Freedom of information online under Article 10 of the European Convention on Human Rights

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ABSTRACT

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Abstract for Master's Thesis

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Abstract:

Society has become more and more digitised and dependent on online structures. The internet has changed the way in which different actors of society, including individuals, process information. The media environment has changed rapidly due to the development of the internet. The internet consists of flows of information. Therefore, the right to freedom of information, as part of freedom of expression, is an important human right today.

The aim of the thesis is to study and analyse the scope and content of the right to freedom of information in the context of the internet. The thesis aims to specify legal issues and challenges related to freedom of information online. The focus is on the European Convention on Human Rights and its Article 10. The case law and general principles of the European Court of Human Rights are presented, analysed and discussed.

It can be argued that, currently, the international human rights law does not adequately answer to the challenges of the digital age. International human rights law regulations concerning the internet and new technologies are scarce. This is mainly because the development of technology has been so rapid that legislation has been unable to keep up to date. The protection of freedom of information online is constantly improving as the Court's case law emerges.

The international human rights law can only impose obligations on states. On the internet, private companies are governing communication and the flow of information and the power of states is limited. As companies have more power on individuals' lives online and the power has shifted from the state to major internet companies, it is probable that some of the fundamental principles of international law will be re-formulated in the future in order to guarantee effective protection of human rights in the digital age. For instance, positive obligations under the Convention might broaden.

The European Court of Human Rights has in its case law acknowledged the importance of the internet for the protection and fulfilment of freedom of expression and information. The same legal norms and principles that are traditionally applied in the cases under Article 10 are largely applicable in the cases concerning freedom of information online. However, the principles that are applicable to the traditional media might need to be developed, to some extent, regarding the online media in order to take account of the special characteristics of the online media.

Recently, the Court has acknowledged that the right of access to information exists under Article 10 in certain circumstances but is limited to state-held information that is of public interest. Online, a lot of information that is of public interest is possessed by private companies and thus, the Convention does not grant the right of access to such information.

Key words: freedom of information, European Convention on Human Rights, the internet, freedom of the press, the right of access to information

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1. Introduction

1.1 Freedom of information is an important right in the digital age

The internet and new technologies have become an inherent part of individuals' lives and society's structures. New, digital technologies are increasingly present everywhere. People carry hand-held digital devices that are equipped with internet connection and easy access to news, social media, maps and mailbox, amongst other useful applications. The access to internet has become necessary as people increasingly carry out everyday tasks online. The internet is used to buy items, book appointments to public and private services, pay the bills, keep in touch with other people as well as for entertainment. Actually, in today's world, almost anything can be done online or with the help of new technologies.

The internet is an "information and communication tool" that differs from the traditional means of communication especially by its "capacity to store and transmit information".[1] The internet and social media have changed the communications for good. The internet enables people to network globally with each other without having to "rely on the traditional mass media intermediaries", such as the newspapers and other traditional media.[2] "The digital revolution" has been exceptionally significant for the development of society and can be compared to the development of radio and television in their time.[3] The internet is not only a new notion of media, that is distinct from the traditional mass media but it has also changed the global media environment by introducing new platforms for media to operate in and to compete with. One of the new online platforms is social media, which is of special character compared to the traditional media, especially because of its rapidness, real-time updates and the possibility for individuals to publish content without anticipatory control by the media intermediary.

The internet and other new technologies have become an inseparable part of modern society. Online, the individual has the possibility to express herself freely, effectively and even anonymously. The language used in online discussions is often intensified and rough. Even balanced and, on the face of

[1] *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, (App no 33014/05), ECtHR, 5 May 2011, para 63.
[2] UN Human Rights Committee General Comment No. 34: Freedoms of opinion and expression (Art. 19), 12 September 2011, UN doc. CCPR/C/GC/34, para 15.
[3] Balkin, Jack, "Digital speech and democratic culture: A theory of freedom of expression for the information society" in *New York University Law Review*, 2004, 79(1), pp. 3-6.

it, neutral discussion openings "may provoke fierce discussions" online.[4] The originality of the internet characterises the world in the digital age.

The special nature of the internet imposes new challenges to the fulfilment of human rights in modern society. The new technologies are continuously and rapidly developed further and many actors in society are taking advantage of this development. Social media has been considered an "uncontrolled danger" for the states.[5] For example, riots and revolutions have sparked with social media activism.[6] Social media has been and is used for influencing elections.[7] Disinformation, influencing elections through social media, hate speech and defamations are topics that have been actively discussed in relation to the internet and freedom of expression. Therefore, the special characteristics of the internet and the internet's major role in modern society may affect the fulfilment of freedom of expression, or, at least, the speciality of the internet should be considered when developing and interpreting the state obligations concerning freedom of expression.

The development of the internet has changed and will continue to change modern society extremely rapidly and dramatically. The rapid development of new technologies means that society and its structures, including legislation, have to adjust to new ways of communication and managing information. As technological development affects almost everything in the modern world, it also has an impact on human rights. However, regulations and legislation are also tools to affect technology.

The European Court of Human Rights (also: the Court) has acknowledged that the internet is the principal channel for enjoying one's freedom of expression and receiving and imparting information and ideas today.[8] Balkin has predicted that the internet changes the definition of freedom of expression because the internet changes the way people are able to enjoy their freedom of expression.[9]

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[4] *Delfi AS v. Estonia*, (App No. 64569/09), ECtHR, 16 June 2015, para 144.
[5] Mcgoldrick, Dominic, "The Limits of Freedom of Expression on and Social Networking Sites: A UK Perspective." in Human Rights Law Review, 2013, 13(1), p. 130.
[6] Wolfsfeld, Gadi, Segev, Elad and Sheafer, Tamir, "Social Media and the Arab Spring: Politics Comes First", *The International Journal of Press/Politics*, Vol. 18, No. 2, pp. 115 – 137, 2013.
[7] Cadwalladr, Carole and Graham-Harrison, Emma, *Revealed: 50 million Facebook profiles harvested for Cambridge Analytica in major data breach*, The Guardian, 17 March 2018, https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election, accessed on 20 March 2020; *Vote Leave's targeted Brexit ads released by Facebook*, BBC News, 26 July 2018, https://www.bbc.com/news/uk-politics-44966969, accessed on 20 March 2020.
[8] *Cengiz and Others v. Turkey*, (App Nos. 48226/10, 14027/11), ECtHR, 1 December 2015, para 49 and 52.
[9] Balkin, Jack, "Digital speech and democratic culture: A theory of freedom of expression for the information society" in *New York University Law Review*, 2004, 79(1), pp. 3-6.

The functions of the internet are based on information. Information has gained huge economic value in the digital age.[10] The new technologies are commonly used for gathering information of behaviour of individuals. Many of the special functions online are founded on the use of information as an effective marketing tool with the help of algorithms. Information is crucial for the functioning of the internet, and because the internet is an inherent part of modern society, information has special significance in modern world. Freedom of expression is a fundamentally important right in a democratic society because it guarantees pluralism of information and opinions, as well as increases the possibility for individuals to participate in public affairs. Freedom of information, which is an inherent part of freedom of expression, has a strong link with the internet and new technologies. Therefore, this thesis studies freedom of information, which is a specific and extremely important part of freedom of expression. The focus on the internet is chosen because of the importance of the internet for society as a whole.

1.2 Research question and limitations

The aim of this public international law thesis is to study and analyse the scope and content of the right to freedom of information in the context of the internet. The thesis aims at specifying legal issues and challenges related to freedom of information online. The focus is on the European Convention on Human Rights (also: the Convention) and, especially, its Article 10 which concerns the right to freedom of expression. The focus was chosen because the European Court of Human Rights has relatively many interesting and relevant cases concerning freedom of expression and the internet. The case law and the principles of the Court regarding the internet are emerging. The Court has decided cases that concern freedom of expression on the internet but case law covering for instance social media platforms is still scarce.[11] The Council of Europe, the regional organisation behind the Convention and the Court, has actively participated and contributed to the debate concerning the protection of various human rights online and with regard to new technologies. For instance, the

[10] Balkin, Jack, “Digital speech and democratic culture: A theory of freedom of expression for the information society” in *New York University Law Review*, 2004, 79(1), p. 3; Lucchi, Nicola, “Media Freedom and Pluralism in the Digital Infrastructure” in Jonason, Patricia and Rosengren, Anna (eds.), The Right of Access to Information and the Right to Privacy - A Democratic Balancing Act, Working paper 2017:2, Södertörns högskola, 2017, p. 157.
[11] Mcgoldrick, Dominic, "The Limits of Freedom of Expression on and Social Networking Sites: A UK Perspective." in Human Rights Law Review, 2013, 13(1), p. 126.

Council of Europe has highlighted the impact of the development of artificial intelligence on the protection of human rights, for instance, by setting up a committee on artificial intelligence .[12]

The thesis aims to answer the following research questions: What are the legal norms and the Court's principles concerning freedom of information online under Article 10 of the European Convention on Human Rights? Which obligations do states have to guarantee freedom of information online under Article 10 of the Convention? Which special questions arise concerning the protection of freedom of information online?

Data protection and the right to privacy are current issues related to the internet and human rights regulations and also relevant regarding the Convention. However, the thesis does not cover data protection or the right to privacy, as such, but will focus on Article 10 of the Convention, and specifically the legal issues and challenges that arise regarding the fulfilment of freedom of information online. Article 8 of the Convention, which protects the right to privacy, is addressed in the thesis to the extent that is necessary. Article 8 is central, for instance, in cases concerning the right of access to information. Corporate responsibility is another relevant issue regarding human rights online as private companies have gained enormous power over individuals especially through the development of new technologies. Balance and connection between business and human rights are increasingly arising issues in the area of international human rights law. The increasing power that internet companies have over individuals will be discussed briefly in the thesis because private companies' presence and power online characterise the internet. The relationship between states and private companies will be discussed with the focus on state obligations under Article 10 of the Convention because the Convention only imposes obligations on states and not on private parties. Corporate responsibility more generally is excluded from the thesis.

Under freedom of information, specific subject matters are discussed. Especially the free flow of information, the freedom of the media to impart information on matters of public interest, and the right of access to information are dealt with in the thesis. These all are of special importance online. In addition, polarisation and the lack of pluralism are discussed in the thesis. These are relevant matters regarding Article 10 of the Convention because freedom of information is a guarantee for pluralism of information in society. Hate speech, terrorism or disinformation are not addressed in the

[12] Ad hoc Committee on Artificial Intelligence (CAHAI) was set up by the Committee of Ministers of the Council of Europe in September 2019. The Council of Europe work concerning artificial intelligence is presented here: https://www.coe.int/en/web/artificial-intelligence (Accessed on 24 March 2020).

thesis even though they are topical issues in the context of the internet and Article 10 of the Convention.

1.3 Material and method

According to the Statute of the International Court of Justice, the primary sources of the international law are "international conventions", international customary law and "the general principles of law recognized by civilized nations".[13] The secondary sources of international law are "judicial decisions", i.e. the case law, and academic literature by "the most highly qualified publicists".[14]

Because the focus of this thesis is in the European Convention on Human Rights system, the primary source that is referred to throughout the thesis, is the European Convention on Human Rights. The analysis in this thesis will largely be based on the case law of the European Court of Human Rights. Even though the case law of international courts is a secondary source of international law the case law is not insignificant source of international law. Case law and other interpretative material of international treaty bodies are important measures for building comprehension on the scope and content of provisions of human rights treaties.[15] When discussing and analysing an emerging right, or an emerging aspect of a right, it is necessary to consider the interpretations of the courts and the academics. Usually, an emerging right does not yet constitute customary international law and is not included in the Convention. The European Convention on Human Rights is a living instrument and the contents of the rights imposed by it can be developed by the interpretations of the Court. The Court has well-established case law and the basic principles it applies under Article 10. However, the Court's case law is constantly developing. Especially the development of the Court's principles, as well as possible establishment of new principles by the Court relating to the internet, will be addressed in the thesis.

Soft law instruments are used to support the analysis of primary and secondary legal sources of international law in the thesis. Soft law instruments are instruments and documents that are legally non-binding. However, taking soft law in the account can be reasonable when discussing the development of international law because soft law often offers progressive interpretations of the treaties. The Committee of Ministers of the Council of Europe has adopted a number of

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[13] Statute of the International Court of Justice, Article 38(1).
[14] Ibid.
[15] Scheinin, Martin, "International mechanisms and procedures for monitoring" in Krause and Scheinin (eds.), *International Protection of Human Rights: A Textbook*, pp. 657-677, 2012, (2nd, revised edition).

recommendations concerning the fulfilment of human rights and the special nature of the internet and other new technologies. The Committee of Ministers' recommendations to member states are not legally binding. Their adoption is based on political and diplomatic discussions between the Council of Europe member states, and thus they can reflect future legal regulations because they are a result of political discussion, as is the formulation of national legislation, eventually. Recommendations of the Committee of Ministers of the Council of Europe show development of politics as they indicate consensus that has been achieved on certain issues. The Court refers to the recommendations of the Committee of Ministers in its case law on a regular basis. Thus, the recommendations can, to some extent, predict to which direction case law of the Court is developed or on which topics new international treaties may arise. Some of the recommendations of the Committee of Ministers are directed to the private sector, whereas most of the recommendations are addressed to states.

In addition to the European Convention on Human Rights, the case law of the Court and the soft law documents of the Committee of Ministers, human rights conventions from the United Nations framework and applicable United Nations documents, such as General Comments of the Human Rights Committee will be discussed, as relevant. These instruments provide additional substance when analysing the scope and content of freedom of information under Article 10 of the European Convention on Human Rights. The Court frequently refers to the conventions of United Nations and to United Nations treaty bodies' general comments in its case law. This is because when interpreting the Convention, other "relevant rules of international law applicable in the relations between the parties" need to be taken into account.[16] The legal material outside the European Human Rights framework is applied in the thesis in order to deepen the analysis and to put the Court's case law and principles to international human rights law context.

1.4 The structure of the thesis

In chapter 2, the scope and content of freedom of information under Article 10 of the Convention is presented. The right of access to information, as a specific emerging right under Article 10, is addressed. The Court's established case law under Article 10, and especially the possible limitations on freedom of information are discussed. Furthermore, positive and negative state obligations arising under Article 10 are dealt with in the chapter. In chapter 3 the special characteristics and the special nature of the internet are discussed in order to be able to further analyse which aspects of freedom of

[16] Vienna Convention on the Law of Treaties, Article 31(3).

information are of particular interest online. Also, specific phenomena online are addressed. The gatekeepers of information online and their responsibilities and influence for freedom of information are presented. Chapter 4 further analyses the special structures of the internet and new technologies and how they are, or could be, regulated – legally and otherwise. In chapter 5, legal norms and principles are specified, with special consideration in the Court's principles regarding freedom of the media in the context of the online media. In addition, the Court's principles concerning prior restraints, the liability, political participation, and pluralism are discussed.

2. The protection of freedom of information under the European Convention on Human Rights

2.1 Freedom of expression is a prerequisite for democracy

Freedom of expression includes two aspects: "freedom to hold opinions without interference" and freedom "to seek, receive and impart information and ideas through any media and regardless of frontiers".[17] The first aspect, freedom to hold opinions, is a freedom that cannot be restricted. An opinion is a person's inner view that has a positive or negative effect on others only when the opinion holder gives expression to the opinion. Giving expression to an opinion means that the opinion is spoken, written or otherwise expressed as words or as actions. The second aspect of freedom of expression concerns freedom of information. The aspects were proclaimed by the Universal Declaration on Human Rights in 1948 and have been echoed in various international human rights treaties and documents that have been adopted during the last 70 years.[18]

Article 10 of the European Convention on Human Rights protects the right to freedom of expression. Article 10 of the Convention consists of two paragraphs:

> *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*

[17] Universal Declaration of Human Rights, Article 19.
[18] International Covenant on Civil and Political Rights, Article 19; European Convention on Human Rights, Article 10.

> *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.*[19]

The right to freedom of expression under Article 10 of the Convention is composed of three freedoms which are presented in the first paragraph of the Article. The freedoms are freedom to hold opinions, freedom to receive information and ideas and freedom to impart information and ideas. All these freedoms derive from the Universal Declaration of Human Rights.[20]

The second paragraph of Article 10 imposes the conditions when states' interference with freedom of expression is permissible. The restriction grounds that are imposed in Article 10(2) and the Court's interpretation of Article 10(2) are scrutinised in subchapter 2.3 of the thesis.

Abuse of the rights of the Convention is prohibited under Article 17 of the Convention. Therefore, certain sort of speech and expressions are considered belonging outside of the protection provided in Article 10 of the Convention. For example, hate speech, incitement to violence, holocaust denial and promoting Nazism are "incompatible with the values proclaimed and guaranteed by the Convention" and thus constitute an abuse of the rights protected by the Convention.[21] Because these types of expressions are considered an abuse of the right to freedom of expression, they fall outside the scope of Article 10. Cases concerning expressions that are incompatible with the Convention values are not examined by the Court under Article 10 because such expressions do not concern freedom of expression to any extent. Right-abusing expressions are, in virtue of Article 17, strictly prohibited, and therefore imposing a sanction on a person behind such expression is not an interference with the individual's freedom of expression.[22]

The European Convention on Human Rights has the purpose to protect human rights and fundamental freedoms. The aim of the international cooperation in the Council of Europe is to maintain and promote justice and peace by protecting and advancing democracy, rule of law and "maintenance and

[19] European Convention on Human Rights, Article 10.
[20] Universal Declaration of Human Rights, Article 19.
[21] *Delfi AS v. Estonia*, (App No. 64569/09), ECtHR, 16 June 2015, para 136.
[22] *Delfi AS v. Estonia*, (App No. 64569/09), ECtHR, 16 June 2015, para 140.

further realisation of Human Rights and Fundamental Freedoms".[23] Openness, plurality and functioning democracy are the preconditions and guarantors of the protection and realisation of human rights and fundamental freedoms.[24] Freedom of expression is a prerequisite for a democratic society because it advances openness and plurality. Therefore, the protection of freedom of expression is considered significant and valuable also for the fulfilment of other human rights and fundamental freedoms than those protected under Article 10. Freedom of expression is considered a highly valuable freedom in a democratic society because the fulfilment of it is a necessary condition for a functioning democracy.

The fulfilment of freedom of expression is important also concerning other aspects. Freedom of expression is a crucial freedom for a functioning democracy, but also for the realisation of democratic culture in which everyone has a chance to actively participate in the areas of society, and by using varying means of participation.[25] "Free exchange of opinions and ideas" is one of the principles of a democratic society.[26] As the Court has repeatedly stressed, freedom of expression is the cornerstone of democracy and "one of the essential foundations of a democratic society".[27] Additionally, freedom of expression forms "one of the basic conditions" for the progress of a democratic society and "for each individual's self-fulfilment".[28] Article 10 applies to expressions that are offending, shocking and disturbing. Allowing these kinds of expressions is necessary for a plural, open and democratic society where those in power can be criticised.[29] In conclusion, freedom of expression is highly valuable in the personal and the societal degree since it enables individuals to participate in society, to express themselves and to fulfil their ambitions. On the societal level, freedom of expression enables plurality and openness, critique towards those in power position, as well as the progress of society.

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[23] European Convention on Human Rights, Preamble.
[24] *Pedersen and Baadsgaard v. Denmark*, (App No. 49017/99), ECtHR, 17 December 2004, para 71 and 79; Voorhoof, 2014, p.6.
[25] Balkin, Jack, "Digital speech and democratic culture: A theory of freedom of expression for the information society" in New York University Law Review, 2004, 79(1), p. 3.
[26] *Gillberg v. Sweden*, (App No. 41723/06), ECtHR, 3 April 2012, para 95.
[27] See, amongst others, *Lingens v. Austria*, (App No. 9815/82), ECtHR, 8 July 1986, para 41; *Şener v. Turkey,* (App No. 26680/95), ECtHR, 18 July 2000, para 39(i); *Thoma v. Luxembourg*, (App No. 38432/97), ECtHR, 29 March 2001, para 43; *Marônek v. Slovakia*, (App No 32686/96), ECtHR, 19 April 2001, para 52; *Dichand and Others v. Austria*, (App No. 29271/95), ECtHR, 26 February 2002, para 37.
[28] *Lingens v. Austria*, (App No. 9815/82), ECtHR, 8 July 1986, para 41; *Şener v. Turkey,* (App No. 26680/95), ECtHR, 18 July 2000, para 39(i); *Thoma v. Luxembourg*, (App No. 38432/97), ECtHR, 29 March 2001, para 43; *Marônek v. Slovakia*, (App No 32686/96), ECtHR, 19 April 2001, para 52; *Dichand and Others v. Austria*, (App No. 29271/95), ECtHR, 26 February 2002, para 37.
[29] *Handyside v. the United Kingdom*, (App No. 5493/72), ECtHR, 7 December 1976, para 49*; Sunday Times v. the United Kingdom (No. 1)*, (App No. 6538/74), ECtHR, 26 April 1979, para 65.

The Court's interpretation of the Convention develops and evolves constantly because the Convention is a living instrument. New aspects of the rights and freedoms, and even new rights and freedoms, emerge under the Convention articles. The Court has well-established case law on Article 10. The Court applies certain principles when deciding on a case concerning freedom of expression. The principles can be and are elaborated by the Court in the course of time. Freedom of information is a specific, emerging aspect under Article 10 of the Convention.

2.2 Freedom of information is a part of freedom of expression

Freedom of information is an integral part of freedom of expression because it is a prerequisite for the full exercise of freedom of expression.[30] This is logical, because without the right to freedom of information, individuals would not be able to exercise their freedom of expression, which essentially is sharing opinions and information with others. According to the wording of Article 10 of the Convention, freedom of information consists of two freedoms: freedom to impart information and ideas, and freedom to receive information and ideas. These two freedoms are closely linked to one another.

All aspects of Article 10, right to freedom of expression, have relevance in the context of the internet. However, freedom of information has particular significance online, since the internet is mainly founded on the flows of information. Freedom of information is a topical and emerging freedom under the Convention because the societal and economic importance of information increases. Today, numerous functions of society and economy depend on the flow of information online.[31] Actually, in modern, digitally-oriented society, "the production and distribution of information" has gained remarkable value by becoming "a key source of wealth".[32] Freedom to receive and impart information under Article 10 of the Convention includes "sharing and dissemination of information" online.[33]

The Committee of Ministers of the Council of Europe has recommended the member states to protect the free flow of information online without frontiers, and to avoid any restrictions on the international

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[30] Riekkinen & Suksi, 2015, p. 28; The Report of the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression to the General Assembly, 4 September 2013, UN Doc. A/68/362, para 18.

[31] Lucchi, Nicola, "Media Freedom and Pluralism in the Digital Infrastructure" in Jonason, Patricia and Rosengren, Anna (eds.), *The Right of Access to Information and the Right to Privacy - A Democratic Balancing Act*, Working paper 2017:2, Södertörns högskola, 2017, p. 157.

[32] Balkin, Jack, "Digital speech and democratic culture: A theory of freedom of expression for the information society" in *New York University Law Review*, 2004, 79(1), p. 3.

[33] European Convention on Human Rights, Article 10; *Neij and Sunde Kolmisoppi v. Sweden*, (App. No. 40397/12), ECtHR, 19 March 2013, The Law, Chapter A.

flow of information on the internet.[34] The recommendation stems from the obligation, provided in Article 10 of the Convention, to ensure the right to freedom of expression "regardless of frontiers".[35]

Information concerning issues of public interest is specifically protected under Article 10. However, also other types of information, such as, "cultural expressions", "pure entertainment" and different forms of art are, in principle, protected under Article 10.[36] Commercial expressions are protected under Article 10 but the states have a wide margin of appreciation in interfering with commercial speech. The wide margin of appreciation occurs, for instance, by the praxis that the states are allowed to restrict and prohibit forms of advertisement.[37]

In addition to the information itself, "the means of dissemination" of information are protected under Article 10 of the Convention.[38] A restriction on the means of dissemination is an interference with the right to freedom of information and can amount to a violation of Article 10.[39] Already in the Universal Declaration of Human Rights, it was highlighted that the right to freedom of expression and information shall be protected regardless of the media used.[40] The internet has a significant role as a facilitator of "dissemination of information in general" as well as improving "public's access to news".[41]

The internet has become an important medium for enjoying one's right to freedom of expression and information. The internet is a means of communication protected under Article 10 of the Convention, regardless of the type of message and even in commercial purposes.[42] In fact, the Court has acknowledged the internet as the principal channel for enjoying one's freedom of expression and receiving and imparting information and ideas today.[43]

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[34] Recommendation of the Committee of Ministers to member States on the free, transboundary flow of information on the Internet, the Council of Europe, 1 April 2015, CM/Rec(2015)6, para 6.
[35] European Convention on Human Rights, Article 10(1).
[36] *Khurshid Mustafa and Tarzibachi v. Sweden*, (App. No. 23883/06), ECtHR, 16 December 2008, para 44.
[37] *Markt intern Verlag GmbH and Klaus Beerman v. Germany*, (App. No. 10572/83), ECtHR, 20 November 1989, para 35; *Casado Coca v. Spain*, (App. No. 15450/89), ECtHR, 24 February 1994.
[38] *Ahmet Yildirim v. Turkey*, (App. No. 3111/10), ECtHR, 18 December 2012, para 50.
[39] Ibid.
[40] Universal Declaration of Human Rights, Article 19.
[41] *Times Newspaper Ltd v. the United Kingdom (Nos. 1 and 2)*, (App. Nos. 3002/03, 23676/03), ECtHR,10 March 2009, para 27.
[42] *Ashby Donald and Others v. France*, (App. No. 36769/08), ECtHR, 10 January 2013, para 34.
[43] *Cengiz and Others v. Turkey*, (App Nos. 48226/10, 14027/11), ECtHR, 1 December 2015, para 49 and 52.

The applicant must have a victim status in order for a case application to be declared admissible in the European Court of Human Rights. Regarding freedom of information, the Court has interpreted victim status somewhat flexibly for example by declaring the case *Cengiz and Others* admissible when the applicants claimed that their freedom of information under Article 10 had been violated by a general ban on YouTube. The general ban was not directly aimed at the applicants. The domestic courts had argued that the applicants lacked *locus standi* in the domestic legal proceedings as they "had not been parties to the case".[44] In *Cengiz*, the Court stated that the applicants, who were academic professors, were affected by the general ban on YouTube as they were its "active users".[45] The applicants used the website for academic purposes and uploaded content to the website themselves. Therefore, they had a victim status in the case.[46]

Previously, in the similar case *Akdeniz*, the Court had decided differently upon applicants' victim status. The applicant claimed that his rights were violated because the access to certain music-streaming websites was blocked. The Court found that the applicant as a user of the music-streaming services had indirectly been affected by the blocking of the services, but could not be found as a victim in the sense of Article 34 of the Convention.[47]

2.3 The right of access to information

2.3.1 The right of access to information is emerging under Article 10

The wording of the freedom of expression clause in the European Convention on Human Rights is narrower than the wording in the Universal Declaration on Human Rights. According to the wording of Article 10 of the Convention, freedom of expression includes freedom to receive and impart information and ideas. The freedom to seek information and ideas is lacking from the wording of the Convention. However, this does not *per se* indicate that the protection of the right to freedom to seek information would be outside of the scope of Article 10.

In fact, the scope of Article 10 of the Convention is considered extending to freedom to seek information, in addition to, and as a part of, freedom to impart and receive information. This is acknowledged in several soft law instruments, such as the recommendations of the Committee of Ministers of the Council of Europe. The Committee of Ministers has referred to the internet as a tool

[44] *Cengiz and Others v. Turkey*, (App Nos. 48226/10, 14027/11), ECtHR, 1 December 2015, para 10 and 14.
[45] Ibid., para 50.
[46] Ibid.
[47] *Akdeniz v. Turkey*, (App. No. 20877/10), ECtHR, 11 March 2014, para 24.

that increases "the public's ability to seek, receive and impart information".[48] The Committee of Ministers has also in a recommendation referred to "people's right to seek, receive and impart information in accordance with Article 10 of the European Convention on Human Rights".[49]

In its analysis in *Magyar Helsinki Bizottság*, the Court discussed if freedom to seek information is included in the Convention even though the wording of Article 10 does not, as such, mention the freedom to seek information. According to the case *Magyar Helsinki Bizottság*, it appears from the drafting history of Protocol No. 6 of the Convention that "the bodies and institutions of the Council of Europe" have a consensus that the wording of Article 10 covers even "freedom to seek information".[50] During the drafting of Protocol No. 6, the Court had given an advisory opinion in which it argued that freedom to seek information is included in Article 10, but Article 10 does not impose any obligation to the states regarding individual's right to freedom to seek information.[51]

In *Guerra and others* the Court decided that Article 10 does not provide for the right of access to information.[52] However, the Court has recently interpreted that the "freedom to receive information" provided in Article 10 also involves a right of access to information.[53] The decision applies to information held by public authorities in certain circumstances.

The Court has earlier, as well, found a violation of the Convention when the authorities have refused a request of access to information but in that case Article 8 was applied and not Article 10.[54] The Court has often discussed cases concerning information, especially the right of access to information, under Article 8 of the Convention. This can be criticised especially because the wording of Article 8 does not mention information at all, whereas Article 10 explicitly refers to information.

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[48] Recommendation of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries, the Council of Europe, 7 March 2018, CM/Rec(2018)2, para 2.
[49] Recommendation of the Committee of Ministers to member states on a new notion of media, the Council of Europe, 21 September 2011, CM/Rec(2011)7, para 2.
[50] *Magyar Helsinki Bizottság v. Hungary*, (App. No. 18030/11), ECtHR, 8 November 2016, para 136.
[51] *Magyar Helsinki Bizottság v. Hungary*, (App. No. 18030/11), ECtHR, 8 November 2016, para 136; The observations of the European Court of Human Rights on Draft Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1981, doc. Court (81) 76.
[52] *Guerra and Others* v. Italy, (App. No. 14967/89), ECtHR, 19 February 1998.
[53] *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria*, (App. No. 39534/07), ECtHR, 28 November 2013, para 41; *Youth Initiative for Human Rights v. Serbia*, (App. No. 48135/06), ECtHR, 25 June 2013.
[54] *Gaskin v. the United Kingdom*, (App. No. 10454/83), ECtHR, 7 July 1989; *Guerra and Others* v. Italy, (App. No. 14967/89), ECtHR, 19 February 1998.

The Court parallels freedom to seek information with the right of access to information.[55] Since *Leander,* the Court has had established case law on Article 10 and its aspects concerning the right of access to information and the right to freedom to seek information.[56] Recently, the Court's established case law on the right of access to information, and thus also on the freedom to seek information, has started to emerge.

The main elements of the Court's approach on the right of access to information and freedom to seek information have for several years been that 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"[57] and also that "the right to receive information cannot be construed as imposing on a State positive obligations to collect and disseminate information of its own motion".[58] In traditional sense, the states are obliged to refrain from interference with communication between individuals. This approach is a good example of classic negative state obligation that the Convention articles impose on states. A negative obligation is an obligation to refrain from interference.

In the case *Magyar Helsinki Bizottság*, the Court illuminates the principles that were imposed already in *Leander*. The basic principles remain as above, but the Court's approach on Article 10 and whether freedom of expression covers the "right of access to State-held information" has been developing especially along with the case *Magyar Helsinki Bizottság.*[59]

The Court decided in *Magyar Helsinki Bizottság* that in Article 10 of the Convention, a "limited right of access to information" is imposed. [60] The Court concluded its analysis by illuminating that in certain circumstances, the right of access to state-held information or the state obligation to "impart such information to the individual" may arise even though Article 10 does not as such "confer on the individual a right of access to information held by a public authority" nor lay such obligation to the state.[61] The right of access to information may arise if a lawful judicial order has been given to disclose the information, or when exposure of information to an individual is necessary for the

[55] *Magyar Helsinki Bizottság v. Hungary*, (App. No. 18030/11), ECtHR, 8 November 2016, para 140.
[56] *Leander v. Sweden,* (App. No. 9248/81), ECtHR, 26 March 1987.
[57] Ibid., para 74.
[58] *Magyar Helsinki Bizottság v. Hungary*, (App. No. 18030/11), ECtHR, 8 November 2016, para 156; *Guerra and Others* v. Italy, (App. No. 14967/89), ECtHR, 19 February 1998, para 53.
[59] *Magyar Helsinki Bizottság v. Hungary*, (App. No. 18030/11), ECtHR, 8 November 2016, para 117 and para 156.
[60] *Magyar Helsinki Bizottság v. Hungary*, (App. No. 18030/11), ECtHR, 8 November 2016, para 132; *Társaság a Szabadságjogokért v. Hungary*, (App. No. 37374/05), ECtHR, 14 April 2009; *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria*, (App. No. 39534/07), ECtHR, 28 November 2013.
[61] *Magyar Helsinki Bizottság v. Hungary*, (App. No. 18030/11), ECtHR, 8 November 2016, para 156.

individual's exercise of her right to freedom of information, and thus, a denial of access to information would constitute an interference with the right.[62] The right of access to information may also arise if the access to information would be needed for "legitimate gathering of information of public interest with the intention of imparting that information to the public and thereby contributing to public debate".[63]

In its analysis, the Court referred to other international human rights instruments, international legal praxis, as well as to the preparatory work (*travaux préparatoires)* of the Convention.[64] The Court argued that the Convention must be "read as a whole" and "interpreted in the light of the rules of interpretation provided for" in the Vienna Convention on the Law of Treaties.[65] The object and purpose, as well as the context of the European Convention on Human Rights, must also be taken into consideration when interpreting the Convention articles. The protection of human rights and fundamental freedoms is in the core of the Convention and thus constitutes its object, purpose and context.[66] The Court has argued that "the object and purpose of the Convention [--] requires that its provisions must be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory".[67] This is also a reason for the fact that the Convention is a living instrument and the rights and freedoms protected by it may develop.

It is a basic principle of international law, that when interpreting an international treaty, "(a)ny relevant rules of international law applicable in the relations between the parties" of the treaty must be taken into consideration.[68] As the Court has framed it, the Convention should be "interpreted in harmony with other rules of international law of which it forms part".[69] This is a clear demonstration of the fact that the international human rights law system is interdependent and reflects development and changes in the society. Human rights are universal and indivisible and thus a regional human rights treaty body may not in its case law weaken the existing international standards, norms or

[62] *Magyar Helsinki Bizottság v. Hungary*, (App. No. 18030/11), ECtHR, 8 November 2016, para 156.
[63] Ibid., para 131.
[64] Ibid., para 117 – para 148.
[65] *Magyar Helsinki Bizottság v. Hungary*, (App. No. 18030/11), ECtHR, 8 November 2016, para 118 and para 120; Vienna Convention on the Law of Treaties, Articles 31-33.
[66] *Magyar Helsinki Bizottság v. Hungary*, (App. No. 18030/11), ECtHR, 8 November 2016, para 120 and para 121.
[67] *Magyar Helsinki Bizottság v. Hungary*, (App. No. 18030/11), ECtHR, 8 November 2016, para 121; *Soering v. the United Kingdom*, (App. No. 14038/88), 7 July 1989, para 87.
[68] Vienna Convention on the Law of Treaties, Article 31(3).
[69] *Magyar Helsinki Bizottság v. Hungary*, (App. No. 18030/11), ECtHR, 8 November 2016, para 123.

principles. The Court has emphasised this by stating that "the Convention is first and foremost a system for the protection of human rights".[70]

Furthermore, if the rules, principles or standards in the member states of the Council of Europe seem to be changing, developing or evolving, the Court should acknowledge this development or change in its interpretation.[71] Therefore, the Court has in its interpretation taken into account legislations and legal practice of the member states, as well as the existence of any other international treaties they are parties to. The Court has as a guideline for interpretation, that if a consensus on the issue in question emerges "from specialised international instruments and from the practice of Contracting States", it may be taken into consideration in specific cases when interpreting the Convention.[72] After studying the legislations of the Contracting States, the Court concluded that there is a strong European consensus that the right of access to state-held information exists, to certain extent.[73] A majority of the Convention parties have in their domestic legislations set forth "statutory right of access to information and/or official documents held by public authorities" which aim at increased transparency.[74] In its analysis, the Court noted that, also beyond Europe, a consensus exists "on the need to recognise an individual right of access to State-held information in order to assist the public in forming an opinion on matters of general interest".[75] Information that is of public or general interest enjoys broader protection than other types of information.

Travaux préparatoires can be used as a means of guidance when interpreting a treaty. It should be noticed that if something is not mentioned in the *travaux préparatoires* of a treaty this does not restrict the treaty rights from emerging and thus the treaty from answering to new challenges. However, the existence of these kinds of emerging rights needs to be supported by the "growing measure of common ground that had emerged in the given area".[76] This is remarkable as the internet has brought about new challenges and aspects for the protection of freedom of expression and information as well as the other Convention rights.

[70] *Magyar Helsinki Bizottság v. Hungary*, (App. No. 18030/11), ECtHR, 8 November 2016, para 150.
[71] Ibid.
[72] Ibid., para 124.
[73] Ibid., para 148.
[74] Ibid., para 139.
[75] Ibid., para 148.
[76] Ibid., para 125.

2.3.2 The circumstances in which the right of access to information arises

In *Magyar Helsinki Bizottság,* the Court decided that a right of access to information exists in certain circumstances, as was briefly explained above. The right of access to information depends gravely on the circumstances of the case.[77] While analysing if the right of access to state-held information exists, the Court examined previous cases of similar issues. The circumstances of almost all the cases that the Court analysed were that the domestic law regulated that the information was public and thus should have been available and accessible. However, the authorities had at some point refused access to information.[78] Additionally, significant for the existence of the right of access to information is the fact that the applicant wants to gather information for purposes of public interest.[79]

The Court has established specific criteria to decide in which circumstances the right of access to information exists. The criteria are explicitly used in cases concerning state-held information. The criteria, that the Court considers when examining if the right of access to state-held information exists in a case, can be divided into four categories.[80] All four aspects are of importance also when analysing the scope and content of freedom of information.

Firstly, "The purpose of the information request" needs to be examined.[81] The purpose of the request needs to be essential for the "individual's exercise of his or her right to freedom of expression", including freedom of information. Essentiality is assessed by analysing whether refusing access to information reduces fulfilment of freedom of information of the individual. The purpose of the request of information should also be to create "a forum for" or constitute "an essential element of" "public debate".[82]

Secondly, "The nature of the information sought" is examined by carrying out a "public-interest test".[83] The result of the test always depends on the specific circumstances of the case, meaning that it cannot be explicitly defined which sort of information is of public interest. "political speech and debate on questions of public interest" enjoy special protection under Article 10 and restrictions on

[77] *Magyar Helsinki Bizottság v. Hungary*, (App. No. 18030/11), ECtHR, 8 November 2016, para 133.
[78] Ibid., para 126 – para 133.
[79] Ibid., para 132.
[80] *Magyar Helsinki Bizottság v. Hungary*, (App. No. 18030/11), ECtHR, 8 November 2016, para 158 – para 170; Rainey, Wicks, Ovey & Jacobs, 2017, p. 506.
[81] *Magyar Helsinki Bizottság v. Hungary*, (App. No. 18030/11), ECtHR, 8 November 2016, para 158 and para 159.
[82] Ibid., para 159.
[83] Ibid., para 160 – para 163.

this kind of speech are infrequently accepted.[84] The Court has acknowledged, to some extent, the right of access to information that is of public interest. However, the right of access to information concerns only "information held by public authorities".[85]

Public interest and general interest are repeatedly upcoming terms in the Court's case law related to freedom of information. The Court parallels the expressions "on matters of public interest" with "political speech".[86] These kinds of speech and expressions enjoy "strong protection" under the Convention and therefore strong and adequate justifications are needed to restrict expressions that constitute political speech or concern matters of public interest.[87]

The Court considers and weighs carefully, according to the specific circumstances of each case, if the information in question can be considered being of public interest. Generally, the Court has not specified what kind of information and expressions amount to public interest. The Court does not have any common criteria that is applied when deciding if a matter is of public interest or not. The Court has decided that information that allows the public to participate in the public governance, information that is of whole society's interest, or information public disclosure of which would benefit the transparency of the conduct of public affairs, is considered of public interest and might be required to be disclosed to the public under Article 10 of the Convention.[88] Information on matters affecting people "to such an extent that it may legitimately take an interest in them" and information that attracts the public's attention or concerns the public "to a significant degree" can be considered being of public interest, especially if it concerns "well-being of citizens or the life of the community".[89] Also information on controversial and problematic matters as well as matters concerning "an important social issue" can be considered being of public interest.[90] This is not an extensive list of the possible reasons for a matter being of public interest but also other type of information may be considered of matters of public interest. The Court has left space for development

[84] *Magyar Helsinki Bizottság v. Hungary*, (App. No. 18030/11), ECtHR, 8 November 2016, para 163.
[85] Ibid.
[86] *Sürek v. Turkey (no. 1),* (App. No. 26682/95), ECtHR, 8 July 1999, para 61; *Kablis v. Russia*, (App. Nos. 48310/16, 59663/17), ECtHR, 30 April 2019, para 101.
[87] *Kablis v. Russia*, (App. Nos. 48310/16, 59663/17), ECtHR, 30 April 2019, para 101; *Perinçek v. Switzerland,* (App. No. 27510/08, ECtHR, 15 October 2015, para 230; *Sürek v. Turkey (no. 1),* (App. No. 26682/95), ECtHR, 8 July 1999, para 61; *Feldek v. Slovakia,* (App. No. 29032/95), ECtHR, 12 July 2001, para 83; *Sergey Kuznetsov v. Russia,* (App. No. 10877/04), ECtHR, 23 October 2008, para 47; *Magyar Helsinki Bizottság v. Hungary*, (App. No. 18030/11), ECtHR, 8 November 2016, para 163.
[88] *Magyar Helsinki Bizottság v. Hungary*, (App. No. 18030/11), ECtHR, 8 November 2016, para 161.
[89] Ibid., para 162.
[90] Ibid., para 162.

of its interpretation in the future by not giving a precise definition on what constitutes information or expression of public interest. This has proved to be useful because it entails that broad scope of issues are able to fall upon public interest.[91]

According to the Court's case law, the state may not create obstacles that hinder access to information of public interest.[92] Undoubtedly this means that the state is prohibited to create obstacles to individuals to access the information that others are willing to impart to the individual. Relevant question for the information online is if the state also has an obligation, of positive character, to guarantee individuals' access to privately held information of public interest. This kind of obligation would possibly mean that information of public interest, held by major internet companies, must be disclosed to individuals in certain circumstances. Regarding the right of access to information, the Court has decided that it only applies to information held by public authorities, i.e. not information possessed by private parties. Therefore, such positive obligation does not currently exist under Article 10.

Thirdly, the "role of the applicant" is of crucial value when assessing whether the right of access to information exists.[93] In principle, the press has an crucial role as a public watchdog "in a democratic society" and thus the press enjoys special protection under Article 10.[94] Additionally, a non-governmental organisation (NGO) may exercise the role of a public watchdog in a society.[95] The Court has acknowledged that even "bloggers and popular users of the social media" may be considered exercising the role of "public watchdogs" under Article 10.[96] This approach stems from "the important role played by the Internet in enhancing the public's access to news and facilitating the dissemination of information".[97] In addition, beyond the European human rights law system, under international human rights treaty bodies practice, public "watchdogs' right of access to information" has been linked with the watchdogs' right to freedom to impart information as well as "to the general public's right to receive information and ideas".[98] Article 10 of the Convention

[91] Harris et al., 2014, p. 708.
[92] *Youth Initiative for Human Rights v. Serbia*, (App. No. 48135/06), ECtHR, 25 June 2013; Voorhoof, 2014, p. 13.
[93] *Magyar Helsinki Bizottság v. Hungary*, (App. No. 18030/11), ECtHR, 8 November 2016, para 165.
[94] Ibid., para 165.
[95] *Animal Defenders International v. the United Kingdom*, (App. No. 48876/08), ECtHR, 22 April 2013, para 103.
[96] *Magyar Helsinki Bizottság v. Hungary*, (App. No. 18030/11), ECtHR, 8 November 2016, para 168.
[97] *Magyar Helsinki Bizottság v. Hungary*, (App. No. 18030/11), ECtHR, 8 November 2016, para 168; *Delfi AS v. Estonia*, (App No. 64569/09), ECtHR, 16 June 2015, para 133.
[98] *Magyar Helsinki Bizottság v. Hungary*, (App. No. 18030/11), ECtHR, 8 November 2016, para 152; *Toktakunov v. Kyrgyzstan*, (Communication No. 1470/2006), the Human Rights Committee, 28 March 2011, para 6.3 and para 7.4; The

guarantees freedom to receive and impart information to "everyone". Thus, individuals and legal persons, in principle, should not be differentiated based on their role in society when their rights under Article 10 are protected.[99] However, in practice, certain actors of society, such as public watchdogs, have a special role in society and thus enjoy special protection under the Convention.

Fourthly and finally, the information should be "Ready and available", meaning that fulfilling a request of information does "not necessitate the collection of any data by the Government".[100] This aspect reflects the Court's traditional approach which was established in *Leander* and emphasised that the states do not have positive obligations regarding the right to access of information.

Relevance of for what purpose access to information is requested for has been considered in human rights case law and it appears that the purpose of information request should mainly be of political character or to monitor state activities.[101] McDonagh calls this "sort of public interest qualitative test".[102] The Strasbourg Court's case law indicates the right of access to information belonging to the press, to an NGO that can be considered 'social watchdog',[103] as well as to a person carrying a 'legitimate historical research'.[104] Especially the *Társaság a Szabadságjogokért v. Hungary* indicates that even though according to the Convention freedom of expression belongs to "everyone", in context of right of access to information a public watchdog position is required for being entitled access to information.[105] Therefore, it appears that the scope of right of access to information has shortcomings, which would mean that not everyone has equal right of access to information.[106] The

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Report of the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression to the General Assembly, 4 September 2013, UN Doc. A/68/362, para 19.

[99] *Cengiz and Others v. Turkey*, (App Nos. 48226/10, 14027/11), ECtHR, 1 December 2015, para 56.

[100] *Magyar Helsinki Bizottság v. Hungary*, (App. No. 18030/11), ECtHR, 8 November 2016, para 169; *Társaság a Szabadságjogokért v. Hungary*, (App. No. 37374/05), ECtHR, 14 April 2009, para 36; See, a contrario, *Weber v. Germany*, (App. No. 70287/11), ECtHR, 6 January 2015, para 26.

[101] McDonagh, Maeve, "The Right to Information in International Human Rights Law", in *Human Rights Law Review,* Vol. 13 No.1, 2013, p. 49-50; *Kenedi v. Hungary*, (App. No. 31475/05), ECtHR, 26 May 2009; *Társaság a Szabadságjogokért v. Hungary*, (App. No. 37374/05), ECtHR, 14 April 2009.

[102] McDonagh, Maeve, "The Right to Information in International Human Rights Law", in *Human Rights Law Review,* Vol. 13 No.1, 2013, p. 48.

[103] *Társaság a Szabadságjogokért v. Hungary*, (App. No. 37374/05), ECtHR, 14 April 2009.

[104] *Kenedi v. Hungary*, (App. No. 31475/05), ECtHR, 26 May 2009, para 43.

[105] McDonagh, Maeve, "The Right to Information in International Human Rights Law", in *Human Rights Law Review,* Vol. 13 No.1, 2013, p. 46; *Társaság a Szabadságjogokért v. Hungary*, (App. No. 37374/05), ECtHR, 14 April 2009.

[106] McDonagh, Maeve, "The Right to Information in International Human Rights Law", in *Human Rights Law Review,* Vol. 13 No.1, 2013, p. 50.

Council of Europe Convention on Access to Official Documents explicitly states that a person "shall not be obliged to give reasons" for requesting access to an official document.[107]

As the right of access to information has been interpreted in connection with other rights, its scope is somewhat limited. Recognising the right to information as a distinct right from other human rights would widen the scope of the right to cover also other areas than those of political or public interest. The right to information or freedom of information clauses increasingly exist in domestic legislations. This shows that there is tendency towards considering the right to information as a distinct, stand alone right. Ultimately, its recognition as a stand alone human right would require political will to include right to information in human right treaties.[108]

In conclusion, at present, the right of access to information concerning issues of general public interest but not held by public authorities is not provided by the Convention. The information online is often privately possessed information of public interest. The Convention is, however, a living instrument and thus its interpretation may develop and evolve during time.

2.4 Freedom of information can be restricted

2.4.1 The limitation clause defines the permissible restrictions

Article 10 of the Convention guarantees freedom of expression and information for everyone. As presented in chapter 2.1, freedom to hold opinions cannot be restricted, because it concerns individual's internal opinions and points of view and does not require any external action to be fulfilled. However, exercising one's freedom to express opinions, i.e. freedom to impart or receive information according to article 10(2) of the Convention, may be subject to restrictions. Restrictions must meet the requirements set forth in the limitation clause of Article 10 in order to be permissible under the Convention. Article 10 applies to interferences by public authorities, as does the Convention in whole. The Convention is only binding to its contracting states and not for individuals or other private parties.

Characteristic for Articles 8, 9, 10 and 11 of the European Convention on Human Rights is that they all have limitation clauses in their second paragraph. The second paragraphs of the articles enlist the conditions that need to be fulfilled in order for a state interference to be permissible under the article

[107] Council of Europe Convention on Access to Official Documents, 18 June 2009, Article 4(1).
[108] McDonagh, Maeve, "The Right to Information in International Human Rights Law", in *Human Rights Law Review,* Vol. 13 No.1, 2013, p. 55.

in question. The requirements imposed in Article 10(2) compose criteria for a permissible restriction of freedom of expression. As is the case with all limitation clauses of the Convention, the Court and the domestic authorities must apply the criteria strictly.

Article 10, contrary to other articles of the Convention, explicitly mentions that exercising one's freedom of expression "carries with it duties and responsibilities".[109] This is a special characteristic of and important principle concerning freedom of expression. According to the Convention, everyone has freedom to have any kind of opinions, but when they express their opinion by imparting information they become responsible for the opinions they express.

Article 10 is closely related to Articles 9 and 11 regulating freedom of thought, conscience and religion and freedom of assembly and association, respectively. Article 8 concerns the right to respect for private and family life and its rights are often balanced with the rights protected under Article 10. The rights protected under Articles 8 and 10 are equally valuable, and as they are not absolute rights, they must accordingly be balanced in cases that concern interferences with the rights of both articles.[110]

The conditions that the limitation clause of Article 10 sets to a restriction of freedom of expression are that the interference by public authority must be prescribed by law, be necessary in a democratic society and have one of the legitimate aims referred to in the limitation clause of Article 10.[111] The legitimate aims identified in the limitation clause of Article 10 are:

> "*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"*[112]

The limitation clause of Article 10 has longer list of legitimate aims for an interference than the other articles with limitation clauses. The wording of Article 10 is strict and the limitation clause lists exhaustively all possible grounds for an interference to be compatible with the Convention.[113] Interferences of freedom of expression cannot be general restrictions but they must be applied to

[109] European Convention on Human Rights, Article 10(2).
[110] *Delfi AS v. Estonia*, (App No. 64569/09), ECtHR, 16 June 2015, para 139.
[111] *Ahmet Yildirim v. Turkey*, (App. No. 3111/10), ECtHR, 18 December 2012, para 56.
[112] European Convention on Human Rights, Article 10(2).
[113] Bychawska-Siniarska, 2017, p. 43.

specific exercise of freedom of expression according to the certain circumstances of the case.[114] Content of the right of freedom of expression and information cannot be restricted because it would be harsh violation of the Convention Article 17, which prohibits the denial and abuse of the rights protected under the Convention.[115]

Article 10 is applicable to speech and expressions both online and offline. This is clear from the wording of Article 10 as well as the object and purpose of the Convention as whole. The protection of freedom of expression and information online has been highlighted in several soft law documents adopted by the Council of Europe. Such restrictions of freedom of expression online that go beyond the restrictions that are permitted offline, are strictly prohibited.[116] In addition, any online interference with freedom of expression and information must follow the criteria set forth in Article 10(2) of the Convention.[117]

The Court has dealt with a great number of cases under Article 10 of the Convention. Its case law and interpretation have had significant positive impact for the development of the protection of freedom of expression in member states. The Court applies same basic principles to cases concerning freedom of expression and the internet than it does to cases concerning freedom of expression offline.[118] Acknowledging this, and especially that the media must be granted the same protection regardless if the media functions in an offline or online platform, took the Court several years.[119]

The Court's interpretation concerning the restriction grounds of Article 10(2) and the duties and responsibilities related to freedom of expression and information has developed during the years. The Court's approach has developed from a traditional interpretation that grants states a broad margin of appreciation and strong powers to a more liberal approach that provides the states limited margin of appreciation, if any.[120] In the 21st century, there has been concerns on "restrictive trends" of the

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[114] Bychawska-Siniarska, 2017, p. 32; European Convention on Human Rights, Article 17.
[115] Bychawska-Siniarska, 2017, p. 32.
[116] Declaration on freedom of communication on the Internet, Council of Europe, Committee of Ministers, 28 May 2003.
[117] Declaration of the Committee of ministers on human rights and the rule of law in the Information Society, the Council of Europe, 13 May 2005, CM(2005)56 final.
[118] *Handyside v. the United Kingdom*, (App No. 5493/72), ECtHR, 7 December 1976, para 49; *Sunday Times v. the United Kingdom (No. 1),* (App No. 6538/74), ECtHR, 26 April 1979; *Lingens v. Austria*, (App No. 9815/82), ECtHR, 8 July 1986; *Oberschlick v. Austria*, (App. No. 11662/85), ECtHR, 23 May 1991; *Observer and Guardian v. the United Kingdom*, (App. No. 13585/88), ECtHR, 26 November 1991; Bychawska-Siniarska, 2017.
[119] *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, (App No 33014/05), ECtHR, 5 May 2011.
[120] Bychawska-Siniarska, 2017, p. 19.

Court's case law regarding freedom of information.[121] According to Voorhoof, the case law of the Court is "still maintaining high standards".[122]

The Court has decided a few cases concerning the internet and Article 10. However, areas and features of the internet still exist, where the Court has not yet applied its established case law and principles under Article 10. The Court most certainly needs to address, for instance, social media to larger extent in the near future as the internet and social media has become so indivisible part of the Europeans' everyday life. The Court has decides some cases concerning social media or social-media-like features, but established case law on social media does not yet exist.[123] The development of the principles applied to the traditional media is needed in order for the Court to be able to consider the special characteristics of the new notions of media.[124]

2.4.2 Balancing competing rights and interests is task of the Court

Balancing competing rights or interests is in the core of human rights case law and therefore a common task of the Court. Domestic courts, as well, need to balance competing rights and interests when deciding cases concerning freedom of expression. In the European Court of Human Rights, often when freedom of expression is balanced with other rights the other rights must move aside.[125] Freedom of expression is fundamentally important for democracy, and thus also for the fulfilment of other human rights. The right to freedom of expression is highly valuable and permissibility of any interferences with it need to be carefully scrutinised. That the information distributed is true and based on facts, does not implicate that publishing and expressing the information is always permitted.[126] For instance, other people's right to privacy or respect for confidentiality "of certain commercial information" are such aspects that may weigh in Court's balancing so much that the factual information shall not be published.[127] If freedom of expression would be balanced with an absolute right the situation would be different, as absolute rights cannot be limited.[128] A criteria for balancing the rights constitutes of, amongst others, considerations if the expression or information in question

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[121] Voorhoof, 2014, p. 3.
[122] Ibid.
[123] See, for instance, *Cengiz and Others v. Turkey*, (App Nos. 48226/10, 14027/11), ECtHR, 1 December*; Kablis v. Russia*, (App. Nos. 48310/16, 59663/17), ECtHR, 30 April 2019.
[124] Rainey, Wicks, Ovey & Jacobs, 2017, p. 516.
[125] See, for instance, *Høiness v. Norway*, (App. No. 43624/14), ECtHR, 19 March 2019.
[126] Bychawska-Siniarska, 2017, p. 38.
[127] *Markt intern Verlag GmbH and Klaus Beerman v. Germany*, (App. No. 10572/83), ECtHR, 20 November 1989, paragraph 35.
[128] Xenos, 2012, p. 136.

contributed "to a debate of general interest".[129] Protecting freedom of information online, as well as offline, is balancing competing interests and rights. Copyright, right to privacy and right to reputation, amongst others, have been balanced with freedom of information online by the Court.

Freedom of expression is often, especially in cases related to internet, linked to and balanced with the right to private life, protected under Article 8 of the Convention. The Court has established "general principles" on balancing "competing interests under Article 8 and Article 10 of the Convention".[130] In principle, the rights under Article 8 and Article 10 are equal and enjoy equal respect.[131] The Court has analysed that same case can be applied to the Court under Article 8 if the applicant is object of a controversial article, comments or other expressions, and under Article 10 if the applicant is the publisher of an article.[132] Regardless of who the applicant is and under which of the articles the case is lodged to the Court, the outcome of the case should be similar. When a domestic court balances competing private or public interests or two Convention rights, the Strasbourg Court grants the state a wide margin of appreciation.[133]

States have a positive obligation under Article 8 of the Convention to adopt legal regulations ensuring that everyone's right to reputation is adequately protected by limiting the right to freedom of expression. Adopting such legislation is also balancing the rights under Article 8 and Article 10. This balancing includes for instance that media must not be limited from conducting their role as public watchdogs and also that public figures and those in public power have lower protection under Article 8, as "misuse of public power" needs to be prevented.[134]

When the Court considers legitimacy of an interference to freedom of expression and information, or any other article with limitation clause, the Court must strike a fair balance between "competing interests of the individual and of the community as a whole".[135] In general, all cases before the Court include competing private and public interest, as they are cases applied to the Court by an individual or a group against a state. It is task of the Court to examine if fair balance has been struck. States have

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[129] *Eerikäinen and others v. Finland*, (App. No. 3514/02), ECtHR, 10 February 2009, para 62; Rainey, Wicks, Ovey & Jacobs, 2017, p. 505.
[130] *Høiness v. Norway*, (App. No. 43624/14), ECtHR, 19 March 2019, para 66.
[131] *Delfi AS v. Estonia*, (App No. 64569/09), ECtHR, 16 June 2015, para 139.
[132] Ibid.
[133] Ibid*., Neij and Sunde Kolmisoppi v. Sweden*, (App. No. 40397/12), ECtHR, 19 March 2013, Chapter D; *Ashby Donald and Others v. France,* (App. No. 36769/08), ECtHR, 10 January 2013, para 40.
[134] *Cumpana and Mazare v. Romania*, (App. No. 33348/96), ECtHR, 17 December 2004, para 113.
[135] *Powell and Rayner v. the United Kingdom*, (App. No. 9310/81), ECtHR, 21 February 1991, para 41; *Delfi AS v. Estonia*, (App No. 64569/09), ECtHR, 16 June 2015, para 137.

wide margin of appreciation in balancing competing interests, meaning that if domestic courts have struck fair balance in assessing competing interests at stake, the Court has a high threshold to challenge the decision of domestic court.[136] The fair balance test is applied at the last stage of examination according to the three-fold test which the Court applies in cases under Article 10.[137] The fair balance test runs through the Convention and is addressed in any situation.[138]

2.4.3 Three-fold test as criteria for weighing if a restriction is permissible under the Convention

When applying Article 10, the first paragraph of the article arises and is examined first by the Court. The Court examines first if the state has interfered with the right to freedom of expression.[139] The Convention does not explicitly define the possible means of an interference with freedom of expression, but the Article 10 refers to "formalities, conditions, restrictions or penalties". Variety of possible interferences is wide and the Court examines on case by case basis if an interference has taken place.[140] If the Court decides that there has been an interference, the Court then examines if the interference has been in accordance with Article 10(2).

In order to find out if an interference is permissible and in accordance with the Article 10(2), the Court applies a three-fold test. The test is part of the Court's established case law. Three-part test is used also in cases applied under Articles 8, 9 and 11.[141] All these articles have similar limitation clauses in their second paragraphs and the three-fold test focuses on the limitation clause. Limitation clause enumerates the three conditions that must be met in order for an interference to be compatible with Article 10. These three conditions are that the interference is prescribed by law, has a legitimate aim and is necessary in a democratic society. The three-fold test of the Court is composed of applying these three conditions.

When Court decides a case under Article 10, it first examines if the interference with freedom of expression is prescribed by law. This is the first part of the three-fold test. Fundamental value of freedom of expression for a democracy requires that, as a rule, the law which prescribes permissible interferences is adopted by a parliament. Norms or standards set by authorities are not applicable.[142]

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[136] *Delfi AS v. Estonia*, (App No. 64569/09), ECtHR, 16 June 2015, para 137, para 139.
[137] Xenos, 2012, p. 64.
[138] *Verein Gegen Tierfabriken Schweiz (Vgt) v. Switzerland (No. 2)*, (App. No. 32772/02), ECtHR, 30 June 2009, para 81.
[139] Xenos, 2012, p. 73.
[140] Bychawska-Siniarska, 2017, p. 34.
[141] Ibid., p. 32.
[142] Ibid., p. 39.

Additionally, the quality of the law is significant, the law has to be "public, accessible, predictable and foreseeable" as well as "compatible with the rule of law".[143] The law needs to be foreseeable for an individual "to a degree that is reasonable in the circumstances" in order to be held compatible with Article 10(2).[144] For an interference with freedom of expression to be permissible under the Convention, domestic law must "afford a measure of legal protection against arbitrary interferences by public authorities".[145] The law must also be clear on prescribing permitted interferences as well as when they are accepted.[146]

If freedom of the press has been interfered with, the Court must scrutinise if the "measures or sanctions imposed on the press" might discourage the press from participating "in debates on matters of legitimate public concern" and thus have a chilling effect that threatens the protection and fulfilment of freedom of expression and information.[147] Possible chilling effect is examined by the Court when it weighs lawfulness of an interference. Chilling effect can appear, for example, as a fear of sanctions.[148] Therefore, punishing or sanctioning whistle-blowers has a serious chilling effect.[149] Even though the press enjoys high level of protection, at some point restrictions and sanctions on the press can be justified and proportionate.[150]

The second stage of three-fold test is to resolve if the interference has been carried out in order to protect one or several of the legitimate aims listed in the article in question. The legitimate aims listed in the paragraph 2 of the Article 10 were presented in page 22 of the thesis. It is noteworthy that Article 10 does not permit an interference that has the aim of protecting or maintaining public order.[151]

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[143] Bychawska-Siniarska, 2017, p. 40; *Sunday Times v. the United Kingdom (No. 1)*, (App No. 6538/74), ECtHR, 26 April 1979, para 49; *Cengiz and Others v. Turkey*, (App Nos. 48226/10, 14027/11), ECtHR, 1 December 2015, para 59; *Ahmet Yildirim v. Turkey*, (App. No. 3111/10), ECtHR, 18 December 2012, para 57; *Dink v. Turkey,* (App. No:s 2668/07, 6102/08, 30079/08, 7072/09, 7124/09), ECtHR, 14 September 2010*,* para 114.
[144] *Delfi AS v. Estonia*, (App No. 64569/09), ECtHR, 16 June 2015, para 121; *Maestri v. Italy*, (App. No. 39748/98), ECtHR, 17 February 2004, para 30.
[145] *Ahmet Yildirim v. Turkey*, (App. No. 3111/10), ECtHR, 18 December 2012, para 59.
[146] Ibid.
[147] *Times Newspaper Ltd v. the United Kingdom (Nos. 1 and 2)*, (App. Nos. 3002/03, 23676/03), ECtHR, 10 March 2009, para 41.
[148] Voorhoof, 2014, p. 4; *Kaperzynski v. Poland*, (App. No. 43206/07), ECtHR, 3 April 2012.
[149] *Guja v. Moldova*, (App. No. 14277/04), ECtHR, 12 February 2008; Voorhoof, 2014, p. 10.
[150] *Kaperzynski v. Poland*, (App. No. 43206/07), ECtHR, 3 April 2012.
[151] *Kablis v. Russia*, (App. Nos. 48310/16, 59663/17), ECtHR, 30 April 2019, para 87; *Perinçek v. Switzerland,* (App. No. 27510/08, ECtHR, 15 October 2015, para 146 – para 151; Compare to the limitation clause of Article 9 of the European Convention on Human Rights.

The third and final part of the three-fold test is to examine if the interference is necessary in a democratic society. The Court has established specific criteria on deciding if an interference was necessary in a democratic society.[152] One requirement for an interference being "necessary in a democratic society" is that there must be a "pressing social need" to interfere exercise of freedom of expression in the particular situation and to the aim pursued.[153] The Court must accordingly decide if the pressing social need exists on a case by case basis.

According to the established case law of the Court, when the Court addresses necessity of an interference in a democratic society, the principle of proportionality is applied.[154] The proportionality principle means that the legitimate aim of interference is proportioned to the means of interference. Basically, the proportionality test is balancing the restriction itself with the aim of the restriction. For instance, assessing if a sanction for a defamatory expression is consistent with protection of reputation of the person to whom the defamatory remarks were aimed at is applying the proportionality principle. When measuring proportionality in a freedom of expression case, the Court addresses particularly "circumstances of the publication, the existence of public interest, and the severity of the sanction".[155] Also, by which reasons the authority has justified an interference is examined by the Court. The reasons the state authorities invoke need to be "relevant and sufficient".[156] States have "certain margin of appreciation" on evaluating if a pressing social need for an interference exists.[157] However, the Court has the final word regarding assessment of the necessity of the interference or the existence of a pressing social need.[158]

In the third part of the three-fold test, the Court applies fair balance test by which it balances competing interests between individual's rights and the society in general. What the Court determines is if "the domestic authorities [have] struck a fair balance between" competing rights and interests.[159]

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[152] See, *inter alia*, *Delfi AS v. Estonia*, (App No. 64569/09), ECtHR, 16 June 2015, para 131; *Hertel v. Switzerland*, (App. No. 25181/94), ECtHR, 25 August 1998, para 46.
[153] *Kablis v. Russia*, (App. Nos. 48310/16, 59663/17), ECtHR, 30 April 2019, para 82; *Observer and Guardian v. the United Kingdom*, (App. No. 13585/88), ECtHR, 26 November 1991, para 59; Bychawska-Siniarska, 2017, p. 44; *Sunday Times v. the United Kingdom (No. 1)*, (App No. 6538/74), ECtHR, 26 April 1979, para 59.
[154] See, *inter alia*, *Cumpana and Mazare v. Romania*, (App. No. 33348/96), ECtHR, 17 December 2004, para 90; Bychawska-Siniarska, 2017, p. 44.
[155] Bychawska-Siniarska, 2017, p. 45.
[156] *Ekin Association v. France*, (App. No. 39288/98), ECtHR, 17 July 2001, para 56.
[157] *Delfi AS v. Estonia*, (App No. 64569/09), ECtHR, 16 June 2015, para 131.
[158] Ibid.
[159] *Cumpana and Mazare v. Romania*, (App. No. 33348/96), ECtHR, 17 December 2004, para 91.

As presented in chapter 2.4.2, the Court is reluctant to substitute domestic court's view on fair balance.

The Court has addressed that Article 10(2) should "be interpreted narrowly" and that Article 10 also applies to offending, shocking and disturbing expressions.[160] Interpreting the limitation clause of freedom of expression narrowly reflects the value of the right to freedom of expression and information in a democratic society and the high protection granted to freedom of expression and information by the Court and the Convention. Protecting offending, shocking and disturbing expressions has become a customary part of the Court's established case law as the Court has several times referred to the case *Sunday Times* in its decisions when examining a case under Article 10.[161]

The Court considers and decides cases on case by case basis, taking into account the different aspects and the specific circumstances of each case. When examining an interference with Article 10, the Court considers, amongst others, the role of the author of the expression, if the expression is factual or value judgment, and how severe the imposed penalty is.[162] In any case, if the public's right to receive information is restricted, the reasoning for an interference must be very strong and accurate.[163] Sometimes public interest overrides the principle of confidentiality, which is one of the legitimate aims listed in Article 10(2).[164]

In the freedom of expression cases that concern anonymous comments online, when assessing the proportionality of an interference, "the context of the comments", the intermediary's action to "prevent or remove defamatory comments", possible "liability of the actual authors of the comments as an alternative to the intermediary's liability" and "the consequences of the domestic proceedings" for the party whose freedom of expression has been interfered with are all taken into consideration by the Court.[165]

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[160] *Sunday Times v. the United Kingdom (No. 1)*, (App No. 6538/74), ECtHR, 26 April 1979; *Handyside v. the United Kingdom*, (App No. 5493/72), ECtHR, 7 December 1976, para 49.
[161] *Sunday Times v. the United Kingdom (No. 1)*, (App No. 6538/74), ECtHR, 26 April 1979.
[162] *Cumpana and Mazare v. Romania*, (App. No. 33348/96), ECtHR, 17 December 2004, para 98; Rainey, Wicks, Ovey & Jacobs, 2017, p. 484.
[163] *Times Newspaper Ltd v. the United Kingdom (Nos. 1 and 2)*, (App. Nos. 3002/03, 23676/03), ECtHR, 10 March 2009, para 41.
[164] *Guja v. Moldova*, (App. No. 14277/04), ECtHR, 12 February 2008.
[165] *Høiness v. Norway*, (App. No. 43624/14), ECtHR, 19 March 2019, para 67; *Delfi AS v. Estonia*, (App No. 64569/09), ECtHR, 16 June 2015, para 142-143.

The three parts of the test are discussed in this particular order, the lawfulness is reviewed first, then the legitimate aim and finally the necessity in a democratic society. Voorhoof argues that the requirement that a restriction of Article 10 must be necessary in a democratic society is the most important of the three-fold test.[166] This view echoes the fundamental significance of freedom of expression and information to a democratic society. However, if it is the most important part of the three-fold test, why is it examined last? It is the final word on the three-fold test, but all parts of the test are significant. For instance, the interference being prescribed by law is extremely important requirement for the fulfilment of the rule of law. If the Court finds that one of the three conditions is not fulfilled, the Court discontinues the examination of the case and finds a violation of Article 10 on the grounds that the interference was not permissible under Article 10.[167] That the Court does not in every case examine the last stage of the test, the necessity in a democratic society, is a strong argument in favour of all parts of the test having equal value or at least that the last part of the test is not more important than the others.

2.5 Negative and positive state obligations under Article 10

State obligations under the Convention can be divided to negative and positive obligations.[168] The effective protection of the rights under Article 10, the freedom of expression, does not only depend on the state abstaining from interferences with the right, but may even require positive protective measures by the state. The positive protective measures can be imposed "through [--] law or practice".[169] Usually, positive obligations oblige the states to take legislative measures and create or increase legislative framework that regulates relations between individuals.[170] Often, a legal framework regulating the right in question is enough to fulfil the state's positive obligation to protect the right. The state fails to comply with its obligations if the legislative framework provided by the state has enabled the interference at hand.[171] Inadequate action from the state part can be a ground for a violation of the Convention if the state does not take the necessary protective steps.[172]

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[166] Voorhoof, 2014, p. 5
[167] Bychawska-Siniarska, 2017, p. 33.
[168] Akandji-Kombe, 2007, p. 5.
[169] *Manole and Others v. Moldova*, (App. No. 13936/02), ECtHR, 17 September 2009, para 99.
[170] Akandji-Kombe, 2007, p. 50.
[171] Akandji-Kombe, 2007, p. 50; *Verein Gegen Tierfabriken Schweiz (Vgt) v. Switzerland (No. 2)*, (App. No. 32772/02), ECtHR, 30 June 2009.
[172] Akandji-Kombe, 2007, p. 50.

The negative state obligations under international human rights law mean that the states must refrain from interferences with human rights.[173] The positive obligations, on the other hand, require action from the state part in order to protect and fulfil the rights in question.[174] A positive obligation is an obligation to actively protect individuals from violations of their rights by private parties, and also from state authorities.

At present, positive state obligations can be characterised an intrinsic part of the Convention system. It lasted years before the existence of positive obligations under the Convention was acknowledged after the adoption of the Convention.[175] The positive state obligations are not optional or additional to the protection of the rights set forth by the Convention, instead the positive obligations are as strongly binding to the state that the negative obligations are.[176]

A state might, in certain circumstances, have an obligation to take action, rather than to abstain from the interference. An obligation to act is a positive obligation to protect individuals from the unlawful interferences of their rights. Positive obligations obligate states to act and if a positive obligation has been violated it means that the state has been inactive or passive on the issue. Besides, negative obligations obligate the states to refrain from an interference with the rights at issue. If a state violates its negative obligations, the violation is a result of state's positive action to prevent or limit the exercise of the right in question.[177]

If the second paragraph of Article 10 is applied by the Court, the Court has first found that the state has interfered with freedom of expression under the first paragraph of Article 10. Therefore, cases in which Article 10(2) is applied, and the Court has found a violation of the article, are not positive obligation cases because they are cases in which the state has interfered with the right in the way that is incompatible with Article 10.[178] If the state fails to guarantee protection it is obliged to guarantee by a positive obligation by being inactive, Article 10(1) is applied rather Article 10(2).[179] If the Court applies Article 10(2) and the three-fold test and find no violation of the article it means that the

[173] Harris et al., 2014, p. 21.
[174] Ibid., p. 22.
[175] *Marckx v. Belgium*, (App. No. 6833/74), ECtHR, 13 June 1979; Akandji-Kombe, 2007, p. 5.
[176] Xenos, 2012, p. 139.
[177] Akandji-Kombe, 2007, p. 11.
[178] Xenos, 2012, p. 69.
[179] Ibid., p. 72.

interference by the state has been compatible with the Article 10 and, therefore, the state has followed its positive obligation under the Convention.

Positive state obligations under Article 10 of the Convention "remain exceptional and are not [as] systematised" as positive obligations under certain other articles of the Convention.[180] The Court does not specify the positive obligations under Article 10 generally because the interferences must be applied on a case by case basis. This is because of the very nature of freedom of expression as a cornerstone for democracy. However, it is indisputable that positive state obligations do arise under Article 10.[181] Positive state obligations under Article 10 are established because "effective exercise" of freedom of expression and information requires imposition of positive protective measures.[182] When the existence of positive obligation is prescribed, fair balance must be struck between the interests of the individual and the society as whole.[183] State authorities must not disproportionately burdened by positive state obligations.[184] This is also a principle arising from the fair balance test. Burdening authorities excessively is not in accordance with the interests of society.

A "trend towards extending the scope of the Convention to private relationships between individuals" exists. This phenomenon is called horizontal effect.[185] The trend is especially stemming from the increasing positive state obligations imposed by the Convention and acknowledged by the Court.[186] The Court has, to some extent, accepted horizontal effect of Article 10, meaning that Article 10 is partly applicable in relations between private individuals.[187] It must be underlined that the Convention imposes obligations only upon the states. Thus, obligations on individuals are not included in the Convention.[188] The Convention and its rights do not have a direct horizontal effect, meaning that the Convention would be "directly applicable in private relationships".[189] However, the states are bound

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[180] Akandji-Kombe, 2007, p. 48.
[181] *Özgür Gündem* v. *Turkey*, (App. No. 23144/93), ECtHR, 16 March 2000; *Centro Europa 7 S.R.L. and Di Stefano* v. *Italy,* (App. No. 38433/09), ECtHR, 7 June 2012; *Youth Initiative for Human Rights v. Serbia*, (App. No. 48135/06), ECtHR, 25 June 2013.
[182] *Özgür Gündem* v. *Turkey*, (App. No. 23144/93), ECtHR, 16 March 2000, para 43; *Verein Gegen Tierfabriken Schweiz (Vgt) v. Switzerland (No. 2)*, (App. No. 32772/02), ECtHR, 30 June 2009, para 80.
[183] *Verein Gegen Tierfabriken Schweiz (Vgt) v. Switzerland (No. 2)*, (App. No. 32772/02), ECtHR, 30 June 2009, para 81.
[184] Ibid.
[185] Akandji-Kombe, 2007, p. 14.
[186] Ibid.
[187] *Appleby and others* v. *UK,* (App. No. 44306/98), ECtHR 6 May 2003; *Verein Gegen Tierfabriken Schweiz (Vgt) v. Switzerland (No. 2)*, (App. No. 32772/02), ECtHR, 30 June 2009; Voorhoof, 2014, p.3.
[188] European Convention on Human Rights, Article 1; Harris et al., 2014, p. 23.
[189] Faut, Frédérique, "The prohibition of political statements by athletes and its consistency with Article 10 of the European Convention on Human Rights: Speech is silver, silence is gold?" in The International Sports Law Journal, Vol. 14, No. 3, pp. 253-263, 2014.

by the Convention to regulate relations between individuals or private parties so that no violation of the Convention rights occurs in private relationships.[190] The Convention itself does not obligate individuals to respect the rights it imposes. When a violation of the Convention occurs in a relationship between private parties, it is still, according to the Convention, the state that has allowed the interference with human rights by directly or consciously endorsing the interference, or by inaction, and thus violated the Convention.[191] If the violation results from endorsing the interference, it is a violation of state's negative obligation. If the violation is caused by state's inaction, it is a violation of state's positive obligation.[192]

Positive obligations regularly arise when a causal link exists between a private party's action and a human rights violation.[193] All protection of individuals from violations of their rights by other individuals, i.e. the horizontal effect, concern positive obligations. However, not all positive obligations concern the horizontal effect, but also inactivity on protecting individuals from violations of their rights by state authorities may be a violation of state's positive obligation.

It is not always straightforward to separate a negative obligation from a positive obligation. For example, in the concurring opinion of *Gaskin,* judge Wildhaber argues that the refusal of the authorities to grant access to the information requested could be interpreted as a negative interference, but at the same time state's duty to provide access to information could be considered a positive obligation.[194] When interpreting and applying state's duties in the Court, application of positive and negative obligations does not, in principle, depart from each other. Fair balance must be struck in both situations and "the criteria to be applied do not differ in substance".[195]

According to the Court's established case law, states are not allowed to restrict individuals "from receiving information that others wish or may be willing to impart".[196] This is a negative obligation

[190] Faut, Frédérique, "The prohibition of political statements by athletes and its consistency with Article 10 of the European Convention on Human Rights: Speech is silver, silence is gold?" in The International Sports Law Journal, Vol. 14, No. 3, pp. 253-263, 2014.
[191] Xenos, 2012, p. 101.
[192] Akandji-Kombe, 2007, p. 11.
[193] Xenos, 2012, p.208.
[194] *Gaskin v. the United Kingdom*, (App. No. 10454/83), ECtHR, 7 July 1989.
[195] *Verein Gegen Tierfabriken Schweiz (Vgt) v. Switzerland (No. 2)*, (App. No. 32772/02), ECtHR, 30 June 2009, para 82.
[196] *Leander v. Sweden,* (App. No. 9248/81), ECtHR, 26 March 1987, para 74; *Gaskin v. the United Kingdom*, (App. No. 10454/83), ECtHR, 7 July 1989, para 52; *Guerra and Others* v. Italy, (App. No. 14967/89), ECtHR, 19 February 1998, para 53; *Roche v. United Kingdom*, (App. No. 32555/96), ECtHR, 19 October 2005, para 172.

and does not impose states a positive obligation to "disseminate information of its own motion".[197] The Court has found "an obligation on the state to provide information" concerning individuals under Article 8 of the Convention.[198] The obligation is closely related to freedom of information as it concerns right of access to information. However, the positive obligation is imposed under Article 8, and thus does not fall under the scope of freedom of information under Article 10.

Positive state obligations can in some cases conflict with each other, for example, balancing Articles 8 and 10 of the Convention is often basically balancing the positive state obligations.[199] However, protecting the right to privacy under Article 8 may amount to an interference of Article 10. Positive obligations under Article 10 sometimes require interfering the right to freedom of expression and information.

The European Parliament has recommended the states to ensure that freedom of expression is not arbitrarily restricted by public or private parties.[200] Interestingly, the recommendation recognises possible arbitrary restrictions on freedom of expression by private actors. Of course, the recommendation is soft law and not part of the European Human Rights Convention system, but it indicates that the power of internet companies on freedom of expression and what are state obligations concerning that power may be a question that needs to be addressed by the Court in near future.

3. The characteristics of the internet

3.1 The special features of the internet

The internet has a positive impact on the freedom of information.[201] The internet enables seeking, imparting and receiving information quickly, widely and across state borders. The internet can be a crucial tool for advancing freedom of expression and information because it enables individuals to interact directly and efficiently with each other, without the same kind of control and editing that

[197] *Leander v. Sweden,* (App. No. 9248/81), ECtHR, 26 March 1987, para 74; *Gaskin v. the United Kingdom*, (App. No. 10454/83), ECtHR, 7 July 1989, para 52; *Guerra and Others v. Italy,* (App. No. 14967/89), ECtHR, 19 February 1998, para 53; *Roche v. United Kingdom*, (App. No. 32555/96), ECtHR, 19 October 2005, para 172.
[198] Rainey, Wicks, Ovey & Jacobs, 2017, p. 506.
[199] Xenos, 2012, pp. 131-133.
[200] The European Parliament recommendation of 26 March 2009 to the Council on strengthening security and fundamental freedoms on the Internet, 2008/2160(INI).
[201] *Times Newspaper Ltd v. the United Kingdom (Nos. 1 and 2)*, (App. Nos. 3002/03, 23676/03), ECtHR, 10 March 2009, para 27.

traditional intermediary of information, the traditional media, pursues.[202] Individuals can themselves create content online. Thus, the significance of the internet and new technologies to advancing freedom of expression and information is enormous. The Court has described the internet as "an unprecedented platform for the exercise of freedom of expression".[203] Especially "accessibility" and "capacity" of the Internet facilitates individuals' access to and possibility of distributing news and information.[204] The internet also has significant potential to advance democracy as the internet itself "is extraordinarily democratic".[205] Additionally, the internet has had positive impact on development and "growth of international civil society" as it enables civil society across the world to set up a network.[206]

However, the Court has also emphasized that the internet imposes greater risk to human rights than the traditional media.[207] The Court especially underlines risks to the right to private life.[208] The internet can also threaten freedom of information or have a negative effect on it. The same digital architecture which enables effective enjoyment of one's freedom of expression and information can be harnessed to limit democratic participation of individuals.[209] This has also been acknowledged by the Committee of Ministers of the Council of Europe in its recommendation on public service value of the internet. The recommendation marks notable potential of the internet to promote and increase exercise of human rights and fundamental freedoms but also pays attention to possible threat to fulfilment of these rights, caused by the internet.[210]

The internet and other new technologies are collectively referred to as the information and communication technology. The term "information and communication technology" clearly explains why freedom of information is essentially important for many operations online and for the basic functions of the digital environment. It is because the information plays a major role in the digital age.

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[202] Bychawska-Siniarska, 2017; Weaver, Russell L., *Free Speech and Democracy in an Internet Era*, in Lind et al, 2015, p. 36.
[203] *Delfi AS v. Estonia*, (App No. 64569/09), ECtHR, 16 June 2015, para 110.
[204] Ibid., para 133.
[205] Weaver, Russell L., *Free Speech and Democracy in an Internet Era*, in Lind et al, 2015, p. 36.
[206] Joyce, Daniel, "Human Rights and the Mediatization of International Law.", Leiden Journal of International Law, Vol. 23, No. 3, 2010, p. 518.
[207] *Delfi AS v. Estonia*, (App No. 64569/09), ECtHR, 16 June 2015, para 110.
[208] *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, (App no 33014/05), ECtHR, 5 May 2011, para 63.
[209] Balkin, Jack, "Digital speech and democratic culture: A theory of freedom of expression for the information society" in New York University Law Review, 2004, Vol. 79 No. 1, p. 6.
[210] Recommendation to member States on measures to promote the public service value of the Internet, the Council of Europe, 7 November 2007, CM/Rec(2007)16.

Online, the advertisement revenue depends on the number of visitors on the website or of the service users. The Court has considered in its case law that the economic interest that the company has for publishing comments and inviting people to comment articles on a news portal indicates that the company can be considered publisher of the comments.[211] The Committee of Ministers of the Council of Europe has in several recommendations emphasised the public service value of the internet and its importance in modern society.[212]

Algorithms, social media and search engines are examples of the special features online that are of relevance for the research question of this thesis. These special tools all need to be defined shortly in order to understand the relevance of the features for the fulfilment of freedom of information.

Algorithms are groups of mathematical rules or instructions that are used by software and other parts of digital architecture in order to help solving problems. Algorithms are frequently used online to filter and categorise information. Algorithms may have influence on the fulfilment of freedom of information online because algorithms affect what kind of content different people encounter online. One especially worrying aspect of the increasing use of recommendation algorithms on the internet and in social media is the formation of so-called "filter bubbles".[213] Filter bubbles are a possible consequence of the use of algorithms and may lead to the lack of pluralism and the increase of polarisation in society. The lack of plural information as well as the increased polarisation of society are threats for the maintenance of democratic structures.[214]

Social media are interactive platforms for individuals to communicate with each other and to create and publish content. The social media platforms have become extremely popular online. Characteristic to social media platforms is that users may easily and effectively impart information through the platform. Social media is of special character compared to the traditional media especially because of its rapidness, real-time updates and possibility of individuals to publish content without anticipatory control by the media intermediary. Even the websites of the traditional news media today

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[211] *Delfi AS v. Estonia*, (App No. 64569/09), ECtHR, 16 June 2015, para 144.
[212] Recommendation to member States on measures to promote the public service value of the Internet, the Council of Europe, 7 November 2007, CM/Rec(2007)16.
[213] The term "filter bubble" was first presented in Pariser, 2011.
[214] *Glasenapp v. the Federal Republic of Germany,* (App. No. 9228/80), ECtHR, 28 August 1986; *Colombani and Others v. France*, (App. No. 51279/99), ECtHR, 25 June 2002; *Groppera Radio AG and Others v. Switzerland*; (App. No. 10890/84), ECtHR, 28 March 1990, para 54; *United Communist Party of Turkey and Others v. Turkey*, (App. No. 19392/92), ECtHR, 30 January 1998, para 57; *Metropolitan Church of Bessarabia and Others v. Moldova*; (App. No. 45701/99), ECtHR, 13 December 2001, para 116; *Serif v. Greece*; (App. No. 38178/97), ECtHR, 14 December 1999, para 53.

include features that are characteristic to social media. Such features are, for instance, the possibility to comment news articles, the possibility to create an account and to decide which kind of content one wants to see. Social media enable people to express their opinions easily, to communicate and connect directly with other people, even strangers, as well as to get visibility and support for their opinions. Also, the interaction with and between individuals, the civil society and the private sector has become more direct through social media. Even states have taken advantage of social media by communicating through it with people and other entities. Therefore, social media has become crucially valuable for the realisation of freedom of expression and information in today's world. Social media is a remarkably useful platform for political and other ideologies to spread and gain support. As an example of this can be mentioned elections behaviour that have been influenced through social media.[215] Social media and other new, digital media have affected and changed the politics as politics have increasingly transferred to media.[216]

The European Court of Human Rights has addressed social media in its case law. In *Cengiz and Others*, the Court considered video-sharing platform YouTube to be "a very popular platform for political speeches and political and social activities" which contains "information that could be of particular interest to anyone".[217] YouTube was reckoned by the Court "a unique platform" for such political speech that is uncovered by the mainstream media and thus an important arena for "citizen journalism".[218] On the other hand, YouTube and other social media platforms have also become platforms where disinformation is imparted. However, conclusion can be drawn that YouTube and other social media platforms are of specific importance in a democratic society.

Search engines are tools that process information online and help people find the information they are looking for on the internet. Search engines have remarkable role online as they help people to find the information they are seeking. Search engines are commonly used by the internet users because without them seeking specific information from the internet is almost impossible or at least really challenging. Search engines are the bottlenecks of information online. Search engines are considered

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[215] Cadwalladr, Carole and Graham-Harrison, Emma, *Revealed: 50 million Facebook profiles harvested for Cambridge Analytica in major data breach*, The Guardian, 17 March 2018, https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election, accessed on 20 March 2020; *Vote Leave's targeted Brexit ads released by Facebook*, BBC News, 26 July 2018, https://www.bbc.com/news/uk-politics-44966969, accessed on 20 March 2020.
[216] Schroeder, 2018, p. 35.
[217] *Cengiz and Others v. Turkey*, (App Nos. 48226/10, 14027/11), ECtHR, 1 December 2015, para 51.
[218] Ibid., para 52.

crucial gatekeepers of information online because in order to find information online people must use them. In the information age, enormous amount of information is available to anyone easily and without high costs. Immense amount of information available does not necessarily mean that the public makes use of it to largest possible extent. Search engines are significant in filtering and making relevant information available from the masses of information.[219] Lucchi describes search engines as "information processor" and "content aggregators".[220]

Search engines undoubtedly are crucial regarding the fulfilment of freedom of information because they list and prioritize information online.[221] Search results of a search carried out through a search engine are prioritized which affects a lot what kind of information an individual encounters online. Search engines, as well as social media platforms, utilise of algorithms when listing and prioritizing information. Therefore, the same search may give different results to persons who have different profile and online search history. It could be considered that the search engines' functions can have a negative impact on the fulfilment of individuals' freedom of information if information of public interest is excluded or deprioritised from the search results. At the same time, search engines have important positive impact on the fulfilment of freedom of information, as without search engines it would be almost impossible to find information one is looking for from the excessive amount of information available on the internet.

The European Court of Justice has in a landmark judgment *Google Spain*, stressed the societal importance of search engines as bottlenecks and gatekeepers of information online.[222] *Google Spain* was among the first judgments that concerned search engines and new technologies in the international case law. Functioning of search engines differs from, and is additional to, functioning of the publishers of websites.[223] Search engines are remarkable because without those, an internet user might not have encountered the website or information she was seeking for, even though a

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[219] Dean, 2002, p. 47; Laidlaw, Emily B, "A Framework for Identifying Internet Information Gatekeepers." International Review of Law, Computers & Technology, Vol. 24, No. 3, 2010, p. 265.
[220] Lucchi, Nicola, "Media Freedom and Pluralism in the Digital Infrastructure" in Jonason, Patricia and Rosengren, Anna (eds.), The Right of Access to Information and the Right to Privacy - A Democratic Balancing Act, Working paper 2017:2, Södertörns högskola, 2017, p. 153.
[221] Recommendation of the Committee of Ministers to member states on promoting freedom of expression and information in the new information and communications environment, the Council of Europe, 26 September 2007, CM/Rec(2007)11, the Guidelines, Chapter I(v).
[222] *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, Case C-131/12, Judgment of the European Court of Justice, 13 May 2014; Schiedermair, Stephanie, "The Right to be Forgotten in the Light of the Google Spain Judgment of the European Court of Justice" in Lind et al., 2015.
[223] *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, Case C-131/12, Judgment of the European Court of Justice, 13 May 2014, para 35.

publisher of website had published the information and thus, it was available online.[224] Hence, search engines can have greater impact on the realisation of freedom of information than the publishers of websites do. The state should not exercise "prior State control over what the public can search for on the Internet".[225] Search engines, which are privately owned, have notable control over what the public finds when it searches information online. The power of search engines is concentrated on hands of only one or few companies.

The Committee of Ministers of the Council of Europe has adopted a recommendation on search engines. Search engines are important for the fulfilment of freedom of information as they facilitate the access to information.[226] It is emphasised in the recommendation that the small amount of search engines might be a problem for the diversity and pluralism of information. Transparency should be the basic principle in the operation of search engines in order to ensure respect for human rights and freedoms.[227] Search engines are valuable to freedom of expression and democratic processes because they "enable a worldwide public to seek, receive and impart information and ideas and other content in particular to acquire knowledge, engage in debate and participate in democratic processes".[228]

3.2 Current phenomena affecting freedom of information online

3.2.1 Privatisation and the concentration of power

One important societal issue with the internet is that the power online is concentrated on hands of a few major internet companies. They have strong position "of influence or even control" of the communications and expressions online.[229] Four biggest and most influential companies in the online business are Google, Apple, Facebook and Amazon, referred to as the GAFA companies. The GAFA companies possess enormous amounts of data and information. Their role is so remarkable in today's

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[224] *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, Case C-131/12, Judgment of the European Court of Justice, 13 May 2014. para 35 – 36.
[225] Explanatory note to the Declaration on freedom of communication on the Internet, Council of Europe, Committee of Ministers, 28 May 2003.
[226] Recommendation of the Committee of Ministers to member States on the protection of human rights with regard to search engines, the Council of Europe, 4 April 2012, CM/Rec(2012)3, para 4.
[227] Recommendation of the Committee of Ministers to member States on the protection of human rights with regard to search engines, the Council of Europe, 4 April 2012, CM/Rec(2012)3.
[228] Ibid., para 1.
[229] Recommendation of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries, the Council of Europe, 7 March 2018, CM/Rec(2018)2, para 7.

communicative and information environment that imposing duties and responsibilities on them is considered justifiable.[230]

Private companies have gained remarkable role as the gatekeepers of information online.[231] Distinction between state and market is fading.[232] The shift of the control over the information flow from the state to private entities that have commercial ambitions can be problematic for freedom of information because private companies do not have similar duty to protect human rights as the states have under international human rights law.[233] Online gatekeepers have gained regulatory powers that have shifted to them from the state.[234] This might risk the fulfilment of freedom of information and other human rights when companies' power online is increasing and the states are lacking that power.[235] The Committee of Ministers of the Council of Europe has acknowledged already in 2007 that non-state actors may affect the fulfilment of human rights online.[236] The increasing power over individuals also means increasing possibilities to violate or affect the fulfilment of human rights and fundamental freedoms of individuals. The lack of regulations and obligations on major internet companies leads to significant imbalance in the power relations between the companies and individuals.[237] Similar imbalance between state and individuals has been traditionally diminished with human rights regulations. The increasing power of private companies might lead to a need of developing basic structures that ensure the protection of human rights by private entities.

The internet has significant potential to advance democracy as internet itself "is extraordinarily democratic".[238] Jodi Dean argues that the internet has lost its potential to become a democratic and

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[230] Recommendation of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries, the Council of Europe, 7 March 2018, CM/Rec(2018)2, para 7.
[231] Weaver, Russell L., *Free Speech and Democracy in an Internet Era*, in Lind et al, 2015, p. 38.
[232] Pasquale, 2015.
[233] Lucchi, Nicola, "Media Freedom and Pluralism in the Digital Infrastructure" in Jonason, Patricia and Rosengren, Anna (eds.), The Right of Access to Information and the Right to Privacy - A Democratic Balancing Act, Working paper 2017:2, Södertörns högskola, 2017, p. 158.
[234] Laidlaw, Emily B, "A Framework for Identifying Internet Information Gatekeepers." International Review of Law, Computers & Technology, Vol. 24, No. 3, 2010, p. 264; Black, Julia, "Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory' World", *Current Legal Problems*, Vol. 54 No. 1, pp. 103-146. 2001, p. 103, p. 110 – 112.
[235] Axberger, Hans-Gunnar, "Constitutional Responsibility for the Free Flow of Information and Ideas in the Internet Age", in Lind et al, 2015.
[236] Recommendation of the Committee of Ministers to member states on promoting freedom of expression and information in the new information and communications environment, the Council of Europe, 26 September 2007, CM/Rec(2007)11.
[237] Zuboff, Shoshana, "Big other: Surveillance capitalism and the prospects of an information civilization", *Journal of Information Technology*, Vol. 30, pp. 75–89, 2015.
[238] Weaver, Russell L., *Free Speech and Democracy in an Internet Era*, in Lind et al, 2015, p. 36.

public place. It has instead become commercialised and market-driven.[239] The development of new communication and entertainment technologies leads to "communicative capitalism" rather than democracy and participation.[240] The internet and modern technology have turned opinions, ideas and other fields of everyday life into commodities that have market value.[241] Today, the internet is a place of market, but also a space of fragmentation.[242] According to Lucchi, the recent legal developments in Europe and the United States concerning the internet have lacked respect for the independence of media and promoted "private forms of controls" which should be avoided.[243]

3.2.2 Anonymity

Anonymity is a special, valued characteristic of the internet. Internet users attach importance to the fact that their identity is not revealed to others and they can communicate with each other anonymously or using pseudonyms. The fundamental role of anonymity in the internet is recognised by the Court and the anonymity is considered a positive feature for enjoying one's freedom of expression.[244] A contradiction exists between individuals' demand for anonymity and state's interest to be able to hold people liable for their acts online.[245] The balance between these two conflicting interests, as well as "other rights and interests" must be struck in a similar way as the Court balances any competing interests in its case law.[246]

It is a principle adopted in a recommendation of the Committee of Ministers of the Council of Europe that individuals may, if they wish, use pseudonyms online rather than exposing their identity.[247] However, not revealing one's identity to other internet users does not necessarily mean that one is fully anonym and her personal information is not disclosed to the service provider. "[D]ifferent degrees of anonymity" exist, depending on the model that the service provider uses. [248] For instance,

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[239] Dean, 2002, p. 110.
[240] Ibid., p. 3.
[241] Ibid., p. 3 – 4.
[242] Dean, 2002.
[243] Lucchi, Nicola, "Media Freedom and Pluralism in the Digital Infrastructure" in Jonason, Patricia and Rosengren, Anna (eds.), The Right of Access to Information and the Right to Privacy - A Democratic Balancing Act, Working paper 2017:2, Södertörns högskola, 2017, p. 158.
[244] *Delfi AS v. Estonia*, (App No. 64569/09), ECtHR, 16 June 2015, para 147.
[245] Declaration on freedom of communication on the Internet, Council of Europe, Committee of Ministers, 28 May 2003; *Delfi AS v. Estonia*, (App No. 64569/09), ECtHR, 16 June 2015, para 149.
[246] Declaration on freedom of communication on the Internet, Council of Europe, Committee of Ministers, 28 May 2003; *Delfi AS v. Estonia*, (App No. 64569/09), ECtHR, 16 June 2015, para 149.
[247] Recommendation of the Committee of Ministers to member States on a Guide to human rights for Internet users, the Council of Europe, 16 April 2014, CM/Rec(2014)6.
[248] *Delfi AS v. Estonia*, (App No. 64569/09), ECtHR, 16 June 2015, para 148.

one can have one and same pseudonym that is always used when the person writes on a certain website but which does not reveal her identity. Pseudonym helps linking the comments the person writes to each other and thus gives a clear picture on how many persons are discussing or publishing comments. Another operations model is that the commenters are completely anonym in the sense that they can write multiple comments and the other users of the service cannot figure out if one person or many people have written the comments. It is relatively easy to impart information and ideas online and make it look like several people are of same opinion, even though it would in reality only be one person behind every comment. This can constitute an illusion that a larger group of persons is of the same opinion than really is, which might weaken the pluralism of information online.

Even though the Court has emphasised the value of anonymity online, there is a trend towards decreasing anonymity and increasing use of pseudonyms or even revealing one's identity before one can contribute to the discussion. The trend might be affected by the number of liability decisions towards intermediaries rather than individuals originally writing the comments. This aspect of liability is more in depth discussed later in the thesis. It should also be noted that a service provider may request the person to reveal her identity to the service provider but not the identity is not revealed to other users but individuals operate behind pseudonyms.

3.3 The information gatekeepers

The internet intermediaries have gained a remarkable role online as facilitators and gatekeepers of information. The intermediaries enable people to enjoy their freedom of expression and information online.[249] The term intermediary is frequently used in relation to new online technologies. The Oxford Dictionary of English defines intermediary as "a person who acts as a link between people in order to try and bring about an agreement; a mediator". The internet intermediaries are companies, organisations or other actors online, who act as a link between the users of the internet. In her analysis, Laidlaw refers to gatekeepers instead of intermediaries.[250]

The traditional gatekeepers are, for instance, the librarians choosing the books that are ordered to a library, as well as journalists in the sense that they have possibility to decide which issues they report

[249] The Report of the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression to the Human Rights Council, 16 May 2011, UN Doc. A/HRC/17/27, para 74.
[250] Laidlaw, Emily B, "A Framework for Identifying Internet Information Gatekeepers." International Review of Law, Computers & Technology, Vol. 24, No. 3, pp. 263-276, 2010.

on and to what extent.[251] The traditional theories of gatekeeping are not entirely applicable online because they are strict and one-way. They include the gatekeeper and the gated, whose access to information the gatekeeper is controlling. On the internet, the roles of the gatekeepers and the gated change and vary constantly. Individuals, who traditionally are the gated, can create and share content online and in certain circumstances become gatekeepers of information. For instance, a blogger is a gatekeeper of the comments written by the visitors on her blog if the blogger can remove the comments. At the same time, the service provider of the platform in which the blogger writes, is the gatekeeper of the blogger because it provides the technical platform of the blog. Thus, a blogger can have a double role as the gatekeeper and the gated.[252] Online, individuals may interact with each other easily and effectively, without interference by the traditional intermediaries. Nevertheless, interaction between individuals online does not completely happen without intermediaries even though one could easily consider it to be so. The internet intermediaries, or the gatekeepers, are constantly present online because the architecture of the internet constitutes of infrastructure developed or controlled by the internet intermediaries. The internet intermediaries are mainly private companies.

The key case of the European Court of Human Rights concerning the internet gatekeepers, or the internet intermediaries, as they are referred to in the Court's case law, is *Delfi v. Estonia*. The case concerns the liability of an internet newspaper for the anonymous comments published in its news portal. The term intermediary is not defined in the Court's decision.[253] However, the Court refers to an appendix of the recommendation by Committee of Ministers of the Council of Europe that concerns the new notions of media. In the appendix, the internet intermediaries' role in the information society is highlighted. In the recommendation, the Committee of Ministers considers that the intermediaries can affect the fulfilment of freedom of expression and information positively because they can prevent states from interfering with freedom of expression and information online. As a potential risk to freedom of expression, the censorship carried out by the intermediaries is mentioned.[254]

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[251] Laidlaw, Emily B, "A Framework for Identifying Internet Information Gatekeepers." *International Review of Law, Computers & Technology*, Vol. 24, No. 3, 2010, p. 264.
[252] Ibid., p. 266.
[253] *Delfi AS v. Estonia*, (App No. 64569/09), ECtHR, 16 June 2015.
[254] The Appendix to the Recommendation of the Committee of Ministers to member states on a new notion of media, the Council of Europe, 21 September 2011, CM/Rec(2011)7, para 63.

In 2018, the Committee of Ministers of the Council of Europe adopted a recommendation on the responsibilities of internet intermediaries. The recommendation defines the internet intermediaries as a "wide, diverse and rapidly evolving range of players" that "facilitate interactions on the internet between natural and legal persons by offering and performing a variety of functions and services".[255] The broad definition covers, *inter alia*, Internet Service Providers (ISPs), web-shops, news portals, blog portals, social media platforms, search engines, online media and online payment providers. These all are services that facilitate actions on the internet and the use of online services.

Zittrain divides the gatekeepers to the traditional gatekeepers which regulate the behaviour of third parties, and to the technological gatekeepers which use technology to regulate individuals.[256] Laidlaw argues that when defining the modern gatekeepers, the ability to control behaviour of third parties is not central but rather the gatekeepers' "power and control over the flow, content and accessibility of information".[257] However, in addition to having the control over the information online, the internet companies, such as social media companies, influence the behaviour of individuals both online and offline. They can for instance affect purchase decisions or which music individuals decide to listen to. The algorithmic categorisation of information online can be considered one of the "forms of control which influence users' access to information online".[258] Thus, the algorithmic categorisation that affects the behaviour of individuals is a form of online gatekeeping.

The internet and social media have the ability to facilitate, promote and inhibit democracy and human rights. This is linked to the two roles that the online gatekeepers have. Firstly, the gatekeepers restrict freedom of information by controlling the access to information. Secondly, a gatekeeper may function as "innovator, change agent, communication channel, link, intermediary, helper, adapter, opinion leader, broker, and facilitator", which has positive effect on freedom of expression.[259]

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[255] Recommendation of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries, the Council of Europe, 7 March 2018, CM/Rec(2018)2, para 4.
[256] Laidlaw, Emily B, "A Framework for Identifying Internet Information Gatekeepers." *International Review of Law, Computers & Technology*, Vol. 24, No. 3, 2010, p 266; Zittrain, Jonathan, 'A History of Online Gatekeeping', *Harvard Journal of Law & Technology,* Vol. 19, No. 2, 2006, p. 253, p. 255 – 256.
[257] Laidlaw, Emily B, "A Framework for Identifying Internet Information Gatekeepers." *International Review of Law, Computers & Technology*, Vol. 24, No. 3, 2010, p. 266.
[258] Recommendation of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries, the Council of Europe, 7 March 2018, CM/Rec(2018)2, para 5.
[259] Metoyer-Duran, Cheryl, 'Information Gatekeepers', *Annual Review of Information Science and Technology,* Vol. 28, 1993, pp. 111 – 118; Laidlaw, Emily B, "A Framework for Identifying Internet Information Gatekeepers." *International Review of Law, Computers & Technology*, Vol. 24, No. 3, 2010, pp. 264-265.

Characteristic for online gatekeeping is that the online gatekeepers perform some of the following acts: deleting, channelling, shaping, manipulating or selecting information.[260] Each of these acts can affect the fulfilment of individuals' freedom of information because they affect the free flow of information. Traditionally, the rights of the gated were not considered to be affected by gatekeeping. In her analysis, Laidlaw emphasizes that many online gatekeepers have impact on the fulfilment of human rights of the gated, especially freedom of expression and information. According to Laidlaw's gatekeeper theory, two types of online gatekeepers exist. Namely, the regular internet gatekeepers that are controlling the flow of information online and the "Internet Information Gatekeepers" (IIGs) that impact "participation and deliberation in democratic culture" as a result of the control over behaviour of individuals.[261] An IIG is "a 'gatekeeper' for the protection of civil and political rights".[262] According to Laidlaw, these two types of gatekeepers have differing responsibilities under international human rights law as IIGs have human rights responsibilities whereas internet gatekeepers do not have those.[263]

According to Laidlaw, human rights that the IIGs can have impact on and control over are only some, namely freedom of expression, the right to privacy and freedom of association and assembly.[264] An IIG can be defined as an entity that "has the capacity to impact democracy in a way traditionally reserved for" the state.[265] An online gatekeeper is a non-state actor that has capacity to affect the behaviour of individuals "in circumstances where the state has limited capacity to do same".[266] This capacity is gained by the role of the IIG, the business type of the IIG and the technology it uses or a combination of these.[267] The analysis reflects the fact that private actors online have gained remarkable power over individuals.

Laidlaw identifies a human rights based method on dividing the internet gatekeepers to the regular gatekeepers and the IIGs.[268] In the method, it is central how much the gatekeeper affects and controls

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[260] Laidlaw, Emily B, "A Framework for Identifying Internet Information Gatekeepers." *International Review of Law, Computers & Technology*, Vol. 24, No. 3, 2010, pp. 266-267.
[261] Ibid., p. 266.
[262] Ibid., p. 267.
[263] Ibid., p. 264, p. 268.
[264] Ibid., p. 268.
[265] Ibid., p. 268.
[266] Ibid., p. 264.
[267] Ibid., p. 268.
[268] Laidlaw, Emily B, "A Framework for Identifying Internet Information Gatekeepers." *International Review of Law, Computers & Technology*, Vol. 24, No. 3, pp. 263 – 276, 2010.

individuals' "deliberation and participation" in democratic society.[269] In the internet, the definition of democracy is broader than the traditional political or representative definition of democracy. The internet promotes the "facilitation and participation in democratic culture" and thus many other forms of speech and expressions than only political speech have significance and are in need of protection online.[270] Even the gatekeepers controlling non-political speech, insomuch that they are contributing to democratic culture, have responsibility to protect freedom of expression, Laidlaw argues.[271] According to Balkin, the "democratic participation" is more important than the "democratic governance" in order to a "democratic culture" to be fulfilled in the digital age.[272]

Laidlaw's analysis should be reviewed with criticism, because international human rights law nor the European Convention on Human Rights do not impose obligations on private parties but only on states. Human rights treaties are binding only to the state parties of the treaty in question. The Convention does not oblige private parties, regardless of their power over individuals, to respect human rights. Therefore, private IIGs do not have human rights obligations under the Convention. Their functions can, however, have an impact on the fulfilment human rights protected by the Convention. The Convention imposes positive obligations on states to protect individuals from interferences of their rights constituted by private parties.

To sum up Laidlaw's Internet gatekeeper theory, an internet information gatekeeper is defined as a gatekeeper that has "control over the flow of information" resulting to possibility to "facilitate or hinder" individuals' "participation in democratic culture".[273] IIGs are divided to above-presented three categories, based on the "democratic significance" of the information they control, the amount of the gated they have and the "structure of the communicative space" the gatekeeper provides.[274]

It is noteworthy that the internet service providers in some cases exercise extensive control over the content published on their platform. This is not usually the case in social media, but in anonymous discussion forums and news portals often after an individual has expressed herself online by leaving

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[269] Laidlaw, Emily B, "A Framework for Identifying Internet Information Gatekeepers." *International Review of Law, Computers & Technology*, Vol. 24, No. 3, 2010, p. 267.
[270] Ibid., p. 269-270.
[271] Ibid., p. 270.
[272] Balkin, Jack, "Digital speech and democratic culture: A theory of freedom of expression for the information society" in *New York University Law Review*, 2004, 79(1), p. 33.
[273] Laidlaw, Emily B, "A Framework for Identifying Internet Information Gatekeepers." *International Review of Law, Computers & Technology*, Vol. 24, No. 3, 2010, p. 273.
[274] Ibid.

a comment, she cannot edit or delete the comment herself. Only the service provider, i.e. the administrator of news portal or discussion forum has control of the content after its publication. This kind of control is classified by the Court "beyond [--] purely technical service provider" and thus the administrator can be considered publisher of the comments.[275] According to Laidlaw's theory, this kind of action by service provider can be defined as internet information gatekeeping.

It is characteristic for the internet intermediaries that they can have multiple simultaneous functions such as being facilitator, publisher and intermediary. The distinction between the internet gatekeepers and media is volatile and overlapping.[276] Not all internet gatekeepers are representatives of the media or publishers of information online and thus they cannot be defined as media in the traditional sense. Other way around, the online media can, in general, be categorised as internet intermediaries. Online media platforms can even be classified as IIGs if they publish user-generated comments.

Difference of being solely an internet intermediary or an online publisher arose in the case *Delfi v. Estonia*. The Estonian Supreme Court had reasoned that an online news media can be considered publisher of third-party comments on its news portal because publishing comments can be considered part of the news company's activities as journalist even though the company does not edit or accept comments before their publication. The online news company did not edit third-party comments before their publication which is a clear distinction from the editorial operations of the traditional media. The domestic court argued that "the nature of internet media" is different than the nature of the traditional media, and therefore, editing the comments is not required in order for the media being classified as a publisher of the comments.[277] The European Court of Human Rights did not substitute the view of the domestic court and found the reasoning of the domestic court applicable. The distinction between the traditional media publishers and the online news portals is important and should be taken into account when regulating journalistic activities online.[278] The Committee of Ministers of the Council of Europe has in its recommendation referred to the "differentiated and graduated approach" which is needed when addressing new notions of media.[279] The differentiated

[275] *Delfi AS v. Estonia*, (App No. 64569/09), ECtHR, 16 June 2015, para 145.
[276] Laidlaw, Emily B, "A Framework for Identifying Internet Information Gatekeepers." *International Review of Law, Computers & Technology*, Vol. 24, No. 3, 2010, p. 265.
[277] *Delfi AS v. Estonia*, (App No. 64569/09), ECtHR, 16 June 2015, para 112; Judgment of the Estonian Supreme Court, 10 June 2009, Case number 3-2-1-43-09, para 14.
[278] *Delfi AS v. Estonia*, (App No. 64569/09), ECtHR, 16 June 2015, para 113.
[279] The Appendix to the Recommendation of the Committee of Ministers to member states on a new notion of media, the Council of Europe, 21 September 2011, CM/Rec(2011)7, para 7.

and graduated approach means basically that the special characteristics of the internet should be taken into account when assessing states' human rights obligations online. Special regulations are acceptable in order to take account of the special characteristics of online services.[280]

In *Delfi*, the news portal company argued that it should be characterised solely as an intermediary which does not have journalistic responsibilities regarding anonymous third-party-generated comments in the comment field of the news portal.[281] If this argument is reviewed having Laidlaw's theory, a news portal defined as an intermediary is a gatekeeper and thus can have responsibilities. An internet intermediary is rarely solely an intermediary but has additional functions due to the special characteristics of the internet. Again, it is important to keep in mind that international human rights law cannot impose obligations or responsibilities directly upon private parties but only upon states that can be obliged to provide legislation to protect individuals from interferences of their rights by third parties.

4. Regulating freedom of information online

4.1 The structure of the digital architecture

The digital architecture affects the modern world tremendously. Therefore, it is significant for society how the technology is regulated.[282] As the digital technology is still a relatively new phenomenon, legal regulations governing it have been lacking or fallen behind. Technology has been developed so rapidly that keeping up with the development of technology has been challenging for legislators. How to regulate technology is one of the special legal issues regarding freedom of information in the digital age. In order to be able to study the relation between technology and legal regulations, the structure and characteristics of the internet and digital architecture will be briefly presented.

The internet consists of three layers, which are the physical layer, the code layer and the content.[283] The physical layer means the physical infrastructure that is needed in order to access the internet. The physical layer comprises, for instance, computers, phones, cables and routers. The code layer is "the

[280] *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, (App No 33014/05), ECtHR, 5 May 2011, para 63-64; The Appendix to the Recommendation of the Committee of Ministers to member states on a new notion of media, the Council of Europe, 21 September 2011, CM/Rec(2011)7, para 7.
[281] *Delfi AS v. Estonia*, (App No. 64569/09), ECtHR, 16 June 2015, para 29.
[282] Goldoni, Marco, "The Politics of Code as Law: Toward Input Reasons", in Lind et al, 2015.
[283] Goldoni, Marco, "The Politics of Code as Law: Toward Input Reasons", in Lind et al, 2015, p. 118; Benkler, Yochai, 'From Consumers to Users: Shifting the Deeper Structures of Regulation toward Sustainable Commons and User Access', *Federal Communications Law Journal*, Vol. 52, 2000, p. 562.

logical infrastructure layer" of the internet, meaning the code and software on which the digital technology is founded on.[284] The content layer extends to all sorts of information imparted and received through the internet, including text, audio-visual content and images. It is the layer most directly affected by freedom of expression regulations.

The internet consists of various websites, of which some can be accessed by everyone and some have restricted access. These different spaces and forums create "self-determination from below"[285] or "a bottom-up filtration system".[286] In the lowest level of visibility on the internet, anyone can express opinions because the lowest level of visibility is open and accessible. If a person or an internet account becomes more popular it might climb to a higher level of visibility and "eventually reach general visibility".[287] Online, the publicity of a platform, website or a space is affected by the service, structure, content and accessibility of the place in question. Publicity and distribution, i.e. the level of visibility, of comments and expressions online is often considered by the Court when balancing freedom of expression and information with other rights.

The digital devices and the digital technology, in general, can only function in the way they are designed, or coded, to function. The code is the law of technology, because the code consists of regulations and norms which instruct the device or the system how to function. The code gives strong instructions to the technological system or device it guides because the code is an absolute norm that cannot be neglected when using the digital device or system. Technological systems consist of codes and therefore the multiple functions of technology follow from the code. Code also "regulates and guides human behaviour" through the technology.[288]

4.2 Online regulations

A regulation can be defined as "the organised attempt to manage risks or behaviour in order to achieve a publicly stated objective or set of objectives".[289] Regulations can consist of three fields: setting

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[284] Benkler, Yochai, 'From Consumers to Users: Shifting the Deeper Structures of Regulation toward Sustainable Commons and User Access', *Federal Communications Law Journal*, Vol. 52, 2000, p. 562.
[285] Laidlaw, Emily B, "A Framework for Identifying Internet Information Gatekeepers." *International Review of Law, Computers & Technology*, Vol. 24, No. 3, 2010, p. 270.
[286] Bracha, Oren and Pasquale Frank, "Federal Search Commission? Access, Fairness, and Accountability in the Law of Search", *Cornell Law Review,* Vol. *93* No. 6, 2008, p. 1159.
[287] Laidlaw, Emily B, "A Framework for Identifying Internet Information Gatekeepers." *International Review of Law, Computers & Technology*, Vol. 24, No. 3, 2010, p. 270; Bracha, Oren and Pasquale Frank, "Federal Search Commission? Access, Fairness, and Accountability in the Law of Search", *Cornell Law Review,* Vol. 93 No. 6, 2008, p. 1159.
[288] Goldoni, Marco, "The Politics of Code as Law: Toward Input Reasons", in Lind et al, 2015, p. 119.
[289] Black, Julia, *Learning from regulatory disasters*, Sir Frank Holmes Memorial Lecture, LSE Law, Society and Economy Working Papers 24/2014, London School of Economics and Political Science Law Department, 2014, p. 3.

standards, changing behaviour and monitoring.[290] The law is a regulation, but there are also other ways to regulate the behaviour in society than the law. Behaviour can be altered "by means of law, by force, by nudging or by means of surreptitious manipulation".[291]

National and international law rest upon the legal norms that guide actions in society. Technological norms that are imposed by the code, and legal norms that are imposed by law have a clear difference. Not following the legal norms is possible even though disobedience can lead to consequences. However, code, "the digital law", is strict and cannot be disobeyed.[292] In general, a technological function can only be carried out if it is coded in the system.

The logical infrastructures of technology are based on code which is a regulatory tool. Online, plenty of regulations exist, but only a few of them are legal regulations. Traditional, "text-driven" legal regulations usually prohibit behaviour or acts, or create norms that oblige to certain behaviour or action, at risk of a sanction.[293] However, the modern technology can be utilised for regulation by design, because the code, the basic foundation of technology, can be used as a regulatory tool.[294] Traditionally, the law consists of "text-driven" regulations whereas the modern technology presents "code-driven" and "data-driven" regulations.[295]

What makes the internet special is that the internet "has no central authority" and it can be considered "a self-organising system [--] where there is order without control".[296] The internet users have had a conception that the internet is not legally regulated, nor supervised, and individuals may do whatever they wish online, regardless of the legal norms of society.[297] This was the case before, when the internet was less popular and not so commonly used, but today, the internet plays so central role in

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[290] Yeung, Karen, "'Hypernudge': Big Data as a mode of regulation by design", *Information, Communication & Society*, Vol. 20 No. 1, 2017, p. 120.
[291] Hildebrandt, Mireille, "Algorithmic regulation and the rule of law*"*, *Philosophical Transactions. Series A, Mathematical, Physical, and Engineering Sciences,* Vol. 376, No. 2128, 2018, p. 4.
[292] Goldoni, Marco, "The Politics of Code as Law: Toward Input Reasons", in Lind et al, 2015, p. 119-120; Lessig, Lawrence, "The Zones of Cyberspace", *Stanford Law Review*, Vol. 48 No. 5, pp. 1403-1411, 1996, p. 1408.
[293] Hildebrandt, Mireille, "Algorithmic regulation and the rule of law*"*, *Philosophical Transactions. Series A, Mathematical, Physical, and Engineering Sciences,* Vol. 376, No. 2128, 2018.
[294] Yeung, Karen, "'Hypernudge': Big Data as a mode of regulation by design", *Information, Communication & Society*, Vol. 20 No. 1, 2017, p. 120.
[295] Hildebrandt, Mireille, "Algorithmic regulation and the rule of law*"*, *Philosophical Transactions. Series A, Mathematical, Physical, and Engineering Sciences,* Vol. 376, No. 2128, 2018.
[296] Naughton, 2000, p. 43; Joyce, Daniel, "Human Rights and the Mediatization of International Law.", Leiden Journal of International Law, Vol. 23, No. 3, 2010, p. 514.
[297] Mcgoldrick, Dominic, "The Limits of Freedom of Expression on and Social Networking Sites: A UK Perspective" in Human Rights Law Review, 2013, 13(1), p. 130.

society that it cannot be considered a place or environment where people can do whatever they wish. The internet is a complex system that has originally been developed by academics, governments and the military but now it is mainly developed by private companies willing to gain economic profit.[298] When discussing legal regulations online, it is significant that both private and public regulations and interests are or have been present on the internet .[299]

Initially, when the internet was developed, the developers wanted it to be an independent environment based on the free flow of information and ideas without regulations, especially without any regulations imposed by governments. One of the first principles of the internet was that the governments should not and cannot regulate it.[300] However, when the use of the internet increased, rules and regulations were needed. The internet started to regulate itself.[301] Self-regulation happened through the code, which is a regulatory tool distinct from the traditional regulatory tools of governments.[302] The Court has acknowledged that the internet "is not and potentially will never be subject to the same regulations and control" as the printed media is subject to.[303] The Court even stresses that the special characteristics of the technology must be taken into account when regulating the internet.[304]

The self-regulation of the internet can give rise to several problems on fulfilment of human rights. The self-regulation of the internet can be problematic because the public service value of the internet has become so enormous. Self-regulation often lacks transparency because, for example, the algorithms that search engines and social media platforms use, are trade secrets of the internet companies. In the absence of legal regulations online, a risk exists that a search engine favours some political arguments or for instance leaves out some search results that can negatively affect market position of the search engine company. To some extent, the risk has already materialised. This can partly result from the lack of legal regulations but also from the indisputable power position of the major internet companies online.

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[298] Joyce, Daniel, "Human Rights and the Mediatization of International Law.", Leiden Journal of International Law, Vol. 23, No. 3, 2010, p. 514.
[299] Ibid.
[300] Barlow, John Perry, *A Declaration of the Independence of Cyberspace*, Davos: Electronic Frontier Foundation, 1996, https://www.eff.org/cyberspace-independence, accessed on 24 March 2020.
[301] Goldoni, Marco, "The Politics of Code as Law: Toward Input Reasons", in Lind et al, 2015, p. 116.
[302] Ibid.
[303] *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, (App No 33014/05), ECtHR, 5 May 2011, para 63.
[304] Ibid.

The internet can be, legally or otherwise, regulated by regulating any of its three layers, which are the physical layer, the code and the content. Regulating the content online can be problematic and difficult especially because the content can vary depending on the receiver, when the algorithmic organising of the content is applied.[305] Controlling the physical layer and the code layer is considered more reasonable than controlling the content and by regulating physical layer and code, the content can also be controlled.[306] Regulating the physical layer or the code of digital infrastructure often require regulating the production of technology. Regulations towards the physical layer of the internet are highly important.[307]

For the same reason, regulating the production of technology is considered more effective than regulating technology that is already up and running.[308] Regulating technology that is already in use, often means regulating the content, which is considered complex. For instance, the fact that the algorithms online cause that the outcome of content and functions of the technology are different for each user, which can complicate regulating the technology already using algorithms in a specific way.

When technology is already started to be used in society, removing it can be difficult. Therefore, it is crucial to regulate the development of technology.[309] The new technologies should be developed with "human rights by design" because the effective implementation of human rights on the internet partly depends on if the technology is designed to support the realisation of human rights and fundamental freedoms.[310]

Imposing legal and administrative regulations on the design and development of new technologies is a way of fulfilling the protection of human rights and freedoms online, including freedom of expression and information.[311] These principles reflect the principles of democratic society.

Also, another important difference between the code and the law exists. Legislation is, at least in principle, public and transparent. Code and the development of code are not often so transparent and

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[305] Goldoni, Marco, "The Politics of Code as Law: Toward Input Reasons", in Lind et al, 2015.
[306] Ibid., p. 125.
[307] Ibid., p. 118.
[308] Ibid., p. 131.
[309] Ibid., p. 128.
[310] *Algorithms and Human Rights - Study on the Human Rights Dimensions of Automated Data Processing Techniques (in Particular Algorithms) and Possible Regulatory Implications*, Council of Europe, DGI(2017)12, Strasbourg, 2018, p. 45-46; Balkin, Jack, "Digital speech and democratic culture: A theory of freedom of expression for the information society" in New York University Law Review, 2004, 79(1), pp. 1-58.
[311] Balkin, Jack, "Digital speech and democratic culture: A theory of freedom of expression for the information society" in New York University Law Review, 2004, 79(1), p. 54.

accessible. It is difficult to assess whether a code or digital system is transparent, accountable and legitimate. Assessing it is considered highly complicated and it requires careful case by case consideration.[312]

The default settings are one example on how "human rights by design" could improve the realisation of human rights. People rarely change the default settings of internet services they use and the default settings are considered the normal settings. The settings are not often changed also because people do not know that the settings could be changed.[313] Thus, if the default settings and terms of service were designed keeping in mind the respect for human rights, including freedom of expression and information, the implementation of human rights might be better in the digital infrastructure, at least to some extent. Goldoni argues that, in order to be legitimate, the design and production of new technologies should be carried out according to the principles of transparency, publicness and chance of participation.[314] In addition, the Committee of Ministers of the Council of Europe has highlighted the significance of transparency of the digital architecture.[315]

Balkin has outlined freedom of expression as a cultural, political and legal system consisting of "technological and regulatory infrastructure".[316] Today, the technological infrastructure has become more and more important concerning freedom of expression and information because the internet has become the principal channel for enjoying one's freedom of expression and information.[317] Hence, regulating production of technology is crucial for the realisation of freedom of information and online.

Much of the attention on legal regulations online has been on creating copyright regulations and on privacy and data protection legislation. This focus on the right to privacy and copyright issues on legal regulations online, even though important rights, may have overshadowed protecting freedom of expression and thus affected negatively the realisation of freedom of expression online.[318] The

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[312] Goldoni, Marco, "The Politics of Code as Law: Toward Input Reasons", in Lind et al, 2015.
[313] Goldoni, Marco, "The Politics of Code as Law: Toward Input Reasons", in Lind et al, 2015, p. 116, p. 128; Brownsword, Roger, "Code, Control and Choice: Why West is West and East is East", *Legal Studies,* Vol. 25, No. 1, pp. 1-21, 2005.
[314] Goldoni, Marco, "The Politics of Code as Law: Toward Input Reasons", in Lind et al, 2015, p. 129.
[315] Recommendation of the Committee of Ministers to member states on promoting freedom of expression and information in the new information and communications environment, the Council of Europe, 26 September 2007, CM/Rec(2007)11.
[316] Balkin, Jack, "Digital speech and democratic culture: A theory of freedom of expression for the information society" in New York University Law Review, 2004, 79(1), p. 51.
[317] *Cengiz and Others v. Turkey*, (App Nos. 48226/10, 14027/11), ECtHR, 1 December 2015, para 49 and 52.
[318] Lucchi, Nicola, "Media Freedom and Pluralism in the Digital Infrastructure" in Jonason, Patricia and Rosengren, Anna (eds.), The Right of Access to Information and the Right to Privacy - A Democratic Balancing Act, Working paper 2017:2, Södertörns högskola, 2017, p. 159.

internet content governance is one issue regarding freedom of expression and the pluralism of information online. Blocking content and adopting strict copyright regulations has implications to freedom of information and the availability of information. Therefore, a balance must be struck between freedom of information and regulating content.[319]

The international human rights law regulations explicitly concerning the digital technology or its production and development are scarce. This has been noticed by the international community and the Committee of Ministers of the Council of Europe has encouraged states and private sector "to develop common standards and strategies regarding" freedom of expression and information in digital age.[320] In the United States, the legal regulations concerning the internet were debated already in 1990's. The counterparts were scholars who argued that the internet needed to be specifically regulated legally, and the scholars who argued that anything is possible to be regulated with the laws that already existed and no special laws were needed regarding the internet.[321]

Some authors have attempted to create normative criteria for the code as law. The protection of human rights has been emphasized in these inquiries. Many of the authors have followed the similar reasoning that the Court does in its case law and relating to democratic society. Transparency, proportionality, accountability and democratic values are highlighted in the attempts to create normative criteria.[322]

The European Convention on Human Rights, as well as other general human rights treaties, do not explicitly mention the internet. However, because the internet is a significant platform in today's society it must be acknowledged that the human rights principles are also applicable online. Human rights are universal and belong to everyone everywhere, even online. Despite that, the internet has in

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[319] Lucchi, Nicola, "Media Freedom and Pluralism in the Digital Infrastructure" in Jonason, Patricia and Rosengren, Anna (eds.), The Right of Access to Information and the Right to Privacy - A Democratic Balancing Act, Working paper 2017:2, Södertörns högskola, 2017, p. 153-154.

[320] Recommendation of the Committee of Ministers to member states on promoting freedom of expression and information in the new information and communications environment, the Council of Europe, 26 September 2007, CM/Rec(2007)11.

[321] Goldoni, Marco, "The Politics of Code as Law: Toward Input Reasons", in Lind et al, 2015, p. 117; Easterbrook, Frank, "Cyberspace and the Law of the Horse", *University of Chicago Legal Forum*, pp. 207-216, 1996; Lessig, Lawrence, "The Law of the Horse: What cyberlaw might teach", *Harvard Law Review*, Vol. 113 No. 2, pp. 501-549.

[322] Reidenberg, Joel R., "States and Internet Enforcement", *University of Ottawa Law & Technology Journal*, Vol. 1, p. 213-230, 2003-2004; Brownsword, Roger, "What the World Needs Now: Techno-Regulation, Human Rights and Human Dignity", in Brownsword (ed.), *Human Rights*, Oxford: Hart, 2004, p. 218; Koops, Bert-Jaap, "Criteria for Normative Technology", in Brownsword, Roger, *Regulating Technologies,* Oxford: Hart, 2008, p. 159; Asscher, Lodewijk, "'Code as Law. Using Fuller Access Code Rules", in Dommering, Egbert, Asscher, Lodewijk (eds.), *Coding Regulation*, The Hague: Asser Press, 2006, p. 85-88; Goldoni, Marco, "The Politics of Code as Law: Toward Input Reasons", in Lind et al, 2015, p. 122 – 125.

its early years suffered from the lack of regulations. The legal regulations and norms regarding the internet have only recently started to develop. It can be argued that the internet lacks human rights regulations. Special treaties concerning the internet and human rights are largely missing. Only recently, the states have started to create frameworks or legislation to legally regulate the internet and actions online. Also, case law on the issue has started to develop recently. Of course, the traditional international human rights treaties, such as the European Convention on Human Rights are applicable online and human rights must be protected and fulfilled also in the digital architecture.

Certain aspects might have affected that legal framework concerning the internet is missing or developing relatively slowly. Regulating the internet intermediaries and the digital environment by law has met practical problems and challenges stemming from the special nature of the internet and the special questions arising regarding the protection of freedom of expression and information online. For instance, the globality of the internet, the variety of intermediaries and actors online as well as the speediness and volume of communications online make regulating the internet and defining state obligations on the internet complicated.[323]

One problem is that online services and internet companies cannot be categorised territorially as strictly as the companies functioning in the offline world.[324] Characteristic for the internet is that it is global. The most popular social media services used in Europe are US based, which gives rise to questions regarding territoriality.[325] The globality of the internet has to be considered, because many intermediaries operate and their services are used globally, or at least regardless of state frontiers. Article 10 of the Convention provides the right to freedom of expression to everyone "regardless of frontiers". The Court has decided in *Ahmet Yildirim* that a comprehensive ban of Google Sites directly violated the principle of guaranteeing freedom of expression and information to everyone everywhere, regardless of where they reside.[326] Thus, it is difficult to define which state's legislation should be imposed in which situation. The legislations in different states can differ or even be in conflict with each other.[327] This is a strong argument towards the need of international legal

[323] Recommendation of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries, the Council of Europe, 7 March 2018, CM/Rec(2018)2, para 9.
[324] Mcgoldrick, Dominic, "The Limits of Freedom of Expression on and Social Networking Sites: A UK Perspective." in Human Rights Law Review, 2013, 13(1), p.128.
[325] Ibid.
[326] *Ahmet Yildirim v. Turkey*, (App. No. 3111/10), ECtHR, 18 December 2012, para 67.
[327] Recommendation of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries, the Council of Europe, 7 March 2018, CM/Rec(2018)2, para 9.

framework addressing the internet. The internet intermediaries, or the internet gatekeepers, have in the lack of legal framework self-regulated their functions by means of "terms of service" or "community standards".[328] One challenge is that imposing legislation that obliges the internet gatekeepers to monitor the information they process might have a chilling effect on freedom of expression.[329]

Even though the focus of this thesis is on the European Court of Human Rights, which is not an organ of the European Union (the EU), the legislative measures of the EU are briefly addressed because the European Union has discussed and lately put into practice "creative approaches" of addressing the major internet companies.[330] The EU regulations are leading the way of regulating legally the use of algorithms. The nature of the internet is changing. The globality of the internet might be diminishing in the future because the internet is starting to fragmentise territorially and is losing its nature as a universal platform for communication. China is isolated online and Europe's internet sphere is affected by, for instance, the EU General Data Protection Regulation (GDPR) which took effect in May 2018. The GDPR is the most comprehensive regulation so far on area of automated collection and use of personal data online.[331] Perhaps, regulating the internet is not as challenging as was considered before. Now, when the legal framework regulating the internet is starting to take its form, the online actors are adjusting to legislation. Increasing legal regulations online may however affect the fundamental characteristics of the internet as an open and public place where everybody has possibility to exercise their freedom of expression by receiving, imparting and seeking information. According to Balkin, if the internet is not legally regulated to serve the public interest as a plural and universal platform for political participation and enjoyment of freedom of expression, it will not remain an environment for public participation but will be governed by private, profit-oriented companies.[332] Thus, considering and respecting the human rights regulations when regulating the internet would be important for protection of freedom of information, and other human rights, online.

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[328] Recommendation of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries, the Council of Europe, 7 March 2018, CM/Rec(2018)2 para 10.
[329] *Algorithms and Human Rights - Study on the Human Rights Dimensions of Automated Data Processing Techniques (in Particular Algorithms) and Possible Regulatory Implications*, Council of Europe, DGI(2017)12, Strasbourg, 2018, p. 46.
[330] Pasquale, 2015, p. 163.
[331] Mantelero, Alessandro, "AI and Big Data: A blueprint for a human rights, social and ethical impact assessment", *Computer Law & Security Review: The International Journal of Technology Law and Practice,* Vol. 34 No. 4, 2018, p. 755.
[332] Balkin, Jack, "Digital speech and democratic culture: A theory of freedom of expression for the information society" in New York University Law Review, 2004, 79(1), p. 23.

Another challenge in regulating the internet is that it has been difficult to keep the legal regulations up with the brisk pace of the technological development.[333] The rapid development and rise of new communication and information technologies has posed challenges to adopting comprehensive legal frameworks and regulations concerning them. Legal practise of countries has been varying and controversial.[334] The European Court of Human Rights acknowledges that because of the rapid technological development, the legislations of European countries concerning the internet are "dynamic and fragmented".[335] The situation has been partly developing in the recent years, as for example the European Union has adopted legal framework concerning the internet.

5. Legal norms and the Court's principles concerning freedom of information online

5.1 Media freedom

Media freedom, or freedom of the press as it is often referred to, is closely linked to freedom of information online. Freedom of expression includes media freedom and media pluralism which are the key principles and preconditions for functioning democracy in which people can participate in democratic culture.[336] Press freedom is a recurrent case topic in the Court under Article 10 of the Convention. The Court has acknowledged that freedom of expression and information in online media and on the internet generally, as well as internet freedom and access to internet, enjoy "high level of protection" under Article 10 of the Convention.[337]

The European Court of Human Rights has acknowledged that Article 10 of the European Convention on Human Rights imposes states a positive obligation to create regulatory framework to ensure protection of journalists' freedom of expression on the internet.[338] In *Editorial Board of Pravoye Delo and Shtekel*, the Court specified that the legislation was lacking the safeguards protecting that the journalists may use information from the internet. The Court considered that the domestic legislation

[333] Mcgoldrick, Dominic, "The Limits of Freedom of Expression on and Social Networking Sites: A UK Perspective." in Human Rights Law Review, 2013, 13(1), p. 129.
[334] Lucchi, Nicola, "Media Freedom and Pluralism in the Digital Infrastructure" in Jonason, Patricia and Rosengren, Anna (eds.), The Right of Access to Information and the Right to Privacy - A Democratic Balancing Act, Working paper 2017:2, Södertörns högskola, 2017, p.151.
[335] *Ahmet Yildirim v. Turkey*, (App. No. 3111/10), ECtHR, 18 December 2012, para 31.
[336] Lucchi, Nicola, "Media Freedom and Pluralism in the Digital Infrastructure" in Jonason, Patricia and Rosengren, Anna (eds.), The Right of Access to Information and the Right to Privacy - A Democratic Balancing Act, Working paper 2017:2, Södertörns högskola, 2017, p.151; Balkin, Jack, "Digital speech and democratic culture: A theory of freedom of expression for the information society" in New York University Law Review, 2004, 79(1), pp. 1-58.
[337] Voorhoof, 2014, p. 3.
[338] *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, (App No 33014/05), ECtHR, 5 May 2011, para 61-64.

must have provisions that guarantee freedom of the press also concerning information that is obtained online. Since the case *Editorial Board of Pravoye Delo and Shtekel*, the Court has applied its general principles concerning freedom of the press also to internet publications.[339]

The notion of media has broadened by the development of the internet. The new notion of media includes a broad number of information disseminators, as well as social networks and online games.[340] The media has power to affect freedom of information, because the media is a gatekeeper which has power to decide what information people receive online, by deciding what they broadcast and publish.[341]

The digital media is poorly regulated and new legal regulations often affect the online media negatively. The discovery of the internet had revolutionary influence on legal regulatory framework governing media. There have been efforts to limit and restrict the internet media and the free flow of information online in almost every state.[342] Also, states have often operated regarding digital media and new technologies in a manner that is incompatible with the legislation and thus lacks authority. This can have serious negative impact on the fulfilment of freedom of expression and information online.[343] The Court's principles regarding freedom of expression and information firmly base on principle of legitimacy. This means that a legal ground for an interference must always exist and it is a part of the three-fold test applied by the Court in cases under Article 10. Thus, the lack of legal framework governing freedom of expression and information online is a risk for the fulfilment of freedom of expression and information. The UN Human Rights Committee has stressed that legal regulatory systems should take into account the differences, as well as similitudes, of the traditional media and the internet.[344]

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[339] *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, (App No 33014/05), ECtHR, 5 May 2011; Bychawska-Siniarska, 2017, p. 108.
[340] *Delfi AS v. Estonia*, (App No. 64569/09), ECtHR, 16 June 2015; Recommendation of the Committee of Ministers to member states on a new notion of media, the Council of Europe, 21 September 2011, CM/Rec(2011)7.
[341] Joyce, Daniel, "Human Rights and the Mediatization of International Law.", Leiden Journal of International Law, Vol. 23, No. 3, 2010, p. 517.
[342] Lucchi, Nicola, "Media Freedom and Pluralism in the Digital Infrastructure" in Jonason, Patricia and Rosengren, Anna (eds.), The Right of Access to Information and the Right to Privacy - A Democratic Balancing Act, Working paper 2017:2, Södertörns högskola, 2017, p. 156.
[343] Ibid., p. 157; The Report of the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression to the Human Rights Council, 16 May 2011, UN Doc. A/HRC/17/27.
[344] UN Human Rights Committee General Comment No. 34: Freedoms of opinion and expression (Art. 19), 12 September 2011, UN doc. CCPR/C/GC/34, para 34.

The international legal regulations regarding the online media are increasingly needed and discussed because the media field has become more global through the development of the internet.[345] The traditional regulations on media are not entirely applicable online and on the digital technology because the content and architecture of them differs significantly from the content and architecture of the traditional media.[346]

Legal regulations affect the media but also the evolution of media shapes legal regulations. This is called the "mediatization of international law".[347] Mediatisation or mediation are terms used defining how the world becomes more and more affected by the media.[348] The international law acknowledges "the media's role both as the object of regulation and as an influence on international society".[349] This phenomenon is applicable also to the development of technology more generally. The law is not a distinct part of society, but it is adopted and developed taking account of changes in the attitudes and reality of society. The development of technology affects the development of legislation and vice versa. It is important to acknowledge that as much as the law can change technology, the technology may also affect, and has affected, the law.[350]

Media is closely related to human rights.[351] NGOs and the media can impart information on human rights through the internet. This has remarkable importance for the fulfilment of human rights and fundamental freedoms of individuals.[352] In democratic societies, where freedom of expression is of crucial value, the media is considered a social good that should be protected.[353] The press has a crucial meaning in a democratic society to impart information and ideas, and "the public also has a right to receive them".[354] As media freedom is considered important value in international human rights law, media is often left self-regulating itself.[355] The self-regulation and the high level of protection of

[345] Joyce, Daniel, "Human Rights and the Mediatization of International Law.", *Leiden Journal of International Law*, Vol. 23, No. 3, 2010, p. 508.
[346] Ibid., p. 515.
[347] Ibid., p. 508, p. 516.
[348] Ibid., p. 516.
[349] Ibid., p. 509.
[350] Goldoni, Marco, "The Politics of Code as Law: Toward Input Reasons", in Lind et al, 2015, p. 116.
[351] Joyce, Daniel, "Human Rights and the Mediatization of International Law.", *Leiden Journal of International Law*, Vol. 23, No. 3, 2010, p. 509.
[352] Ibid., p. 517.
[353] Ibid., p. 511.
[354] *Times Newspaper Ltd v. the United Kingdom (Nos. 1 and 2)*, (App. Nos. 3002/03, 23676/03), ECtHR, 10 March 2009, para 40.
[355] Joyce, Daniel, "Human Rights and the Mediatization of International Law.", *Leiden Journal of International Law*, Vol. 23, No. 3, 2010, p. 511.

media freedom can hinder the states' possibility to legally regulate and limit powers of internet companies which can also be categorised as media companies.

Legal regulations concerning social media might be even more challenging to impose than legal regulations on online media in general, because social media is different from the professional media outlets. In social media, the distinctions between public and private, as well as between mass communication and individual communication, are fading.[356] Often the administrator of the page moderates the discussion and deletes comments that might be unlawful or contrary to the good practice. Another example is discussions between individuals that are held on private groups or in private page or profile of an individual. In this case it is more difficult to decide if the discussion is public or private. This depends on the nature of the comments as well as their reach. The traditional freedom of expression and information norms must adapt to social media as it becomes, and has already become, more and more important and meaningful in the everyday life of individuals.[357]

Independent, diverse and plural media has a crucial role in a democratic information society, yet, at the same time, the media has responsibilities.[358] Same legal obstacles that hinder the realisation of potential that the new technologies have hinders also media pluralism.[359] Joyce argues that for a true and functioning international information society, the digital architecture and material resources should be available to everyone everywhere.[360]

The primary role of the media in democratic society is to function as a public watchdog.[361] The term public watchdog refers traditionally to media. Social watchdog, which is a new term, may include NGOs, campaign groups, popular social media figures, bloggers and academics.[362] What unites the

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[356] Mcgoldrick, Dominic, "The Limits of Freedom of Expression on and Social Networking Sites: A UK Perspective." in Human Rights Law Review, 2013, 13(1), p.151.
[357] Ibid.
[358] Declaration of Principles, Building the Information Society: a global challenge in the new Millennium, World Summit on the Information Society, Document WSIS-03/GENEVA/DOC/4-E, 12 December 2003; Joyce, Daniel, "Human Rights and the Mediatization of International Law.", Leiden Journal of International Law, Vol. 23, No. 3, 2010, p. 514 - 515.
[359] Lucchi, Nicola, "Media Freedom and Pluralism in the Digital Infrastructure" in Jonason, Patricia and Rosengren, Anna (eds.), The Right of Access to Information and the Right to Privacy - A Democratic Balancing Act, Working paper 2017:2, Södertörns högskola, 2017, p. 152.
[360] Joyce, Daniel, "Human Rights and the Mediatization of International Law.", Leiden Journal of International Law, Vol. 23, No. 3, 2010, p. 526.
[361] *Times Newspaper Ltd v. the United Kingdom (Nos. 1 and 2)*, (App. Nos. 3002/03, 23676/03), ECtHR, 10 March 2009, para 45; *Cumpana and Mazare v. Romania*, (App. No. 33348/96), ECtHR, 17 December 2004, para 93.
[362] *Magyar Helsinki Bizottság v. Hungary*, (App. No. 18030/11), ECtHR, 8 November 2016, para 164 – para 168; Rainey, Wicks, Ovey & Jacobs, 2017, p. 506.

social watchdogs, is that they have "a message outside the mainstream".[363] United Nations Human Rights Committee has linked bloggers and others who publish online, and are followed by a substantive number of people, to professional journalists.[364] Being able to gather information, and thus having the access to information, is important for journalists and others who use their role as public or social watchdogs. The public and social watchdogs enjoy special protection of freedom of expression and information under Article 10 of the Convention.

The Court has acknowledged that imparting information and ideas through audio-visual broadcasting is more effective than imparting information and ideas in traditional printed media.[365] The Court explicitly refers to radio and television, but it is beyond dispute that the online media can be equalled to the audio-visual media regarding its effectiveness. The new notions of media are even more effective in imparting information and ideas, and especially in influencing individuals' thoughts and behaviour, than radio and television are. The Court has acknowledged that the audio-visual media has "more immediate and powerful effect than the print media".[366] This should be taken into account when considering the "duties and responsibilities" of the professional media and journalists.[367] One can argue that the social media is even more powerful than the other audio-visual media because social media is not only an audio-visual media but the content of it is created by users and based on active interaction between users.

The media has a duty to impart information and the public also has the "right to receive information of general interest" as part of the public's right to freedom of information.[368] The Court has acknowledged that the public has right "to be properly informed" of matters of public interest.[369] The Court has further acknowledged that in addition to the right to freedom to impart information, Article 10 guarantees also "the right of the public to receive it".[370] This right is fulfilled by adequate

[363] Voorhoof, 2014, p.11; *Youth Initiative for Human Rights v. Serbia*, (App. No. 48135/06), ECtHR, 25 June 2013.
[364] UN Human Rights Committee General Comment No. 34: Freedoms of opinion and expression (Art. 19), 12 September 2011, UN doc. CCPR/C/GC/34, para 44.
[365] *Manole and Others v. Moldova*, (App. No. 13936/02), ECtHR, 17 September 2009.
[366] *Delfi AS v. Estonia*, (App No. 64569/09), ECtHR, 16 June 2015, para 139, *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, (App no 33014/05), ECtHR, 5 May 2011.
[367] *Delfi AS v. Estonia*, (App No. 64569/09), ECtHR, 16 June 2015, para 134.
[368] *Társaság a Szabadságjogokért v. Hungary*, (App. No. 37374/05), ECtHR, 14 April 2009, para 26; *Cengiz and Others v. Turkey*, (App Nos. 48226/10, 14027/11), ECtHR, 1 December 2015, para 56.
[369] *Sunday Times v. the United Kingdom (No. 1)*, (App No. 6538/74), ECtHR, 26 April 1979.
[370] *Times Newspaper Ltd v. the United Kingdom (Nos. 1 and 2)*, (App. Nos. 3002/03, 23676/03), ECtHR, 10 March 2009, para 27.

protection of freedom of information because if freedom of information is fulfilled, people are informed of issues of public interest.

The media has a significant role as an archiver of news.[371] The Court has considered that internet archives enjoy protection under Article 10 of the Convention. This is especially because of the capacity of the internet "to store and communicate vast amounts of information" as well as the accessibility of the internet.[372] The interest of the public to access internet archives can be considered legitimate and the access to internet archives is thus protected under Article 10 of the Convention.[373] In addition, the Court puts weigh on the fact that the internet archives are generally free of charge.[374] However, there is a tendency towards turning news archives and other online features subject to a charge. In case *Cengiz and Others,* the Court considered YouTube "a very popular platform for political speeches and political and social activities" which also contained "information that could be of particular interest to anyone".[375] In the light of this, it can be argued that news archives, video archives and even social media platforms can be foundations of information on matters of public interest.

Stemming from its special role as public watchdog, the press has a duty to impart "information and ideas on all matters of public interest".[376] The Court has stressed in the judgment *Sunday Times* that the journalists enjoy high protection of freedom of expression under the Convention when they are covering matters of public interest.[377] The journalists are safeguarded the protection "in relation to reporting on issues of general interest" if they act in good faith "in order to provide accurate and reliable information in accordance with the ethics of journalism".[378] The wording stresses that

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[371] *Times Newspaper Ltd v. the United Kingdom (Nos. 1 and 2)*, (App. Nos. 3002/03, 23676/03), ECtHR, 10 March 2009, para 45.
[372] Ibid., para 27.
[373] *Węgrzynowski and Smolczewski v. Poland*, (App. No. 33846/07), ECtHR, 16 July 2013, para 65.
[374] *Times Newspaper Ltd v. the United Kingdom (Nos. 1 and 2)*, (App. Nos. 3002/03, 23676/03), ECtHR, 10 March 2009, para 45.
[375] *Cengiz and Others v. Turkey*, (App Nos. 48226/10, 14027/11), ECtHR, 1 December 2015, para 51. See also, *Khurshid Mustafa and Tarzibachi v. Sweden*, (App. No. 23883/06), ECtHR, 16 December 2008, para 44.
[376] *Delfi AS v. Estonia*, (App No. 64569/09), ECtHR, 16 June 2015, para 132; See also, amongst others, *Observer and Guardian v. the United Kingdom*, (App. No. 13585/88), ECtHR, 26 November 1991, para 59(b); *Jersild v. Denmark*, (App. No. 15890/89), ECtHR, 23 September 1994, para 31; *Bladet Tromsø and Stensaas v. Norway*, (App. No. 21980/93), ECtHR, 20 May 1999, para 59 and para 62; *Magyar Helsinki Bizottság v. Hungary*, (App. No. 18030/11), ECtHR, 8 November 2016, para 165.
[377] *Sunday Times v. the United Kingdom (No. 1)*, (App No. 6538/74), ECtHR, 26 April 1979.
[378] *Magyar Helsinki Bizottság v. Hungary*, (App. No. 18030/11), ECtHR, 8 November 2016, para 159; *Goodwin v. the United Kingdom*, (App. No. 17488/90), ECtHR, 27 March 1996, para 39; *Fressoz and Roire v. France*, (App. No. 29183/95), ECtHR, 21 January 1999, para 54; *Bladet Tromsø and Stensaas v. Norway*, (App. No. 21980/93), ECtHR, 20 May 1999, para 65.

freedom of expression under Article 10 of the Convention carries with it responsibilities and the journalists have a responsibility to act ethically, respecting human rights. [379] Obviously, these principles also apply to media operating online.

Regulating actors belonging under new notion of media must be carefully reviewed so that the media freedom as well as the media users' freedom of information is protected and respected. Any regulation that may lead to self-censorship, or prior restraints, should be avoided.[380]

5.2 Prior restraints

Because of the universality of human rights, the states have under international law an obligation to protect human rights equally everywhere and for everyone. As a result, human rights and fundamental freedoms, including freedom of expression and information, must be equally fulfilled, respected and protected online and offline.[381] However, because of "the special nature of the Internet" and other new technologies, special questions and issues arise regarding the protection of the rights and freedoms under Article 10 of the European Convention on Human Rights online compared to the protection under Article 10 traditionally.[382]

In *Youth Initiative for Human Rights,* the state had refused an information request made by an NGO. The applicant NGO requested access to information concerning electronic surveillance carried out by the state authorities. The Court decided that the state's refusal amounted to an interference with freedom of information of the NGO under Article 10. After having examined the case with the three-fold test, the Court found the interference incompatible with the Convention, and thus found a violation of Article 10. The ground for incompatibility was that a domestic legal body had given an order to provide the requested information for the NGO, but the order was not fulfilled.[383]

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[379] *Magyar Helsinki Bizottság v. Hungary*, (App. No. 18030/11), ECtHR, 8 November 2016, para 159; *Goodwin v. the United Kingdom*, (App. No. 17488/90), ECtHR, 27 March 1996, para 39; *Fressoz and Roire v. France*, (App. No. 29183/95), ECtHR, 21 January 1999, para 54; *Bladet Tromsø and Stensaas v. Norway*, (App. No. 21980/93), ECtHR, 20 May 1999, para 65.

[380] Recommendation of the Committee of Ministers to member states on a new notion of media, the Council of Europe, 21 September 2011, CM/Rec(2011)7.

[381] Recommendation of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries, the Council of Europe, 7 March 2018, CM/Rec(2018)2, para 1.1.3.; Declaration of the Committee of ministers on human rights and the rule of law in the Information Society, the Council of Europe, 13 May 2005, CM(2005)56 final.

[382] *Delfi AS v. Estonia*, (App No. 64569/09), ECtHR, 16 June 2015, para 113.

[383] *Youth Initiative for Human Rights v. Serbia*, (App. No. 48135/06), ECtHR, 25 June 2013.

The European Court of Human Rights has decided that banning access to entire website or an internet portal (Google Sites or YouTube) cannot be held compatible with the Convention because it restricts the right to freedom to impart and receive information under Article 10 of the Convention.[384] The case *Ahmet Yildirim* concerns the ban of Google Sites, which is a tool for creating websites, in Turkey. The ban was imposed because allegedly illegal content was published on one of the websites hosted by Google Sites. Google Sites hosted substantial number of websites. Completely banning functioning of Google Sites affects even other websites than the one with allegedly illegal content. It affected everyone residing in Turkey and wanting to access a website hosted by Google Sites. Complete ban of contents in a platform makes "large quantities of information inaccessible".[385] The blockage had continued for several months, which was a relatively long time.[386]

In *Ahmet Yildirim*, the Court considered banning access to Google Sites a prior restraint. The main legal issue of the case concerns possible "collateral effect of a preventive measure".[387] The Court found that blocking the access to Google Sites "had a significant collateral effect".[388] Banning of whole internet service, in this case Google Sites, is collateral ban that can have serious effect on individuals' possibility to exercise their freedom of expression and information. Article 10 obliges states to avoid collateral damage which can be caused for instance when a whole website or social media account is blocked because of containing something unlawful. This kind of ban may have collateral effect on lawful material that is banned without a clear reason.[389] The case was the first case in which the Court dealt with freedom of expression in "Web 2.0-based platforms", referring to blog portals, social media and other interactive internet platforms.

State's interferences with Article 10 that take form of a prior restraint or "censorship prior to publishing" weaken the fulfilment of freedom of expression the most and thus need strong grounds to be held permissible under the Convention.[390] Prior restraints are especially harmful when directed at the media because a prior restraint may refuse the media from publishing news or other information of public interest. However, restraints aimed at private individuals may also amount to prior restraints

[384] *Ahmet Yildirim v. Turkey*, (App. No. 3111/10), ECtHR, 18 December 2012; *Cengiz and Others v. Turkey*, (App. No:s. 48226/10, 14027/11), ECtHR, 1 December 2015.
[385] *Ahmet Yildirim v. Turkey*, (App. No. 3111/10), ECtHR, 18 December 2012, para 66.
[386] Ibid., para 45.
[387] Ibid., para 52.
[388] Ibid., para 66.
[389] *Kablis v. Russia*, (App. Nos. 48310/16, 59663/17), ECtHR, 30 April 2019, para 94.
[390] Bychawska-Siniarska, 2017, p. 35, *Kablis v. Russia*, (App. Nos. 48310/16, 59663/17), ECtHR, 30 April 2019, para 91.

if the subject of the expression is current and of public interest.[391] Prior restraints are not explicitly forbidden under the Convention. However, any possible grounds and circumstances for prior restraints must be legally regulated. Legislation must ensure judicial review that hinders arbitrarily imposed prior restraints or the misuse of power.[392] According to the Court, prior restraints demand very careful legal scrutiny especially if the prior restraint is aimed at the press.[393]

An NGO, which intervened in *Ahmet Yildirim* as a third-party, reasons that Google Sites cannot be considered a website but rather a system that includes enormous amount of data and information and could be compared to "online archives of major newspapers or traditional libraries".[394] According to the third-party intervener, the ban could be considered "a prior restraint on publication" meaning that it could be paralleled with pre-publication censorship of the press, in traditional sense.[395] The intervening NGO interpreted the ban to constitute collateral censorship because banning the access to Google Sites caused blocking access to numerous other web pages than the one in which unlawful content was published, including Google's services such as YouTube. YouTube is considered by the Court as an important means of communication and a unique platform for exercising one's freedom of expression and information, including imparting and receiving information of public interest, online.[396]

Recently, in *Kablis*, the Court found a violation of Article 10 when state had blocked applicants' social media account as well as three blog posts written by the applicant.[397] The Court considered that no pressing social need existed for blocking the account and the blog posts. According to the Court, the measures taken by respondent state constituted a prior restraint as the blocking order was given by a deputy prosecutor, without a court decision declaring the content of blog posts or applicant's account illegal. The Court argued that blog posts concerned issues of general public interest and therefore blocking them constituted a violation of Article 10. Online, information is often time-bound and delays in publishing information may cause that imparting the information meaningless. The Court has marked this in *Kablis* as a reason why prior restraints need to be defined strictly

[391] *Kablis v. Russia*, (App. Nos. 48310/16, 59663/17), ECtHR, 30 April 2019, para 91.
[392] *Ahmet Yildirim v. Turkey*, (App. No. 3111/10), ECtHR, 18 December 2012, para 64.
[393] Ibid., para 47.
[394] Ibid., para 43.
[395] Ibid.
[396] *Cengiz and Others v. Turkey*, (App Nos. 48226/10, 14027/11), ECtHR, 1 December 2015, para 51.
[397] *Kablis v. Russia*, (App. Nos. 48310/16, 59663/17), ECtHR, 30 April 2019, para 90.

beforehand.[398] This concerns both information published by media as well as communications between individuals.

In a concurring opinion, judge Pinto de Albuquerque analysed the principles that the Court's assessment on *Ahmet Yildirim* could give rise to. He formulates "the minimum criteria for Convention-compatible legislation on Internet blocking measures".[399] According to de Albuquerque's analysis, a total ban of access to the internet or a ban of access to parts of the internet, for instance web portals, internet databases or social media platforms, "for whole populations or segments of the public" is never compatible with the convention.[400] Total ban is easy for states to carry out because it does not require careful scrutiny. However, in practice such ban is not acceptable because it unproportionally affects either information that is of public interest or other people than those who initially published the unlawful information.

5.3 The liability

In cases concerning the internet, the Court has mainly applied Article 8 on right to privacy and Article 10 on freedom of expression. Many of the Court's decisions regarding the internet under Article 10 of the European Convention on Human Rights concern the liability and the responsibilities of third parties.

The liability of the internet news portals has been addressed by the Court in a number of cases.[401] The Court has addressed that the responsibilities of internet news portals differ from the responsibilities of the traditional media publishers.[402] Online news portals cannot be considered publishers of third-party comments situated at their portal in the same way as the traditional media is considered publisher of letters to the editors in printed media. However, "under certain circumstances" the internet portals are held responsible "for user-generated content".[403]

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[398] *Kablis v. Russia*, (App. Nos. 48310/16, 59663/17), ECtHR, 30 April 2019, para 91 and para 96.
[399] *Ahmet Yildirim v. Turkey*, (App. No. 3111/10), ECtHR, 18 December 2012, Concurring Opinion of Judge Pinto de Albuquerque.
[400] Ibid.
[401] *Delfi AS v. Estonia*, (App No. 64569/09), ECtHR, 16 June 2015; *Magyar Jeti Zrt v. Hungary*, (App. No. 11257/16), ECtHR, 4 December 2018; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary,* (App. No. 22947/13), ECtHR, 2 February 2016.
[402] *Magyar Jeti Zrt v. Hungary*, (App. No. 11257/16), ECtHR, 4 December 2018, para 66; *Delfi AS v. Estonia*, (App No. 64569/09), ECtHR, 16 June 2015, para 113.
[403] *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary,* (App. No. 22947/13), ECtHR, 2 February 2016, para 62.

The states have been increasingly striving for controlling the internet gatekeepers and holding them liable for enabling public's access to content that is considered illegal.[404] The internet intermediaries have also been held liable for content that is published by third parties trough their platform.[405] This practice may be a threat to freedom of expression and information because it may result in self-censorship.[406] The UN Special rapporteur has emphasised that censorship tools may not be provided to the use of private parties, but only states as subjects of international human rights law may use censorship when necessary.[407] Of course, this does not mean that the internet intermediaries as private parties would not have responsibilities regarding their action.[408]

Holding the internet gatekeepers liable for content generated by others can be more effective, in terms of preventing unlawful content from being published, than holding the individuals who published the content liable. Also, it can be considered more effective that the gatekeepers monitor behaviour and content online rather than the state monitoring the content, because the gatekeepers might have more comprehensive tools for monitoring the flow of information online.[409] States have often imposed legislation that obliges companies and service providers to monitor, to some extent, what people publish online through the platforms governed by the gatekeepers. The internet gatekeepers have been held vicariously liable for comments and expressions created by individuals.[410] This can be problematic from public international law point of view if the state delegates its human rights obligations to private parties. [411] However, through states' positive obligations the states may be obliged to provide certain kind of legislation. According to the Court, the information society service providers, which are internet intermediaries, are not responsible for content created by third parties unless they fail removing the content or blocking access to it when they become "aware of its illegality".[412]

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[404] The Report of the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression to the Human Rights Council, 16 May 2011, UN Doc. A/HRC/17/27, para 74.
[405] Ibid., para 40.
[406] Ibid.
[407] Ibid., para 75; Laidlaw, Emily B, "A Framework for Identifying Internet Information Gatekeepers." *International Review of Law, Computers & Technology*, Vol. 24, No. 3, 2010, p. 264.
[408]The Report of the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression to the Human Rights Council, 16 May 2011, UN Doc. A/HRC/17/27, para 76.
[409] Laidlaw, Emily B, "A Framework for Identifying Internet Information Gatekeepers." *International Review of Law, Computers & Technology*, Vol. 24, No. 3, 2010, p. 264.
[410] Ibid.
[411] Ibid.
[412] *Tamiz v. the United Kingdom,* (App. No. 3877/14), ECtHR, 19 September 2017.

A key case of the European Court of Human Rights regarding the liability of the internet intermediaries is *Delfi AS v. Estonia*. It is a case under Article 10 concerning freedom of information, and more precisely, freedom to impart information.[413] The case also concerns media freedom and the intermediaries' responsibilities. In *Delfi*, the state held an online news portal liable for comments written by third parties in the news portal.[414] The news company applied to the Court under Article 10 and claimed that holding the company liable for comments not written by the company was a violation of the company's freedom of expression and information.

The case was first decided by the Chamber, which found no violation of Article 10, meaning that holding the intermediary liable for users' comments was in accordance with the Article 10 and the state did not violate the rights of the intermediary under Article 10. The case was then referred to the Grand Chamber which, as well, did not find a violation of Article 10.

In *Delfi,* the state had imposed a responsibility to the media company to remove clearly unlawful comments from the news portal "without delay after publication".[415] Unlawful comments should be removed without a separate notion from the victim of comments or any others, but the company should itself be able to identify and remove the comments that were unlawful.[416] According to the Court, the responsibility laid to the company by the state was an acceptable interference with the applicant media company's freedom of information. The state did not demand the company to enforce any editing or approval of comments prior to publishing. That a professional news portal was held liable for not removing comments amounting to hate speech and incitement to violence from its website, cannot be considered delegating means of censorship from the state to a private party. It belongs to the media's special duties and responsibilities as facilitators of plural information in a democratic society to remove such unlawful comments.[417]

The unlawful comments were on the news portal for six weeks before their removal which happened only after a notification from the object of the comments.[418] The automatic filtering used by the company did not sufficiently filter unlawful comments, because clearly unlawful comments remained

[413] *Delfi AS v. Estonia*, (App No. 64569/09), ECtHR, 16 June 2015, para 140.
[414] Ibid., para 29.
[415] Ibid., para 153.
[416] Ibid., para 159.
[417] Ibid., para 157.
[418] Ibid., para 152.

in the news portal for a long time.[419] Automatic systems to monitor content have improved since then and are nowadays frequently used online. The news company had published a disclaimer on the website stating that the commenters are themselves liable for the comments they write. The company set up a team of administrators on the commenting forum after the case was applied to the domestic courts. When the comments were published, the company used a notice-and-take-down system in which individuals could notify the company of any comment that they considered being against the rules of discussion.[420]

The case concerns, and is thus applicable to, comments that are "clearly unlawful", and even amount "to hate speech and incitement to violence".[421] Thus, the decision and the Court's reasoning in *Delfi* cannot be directly interpreted with regard to every kind of user-generated comments online. Also, the Court underlines that the case only concerns third-party comments on online news portals, and cannot be applied to other online platforms, such as social media. Significant difference between the news portal commenting platform and other online platforms, such as online discussion forums and social media is, according to the Court, that the company invited the visitors to engage in discussion and offered the discussion topics, i.e. the news.[422]

In *Delfi*, when examining the possible liability of the original authors of the anonymous online comments, the Court concluded that the media company could be assumed being in better economical position than the anonymous authors of the comments. Therefore, the Court found it reasonable that the applicant sought redress from the media company rather than the anonymous commenters.[423]

The states may have an obligation to provide public space for individuals to express themselves and to discuss with each other.[424] Commenting possibility in news portals may also be an asset to freedom of expression and plurality because it offers a platform for the public discussion. Yle, the Finnish public service broadcasting company, has commenting possibility for some, selected news articles published in its website. The discussions are moderated by the company and only open for a certain time. This can also be the fulfilment of obligation to provide a public space for the public debate.[425]

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[419] *Delfi AS v. Estonia*, (App No. 64569/09), ECtHR, 16 June 2015, para 156.
[420] Ibid., para 155, para 157.
[421] Ibid., para 115.
[422] Ibid., para 116.
[423] Ibid., para 151.
[424] *Appleby and others* v. *UK,* (App. No. 44306/98), ECtHR, 6 May 2003.
[425] *Appleby and others* v. *UK,* (App. No. 44306/98), ECtHR, 6 May 2003.

The liability of an intermediary is a controversial topic that has been argued for and against. Before, the international community apparently had an effort to establish a principle that "No one should be liable for content on the Internet of which they are not the author, unless they have either adopted that content as their own or refused to obey a court order to remove that content".[426] This view echoes the general principle that no one shall be held liable for content that she has not herself created or published.[427] However, in the digital age, and especially because of the special structure of the internet, new principles regarding liability have started to emerge. The Court's case law has turned to a direction that internet intermediaries can be held liable for user-generated content.[428] Academics have, to some extent, diverging views on the liability online. Lucchi has criticised the practice to hold intermediaries liable for user-created content. According to Lucchi, the practice can have negative effect on freedom of expression of the users of online services. Content regulations and moderation by private intermediaries can lead to "private censorship" which is against the principle of rule of law.[429]

In *Delfi* the main argument was that the news portal was considered publisher of the comments, even though it had not written or edited the comments. What helped the Court to reach that conclusion was that the company had economic interest on comments and ran the news portal professionally and with aim of getting economic profit.[430] Being "a professional" on the branch, the news media company could be presumed being familiar with its legal duties and responsibilities in carrying on its business.[431]

In case *Magyar Jeti Zrt v. Hungary*, the Court found a violation of Article 10 of the Convention when a company was held liable for posting a link to a YouTube video that was later found by the domestic court to be defamatory. The Court addressed that hyperlinks and sharing them is part of the free flow of information online and thus restricting sharing of hyperlinks can have a chilling effect on freedom

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[426] *International Mechanisms for Promoting Freedom of Expression*, Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE (Organization for Security and Co-operation in Europe) Representative on Freedom of the Media and the OAS (Organization of American States) Special Rapporteur on Freedom of Expression, Organization for Security and Co-operation in Europe, 28 December 2005.
[427] The Report of the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression to the Human Rights Council, 16 May 2011, UN Doc. A/HRC/17/27, para 43.
[428] *Delfi AS v. Estonia*, (App No. 64569/09), ECtHR, 16 June 2015.
[429] Lucchi, Nicola, "Media Freedom and Pluralism in the Digital Infrastructure" in Jonason, Patricia and Rosengren, Anna (eds.), The Right of Access to Information and the Right to Privacy - A Democratic Balancing Act, Working paper 2017:2, Södertörns högskola, 2017, p. 158.
[430] *Delfi AS v. Estonia*, (App No. 64569/09), ECtHR, 16 June 2015, para 128-129.
[431] Ibid., para 122 and 129.

of information.[432] *Magyar Jeti Zrt* is considered a key case as it is the first occasion on which the Court has addressed hyperlinks' significance to freedom of information as well as the liability of a media organisation for posting a hyperlink leading to material damaging reputation of a third party.

The Court analysed that hyperlinks have important role to enable the internet users navigate online. The Court stressed that hyperlinks make "information accessible" online.[433] Hence, the Court decided that the applicant media organisation cannot be held liable for defamatory content of the linked YouTube video. To hold the company liable that way "may have foreseeable negative consequences on the flow of information on the Internet" as well as "a chilling effect on freedom of expression online".[434]

In the concurring opinion of the judgment, judge Pinto de Albuquerque sums up the Court's principles regarding the liability in the context of the use of hyperlinks. The principles regarding journalistic hyperlinking include, amongst others, the principle that a journalist or a media company can be held liable only if she knows or "could reasonably have known" that the content that the hyperlink leads to is unlawful; the principle that when a journalist or a media company "endorses" or "repeats defamatory or otherwise unlawful content" to which the hyperlink leads to, liability can be imposed. [435] One important principle is also that "an individual assessment" is required "in each case".[436] It is typical for freedom of expression that the cases under Article 10 need to be assessed on case by case basis.

5.4 Freedom of information is important for political participation

Freedom of expression and freedom of seeking, receiving and imparting information are crucial for the fulfilment of the right to political participation and thus cornerstones of functioning democracy. Freedom of expression was fundamentally developed to guarantee individual's possibilities to participate in politics.[437] Individual's possibility to participate in political decision making and to take part in public affairs is crucial for maintaining the democratic structures. The maintenance and development of democratic society is one of the aims of freedom of expression, and one of the core

[432] *Magyar Jeti Zrt v. Hungary*, (App. No. 11257/16), ECtHR, 4 December 2018.
[433] Ibid., para 73.
[434] Ibid., para 83.
[435] *Magyar Jeti Zrt v. Hungary*, (App. No. 11257/16), ECtHR, 4 December 2018, Concurring Opinion of Judge Pinto de Albuquerque, para 20.
[436] Ibid.
[437] Joyce, Daniel, "Human Rights and the Mediatization of International Law.", *Leiden Journal of International Law*, Vol. 23, No. 3, 2010, p. 510.

values of the Council of Europe and the Convention as a whole. The states have an obligation to create such an inclusive environment that everyone is free to participate in public debate without fear.[438]

The Court has underlined freedom of information on the internet and how important it is to fulfilment of individuals' right to political participation. In *Ahmet Yildirim*, the Court underlines the public value of the internet and its significance for the exercise of freedom of expression and information. The internet provides "essential tools for participation" in political discussions and political activities, as well as in discussion on issues of general interest.[439] Individual's access to plural information is a precondition for her effective participation in society.[440] The Court draws a conclusion from comparison made between different legislations in the European states that individuals should have a right to participate in information society and a right to unhindered internet access under their freedom of expression.[441]

Also, the Committee of Ministers of Council of Europe recommendation on search engines stresses how the fulfilment of freedom of information promotes political participation.[442] In addition, the UN Human Rights Committee has highlighted the importance of freedom of information for the right to political participation and the protection of democratic structures.[443] According to the UN Human Rights Committee, crucial for the protection of the right to political participation and the participation in democratic society are "freedom to debate public affairs", freedom "to criticize and oppose, to publish political material" and "to advertise political ideas".[444] All these are aspects of freedom of expression and information.

5.5 The lack of pluralism of information increases the risk of polarisation

Article 10 of the Convention guarantees diversity and pluralism of information. The pluralism of media is of particular significance in guaranteeing freedom of information and maintaining democratic structures.

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[438] *Dink v. Turkey,* (App. No:s 2668/07, 6102/08, 30079/08, 7072/09, 7124/09), ECtHR, 14 September 2010.
[439] *Ahmet Yildirim v. Turkey*, (App. No. 3111/10), ECtHR, 18 December 2012, para 54.
[440] Lucchi, Nicola, "Media Freedom and Pluralism in the Digital Infrastructure" in Jonason, Patricia and Rosengren, Anna (eds.), The Right of Access to Information and the Right to Privacy - A Democratic Balancing Act, Working paper 2017:2, Södertörns högskola, 2017, p. 156.
[441] *Ahmet Yildirim v. Turkey*, (App. No. 3111/10), ECtHR, 18 December 2012, para 31.
[442] Recommendation of the Committee of Ministers to member States on the protection of human rights with regard to search engines, the Council of Europe, 4 April 2012, CM/Rec(2012)3, para 1.
[443] UN Human Rights Committee, General Comment No. 25, 27 August 1996, UN doc. CCPR/C/21/Rev.1/Add.7.
[444] Ibid., para 25.

States have an obligation, under Article 10 of the Convention, to provide and guarantee the pluralism of information. Pluralism has enormous significance in democratic society. The states have to protect the pluralism and access of the public to "impartial and accurate information and a range of opinion and comment, reflecting *inter alia* the diversity of political outlook within the country" "through [--] law and practice".[445] Additionally, in order to ensure pluralism, the states must safeguard that it is possible for journalists and other media professionals to freely impart information and ideas to the public.[446] Therefore, it can be considered that the state also has positive obligation to ensure public's accessibility to plural information and ideas imparted in the internet media and social media and that plural opinions are provided online.

Even though the information is available online, people cannot be forced or directed on seeking and receiving specific information. In traditional audio-visual media, state's positive obligation to ensure pluralism means that multiple channels should exist. However, an individual may, if she wishes so, watch or listen to only one channel. Similarly, and maybe even more so, based on social media's and online services' characteristics as personalised platforms, individuals can themselves decide what channels they follow and thus what information they receive. In principle, it can be considered that the state's positive obligation to ensure pluralism online is fulfilled by the very nature of the internet. However, based on the special characteristics of the internet, the fulfilment of pluralism of information online might benefit from legislative measures protecting freedom of information and pluralism of information online?

At first sight, the internet seems to be promoting pluralism. However, the power of imparting information online and governing online structures is concentrated on hands of few major companies which may affect the pluralism of information because the information is governed by the companies. A challenge arising from concentrated power online as well as the new algorithm-based technologies is how to maintain the pluralism of information online. Risk of polarisation is characteristic in the digital age and has been up in lively public discussion. The concentrated power online in the hands of a few major companies together with the extensive use of new online technologies such as algorithmic categorisation of information can lead to a situation where the internet users see only, or at least primarily, content that is similar or related to the material they have previously been interested in and that the service provider is willing to show to users.

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[445] *Manole and Others v. Moldova*, (App. No. 13936/02), ECtHR, 17 September 2009, para 107.
[446] Ibid.

The algorithmic categorisation of information may lead to so called "filter bubbles" where like-minded persons only interact with each other and one only sees content that is in accordance his or her views. People operate online in their own "filter bubble" of like-minded persons. Formation of "filter bubbles" may lead to a risk of polarisation.[447] Especially, in social media the risk of "filter bubbles" and polarisation exists, when similar-minded people connect with each other and do not encounter divergent opinions. It has been suspected that the presidential elections of the Unites States and the Brexit vote in the United Kingdom were influenced by utilising algorithmic organising of information and "filter bubbles" in social media, especially on Facebook.[448] In addition to the personalisation of social media platforms, many online features such as search engines and online news portals use algorithmic categorisation for personalising their services. Personalising web searches might lead to a situation where an individual does not encounter diverging opinions at all when searching for information online.

The diversity of information needed for a pluralistic approach of information cannot be guaranteed by only one broadcasting company.[449] From this point of view, the development of the internet and new media is a positive development for the pluralism of information, as new technologies make broadcasting possible to anyone. Anyone can easily express herself on social media. However, the current problem and challenge for pluralism of media is actually the issue that the power on the digital architecture is in the hands of few companies that have the possibility to function as gatekeepers of information even though individuals would have possibility to publish content freely. A threat for the pluralism and maintenance of a democratic society can be that people only get information from few, concentrated sources, be it traditional media publishers, search engines or social media platforms.[450]

Joyce refers to the "Google effect" that may diminish the pluralism of information.[451] The internet is an "extremely concentrated" medium, which might also have a negative impact on freedom of expression.[452] Google and other GAFA companies can have, and do have, unreasonably much power

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[447] Pariser, 2011.
[448] Cadwalladr, Carole and Graham-Harrison, Emma, *Revealed: 50 million Facebook profiles harvested for Cambridge Analytica in major data breach*, The Guardian, 17 March 2018, https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election, accessed on 20 March 2020; *Vote Leave's targeted Brexit ads released by Facebook*, BBC News, 26 July 2018, https://www.bbc.com/news/uk-politics-44966969, accessed on 20 March 2020.
[449] Bychawska-Siniarska, 2017.
[450] Valcke et al., 2015.
[451] Joyce, Daniel, "Human Rights and the Mediatization of International Law.", *Leiden Journal of International Law*, Vol. 23, No. 3, 2010, p. 526.
[452] Ibid.

on regulating and deciding which information people have access to. Google itself, like the internet in general, has been largely self-regulated.[453] Search engines are a form of internet intermediaries and the power of processing information online is highly concentrated to Google which has monopoly position in the market in Europe.[454] Lucchi considers that a risk exists when the companies have to balance "search engines' commercial interests and pluralism" of information.[455] This balancing may also be one reason for the formation of "filter bubbles".[456]

Reaching different audiences effectively, as well as receiving plural information from various sources, has become more difficult, notably because the use of algorithmic categorisation of information based on the receiver.[457] At the same time, filtering and restrictions on the free flow of information online are increasing which may risk the pluralism online. The lack of pluralism of sources of information leads to polarisation which, at worse, can be a threat to democracy. The Court has acknowledged that pluralism of information is a fundamental precondition for a democracy.[458]

6. Conclusions

In this thesis, some of the emerging legal issues concerning the right to freedom of information online have been addressed. The state obligations concerning freedom of information online under Article 10 of the European Convention on Human Rights have been itemised and the legal norms and special principles arising from the Court's case law in cases concerning freedom of information and the internet have been specified. A general conclusion can be made, that the Court's case law reflects the changes of society with a delay. This is because the Court proceedings are lengthy and because the domestic remedies need to be exhausted in each case before it can be taken up by the Court. The Court's case law concerning the internet is still scarce. Therefore, in order to analyse the existing legal principles concerning freedom of information online, it could be fruitful to study further the national legislations and the case law of domestic courts, as well as the EU legislation regarding the issue. Currently, the domestic courts might have more extensive case law concerning freedom of expression and information online, than the European Court of Human Rights.

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[453] Ibid., p. 524.
[454] Lucchi, Nicola, "Media Freedom and Pluralism in the Digital Infrastructure" in Jonason, Patricia and Rosengren, Anna (eds.), *The Right of Access to Information and the Right to Privacy - A Democratic Balancing Act*, Working paper 2017:2, Södertörns högskola, 2017, p. 153.
[455] Ibid.
[456] Ibid.
[457] Ibid., p. 159.
[458] *Manole and Others v. Moldova*, (App. No. 13936/02), ECtHR, 17 September 2009.

The Court has acknowledged the significance of the internet for the exercise of freedom of information today. Generally, the Convention is equally applicable online and offline. Therefore, the same legal norms and principles are largely applicable in cases concerning freedom of information online as traditionally are applied under Article 10. However, the Court's principles that are applicable to the traditional media might need to be developed regarding the online media because of the special characteristics of the said media. The Court acknowledged in *Editorial Board of Pravoye Delo and Shtekel* that the general principles that concern freedom of the press are also applicable to internet publications.[459] Media freedom is of substantial importance in a democratic society. The Court has acknowledged the new notions of media online by recognising that the professional online journalists and bloggers enjoy special protection of their freedom of information under the Convention. The media have freedoms and rights under Article 10, but also duties and responsibilities. For instance, individuals have the right to be informed of matters of public interest and therefore, the press has a duty to inform the public of these matters. Also, holding a professional news portal liable for not removing comments amounting to hate speech and incitement to violence is compatible with the Convention because it belongs to the media's special duties and responsibilities as facilitators of plural information in a democratic society.[460] It is noteworthy that Article 10 also more generally imposes not only rights and freedoms but also duties and responsibilities.

The internet, in general, has special characteristics that should be recognised while applying the Court's principles online. Therefore, the Court has presented a few principles under Article 10 that specifically concern the internet. The Court has, for instance, decided that banning access to an entire website or an internet portal is not compatible with Article 10 of the Convention. The Court has acknowledged that hyperlinks and sharing them is part of the free flow of information online and thus restricting sharing hyperlinks could have a chilling effect on freedom of information online.[461] The free flow of information is the basis of the internet, and thus needs to be specifically protected online.

In addition to the free flow of information, the right of access to information is of great importance concerning freedom of information and the internet. Traditionally, the states have an obligation to refrain from interfering with relations and communications between individuals, and from creating

[459] *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, (App No 33014/05), ECtHR, 5 May 2011; Bychawska-Siniarska, 2017, p. 108.
[460] *Delfi AS v. Estonia*, (App No. 64569/09), ECtHR, 16 June 2015, para 157.
[461] *Magyar Jeti Zrt v. Hungary*, (App. No. 11257/16), ECtHR, 4 December 2018.

obstacles that hinder access to information of public interest.[462] However, an obligation to provide access to information does not traditionally exist under Article 10. Recently, the Court has acknowledged that the right of access to information exists under Article 10 in certain circumstances but is limited to state-held information that is of public interest. In the digital age, information held by private parties that have power over individuals online, could also be considered being of public interest. However, the Convention does not impose a positive obligation on the state to ensure that individual would have access to such information because it is not state-held information. The Convention is a living instrument and thus its interpretation on the right of access to information will probably further evolve over time.

Traditionally, the international human rights law protects individuals from state interferences of their rights and freedoms. In the digital age, it has become easier for private companies and other individuals to interfere with individuals' rights and freedoms.[463] As the distinction between state and market is fading and companies have more power on individuals' lives, it is possible that some of the fundamental principles of international law will be re-formulated in the future in order to guarantee effective protection of human rights in the digital age. Of course, the purpose of states' positive obligations under international human rights law is to protect individuals from violations of their rights by other than state parties. When major internet companies gain more and more power on individuals' lives, positive state obligations may not be adequate measures to protect individuals from violations of their rights by private companies.

It can be argued, that currently the international human rights law does not adequately answer to the challenges of the digital age. For instance, further recognition of horizontal effect under Article 10 of the Convention could answer to some of the challenges of the digital age. As the internet has become such an important part of the daily lives of the majority of Europeans and especially a remarkable means of communication and enjoyment of freedom of expression and information, it is without a doubt that the Court will have to address more cases concerning freedom of information online in the future.

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[462] *Youth Initiative for Human Rights v. Serbia*, (App. No. 48135/06), ECtHR, 25 June 2013; Voorhoof, 2014, p. 13.
[463] Österdahl, Inger, "Transparency versus secrecy in an international context: Swedish dilemma", in Lind et al., 2015, p. 78.

The states have a positive obligation to provide pluralism of information.[464] It can be considered that the obligation is fulfilled by the very nature of the internet. However, based on the special characteristics of the internet, especially algorithmic categorisation of information and the concentration of power online, the fulfilment of pluralism of information online could benefit of legislative measures protecting pluralism of information online.

The relevance of freedom of information for the fulfilment of pluralism of information is an interesting topic that could be further studied. One possible threat of the internet to the pluralism of information and freedom of information is the algorithmic categorisation of information. The algorithmic categorisation leads to recommendations of content and people seeing content that is similar to that with which they have previously interacted. This can create so-called "filter bubbles", which may lead to a lack of pluralism which in turn may lead to polarisation of society and become a threat to democracy. It would be important to study the connection between the polarisation of opinions and information online and the democratic structures. Do the polarisation of information and opinions, as well as the harsh language often used online, pose a threat or a challenge to democracy? Additionally, imparting disinformation is a common phenomenon online. It happens in large scale online and is often systematic. One interesting question arising from disinformation online is how it affects the fulfilment of the right to political participation or the right to freedom of information. Another specific topic related to freedom of information online that could be further addressed in legal research is the algorithms and their influence on the fulfilment of the right to freedom of information as well as concerning the general principles of the Court.

[464] *Manole and Others v. Moldova*, (App. No. 13936/02), ECtHR, 17 September 2009, para 107.

Svensk sammanfattning – Swedish summary

Informationsfrihet på nätet under artikel 10 i Europeiska människorättskonventionen

Internet har blivit en oskiljaktig del av vardagen för människor som lever i informationssamhällen. Internet är ett verktyg som kan samla in och överföra information på ett exempellöst sätt. Internet har förändrat hur människor kommunicerar med varandra och hur information sprider sig i samhället. Man kan lätt kommunicera med varandra på nätet och söka, motta och sprida information på internet. Det är möjligt att yttra sig på nätet anonymt, fritt och effektivt.

Denna avhandling i folkrätt fokuserar på rätten till yttrandefrihet och närmare bestämt rätten till informationsfrihet. Avhandlingen koncentrerar sig på den europeiska konventionen om skydd för de mänskliga rättigheterna (Europakonventionen). Europeiska människorättsdomstolens (Europadomstolens) rättspraxis i yttrandefrihetsfall under artikel 10 i Europakonventionen undersöks i avhandlingen.

Syftet med denna avhandling är att specificera och undersöka hurudana speciella frågor och utmaningar som hänför sig till förverkligande av informationsfriheten på nätet. Avhandlingen strävar efter att besvara frågan om vilka skyldigheter staten har för att skydda informationsfriheten på nätet under artikel 10 i Europakonventionen. Europadomstolens rättsliga principer specificeras och analyseras i avhandlingen.

Rätten till yttrandefrihet, som skyddas i Europakonventionen artikel 10, är en av de grundläggande rättigheterna i ett demokratiskt samhälle. Yttrandefriheten är en förutsättning för demokrati. Informationsfriheten är en del av yttrandefriheten. Rätten till tillgång till information, som del av informationsfrihet, är en framträdande rätt under artikel 10 i Europakonventionen. Enligt Europadomstolens etablerade rättspraxis utreder domstolen först om staten har inskränkt i rätten till yttrandefrihet. Om en inskränkning har skett tillämpar Europadomstolen ett trestegstest för att utreda om inskränkningen har varit en inskränkning med Europakonventionen. I artikel 10(2) föreskrivs tillåtna grunder för statens inskränkning i yttrandefriheten.

Internetets speciella struktur och karaktär måste beaktas när informationsfrihet på nätet granskas. Algoritmer, sociala medier och sökmaskiner är internets särdrag som är betydelsefulla för förverkligandet av informationsfriheten på nätet. Internet har traditionellt ansetts vara en plats där

statens bestämmelser och lagar inte gäller. Detta beror på att teknologin har utvecklats så snabbt att lagstiftningen har haft svårt att följa med utvecklingen. Internet var tidigare en plats som var rättsligt oreglerad och därför blev den mestadels självreglerad. Situationen är inte längre sådan, utan samma mänskliga rättigheter och yttrandefrihetslagar gäller på nätet som gäller annars. Lagstiftningen och till exempel Europadomstolens rättspraxis utformar sig långsamt, vilket betyder att några brister i regleringen av internet ännu finns.

Det finns inga bindande folkrättsliga instrument som särskilt gäller internet och informationsfrihet. Europadomstolens rättspraxis kring ämnet utvecklas kontinuerligt. Europarådets ministerkommitté har varit aktiv inom området och utfärdat ett flertal icke-bindande rekommendationer som behandlar internet och dess egenskaper. Dessa rekommendationer är oftast riktade till medlemsstaterna men emellanåt tilltalas även privata företag och andra samhälleliga aktörer i rekommendationer.

Maktstrukturerna på internet kan påverka hur informationsfriheten förverkligas på nätet. Stora företag har fått makt över informationsflödet på nätet. De har nått en mäktig position som mellanhänder av information på nätet. Tidigare var det tidningsredaktioner och bibliotek som hade makt att kontrollera vilken information som når publiken. Mellanhänder av information på nätet skiljer sig betydligt från tidningar och andra traditionella media. På nätet är det möjligt för individer att uttrycka sig utan förhandskontroll från mellanhandens sida.

Statens förpliktelser i förhållande till informationsfriheten och den fria rörligheten av information på internet analyseras i avhandlingen. Enligt folkrätten binder konventioner staten. Människorättsligt ansvar binder endast stater, som inte får kränka individers mänskliga rättigheter. Det vill säga att bara stater kan vara skyldiga till kränkningar av mänskliga rättigheter under folkrätten. Företag eller andra betydande aktörer har inte någon skyldighet enligt folkrätten i nuläget. Detta kan vara problematiskt gällande internet, eftersom makthavarna på nätet är privata storföretag.

Stater kan ha positiva förpliktelser enligt folkrätten för att till exempel stifta lagar som förbjuder företag att agera på sätt som kränker mänskliga rättigheter. I alla fall kan dessa företag inte bli dömda av Europadomstolen, eftersom bara stater kan vara ansvariga för kränkningar av Europakonventionen. På nätet har vissa företag nått stor makt över individer. Detta maktbruk kan till och med jämföras med makten som stater traditionellt sett har över individer. Därför är det relevant att diskutera den möjliga horisontella effekten under folkrätten och Europakonventionen. Det är viktigt att garantera att stora internetföretag blir ansvariga för sina handlingar på nätet och att de inte

missbrukar sin maktposition. Europeiska människorättskonvention och folkrätten kan utgöra verktyg för att reglera företagens maktposition för att skydda rätten till informationsfrihet på nätet.

Internet har påverkat förverkligandet av mänskliga rättigheter både positivt och negativt. Positivt är att det är lätt för individer att utnyttja sin informationsfrihet på nätet snabbt, brett och över statsgränser. Individer kan direkt lägga fram innehåll på nätet, vilket har tydligt förbättrat människors möjligheter att utnyttja sin yttrandefrihet. Europadomstolen har även konstaterat att internet kan vara en risk för mänskliga rättigheter. Till exempel kan rätten till skydd för privatliv äventyras på grund av den ökande användningen av internet och på grund av bristerna i lagstiftningen och folkrättsliga bestämmelser.

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