Freedom of expression and the right to respect private life

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Ladies and Gentlemen:

Freedom of expression as safeguarded in various constitutional and international law instruments has been developed and expanded by the case-law and the doctrine of western countries and by the struggles of journalists in a dynamic and progressive manner in line with the liberal trends and ideas of democracy that have emerged during the years following the Second World War. However the concept of freedom of expression was enlarged with an idealistic approach to such an extent that other legitimate interests or rights such as the right to respect the private life and the reputation of individuals had on occasions to be subjected to inroads and lost, to some substantial degree, the required protection which those values deserve.

An attempt will be made to deal with the topic of freedom of speech and the right of privacy on the basis of the provisions of the European Convention on Human Rights and the relevant case-law of the European Court of Human Rights.

Freedom of speech is safeguarded by Article 10 of the Convention the relevant parts on which we need to concentrate being as follows:

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

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such conditions, restrictions or penalties as
are prescribed by law and are necessary in a democratic society...for the protection of the reputation or rights of others...

In *Handyside v. UK*\(^1\), the Court, in a much quoted passage, said:

“Freedom of expression constitutes one of the essential foundations of a [democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to “information” or “ideas” that are favourably 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 that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’”.

In another case\(^2\) the Court stated the following:

“One factor of particular importance for the Court’s determination in the present case is the essential function the press fulfils in a democratic society. Although the press must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart - in a manner consistent with its obligations and responsibilities - information and ideas on all matters of public interest. In addition, the Court is mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation. In cases such as the present one the national margin of appreciation is circumscribed by the interest of democratic society in enabling the press to exercise its vital role of “public watchdog” in imparting information of serious public concern.”

In the *Lingens* case\(^3\) the Court pointed out that it is incumbent on the press “to impart information and ideas on political issues just as on those of other areas of public interest” and added that “...freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders”. This is why in this context “...the limits of acceptable criticism are

\(^{1}\) Series A 24 § 49 (1996).
\(^{2}\) Bladet Tromsø and Stensaas v. Norway, no. 21908/93 ECHR 1999-III.
\(^{3}\) Eur. Court H.R., Lingens judgment of 8 July 1986, Series A no. 103, 41.
accordingly wider as regards a politician as such than as regards a private individual”. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance”.

However in my view the principle established by the jurisprudence, that there is more latitude in the exercise of freedom of expression in the area of political speech or debate, and in cases of criticism of politicians should not be interpreted as allowing the publication of any unverified defamatory statements. To my mind this principle means simply that in those cases that I have just mentioned, some excessive offending effect should be tolerated and should not be sanctioned. But the principle does not mean that the reputation of politicians is at the mercy of the mass media or other persons dealing with politics, or that such reputation is not entitled to the same legal protection as that of any other individual. Reputation is a sacred value for every person including politicians and is safeguarded as a human right under the Convention for the benefit of every individual without exception.

It is important to draw attention to the fact that for many years the jurisprudence of the Court has developed on the premise that, while freedom of speech is a right expressly guaranteed by the Convention, the protection of reputation was simply a ground of permissible restrictions on the right in question which may be regarded as justified interference with the freedom of expression only if it was “necessary in a democratic society”, in other words if it corresponds to “a pressing social need” and is “proportionate to the aim pursued” and if “the reasons given were relevant and sufficient”.

As a consequence of this approach, the case-law on the subject of freedom of speech has on occasion shown excessive sensitivity and granted over-protection in respect of interference with freedom of expression, as compared with interference with the right to reputation. Freedom of speech has been upheld as a value of primary importance which in many cases could deprive deserving plaintiffs of an appropriate remedy for the protection of their dignity.
The case of Tromso and Stensaas v. Norway\textsuperscript{4} illustrates in my opinion the over-protective approach of the Court as regards freedom of speech in contrast to the right to reputation. The relevant facts of the case may be summed up as follows:

The applicant’s newspaper had published an interview with a certain Mr Lindberg who on the instructions of the Ministry of Fisheries had carried out an inquiry and prepared a report in relation to allegations that certain seal hunters of a seal hunting vessel had used illegal hunting methods. The report was by order of the Ministry in question exempted from public disclosure, the ground being that it contained allegations of statutory offences. The applicant’s newspaper reproduced some of the statements of Mr Lindberg included in his report concerning the alleged breaches of the seal-hunting regulations by members of the crew of the vessel. Defamation proceedings were instituted by the persons concerned against the applicant seeking compensation and requesting that certain of the statements in question be declared null and void. Judgment was entered in favour of the plaintiffs for certain statements which were found to be false and defamatory.

The Court, by a majority, found that the judgment against the applicant declaring null and void the above statements and awarding compensation to the plaintiff amounted to a violation of Article 10 of the Convention which safeguards freedom of expression. The majority found that the impugned judgment served the legitimate aim of protecting the reputation of the crew members but came to the conclusion that such judgment was not necessary “in a democratic society”. In this respect, the majority stressed that the publications in question concerned a matter of public interest\textsuperscript{5} and pointed out the duty of the Court to conduct a careful scrutiny of measures interfering with the freedom of speech when such measures are capable of “discouraging the participation of the press in debates over matters of legitimate public concern”. Reference was also made to the duty of journalists “to act in good

\textsuperscript{4} No. 21908/93 ECHR 1999-III.
\textsuperscript{5} Dr Micha, in her article “Defamation: Dignity Lost?” in Netherland Quarterly of Human Rights, Vol. 16, No 3 p.272 points out “... the subjectivity of the distinction between matters of public and private concern. Who could really decide on the issue when the mass media - having a really mighty role today - are able to manipulate people’s opinions and promote as matters of public concern, issues really insignificant?” c.f. Justice Brennan’s criticism of the “public-private dichotomy created by the majority” with “almost no guidance” concerning its extent with the consequence of containing an impoverished definition of “public concern”: Dun & Bradstreet v. Greenmoss Builders, 472 U S 749 (1985).
faith in order to provide accurate and reliable information in accordance with the ethics of journalism. It was also accepted that the impugned expressions consisted of factual statements.

Nevertheless, the Court found that the applicant’s newspaper was dispensed from the “obligation to verify factual statements that were defamatory of private individuals” because such statements “did not emanate from the newspaper itself” (§ 66) but originated in a report drawn up by Mr Lindberg in an official capacity and could in the circumstances of the case be considered as reliable without being necessary for the newspaper “to carry out its own research into the accuracy of the facts reported”.

As regards the nature of the defamation, the Court found that although the four impugned statements “implied reprehensible conduct they were not particularly serious”. The other two allegations - that seals had been skinned alive and that furious hunter had beaten up Mr Lindberg and threatened to hit him with a gaff - “were more serious but were expressed in rather broad terms and could be understood by readers as having been presented with a degree of exaggeration”.

One could also refer to other cases manifesting the same trend. The case of Nilsen and Johnsen v. Norway contains basic elements of such a trend. In that case the applicants were police officers representing the Norwegian and the Bergen Police Associations respectively. They were found responsible for having published false defamatory statements concerning Professor Bratholm who, in a book published by him, attributed to the police incidents of unlawful violence, brutality and other forms of misconduct. The impugned statements amounted to allegations that Professor Bratholm “with the intent of harming the police is deliberately imparting false information on police brutality, that he has dishonest motives and that he is taking part in a private investigation for the purpose of fabricating allegations of police brutality”. The domestic court found that these allegations were assertions of fact the

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6 In the case of Freusoz and Roire v. France, 21 January 1999, the Court confirmed the principle that Article 10 “protects journalists’ rights to divulge information on issues of general interest provided that they are acting in good faith and on an accurate factual basis and provide ‘reliable and precise’ information in accordance with the ethics of journalism”.

truth of which could be tested by evidence. In finding in favour of the professor, the Norwegian Supreme Court observed *inter alia* that—

“However, freedom of expression does not go as far as [allowing] every statement in a debate, even if the debate relates to matters of public concern. Freedom of expression must be weighted against the rights of the injured party. ... Nor do accusations of lies, improper motives, dishonesty ... serve to promote the freedom of expression but, perhaps, rather to suppress or prevent debate which should have been allowed to take place.”

The European Court found by majority that there has been a violation of the freedom of expression as a result of the judgment against the applicants. As regards the statements which imputed improper motives or intentions to Professor Bratholm, the Court found that they should not be regarded as allegations of facts requiring the applicants to prove their truth because, according to the Court, those statements “were intended to convey the applicants’ own opinions and were thus rather akin to value judgements”. The majority took into account the fact that the applicants were speaking on behalf of the members of the police associations criticised by Professor Bratholm and therefore they “were not entirely unjustified in claiming that they were entitled to ‘hit back in the same way’”.

Nobody can disagree with the importance of the freedom of speech, especially that of the media, as an essential factor of democratic society. However, the question is whether the protection accorded to such a freedom may, under any circumstances, be so excessive as to deprive the victims of false defamatory statements or of unnecessary intrusion in their private life of the necessary effective remedy.

I reiterate here the view that I expressed in the case of Bladet Tromso which concern the balancing of freedom of speech on the one hand and the right to reputation on the other as follows:

“The press is, in our days, an important and powerful means of influencing public opinion. The impressions that may be created through a publication in the press are usually more decisive than the reality because until the reality is
found out the impressions prevail. And the reality may never be discovered or when it is disclosed it may be too late to remedy the damage done by the original impressions. The press is in effect exercising a significant power and should be subject to the same restraints applicable to any exercise of power, namely it should avoid abuse of its power, it should act in a fair way and respect the rights of others. Therefore, whenever it engages in imparting information of a defamatory nature it should respect basic rules of natural justice such as the rule of *audi alteram partem*.

I take this opportunity to point out some adverse consequences resulting from over-protection of freedom of expression at the expense of the right to reputation. The main argument in favour of protecting freedom of expression, even in cases of inaccurate defamatory statements, is the encouragement of uninhibited debate on public issues. But the opposite argument is equally strong: the suppression of untrue defamatory statements, apart from protecting the dignity of individuals, discourages false speech and improves the overall quality of public debate through a chilling effect on irresponsible journalism. Moreover, such debates may be suppressed if the potential participants know that they will have no remedy in the event that false defamatory accusations are made against them. The prohibition of defamatory speech also eliminates misinformation in the mass media and effectively protects the right of the public to truthful information. Furthermore, false accusations concerning public officials, including candidates for public office, may drive capable persons away from government service, thus frustrating rather than furthering the political process.

In recent years the Court has expressly recognised that protection of reputation is a right which is covered by the scope of the right to respect for one’s private life under Article 8 § 1 of the Convention (see Chauvy and Others v. France, no. 64915/01, ECHR 2004-VI; Abebrey v. France (dec.), no. 58729/00, 21 September 2004; and White v. Sweden, no. 42435/02, 19 September 2006), even though the relevant jurisprudence has not expanded on this novel approach, nor has it been

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8 As rightly observed by the U S Supreme Court in the Gertz case op. cit. (n. 9) "Of course, an opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood. Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie. See also Thomas David Jones "Human Rights: Group Defamation, Freedom of Expression and the Law of Nations", Chap. III, “The Myth of Absolutism: The First Amendment Right to Freedom of Expression” at p. 68: “Once tarnished, reputation is virtually impossible to restore".
invoked in other cases involving freedom of speech and defamation. In the light of this case law any defamatory statement amounts to interference with the right guaranteed by the Convention which has the same status as that of freedom of expression and such interference can only be justified if it satisfies the requirements of permissible restrictions on the exercise of such right, i.e., it must be necessary in a democratic society etc. It will be more difficult to defend a defamatory statement for the purposes of the protection under the Convention when it is examined as interference with a right recognised under the Convention, rather than as a necessary restriction on freedom of expression.

The right to respect for private life is expressly safeguarded under Article 8 of the Convention. It is subject to restrictions similar to those of Article 10 which safeguards freedom of expression. As to the concept of private life the jurisprudence of the Court has established the following:

Private life is a broad term not susceptible to exhaustive definition. Elements such as gender identification, name, sexual orientation and sexual life are important elements of the personal sphere protected by Article 8. That Article also protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world and it may include activities of a professional or business nature. There is, therefore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of “private life”. Under the influence of prevailing moral and social values and conditions, developing jurisprudence determines the scope of the concept of private life. It is also inevitably affected by the passage of time. In any event it should be borne in mind that freedom of expression and the right to privacy are in principle of equal value.

If the Court has to decide in any particular case which of the two rights should prevail over the other the matter is decided through the application of a balancing test of the competing rights on the basis of the facts and circumstances of the case. As rightly pointed out by Judge Dean Spielman when he was asked in an interview how

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9 See inter alia Peck v. UK, application no. 44647/98
10 See P.G. and J.H. v. the United Kingdom, no. 44787/98, § 56, ECHR 2001-IX.
we find this balance: “It all boils down to the issue of proportionality. If sacrifice of one value has been disproportionate then we rule in favour of the sacrificed value. It really depends on the circumstances of the case and also on the issue of whether the protected value is at the heart of privacy or on the boundaries of it”.

This is illustrated by the approach of the Court in relevant cases to some of which I am now going to refer.

An important case on this subject is that of *Von Hannover v. Germany* the facts of which are as follows.

Princess Caroline von Hannover was campaigning since the beginning of the 1990s to prevent the publication of photographs revealing her private life. On this basis she unsuccessfully applied on several occasions to the German courts to obtain an injunction preventing any further publication of a series of photographs which had appeared in the 1990s in certain German magazines. She claimed that they infringed her right to protection of her private life and her right to control the use of her image.

In a landmark judgment of 15 December 1999 the German Federal Constitutional Court granted the applicant’s injunction regarding the photographs in which she appeared with her children on the ground that their need for protection of their intimacy was greater than that of adults. However, the Constitutional Court considered that the applicant, who was undeniably a contemporary ‘public figure’, had to tolerate the publication of photographs of herself in a public place, even if they showed her in scenes from her daily life rather than engaged in her official duties. The Constitutional Court referred in that connection to the freedom of the press and to the public’s legitimate interest in knowing how such a person generally behaved in public.¹¹

The applicant maintained that the decisions of the German courts infringed her right to respect for her private life, as guaranteed by Article 8 of the Convention, since they failed to afford her adequate protection from the publication of photographs
taken without her knowledge by paparazzi on the ground that, in view of her origins, she was undeniably a contemporary ‘public figure’.

In its judgment of 24 June 2004,12 the Court observed at the outset that there was no doubt that the publication by various German magazines of photographs of the applicant in her daily life either on her own or with other people fell within the scope of her private life. It was therefore necessary to balance protection of the applicant’s private life against freedom of expression, as guaranteed by Article 10 of the Convention.13

Although freedom of expression applied to the publication of photographs, this was an area in which the protection of the rights and reputation of others took on a particular importance, as it did not concern the dissemination of ‘ideas’, but of images containing very personal or even intimate ‘information’ about an individual. Furthermore, photos appearing in the tabloid press were often taken in a climate of continual harassment which induced in the person concerned a very strong sense of intrusion into their private life or even of persecution.14

The Court considered that the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photographs and articles made to a debate of general interest. In the case before it, the photographs showed scenes from the applicant’s daily life, engaging in activities of a purely private nature. The Court noted in that connection the circumstances in which the photographs had been taken: without the applicant’s knowledge or consent and, in some instances, in secret. It was found that they made no contribution to a debate of public interest, since the applicant exercised no official function and the photographs and articles related exclusively to details of her private life.15

Furthermore, while the general public might have a right to information, including, in special circumstances, on the private life of public figures, they did not

12 von Hannover v. Germany, no. 59320/00, ECHR 2004-VI.
13 § 53 and § 58.
14 § 59.
15 §§ 60 et seq.
have such a right in this instance. The Court considered that the general public did not have a legitimate interest in knowing Caroline von Hannover’s whereabouts or how she behaved generally in her private life even if she appeared in places that could not always be described as secluded and was well known to the public. Even if such a public interest existed, just as there was a commercial interest for the magazines to publish the photographs and articles, those interests had to yield, in the Court’s view, to the applicant’s right to the effective protection of her private life.\textsuperscript{16}

The Court reiterated the fundamental importance of protecting private life from the point of view of the development of every human being’s personality and said that everyone, including people known to the public, had to have a ‘legitimate expectation’ that his or her private life would be protected. The criteria that had been established by the domestic courts for distinguishing a figure of contemporary society ‘\textit{par excellence}’ from a relatively public figure were not sufficient to ensure the effective protection of the applicant’s private life and she should, in the circumstances of the case, have had a ‘legitimate expectation’ that her private life would be protected.\textsuperscript{17}

Having regard to all the foregoing factors, and despite the margin of appreciation afforded to the State in this area, the Court considered that the German courts had not struck a fair balance between the competing interests. Accordingly, it held that there had been a violation of Article 8 of the Convention.

In the more recent case of \textit{Craxi (nº 2)}\textsuperscript{18} concerning the publication of a private conversation the Court, in balancing the different interests at stake namely that of freedom of the press and the right to privacy, applied the same test as it usually applies whilst examining the justification of an interference by public authorities. In the judgment the following are stated:

“However, public figures are entitled to the enjoyment of the guarantees set out in Article 8 of the Convention on the same basis as every other person. In

\begin{itemize}
\item \textsuperscript{16} § 77.
\item \textsuperscript{17} Esp. § 78.
\item \textsuperscript{18} \textit{Craxi v. Italy (nº 2)}, no. 25337/94, 17 July 2003.
\end{itemize}
particular, the public interest in receiving information only covers facts which are connected with the criminal charges brought against the accused. This must be borne in mind by journalists when reporting on pending criminal proceedings and the press should abstain from publishing information which is likely to prejudice, whether intentionally or not, the right to respect for the private life and correspondence of the accused persons. The Court observes that in the present case some of the conversations published in the press were of a strictly private nature. They concerned the relationships of the applicant and his wife with a lawyer, a former colleague, a political supporter and the wife of Mr Berlusconi. Their content had little or no connection at all with the criminal charges brought against the applicant. This is not disputed by the Government. In the opinion of the Court, their publication by the press did not correspond to a pressing social need. Therefore, the interference with the applicant's rights under Article 8 § 1 of the Convention was not proportionate to the legitimate aims which could have been pursued and was consequently not “necessary in a democratic society” within the meaning of the second paragraph of this provision.”

In the Peck v The U.K case the applicant was suffering from depression as a result of personal and family circumstances. On 20 August 1995 at 11.30 p.m. he walked alone down the high street towards a central junction in the centre of Brentwood with a kitchen knife in his hand and he attempted to commit suicide by cutting his wrists. He stopped at the junction and leaned over a railing facing the traffic with the knife in his hand. He was unaware that a close circuit television camera, mounted on the traffic island in front of the junction, filmed his movements. The relevant footage later disclosed did not show the applicant cutting his wrists, the operator being solely alerted to an individual in possession of a knife at the junction.

The police were notified by the operator of the TV camera and arrived. They took the knife from the applicant, gave him medical assistance and brought him to the police station. Thereafter he was detained in the mental hospital.

This incident in a public street was recorded by the closed-circuit television and that footage was shown on television on several occasions. The Court referred to the
concept of “private life” as not being susceptible to exhaustive definition and reiterate its jurisprudence according to which

“There are a number of elements relevant to a consideration of whether a person's private life is concerned in measures effected outside a person's home or private premises. Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, a person's reasonable expectations as to privacy may be a significant, although not necessarily conclusive, factor. A person who walks down the street will, inevitably, be visible to any member of the public who is also present. Monitoring by technological means of the same public scene (for example, a security guard viewing through closed-circuit television) is of a similar character. Private life considerations may arise, however, once any systematic or permanent record comes into existence of such material from the public domain.”

The Court found that there was a violation of the right to respect for private life of the applicant because of the disclosures of the incident through the television which were considered by the Court as disproportionate and therefore unjustified interference with his private life and a violation of Article 8 of the Convention.

In the case of Hachette Filipacchi Associates v. France the family of the deceased Prefect of Corsica who was murdered and his body was lying on a street complained that the well known magazine Paris Match published a photograph of this scene without their consent. The owners of the periodical in question were ordered by the domestic courts to publish in their next edition of their magazine that the publication of the photograph in question was made without the consent of the family of the deceased Prefect and that the members of his family consider that such publication infringes their private life. The publishers of the magazine in question

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19 In P.G. and J.H. (§ 57)

20 Appl. No 71111/01, 14 June, 2007
complained before the European Court that the order in question was an interference with their freedom of expression. The Court by five votes to two found that there has not been a breach of the right to freedom of speech and that the domestic courts were right in finding that there has been an unjustified interference with the right to private life of the relatives of the Prefect. I was one of the judges who disagreed with this judgment having myself found that the effect of the photograph was to convey the full tragic impact of the assassination, correctly described in the accompanying comment as “a tragic page in [French] history” and that it is in the general interest for such events to be publicised, in full detail, so that the public is informed about matters that affect society and the country as a whole. The public also has a right to receive that information, a right that cannot be overridden by the subjective feelings of the victim’s family”.

Ladies and Gentlemen:

I have given you examples of the case law of the ECHR where in balancing the competing rights of freedom of expression and the right of privacy the latter prevailed. Apart from for one case with somewhat exceptional aspects I could not trace any other case law where after balancing of the two rights in question freedom of expression was found to succeed. The case is the one21 in which the widow and sons of President Mitterrand were able to restrain dissemination of a book “Le Grand Secret” by his doctor which revealed that the late President knew he was suffering from cancer in 1981, a secret he has kept from his family as well as the public. The Paris Court of Appeal rejected a freedom of expression argument holding that it was necessary to stop the distribution of the book which was infringing the right to privacy of the deceased and his heirs. The ECHR held that the permanent injunction could not be justified. According to the judgment: “The Court considers that the book was published in the context of a wide-ranging debate in France on a matter of public interest, in particular the public’s right to be informed about any serious illnesses suffered by the head of State, and the question whether a person who knew that he was seriously ill was fit to hold the highest national office. Furthermore, the secrecy which President Mitterrand imposed, according to the book, with regard to his condition and its development, from the moment he became ill and at least until the

point when the public was informed (more than ten years afterwards), raised the public-interest issue of the transparency of political life. However the Court found that the interim injunction, in contrast with permanent one, was justified because the distribution of the book was very close to the death of President Mitterrand a fact which could have deepened the family’s grief.

In any event freedom of expression may understandably be upheld for example in respect of disclosures about public officials or candidates for political posts regarding their disreputable behaviour in their private life; even the marital infidelities of people holding sensitive post in the State may be disclosed if they create commitments or situations incompatible with the functions of their office, details of a politician’s health may also be disclosed because there is a reasonable assumption that it may affect the execution of his duties; secret sources of income may as well be published.

There is no doubt that freedom of expression especially by the mass media is the cornerstone of democracy and the most effective way to control those in a position of power. However we should not lose sight of the fact that the mass media are nowadays to a great extent commercial enterprises with uncontrolled and virtually unlimited strength, interested more in profitable, flashy news than in disseminating proper information to the public, in controlling government abuse or in fulfilling other idealistic objectives. And although they may be achieving such objectives incidentally, accidentally or even deliberately, they should be subject to certain restraint out of respect for the truth and for the dignity and private life of individuals. Like any power, the mass media cannot be accountable only to themselves. A contrary position would lead to arbitrariness and impunity, which undermine democracy itself.

22 Par.44.