consists only of a computer name, is also valid.

Before it can obtain information, a browser must be given a URL. A user can enter the URL manually or click on a selectable link. In each case, once it has been given a URL, the browser uses the URL to obtain a new page, which it then displays for the user. The URL associated with a selectable link is not usually visible because the browser does not display the URL for the user. Instead, to indicate that an item is selectable, the browser changes the color of the item on the screen and keeps the URL associated with the link hidden. When a user clicks on an item that corresponds to a selectable link, the browser consults the hidden information to find the appropriate URL, which the browser then follows to the selected page. Because a link can point to any page in the Web, the links are known as hyperlinks.

When a browser uses a URL to obtain a page, the information may be in one of many forms, including text, a graphical image, video, or audio. Some Web pages are known as active pages because the page contains a miniature computer program called a script or applet (a small application program). When a script or applet arrives, the browser runs the program. For example, a script can make images appear to move on the user's screen or can allow a user to interact with a mouse, keyboard, or microphone. Active pages allow users to play games on the Web, search databases, or perform virtual scientific experiments. Active pages are also used to generate moving advertisements, such as a banner that keeps changing or a logo that appears to rotate.

The codes that tell the browser on the client computer how to display a Web document correspond to a set of rules called Hypertext Markup Language (HTML). An HTML document consists of text with special instructions called tags, which are inserted to tell the browser how to display the text. The HTML language specifies the exact rules for a document, including the meaning of each tag. Thus, a person who creates an HTML page is responsible for inserting tags that cause the browser to display the page in the desired form. Not all Web pages use HTML. Graphics images are usually encoded using the Graphics Interchange Format (GIF) or Joint Photographic Experts Group (JPEG) standards. Active pages are written in a computer programming language such as ECMA Script or Java.

FUTURE TRENDS

The amount of information on the Web continues to grow rapidly, as does the number of users around the world and the amount of online commerce. For many businesses, the Web is replacing traditional catalog ordering. In addition, people continue to extend and improve Web technology. Several research efforts are underway to generate new methods that search the Web for information, new methods for restricting access to intellectual property, and new technologies that will permit live Webcasts similar to television broadcasts.

Although most Web pages still use the HTML language, extensions and alternative technologies have been proposed. The Extensible Markup Language (XML) is becoming popular for business-to-business communication. Unlike HTML, in which the meaning of all tags is pre-determined, XML allows companies that use it to define their own tags. For example, a publisher and a bookstore might choose to define their own tags for information about authors, titles, and publication dates for the information they exchange. Similarly, an automaker and a dealership might choose to define their own unique tags for models, body styles, and price. XML definitions are only meaningful to the parties involved. For example, the automaker's software will not understand a book publisher's author tag, and the bookstore's software will not understand the automaker's body style tag.

Other alternative forms are also emerging. The Wireless Markup Language (WML) is designed to be used with small wireless devices such as Web-enabled cell phones. Several scripting languages are available, including ECMA Script (which was originally called JavaScript) and Visual Basic. Scripting is gaining importance as more sites use animation.

Another Web technology expected to gain importance is known as a Content Distribution Network (CDN) or mirroring. A CDN consists of multiple sites around the world that all contain the same information. When a user requests a page, the CDN directs the request to the closest copy. From a user's viewpoint, a CDN results in a faster response. From a

company's viewpoint, a CDN is necessary because no single Web site can handle simultaneous requests from several hundred million users. The largest Web sites already use CDN technology.

Higher-speed Internet transmission facilities, known as broadband, are also helping improve response times. Broadband technologies include Asymmetrical Digital Subscriber Line (ADSL), which works over telephone wiring, and cable modems, which work over cable TV wiring. Each technology allows data to flow from an Internet service provider to a user's computer hundreds of times faster than traditional dialup modems. Another, less popular option is satellite Internet access, in which a computer grabs an Internet signal from orbiting satellites via an outdoor dish.

5.3. Mechanisms of Internet Governance

Internet governance is the development and application by governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision making procedures, programs that shape the evolution and use of the internet. There are diverse participants in this because of the internet disorganized, heavily diversified, and more importantly its cross border nature as well as timing.

In 2003 World Summit on the Information Society (WSIS), various stakeholders such as SDOs (standards-development organizations), RIRs (regional internet registries), ICANN (the internet corporation for assigned names and numbers), user communities, governmental and intergovernmental organizations asked the Secretary-General of the United Nations to form a Working Group on Internet Governance (WGIG). In accordance with this mandate, the Secretary-General established the WGIG in 2005 comprising 40 members from the above stakeholders. They established principles to guide the management of the internet including defining the roles and responsibilities of the various stakeholders.

Identifying public policy issues that are relevant to internet governance is a critical point to its role as a social platform for free expression. There are three broad categories of governance.

1) Issues with technological aspects that overlap to some extent with certain infrastructure concerns. Standardization of software or procedure is a key element in dealing with them:

- Spam;
- Cyber security, cyber crime;
- Security of network and information systems;
- Critical infrastructure protection.

2) Legal issues where harmonization of global regulatory framework is the key concern:

- Applicable jurisdiction, cross-border coordination;
- Consumer rights;
- Data protection and privacy rights;
- Freedom of expression;
- Internet service providers (ISP) and third party liabilities.

3) National policies and regulations.

The WGIG recommended that “vigilance is required to ascertain that public policy initiatives and technical solutions introduced to ensure a safe and stable internet are balanced with the need to protect freedom of expression, and are not implemented as proxy measures for new and increased forms of censorship”.

States want to make sure that rules made for the offline world do not lose their significance in digital world. For example, we have a criminal law and copyright law but the concern here is how we can make sure of their enforcement in the internet. There are a number of theories offering guidance to deal with regulatory problems arising on the internet. However, most can be summed up by two or three phases. The first phase covers movement of data from the content provider, through several intermediaries, to an ISP hosting content. It is a movement of data to the location where they are in “cyberspace”,

being permanently available to all internet users. This is the input side of internet activities. The second phase covers movement of data from the hosting provider, through several intermediaries, to a computer of the end user. It is the output side of internet activities. The terms “input” and “output” refer to the movement of information and the activity a particular actor performs at any given moment. In practice, many actors perform in both sides simultaneously. Thirdly, there are a number of actors that do not directly participate in transfer of information but play a significant role in facilitating the availability and accessibility of internet content to a user. For example, search engines disclose the existence of content and registries allow surfing without having to remember an IP address of each site. These actors offer indirect means of control and increase the variety of options for states’ regulatory activities.

5.3.1. Input Control

Input control applies on individual users publishing content in cyberspace and ISPs performing a variety of functions, from providing internet connection to hosting third-party content. Of course, in reality many actors perform their function on the input and output side simultaneously. There is a difference whether a state prosecutes an author or a viewer of objectionable material, as well as a difference in obligations of an access provider carrying the data to the user and from the user such as putting an age restriction for some sites or not showing such words which are regarded as offensive.

A. Input User as A Point Of Control

Measures directed at a user placing material on the server connected to the internet offer the most obvious solution. To prevent illegal content from getting online, a state may establish civil and criminal sanctions on the input user. This is a popular approach since no state would be reluctant to prosecute an author of an online publication anymore than an author of any other publication. However, a state can only prescribe the rules to those users who reside on the state’s territory. It does not have jurisdictions over foreign actors. When the goal of regulation is not only to punish the offender but also to remove objectionable content from cyberspace or make it inaccessible to local audience,

prosecution of the input user is not necessarily the best solution due to persistence of internet content. Once content is published on the internet it is always possible to exercise control over its dissemination since others can overtake content management or can create mirror sites and continue spreading it.

B. Internet Service Providers (ISP)

Any online activity needs the services of ISPs. Almost any ISP is able to exercise control over information flows in its respective level. Depending on a particular function an ISP performs, it may be subject to different state-imposed obligations. These functions could be content providing, hosting providing or access providing.

The legal status and controllability of an ISP that acts a content provider is similar to the status of an individual user. An ISP may face civil and criminal sanctions for the authored content in the same way However; several factors make an ISP a more attractive point of control.

First, in comparison with an individual, a corporation has fewer opportunities to hide or to remain anonymous, being an easier target for a state. Second, state measures directed at a corporation are more likely to actually remove objectionable content from the Internet.

Finally, a corporation may be required to take specific measures to keep its content from locations where it is considered objectionable, i.e. to exercise zoning. Zoning refers to a technical procedure undertaken by a content provider to direct information flows to particular users only. Metaphorically, it can be described as creating zones in cyberspace that are open for some categories of users and closed for others. A distinction may be drawn between zoning technologies aimed to restrict access of a particular group of users (as a rule, children) and technologies aimed to restrict access of all users within a given location (as a rule, within a state). The latter is of a particular interest for the present discussion. In terms of geographical zoning, various tools already exist to identify the geographical location of users and many companies routinely employ these tools for

targeting advertising purposes. Employment of Geolocation technologies as a means for compliance with local laws without refusing to carry the content generally has not yet become a rule but it is a controversial issue. For example, Yahoo! stopped running online casino advertisements after a prosecution threat by the United States but limited the measure to the US territory.

Many states would be relieved to have foreign content providers zone, content according to states' local laws but such an obligation is hard to impose on foreign actors. So far, there is no obligation to perform regional zoning in any legal norm and only one court addressed the issue of zoning in its decision. In 2000, a French court ordered the US Company Yahoo! to restrict French citizens' access to auctions bearing Nazi items. Yahoo! changed its auctions policy to exclude the controversial items but claimed that the French decision was not a reason for the policy change. In any case, zoning would be a very convenient option if a state had sufficient power to impose the obligation to zone on a respective content provider.

An ISP that hosts objectionable content of a third party offers an excellent point of control for a state. Measures directed at this actor can even turn out to be more effective than targeting the actual content provider considering that the latter does not always have full control over the dissemination of his or her content. Thus, many states impose liability on a hosting provider for the illegal material it hosts. The most severe method is to make hosting providers directly liable irrespective of knowledge of the material's existence and legality. This approach involves a lot of risk for a hosting provider and is likely to influence the decision of an ISP to provide hosting altogether. Many states choose a more flexible model of hosting provider liability -the notice and take down procedure. It shields a hosting provider from legal consequences as long as a hosting provider does not have knowledge of objectionable content or acts expeditiously to remove objectionable content upon obtaining such knowledge. For example, this approach is followed by the European Union. To sum up, the imposition of liability on a hosting provider is an effective measure for regulation of internet content provided that a state has jurisdiction over the hosting provider.

The European Union E-directive allows a state to require the access provider to terminate or prevent an infringement. Considering the general move for control in the name of security all over the world, many states oblige ISPs to monitor all incoming and outgoing traffic. Theoretically, once facilities are there and monitoring is a rule, an obligation to report or to block objectionable content incoming from a user could follow. Of course, other values to be considered within this approach, from privacy to freedom of expression. Nevertheless, access providers provide another point of control for a state. The Chinese case of forcing Google and other ISPs to provide such service to the Chinese government is one example.

5.3.2. Output Control

The actors on the output side are the same or similar to the actors on the input side – a user and an ISP. However, the functions they perform in the process of information transfer make their position, obligations, and liability distinctly different. In contrast to the input actors, the actors on the output side are always closely connected to a local forum. Indeed, a state has no, or only very remote interest in regulating the output side of data transfer beyond its borders. No state has ever prescribed to residents of another state what content they are allowed to look up in cyberspace or elsewhere. It means, there are no jurisdiction or enforcement concerns for a state on the output side.

A. Output User

A user receiving information from the internet is a subject of control in many states. Criminalization of online activities involving illegal content is a common measure. For example, where criminal laws proscribe creation or possession of illegal content, these restrictions are automatically applicable to the internet. Thus, downloading illegal material from the Internet is interpreted "production" or "making" of illegal material by many courts and is punishable. Similarly, possession of illegal material that a user downloaded from the Internet is often a separate offense. Besides, several states establish liability of a user for "mere viewing" of objectionable sites. Because every instance of "viewing" of prohibited material means a copy of it in the "temporary Internet files"

folder, some courts interpret it as possession of illegal content. At least one country, Australia, explicitly criminalizes the act of accessing illegal material.

In addition to the above measures, some states are creative in inventing further tools to decrease the incentive of users to look up prohibited content. For example, the computer of a Chinese user can become frozen as a reaction to the attempt to download prohibited information from the Internet. Uzbek authorities use "modified mirrors" - they do not just restrict access to the controversial sites but redirect users to the copies of these sites with less controversial material.

B. Output Access Providers

The category of output access providers includes not only technical actors responsible for Internet connection, such as a dial-up ISP or backbone computer, but also those access providers that offer Internet access in the most literal meaning, such as libraries, schools, and Internet cafes. Output access providers are central players for regulation of Internet content. First, they are local by their nature and available for regulation. Second, they are more visible than millions of individual users.

Currently, the majority of states use output access providers for filtering or blocking Internet content on its way to the end user. Extent and methods of filtering vary all over the world, as well as the ways of ensuring compliance with the filtering obligation. Sometimes ISPs are actually extensions of the government; in some states compliance is ensured by licensing requirements; access providers may also be held liable for actions of their customers if they do not prevent the illegal activity.

Regulation through access providers have to rely on filtering technologies and these technologies cannot always ensure the desired result as there could be under blocking and over blocking; besides various technical tools are available to circumvent local filtering. Nevertheless, filtering can achieve a remarkable degree of effectiveness if a state is not concerned about blocking harmless information and the usage of circumvention tools is

forbidden, China managed to create a sophisticated and well functioning filtering system - "the Great Chinese Firewall".

5.3.3. Indirect Control

The input actors and output actors directly participating in information transfer are likely to remain the main points of control for a state. However, the Internet offers a vast playing field for states as there are a number of actors who have influence on the availability and accessibility of content online. Most notable are search engines and registries.

A. Search Engines

Search engines have become significant players in the internet since an average user is totally dependent on them to go through the massive volume of content. If Google fails to list a site in its results, the site becomes almost non-existent. Google makes them invisible or popular. In addition, the search engine provides cached copies of the majority of indexed sites that allow users to see content of the site even if the site itself is blocked. Not surprisingly, many states want to get Google under their control. However, the company is firmly rooted in the United States where its search results fall under protection of the First Amendment of the US Constitution. Apart from the United States, no other state can influence Google, at least not by legal means. No doubt, as a successful transnational company Google cannot completely ignore local laws, especially when interests of economically powerful states are involved, and many regional versions of Google conform to local policies. For example; Google has agreed to exclude from a list of links publications the Chinese government finds objectionable. The same is true for Microsoft and Yahoo but recently Google refused to provide service in China because the government's act of blocking and filtering is against freedom and the company is under pressure in the west for that reason.

B.Registries

The significance of registries lies on their role in supporting the functioning of the Domain Name System (DNS). Every computer connected to the internet has a unique address – a string of numbers – called Internet Protocol address (IP address). The DNS allows a string of letters to be used instead of numbers. It also helps websites to keep their names even if they move to another IP address. While IP addresses locate resources, location-independent names identify them. There are generic Top-Level Domains (gTLD) that do not have a connection to a particular state such as .com, .net or .org and Country Code Top-Level Domains that are country specific such as .et or .uk. Although ccTLDs give no information as to the location of the owner of a domain name, they are closely connected to a respective state and the authority of a state to administer its ccTLD space is comparable to its authority over activities on its physical territory. Zoning through ccTLD and voluntary compliance of foreign actors has a clear advantage. While the actor performing zoning would have to bear the cost of zoning, these costs would be voluntary as they are driven by the business decision of the company to provide service in that country or not.

In conclusion, out of the various mechanisms of control Ethiopia can adopt hosting provider, output user, output access provider and zoning. Zoning may not be effective as the country does not have enough economic power to influence multinational companies. Output user control is also cumbersome as it is difficult, if not impossible, to regulate every individual's activity in their computer and involves too much cost. Hosting providers are mainly situated in other legal system so Ethiopia cannot claim jurisdiction over them but on those in its territory control could be effective. One such actor is the state run monopoly Ethiopian Telecommunications Corporation (ETC) since it serves as hosting provider. ETC also serves as an output access provider and in fact it is the only ISP which makes it an easy and cheap target of control.

Questions for Discussion

1. Discuss the manner of content regulation for audiovisual media.
2. What should the requirement for film classification in Ethiopia?
3. What factors would you take to for such classification?
4. What measures would you take to regulate foreign films in our market?
5. Identify the major issues involved in global regulation of the Internet
6. Which mechanism do you think is good for Ethiopia in order to govern Internet? Why?
7. Evaluate China's experience of blocking sites it considers as dangerous based on the standards of freedom of expression
8. Evaluate the current controversy between China and Google or 'the search engine controversy'
9. Why does blocking sites raise issues of violation of free speech? Can a state legitimately block websites? On what grounds?

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