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**The Paradox of the 21st Century:
The Protection of Freedom of Expression in Europe**

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**THE PARADOX OF THE 21ST CENTURY:
THE PROTECTION OF FREEDOM OF EXPRESSION IN EUROPE**

By Claire d'Humilly de Serraval*

Abstract

The cohabitation of dynamics of progress in our society with a growing multiculturalism enhances conflicts of interests that question freedom of expression. Whereas States succeeded in consecrating a high protection of free speech pursuant to harmonised International and European standards, sections of the population tend to reject it, whether it is offensive or merely too liberal for some *more*. This paper analyses this new paradox surrounding the said freedom of expression throughout four main examples in EU Member States. Not only does this conflict result in a dilemma that States somehow need to solve by striking a balance between liberticidal freedoms; but it also jeopardises freedom of expression itself, questioning the value of censorship while this freedom is still used as a tool for controlling people. Based on this postulate, this paper aims at discussing the remedies to a paradox that endangers the States' ultimate goal: prosperous and peaceful democracies.

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Introduction:

“I despise what you say, but will defend to the death your right to say it”.¹

Freedom of expression, as also called free speech,² is simply defined in basic dictionaries as “*the right to express one’s opinions publicly*”.³ It has to be understood, that this liberty to express one’s self is an individual liberty tolerated or conferred by a State, which would not impose censorship on it. Freedom of expression is thus the voice of an individual on the public forum. Nonetheless, this voice is not unlimited. It commonly finds limitations in restrictions imposed by the State for public order reasons and other balancing interests,⁴ in legislation as well for instance regarding libel, slander or defamation.⁵ These limits will be further developed.

In spite of this very brief definition, free speech encompasses various notions. As defined by Warbuton free speech covers a wide range of expression, including “*the written word, plays, films, videos, photographs, cartoons, paintings, and so on*”.⁶ The freedom however is a ‘public’ one, the speech must be received by an audience in the sense that a speech of one self’s to a mirror is not considered within the notion. This enables analysing different elements to take into account. Firstly, regarding the person delivering the speech, if it is a public person or an official, the dimension would be even more important vis-à-vis the impact of the speech. Secondly, free speech implies having an audience, and depending on the nature of the audience as a nation, an informed public, the impact would differ as no one receives an information in a similar manner. All the more, because free speech implies imparting informations or opinions, but also

¹ Quote attributed to Voltaire.

² Nigel Warbuton, *Free speech, a short introduction*, OUP, NY, 2009, p.5.

³ Collins Online Dictionary, ‘Free speech’, *Collins*, 2011. Available online at: <http://www.collinsdictionary.com/dictionary/english/free-speech>.

⁴ E.g. Council of Europe, *ECHR*, Article 10.

⁵ *see*, European Commission of Human Rights, *David Irving v. Germany - Decision on admissibility*, Application No. 26551/95, June 1996, p.2. Available online at: http://www.concernedhistorians.org/content_files/file/le/50.pdf.

⁶ Nigel Warbuton, *Free speech, a short introduction*, OUP, NY, 2009, p.5.

receiving them.⁷ In this duality, the protection conferred to freedom of speech would require to protect both the author of the speech, but also the audience, which is more or less vulnerable to the expressed ideas. Already a dilemma arises from the notion, as both the author and the audience have to be protected, if the interests differ, one will be disfavoured.

Furthermore, the importance of freedom of expression is crucial, and it shall not be undermined in the 21st century as one could think the society has attained its highest level of development and protection of fundamental right so far. As enounced by the doctrine, four notions are to be linked to freedom of expression.⁸ Indeed, free speech allows a citizen to participate to a democracy.⁹ Moreover, in a same line of thought, it is a way to contest the government and protest against its abuse.¹⁰ A third concept of free speech enables to 'discover the truth' thanks to an exchange of ideas.¹¹ Finally, free speech permits the individual's self-development and fulfilment.¹²

Regarding the first two ideas, freedom of expression is a fundamental right that permits the existence and maintenance of a democratic society. Warbuton explicitly stated that free speech is "*necessary to protect democracy*"¹³ and oppose governments degenerating in tyrannies. Democracy must then allow debate and thinking : "*progress is achieved through a polite battle of ideas rather than through one side having exclusive access to the podium*".¹⁴ Through ideas and voices of citizens, a prosper democratic society can be established, and the reign of terrors or absolutisms be buried.

Free speech is indeed a growing concept as its definition is enlarging every day thanks to different legal instruments, which are a constant victory against lacks of transparency and secrecy in governments. The dialectic of its protection is remarkable as it started

⁷ E.g. Council of Europe, *ECHR*, Article 10.

⁸ Eric Barendt, *Freedom of Speech*, 2nd edition, OUP, NY, 2005, 526p, p. 7.

⁹ Eric Barendt, *Freedom of Speech*, 2nd edition, OUP, NY, 2005, 526p, p. 18.

¹⁰ Eric Barendt, *Freedom of Speech*, 2nd edition, OUP, NY, 2005, 526p, p. 21.

¹¹ Eric Barendt, *Freedom of Speech*, 2nd edition, OUP, NY, 2005, 526p, p. 7.

¹² Eric Barendt, *Freedom of Speech*, 2nd edition, OUP, NY, 2005, 526p, p. 13.

¹³ Nigel Warbuton, *Free speech, a short introduction*, OUP, NY, 2009, p.2.

¹⁴ Nigel Warbuton, *Free speech, a short introduction*, OUP, NY, 2009, p.29.

from scratch at the stone age until today. It is remarkable as well, as many dark events are easy to remember where a link can be established between the prohibition or lack of free speech and an anti-democratic society or State. Indeed, through the centuries, the battle of freedom of expression has faced many opponents. The 17th century had the amazing example of an obscurantist and absolutist era. The Monarch was a dictator to whom anyone has to pay due respect, in spite of unfairness and arbitrary. The Church, 'frenemy' of the Kingship was helping maintaining this obscurantism. The only cultivated circles were either in the nobles, either in the Church, which permitted easily to maintain a general ignorance, unfair laws, and with it, the prohibition of revolts, thus the prohibition of free speech by censorship.

This scheme has been reiterated through the ages, at the same time for instance with the Catholic Inquisition, which enabled as much torture and ignorance to explicitly convert proselytes, and implicitly participate cruelly to its own enrichment. Montesquieu described this era and wrote that "*No kingdom has shed more blood than the kingdom of Christ*".¹⁵ More recently, the totalitarians regimes of Europe during the 20th century repeated the scheme. In a same manner as the 17th century's monarchs described above, in possessing every power in a same hand and violating the concept of rule of law, and many other fundamental rights until human dignity, terror was easily instituted by these tyrants. Obviously, to maintain such dictatorship to prosper prohibited revolts through a the silencing of free speech. This type of example lead to a vicious circle of silence. Indeed, dissident free speech is punished by the dictatorial regime, the latter selecting the informations to impart to format a society on an unique pattern by prohibiting divergent literature and so on. This ends in depriving individuals from uncontrolled informations, for ideas of a better world and of democracy. Free speech is then shackled and silence instituted.

Progressively, through revolts and liberations, free speech has been finally possible. To prevent a come-back to dictatorship, free speech needs to be maintain. It is then a crucial element in constituting and maintaining democracy. Free speech enables

¹⁵ Quote attributed to Charles de Montequieu, 1689-1755.

protestation against governments, as well as it permits to individuals to elect their representatives, hence to participate in a democracy.

On a second point, free speech also grants the possibility to exchange ideas, to create a debate in order to 'discover a truth' and maybe find other ways than the one dictated or commonly used. John Stuart Mill as Voltaire in his quote above, agreed that the debate of ideas is necessary. It is indeed essential to debate, allowing then to weight pros and cons and argue about the viability of ideas, what should be seen as reasonable or what should be morally prohibited. For instance, according to Mill's conception, there would be a necessity to invite extremists' view even if you find it disgusting. In this manner, it has been criticised that legally prohibiting types of speech was a mistake that would endanger the formation of ideas. In so doing, individuals could be lead to prohibit without understanding, which is as much dangerous as totalitarian ideas in a sense. Therefore, Warbuton saw a failure in Irving's arrest in 2006 in Austria. It has been held in a similar dimension that there is also a need of a 'bad or false' speech to understand the core of the problems of these condemnable ideas, indeed "[...] *Knowledge advances through the destruction of bad ideas. Mockery and derision are among the most powerful tools in the process*".¹⁶

Nonetheless, this is not what the doxa imposes in Europe. It would be interesting to observe the difference between this new European conception of ideas, which tend to moralise speech, for instance with memorial laws in France¹⁷ or the 2008 framework decision on the prohibition of hatred and racist speech, to an American way of thinking. The US would follow Mill's conception, arguing in favour of a 'market-place of ideas' in a very liberal way. A striking example of the US first Amendment's¹⁸ impact would be the demonstrations of the KKK in the streets of NY, or even the *Skookie* event that occurred in the US.¹⁹ The advantage of this incredibly wide form of tolerance from the State permits surprisingly to undermine the events. Indeed, it seems that population does not

¹⁶ Oliver Kamm, 'New Labour : the Tyranny of Moderation', *Index on Censorship*, 36/2, Volume 84, 2007.

¹⁷ See further, Part II- B.

¹⁸ United States of America, *Constitution*, First Amendment.

¹⁹ Nigel Warbuton, *Free speech, a short introduction*, OUP, NY, 2009, p.56.

care or does not pay attention to such demonstrations, whereas restricting them would give them much more importance.

Finally, freedom of expression is a right to express opinions, which is conferred and guaranteed by a State. Free speech allow individuals to a catharsis through the expression of ideas, the creation of emotions, ideas, conscience for instance. Thus, freedom of expression is actually a 'patchwork' right completed by other concepts, such as the freedom of opinion and conscience, the freedom of religion for instance. However, even if freedom of expression is completed by other liberties, it might contravene to other interests. This comes back to the idea of protection of both the authors and the audience, in a conflict of interests between different freedoms because of a pluralism of actors in the society, a balance will have to be struck. This balance is a very audacious enterprise which has no ready-made answers. This dilemma arises once again and triggers the question of limitations to freedom of expression.

John Stuart Mill, who was very liberal and progressive for his century and was also a fervent defendant of the freedom of expression. In spite of the concept of a 'market-place of ideas', and a need to consider any type of speech to forge one's own opinion, he acknowledged that there can be a need for boundaries. For instance he expressed that freedom of expression as he defined it, very liberal and argumentative, only applied to "*Human beings in the maturity of their faculties*".²⁰ However, legislations do not distinguish between different category of actors. As individuals are equal before the law, an in-between must be find by the legislator himself to enable a liberal conception of free speech, although a conception which would not offend certain categories of populations.

This is an inextricable dilemma that is frequently dealt with, when judges are confronted to the necessity of striking a balance in the courts' arena. On this issue, the problem gets even bigger when perception differs due to a multicultural society. The scope of legislations have to be wider to include any section of population, although, it shall not

²⁰ John Stuart Mill, *On liberty*, Chapter 2, 1859.

restrict the scope of protection of freedom of expression, which has already been established and acknowledged.

This issue that has been actualised by recent events, and particularly when stepping in the 21st century. These events are for example, the case of *Satanic verses* of Salman Rushdie in UK, on whom the Ayatollah Khomeini threw a Fatwa, or the 2005 Danish cartoons published in the newspapers *Jyllands-Posten* considered deeply offensive by many Muslims. Forced out of our taboos in trying to combine the widest scope of protection to free speech and a multicultural society, new limits shall be drawn around freedom of expression and what is nowadays tolerable if we want to maintain a peaceful society.²¹

This issue will be analysed throughout the example of Theo Van Gogh's murder and the outcome triggered by the violence of such action (II-A). The balance of interests in a similar dimension opposing free speech and freedom of expression will be demonstrated as well thanks to the example of the *Piss Christ* (II-B).

Nonetheless, another problematic arises from this first issue. It seems that there is a need to draw some limits to free speech. But are we all ready to limit freedom of expression? After such struggle during centuries to finally enter democracy, are we willing to reduce our standards and say yes to censorship? A diptych can be distinguished in this problematic.

For the above mentioned reasons on protection of a democratic society and fight against totalitarian regimes, anyone should try to safeguard free speech for these reasons, and hope that no governments would try to take over it once again. In this dimension, free speech should not be restricted when democracy is endangered. This is exemplified by some recent developments within the last few years showing that in Hungary for instance (III-A), the society is jeopardised by anti-democratic measures and freedom of expression is restrained. It should not be acceptable because the freedom of speech of an entire nation would be reduced by a few oligarchs.

²¹ Nigel Warbuton, *Free speech, a short introduction*, OUP, NY, 2009, p. 18.

Contrary to this line of thinking, in the respect of the various actors of a society, an 'offensive' free speech might have to be limited. If free speech is used as a sword and not a shield anymore, this becomes the positive obligation of States to protect the offended. Censorship would then not be a tool for the government's power, but surprisingly a necessity to maintain a peaceful democratic society. This will be demonstrated through the recent events concerning David Irving and Holocaust denial (III-B).

Free speech is then a crucial fundamental right essential in a democratic society. It is essential for the society in itself and its institutions, but for the individuals as well, regarding a personal self-fulfilment and as a major substantive right of the citizens. This vital nature renders the problematic triggered by the freedom even more difficult to solve, if the freedom must be both protected but limited. This dilemma will be observed all along of the developments. In a first part, the dialectic of the protection of freedom of expression will be scrutinised through International law (I-A), European law (I-B) and various Member States exemplifying the study (I-C).

I. Legal developments

I.A. Public International law

I.A.1. The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) was proclaimed in 1948, in Paris and adopted by the General Assembly of the United Nations, with forty-eight favourable votes and eight abstentions.²² Its application is very broad as at least a country of each of the five continents adopted it. In the aftermath of the atrocities committed during the

²² See UN Website, 'Universal Declaration of Human Rights- History', article online available at : <http://www.un.org/en/documents/udhr/history.shtml>.

Second World War the UDHR was proclaimed and consequently, the protection of the freedom of opinion and expression in Article 19 UDHR has been legally recognised. In the writings of Eleanor Roosevelt and René Cassin, a cornerstone for democracy was born: “*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers*”.²³ This brief definition of the freedom of expression includes every essential element of the freedom, namely receiving and imparting informations through any means, and without suffering any interference. Similarly to the protection conferred by the French Declaration of 1789,²⁴ it inspired proselytes (e.g., the Association for freedom of expression *Article XIX*)²⁵ and Regional or International Conventions. However, the UDHR having the inconvenient of its non-binding status, the United Nations completed this declaration and affirmation of human rights with the two Covenants of 1966.

I.A.2. The two UN Covenants: ICCPR and ICESCR

Both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) confirmed and reinforced the freedom of expression’s protection.

I.A.2.a. The ICCPR

Firstly, Article 19 of the ICCPR constituted of three paragraphs repeats the idea of a global right devoid of any interference in 19(1) and also resumes the exact wording of

²³ Eleanor Roosevelt and René Cassin et al., *Universal Declaration of Human Rights*, 1948, Article 19.

²⁴ République Française, *Déclaration des Droits de l’Homme et du Citoyen*, 1789.

²⁵ Article XIX Free Word Centre, association.

the UDHR in 19(2). Nevertheless, the ICCPR also brings an interesting change in precisising, thus limiting, the scope of the freedom of expression. According to this provision, it is indeed a right that “*carries with it special duties and responsibilities*”,²⁶ and therefore can be subject to restrictions. The two possible restrictions must be provided by law and declared as necessary. First, the freedom of expression can be restricted in “*respect of the rights or reputations of others*”,²⁷ and second “*for the protection of national security or of public order (ordre public), or of public health or morals*”.²⁸ One should notice that this is already a high level of protection of the freedom of expression covered by the ICCPR on one hand, and also already a limited freedom on the other. Two types of limits to the freedom emerge and stick continually to it. There is first the idea that a liberty stops where others’ starts, but also the fact that States competent and sovereign are responsible of public order. Scrutinising the protection conferred, another limit can arise when observing the Article 20 of the same Covenant. It restrains the scope of the freedom in strictly prohibiting propaganda for war in 20(1); and above all any “*advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*”.²⁹ As elaborated by the doctrine, this limitation seen as an extension of Article 19(3), can be viewed as “*fully compatible*” with Article 19 as it must be carried with duties and responsibilities.³⁰ Nonetheless, as elaborated within UN Committees, this limitation falls on Member States that should take measures “*necessary to fulfil the obligations contained in Article 20, and should themselves refrain from any such propaganda or advocacy*”.³¹

I.A.2.b.The ICESCR

²⁶ United Nations, *International Covenant on Civil and Political Rights* (ICCPR), 1966, Article 19(3).

²⁷ United Nations, *International Covenant on Civil and Political Rights* (ICCPR), 1966, 19(3)(a).

²⁸ United Nations, *International Covenant on Civil and Political Rights* (ICCPR), 1966, 19(3)(b).

²⁹ United Nations, *International Covenant on Civil and Political Rights* (ICCPR), 1966, Article 20(2).

³⁰ Ineke Boerefijn & Joanna Oyediran, ‘Chapter 4: Article 20 of the ICCPR’ in *Striking a balance: Hate speech, Freedom of Expression and non-discrimination*, edited by Sandra Coliver, Contributing Editors Kevin Boyle and Frances D’Souza, XIX (Article 19) – International Centre Against Censorship, Human Rights Centre, University of Essex, 1992, p. 32.

³¹ General Comment No. 11(19), 1983 *Annual Report of the Human Rights Committee*, 38 GAOR, Supp. 40, UN Doc. A/38/40.

Secondly, Article 15 of the ICESCR offers an even deeper protection, which is according to Paul Kearns “*slightly more interesting*”.³² The provision grants a right for everyone to take part in cultural life under 15(1)(a) ICESCR and broadens the scope of free speech to scientific progress.³³ Moreover, it also grants the protection of authorship in covering both moral and material interest of the author of a creative work.³⁴ Pursuant to the following paragraphs States are under an obligation to respect, protect, and fulfil the access to this right. Under such obligations, a State shall not implement legislations that would “*dramatically impact enjoyment of the right of access to knowledge, by bringing about the environment of encouragement, freedom and public participation envisioned by Article 15*”.³⁵

It should be furthermore pointed out that the definition of freedom of expression and with it its protection, grew through the elaboration and completion of the two Covenants. The latter (ICESCR) broaden the scope of the freedom in introducing the notion of cultural life, nowadays associated to the freedom. The introduction of scientific creation is as well of crucial importance as free speech in its modern definition is usually associated to political, commercial and artistic speech only.³⁶ Finally, the last paragraph of Article 15 ICESCR protects authorship. This should be seen then as an introduction of copyright or patents protection covered by the Covenant which is a significant step towards the protection of expression.

I.A.3. The American Convention on Human Rights

³² Paul Kearns, *lecture on Law literature and Art*, University of Manchester, Tuesday 15th February 2011.

³³ United Nations, *International Covenant on Economic, Social and Cultural Rights* (ICESCR), 1966, Article 15 (1)(b).

³⁴ United Nations, *International Covenant on Economic, Social and Cultural Rights* (ICESCR), 1966, Article 15 (1)(c), - A creative work being understood as the wording of the provision : the result of any ‘scientific, literary or artistic production’.

³⁵ Information Society Project at Yale Law School to the Committee on Economic, Social and Cultural Rights

41st Session, *Access to Knowledge and the Right to Take Part in Cultural Life*, 3-21 November 2008, p.8. Available at : <http://www.law.yale.edu/documents/pdf/ISP/article15.pdf>

³⁶ *Inter alia*, Georg J. Benston, ‘Government Constraints on Political, Artistic, and Commercial Speech’, 20 *Connecticut Law Review*, 1987-1988, p.303.

When the Inter-American Commission on Human Rights was set up in 1960, there was no legal instrument to guide it on what rights to protect or promote.³⁷ The Inter-American Commission could have based its decision on the UDHR, however, its provisions being not binding, the Commission decided not to do so. It was then on the model³⁸ of the American Declaration which never entered into force,³⁹ that the American Convention on Human Rights, a Regional Convention also called “*Pact of San José*”, was drafted in 1969. This testifies from a certain activism of the Organisation of the American States in the protection of human rights, even if the ACHR entered into force in 1978 only.⁴⁰ The freedom of thought and expression is then protected in a lengthy article composed of five paragraphs. This Article 13 ACHR “*contains a more detailed elaboration of this right than any other regional or international human rights instrument*”.⁴¹ It indeed seems to be a collection of the same provisions in the UDHR, the two UN Covenants and the American Convention. It gives the same definition of the freedom as the UDHR,⁴² including as well the two restrictions brought by the ICCPR.⁴³ The limits included though are even narrower than the one in the ICCPR, going so far as to the prohibition also on propaganda for war and hatred speech.⁴⁴ Nonetheless, its paragraphs 3 and 4 seem to be very innovative. First, means of prohibited controls and restrictions are enumerated.⁴⁵ Then, ‘prior censorship’ is specifically allowed on public entertainments only, regulating their access “*for the moral protection of childhood and adolescence*”.⁴⁶ This is both a wide and detailed protection conferred to freedom of expression, proclaimed by the regional Convention. The

³⁷ “The Inter-American Human Rights Convention, The Review, International Commission of Jurists, Geneva, 1969, No. 2”, in *International Review of the Red Cross* (1961 - 1997) , Volume 10, Issue 106, p. 56.

³⁸ Egon Schwelb , “International Conventions on Human Rights”, *International & Comparative Law Quarterly*, Volume 9, Issue 04, October 1960, pp 654 – 675, p.655.

³⁹The Organisation of American States(OAS), *the American Declaration of the Rights and Duties of Man*, Bogota, 1948.

⁴⁰ Thomas Buergethal, ‘ The American and European Conventions on Human Rights: Similarities and Differences’, 30 *American University Law Review*, 1980-1981, p. 155.

⁴¹ Joanna Oyediran, ‘Chapter 5 :Article 13(5) of the American Convention on Human Rights’, in *Striking a balance: Hate speech, Freedom of Expression and non-discrimination*, op.cit., p.33.

⁴² Eleanor Roosevelt and René Cassin et al., *Universal Declaration of Human Rights*, 1948, Article 19.

⁴³ United Nations, *International Covenant on Civil and Political Rights* (ICCPR), 1966, Article 19(3)(a)(b).

⁴⁴ United Nations, *International Covenant on Civil and Political Rights* (ICCPR), 1966, Article 20(1)(2).

⁴⁵ OAS, *American Convention on Human Rights*, Costa Rica, 1969, Article 13(3).

⁴⁶ OAS, *American Convention on Human Rights*, op.cit., Article 13(4).

provisions of Article 12 of the ACHR can be seen as completing the freedom of expression as the freedom of religion allows its beneficiary to a “*freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private*”.⁴⁷ As does Article 14 ACHR which confers a ‘right of reply’, ensuring then a full guarantee of expression.⁴⁸ Nevertheless, such a well-drafted text found its ultimate limits when principal Members of the OAS decided to never ratify it. Whereas Brazil finally ratified it in 1992, Cuba opted out, and Canada and USA never signed it.⁴⁹

I.A.4. The African Charter on Human and People’s Rights

The African Charter on Human and People’s Rights,⁵⁰ (ACHPR) is an even more recent Regional Convention. The Charter was drafted in 1982 to then enter into force in 1986. Thus, its context must be recalled for better understanding. This occurred entirely during the post-decolonization era, whereas the last African countries fully accessed to their independence. This context demonstrates a difference in the interests between the Northern and Southern hemispheres regarding the protection of Human Rights. This is what is explained by Bello: “*European States represent the privileged few of the world, living as they do under prosperous conditions and enjoying excessive freedom of speech and privileges. It is therefore easy for them to be preoccupied with issues that have little bearing on the way of life, the thinking and the conditions which exist following colonial domination*”.⁵¹ It could explain the scarcity of Article 9 of ACHPR on freedom of expression composed of two brief paragraphs conferring the right to “*receive*

⁴⁷ OAS, *American Convention on Human Rights*, op.cit., Article 12(1).

⁴⁸ Joanna Oyediran, ‘Chapter 5 :Article 13(5) of the American Convention on Human Rights’, in in *Striking a balance: Hate speech, Freedom of Expression and non-discrimination*, op.cit., p.34.

⁴⁹ See the Charts and figures of the ACHR Members in the OAS website, available at : <http://www.oas.org/juridico/english/signs/b-32.html>.

⁵⁰ Organization of African Unity (OAU), *African Charter on Human and People’s Rights*, Kenya, 1982.

⁵¹ Emmanuel G. Bello, ‘Human Rights: the Rule of Law in Africa’, *International & Comparative Law Quarterly*, Volume 30, Issue 03, July 1981, pp 628 - 637, p. 630.

informations”,⁵² and to “*express and disseminate his opinions*”.⁵³ The freedom to express opinion is even limited in the sentence through the wording “*express [...] within the law*”.⁵⁴ Nonetheless, an extension to these provisions could be interpreted through Article 17 of ACHPR. The latter allows the right to “*take part in the cultural life of his community*”⁵⁵ which resembles the provision of the ICESCR on freedom of expression,⁵⁶ and helps completing the too short provisions of Article 9 of ACHPR.

Considering the foregoing, one shall admit that the freedom of expression is to be considered as a fundamental right universally acknowledged, with a need to a wide protection in respect of democracy. For these reasons the Council of Europe consecrated very early this freedom that the signatories States must respect to ensure democracy.

I.A.5. The European Convention on Human Rights

The ECHR, as enounced by Errera, is an unprecedented step. It is indeed, “*the first general human rights treaty and a well-drafted one, creating a permanent Court and a right of application for individuals against states*”.⁵⁷ The European Convention is a was signed on 3 September 1953 and has been ratified by all 46 member States of the Council of Europe.⁵⁸ It is considered as an International Agreement vis-à-vis its nature of a broad Regional Convention in terms of geographical application, as for instance a

⁵² Organization of African Unity (OAU), *African Charter on Human and People's Rights*, op.cit., Article 9(1).

⁵³ Organization of African Unity (OAU), *African Charter on Human and People's Rights*, op.cit., Article 9(2).

⁵⁴ Organization of African Unity (OAU), *African Charter on Human and People's Rights*, op.cit., Article 9(2).

⁵⁵ Organization of African Unity (OAU), *African Charter on Human and People's Rights*, op.cit., Article 17(2).

⁵⁶ United Nations, *International Covenant on Economic, Social and Cultural Rights* (ICESCR), 1966, Article 15(1)(a).

⁵⁷ Roger Errera, ‘Freedom of Speech in Europe’, *European and US Constitutionalism*, edited by Georg Nolte, Cambridge University Press, 2005, 312p., p. 27.

⁵⁸ Council of Europe, *Freedom of Expression in Europe, case-law concerning Article 10 of the European Convention on Human Rights*, Human Rights files, No. 18, Council of Europe Publishing, 2007, 184p, p. 6.

few countries are Eurasian.⁵⁹ As far as the freedom of expression is concerned, it offers a broad protection in its Article 10, which has been then largely defined by the jurisprudence of its Court guiding States and preventing infringements. The ECHR confers a right to express and hold opinions, ideas and informations without suffering from authorities' interference similarly to the wording of the UDHR.⁶⁰ Furthermore, it also confers a right for the public to receive these ideas, meaning 'a right to know'.⁶¹ In particular Article 10(1) ECHR especially mentions that its scope does not prevent States from requiring "*the licensing of broadcasting, television or cinema enterprises*", which could be seen in some way as authorising certain prior restraints in the media field. This last sentence of Article 10(1) ECHR has been clarified by the ECtHR in assessing that "*this may lead to interferences whose aims will be legitimate[...] such interferences must nevertheless be assessed in the light of the other requirements of paragraph 2*".⁶² However, similarly to the previous texts mentioned above, the freedom of expression enshrined in the ECHR, carries with it duties and responsibilities as worded in the provisions of Article 10(2). It thus can be limited in these specific circumstances enumerated in this paragraph as "*interests of national security, territorial integrity or public safety [...]*".⁶³ Article 10(1) ECHR confers a broad protection to freedom of expression which has been enlarged by its Court. However, this protection is granted under three different levels by the ECHR and they need to be distinguished. These three levels are gradually the protection of commercial expression, artistic expression and political expression.⁶⁴ It means then that "*the shocking as well as the acceptable deserves protection*".⁶⁵ This difference of protection will tend to be more favourable to political speech or statement when conflicting with other freedoms or rights. As Pr Kearns explained, "*political free speech is the most highly praised speech; the Court is*

⁵⁹ E.g. Azerbaijan, Georgia, Armenia.

⁶⁰ See Council of Europe, *the European Convention on Human Rights*, Article 10(1).

⁶¹ ECtHR, *Sunday Times v. UK*, Application No 6538/74 of 26 April 1979, para. 66.

⁶² ECtHR, *Informationsverein Lentia and Others v. Austria*, Application No 13914/88, 15041/89, 15717/89, 15779/89, 17207/90, of 24 November 1993, para. 32.

⁶³ Council of Europe, *the European Convention on Human Rights*, Article 10(2).

⁶⁴ Lorna Woods, 'Freedom of Expression in the European Union', *European Public Law*, Volume 12, Issue 3, Kluwer Law International, 2006, p. 374.

⁶⁵ Lorna Woods, 'Freedom of Expression in the European Union', *European Public Law*, Volume 12, Issue 3, Kluwer Law International, 2006, p. 374.; e.g. ECtHR, *The Observer and Guardian v. UK*, Application No 13585/88 of 26 November 1991, para. 79-86.

usually quite reluctant to allow restriction to political free speech".⁶⁶ This can be observed in many cases and among them the Turkish cases as *Gündüz*,⁶⁷ *Alinak*,⁶⁸ *Okcuoglu*⁶⁹ or *Karata*.⁷⁰

In the latter case, political and artistic freedoms are joined. Mr. Karata wrote poems named 'the song of a rebellion'. The Istanbul National Security Court composed of three judges including a military judge, judged the author guilty of "*disseminating separatist propaganda*".⁷¹ The poetry was held to be detrimental to the unity of the Turkish nation, and Karata was thus sentenced to one year and eight months' imprisonment and ordered to pay a large fine. Moreover, all the publications were confiscated. In the case at hand, the interference to freedom of expression appeared on the ground of the protection of the territorial integrity of the State. The poems themselves were said aggressive, expressing for instance: "*they are preparing genocide like those who know no bounds.[...] for thousands of years, our clan has been under siege in our besieged land [...] Young Kurds 'I am seventy-five years old I die a martyr*".⁷² However, it was decided that "*the aggressive tone of the poems was less a call to violence and more an expression of deep distress*".⁷³ As the ECtHR ruled on the case, it recognised that Karata was punished for his Kurdish identity more than anything and held his conviction "*disproportionate and not the proof of a democratic society*".⁷⁴ Therefore, according to the ECtHR, there had been a violation of Article 10 ECHR. It should be underlined in this context that the provisions of Article 10 ECHR tolerate limits to artistic freedom of expression or too controversial statements when considered as offending, i.e. regarding very often the criterion of morality which is evaluated through a margin of appreciation. Regarding commercial speech, the protection is minimal, or even absent. However, Kearns explained that the artistic expression being faced with such limitation as the

⁶⁶ Paul Kearns, *lecture on Law literature and Art*, University of Manchester, Tuesday 5th April 2011.

⁶⁷ ECtHR, *Gündüz v. Turkey*, Application No. 35071/97 of the 4 December 2003.

⁶⁸ ECtHR, *Alinak v. Turkey*, Application No. 40287/98 of the 29 March 2005.

⁶⁹ ECtHR, *Okcuoglu v. Turkey*, Application No 24246/94 of 8 July 1999, para. 46.

⁷⁰ ECtHR, *Karata v. Turkey*, Application No. 23168/94 of the 8th July 1999.

⁷¹ ECtHR, *Karata v. Turkey*, Application No. 23168/94 of the 8th July 1999, para. 22.

⁷² Karata, *Song of a Rebellion*, 1991, in ECtHR, *Karata v. Turkey*, Application No. 23168/94 of the 8th July 1999, para. 10.

⁷³ Article XIX Free Word Centre, Jurisprudence *Karata v. Turkey*, online article, available at : <http://www.article19.org/resources.php/resource/2561/en/karatas-v.-turkey>.

⁷⁴ ECtHR, *Karata v. Turkey*, Application No. 23168/94 of the 8th July 1999, para. 54.

possibility to infringe very easily the moral standards, that commercial speech thanks to copyright law can be seen as better protected.⁷⁵

As previously seen, the scope of the freedom of expression is continually enlarged through International public law. In a same manner, the protection offered through Article 10 ECHR is a wide one, constantly progressing thanks to the broad and prolific ECtHR jurisprudence. When there is an interference with the freedom of expression, the ECtHR operates a three-stage test: if there is a legitimate aim as stated in Article 10, if the restriction is necessary in a democratic society and if the restriction is prescribed by law.⁷⁶ If the test is negative it would constitute a violation of the Article 10. The interference has furthermore to be necessary in a democratic society,⁷⁷ meaning that it must comply with a “*pressing social need*”.⁷⁸ In a same manner that the point of reference in national legislations is the ‘average man’, the point of reference for the Council of Europe will be the one of a democratic society. Such approach gives the standards expected by the ECtHR to have a stable and democratic society in the Member State. To avoid any inextricable debate on fake democracies and auto-proclaimed ‘Republic’, the Countries mentioned below or dealt with by the ECtHR are considered stable and democratic. The proportionality of the measures interfering with the freedom is carefully and regularly observed as well.⁷⁹ A proportionality test must consider the appropriateness of the measure to achieve its stated aim and if less intrusive measures exists. But also as completed by the early *Lingens* case, if the measure is in itself proportionate to its aim.⁸⁰ However, the ECtHR is said to be inconsistent in its assessment of proportionality,⁸¹ which could lead to different outcomes according to the context and assessment adjusted on it.

⁷⁵ Paul Kearns, *lecture on Law literature and Art*, University of Manchester, Tuesday 5th April 2011.

⁷⁶ Lorna Woods, ‘Freedom of Expression in the European Union’, *European Public Law*, Volume 12, Issue 3, Kluwer Law International, 2006, p. 376.

⁷⁷ Inter alia ECtHR, *Hachette Filipacchi Associés (Paris-Match) v. France*, Application no. 71111/01 of 14 June 2007; ECtHR (Second Section), *Aydın Talav v. Turkey*, Application no 50692/99 of 2 May 2006; ECtHR (First Section), *Mamère v. France*, Application no. 64772/01 of 7 November 2006.

⁷⁸ ECtHR, *Handyside v. UK*, Application No 5493/72 of 7 December 1976, para. 48.

⁷⁹ For instance *Mamère v. France*, Application no. 64772/01 of 7 November 2006.

⁸⁰ ECtHR, *Lingens v. Austria*, Application No 9815/82 of 8 July 1986, para. 40.

⁸¹ Lorna Woods, ‘Freedom of Expression in the European Union’, *European Public Law*, Volume 12, Issue 3, Kluwer Law International, 2006, p. 376.

Another step in the ECtHR's analysis consists in the balance struck between the freedom of expression and other freedoms. The interference can legitimately appear if there is an overriding requirement of public interest⁸² or, a legitimate aim pursued as the protection of the rights of others for instance.⁸³ The freedom of expression is then often balanced with other rights as first it is not an 'absolute right'.⁸⁴ Second, the conflicting freedoms are balanced because there is no hierarchy in the ECHR between 'relative' rights. Dignity for instance will almost every time be a fundamental right privileged in the Court's decision. The ECtHR consistently held that "[t]he very essence of the Convention is respect for human dignity and human freedom";⁸⁵ with a very few exceptions only, such as the right to life enshrined in Article 2 ECHR and evoked in the past decades in inextricable debates on euthanasia.⁸⁶ Whereas relative rights are the Articles on which can be imposed some limits as mention in the second paragraph of the Article 2 ECHR. Additionally, as already mentioned, Article 10(2) ECHR, permits States to restrain the scope of the freedom in specific circumstances. It can be (counter-)illustrate as such by the *Klein* case.⁸⁷ In this case, a journalist criticised the Archbishop Jan Sokol in an article, containing slang terms, sexual connotations and making allusions to his relationship with the former communist regime. The Slovakian regional Court in charge considered that Klein could not enjoy and benefit protection of Article 10 ECHR, the article being vulgar and offending; the regional court also considered that the "article had violated the rights guaranteed by the Christian".⁸⁸ Contrary, the ECtHR accepted in *Klein* the applicant's argument that the litigious article of a journal did not interfere with the rights conferred by the Article 9 of the ECHR protecting the

⁸² Inter alia Decision as to the admissibility by the ECtHR (First Section), *Nordisk Film & TV A/S v. Denmark*, Application no. 40485/02, 8 December 2005.

⁸³ ECtHR, *Hachette Filipacchi Associés (Paris-Match) v. France*, Application no. 71111/01 of 14 June 2007.

⁸⁴ Council of Europe, *Freedom of Expression in Europe, case-law concerning Article 10 of the European Convention on Human Rights*, Human Rights files, No. 18, Council of Europe Publishing, 2007, 184p, p. 7.

⁸⁵ ECtHR, *Pretty v. the United Kingdom*, Application No. 2346/02 of 29 April 2002, para. 65; ECtHR, *Vereinigung Bildender Künstler v. Austria*, Application No 68354/01 of 25 January 2007, para. 8.

⁸⁶ Diane Roman, "Du droit de donner la vie au droit de mourir", *Colloque IDEDH: Le droit au respect de la vie au sens de la CEDH*, Montpellier, 7 Novembre 2009.

⁸⁷ For instance ECtHR (Fourth Section), *Klein v. Slovakia*, Application no. 72208/01 of 31 October 2006.

⁸⁸ Dirk Voorhoof, Ghent University / Copenhagen University, *Freedom of expression and Article ECHR – Summaries of 20 recent judgements (and decisions) of the ECtHR, published in Iris, Legal Observations of the European Audiovisual Observatory, 2005-2008*, September 2008, p. 9. Available online at : http://www-ircm.u-strasbg.fr/seminaire_oct2008/docs/Summariesrecentcases.Voorhoof.pdf.

freedom of religion and belief. The ECtHR in claiming the violation of 10 ECHR overruled the national ruling, re-establishing the protection of freedom of expression.

Finally, among this wide protection of freedom of expression, there seems to be a loophole in the ECtHR system. The proportionality test having already been evoked, it must be completed regarding the wide notion of ‘margin of appreciation’, a notion invented by the Court.⁸⁹ The ECtHR “*reserves to itself the position of final arbiter*”,⁹⁰ but nonetheless allows a certain “margin of appreciation” to the States vis-à-vis the assessment of a restriction to the freedom. According to Woods, this is an understandable means to manage the difference between the signatory States. It would allow a different degree of scrutiny as many factors can affect the margin of appreciation as “*the aim protected, the degree of common ground between the States, and the seriousness of the interference*”.⁹¹ This margin is wider in areas as “*morals*,⁹² and narrower in others such as *political speech*⁹³ or *criticism of the judiciary*⁹⁴”.⁹⁵ This is a cause to the difference of protection in the three levels regarding the freedom of expression. Furthermore, it also comforts the idea of a balance and discretion in the assessment of freedom of expression. It should however be considered as a blind spot in the protection of this freedom. This has been forcefully expressed in a dissenting opinion of the ECtHR judges in the case *Lindon*.⁹⁶ The dissenters held that in the judgement at stake denying the violation of Article 10, the ECtHR “*has quite simply refrained from carrying out its own review. The result is that European supervision is lacking, or at best considerably limited [...]*”.⁹⁷ This is unfortunately the reinsurance

⁸⁹ E.g., ECtHR, *Otto-Preminger-Institut v. Austria*, Application No 13470/87 of 20 September 1994.

⁹⁰ Lorna Woods, ‘Freedom of Expression in the European Union’, *European Public Law*, Volume 12, Issue 3, Kluwer Law International, 2006, p. 377.

⁹¹ Lorna Woods, ‘Freedom of Expression in the European Union’, *European Public Law*, Volume 12, Issue 3, Kluwer Law International, 2006, p. 377.

⁹² ECtHR, *Müller and others v. Switzerland*, Application No 10737/84 of 24 May 1988.

⁹³ ECtHR, *Lingens v. Austria*, Application No 9815/82 of 8 July 1986.

⁹⁴ ECtHR, *Prager and Oberschlick v. Austria*, Application No 15974/90 of 26 April 1995, para. 34.

⁹⁵ Roger Errera, ‘Freedom of Speech in Europe’, *European and US Constitutionalism*, edited by Georg Nolte, Cambridge University Press, 2005, 312p., p. 32.

⁹⁶ ECtHR, *Lindon, Otchakovsky-Laurens and July v. France*, Applications No 21279/02 and 36448/02 of 22 October 2007.

⁹⁷ Joint partly dissenting opinion of Judges Rozakis, Bratza, Tulkens and Šikuta, in *Lindon, Otchakovsky-Laurens and July v. France*, Applications No 21279/02 and 36448/02 of 22 October 2007, para. 3.

that the ECtHR case law remains of International law, with all the difficulties of the world to bind Member States on some provisions.

However, this protection of freedom of expression can be viewed as ‘complementarily’ protected in Europe through the European Union.

I. B. Law of the European Union

The European Union’s (EU) protection of human rights is very peculiar. It has nowadays reached a high level of protection. Indeed, this protection is widely guaranteed by its different legal basis. However, this protection ‘wasn’t built in a day’. First of all, because the EEC was restricted to economic interests only, it has been the role of the European Court of Justice to draw the frame of a fundamental rights protection, but only in “*economic and commercial interests, rights to property and the freedom to pursue a trade or profession*”.⁹⁸ This has been a characteristic of the Union⁹⁹ it kept on for a long time as clearly recalled by Mrs Woods. She wrote that originally the “*EC Treaty, a trade treaty, contained no reference to human rights and it was only in the face of rebellion from a number of national courts that the CJEU accepted*”¹⁰⁰ that Human Rights did form part of the Community legal order”.¹⁰¹ The protection of human rights in the EU has gone through an impressive chronological development. The first reference to human rights appeared quite late in the integration process through the “recitals of the Single European Act”.¹⁰² The Single European Act (SEA) affirmed the need to protect human rights on the basis of the rights “*recognised in the constitutions and laws of*

⁹⁸Eurofound Website, ‘Fundamental Rights’, *European industrial relations dictionary*, last updated 21 September 2011, online article available at: <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/fundamentalrights.htm>.

⁹⁹ In an attempt of consistency, the European (Economic) Community, former European Union will be defined under the designation of ‘EU’ or ‘Union’, even if the chronological developments antedate the Maastricht Treaty; in a same manner the European Court of Justice or Court of Justice of the European Union will be defined under the designation of ‘CJEU’.

¹⁰⁰ E.g. Case 4/73 *Nold v. Commission* [1974] ECR 491.

¹⁰¹ Lorna Woods, ‘Freedom of Expression in the European Union’, *European Public Law*, Volume 12, Issue 3, Kluwer Law International, 2006, p. 372.

¹⁰² Lorna Woods, ‘Freedom of Expression in the European Union’, 12 *European Public Law* 3, Kluwer Law International (2006), p. 372.

Member States (...) the Convention for the Protection of Human Rights and Fundamental Freedoms¹⁰³ and the European Social Charter,¹⁰⁴ notably freedom, equality and social justice”.¹⁰⁵ In a following paragraph, the SEA mentioned the need to promote democracy in “compliance with the law and human rights to which they are attached [...] within the framework of the United Nations Charter”.¹⁰⁶ The Community referred then through the Member States Constitutions and three International ‘Conventions’, among them two of the Council of Europe, to the fundamental rights and human rights as proclaimed at the international level. This constitutes a proof that at that time, the Community itself did not have yet its own legal basis on which protecting and guaranteeing these rights. Whereas in comparison, at a same stage the Inter-American Court of Human Rights, instead of choosing to base its ruling on the UDHR, decided to draft its own Convention, showing a particular attention to the protection of human rights. Concerning substantive rights in the European Union, they have had according to the doctrine, a place in the EEC from the very beginning.¹⁰⁷ When the EEC was born in 1957 thanks to the Treaty of Rome,¹⁰⁸ substantive rights aroused with it; the most prominent being the freedom of movement enshrined in Article 48 EEC and its corollary the freedom of establishment guaranteed in Article 52 EEC.¹⁰⁹ These are most of all ‘economic’ rights, underlining the very nature of the EEC. However as supported by Apt, they are also rights on which “people may call when attempting to change their social circumstances, along with their economic prospects”.¹¹⁰ It must be understood that there is a real dialectic in the Union as it started from scratch with only a basic and evolving protection of economic freedoms to the recognition of different categories of fundamental rights. It then progressively evolved through the creation of the EU

¹⁰³ Council of Europe, *European Convention on Human Rights*, 4 November 1950.

¹⁰⁴ Member States of the Council of Europe, *European Social Charter*, Turin, 18 October 1961. Available online at: <http://conventions.coe.int/Treaty/en/Treaties/html/035.htm>.

¹⁰⁵ In *Single European Act*, Luxembourg, 17 February 1986,p.2. Available online at : http://ec.europa.eu/economy_finance/emu_history/documents/treaties/singleeuropeanact.pdf.

¹⁰⁶ In *Single European Act*, Luxembourg, 17 February 1986,p.2. Available online at : http://ec.europa.eu/economy_finance/emu_history/documents/treaties/singleeuropeanact.pdf.

¹⁰⁷ Benjamin L. Apt, ‘On the Right to Freedom of Expression in the European Union’, 4 *Columbia Journal of European Law*, (1998), p. 70.

¹⁰⁸ Treaty of Rome, 25 March 1957, establishing the European Economic Community.

¹⁰⁹ Benjamin L. Apt, ‘On the Right to Freedom of Expression in the European Union’, 4 *Columbia Journal of European Law*, (1998), p. 70.

¹¹⁰ Norbert Reich, ‘A European Constitution for citizens: Reflections on the Rethinking of Union and Community Law’, 3 *European Law Journal*, (1997) p. 132-133, in Benjamin L. Apt, ‘On the Right to Freedom of Expression in the European Union’, 4 *Columbia Journal of European Law*, (1998), p. 70.

citizenship for instance, the jurisprudential development and consecration of individual fundamental rights by the CJEU, the consolidation of the Treaties and finally the Charter of Fundamental Rights.¹¹¹

Nonetheless, when Apt asked the question in his article in 2006 “*Is there an individual right to free expression in the legal system of the European Union?*”,¹¹² he answered negatively. The freedom of expression, especially before the integration of the Charter through the amendments made by the Treaty of Lisbon,¹¹³ was disappointingly not a fundamental right as well proclaimed and protected as in the ECHR. However, through the dialectic of the Community then Union, let’s observe this daily construction through Primary law of the Union, secondary legislation and the core of the protection relying on the CJEU case law.

In EU primary law, “*neither the Treaty Establishing the European Community (EC Treaty)* ¹¹⁴ *nor the Treaty on European Union (TEU)* ¹¹⁵ *explicitly guarantees a subjective right to freedom of opinion or free speech*”.¹¹⁶ While the growth of substantive rights is being considered as a “dialectical process, rebounding between the CJEU, on the one side, and the Council and Commission on the other”,¹¹⁷ there is no real mention of freedom of expression in the Treaties. Substantive rights, as already enunciated, are arising through the SEA, and are reinforced by the Treaty of Maastricht (TEU).¹¹⁸ However, authors as B. Apt seem disappointed to notice that Maastricht has been successful enough to introduce the idea of a common citizenship, however “*did not at any point call for the guaranteed right to freedom of expression*”.¹¹⁹ This is

¹¹¹ Charter of Fundamental Rights of the European Union, OJ 2010/C 83/02, 30.3.2010.

¹¹² Benjamin L. Apt, ‘On the Right to Freedom of Expression in the European Union’, 4 *Columbia Journal of European Law*, (1998), p. 69.

¹¹³ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed in Lisbon, 13 December 2007 [2007] OJ EU C306/1.

¹¹⁴ Treaty establishing the European Community, latest consolidated text published OJ EU C 321 E, 29.12.2006.

¹¹⁵ Treaty on European Union [1992] OJ EC C 191, 9.7.1992, latest consolidated text published OJ EU C 321 E, 29.12.2006.

¹¹⁶ Benjamin L. Apt, ‘On the Right to Freedom of Expression in the European Union’, 4 *Columbia Journal of European Law*, (1998), p. 69.

¹¹⁷ Benjamin L. Apt, ‘On the Right to Freedom of Expression in the European Union’, 4 *Columbia Journal of European Law*, (1998), p. 96.

¹¹⁸ Michael Newman, *Democracy, Sovereignty and the European Union* (1996), p. 36-39.

¹¹⁹ Benjamin L. Apt, ‘On the Right to Freedom of Expression in the European Union’, 4 *Columbia Journal of European Law*, (1998), p. 106.

understandable to be puzzled vis-à-vis such discrepancies in the evolution of an 'European constitutionalism'. It is thus natural to wonder why. Is it because the very nature of the Community was economic more than individuals-centred or, that the Community did not see the necessity to protect rights already protected at the ECHR level for instance? Apt gives the hypothesis of a conflict of sovereignty: "*To talk about freedom of expression is to talk, as well, about conflicts of sovereignty: the rights of individual for independent action and the expression of personal thought versus the obligation of state to preserve social harmony among its citizens*".¹²⁰ It seems to be then that the non-codification of this crucial freedom is a means for the European Institutions not to overstep their power.

However and thankfully, the Union evolves and so does its legal basis, due to its Court or to a dialectic of its interests toward a socialisation of its objectives. Through the consolidation of the Treaties with the Treaty of Lisbon in 2007, the gradual interest of the Union for the protection of human rights seems to have matured. Even if references to fundamental rights are still "*scarce and oblique in the Treaties*",¹²¹ they are not absent. Article 2 TEU reads for instance that "*the Union is based on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities*".¹²² Article 3 TEU for instance explains how "*the Union commits itself to the pursuance of certain values, including fundamental rights, even beyond the borders of the EU*".¹²³ Following up, there has then been a major change at EU level regarding the consecration of the freedom of expression. The new wording of Article 6 TEU has enabled this change. The reformed Article 6 TEU is quite similar to the previous article ante Lisbon, however the difference resides in the legal status it confers to the Charter, now part of the primary

¹²⁰ Benjamin L. Apt, 'On the Right to Freedom of Expression in the European Union', 4 *Columbia Journal of European Law*, (1998), p. 106.

¹²¹ David Chalmers, Gareth Davies, & Giorgio Monti, *European Union Law: Cases and Materials*, 2nd Ed., Cambridge University Press, 2010, 1116p., p. 230.

¹²² The Treaty on the European Union (Consolidated Version), of the 30.03.2010 (2010) OJ C 83, Article 2.

¹²³ Herwig C.H. Hofmann, Gerard C. Rowe, and Alexander H. Türk, *Administrative Law and Policy of the European Union*, Oxford University Press, October 2011, 1064p., p.158.

law.¹²⁴ Thanks to this major change, “*the system of fundamental rights protection in Europe is expected to reach apparently the highest formal level of individual rights protection that has ever existed in the European Communities*”.¹²⁵ Freedom of expression becomes now expressively protected at the EU primary law level through the Charter of Fundamental rights (CFR)¹²⁶ which has a binding effect upon Member States since the Lisbon Treaty amendments. Article 6(1) TEU provides that the Charter has ‘same legal value as the Treaties’. It thus has a legal effect and offers the possibility of being enforced before the CJEU, but also before the national courts when Union law issues are tackled.¹²⁷

The starting point of the EU Charter of Fundamental Rights draft occurred during the Cologne Summit in Mid-1999. During this European Summit was attributed a mandate to the “*specially created body by the European Council [...] specified by the European Council in Tampere in October*”.¹²⁸ The Cologne mandate, which was in charged to ‘codify’ emergent fundamental rights of the EU, claimed a strong link “*between the legitimacy of the Union and its respect for fundamental (human) rights*”.¹²⁹ It justified also this addition to the already existent treaties by describing the protection of fundamental rights as “*a founding principle of the Union and an indispensable prerequisite*”.¹³⁰ Remarkably, it was also held that “*there appears to be a need, at the present stage of the Union’s development, to establish a Charter of Fundamental Rights*”.¹³¹

¹²⁴Agata B. Capik, Still lost in space - searching for an effective enforcement of Fundamental Right under Lisbon Treaty [in:] Piontek, E., /Karasiewicz K., *Quo vadis Europa? III*, UKIE Warsaw 2009, p.451.

¹²⁵ Agata B. Capik, Capik Agata B, Still lost in space – searching for an effective enforcement of Fundamental Right under Lisbon Treaty [in:] Piontek, E., /Karasiewicz K., *Quo vadis Europa? III*, UKIE Warsaw 2009, p.449.

¹²⁶ Charter of Fundamental Rights of the European Union, OJ 2010/C 83/02, 30.3.2010.

¹²⁷ Catherine Barnard, “The EU Charter of Fundamental rights: Happy 10th Birthday?”, Trinity College, Cambridge, 2010, p. 2. Available online at : <http://www.law.cam.ac.uk/faculty-resources/summary/the-eu-charter-of-fundamental-rights-happy-10th-birthday/8348>.

¹²⁸ Justus Schönlaue, *Drafting the EU Charter –Rights, Legitimacy and Process*, Palgrave Macmillan, series editors: Egan, Nugent & Paterson, 2005, 213p, p. 82.

¹²⁹ Justus Schönlaue, *Drafting the EU Charter –Rights, Legitimacy and Process*, Palgrave Macmillan, series editors: Egan, Nugent & Paterson, 2005, 213p, p. 34.

¹³⁰ Justus Schönlaue, *Drafting the EU Charter –Rights, Legitimacy and Process*, Palgrave Macmillan, series editors: Egan, Nugent & Paterson, 2005, 213p, p. 82.

¹³¹ Justus Schönlaue, *Drafting the EU Charter –Rights, Legitimacy and Process*, Palgrave Macmillan, series editors: Egan, Nugent & Paterson, 2005, 213p, p. 82.

The Charter has then been politically proclaimed in December 2000 by the European institutions during the Nice summit, first intending to make existing fundamental rights more visible.¹³² Drafted on the legal basis protecting human rights mentioned in the SEA, it did not create new Universal rights but took ownership of these rights the EU will grant. The Charter due to its non legally binding status has been considered for almost a decade as a simple declaration, while “*the Court of Justice of the EU referred to it on a few occasions, but its presence never actually affected the outcome of any case*”.¹³³ But, the fact that the Charter was not legally binding did not mean that it had to be ignored.¹³⁴ Progressive mentions to the Charter by divers Advocate-Generals encouraged the European Court to do the same,¹³⁵ which as a result tried “*to promote its application*”.¹³⁶ Indeed, it was to be considered as a “*political document which expresses the aspirations of the EU institutions and the Member States as regards the level of fundamental rights protection in the EU*”.¹³⁷ In a same manner, it was the “*point of reference for EU institutions and bodies when carrying out their tasks*”.¹³⁸

Now the Charter is part of the EU primary law, it should be noticed that regarding this context Article 51(1) of the CFR clarifies to whom the Charter applies, meaning primarily to the Institutions and bodies of the Union.¹³⁹

The aim of this “*new catalogue of fundamental rights was indeed ‘just’ to show that the EU Institutions are already bound by the fundamental rights as they have emerged from the developments of the EU Treaties [...] European Court of Human Rights and*

¹³² Catherine Barnard, “The EU Charter of Fundamental rights: Happy 10th Birthday?”, Trinity College, Cambridge, 2010, p. 2. Available online at : <http://www.law.cam.ac.uk/faculty-resources/summary/the-eu-charter-of-fundamental-rights-happy-10th-birthday/8348>.

¹³³ Dorota Leczykiewicz, “The EU Charter of Fundamental Rights and its effects”, UK Constitutional Law Group website, 4 August 2011, online article available at : <http://ukconstitutionallaw.org/2011/08/04/dorota-leczykiewicz-the-eu-charter-of-fundamental-rights-and-its-effects/>.

¹³⁴ UKHL House of Lords EU Select Committee, The Treaty of Lisbon: An Impact Assessment, 10th Report, London, 2007-8, HL Paper 62, para. 5.7.

¹³⁵ UKHL House of Lords EU Select Committee, The Treaty of Lisbon: An Impact Assessment, 10th Report, London, 2007-8, HL Paper 62, para. 5.8.

¹³⁶ UKHL House of Lords EU Select Committee, The Treaty of Lisbon: An Impact Assessment, 10th Report, London, 2007-8, HL Paper 62, para. 5.8.

¹³⁷ UKHL House of Lords EU Select Committee, The Treaty of Lisbon: An Impact Assessment, 10th Report, London, 2007-8, HL Paper 62, para. 5.7.

¹³⁸ UKHL House of Lords EU Select Committee, The Treaty of Lisbon: An Impact Assessment, 10th Report, London, 2007-8, HL Paper 62, para. 5.7.

¹³⁹ Explanations relating to the Charter of Fundamental rights OJ 2007/C303/17.

of the European Court of Justice".¹⁴⁰ But the Charter also applies to Member States when 'implementing' EU law. This explains partly the "*mixed reactions*"¹⁴¹ regarding the new status of the Charter, whereas Article 51(2) CFR that it "*does not extend the field of application of the Union law beyond the competences of the Union [neither] establish new powers or tasks of the Union, [nor] modify any tasks defined in the Treaties*".¹⁴² For instance, "*Andrew Duff MEP saw the decision to give legally binding effect to the Charter as a "huge step forward for the European citizen" and the Law Society of England and Wales commented that it would allow the rights in the Charter "to be recognised or interpreted in new ways that could bring positive benefits to individuals"*".¹⁴³ Whereas certain Member States were officially reluctant regarding the elevation of the Charter into the primary level of EU law. Even if the Charter is not creating new rights, some 'Euro-sceptics' benefited from a 'loop-hole': "*The principal and most public demonstration of this desire was the adoption of what became Protocol 30 on the application of Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, referred to in the (probably incorrect) short-hand as the 'opt-out'*".¹⁴⁴

The effects of this protocol are not entirely defined. The protocol was described as another clarification on the charter,¹⁴⁵ or the personal reinsurance of the Euro-sceptics. It was commented for instance that the "*Charter is likely to have in the UK exactly the same force as any other EU act of primary law, and its practical effects will depend on*

¹⁴⁰ Justus Schönlaue, *Drafting the EU Charter –Rights, Legitimacy and Process*, Palgrave Macmillan, series editors: Egan, Nugent & Paterson, 2005, 213p, p. 83.

¹⁴¹ UKHL House of Lords EU Select Committee, *The Treaty of Lisbon: An Impact Assessment*, 10th Report, London, 2007-8, HL Paper 62, para. 5.65.

¹⁴² Anna Wyrozumska, 'Chapter IV. Incorporation of the Charter of Fundamental Rights into the EU Law: Status of the Charter, Scope of its Binding Force and Application, Interpretation Problems and Polish Position', in Zarys Prawa and Jan Barcz (Eds), *Fundamental Rights protection on the European Union*, C.H. BECK, Warszawa, 2009, 388p., p. 85.

¹⁴³ UKHL House of Lords EU Select Committee, *The Treaty of Lisbon: An Impact Assessment*, 10th Report, London, 2007-8, HL Paper 62, para. 5.65.

¹⁴⁴ Catherine Barnard, 'The EU Charter of Fundamental rights: Happy 10th Birthday?', Trinity College, Cambridge, 2010, p. 1. Available online at : <http://www.law.cam.ac.uk/faculty-resources/summary/the-eu-charter-of-fundamental-rights-happy-10th-birthday/8348>.

¹⁴⁵ Catherine Barnard, 'The EU Charter of Fundamental rights: Happy 10th Birthday?', Trinity College, Cambridge, 2010, p. 7. Available online at : <http://www.law.cam.ac.uk/faculty-resources/summary/the-eu-charter-of-fundamental-rights-happy-10th-birthday/8348>.

the content of Charter provisions and the general doctrines of EU law".¹⁴⁶ This has been confirmed by a few authors, among them Catherine Barnard: "*In other words, to the extent that the Charter is merely a restatement of the existing law, then the Protocol is not an opt-out and the Charter will apply to the UK/Poland*".¹⁴⁷ An exception to this could occur in the situation that the Charter would create new rights, then the UK, Poland and Czech would be spared in the application of these dispositions. And also, the tricky "*rights/principles dichotomy*"¹⁴⁸ as mentioned in Article 1(2) CFR pops new questions regarding the application of the Title IV of the Charter on 'Solidarity'. Barnard stated on this issue that "*Article 1(2) appears to leave open the door to the possibility of the UK/Poland having an opt-out from any provisions in Title IV which might be considered, in the future, to contain rights, rather than principles*".¹⁴⁹

If the wording set out in Article 6(1) TEU seems to limit the scope of application of the fundamental rights in the EU, on the contrary Article 6(3) TEU permits to reaffirm in parallel the constant importance of the General Principles of EU law extricated from the Court's jurisprudence. These General Principles are the unwritten principles of EU law, to which must be paid as much attention as to the codified fundamental rights. Paragraphs 6(1) and 6(3) TEU shall be considered as complementary in this matter. Considerably important, the Charter also proclaims in Article 52(3) that the CFR "*contains rights which correspond to rights guaranteed by the ECHR, the meaning and the scope shall be the same as enshrined in the Convention*".¹⁵⁰ It becomes official

¹⁴⁶ Dorota Leczykiewicz, 'The EU Charter of Fundamental Rights and its effects', UK Constitutional Law Group website, 4 August 2011, online article available at : <http://ukconstitutionallaw.org/2011/08/04/dorota-leczykiewicz-the-eu-charter-of-fundamental-rights-and-its-effects/>.

¹⁴⁷ Catherine Barnard, 'The EU Charter of Fundamental rights: Happy 10th Birthday?', Trinity College, Cambridge, 2010, p. 7. Available online at : <http://www.law.cam.ac.uk/faculty-resources/summary/the-eu-charter-of-fundamental-rights-happy-10th-birthday/8348>.

¹⁴⁸ Catherine Barnard, 'The EU Charter of Fundamental rights: Happy 10th Birthday?', Trinity College, Cambridge, 2010, p. 9. Available online at : <http://www.law.cam.ac.uk/faculty-resources/summary/the-eu-charter-of-fundamental-rights-happy-10th-birthday/8348>.

¹⁴⁹ Catherine Barnard, 'The EU Charter of Fundamental rights: Happy 10th Birthday?', Trinity College, Cambridge, 2010, p. 8-9. Available online at : <http://www.law.cam.ac.uk/faculty-resources/summary/the-eu-charter-of-fundamental-rights-happy-10th-birthday/8348>.

¹⁵⁰ Di Giacomo Di Frederico, 'The Impact of the Lisbon Treaty on EU Antitrust Enforcement: Enhancing procedural Guarantees Through Article 6 TEU', *Il Diritto dell'Unione Europea*, Anno XV (2010) 4, 805-834p., p.806.

in primary law that the human rights of the ECHR are to be applied among the EU. This is an exceptional turn of events in the whole history of the EU legal basis. It must be observed then that the Union comes from a protection onto strictly economic rights, to an individualisation of this protection in guaranteeing the respect of human rights.

Regarding the freedom of expression, Article 11 of the CFR grants a clear right to freedom of expression. The wording is exactly the same in 11(1) as to Article 10 ECHR including the same notion of a right to 'impart' and 'receive' ideas and informations. The mention on media as the possibility for state to require licensing is absent from the CFR. However, it is strictly provided for in the provisions of Article 11(2) CFR that "*freedom and pluralism of the media shall be respected*". Moreover, the freedom of expression as worded in the CFR does not include any paragraph on enumerated restrictions to the freedom. Nonetheless, the explanations of the Charter as underlined by Lorna Woods,¹⁵¹ explain clearly how Article 11 of the CFR corresponds to Article 10 ECHR and that "*the meaning and scope of this right are those guaranteed by the ECHR*".¹⁵²

Two corollaries of freedom of expression can be found in the Charter in addition to Article 11 CFR. Indeed, not only freedom of expression can be completed by Article 10 CFR, it can be as well extended by Article 13 CFR. Firstly, Article 10 CFR is a corollary of the freedom of expression as it consecrates 'freedom of thought, conscience and religion', both being related by the international definitions¹⁵³ previously mentioned. Secondly, Article 13 CFR provides that "The arts and scientific research shall be free of constraint. Academic freedom shall be respected." The Explanations say this is "deduced primarily from the right to freedom of thought and expression".¹⁵⁴ However, the scope of Article 13 seems to be fairly debated in the British report, which is no surprise regarding the Blasphemy laws still existing at the time of the report.¹⁵⁵ The British Committee on EU drafted the issue as such: "*While there is no question that the right to*

¹⁵¹ Lorna Woods, 'Freedom of Expression in the European Union', *European Public Law*, Volume 12, Issue 3, Kluwer Law International, 2006, p. 373.

¹⁵² Explanations relating to the Charter of Fundamental rights, OJ 2007/C 303/02, p.5.

¹⁵³ E.g., The Organisation of American States (OAS), *the American Declaration of the Rights and Duties of Man*, Bogota, 1948, Article 13.

¹⁵⁴ UKHL House of Lords EU Select Committee, *The Treaty of Lisbon: An Impact Assessment*, 10th Report, London, 2007-8, HL Paper 62, , para. 5.44.

¹⁵⁵ UKHL House of Lords EU Select Committee, *The Treaty of Lisbon: An Impact Assessment*, 10th Report, London, 2007-8, HL Paper 62, , para. 5.44.

freedom of expression is protected under existing human rights obligations, the question arises as to the extent to which this right can be interpreted as including a right to "freedom of the arts and sciences" extending beyond the right of expression itself.¹⁵⁶

Then, a broader connexion to the freedom of expression can be extended through a few Articles, to the notion of a 'right to know'. For instance, the second paragraph of Article 296 TFEU reads "*Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties*".¹⁵⁷ One could think at a first glance that this remains in the field of the rights of defence or even the principle of a good administration, however this corresponds as well to the right to know as part of the definition of freedom of expression¹⁵⁸. Also, Article 169 TFEU provides in a same manner the 'promotion' of the consumers' right to know, and Article 15(3) TFEU confers a "*right of access to documents of the Union institutions*".¹⁵⁹

Moreover, it should not be forgotten that the freedom of expression is nowadays protected but also promoted at a secondary law level through recent directives, Council decisions¹⁶⁰ and resolutions¹⁶¹ on specific matters as broadcasting, licensing or internet.

¹⁵⁶ UKHL House of Lords EU Select Committee, The Treaty of Lisbon: An Impact Assessment, 10th Report, London, 2007-8, HL Paper 62, , para. 5.44.

¹⁵⁷ The Treaty on the Functioning of the European Union (Consolidated Version), of the 30.03.2010 (2010) OJ C 83, Article 296.

¹⁵⁸ E.g. Charter of Fundamental Rights of the European Union, OJ 2010/C 83/02, 30.3.2010., Article 11 ; Council of Europe, *European Convention on Human Rights*, 4 November 1950, Article 10.

¹⁵⁹ The Treaty on the Functioning of the European Union (Consolidated Version), of the 30.03.2010 (2010) OJ C 83, Article 15(3).

¹⁶⁰ *Inter alia*, Council Decision of 26 July 2010 concerning the conclusion of an Agreement between the European Community and the Swiss Confederation in the audiovisual field, establishing the terms and conditions for the participation of the Swiss Confederation in the Community programme MEDIA 2007, and a Final Act - 2010/478/EU, OJ L 234 of 4.9.2010, p.1-2.; Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) - (codified version), OJ L51 of 15.4.2010.; Council conclusions of 20 November 2008 on the Development of legal offers of online cultural and creative content and the prevention and combating of piracy in the digital environment, OJ C 319 of 13.12.2008, p. 15-17.

¹⁶¹ *Inter alia*, Council Resolution of 19 December 2002 on interactive media content in Europe, OJ C 013 , 18.01.2003, p. 0008-0009.; Council Resolution on the protection of consumers, in particular young people, through the labelling of certain video games and computer games according to age group, 2 March 2002 (2002/C65/02), OJ C65, 14.3.2002, p.2.

For instance, the Directive 2007/65/EC¹⁶² is a way to regulate television broadcasting, recalling the ‘growing importance’ of Audiovisual media for democratic societies, regarding also education and society.¹⁶³ In it, both paragraphs 12 and 45 recall for example the compliance of the Directive to the freedom of expression enshrined in Article 11 CFR. Are recalled also, the necessity of an access to information,¹⁶⁴ a duty of Member States against harmful content,¹⁶⁵ and a duty to take measures to protect dignity or even the development of minors carefully balanced with the freedom of expression.¹⁶⁶ It should be underlined that this Directive emphasises the importance of this type of regulation from the Union, as regard to the importance of medias to be regulated; but above all the importance of unshackled media necessary to help democracy to prosper. Also, a cornerstone on recent media legislation is the Audiovisual Media Services Directive, which recalls in a same manner its compliance with Freedom of expression as protected at EU level.¹⁶⁷ Another example can be given through the Council Decision 2006/515/EC¹⁶⁸ promoting cultural diversity and expression defined in its Article 4, and recalling Universal Rights.¹⁶⁹ This Council Decision follows up the UNESCO Convention having the same name, and permits to approved it on behalf of the

¹⁶² Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 332, 18.12.2007, p. 27-45.

¹⁶³ Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 332, 18.12.2007, p. 27-45, para. 3.

¹⁶⁴ Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 332, 18.12.2007, p. 27-45, para. 43.

¹⁶⁵ Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 332, 18.12.2007, p. 27-45, para. 44.

¹⁶⁶ Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 332, 18.12.2007, p. 27-45, para. 45.

¹⁶⁷ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L 095, 15.4.2010, p. 1, para. 16.

¹⁶⁸ Council Decision No 2006/515/EC of 18 May 2006 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, OJ L 201, 25.7.2006, p. 15.

¹⁶⁹ Referring in introduction to UNESCO Convention or the Universal Declaration of Human Rights.

Union. It recalls human rights and promotes a diversity of cultural expressions, enlarging again the scope and definition of freedom of expression. These examples of secondary legislation on the regulation of freedom of expression illustrate a certain need of uniformity, in the growing fields of medias and licensing for instance, which are ‘the barrel of the Danaids’ to regulation. These provisions concern freedom of expression but mostly are in direct link with the internal market, justifying strong and details legislative instruments on very specific areas.

Finally, in the protection of freedom of expression within the European Union, the crucial protagonist in this development is the European Court of Justice. Once a again, the CJEU is the motor of the European legal integration.¹⁷⁰ In spite of the scarcity of its case law compared to the ECtHR, its role is not to be undermined. It comes from the fact that the CJEU is the main author and actor of the EU law system, and also thanks to the preliminary ruling. Indeed, the system of preliminary rulings under 267 TFEU creates a permanent dialogue between the CJEU and national courts.¹⁷¹ It is also significant as it enables and provides for “*alternative means for individuals to challenge the legality of Community acts*”.¹⁷² The role of the Court in the affirmation of fundamental rights started in relation to the Union supremacy. This supremacy means that the national constitutions, even regarding the protection of constitutional fundamental rights, could not be used “*in all circumstances, as any EU legal provision took precedence over them*”.¹⁷³ The EU supremacy arose thanks to the *Van Gend en Loos*¹⁷⁴ and *Costa v. ENEL*¹⁷⁵ cases. In *Van Gend en Loos*, the Dutch revenue authorities decided to charge import duty according to the Dutch Tariff Ordinance of 1960, whereas the company Van Gend en Loos relied on a previous Tariff Ordinance of 1947 with a smaller rate charged on import duty. The company thus claimed that the Government violated Article 25 of

¹⁷⁰ Donna Starr-Deelen and Bart Deelen, ‘The European Court of Justice as a Federator’, *Publius*, 1996, Volume 26, Issue 4, pp. 81-97.

¹⁷¹ Roger Errera, ‘Freedom of Speech in Europe’, *European and US Constitutionalism*, edited by Georg Nolte, Cambridge University Press, 2005, 312p., p.28.

¹⁷² Agata B. Capik Still lost in space - searching for an effective enforcement of Fundamental Right under Lisbon Treaty [in:] Piontek, E., /Karasiewicz K., *Quo vadis Europa? III*, UKIE Warsaw 2009, p. 464.

¹⁷³ David Chalmers, Gareth Davies, & Giorgio Monti, *European Union Law: Cases and Materials*, 2nd Ed., Cambridge University Press, 2010, 1116p., p.233.

¹⁷⁴ CJEU, Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, [1963] ECR 1.

¹⁷⁵ CJEU, Case 6/64, *Costa v. ENEL*, [1964] ECR 585.

the EC Treaty.¹⁷⁶ The case ended before a Dutch administrative tribunal which made a preliminary reference to the CJEU concerning the direct application of the Treaty provision within the territory of a Member State. In recognising the direct effect of a clear and unconditional prohibition supported by the provision, the Court formulated that the Treaty “*counted in addition to Member States, individuals as its subjects [and that the] legal order set up by the Treaty was ‘a new legal order of international law’*”.¹⁷⁷

The *Costa* case came to complete this remarkable progress in adding that the EU was now an “*integral part of the legal systems of the Member States*”,¹⁷⁸ establishing then the EU supremacy.¹⁷⁹ This is how the EU supremacy was born, attributing it the competence to acknowledge and then protect fundamental rights. Without these cornerstone cases, the EU would “*have remained an abstract skeleton, and a great variety and number of Treaty violations would have remained undisclosed and unredressed*”.¹⁸⁰

A bit later, a care for fundamental rights became more explicit in the Court’s judgement *Stauder*.¹⁸¹ The case concerned a “*Commission Decision designed to reduce butter stocks, which allowed butter to be sold at a lower price to people who were on certain welfare schemes*”.¹⁸² However, to benefit from this offer, beneficiaries had to present butter coupon with their names on it, under the German and Dutch versions of the

¹⁷⁶ Franz C. Mayer, ‘Van Gend en Loos: The Foundation of a Community Law’, in Miguel Poiars Maduro and Loïc Azoulai (Eds.), *The Past and Future of EU Law –The Classic of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Hart Publishing, 2010, 512p., p. 16-17.

¹⁷⁷ Ole Spiermann, ‘On Law or Policy in the European Court of Justice, Van Gend en Loos and Costa v. ENEL’, in Henning Koch, Karsten Hagel-Sorensen, Ulrich Haltern and Joseph H.H. Weiler (Eds.), *Europe – The New Legal Realism*, Djof Publishing, 2010, 860p., p. 724.

¹⁷⁸ Ole Spiermann, ‘On Law or Policy in the European Court of Justice, Van Gend en Loos and Costa v. ENEL’, in Henning Koch, Karsten Hagel-Sorensen, Ulrich Haltern and Joseph H.H. Weiler (Eds.), *Europe – The New Legal Realism*, Djof Publishing, 2010, 860p., p. 726.

¹⁷⁹ Nial Fennelly, ‘The European Court of Justice and the Doctrine of Supremacy: Van Gend en Loos; Costa v ENEL; Simmenthal’, in Miguel Poiars Maduro and Loïc Azoulai (Eds.), *The Past and Future of EU Law –The Classic of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Hart Publishing, 2010, 512p., p. 39.

¹⁸⁰ E. Stein, in Franz C. Mayer, ‘Van Gend en Loos: The Foundation of a Community Law’, in Miguel Poiars Maduro and Loïc Azoulai (Eds.), *The Past and Future of EU Law –The Classic of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Hart Publishing, 2010, 512p., p. 25.

¹⁸¹ CJEU, Case 26/69, *Stauder v. City of Ulm*, [1969] ECR 419.

¹⁸² David Chalmers, Gareth Davies, & Giorgio Monti, *European Union Law: Cases and Materials*, 2nd Ed., Cambridge University Press, 2010, 1116p., p. 233.

Decision only.¹⁸³ Mr Stauder, challenged the decision on the basis that the requirement of his name being on it was a breach of his right to respect for privacy.¹⁸⁴ The European Court ruling upon it, decided that the French and Italian versions of the decisions should be adopted instead, as they did not mention such requirement. In so doing, the Court held that “*the fundamental human rights [are] enshrined in the general principles of Community law [and are] protected by the Court*”.¹⁸⁵

This is a real beginning for a growing and continue affirmation by the Court of General principles and care for human rights. The line of jurisprudence continued on a same path with another landmark case, *Internationale Handelsgesellschaft*.¹⁸⁶ Because the Court did not established properly an “*organic status*”¹⁸⁷ for these fundamental rights, national courts were left with the choice until *Internationale Handelsgesellschaft*, to “refuse applying EU law or neglect fundamental liberties enshrined in their national constitutions”.¹⁸⁸ In the case, a Regulation provided a German Company a licence to export maize under a certain limit of time and the condition of a deposit that would be forfeited only in a case a failure to export. The company failing to fulfil its commitment challenged the Regulation before the Frankfurt administrative Court, which referred a question to the CJEU after having considered that the Regulation was incompatible with the German Constitutional freedom to trade. Even if the Court recognised there had been no violation committed by the Regulation, it took the opportunity to affirm the importance of the fundamental rights’ respect within the EU. The Court held: “*In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to Member States, must be ensured within the*

¹⁸³ David Chalmers, Gareth Davies, & Giorgio Monti, *European Union Law: Cases and Materials*, 2nd Ed., Cambridge University Press, 2010, 1116p., p. 233.

¹⁸⁴ David Chalmers, Gareth Davies, & Giorgio Monti, *European Union Law: Cases and Materials*, 2nd Ed., Cambridge University Press, 2010, 1116 p., p. 233.

¹⁸⁵ CJEU, Case 26/69, *Stauder v. City of Ulm*, [1969] ECR 419.

¹⁸⁶ CJEU, Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

¹⁸⁷ David Chalmers, Gareth Davies, & Giorgio Monti, *European Union Law: Cases and Materials*, 2nd Ed., Cambridge University Press, 2010, 1116 p., p. 233.

¹⁸⁸ David Chalmers, Gareth Davies, & Giorgio Monti, *European Union Law: Cases and Materials*, 2nd Ed., Cambridge University Press, 2010, 1116 p., p. 233.

framework of the structure and objectives of the Community".¹⁸⁹ This case found echo in the Italian case *Frontini*,¹⁹⁰ where "the challenge to the EU supremacy has been supported by the Italian Court".¹⁹¹ In a same manner, it was held in *Frontini* that EU law would not prevail on national law if the first would come to violate the Constitutional principles of the country, including fundamental rights.¹⁹² *Frontini* can also be considered as the Italian equivalent for the *Solange*¹⁹³ saga which followed a few years later. In this saga, the German Constitutional Court ruled that 'as long as' fundamental rights were sufficiently protected at the EU level vis-à-vis the protection granted by the German Constitution, it would not impinge on the EU supremacy. However, this led to critics accusing the EU to develop the protection of fundamental rights not for the sake of the human rights, but to affirm its primacy and authority on Member States.¹⁹⁴

Thus, such accusations concerning ulterior motives of the Union did not prevent the Court of Justice in helping general principles and fundamental rights to emerge progressively in EU law. The Court of Justice used for that different sources in addition to the constitutional traditions of the Member States. It significantly stated in the *Nold* case¹⁹⁵ that "international human treaties were another source of fundamental rights in EU law".¹⁹⁶ In integrating other sources, this is an excessively important step in the recognition and the broadening of the scope of application of the fundamental rights within the EU. Nonetheless, the Court held at the same time that these rights were not absolute, and could be obviously subject to limits imposed by the public interest for instance.¹⁹⁷ Such limitation has been repeated in 1988 in *Wachauf*¹⁹⁸ when the Court

¹⁸⁹ CJEU, Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, para. 4.

¹⁹⁰ CJEU, *Frontini v. Ministero delle Finanze* [1974] 2 CMLR 372.

¹⁹¹ David Chalmers, Gareth Davies, & Giorgio Monti, *European Union Law: Cases and Materials*, 2nd Ed., Cambridge University Press, 2010, 1116 p., p. 234.

¹⁹² David Chalmers, Gareth Davies, & Giorgio Monti, *European Union Law: Cases and Materials*, 2nd Ed., Cambridge University Press, 2010, 1116 p., p. 234.

¹⁹³ Decision of 29 May 1974, *Solange I-Beschluß* BVerfGE 37, 271 2; Decision of 22 October 1986, *Solange II* BVerfGE 73, 339.

¹⁹⁴ David Chalmers, Gareth Davies, & Giorgio Monti, *European Union Law: Cases and Materials*, 2nd Ed., Cambridge University Press, 2010, 1116 p., p. 235.

¹⁹⁵ CJEU, Case 4/73 *Nold KG v. Commission* [1974] ECR 491.

¹⁹⁶ David Chalmers, Gareth Davies, & Giorgio Monti, *European Union Law: Cases and Materials*, 2nd Ed., Cambridge University Press, 2010, 1116 p., p. 235.

¹⁹⁷ CJEU, Case 4/73 *Nold KG v. Commission* [1974] ECR 491, para. 14.

held that general principles of EU law “*have to be observed by the Member States when they implement EU law*”.¹⁹⁹ The *Nold* case was followed closely by *Rutili*,²⁰⁰ in which the Court explicitly referred to the ECHR as one of those international sources. In spite of the particular status recognised to the ECHR as a source,²⁰¹ this acknowledgement is of particular importance once again on the path to a high respect of fundamental rights at EU level, and that a few decades before the consecration brought by the CFR. Within this progression and relying on a diversity of sources, nationals as well as internationals, the Court of Justice acknowledged different categories of rights : Civil Rights (including family and private life, freedom of religion or freedom of expression for instance), Economic rights (e.g. right to trade), Rights of defence (e.g. right to an effective judicial remedy), and its general principles of law (e.g. principle of non-discrimination).²⁰²

The primary law of the EU having been rather inefficient to include substantive rights, and then the freedom of expression, the CJEU has been in charge in various cases to deal with them.²⁰³ There is an undeniable influence of the ECtHR on the CJEU that was at first very shy. In the case *Cinéthèque*, the CJEU affirmed that “*freedom of speech, or expression, is a part of Community law in those areas where it is relevant to the activities of the Community [...]*”,²⁰⁴ instead of basing its ruling on principles early recognised by the ECtHR. The CJEU established a cornerstone definition of the freedom of expression through the two landmark cases *ERT*²⁰⁵ and *Grogan*.²⁰⁶ In those two cases, a dual evaluation of the CJEU has been elaborated. First, the Court acknowledged the great protection conferred to freedom of expression by Article 10 of the ECHR. Second, it nonetheless recognized in the meantime that the Convention was beyond its

¹⁹⁸ CJEU, Case 5/88 *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609, para. 18.

¹⁹⁹ Herwig C.H. Hofmann, Gerard C. Rowe, and Alexander H. Türk, *Administrative Law and Policy of the European Union*, Oxford University Press, October 2011, 1064p., p.144.

²⁰⁰ CJEU, Case 36/75 *Roland Rutili v Ministre de l'intérieur* [1975] ECR 1219, para 32.

²⁰¹ *Inter alia*, CJEU, Case C-299/95 *Kremzov v. Austria* [1997] ECR I-2629.

²⁰² See David Chalmers, Gareth Davies, & Giorgio Monti, *European Union Law: Cases and Materials*, 2nd Ed., Cambridge University Press, 2010, 1116 p., p. 235-236.

²⁰³ Benjamin L. Apt, 'On the Right to Freedom of Expression in the European Union', 4 *Columbia Journal of European Law*, (1998), p. 73.

²⁰⁴ CJEU, *Joined Cases 60 and 61/84 Cinéthèque v. Fédération des Cinémas Français*, 1985, E.C.R.

²⁰⁵ CJEU, Case C- 260/89, *Ellikini Radiophonia Tileorassi AE*, 1991 E.C.R. 2925.

²⁰⁶ CJEU, Case C-159/90, *SPUC v. Grogan*, 1991 E.C.R. I-4685.

jurisdiction.²⁰⁷ In *ERT*, it was held that the government's monopoly on broadcasting imposed under Articles 52 and 62 TFEU for reasons of public policy, violated freedom of expression under 10 ECHR. To apply this provisions, the CJEU followed three steps: firstly, it recognized that the issue at hand belong to Community law, secondly - that the issue concerned freedom of expression as protected by the ECHR, thirdly and finally that it had competence when these two first steps were gathered.²⁰⁸ It is to be understood then, that the principle of freedom of expression as "*codified in Article 10, is assumed in ERT as a jurisprudential fundament of the Community*".²⁰⁹ Not only the CJEU strikingly recognised a need to protect freedom of expression within EU law as well as the ECHR protects it; the CJEU also crucially extended the scope of fundamental rights. Indeed, *ERT* provided that "*wherever a national measure, whatever its intent, restricts free movement it will be governed by EU fundamental right norms [...] all would fall for assessment for their compliance with fundamental rights, insofar as they have the potential to restrict free movement between EU States*".²¹⁰ In *Grogan*, an Irish organisation against abortion filled a complaint against a group of students who distributed leaflets about English abortion clinic at their University.

The CJEU reiterated its definition of freedom of expression, while restating *ERT* to confirm its jurisdiction. However, the CJEU avoided well to rule upon such highly sensitive matter and freedom of expression was not properly discussed, the spotlight of the ruling being focused on the freedom to provide services.²¹¹ Indeed, as the service provided by the students was free, Article 56 TFEU could not serve as a legal basis for the case and it was decided to fall outside the scope of EU law. A few other cases enabled the CJEU to proclaim the principle of freedom of expression at EU level. However, these cases of the Court emerged above all because there has been a balance or restrictions to

²⁰⁷ Benjamin L. Apt, 'On the Right to Freedom of Expression in the European Union', 4 *Columbia Journal of European Law*, (1998), p. 89.

²⁰⁸ Benjamin L. Apt, 'On the Right to Freedom of Expression in the European Union', 4 *Columbia Journal of European Law*, (1998), p. 90.

²⁰⁹ Benjamin L. Apt, 'On the Right to Freedom of Expression in the European Union', 4 *Columbia Journal of European Law*, (1998), p. 91.

²¹⁰ David Chalmers, Gareth Davies, & Giorgio Monti, *European Union Law: Cases and Materials*, 2nd Ed., Cambridge University Press, 2010, 1116 p., p. 254.

²¹¹ Lorna Woods, 'Freedom of Expression in the European Union', *European Public Law*, Volume 12, Issue 3, Kluwer Law International, 2006, p. 373.

the economic fundamental freedoms as in *Schmidberger*²¹² or *Familiapress*.²¹³ In *Schmidberger* for instance, an authorised and framed demonstration in Austria disrupted the delivery of goods through the Alps. The Court surprisingly favoured freedom of expression and assembly in this battle against the free movement of goods of Article 30 TFEU. It held “*Thus, since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods*”.²¹⁴ Freedom of expression is then protected only indirectly.²¹⁵ Or because the Court has to rule on other rights as well conflicting with freedom of expression such as in *Lindqvist*,²¹⁶ *RTL*,²¹⁷ *Tobacco Advertising*,²¹⁸ in that it “*involves human rights arguments in the interpretation of Community secondary measures*”.²¹⁹ In *Lindqvist* for instance, Mrs Lindqvist unilaterally provided informations about her and colleagues on a blog with religious details on her parish. In doing this, she violated the data privacy rules. Although she tried to rely on her freedom of expression, the balance struck by the Court²²⁰ did not lean on her side : “*Even though Mrs Lindqvist could rely on the freedom of expression and the pursuance of activities contributing to religious life, the publication of the information breached Article 8(1) of Directive 95/46 on data protection,*²²¹ *as this was done without the consent of her*

²¹² CJEU, Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria*, 2003 ECR I-5659.

²¹³ CJEU, Case C-368/95, *Vereinigte Familipress Zeitungsverlags und vertriebs GmbH v. Heinrich Bauer Verlag*, 1997 E.C.R. I-3689.

²¹⁴ CJEU, Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria*, 2003 ECR I-5659, para. 74.

²¹⁵ Lorna Woods, ‘Freedom of Expression in the European Union’, *European Public Law*, Volume 12, Issue 3, Kluwer Law International, 2006, p. 386.

²¹⁶ CJEU, Case C-101/01 *Lindqvist*, 2003 E.C.R. I-12971.

²¹⁷ CJEU, Case C-245/01 *RTL Television GmbH v. Niedersächsische Landesmedienanstalten für privaten Rundfunk*, 2003 E.C.R. I-12489.

²¹⁸ CJEU, Case C-376/98, *Germany v. European Parliament and Council of the European Union (Tobacco Advertising Directive)*, 2000 ECR I-8419.

²¹⁹ Lorna Woods, ‘Freedom of Expression in the European Union’, *European Public Law*, Volume 12, Issue 3, Kluwer Law International, 2006, p. 387.

²²⁰ CJEU, Case C-101/01 *Lindqvist*, 2003 E.C.R. I-12971, para. 87.

²²¹ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995 L 281/31.

colleagues".²²² The CJEU allows then after preliminary rulings the national courts to "balance the competing interests, always in the light of the principle of proportionality"²²³.²²⁴ It has to be noticed that the CJEU's role is crucial. It is the main actor of the development of the interest on freedom of expression, enabling its protection at EU level, and able to refer to the ECHR and its jurisprudence.²²⁵

It can be disappointing to analyse the CJEU case law compared to the ECtHR's jurisprudence which is prolific and enlarging the freedom. Disappointing indeed when comparing the two, especially that one could expect better protection from the EU regarding the pressure the Institutions can weight on Member States. In spite of these expectations, the ECtHR seems to deal with most of the issues on freedom of expression, and be so far, or at least until the Lisbon Reforms, the watchdog of human rights. However, the dialectic and progress of the EU regarding the protection of freedom of expression is remarkable, especially considering that Member States rigorously care about a strict absence of encroachment in their sovereignty.

The protection of freedom of expression is even more considerable when studied in the light of a cooperation between CJEU and ECtHR. Errera confirmed this in mentioning a "permanent triangular relationship between domestic courts, the ECtHR and the CJEU, leading to the slow growth of a 'transnational constitutionalism'. In today's Europe the protection of fundamental rights, freedom of speech being one of them, is achieved both at domestic constitutional and at European level [...] there is both 'competition and complementarity' between domestic courts and the Strasbourg and Luxembourg Courts".²²⁶

²²² Herwig C.H. Hofmann, Gerard C. Rowe, and Alexander H. Türk, *Administrative Law and Policy of the European Union*, Oxford University Press, October 2011, 1064p., p.161.

²²³ E.g. CJEU, Case C-101/01 *Lindqvist*, 2003 E.C.R. I-12971, para. 87.

²²⁴ Lorna Woods, 'Freedom of Expression in the European Union', *European Public Law*, Volume 12, Issue 3, Kluwer Law International, 2006, p. 388.

²²⁵ Since the CJEU *Case C-279/09 DEB* of 22 December 2010, the meaning and scope of Rights enshrined in CFR are also to be understood in the light of the ECtHR jurisprudence.

²²⁶ Roger Errera, 'Freedom of Speech in Europe', *European and US Constitutionalism*, edited by Georg Nolte, Cambridge University Press, 2005, 312p., p. 29.

I. C. National law of several (Member) States

In *Otto Preminger*,²²⁷ the ECHR confirmed the *Handyside*²²⁸ jurisprudence of 1976 when it held that States and national courts have a margin of appreciation to assess the need of the measures contravening the freedom of expression in the light of national circumstances and traditions. National courts have then a specific and crucial role, whereas Member States are the one taking these measures, and creating these policies. States then have a major role regarding the legal protection of freedom of expression (ex. National Constitutions, legislations, criminal codes), but also a major role when Member States go a step backward and decide to breach this freedom.

I.C. 1. Freedom of expression in Germany

The German Basic Law (*Grundgesetz*) guarantees the Freedom of expression, press freedom and other related freedom in the provisions of its Article 5. This Article, constituted of three paragraphs, is striking, not only because it refers similarly to Article 10(1) ECHR to broadcasting and cinema while drafted in 1949, but also as mentioned by Barendt²²⁹ as it offers particularly a protection for “academic and artistic freedom” in 5(3). In a same manner that the ICESCR broadened the definition and protection of freedom of expression to scientific progress,²³⁰ the freedom of expression protected under the German Constitution is a novelty as its scope covers as well academic freedom. Moreover, the protection of freedom of expression in Germany is interestingly regulated, as there is a clear distinction between the freedom to express opinion (*Meinungsfreiheit*) and the right to receive information (*Informationsfreiheit*). This distinction will be further developed thanks to the Irving’s example.²³¹ The Federal Constitutional Court distinguished them as separate rights where the latter is not considered part of the freedom to express an opinion.²³² Furthermore, both the

²²⁷ ECtHR, *Otto-Preminger-Institut v. Austria*, Application No 13470/87 of 20 September 1994.

²²⁸ ECtHR, *Handyside v. UK*, Application No 5493/72 of 7 December 1976.

²²⁹ Eric Barendt, *Freedom of Speech*, 2nd edition, OUP, NY, 2005, 526p, p. 60.

²³⁰ United Nations, *International Covenant on Civil and Political Rights* (ICCPR), 1966, 15(1)(a).

²³¹ See, Part III-B. Irving’s example.

²³² Decision of the German Constitutional Court, 27 BVerfGE (*Bundesverfassungsgerichts*) 71, 1969.

freedom of the press (*Pressefreiheit*) and broadcasting freedom (*Rundfunkfreiheit*) are “treated by the Constitutional Court as distinct from the freedom to express opinions”.²³³ However, the Court precised the nature of this distinction in explaining that the broadcasting freedom has a purpose to broaden the access to informations and deliver them. Thus it serves both the values and aim of freedom of expression. Consequently, the freedom of expression, in accordance with German law, shall then be understood as a strong and overall right, a patchwork which encompasses ‘separate’ freedoms serving the same values.

If censorship is strongly prohibited :“*There shall be no censorship*”²³⁴ , this *Zensurverbot* is nuanced in context of prior restraints or penal sanctions. For instance, the Constitutional Court précised this nuance regarding the regulatory body in Germany in charge for the film industry “*the confiscation by classification authority for a film which had been submitted before release, on the ground that its distribution would infringe the penal law*”²³⁵ does not constitute unlawful censorship.²³⁶ This perfectly fulfils the requirements of limitations include in the law such as 10(2) ECHR, which demand to limit freedom of expression on limits fixed by law, in case for instance of threat to the public order. This limitation in Germany through the penal law is the reinsurance that public order would be maintain, thus is legitimate.

Indeed, the second paragraph of Article 5 of the German Basic Law draws limitations to the scope of freedom of expression, within limitations of provisions imposed “*by general laws, the provisions of law for the protection of youth, and by the right to inviolability of personal honour*”.²³⁷ Whereas the freedoms of Art and Science seem unlimited in the wording of the following paragraph,²³⁸ it can nonetheless be balanced with other rights constitutionally protected. Among these rights, the supreme right in Germany is the inalienable right to human dignity.²³⁹ The landmark case *Mephisto*²⁴⁰

²³³ Eric Barendt, *Freedom of Speech*, op. Cit., p. 60.

²³⁴ German Basic Law (*Grundgesetz*), Article 5(1), 1949.

²³⁵ Eric Barendt, *Freedom of Speech*, op.cit., p.133.

²³⁶ Decision of the German Constitutional Court, *87 BVerfGE 209*, 232-33, 1993.

²³⁷ German Basic Law (*Grundgesetz*), Article 5(2), 1949.

²³⁸ German Basic Law (*Grundgesetz*), Article 5(3), 1949.

²³⁹ German Basic Law (*Grundgesetz*), Article 1, 1949.

demonstrates a brilliant example of the balance operated between these fundamental rights in Germany. In the case, Klaus Mann wrote a satirical novel²⁴¹ on an actor whose career was promoted when being in the good graces of Nazi leaders. The Court weighed both rights before pronouncing the ban on its publication, taking into account factors as the need to protect reputation and memory of a dead person, the contribution of the work to public debate. This balance and approach operated by the national Courts is similar to other European countries and even to the ECtHR. The freedom of expression must be protected, it however is not unlimited.

Germany grants a strong protection to freedom of expression, through its definition of the freedom and the novelty designed in it, through also its prohibition against arbitrary censorship probably intended in opposition to scenes of a dark past²⁴². Germany thus respect and integrate the European standards of fundamental rights regarding freedom of expression, as it is protected by Article 10 ECHR, and 11 CFR. In a similar manner, Germany would restrict free speech when it comes to strike a balance with other freedoms, and especially the core value of human dignity. Finally, it should not be seen as paradoxical that Germany is one of the Member States which pushed the European Union concerning the regulation of free speech, especially regarding hatred speech and Holocaust denial.²⁴³

I. C.2. Freedom of expression in Austria

The law in Austria gives an interesting example regarding the protection of Freedom of expression. The Austrian Constitution in the provisions of its Article 17(a) is very pro-artist, allowing an even stronger protection than in Germany relating to artistic freedom. This has been reinforced by rulings of national courts. However, two cases decided by the Strasbourg Court permit to observe that the freedom of expression, when seen disturbing for certain groups, is balanced to other interests or rights.

²⁴⁰ Decision of the German Constitutional Court, *30 BVerfGE 173*, 1971.

²⁴¹ Klaus Mann, *Mephisto*, Penguin Classics, 1995 (First published in 1936), 272p.

²⁴² E.g. the SS huge art pyres and censorship: Online Article, 'Nazi Censorship of the Arts "Entartete Kunst" - Degenerate Art', last updated 2011. Online resource available at : <http://www.historyofpainters.com/entartete.htm>.

²⁴³ See, Part III-B, through Irving's example.

Firstly, the freedom of expression has been limited for instance in the case *Otto Preminger Institute*.²⁴⁴ Article 10 ECHR did not protect the prevention of the screening of a provocative film as it was balanced on the public interest of the Tyrolean community (mainly Roman Catholic). The Association Otto Preminger Institutes planned the screening of six different films during a festival in Innsbruck.²⁴⁵ Among these films were the film *Das Liebeskonzil* based on a play written in 1894, whose publication is banned since then in Germany.²⁴⁶ The film directed by Werner Schroeter and released in 1981, portrayed the Holy family flirting with the Devil, where Jesus is a “mummy boy”,²⁴⁷ God is an old man and Virgin Mary is an “unprincipled wanton”.²⁴⁸ Wanting to punish the mankind for its immortality, the devil whisper them the idea to punish them through sexually transmitted diseases. The movie also involved scenes where the God of Christian, Jewish and Islamic religions is prostrated before the devil with whom he exchanged deep kisses; a scene where an obscene story is read to Virgin Mary and sexual tension aroused between her and the devil; and also Jesus is depicted as a mental grown-up, “shown lasciviously attempting to fondle and kiss his mother’s breasts”.²⁴⁹

This case²⁵⁰ shows firstly that the protection of the freedom of expression is reaffirmed once again by the ECtHR; secondly that freedom of expression does however find limits²⁵¹ in general interest or even when attacking religious beliefs in an offensive manner. It should not be forgotten that this is not the first time that the Austrian identity limits rights acknowledged by the ECtHR or ECJ. It reminds us of the *Wittgenstein* case²⁵² where Austria was able to affirm its national identity and constitutional principles. This is then very understandable that a national identity can ask for a special protection, thus limiting other proclaimed freedoms. One can argue

²⁴⁴ ECtHR, *Otto-Preminger-Institut v. Austria*, Application No 13470/87 of 20 September 1994.

²⁴⁵ ECtHR, *Otto-Preminger-Institut v. Austria*, Application No 13470/87 of 20 September 1994, para.9.

²⁴⁶ ECtHR, *Otto-Preminger-Institut v. Austria*, Application No 13470/87 of 20 September 1994, para. 20.

²⁴⁷ ECtHR, *Otto-Preminger-Institut v. Austria*, Application No 13470/87 of 20 September 1994, para. 21.

²⁴⁸ ECtHR, *Otto-Preminger-Institut v. Austria*, Application No 13470/87 of 20 September 1994, para. 21.

²⁴⁹ ECtHR, *Otto-Preminger-Institut v. Austria*, Application No 13470/87 of 20 September 1994, para. 22.

²⁵⁰ ECtHR, *Otto-Preminger-Institut v. Austria*, Application No 13470/87 of 20 September 1994.

²⁵¹ ECHR, *Article 10(2)*, freedom of expression can be restricted ‘for the protection of the reputation or the rights of others’.

²⁵² ECJ, Case C-208/09 *Sayn-Wittgenstein*, E.C.R. 2010, nyr; and Opinion of AG Sharpston.

that a balance between rights or freedoms is frequently elaborated; as in the previously mentioned *Schmidberger* case, Austria has been able to protect freedom of expression strictly framed by public security to be allowed to restrict a fundamental freedom.

Secondly, The attention should be then drawn to the case *Vereinigung Bildender Künstler*.²⁵³ This case, similar to the *Müller* case,²⁵⁴ is a golden case to exemplify the daily battle that revolves around the freedom. Interestingly, this controversial judgement decided of an effective violation of Article 10 ECHR by four judges to three only. In *Vereinigung Bildender Künstler*, the eponymous association had organised in 1998 an exhibition entitled *The century of artistic freedom*. The collage entitled 'Apocalypse' of the artist Otto Mühl represented 34 public figures naked involved in sexual activities. Among them, the former secretary of the Austrian Freedom Party (FPÖ) Mr Meischberger who was then deputy in the National Assembly was shown "gripping the ejaculating penis of Mr Jörg Haider (FPÖ) while at the same time being touched by two other FPÖ politicians and ejaculating on Mother Theresa".²⁵⁵ Mr Meischberger brought proceedings under the Article 78 of the Copyright Act to the Commercial Court dismissing his action; however both Court of Appeal and Supreme Court ruled in his favour deciding that the sub-mentioned Article 78 could-prevail over the Article 17a of the Basic Law (*Staatsgrundgesetz*) because the pictures were used in a negative, insulting and degrading manner.²⁵⁶ The ECtHR finally disagreed with the Vienna Court of Appeal and Supreme Court in defining satire, and thus protecting it as an element of the freedom of expression.²⁵⁷

²⁵³ ECtHR, *Vereinigung Bildender Künstler v. Austria*, Application No 68354/01 of 25 January 2007.

²⁵⁴ ECtHR, *Müller and others v. Switzerland*, Application No 10737/84 of 24 May 1988.

²⁵⁵ Dirk Voorhoof, Ghent University / Copenhagen University, *Freedom of expression and Article ECHR – Summaries of 20 recent judgements (and decisions) of the ECtHR, published in Iris, Legal Observations of the European Audiovisual Observatory, 2005-2008*, September 2008, p. 8. Available online at : http://www-ircm.u-strasbg.fr/seminaire_oct2008/docs/Summariesrecentcases.Voorhoof.pdf.

²⁵⁶ Dirk Voorhoof, Ghent University / Copenhagen University, *Freedom of expression and Article ECHR – Summaries of 20 recent judgements (and decisions) of the ECtHR, published in Iris, Legal Observations of the European Audiovisual Observatory, 2005-2008*, September 2008, p. 8. Available online at : http://www-ircm.u-strasbg.fr/seminaire_oct2008/docs/Summariesrecentcases.Voorhoof.pdf.

²⁵⁷ ECtHR, *Vereinigung Bildender Künstler v. Austria*, Application No 68354/01 of 25 January 2007, para. 33.

In conclusion, it should be clearly stated that the protection of the freedom clashes the difference of understanding we can have about it. The disagreement between the ECtHR judges illustrates not only this difference, but also shows how it can limit or broaden the protection. The opinion of the dissenters is valuable arguing of the misunderstanding of the judges faced to pieces of art, and their argument in favour of dignity over freedom of expression.

If the cases analysed courts sought to limit free speech, and sometimes did,²⁵⁸ it is not because of Austrian law, but because of the necessity to respect other interests and freedoms in a democratic society. In a same manner as Germany, Austria guarantees a high protection of freedom of expression, going further than the European standards for instance regarding the protection of artistic freedom of expression. This deep respect for the freedom trying to push beyond the limits of the European standards is not common to every Member States; on that point the United Kingdom differs from Austria.

I. C. 3. Freedom of expression in United Kingdom

The law in UK demonstrates also an interesting example as it possessed an offense for blasphemy under the Blasphemy law, only repealed recently (2008). There is a prolific jurisprudence on the matter in the last fifty years, restricting freedom of expression especially artistic, and due to the context then in Great Britain. It should be underline in this context that most of those cases were judged following the era of Mary Whitehouse in the 60's,²⁵⁹ imposing a Victorian vision and expectation of the nation standards. It can be perceived through such famous cases as : *Wingrove*²⁶⁰ (a 18-minute film entitled 'Visions of Ecstasy' on St Theresa d'Avila's acts of a sexual nature with the Christ), Chris Ofili's artwork²⁶¹ (a Virgin Mary surrounded by pornography), or *the Lemon case*²⁶²

²⁵⁸ E.g., ECtHR, *Otto-Preminger-Institut v. Austria*, Application No 13470/87 of 20 September 1994.

²⁵⁹ Paul Kearns, *The Legal Concept of Art*, Hart Publishing, 1998, 304p, p. 26.

²⁶⁰ ECtHR, *Wingrove v. UK*, Application no. 17419/90 of 25 November 1996.

²⁶¹ During exhibition *Sensation*, at the Royal Academy of Art in London, 18 September – 28 December 1997.

²⁶² UKHL, *R v. Lemon* [1979] AC 617.

(poem on the sexual adventures of a Roman centurion with the Christ) and many others.²⁶³

It has to be underlined that the Blasphemy Act was absolutely contrary to the ECHR as it enabled English jurisdictions to censor very easily artwork on the basis it offended the Christian religion. Tatchell declared on that point “*in the name of free speech, the right to protest and artistic freedom, the offence of blasphemy should be abolished*”.²⁶⁴ It was finally repealed when enacting the new Statute on prohibition of hatred speech on race and religion,²⁶⁵ which does not protect only Christian religion, but also other religion and religious minorities as imposed by the ICCPR.²⁶⁶ The new provisions are then less restrictive compared to the Blasphemy Act, and more equal as they protect any religion. Nevertheless, according to Nigel Warbuton,²⁶⁷ protecting equally all religion is a progress, but still religion shall not be a ground to censor free speech. The Blasphemy Act repealed in 2008 did not however change the status of laws on obscenity. These obscenity laws can be understood as “*a limit to the moral of the artist, in the idea that the people should not be exposed to immoral influence.*”²⁶⁸ In the *Foetus Earrings case*,²⁶⁹ the prosecution has been able under the frame of ‘Outrage to public decency’. It is a common law offence, which has the advantage of offering broad criteria to condemn under this offence, this enables judges to discretionary censor easily art. It is also a problem in UK legislation according to Mr Kearns, as judges ruling on the cases are not expert in art.²⁷⁰ It seems to be remaining an unsolved problem, especially regarding the margin of appreciation that is accorded by both the ECtHR and ECJ to domestic courts regarding the evaluation of moral standards. Nonetheless, the UK legislation conformed

²⁶³ *Inter alia*, English High Court, *R v Chief Metropolitan Stipendiary Magistrates ex parte Choudhury* [1991] 1 QB 429; English High Court, *Whitehouse v Lemon* [1979] 2 WLR 281; see also, UK Parliament, Select Committee on Religious Offences in England and Wales, ‘Appendix 3, Blasphemy’, *First Report*, 2003. Available online at: <http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldrelof/95/9515.htm>.

²⁶⁴ Peter Tatchell, in Nigel Warbuton, *Free speech, a short introduction*, OUP, NY, 2009, p. 45.

²⁶⁵ UK HL, *Racial and Religious Hatred Act 2006*, partially available online at : http://www.legislation.gov.uk/ukpga/2006/1/pdfs/ukpga_20060001_en.pdf

²⁶⁶ United Nations, *International Covenant on Civil and Political Rights* (ICCPR), 1966, Article 27.; also under the EU’s principles: The Treaty on the European Union (Consolidated Version), of the 30.03.2010 (2010) OJ C 83, Article 2.

²⁶⁷ Nigel Warbuton, *Free speech, a short introduction*, OUP, NY, 2009, p. 43.

²⁶⁸ Paul Kearns, *lecture on Law literature and Art*, University of Manchester, February 2011.

²⁶⁹ [1990] 2 QB 619, [1990] 3 WLR 595.

²⁷⁰ Paul Kearns, *The Legal Concept of Art*, Hart Publishing, 1998, 304p, p. 9-13.

progressively with the standards and the protection conferred in Article 10 ECHR, especially since the Human Right Act enacted in 1998 and the recently repeal of Blasphemy laws. Article 10(2) ECHR permits to limit freedom of expression regarding the standard of what is necessary to maintain a democratic society, which can hardly justify such high level of protection to the Christian religion only, at the expense of free speech. Standards of protection of freedom of expression benefit from a minimum of harmonisation since the elevation of the CFR to EU primary level, in spite of the ‘opt-out’ UK signed for. It is to hope that freedom of expression will gradually become stronger in its scope and protection in UK.

I. C. 4. Freedom of expression in Luxembourg

Interestingly enough, in Luxembourg, the 1868 revised Constitution does not contain “*any specific provisions on the relationship between international treaty law and domestic law*”.²⁷¹ The Constitution of Luxembourg has been drafted in 1868, never replaced but very often amended or revised. According to Professor Gerkrath, the Constitution has experienced about 37 majors changes until 2009.²⁷² A revised Constitution has been published by the Luxemburgish central service of legislations, displaying the newly revised Constitution, as well as jurisprudences having authority on law, and other instruments such as international treaties.²⁷³ Since 1950, the Luxembourgish courts apply international treaties as part of domestic law.²⁷⁴ Remarkably then, the ECHR and its protocols are applied immediately and directly by

²⁷¹ Dean Spielmann, ‘Human Rights and Freedom of Expression in Luxembourg’, *Annales de droit Luxembourgeois* 1992, No 2, pp.209-227, p.210.

²⁷² Jörg Gerkrath, ‘Avant-propos’, in Jörg Gerkrath (Dir.), *La refonte de la Constitution Luxembourgeoise en débat*, Collection de la Faculté de Droit, D’Economie et de Finance de l’Université du Luxembourg, Larcier, 2010, 337p., p.21.

²⁷³ Luxemburgish central service of legislations (Dir.), helped by André Prüm and Jörg Gerkrath, *Constitution du Grand-Duché du Luxembourg 2011*, texte à jour au 1er Octobre 2011, online resource. Available at :

http://www.legilux.public.lu/leg/textescoordonnes/recueils/Constitution/Page_de_garde.pdf.

²⁷⁴ E.g., Cour Supérieure de Justice, (Cass. Crim.), 14.7.1954, (Chambre des Métiers c/ Pagani), *Pasicrisie luxembourgeoise*, Tome XVI, p. 150.

the Luxembourgish national courts, and do even take precedence on national law.²⁷⁵ It should be also pointed out that the Luxembourgish legal system is also strongly influenced by the French and Belgium law which are quite similar.²⁷⁶ The freedom of press is regulated in Luxembourg under Article 24 of the Constitution. The article is widely drafted, including the scope of the freedom, the prohibition of censorship, the exception of committing offences and the impossibility of being prosecuted if the author or publisher is Luxembourgish and resident of the Grand-Duchy. Press freedom is regulated through various acts adopted by the legislature,²⁷⁷ and domestic courts held also for instance that press freedom can be limited.²⁷⁸ The Luxembourgish District Tribunal held in 1988: “*Its freedom is however not without limits and ceases where it is inconsistent with other legitimate rights and interests*”.²⁷⁹ In this context, freedom of expression can be limited for instance for the protection of Public Morals or Health, obscenity in Articles 383-386 of the Criminal Code;²⁸⁰ or also on grounds of incitement to national, racial or religious hatred or discrimination under Articles 454 and 455 of Luxembourgish Criminal Code. However, Article 24 is said to be consistent with Article 10 ECHR and its case law,²⁸¹ which is crucial considering that Article 10 ECHR is the point of reference by excellence and even broader in its definition. Indeed, Article 24 of the Luxembourgish Constitution corresponds to the protection of freedom of expression offers by Article 10 ECHR, as in a same manner, limits can be imposed by law as this freedom is not an absolute one.²⁸² For these reasons, in adopting a favourable approach

²⁷⁵ Dean Spielmann, ‘Human Rights and Freedom of Expression in Luxembourg’, *Annales de droit luxembourgeois 1992, No 2*, pp.209-227, p.212.; Rusen Ergec, ‘Conclusions Générales’, in Jörg Gerkrath (Dir.), *La refonte de la Constitution luxembourgeoise en débat*, Collection de la Faculté de Droit, D’Economie et de Finance de l’Université du Luxembourg, Larcier, 2010, 337p., p. 165.

²⁷⁶ Dean Spielmann, ‘Human Rights and Freedom of Expression in Luxembourg’, *Annales de droit luxembourgeois 1992, No 2*, pp.209-227, p.213-214.

²⁷⁷ See Alphonse Spilemann, *Liberté d’expression ou censure ?*, Luxembourg, Imprimerie centrale, 1982.

²⁷⁸ Dean Spielmann, ‘Human Rights and Freedom of Expression in Luxembourg’, *Annales de droit luxembourgeois 1992, No 2*, pp.209-227, p.217.

²⁷⁹ Tribunal d’Arrondissement du Luxembourg, 13.7.1988, Jugement n° 425/88, published in Alphonse Spielmann and Albert Weitzel, *La Convention européenne des droits de l’homme et le droit luxembourgeois*, Bruxelles, Nemesis, 1991, pp. 293-303.

²⁸⁰ Dean Spielmann, ‘Human Rights and Freedom of Expression in Luxembourg’, *Annales de droit luxembourgeois 1992, No 2*, pp.209-227, p.220.

²⁸¹ Dean Spielmann, ‘Human Rights and Freedom of Expression in Luxembourg’, *Annales de droit luxembourgeois 1992, No 2*, pp.209-227, p.214.

²⁸² E.g., Paul-Henri Meyers, ‘Les droits fondamentaux dans la Constitution luxembourgeoise’, in Jörg Gerkrath (Dir.), *La refonte de la Constitution luxembourgeoise en débat*, Collection de la Faculté de Droit, D’Economie et de Finance de l’Université du Luxembourg, Larcier, 2010, 337p., p.67.

toward international human rights and applying them in Luxembourg, the Grand-Duchy succeeds in striking a balance.²⁸³ Luxembourg, is regarded as a good example among the Member States when it comes to integrate European provisions.²⁸⁴ It conforms absolutely with the European standards, both of the ECHR and EU, in its protection of freedom of expression. Luxembourg even goes beyond the European standards, for instance regarding the non-prosecution of authors and publishers residing in Luxembourg.

I. C. 5. Overview of freedom of expression in France, Netherlands and Hungary

Regarding the protection of freedom of expression in Netherlands, France and Hungary, it will be studied with scrutiny in later developments. Nonetheless, an overview can already be given here.

The freedom of expression is highly protected in France,²⁸⁵ for instance by the French Declaration 1789 Article 10 and 11, and considered as one of the most important rights of the citizens in being a 'constitutional right'. The high protection is completed by various laws such as the 1881 law on freedom of press.²⁸⁶ Consequently, in France the freedom of expression is regulated rather broadly, while the few limits/limitations? to it concern the prohibition of positive advertisement of drugs, hatred speech directed to sexual orientation, race²⁸⁷ or religion and particularly on the Holocaust²⁸⁸; also the protection of minors regarding access to pornography²⁸⁹ and offenses to national flag or anthem or to public authorities^{290, 291}

²⁸³ Dean Spielmann, 'Human Rights and Freedom of Expression in Luxembourg', *Annales de droit Luxembourgeois* 1992, No 2, pp.209-227, p.223.

²⁸⁴ Rusen Ergec, 'Conclusions Générales', in Jörg Gerkrath (Dir.), *La refonte de la Constitution Luxembourgeoise en débat*, Collection de la Faculté de Droit, D'Economie et de Finance de l'Université du Luxembourg, Larcier, 2010, 337p., p. 165.

²⁸⁵ See Part II B.

²⁸⁶ French Republic, *Loi 1881 on Press*, 29 July 1881.

²⁸⁷ French Republic, *Loi 1881 on Press*, 29 July 1881, Articles 29, 31 and 32 (defamation and insults).

²⁸⁸ French Republic, *Loi Gayssot* 1990, especially Article 24b on Press.

²⁸⁹ French Republic, *Loi n°49-956 du 16 juillet 1949 sur les publications destinées à la jeunesse*.

²⁹⁰ French Republic, *Nouveau Code Pénal*, Article 433-5-1.

²⁹¹ French Republic, *Loi du 16 juillet 1949*, Article 14.

Netherlands highly respect and protect the freedom of expression,²⁹² allowing easily the manifestation of opinions and beliefs without any control. The Dutch Constitution, amended in 1983,²⁹³ grants the right to manifest someone's religion or belief in its Article 6. More importantly, its Article 7 protects in three paragraphs a wide freedom of expression, to the exception only of commercial advertising.

As far as Hungary is of concern,²⁹⁴ it should be firstly pointed out that its new Constitution was adopted in April 2011. It thus is still in progress regarding its adaptation to law, standards, in particular standards expected by the EU or ECHR. The provisions on freedom of expression in the Country in the "*text as the authorized version - until the ratification of its replacement - of the Constitution of Hungary*",²⁹⁵ differ from the last version of the text. In the latest version of the Hungarian Constitution,²⁹⁶ freedom of expression is guaranteed under Article IX through three paragraphs. It ensures the right to express freely opinions in IX(1), protecting the pluralism of the press in IX(2), and refers to the organ supervising media services in IX(3). Moreover, also, Article X completes this definition of the freedom in granting particularly the same right to 'scientific research and artistic creation', similarly to the ICESCR, in Article 15 (1)(b).

I. D. Conclusions

Considering the foregoing, it should be underlined that freedom of expression, due to the protection of substantive rights and human rights, has been progressively developed and protected at both International and European level. Evolving through the past 60 years, this protection attained today a strong and assured protection which shall be

²⁹² See Part II A.

²⁹³ See *Dutch Constitution*, 1815, lastly amended in 2002, available at : <http://legislationline.org/documents/section/constitutions>.

²⁹⁴ See Part III A.

²⁹⁵ See Hungarian 'provisional' text, available online at: <http://www.lectlaw.com/files/int05.htm>.

²⁹⁶ Fundamental Law of Hungary, 25 April 2011. Available online at : <http://right2info.org/resources/publications/laws-1/fundamentallawofHungary.pdf>

respected to ensure the standards of a democratic society, as it has been demonstrated above. Member States have all integrated the required European standards imposed by both the Strasbourg and Luxembourg Courts. Some Member States even go beyond this protection in defining the freedom of expression and its scope of application in a way it enables an effective and broad protection of the freedom. As studied, at European level, the dialectic of this protection is very impressive, but still questionable regarding its efficiency. However, the triangular relationship between the ECtHR, the CJEU and domestic courts enables a full protection of this crucial freedom, moreover in the light of the EU accession to the ECHR. Nowadays the protection of fundamental rights is protected and complemented at EU and domestic level,²⁹⁷ but the complementarity brought by the ECHR could push forward the respect and standards of fundamental rights. Indeed, with a future accession of the EU to the ECHR, Woods explains that “*it is nonetheless timely to consider the current level of protection awarded to human rights within EU and how it corresponds with the model provided by the ECHR*”.²⁹⁸

As the analyses above have demonstrated, freedom of expression is nonetheless not an unlimited right. It can therefore be balanced with other rights and interests. It is stunning to observe that nowadays, in our bright new century, freedom of expression can still be put in danger, and then jeopardize either by personal demands, or States themselves. Having said this, a point shall be made: It is certainly understandable that a balance must be struck. However, shall not the society evolve at the same time of our century, and accept new standards of expression with the arrival of modernity ? It is something to wonder, especially when regarding that our society is not uniform. For instance, one of the society's problem in 21st century, that regards freedom of expression, seems to be that religion and more often and paradoxically do not progress with such a new level of protection. This lead to different standards of morals, and actions, which contribute to the collision and opposition of different freedoms. What is the role of the State in such confrontation of two freedoms which both require to be protected? Moreover, how and where the balance should be struck? This problematic is

²⁹⁷ Roger Errera, 'Freedom of Speech in Europe', *European and US Constitutionalism*, edited by Georg Nolte, Cambridge University Press, 2005, 312p., p. 29.

²⁹⁸ Lorna Woods, 'Freedom of expression in the EU', *European public law*, vol. 12, Issue 3, Kluwer law international 2006, p. 371.

illustrated by the two case-study in Part I. Regarding Part II, it deals with the assessment of limitations to freedom of expression, and in which configuration censorship must be strictly fight or shall be imposed.

II – “My freedoms stops when someone else's starts”? A part of the society rejects others’ freedom of expression (Art versus Religion).

II. A. Theo Van Gogh's murder, 2004.

II. A. 1. Freedom of expression in Netherlands

As previously evoked, Netherlands is a country allowing a wide freedom of expression, especially due to its history and also to an open-minded culture. To set up the context, it is often said that liberty of press “*has always prevailed in the Netherlands*”.²⁹⁹ Even going back to the 16th century, censorship and especially prior restraints were not practised, to the exception of “*sedition libels against the government and defamations of princes and authorities*”.³⁰⁰ Such tolerance and allowance was exceptional at that time. It could remind us of the *Dangerous Liaisons*,³⁰¹ where the evil and infamous Marquise de Merteuil escapes in the end and finds a shelter and hideout for her vices only in Holland. It should be kept in mind in this context that Netherlands’ amalgamation of mercantile tolerance and liberal attitude forged its country spirit. Foreign authors such as *Descartes* enjoyed this liberty and had works published there.³⁰² Such tolerance regarding publications and freedom of expression is remarkable especially during the century of Enlightenment where knowledge was confronted to the Monarchy’s absolutism and obscurantism.

Interestingly, it was only during the brief French domination by the Napoleonic Empire that censorship was practised. This was then immediately abolished, and phrased in the 1848 Constitution under: “*No one shall require prior permission to publish thoughts or opinions via press, notwithstanding legal obligations which must be upheld by every person under the law*”.³⁰³ The Dutch Constitution of 1848 is in general the previous one of 1815, considerably revised.³⁰⁴ It has been modified and amended few times, notably in 1983 where Fundamental Rights including social rights were joined in a single

²⁹⁹ Evert E. Alkema, ‘The protection of the freedom of expression in the Constitution and in civil law – Netherlands Report’, in *Netherlands Reports to the Thirteenth International Congress of Comparative Law*, Montreal 1990, T.M.C. Asser Instituut, The Hague, 1990, p. 375.

³⁰⁰ Evert E. Alkema, ‘The protection of the freedom of expression in the Constitution and in civil law – Netherlands Report’, in *Netherlands Reports to the Thirteenth International Congress of Comparative Law*, Montreal 1990, T.M.C. Asser Instituut, The Hague, 1990, p. 375.

³⁰¹ Choderlos de Laclos, *Dangerous Liaisons*, Penguin Classics, New Edition, 2007, (originally published in 1782), 448p.

³⁰² Evert E. Alkema, ‘The protection of the freedom of expression in the Constitution and in civil law – Netherlands Report’, in *Netherlands Reports to the Thirteenth International Congress of Comparative Law*, Montreal 1990, T.M.C. Asser Instituut, The Hague, 1990, p. 375.

³⁰³ In Evert E. Alkema, ‘The protection of the freedom of expression in the Constitution and in civil law – Netherlands Report’, in *Netherlands Reports to the Thirteenth International Congress of Comparative Law*, Montreal 1990, T.M.C. Asser Instituut, The Hague, 1990, p. 375.

³⁰⁴ See WIPO Website (World Intellectual Property Organization), *Netherlands, Constitution of the Kingdom of the Netherlands of August 24, 1815*, online resources, available at : <http://www.wipo.int/wipolex/en/details.jsp?id=7418>.

chapter,³⁰⁵ and 2002 as previously mentioned. The content of this provision has been included in the reformed Dutch Constitution and forms now its Article 7(1).³⁰⁶ In the provisions of Article 7, the prohibition of censorship is emphasised in the negative obligation of requiring prior permission to publication or broadcast, repeated in its first three paragraphs. Freedom of expression is regulated in Article 7(1) via press means, in 7(2) via radio and television broadcast, and in 7(3) via other means. It should be underlined that this complete prohibition of prior censorship has been supported as well by the case law and doctrine.³⁰⁷

Two precisions clarify the definition of the Dutch freedom of expression in Article 7. Firstly, Acts of Parliament may be required when involving “*the holding of performances*” open to persons aged of under sixteen, regarding the safeguard of good morals.³⁰⁸ Secondly, it also seems to respect the implicit hierarchy operated by the ECHR, regarding a different protection according to the type of speech.³⁰⁹ Indeed, the regulation and protection conferred by Article 7 does not cover commercial advertising;³¹⁰ advertising being limited by statute only with respect to tobacco with regard to broadcasting.³¹¹

The Dutch definition of freedom of expression enables a broad protection of its scope. As understandable by the requirement of Act of Parliament specifically mentioned in the Constitution, the freedom of expression is strongly protected, and nonetheless regulated. Article 7(1) requires furthermore a statutory provision to “*limit freedom of expression via the printing press*”, and 7(2) requires delegated legislation for the

³⁰⁵ M.C.B. Burkens, “The Complete Revision of the Dutch Constitution”, 29 *Netherlands International Law Review* 3, 1982, pp. 323-336.

³⁰⁶ See *Dutch Constitution*, 1815, lastly amended in 2002, available at : <http://legislationline.org/documents/section/constitutions>.

³⁰⁷ Evert E. Alkema, ‘The protection of the freedom of expression in the Constitution and in civil law – Netherlands Report’, in *Netherlands Reports to the Thirteenth International Congress of Comparative Law*, Montreal 1990, T.M.C. Asser Instituut, The Hague, 1990, p. 375.

³⁰⁸ Kingdom of Netherlands, *Dutch Constitution*, 2002, Article 7(3).

³⁰⁹ See Lorna Woods, F.N. 46 and 47.

³¹⁰ Kingdom of Netherlands, *Dutch Constitution*, 2002, Article 7(4).

³¹¹ see *Tabakwet 1988* (Tobacco Act) O.G. 342., in Evert E. Alkema, ‘The protection of the freedom of expression in the Constitution and in civil law – Netherlands Report’, in *Netherlands Reports to the Thirteenth International Congress of Comparative Law*, p. 379.

regulation only in the field of broadcasting.³¹² However, the limitation of the freedom by 'law' shall be understood more broadly according to the doctrine, and not only as Acts of Parliament but also including "*regulations enacted by lower legislative organs*".³¹³ According to Alkema, Article 7 does not prescribe for which purpose freedom of expression can be limited, showing then a great faith in the "*parliamentary legislator's wisdom*".³¹⁴ These statutory limitations to freedom of expression are especially provided in Civil and Penal Codes regarding offences as slander, obscenity or libel.³¹⁵ However, as précised by Alkema, the Dutch freedom of expression is continually reformed or completed.³¹⁶ For instance, some offences have disappeared from the criminal classification to become only 'misdemeanours', such as "*insulting the Head of a friendly State*", former Article 131 of the Penal Code, or insulting "*public authorities*".³¹⁷ The usual limitations then to freedom of speech occur for the protection of good morals, reputation of private persons, authority of public office or institutions.³¹⁸ Moreover, Netherlands offer a specificity regarding a positive obligation of the country on freedom of expression, that can help us clarify a problematic on the existence or not of such positive obligation from the States. As explained in early 1990 by Alkema, this positive obligation is constituted for instance of funds; such as the 'Bedrijfsfonds voor de Pers',³¹⁹ founded by the ministry for Culture in 1974, in order to preserve and subsidise a

³¹² Evert E. Alkema, 'The protection of the freedom of expression in the Constitution and in civil law – Netherlands Report', in *Netherlands Reports to the Thirteenth International Congress of Comparative Law*, Montreal 1990, T.M.C. Asser Instituut, The Hague, 1990, p. 378.

³¹³ Erades, 'The Relation Between the European Convention for the Protection of Human Rights and Fundamental Freedoms and Netherlands Legislation', Vol. 11 *Netherlands International Law Review* Issue 3, 1964, pp 299-312, p. 302. doi:10.1017/S0165070X00025110.

³¹⁴ Evert E. Alkema, 'The protection of the freedom of expression in the Constitution and in civil law – Netherlands Report', in *Netherlands Reports to the Thirteenth International Congress of Comparative Law*, Montreal 1990, T.M.C. Asser Instituut, The Hague, 1990, p. 378.

³¹⁵ In, Evert E. Alkema, 'The protection of the freedom of expression in the Constitution and in civil law – Netherlands Report', in *Netherlands Reports to the Thirteenth International Congress of Comparative Law*, Montreal 1990, T.M.C. Asser Instituut, The Hague, 1990, p. 378.

³¹⁶ Evert E. Alkema, 'The protection of the freedom of expression in the Constitution and in civil law – Netherlands Report', in *Netherlands Reports to the Thirteenth International Congress of Comparative Law*, Montreal 1990, T.M.C. Asser Instituut, The Hague, 1990, p. 378.

³¹⁷ Evert E. Alkema, 'The protection of the freedom of expression in the Constitution and in civil law – Netherlands Report', in *Netherlands Reports to the Thirteenth International Congress of Comparative Law*, Montreal 1990, T.M.C. Asser Instituut, The Hague, 1990, p. 378.

³¹⁸ Evert E. Alkema, 'The protection of the freedom of expression in the Constitution and in civil law – Netherlands Report', in *Netherlands Reports to the Thirteenth International Congress of Comparative Law*, Montreal 1990, T.M.C. Asser Instituut, The Hague, 1990, p. 379.

³¹⁹ Kingdom of Netherlands, *Media Act*, Articles 123 et seq.

“*pluriformity of press*”.³²⁰ Nowadays, other funds exist in the same line as the ‘MediaFonds’ offering subsidies for “*radio and television programmes in [...]: drama, documentary, feature film, youth, new media and performing arts...*”.³²¹ All the above mentioned steps taken in Netherlands constitute a remarkable example of how a democratic society enables a strong freedom of expression but also cares about maintaining it and helping it to prosper.

Finally, self-executing provisions of treaties and resolutions are supposed to be ‘the law of the land’ as they are “*By virtue of Articles 93 and 94 of the Constitution [...]directly applicable by the Courts*”;³²² and thus have primacy “*over conflicting domestic laws, both of an earlier and later date*”.³²³ Such regulation includes then provisions of the UN Covenants and the ECHR, especially its Article 10. The application of freedom of expression can then be even broaden including right to ‘receive and impart’ informations, especially as the country is early driven by a care to comply its national legislation with the ECHR.³²⁴ The ideas and informations protected are the one “*favourably received as a matter of indifference, but also those that offence, shock or disturb the State, [and even more] or any section of the population*”.³²⁵ This is the core of the demands of “*that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’*”.³²⁶ This wide and utmost important protection of freedom of expression is however unfortunately to be balanced as previously enounced,

³²⁰ Evert E. Alkema, ‘The protection of the freedom of expression in the Constitution and in civil law – Netherlands Report’, in *Netherlands Reports to the Thirteenth International Congress of Comparative Law*, Montreal 1990, T.M.C. Asser Instituut, The Hague, 1990, p. 379.

³²¹ Stimuleringsfonds Nederlandse Culturele Mediaproducties, *Mediafonds*, see website, available at : <http://www.mediafonds.nl/english>.

³²² Evert E. Alkema, ‘The protection of the freedom of expression in the Constitution and in civil law – Netherlands Report’, in *Netherlands Reports to the Thirteenth International Congress of Comparative Law*, Montreal 1990, T.M.C. Asser Instituut, The Hague, 1990, p. 382.

³²³ R.C.R. Siekmann, ‘Review of P. van Dijk, C. Flinterman, and P.E.L. Janssen ‘International Law, Human Rights’ Vol. 35 *Netherlands International Law Review* Issue 01, 1988, pp 111-111. doi:10.1017/S0165070X00007609

³²⁴ See null Erades, ‘The Relation Between the European Convention for the Protection of Human Rights and Fundamental Freedoms and Netherlands Legislation’, Vol. 9 *Netherlands International Law Review* 3, 1962, pp 315-322, doi:10.1017/S0165070X00034550.

³²⁵ ECtHR, *Müller and others v. Switzerland*, Application No 10737/84 of 24 May 1988, para. 33.

³²⁶ ECtHR, *Müller and others v. Switzerland*, Application No 10737/84 of 24 May 1988, para. 33, in Evert E. Alkema, ‘The protection of the freedom of expression in the Constitution and in civil law – Netherlands Report’, in *Netherlands Reports to the Thirteenth International Congress of Comparative Law*, Montreal 1990, T.M.C. Asser Instituut, The Hague, 1990, p. 383.

with the margin of appreciation conferred by the ECHR to the signatory States enable them to restrict it anyway.

The Dutch concept of the freedom of expression is a remarkable amalgamation of various aspects, namely tolerance, indifference and religion. As explained by the Dutch author, “*originally it was embedded in the prevailing tolerance (nowadays apparently mixed with a certain indifference) and connected with the freedom of religion*”.³²⁷ The Dutch definition can be completed by Professor Scheffer’s explanations.³²⁸ Netherlands possess a dual image of a tolerant society: a society of laissez-faire in the one hand, and a society of consensus in the other hand. However, Scheffer complains that the ‘laissez-faire’ has become indifference, and the great liberal picture we have from the country is no open-mind, but more a conformism towards consensus.³²⁹ Regarding the legal consecration and protection of the freedom, they seem to evolve as well regarding needs created by a society in motion.

II.A. 2. A multicultural society, mixing expression, religion and tolerance

Netherlands is also a country attracting migrants as any other. Whereas 900 000 Muslim allochthonous “*mainly from Turkish and Moroccan origins (5,5% of the Netherlands’ population)*”³³⁰ live in the Kingdom, this diversity lead progressively to a *clash of civilisation*, however softer than Huntington’s theory. This clash aroused with a diversity created by different migrations and from which, certain communities’ standards do not always fit with the national tolerance.

³²⁷ Evert E. Alkema, ‘The protection of the freedom of expression in the Constitution and in civil law – Netherlands Report’, in *Netherlands Reports to the Thirteenth International Congress of Comparative Law*, Montreal 1990, T.M.C. Asser Instituut, The Hague, 1990, p. 384.

³²⁸ Paul Scheffer’s testimony, in Alexandre Héraud, *L’assassinat de Théo Van Gogh, voyages au bout d’une vie*- volume 12, E-dite, 2006, Paris, p. 44.

³²⁹ Paul Scheffer’s testimony, in Alexandre Héraud, *L’assassinat de Théo Van Gogh, voyages au bout d’une vie*- volume 12, E-dite, 2006, Paris, p. 44.

³³⁰ Alexandre Héraud, *L’assassinat de Théo Van Gogh, voyages au bout d’une vie*- volume 12, E-dite, 2006, Paris, p. 26. [Own translation]

“*In recent years the religious skyline of Dutch cities has changed considerably*”.³³¹ This quotation expresses the changes, focusing here on religious ones, brought by a migrant population and a country moving due to the adaptation required. The problematic popped by Labuschagne is to wonder “*How does the law reflect these changes*” and if pluralism is taken into account.³³² Globally it is said that the law always “*lags behind developments in society*”,³³³ however it must be underlined that Netherlands introduced new bills and laws to integrate a migrant population and with it a cultural diversity. This is for instance illustrated by the *Meat Inspection Act*, with special mentions on ritual slaughtering in Article 18, as well as the new *Act on Health and Welfare of Animals* specially taking into account Israelites. Or, also the *Act on Public Events*³³⁴ with the questions of the call to prayer by Muezzins,³³⁵ or Islamic and Hindu burials regulations.³³⁶ The Dutch case law enables to witness a “*general tendency towards individualization and diversification of the protected scope of religious freedom*”.³³⁷ There is indeed a growing respect and adaptation for the cultural and religious diversity, with the examples of taking a day off on a religious day,³³⁸ or the allowance of wearing a turban and grow a beard at work.³³⁹

³³¹ B.C. Labuschagne, ‘Religious Freedom and Newly-Established Religions in Dutch Law’, Vol. 44 *Netherlands International Law Review* Issue 2 , 1997, pp 168-185, p. 168. doi:10.1017/S0165070X00004435.

³³² B.C. Labuschagne, ‘Religious Freedom and Newly-Established Religions in Dutch Law’, Vol. 44 *Netherlands International Law Review* Issue 2 , 1997, pp 168-185, p. 168. doi:10.1017/S0165070X00004435.

³³³ B.C. Labuschagne, ‘Religious Freedom and Newly-Established Religions in Dutch Law’, Vol. 44 *Netherlands International Law Review* Issue 2 , 1997, pp 168-185, p. 168. doi:10.1017/S0165070X00004435.

³³⁴ Kingdom of Netherlands, *Act on Public Events*, Act of 20 April 1988, Stb. 1988, 157.

³³⁵ See B.C. Labuschagne, ‘Religious Freedom and Newly-Established Religions in Dutch Law’, Vol. 44 *Netherlands International Law Review* Issue 2 , 1997, pp 168-185, p. 180. doi:10.1017/S0165070X00004435.

³³⁶ See B.C. Labuschagne, ‘Religious Freedom and Newly-Established Religions in Dutch Law’, Vol. 44 *Netherlands International Law Review* Issue 2 , 1997, pp 168-185, p. 181. doi:10.1017/S0165070X00004435.

³³⁷ B.C. Labuschagne, ‘Religious Freedom and Newly-Established Religions in Dutch Law’, Vol. 44 *Netherlands International Law Review* Issue 2 , 1997, pp 168-185, p. 184. doi:10.1017/S0165070X00004435.

³³⁸ Dutch High Court decision of 30 March 1984, *Nederlandse Jurisprudence* 1985, no. 350.

³³⁹ Decision of the Cantonal Judge of Amsterdam of 24 January 1986, *Rechtspraak Vreemdelingenrecht* 1986, no. 83.

However, freedom of religion is not an absolute one. It must like others, be balanced, especially with the “rights and interests of others”.³⁴⁰ Tolerance must be present in the equation, under two forms: negative or positive. Negative would mean that governments and people don’t mind about religious practices, and positive that there is a genuine respect for the meaning and function, religion can have in people’s live, to the risk though of opening doors to a dangerous fanaticism.³⁴¹ According to Labuschagne, a balance is to be struck by the judges between the different freedoms: “*whether in a Solomonic sense or in the Aristotelian meaning of Phronesis, can strike a balance*”.³⁴² Although, it must be commented here, that not only this is a difficult task, but also this is a lot of responsibilities weighting on the arbiters of law. It could be imagined that governments democratically guided by their population would be able to strike this balance.

There is then a problem in assessing the balance between two freedoms such as the freedom of expression and freedom of religion; especially when they are conflicting each other in a democratic society, fraught with liberalism and cultural diversity. This can be ultimately illustrated by Theo Van Gogh’s murder in Amsterdam in 2004.

II.A. 3. Theo Van Gogh : the character

Theo Van Gogh is a Dutch artist, writer and prolific filmmaker, and a very polemical character. His art was controversial and provocative. He tried in vain to enter the Cinematographic School of Amsterdam (Nederlandse Film en Televiacademie), where

³⁴⁰ B.C. Labuschagne, ‘Religious Freedom and Newly-Established Religions in Dutch Law’, Vol. 44 *Netherlands International Law Review* Issue 2 , 1997, pp 168-185, p. 184. doi:10.1017/S0165070X00004435.

³⁴¹ B.C. Labuschagne, ‘Religious Freedom and Newly-Established Religions in Dutch Law’, Vol. 44 *Netherlands International Law Review* Issue 2 , 1997, pp 168-185, p. 185. doi:10.1017/S0165070X00004435.

³⁴² B.C. Labuschagne, ‘Religious Freedom and Newly-Established Religions in Dutch Law’, Vol. 44 *Netherlands International Law Review* Issue 2 , 1997, pp 168-185, p. 185. doi:10.1017/S0165070X00004435.

he was refused and advised to consult a psychiatrist.³⁴³ His first film *Luger*³⁴⁴ won a prize at the Nederland Film Festival, even if it was qualified of scandalous, and of the uninteresting opus of a “*retarded teenager*”.³⁴⁵ He used to be even more famous in Netherlands for his habit of using its freedom of expression without limits or boundaries. Indeed, he was born in 1957 “*into a family of World War II resistance heroes, wanted to be a taboo-breaker*”.³⁴⁶ The very provocative Van Gogh was used to tell his stories about debauchery parties in brothels, smoking and drinking habit on his blog ‘the healthy smoker’;³⁴⁷ he was known to wear dirty outfits, especially for formal invitations.³⁴⁸ Holding controversial statements and jokes on any religion or sensible matter, he was nicknamed the “*Dutch Michael Moore*”.³⁴⁹ He called Muslims “*Goats’ fuckers*” due to the Ayatollah Khomeini’s speech that would have allowed men when being far from their spouse “*to take a goat*”.³⁵⁰ Whereas he frequently said things as “*Oh, it smells like caramel here.. Diabetic Jews are probably burning today*”.³⁵¹ Through his statements, it seems that he did not pay respect to anything, and he did not really value himself either, saying that he was “*the village idiot*”.³⁵²

His murder is then the tragic end of a flippant man who did not care much about any consequence of his acts or words, acting under the banner of free speech. Whereas as previously mentioned, free speech is not unlimited according to Warbuton, especially as soon as it enters the public sphere.³⁵³ Van Gogh being a ‘public person’ shall have pay

³⁴³ Hans Beerekamp’s testimony in Alexandre Héraud, *L’assassinat de Théo Van Gogh, voyages au bout d’une vie-* volume 12, E-dite, 2006, Paris, p. 46-47.

³⁴⁴ Dir. Theo Van Gogh, *Luger*, 85mn, April 1982.

³⁴⁵ Hans Beerekamp’s testimony in Alexandre Héraud, *L’assassinat de Théo Van Gogh, voyages au bout d’une vie-* volume 12, E-dite, 2006, Paris, p. 47. [Own translation]

³⁴⁶ Christopher Caldwell, ‘Faith and Death’, New York Times, 10 September 2006, online Article, available at : <http://www.nytimes.com/2006/09/10/books/review/Caldwell2.t.html>.

³⁴⁷ Fouad Laroui’s testimony, in Alexandre Héraud, *L’assassinat de Théo Van Gogh, voyages au bout d’une vie-* volume 12, E-dite, 2006, Paris, p.85.

³⁴⁸ Hans Beerekamp’s testimony in Alexandre Héraud, *L’assassinat de Théo Van Gogh, voyages au bout d’une vie-* volume 12, E-dite, 2006, Paris, p. 35.

³⁴⁹ Alexandre Héraud, *L’assassinat de Théo Van Gogh, voyages au bout d’une vie-* volume 12, E-dite, 2006, Paris, p. 107. [Own translation]

³⁵⁰ Nelleke Noordervliet’s testimony in Alexandre Héraud, *L’assassinat de Théo Van Gogh, voyages au bout d’une vie-* volume 12, E-dite, 2006, Paris, p. 55. [Own translation]

³⁵¹ Alain Franco’s testimony in Alexandre Héraud, *L’assassinat de Théo Van Gogh, voyages au bout d’une vie-* volume 12, E-dite, 2006, Paris, p. 38. [Own translation]

³⁵² Paul Sceffer’s testimony in Alexandre Héraud, *L’assassinat de Théo Van Gogh, voyages au bout d’une vie-* volume 12, E-dite, 2006, Paris, p. 40. [Own translation]

³⁵³ Nigel Warbuton, *Free speech, a short introduction*, OUP, NY, 2009, p.5.

due regard to limiting his speech or to the harmful consequences it could trigger, even in the highly tolerant Kingdom of Netherlands.

Indeed, Fouad Laroui commented that it is not because in Netherlands the freedom of expression is almost limitless that you have to go that far.³⁵⁴ Before the murder, Laroui was of the opinion that freedom of expression shall be almost unlimited, with limits imposed only as the French model for instance by the 1972 law on hatred speech concerning anti-Semitism. However, since the murder, Laroui explained rightly how he understood now that there is a difference between the possibility of saying everything, and the action of saying everything. According to him, Van Gogh should have tempered his words, especially during the worldwide tensions post 9/11, and a so-called clash of civilizations.³⁵⁵

Nonetheless, Van Gogh has been now stigmatised as the martyr for freedom of expression. He became a national symbol supported by his patriots. In the place of the crime, near Oosterpark in Amsterdam, stands now a monument for the freedom of expression, entitled *De Schreeuw* (The Scream).³⁵⁶ According to Cohen, Mayor of Amsterdam: “ [...] *Van Gogh, whose work often offended sections of society, was not a loudmouth - as he was sometimes labelled by critics - but an artist with a clear message about freedom of speech.*”³⁵⁷ This is a way to interpret the character, and then to understand from this murder a suffocating violation of democracy and with it of freedom of expression. The importance of speech for the Dutch is crucial. With words you are supposed to be able to say anything as Van Gogh thought so, and you are able to fix anything as well. This is what is illustrated by the last words of Van Gogh to his murderer: “ *Please, please! Maybe we could talk about it?*”³⁵⁸

³⁵⁴ Fouad Laroui's testimony, in Alexandre Héraud, *L'assassinat de Théo Van Gogh, voyages au bout d'une vie*- volume 12, E-dite, 2006, Paris, p.85.

³⁵⁵ Fouad Laroui's testimony, in Alexandre Héraud, *L'assassinat de Théo Van Gogh, voyages au bout d'une vie*- volume 12, E-dite, 2006, Paris, p.85.

³⁵⁶ Article, 'Oosterpark, Amsterdam', *Amsterdam info Website*, last update 13 May 2012, available at : <http://www.amsterdam.info/parks/oosterpark/>.

³⁵⁷ A.P., 'Theo Van Gogh memorial 'screams' injustice', *The Jerusalem Post Website*, 21 Marche 2007, available at : <http://www.jpost.com/ArtsAndCulture/Arts/Article.aspx?id=55438>.

³⁵⁸ Alain Franco's testimony in Alexandre Héraud, *L'assassinat de Théo Van Gogh, voyages au bout d'une vie*- volume 12, E-dite, 2006, Paris, p. 37. [Own translation]

II.A. 4. Theo Van Gogh's murder- silencing free speech

Perhaps, the focus shall not be on the character of Mr Van Gogh but rather on the act committed through his murder. For its violence, its anti-democratic nature, and its symbolism. When and where do we solve a conflict on free speech by death ? Prime Minister Jan Peter Balkenende said during the commemoration of his death that “*The murder impinges on everything that is dear to us in the Netherlands. Violence is not the way*”.³⁵⁹ It is not a tradition of the 21st century in Europe, and it should not be one. Such anti-democratic and violent gesture, no matter by whom it is committed or for what purpose, shall not be tolerated. If democratic countries and regionally Europe have created rights and fundamental principles, it is for the own good of citizens, ensuring democracies' prosperity. Except if we are looking forward to coming back to anarchy where ‘Man is Wolf to Man’,³⁶⁰ such basic values have to be understood by everyone.

His death is the evidence of a misunderstanding between two worlds, in between which the gap seems impossible to fill. Indeed, in the portrait of Van Gogh drew by Buruma in his book,³⁶¹ “*Certain Muslim immigrants and their Dutch-born children [...] did not get*”³⁶² the controversial anti-taboo character that he was. For instance, Caldwell explains this misunderstanding “*When van Gogh, at an Amsterdam theater, called a Belgian-Arab leader ‘the pimp of the prophet’, a gang of kids outside promised to ‘get that fat pig and cut him open’*”.³⁶³

Theo Van Gogh was already disliked by sections of population when the last movie he directed was released on TV. This is following the broadcast of his short-film

³⁵⁹ Article ‘Dutch mourn Theo van Gogh's death’, *New York Times*, 2 November 2005, available online at : <http://www.nytimes.com/2005/11/02/world/europe/02iht-web.1102theo.html>.

³⁶⁰ See Thomas Hobbes, *Leviathan*, Dover Publications Inc., New Edition, 2006, 464p.

³⁶¹ Ian Buruma, *Murder In Amsterdam, The Death of Theo van Gogh and the Limits of Tolerance*, The Penguin Press, 278 pp.

³⁶² Christopher Caldwell, ‘Faith and Death’, *New York Times*, 10 September 2006, online Article, available at : <http://www.nytimes.com/2006/09/10/books/review/Caldwell2.t.html>.

³⁶³ Christopher Caldwell, ‘Faith and Death’, *New York Times*, 10 September 2006, online Article, available at : <http://www.nytimes.com/2006/09/10/books/review/Caldwell2.t.html>.

Submission,³⁶⁴ supposed to be the first part of three opuses, that Van Gogh was murdered.

Submission, still available online thanks to the uncontrollable web, is a ten-minutes film criticizing Islam through the stories of four women, sexually abused or beaten up.³⁶⁵ While they are saying prayers, they describe “*to God the sexual and physical abuse they have suffered at the hands of the men in their lives. The actresses have Koranic verses dealing with women written on their bare skin, and some have traces of lashings painted on their bodies*”.³⁶⁶ These verses are holy writings, saying that men are allowed to beat up their wives.³⁶⁷ If Van Gogh wanted to “*denounced Islam as it is ! [...] and create a debate. The problem is that the Muslims who saw the movie where shocked and refused to talk about it*”.³⁶⁸ More than the critic in itself, the decisive detail for the blow suffered and Fatwa thrown on Van Gogh was the blasphemy to draw Koranic and holy verses on the women’s flesh.

If the message of the screenwriter Aayan Hirsi Ali’s should be recalled, she explained: “*My message was that the Quran is an act of man, not of God. We should be free to interpret it; we should be permitted to apply it to the modern era in a different way, instead of performing painful contortions to try to recreate the circumstances of a horrible past. My intention was to liberate Muslim minds so that Muslim women- and Muslim men, too – might be freer.*”³⁶⁹ She also précised that her intention was not to provoke but to deliver her message. Ali, screenwriter of *Submission* is a Dutch deputy in Parliament of Somalian origin who became atheist even though she used to be Muslim.

It is unnecessary to precise that the audience to the short-film was astonished, and also mitigated. If somehow, the provocative film was received with good feedbacks from

³⁶⁴ Dir. Theo Van Gogh, Script by Ayaan Hirsi Ali, *Submission*, 11mn, VPRO Distribution, 2004.

³⁶⁵ Dir. Theo Van Gogh, Script by Ayaan Hirsi Ali, *Submission*, 11mn, VPRO Distribution, 2004, available for instance at : http://www.youtube.com/watch?v=G6bFR4_Ppk8.

³⁶⁶ Marlise Simons, ‘Dutch Filmmaker, an Islam Critic, Is Killed’, *New York Times*, 3 November 2004, available online at : http://www.nytimes.com/2004/11/03/international/europe/03dutch.html?_r=1.

³⁶⁷ Hans Beerekamp’s testimony in Alexandre Héraud, *L’assassinat de Théo Van Gogh*, voyages au bout d’une vie- volume 12, E-dite, 2006, Paris, p. 68.

³⁶⁸ Hans Beerekamp’s testimony in Alexandre Héraud, *L’assassinat de Théo Van Gogh*, voyages au bout d’une vie- volume 12, E-dite, 2006, Paris, p. 68. [Own translation]

³⁶⁹ Aayan Hirsi Ali, *The caged Virgin: A Muslim Woman’s Cry for a Reason*, New York: Free Press, 2006, p. 157.

some, it was not the opinion of others. First, as Beerekamp explains it : “*This is obviously a film made to create shock and debate. I found that it was very interesting because it challenged the core of an allegorical conflict between Islam and Western Europe.*”³⁷⁰ Second, the critic felt as a personal attack, the outrage of the verses on the flesh created anger and hatred from sections of populations, particularly from Muslims feeling offended. This is noticeable via different means. For instance, one could be speechless when reading some of the comments underneath the video linked on youtube. It is possible to read French comments as : “*May Allah curse them and smashes the person making such hateful videos on him and grant him humiliation on humiliation misfortune on misfortune AMINE (so be it)*”.³⁷¹ A blog also reports neutrally the crime of Van Gogh, commenting that the artist was islamophobic, misogynist and homophobic. What is noticeable in this article entitled ‘*Tribute to our brother Mohamed Bouyeri sentenced to life imprisonment*’, is the religious quotes that framed the article such as “*the best way to approach Allah is to hate anyone transgressing him and his Prophet, to fight with your hand, your tongue, your heart, as much as you can*”.³⁷² If the critic is not understood, or is not tolerable, then obviously Van Gogh was the number one enemy.

On November, 2nd 2004, Mohamed Bouyeri “*fired several shots at about 8:30 a.m., then crossed the street and stabbed him several times with a knife*”.³⁷³ Bouyeri shot “*eight bullets at close range, [...] cut his throat from ear to ear. A ritual sacrifice*”.³⁷⁴ Finally, the murderer left a note “*on his victim's chest with the knife*”.³⁷⁵ In the five-page letter pinned to Van Gogh’s chest by his murderer, among Koran quotations, there was a threat of death directed to Ali. She is now forced to hide for her own survival, and in that

³⁷⁰ Hans Beerekamp’s testimony in Alexandre Héraud, *L’assassinat de Théo Van Gogh*, voyages au bout d’une vie- volume 12, E-dite, 2006, Paris, p. 68. [Own translation]

³⁷¹ Youtube User ‘ightibat’, Comments of Van Gogh’s video Submission, April 2012, available at : <http://www.youtube.com/watch?v=JgDuBobPuPQ>. [Own translation]

³⁷² Article, ‘Hommage à notre frère Mohamed Bouyeri condamné à la perpétuité’, Blog Fatouba Lil Gouraba, available online at : <http://fatouba-lil-ghouraba.over-blog.com/article-hommage-a-notre-frere-mohammed-bouyeri-condamne-a-la-perpetuite-63299433.html>. [Own translation]

³⁷³ Marlise Simons, ‘Dutch Filmmaker, an Islam Critic, Is Killed’, New York Times, 3 November 2004, available online at : http://www.nytimes.com/2004/11/03/international/europe/03dutch.html?_r=1.

³⁷⁴ Alexandre Héraud, *L’assassinat de Théo Van Gogh*, voyages au bout d’une vie- volume 12, E-dite, 2006, Paris, p. 25. [Own translation]

³⁷⁵ Marlise Simons, ‘Dutch Filmmaker, an Islam Critic, Is Killed’, New York Times, 3 November 2004, available online at : http://www.nytimes.com/2004/11/03/international/europe/03dutch.html?_r=1.

matter this resembles to the Rushdie case. However, as stated by Nelleke Noordervliet, the Rushdie case occurred among “*the Muslim world as Rushdie was a Muslim*”.³⁷⁶ According to her, Ayaan Hirsi Ali openly criticized Islam for the treatment women suffer because of it. With the Fatwa thrown on her, “*she now is imprisoned. Imprisoned by our freedom. And this is something so paradoxical, I cannot live with such observation*”.³⁷⁷ Regarding the membership of Ali in the Dutch Parliament, the writer adds: “*the Fatwa against Rushdie was a terrible shock for any writer, but now it affects the heart of our Parliament, the heart of our democracy, this is even more serious*”.³⁷⁸

The murderer, Mohamed Bouyeri, is a Dutch born citizen, from Moroccan origins. He could be qualified of an exemplary boy when looking at his youth and scholar achievements. When he ended up in prison after a fight, this is where he met radical Islam.³⁷⁹ To Buruma, as Caldwell reports it, “*Bouyeri [...] was less a revolutionary than a ‘confused and very resentful young man’. He and his friends demanded shuttle-bus service to their publicly financed youth clubhouse. They insisted that municipal authorities renovate his parents’ flat so that women could go in and out of the kitchen unseen, in line with Islamic custom*”.³⁸⁰

The judgement of the young Moroccan-Dutch, Mohamed Bouyeri, lasted two weeks. While the 27 years old murderer did not present any defence, he mentioned “no regrets” and spoke about himself as a Jihadist. He was sentenced to life by the Tribunal of Amsterdam, and could not then fulfil his wish to die as a martyr.³⁸¹

³⁷⁶ Nelleke Noordervliet’s testimony in Alexandre Héraud, *L’assassinat de Théo Van Gogh*, voyages au bout d’une vie- volume 12, E-dite, 2006, Paris, p. 72. [Own translation]

³⁷⁷ Nelleke Noordervliet’s testimony in Alexandre Héraud, *L’assassinat de Théo Van Gogh*, voyages au bout d’une vie- volume 12, E-dite, 2006, Paris, p. 73. [Own translation]

³⁷⁸ Nelleke Noordervliet’s testimony in Alexandre Héraud, *L’assassinat de Théo Van Gogh*, voyages au bout d’une vie- volume 12, E-dite, 2006, Paris, p. 73. [Own translation]

³⁷⁹ Alexandre Héraud, *L’assassinat de Théo Van Gogh*, voyages au bout d’une vie- volume 12, E-dite, 2006, Paris, p. 96.

³⁸⁰ Christopher Caldwell, ‘Faith and Death’, *New York Times*, 10 September 2006, online Article, available at : <http://www.nytimes.com/2006/09/10/books/review/Caldwell2.t.html>.

³⁸¹ Alexandre Héraud, *L’assassinat de Théo Van Gogh*, voyages au bout d’une vie- volume 12, E-dite, 2006, Paris, p. 97.

II.A. 5. Conclusions

The consequences of Theo Van Gogh's murder had a massive impact on a modern society constantly in conversion, popping problematic questions on the taboos arising during our new century. To Smith, his murder divided the country where the discomfort was palpable. *"His killing has polarized the country, giving the rest of Europe a disturbing glimpse of what may be in store if relations with the Continent's growing immigrant communities are not managed more adeptly"*.³⁸² The Court concluded that his murder was the result of a 'terrorist attack', while retaliation followed in the country *"against mosques and Muslim schools and strained relations with the country's immigrant Muslims"*.³⁸³ It triggered of course *"retaliatory attacks on Christian churches"*.³⁸⁴ Fortunately, eight years later the atmosphere seems to have calm down and back to 'normal' nowadays. The murder also lead to the crucial question of a positive protection by the States regarding protection to offences, but also the question of a positive protection of freedom of religion. The latter question is spiky, knowing that freedom of religion remains more and more in the private sphere in Europe, and it would then not be a competence belonging to States to rule upon it. Disregarding *Submission*, how come that Theo Van Gogh in his usual provocation was able to offend freely sections of population without being stopped by Dutch law? This could be a problem of a too wide freedom of expression, when people use it in spite of consequences, they then tend to abuse it. Especially as explained by Laroui, the character himself of Van Gogh with his provocation *"made 'Muslim' people who went away of religion and were perfectly integrated in the society"*.³⁸⁵ In a same manner, *"the Dutch intelligence service issued a report in March warning that the unrestrained*

³⁸² Craig S. Smith, 'In Mourning Slain Filmmaker, Dutch Confront Limitations of Their Tolerance', *New York Times*, November 10, 2004, Available online at: <http://www.nytimes.com/2004/11/10/international/europe/10dutch.html>.

³⁸³ Gregory Crouch, 'Europe: The Netherlands: Van Gogh Killer Jailed For Life,' *New York Times*, 27 July 2005, available online at : <http://select.nytimes.com/gst/abstract.html?res=F40915F6385B0C748EDDAE0894DD404482>.

³⁸⁴ Article 'Dutch mourn Theo van Gogh's death', *New York Times*, 2 November 2005, available online at : <http://www.nytimes.com/2005/11/02/world/europe/02iht-web.1102theo.html>.

³⁸⁵ Fouad Laroui's testimony, in Alexandre Héraud, *L'assassinat de Théo Van Gogh*, voyages au bout d'une vie- volume 12, E-dite, 2006, Paris, p.89. [Own translation]

*language could encourage radicalization of the country's Muslim youth and drive people into the arms of terrorist recruiters".*³⁸⁶

Then, followed closely the events of the Danish caricatures of Mahomet. The twelve caricatures were actually a reply to the writer Käre Bluitgen who complained then that no one dared illustrating his book on Mahomet since Theo Van Gogh's murder.³⁸⁷ The Danish cartoons published in the newspapers *Jyllands-Posten* were considered deeply offensive by many Muslims and lead to unprecedented events as the attacks against Danish Embassies in Orient, massive bone fires of Danish flags and of other European countries. The motivation of the cartoons shall be regarded as "*the will to assert free speech and to emphasize the inappropriateness for particular groups to have special protection from offence, and that in a modern democracy*".³⁸⁸ These events force us out of our taboos, from which we still not know how to solve the problems. Warbuton announces rightly "*What had often been an abstract ivory tower debate became a polarized discussion about where the acceptable limits of free speech lie in a democracy that strives to be multicultural*".³⁸⁹

The artistic characteristic of Mr Van Gogh's artwork has not been treated here and it will be mentioned further. However, should it be briefly evoked, let's remind Karel Appel's words : "Art must shock".³⁹⁰ As the message conveyed by Paul Kearns, it should be understood that Art should be free to be expressed and convey any message, reaction or thought, as it is its true nature, its essence. Yet it seems that sections of society are definitely not ready to be confronted to unshackled and free art or speech, especially regarding highly sensible matters. Already in France, Kubrick's film *Paths of Glory*, was considered as an anti-military movie and forbidden there mainly because the premiere in the 1950's created huge demonstrations from the military corps. The Observateur

³⁸⁶ Craig S. Smith, 'In Mourning Slain Filmmaker, Dutch Confront Limitations of Their Tolerance ', *New York Times*, November 10, 2004. Available online at: <http://www.nytimes.com/2004/11/10/international/europe/10dutch.html>.

³⁸⁷ Jörg Lau, 'Who's afraid of Muhammad?', *Die Zeit*, 2 February 2006, available online at : <http://www.signandsight.com/features/588.html>.

³⁸⁸ Nigel Warbuton, *Free speech, a short introduction*, OUP, NY, 2009, p. 18.

³⁸⁹ Nigel Warbuton, *Free speech, a short introduction*, OUP, NY, 2009, p. 18.

³⁹⁰ Karel Appel, in Paul Kearns, *Chapter 7 – Public Morality Laws and the Creation and Appreciation of Art: The Postmodern Western Experience*, in *Legal Convergence in the Enlarged Europe of the New Millennium*, edited by Paul L.C. Torremans, Kluwer Law International, Netherlands, 2000, p. 144.

magazine titled its article: “*Will be Paths of Glory screened in France?*”.³⁹¹ Some sections of society seems to evolve more slowly in reaction to art or free speech than others.

A balance necessarily needs to be struck between different freedoms. This is such hard task that the ECtHR resents to do so and leave it to the States under the pretext of a so-called margin of appreciation. This task is so hard, that Labuschagne suggests that judges should deal with it, striking a balance case by case.³⁹² If a way must be found to strike a balance, let's suggest that freedoms shall not impinge over democracy such as observed previously; this is a definite limit that we should make sure of. When a freedom starts to be liberticidal and threatens democracy, something is wrong.

II. B. Art : example of the ‘*Piss Christ*’.

II.B.1. Legal protection of freedom of expression in France

II.B.1.a. The French chaotic journey to attain an ultimate protection of free speech

In the line of the Netherlands, France is a very liberal country regarding freedom of expression and its protection. However, the journey to arrive at such point has been impressively chaotic and bloody. If France is nowadays, or until today, a democracy, we should thank the numerous dead who fought for it, particularly for the institution of a Republic. There is no criticism implied about kingdoms, only about the French Monarchy and its management that shed more blood than the fights for its termination. The greatest civic success of France, mainly over a constant obscurantism, consists in its early Declaration of the Rights of Man and of the Citizen. Thus, “*the recognition of freedom of speech in France antedates the First Amendment to the US Constitution*”.³⁹³

³⁹¹ Louis Marcourelles, *Verrons-nous en France Les Sentiers de la Gloire ?*, France Observateur Journal, 14th March 1958.

³⁹² B.C. Labuschagne, ‘Religious Freedom and Newly-Established Religions in Dutch Law’, Vol. 44 *Netherlands International Law Review* Issue 2 , 1997, pp 168-185, p. 185. doi:10.1017/S0165070X00004435.

³⁹³ Eric Barendt, *Freedom of Speech*, 2nd edition, OUP, NY, 2005, 526p, p. 67.

Thanks to this Declaration, the freedom of expression is highly protected through its Article 11. The Article states that : “*The free communication of thoughts and opinions is one of the most precious rights of man; hence, every citizen may speak, write, and publish freely, save that he must answer for any abuse of such freedom in cases specified by law*”.³⁹⁴ Such cornerstone followed up the Enlightenment Century, with its great authors and multiple pioneers philosophical essays on democracy.³⁹⁵

The brand new tolerated freedom of expression permitted also to re-establish justice. Whereas criticisms were still masked during the Enlightenment Century, giving fake names to a despot for instance or inventing countries,³⁹⁶ a few started already to be the defenders of justice, such as Voltaire, making himself lawyer of some through his writings, e.g. in the *Calas case*,³⁹⁷ *Knight de la Barre case*. Freedom of expression has been progressively appropriated by the defenders of justice and democracy through the centuries. This can be illustrated by the *Dreyfus case*, where the novelist Emile Zola made of the injustice suffered by Mr Dreyfus, a national matter. Dreyfus was in the French military corps and was unfairly and implicitly dismissed for being Jewish. Zola managed to re-establish the justice after arising a collective indignation via his article “*J'accuse*” (I Blame...) addressed to the French President, and cover of the newspaper *L'Aurore*.³⁹⁸ The French Declaration in itself inspired some followers; it was for instance one of the model for the Universal Declaration on Human Rights.³⁹⁹ It also built a certain image of the country, that persists somehow still nowadays. In Chinese for example, France is said 法国 (faguo) meaning ‘the country of law’.

But freedom of expression, is also regulated by other Statutes and laws. Freedom of expression in French law is characterised by three elements. It is heterogeneous, but

³⁹⁴ République Française, *Déclaration des Droits de l'Homme et du Citoyen*, 1789, Article 11.

³⁹⁵ E.g. Charles de Montesquieu, *De l'esprit des Loix*, Editions Gallimard, Paris, 1995. (Original version 1758).

³⁹⁶ E.g. Charles de Montesquieu, *Lettres Persanes*, Classiques, Livre de Poche, Reprint, 2006, 444p. (Original version 1721) ; Voltaire, *Candide*, Librio, J'ai Lu, 2004, 96p. (Original version 1759).

³⁹⁷ Voltaire, *Treatise on Tolerance*, Cambridge University Press, November 2000, 192p. (Original Version 1763).

³⁹⁸ Emile Zola, ‘J'accuse’, *L'Aurore*, Issue 87, January 13 1898.

³⁹⁹ Pr. Sir Nigel Rodley, ‘The Universal Declaration of Human Rights: Learning from Experience’, Vol. 5 *Essex Human Rights Review* No. 1, July 2008, pp.1-6, p.1. Available online at : <http://projects.essex.ac.uk/ehrr/V5N1/Rodley.pdf>.

unified, and it is more and more influenced by the ECHR.⁴⁰⁰ Firstly, it is heterogeneous regarding the diversity of laws protecting it. Primarily, freedom of expression as consecrated by Article 11 of the 1789 Declaration, is a ‘Constitutional Right’, meaning it is a right with the highest value. The consecration is due to the French Constitution of 1958, and its Preamble reminding the respect to the Declaration, and a definition completed by the 1946 Constitution Preamble, granting it a constitutional value.⁴⁰¹

Additionally, the cornerstone of the protection revolves around the 1881 Law on Press, which is seen as a general law, a code of offenses and a code of prosecution procedure.⁴⁰² It is completed then by the French Civil Code and Penal Code reformed to mention freedom of expression, including also limits developed below. The 1881 Law has been as well completed by numerous other laws since, especially since the 1930’s and post World War II, and with the creation of new technologies and communication means.⁴⁰³ First of all, the end of the war and atrocities committed during it, gave birth to a few ‘Memorial laws’. The legislator became historian and enacted laws giving strict prohibition of freedom of expression to cross borders and certain matters, instituting a duty to remember;⁴⁰⁴ such as the ‘Loi Gayssot’ prohibiting the Holocaust Denial,⁴⁰⁵ or the law recognising the 1915 Armenian genocide.⁴⁰⁶ Then, on the extension of communication, Errera gives the example of adverts: “ *Advertising, unknown area of the legislator in 1881, is now subject to a particular regulation*”.⁴⁰⁷ Secondly, freedom

⁴⁰⁰ Roger Errera, ‘Les limites de la liberté d’expression en droit français’, *Report of the Conference organised by the Foundation Friedrich Ebert, Law School of the University Bilgi, Istanbul, 8 June 2007*, pp. 1-13, p.2. Available online at : http://www.rogererrera.fr/liberte_expression/docs/Limites_libertes_expression_en_droit_francais.pdf.

⁴⁰¹ French Republic, *Constitution of the French Republic*, 4 October 1958, Preamble. Available online at : <http://www.assemblee-nationale.fr/connaissance/constitution.asp>.

⁴⁰² Roger Errera, ‘Les limites de la liberté d’expression en droit français’, *Report of the Conference organised by the Foundation Friedrich Ebert, Law School of the University Bilgi, Istanbul, 8 June 2007*, pp. 1-13, p.2. Available online at : http://www.rogererrera.fr/liberte_expression/docs/Limites_libertes_expression_en_droit_francais.pdf.

⁴⁰³ Roger Errera, ‘Les limites de la liberté d’expression en droit français’, *Report of the Conference organised by the Foundation Friedrich Ebert, Law School of the University Bilgi, Istanbul, 8 June 2007*, pp. 1-13, p.2. Available online at : http://www.rogererrera.fr/liberte_expression/docs/Limites_libertes_expression_en_droit_francais.pdf.

⁴⁰⁴ Jean Pradel, ‘La liberté d’expression, jusqu’où? Brèves remarques sur quelques affaires récentes’, in Dir. Danielle Corrigan-Carsin, *La Liberté de Critique*, Lexis Nexis, Litec, Paris, 2007, 215p, p.134.

⁴⁰⁵ French Republic, *Loi Gayssot No 90-615*, of 13 July 1990, added to the 1881 Law Article 24 bis.

⁴⁰⁶ French Republic, *Law No 2001-70*, of 29 July 2001.

⁴⁰⁷ Roger Errera, ‘Les limites de la liberté d’expression en droit français’, *Report of the Conference organised by the Foundation Friedrich Ebert, Law School of the University Bilgi, Istanbul, 8 June 2007*,

of expression in France is a unified one, in the sense that the protection conferred to the freedom is a strong one. The French freedom of expression benefits from a “*double guarantee*”,⁴⁰⁸ as it is as mentioned already, a freedom constitutionally guaranteed, and as it also protected by Article 10 ECHR.⁴⁰⁹

II.B.1.b. freedom of expression, a French constitutional guarantee completed by the ECHR

Thirdly, the influence of Article 10 ECHR has an increasing importance regarding the protection of freedom of expression in French law. France has been condemned by the ECtHR for different reasons: violation by decisions of French tribunals in their application of the law, and violation of the ECHR, mainly lead by the incompatibility of the French law to Article 10.⁴¹⁰ Regarding first type of violation, the case *Mamère v. France*,⁴¹¹ is an interesting example to illustrate the limits of freedom of expression in France. Mr Mamère was condemned by the Criminal Court of Paris, a judgement upheld by the Paris Court of Appeal, for defamation under Article 29 of the 1881 law. Mr Mamère publically accused *inter alia* Mr Pellerin of having “*repeatedly sought to lie and to distort the truth about the consequences of the Chernobyl nuclear accident, spring 1986*”.⁴¹² The ECtHR however decided differently, considering that Mamère’s

pp. 1-13, p.2. Available online at :
http://www.rogererrera.fr/liberte_expression/docs/Limites_libertes_expression_en_droit_francais.pdf.
[Own translation]

⁴⁰⁸ Roger Errera, ‘Les limites de la liberté d’expression en droit français’, *Report of the Conference organised by the Foundation Friedrich Ebert, Law School of the University Bilgi, Istanbul*, 8 June 2007, pp. 1-13, p.2. Available online at :
http://www.rogererrera.fr/liberte_expression/docs/Limites_libertes_expression_en_droit_francais.pdf.
[Own translation]

⁴⁰⁹ Roger Errera, ‘Les limites de la liberté d’expression en droit français’, *Report of the Conference organised by the Foundation Friedrich Ebert, Law School of the University Bilgi, Istanbul*, 8 June 2007, pp. 1-13, p.2. Available online at :
http://www.rogererrera.fr/liberte_expression/docs/Limites_libertes_expression_en_droit_francais.pdf.

⁴¹⁰ Roger Errera, ‘Les limites de la liberté d’expression en droit français’, *Report of the Conference organised by the Foundation Friedrich Ebert, Law School of the University Bilgi, Istanbul*, 8 June 2007, pp. 1-13, p.3. Available online at :
http://www.rogererrera.fr/liberte_expression/docs/Limites_libertes_expression_en_droit_francais.pdf.

⁴¹¹ ECtHR, *Mamère v. France*, Application no. 64772/01 of 7 November 2006.

⁴¹² Dirk Voorhoof, Ghent University / Copenhagen University, *Freedom of expression and Article ECHR – Summaries of 20 recent judgements (and decisions) of the ECtHR, published in Iris, Legal Observations*

comments were “*sarcastic but they remained within the limits of acceptable exaggeration or provocation*”.⁴¹³ The ECtHR dismissed the national courts’ decisions in evaluating that the conviction was thus disproportionate and not necessary as such in a democratic society. Despite very few limits, the French freedom of expression is still very wide. Some limits have already been evoked in the first part (I). As freedom of expression is not an absolute right in France either, the guarantee conferred to other rights can limit the first. For instance the protection granted to natural persons, includes a broad field of protection to them, thus limiting freedom of expression. For instance, this includes the protection of private life under Article 9 of the Civil Code, and with it the presumption of innocence, under Article 9-1.⁴¹⁴ It includes as well any regulation on insults and defamation, strictly regulated by the 1881 Law;⁴¹⁵ with a scope broaden to hatred speech as mentioned before,⁴¹⁶ and new promulgations with the ‘Memorial laws’, among them the prohibition of the Holocaust denial.⁴¹⁷

A second type of limits, consists in the protection of “*fundamental public interests*”,⁴¹⁸ for instance the prohibition of advocacy of crimes against humanity.⁴¹⁹ Also, a mix category of both would prohibit for instance insults to public authorities, such as prohibition of defamation on judicial authorities, of insults to the President, or to Republican French symbols as its flag or anthem⁴²⁰.⁴²¹ Finally, on a different category of limits, whereas for instance, the United Kingdom kept its blasphemy law until very

of the European Audiovisual Observatory, 2005-2008, September 2008, p. 6. Available online at : http://www-ircm.u-strasbg.fr/seminaire_oct2008/docs/Summariesrecentcases.Voorhoof.pdf.

⁴¹³ Dirk Voorhoof, Ghent University / Copenhagen University, *Freedom of expression and Article ECHR – Summaries of 20 recent judgements (and decisions) of the ECtHR*, published in *Iris, Legal Observations of the European Audiovisual Observatory, 2005-2008*, September 2008, p. 7. Available online at : http://www-ircm.u-strasbg.fr/seminaire_oct2008/docs/Summariesrecentcases.Voorhoof.pdf.

⁴¹⁴ Roger Errera, ‘Les limites de la liberté d’expression en droit français’, *Report of the Conference organised by the Foundation Friedrich Ebert, Law School of the University Bilgi, Istanbul*, 8 June 2007, pp. 1-13, p.4. Available online at : http://www.rogererrera.fr/liberte_expression/docs/Limites_libertes_expression_en_droit_francais.pdf.

⁴¹⁵ French Republic, Loi 1881 on Press, 29 July 1881, Article 29.

⁴¹⁶ French Republic, Loi 1881 on Press, 29 July 1881, Article 32.

⁴¹⁷ French Republic, *Loi Gayssot No 90-615*, of 13 July 1990, added to the 1881 Law Article 24 bis.

⁴¹⁸ Roger Errera, ‘Les limites de la liberté d’expression en droit français’, *Report of the Conference organised by the Foundation Friedrich Ebert, Law School of the University Bilgi, Istanbul*, 8 June 2007, pp. 1-13, p.4. Available online at : http://www.rogererrera.fr/liberte_expression/docs/Limites_libertes_expression_en_droit_francais.pdf.

[Own Translation]

⁴¹⁹ French Republic, Loi 1881 on Press, 29 July 1881, Article 24(3)..

⁴²⁰ Nouveau Code Pénal, Article 433-5-1.

⁴²¹ Loi du 16 juillet 1949, Article 14.

recently; the common law offences of blasphemy and blasphemous libel in England and Wales were only repealed in 2008 when enacting the Criminal Justice and Immigration Act, enforced in July 2008. In France, the last trials for blasphemy offence on artwork were two centuries ago, the last one staging Baudelaire's *Fleurs du mal*. In this matter, France is more liberal and flexible. But, it is also due to a particular specificity of the country, its secularism.

II.B.1.c. A secularist protection of freedom of expression

Indeed, France is also a laic country since 1905 with the law of *Separation between the Church and the State*, limiting the relations between State and Church to public funding for the maintenance of the Church building.⁴²² From this 1905 law aroused the liberty of conscience allowing anyone to criticise, satirise, mock or caricature any metaphysical conception.⁴²³ Even if Article 10 of the 1789 Declaration grants a freedom and respect of everyone's beliefs, opinions "*even religious*",⁴²⁴ the liberty of religion and beliefs is made then a private matter. This secularism evolving in the same time as modernity, lead in France to what is defined as the "*Catholicism erosion*".⁴²⁵ The relationship to the Church has evolved and has been redefined. For a country whose Head of State was said to be 'picked by God', a few centuries later, less and less Frenchs claim their faith or claim being religious.

Two paradoxical currents appear in parallel. If the years 1950's and 1960's gave birth to a clear and public "*rejection of clericalism*",⁴²⁶ the second phenomenon arising is a return to religion. The second wave finds its reason in that "*Human beings [...]cannot rely anymore on Reason, decide to recompose a coherence in gathering strength in the*

⁴²² Erik Sengers, 'The Religious Market and its Regulation', Vol. 9 *Ecclesiastical Law Journal*, 2007, 294-307p., p. 298.

⁴²³ Christian Baque and Jacques Fassie, *L'affaire Piss Christ- Contre le cléricalisme, pour la liberté d'expression, vive la loi de 1905.. et à bas la calotte!*, <http://www.fichier-pdf.fr/2012/02/08/affaire-piss-christ/#>.

⁴²⁴ French Republic, *Declaration of the Rights of Man and of the Citizen*, 1789, Article 10.

⁴²⁵ Philippe Portier, 'La critique contemporaine du religieux : essai d'interprétation', in Dir. Danielle Corrignan-Carsin, *La Liberté de Critique*, Lexis Nexis, Litec, Paris, 2007, 215p, p.146. [Own translation]

⁴²⁶ Philippe Portier, 'La critique contemporaine du religieux : essai d'interprétation', in Dir. Danielle Corrignan-Carsin, *La Liberté de Critique*, Lexis Nexis, Litec, Paris, 2007, 215p, p.147. [Own translation]

pedestal of spiritual entities".⁴²⁷ The first movement finds echoes in the "*emergence of an anti-clericalism of mockery*".⁴²⁸ The rejection of religion has become frequent, common and well-known. Nowadays, caricaturing the Church in France would be 'defrosting' what has already been done thousand times, and is not 'trendy' anymore. Although, there seems to be in the last decades, a use of Christian symbols perceived as provocation through art, particularly through visual art, and lately advertising. Then, the point is not to explain anymore, but to provoke or shock, "*the theoretical text disappears to leave place to a rough image (or speech)*".⁴²⁹ Nonetheless, even if the critic of religion is a bit outdated, there seemed to be more respect in the satire in the previous centuries, with a certain respect of standards. Indeed, the target of the critic was more the "*greed and fanaticism of the religious hierarchy*";⁴³⁰ testifying of certain respect for religious 'icons': "*the lines are often cruel but only a few crossed the boundaries: the image of Christ for example, is rarely used [...] All this is bathed in a religiosity which marked the most anticlerical artists*".⁴³¹

Among the latest artistic or visual production, a provocative one and qualified as "*profane*",⁴³² is the artwork of Mr Serrano. Although the French law under the 1881 law protects artworks such as Serrano's under the liberty of creation and expression.

II.B. 2.a. The Artwork *Piss Christ* provoked religious demonstrations and revolts

Andres Serrano's artwork *Piss Christ* has been created in 1987. The *Piss Christ* is not recognised as the most artistically remarkable of Serrano's artwork, however the artwork has been in the centre of a whirlwind controversy since its creation. It thus

⁴²⁷ Philippe Portier, 'La critique contemporaine du religieux : essai d'interprétation', in Dir. Danielle Corrignan-Carsin, *La Liberté de Critique*, Lexis Nexis, Litec, Paris, 2007, 215p, p.148. [Own translation]

⁴²⁸ Philippe Portier, 'La critique contemporaine du religieux : essai d'interprétation', in Dir. Danielle Corrignan-Carsin, *La Liberté de Critique*, Lexis Nexis, Litec, Paris, 2007, 215p, p.148. [Own translation]

⁴²⁹ Philippe Portier, 'La critique contemporaine du religieux : essai d'interprétation', in Dir. Danielle Corrignan-Carsin, *La Liberté de Critique*, Lexis Nexis, Litec, Paris, 2007, 215p, p.149. [Own translation]

⁴³⁰ Philippe Portier, 'La critique contemporaine du religieux : essai d'interprétation', in Dir. Danielle Corrignan-Carsin, *La Liberté de Critique*, Lexis Nexis, Litec, Paris, 2007, 215p, p.149. [Own translation]

⁴³¹ François Boepsflug, *Caricaturer Dieu? Pouvoir et dangers de l'image*, Paris, Bayard, 2006, p. 36.

⁴³² Philippe Portier, 'La critique contemporaine du religieux : essai d'interprétation', in Dir. Danielle Corrignan-Carsin, *La Liberté de Critique*, Lexis Nexis, Litec, Paris, 2007, 215p, p.149. [Own translation]

became Serrano's most famous and polemical piece of art. The *Piss Christ*, is one of the different pieces of work on 'liquids' by Serrano; these liquids being blood, milk, urine and sperm.⁴³³ The *Piss Christ* is a photograph of a small "*plastic crucifix submerged in a yellow liquid, allegedly the artist's own urine*".⁴³⁴ It has been described by the art critic Lippard as : "*a darkly beautiful photographic image... the small wood and plastic crucifix becomes virtually monumental as it floats, photographically enlarged, in a deep rosy glow that is both ominous and glorious*".⁴³⁵ From the very beginning, the *Piss Christ* created heated debates and indignation. It started early in 1989 in US, it created controversy already when it was exposed there; not only because of a certain rejection by puritans, but especially because it received public funding from the State through the National Endowment for the Arts. The *Piss Christ* "*along with the homoerotic photographs of Robert Mapplethorpe, found themselves at the centre of controversy in the United States, where the forces of the Christian Right rallied to curtail the National Endowment for the Arts*".⁴³⁶ While the Senator Alphonse D'Amato destroyed a copy of the *Piss Christ* in the US Senate, he "*launched Piss Christ into prominence, making it a symbol of the excesses of liberalism*",⁴³⁷ while this also triggered legislation by the Congress, "*upheld by the Supreme Court, that the NEA must take 'into consideration general standards of decency' in awarding grants*".⁴³⁸

Then the artwork revived the polemic in October 1997 when exhibited in the National Gallery of Victoria in Melbourne Australia. Firstly the Archbishop Dr Pell tried in vain to bring an action against the *Piss Christ* before the Supreme Court, considering the work

⁴³³ Damian Casey, Sacrifice, 'Piss Christ, and liberal excess', vol. 3 *Arts & Opinion* No3, 2004. Available online at: <http://dlibrary.acu.edu.au/staffhome/dacasey/Serrano.htm>.

⁴³⁴ Mortensen, Preben, *Art in the social order: the making of the modern conception of art*, SUNY Press, 1997, p. 13.

⁴³⁵ Richard Thomas Eldridge, *An introduction to the philosophy of art*, Cambridge University Press, 2003, p. 211.

⁴³⁶ Damian Casey, Sacrifice, 'Piss Christ, and liberal excess', vol. 3 *Arts & Opinion* No3, 2004. Available online at: <http://dlibrary.acu.edu.au/staffhome/dacasey/Serrano.htm>.

⁴³⁷ Damian Casey, Sacrifice, 'Piss Christ, and liberal excess', vol. 3 *Arts & Opinion* No3, 2004. Available online at: <http://dlibrary.acu.edu.au/staffhome/dacasey/Serrano.htm>.

⁴³⁸ Damian Casey, Sacrifice, 'Piss Christ, and liberal excess', vol. 3 *Arts & Opinion* No3, 2004. Available online at: <http://dlibrary.acu.edu.au/staffhome/dacasey/Serrano.htm>.

“*blasphemous*”.⁴³⁹ Secondly, a group of people succeeded in physically attacking the artwork with a hammer while it was exhibited.

From the multiple questions popped by the *Piss Christ* controversy, arose some on tolerance, Christianity, blasphemy. These are notions usually treated differently according to the culture or country, if it is more or less liberal, reactions will be stricter or not. Although, this photograph seems to have received most of the times the same echoes, in the various countries it has been exhibited, and strangely so, as it has been exhibited for the past twenty years.

Indeed, is it because one of the interest in creating polemic and provocation is to attract the attention,⁴⁴⁰ or perhaps is it thanks to its artistic value, the photograph has been world widely exhibited. It was then part of an exhibition in 2007 in Avignon, France, and surprisingly no events took place to contest it. However during the exhibition of the year 2011 in Avignon for the second time, many demonstrations occurred. The surprise is understandable regarding that a first exhibition did not raise any voice against it. Also, anyone could be surprise when hearing about the 2011 events in Avignon, as there is a wide and liberal protection of freedom of expression in France, especially in Art context, artefacts and currents. It has been reported that following the opening of the exhibition, the ‘Institut Civitas’ introducing itself on its website as a “*a work of social and political conquest to re-Christianize France*”,⁴⁴¹ and activist for the “*establishment of the social kingship of Christ over the nations and people*”,⁴⁴² launched a petition against Serrano’s *Piss Christ*. Further to the petition, the director of the collection, Eric Mézil received about “*hundreds of phone calls and insulting e-mails*”.⁴⁴³ Finally, Mézil

⁴³⁹ Damian Casey, Sacrifice, ‘Piss Christ, and liberal excess’, vol. 3 *Arts & Opinion* No3, 2004. Available online at: <http://dlibrary.acu.edu.au/staffhome/dacasey/Serrano.htm>.

⁴⁴⁰ Pierre Bourdieu, ‘L’institutionnalisation de l’anomie’, *Les Cahiers du Musée national d’art moderne*, No 19-21, 1987, p. 6-19.

⁴⁴¹ Institut Civitas, ‘Qui sommes-nous’, *Website presentation*. Available online at :<http://www.civitas-institut.com/content/view/16/62/>. [Own translation]

⁴⁴² AFP (Agence France Presse), ‘Immersion, Piss Christ’, une photographie d’art controversée, vandalisée à Avignon’, *Website France 24, l’actualité Internationale 24/24*, 18 April 2011. [Own translation]. Available online at : <http://www.france24.com/fr/20110418-piss-christ-avignon-vandalisme-photographie-andres-art-crucifix-urine-integristes-jesus-croix-institut-civitas>.

⁴⁴³ AFP (Agence France Presse), ‘Immersion, Piss Christ’, une photographie d’art controversée, vandalisée à Avignon’, *Website France 24, l’actualité Internationale 24/24*, 18 April 2011. [Own translation]. Available online at : <http://www.france24.com/fr/20110418-piss-christ-avignon-vandalisme-photographie-andres-art-crucifix-urine-integristes-jesus-croix-institut-civitas>.

was forced to close the Museum because of a demonstration gathering about “800 ultra-conservatives and young fundamentalists”.⁴⁴⁴ In the same time, while the town hall of Avignon was overflowed under thousands of emails, the owner of the collection Yvon Lambert received about 30 000 emails to ask him not to exhibit the painting, or sending death threats, instituting a tensed climate of hatred.⁴⁴⁵ This climate has been as well exacerbated by the accusation of one of the nowadays actors of Catholicism, the Archbishop of Avignon. The Archbishop publically notified his disagreement to the exhibition and the offense suffered to the symbolism of the Christ. On the 7th of April, he qualified the artwork of “*odious photograph*”, “*a profanation*”, and “*an affront to faith*”.⁴⁴⁶ The Archbishop continued to fan the flame for a few days, and dared “*claiming back the offense of blasphemy abolished during the French Revolution*”.⁴⁴⁷

Last but not least, this is during this tense context that the twenty-three years old artwork of Andres Serrano was then hammered during the same week-end of April 2011. Indeed, in the aftermath of the catholic protest movements of the 9th and 10th of April, then 16th of April,⁴⁴⁸ two visitors equipped with a hammer and what could be an ice pick or a screwdriver entered the museum.⁴⁴⁹ After assaulting three guards in the gallery, they attacked the *Piss Christ* and another artwork of Serrano entitled *Sister Jeanne Myriam*.⁴⁵⁰ The destructive gesture hammering and partially destroying the artwork

⁴⁴⁴ AFP (Agence France Presse), ‘Immersion, Piss Christ’, une photographie d’art controversée, vandalisée à Avignon’, *Website France 24, l’actualité Internationale 24/24*, 18 April 2011. [Own translation]. Available online at : <http://www.france24.com/fr/20110418-piss-christ-avignon-vandalisme-photographie-andres-art-crucifix-urine-integristes-jesus-croix-institut-civitas>.

⁴⁴⁵ Christian Baque and Jacques Fassie, ‘L’affaire Piss Christ- Contre le cléricalisme, pour la liberté d’expression, vive la loi de 1905.. et à bas la calotte!’. Available online at : <http://www.fichier-pdf.fr/2012/02/08/affaire-piss-christ/#>.

⁴⁴⁶ Christian Baque and Jacques Fassie, ‘L’affaire Piss Christ- Contre le cléricalisme, pour la liberté d’expression, vive la loi de 1905.. et à bas la calotte!’, [Own translation]. Available online at :<http://www.fichier-pdf.fr/2012/02/08/affaire-piss-christ/#>.

⁴⁴⁷ Christian Baque and Jacques Fassie, ‘L’affaire Piss Christ- Contre le cléricalisme, pour la liberté d’expression, vive la loi de 1905.. et à bas la calotte!’, [Own translation]. Available online at :<http://www.fichier-pdf.fr/2012/02/08/affaire-piss-christ/#>.

⁴⁴⁸ Christian Baque and Jacques Fassie, ‘L’affaire Piss Christ- Contre le cléricalisme, pour la liberté d’expression, vive la loi de 1905.. et à bas la calotte!’. Available online at :<http://www.fichier-pdf.fr/2012/02/08/affaire-piss-christ/#>.

⁴⁴⁹ AFP (Agence France Presse), ‘Immersion, Piss Christ’, une photographie d’art controversée, vandalisée à Avignon’, *Website France 24, l’actualité Internationale 24/24*, 18 April 2011. [Own translation]. Available online at : <http://www.france24.com/fr/20110418-piss-christ-avignon-vandalisme-photographie-andres-art-crucifix-urine-integristes-jesus-croix-institut-civitas>.

⁴⁵⁰ AFP (Agence France Presse), ‘Immersion, Piss Christ’, une photographie d’art controversée, vandalisée à Avignon’, *Website France 24, l’actualité Internationale 24/24*, 18 April 2011. [Own

was qualified by the French Minister of Culture, Frédéric Mitterrand, of scandalous and unbearable gesture even if it could shock a part of the audience.⁴⁵¹

At the same time and in the line of the Archbishop's accusations, the AGRIF introduced an action before the Tribunal of Avignon, against the exhibition of the *Piss Christ*.⁴⁵² The AGRIF is the 'Alliance générale contre le racisme et pour le respect de l'identité française et chrétienne' (General Alliance against racism and for the respect of the Christian and French identity), which is used to bring actions in justice.⁴⁵³ The religious association made a claim then the same week of the Archbishop's accusation, a week before the destruction of the artwork and it lost the case judged in April 2011 by the Tribunal de Grande Instance (District Court).⁴⁵⁴ The national judges decided that "*no public offense could be invoked*",⁴⁵⁵ and the association was condemned to bear the cost of 3000 euros for the proceedings and 5000euros to the Collection Lambert for the prejudice of the claim. The Defendant's lawyer Maître Agnès Tricoire said publically a few words about the verdict: "*this is historic and this is a scathing disapproval*".⁴⁵⁶

II.B.2.b. Duality in the public reception

Two opinions are firmly opposed in this case. The 'Catholics' involved are claiming the profane nature of the artwork, and the other part of the population involved claims that the destruction and attacks were limitations to freedom of expression. Firstly, the

translation]. Available online at : <http://www.france24.com/fr/20110418-piss-christ-avignon-vandalisme-photographie-andres-art-crucifix-urine-integristes-jesus-croix-institut-civitas>.

⁴⁵¹ Thomas Schlessler, 'Des jeunes cathos intégristes font le siège du Théâtre de la ville de Paris', *Website Rue89*, 24 October 2011. Available online at: <http://www.rue89.com/2011/10/22/des-cathos-integristes-menacent-le-public-du-theatre-de-la-ville-de-paris-225837>.

⁴⁵² Christian Baque and Jacques Fassie, 'L'affaire Piss Christ- Contre le cléricalisme, pour la liberté d'expression, vive la loi de 1905.. et à bas la calotte!'. Available online at :<http://www.fichier-pdf.fr/2012/02/08/affaire-piss-christ/#>.

⁴⁵³ *E.g.* Cass. Crim., 28 avr. 1998 : *Gaz. Pal.* 1998, II, chron. Dr. Crim. No 137.

⁴⁵⁴ TGI Avignon, réf., 20 avril 2011, AGRIF c/ Collection Lambert.

⁴⁵⁵ Caroline Reinhart, 'Art : « Piss Christ » : les intégristes déboutés', *Lextimes Website*, 21 April 2011. Online and available at : <http://www.lextimes.fr/4.aspx?sr=1008>. [Own translation]

⁴⁵⁶ Caroline Reinhart, 'Art : « Piss Christ » : les intégristes déboutés', *Lextimes Website*, 21 April 2011. Online and available at : <http://www.lextimes.fr/4.aspx?sr=1008>. [Own translation]

offense felt by Christians is for instance noticeable on the blog of *Christ-Roi*.⁴⁵⁷ This article seems to be a very angry lampoon against the artwork; a confused emotional libel mistaking the provocation of the *Piss Christ* for an “*illegal and anti-democratic attack*”.⁴⁵⁸ The article explains how to its author, attacking the crucifix is attacking a major figure of the religion, and then “*the alliance of God with Men, symbol through which every Men is rescued, and so it is an attack against the entire humanity*”.⁴⁵⁹ Also, a few aberration can be quoted, such as “[the artwork] *was illegal and the ones destroying it acted on self defence motives*”, “*the freedom of beliefs is attacked today, so this is an attack against the first human right*”.⁴⁶⁰

Finally the author explains how it will be too late when public authorities will realise their mistake to have believed it was an artwork, and he discusses the damages for the souls of the ones losing the path to god in quoting Isaiah. A more reasonable or intelligible article has been republished on a facebook page by the member “FIERS D’ETRE CATHOLIQUES!” (proud to be Catholics). The article written by the art critic Christine Sourgins reads that in any case, the demonstrations of the Catholics would not be taken seriously, and that the scandal will be evidently used to illustrate fundamentalism among Catholics.⁴⁶¹ From the *Piss Christ* incident in Avignon, Nathalie Heinich concluded in her article that the French society starts to be ‘Americanised’ in the way that it reacts strongly to any transgression of morals standards by contemporary

⁴⁵⁷Ingomer, ‘Piss Christ : une attaque contre l’humanité’, *Blog Christ Roi*, 21 April 2011. Online article, available at : <http://christroi.over-blog.com/article-piss-christ-une-attaque-contre-l-humanite-72228358.html>.

⁴⁵⁸Ingomer, ‘Piss Christ : une attaque contre l’humanité’, *Blog Christ Roi*, 21 April 2011. Online article, available at : <http://christroi.over-blog.com/article-piss-christ-une-attaque-contre-l-humanite-72228358.html>. [Own translation]

⁴⁵⁹Ingomer, ‘Piss Christ : une attaque contre l’humanité’, *Blog Christ Roi*, 21 April 2011. Online article, available at : <http://christroi.over-blog.com/article-piss-christ-une-attaque-contre-l-humanite-72228358.html>. [Own translation]

⁴⁶⁰Ingomer, ‘Piss Christ : une attaque contre l’humanité’, *Blog Christ Roi*, 21 April 2011. Online article, available at : <http://christroi.over-blog.com/article-piss-christ-une-attaque-contre-l-humanite-72228358.html>. [Own translation]

⁴⁶¹FIERS D’ETRE CATHOLIQUES ! (republishing), ‘Affaire PissChrist : Très bonne analyse de Christine Sourgins, historienne de l’art’, *Facebook page of FIERS D’ETRE CATHOLIQUES !*, 20 April 2011. Available online at : https://www.facebook.com/notes/fiers-detre-catholiques-/affaire-pisschrist-tr%C3%A8s-bonne-analyse-de-christine-sourgins-historienne-de-lart/10150167483747488?comment_id=17279464&offset=0&total_comments=8.

art.⁴⁶² It seems however that it is just the wave described by Philippe Portier, a strong return or reaffirmation of beliefs.⁴⁶³ This is not the first indignation of Ultra-Catholics recently in France, the AGRIF intervened a few years ago to take down the posters of the film *Amen* by Costa-Gavras, where the cover picture of the film mixed swastika and Christian cross.⁴⁶⁴ These events can be compared to the even more recent events in a Parisian theatre last October. Roméo Castellucci's play is entitled *Sur le concept du visage du fils de Dieu*,⁴⁶⁵ and depicts "a confrontation between human poverty (an incontinent father) and his Saviour (the projection of a huge face of Christ painted by Antonello da Messina). The play questions the possible limits of pity, mercy, benevolence. The Christ ends up being vandalised, with grenades and excrements".⁴⁶⁶ The play has been interrupted a few times when it was displayed in Paris last winter, by activists from the 'Mouvement de la jeunesse catholique de France' (MJCF) shouting during the play, throwing things to the audience or shouting from the stage with a banner; they are supposedly the same activists that the ones destroying the *Piss Christ*.⁴⁶⁷ A video broadcasted on youtube of the interruption enables to witness the interruption by seven young 'kidults', manifesting very seriously with a banner saying no to 'christianophobia'.⁴⁶⁸

Whereas some people viewing the video could think that these are just a few impulsive and lost kids, some comments under the video call them the 'martyrs of modern times'. On the other hand, a second opinion contradicts this one. For instance, Yvon Lambert affirms that this is a regress to the 'Middle-Age', while Baque and Fassie express in their

⁴⁶² Nathalie Heinich, *Ce que la destruction du Piss Christ dit de notre société*, Le Nouvel Observateur, 24th April 2011 ; online : <http://tempsreel.nouvelobs.com/actualite/culture/20110422.OBS1779/ce-que-la-destruction-de-piss-christ-dit-de-notre-societe.html>

⁴⁶³ Philippe Portier, 'La critique contemporaine du religieux : essai d'interprétation', in Dir. Danielle Corrigan-Carsin, *La Liberté de Critique*, Lexis Nexis, Litec, Paris, 2007, 215p, p.148.

⁴⁶⁴ Caroline Reinhart, 'Art : « Piss Christ » : les intégristes déboutés', *Lextimes Website*, 21 April 2011. Online and available at : <http://www.lextimes.fr/4.aspx?sr=1008>.

⁴⁶⁵ On the concept of God's son's face.

⁴⁶⁶ Thomas Schlessler, 'Des jeunes cathos intégristes font le siège du Théâtre de la ville de Paris', *Website Rue89*, 24 October 2011. Available online at: <http://www.rue89.com/2011/10/22/des-cathos-integristes-menacent-le-public-du-theatre-de-la-ville-de-paris-225837>. [Own translation]

⁴⁶⁷ Thomas Schlessler, 'Des jeunes cathos intégristes font le siège du Théâtre de la ville de Paris', *Website Rue89*, 24 October 2011. Available online at: <http://www.rue89.com/2011/10/22/des-cathos-integristes-menacent-le-public-du-theatre-de-la-ville-de-paris-225837>.

⁴⁶⁸ Displayed by youtube user Renouveau Français, 'Des jeunes du Renouveau Français interrompent Castellucci', *Youtube Video*, 22 October 2011. Available online at : http://www.youtube.com/watch?feature=player_embedded&v=EuPCF238ejI#!.

article that it is a '*clerical terrorism*'.⁴⁶⁹ Baque and Fassie commented on the Avignon Archbishop's speech: "*the Archbishop is obviously nostalgic of the times, where in the name of its dogmas and above all of the preservation of its temporal force, the Catholic Church, apostolic and roman, told the entire society every limit to the freedom of creation, freedom of derision, of critic...*".⁴⁷⁰

II.B. 3. Conclusions

To me, the example of the *Piss Christ* is a striking example on how Art is misunderstood by a type of the society, usually not very 'progressive'. This is also the evidence of how this misunderstanding leads to a breach of the freedom of expression of the artist, of the public which has a 'right to receive informations' when the piece of art is destroyed for instance. Whereas at the same time the group 'offended' feels that it has to defend its own freedom of religion and beliefs.

This is again the question of striking a balance between different freedoms, when each other is impinging in a way, on the other. This is not because freedom of religion is supposed to be more of a 'private matter' in a secularist France, that it should be completely ignored and devoid of protection. This is a liberty like any other. However, religious beliefs should be protected, but fanaticism should not. The accusations of the Avignon Archbishop were rightly qualified of "*liberticidal requirements*",⁴⁷¹ as they were very similar to the middle-age and the time of Inquisition state of mind.

As held by Kearns, a particular attitude is necessary to be adopted facing art, and trying to understand it by stepping back on our first emotions and reactions. Indeed, outrage cannot result from art unless art-work is approached incorrectly, a wrong attitude to art

⁴⁶⁹ *Christian* Baque and Jacques Fassie, 'L'affaire Piss Christ- Contre le cléricalisme, pour la liberté d'expression, vive la loi de 1905.. et à bas la calotte!'. Available online at :<http://www.fichier-pdf.fr/2012/02/08/affaire-piss-christ/#>. [Own translation]

⁴⁷⁰ *Christian* Baque and Jacques Fassie, 'L'affaire Piss Christ- Contre le cléricalisme, pour la liberté d'expression, vive la loi de 1905.. et à bas la calotte!'. Available online at :<http://www.fichier-pdf.fr/2012/02/08/affaire-piss-christ/#>. [Own translation]

⁴⁷¹ *Christian* Baque and Jacques Fassie, 'L'affaire Piss Christ- Contre le cléricalisme, pour la liberté d'expression, vive la loi de 1905.. et à bas la calotte!'. Available online at :<http://www.fichier-pdf.fr/2012/02/08/affaire-piss-christ/#>. [Own translation]

can hardly constitute the artist's fault.⁴⁷² Freedom of expression should have more weight regarding art, because the interpretation is personal, and as it was recalled "*it is to the audience to judge of the artworks, not to the auto-proclaimed censors*".⁴⁷³ Once again, a balance between freedoms is more that hard to strike. May us be guided by a democratic society, far from fanaticism and liberticidal freedoms.

III. C. Conclusions

In the presentation of the dilemma 'censorship versus racism', Kevin Boyle evokes the need to strike a balance.⁴⁷⁴ Even if the two notions conflicting are different from the one above studied, the question arising remains similar. According to Boyle, within the two notions dealing with freedom of expression, one is subordinate to the other. Moreover, "*circumstances in which other interests should win out over freedom of expression is not inconsistent with a strong commitment to the value of freedom of expression*".⁴⁷⁵ This clearly gives the most intelligible reason possible for the necessity of striking a balance when needed. If striking a balance is a tough task it is that the consequences could be terrible, especially when trying to help democracy to prosper whereas the society keeps changing thanks to the progress, migrations, and evolutions brought with the 21st century. Particularly as well that no reasonable mind possesses the 'truth' neither the perfect guidance to show the way. As explained by Boyle, "*Much censorship down the centuries has been advanced for ideal causes to promote versions of the good*

⁴⁷² Paul Kearns, *Chapter 7 – Public Morality Laws and the Creation and Appreciation of Art: The Postmodern Western Experience*, in *Legal Convergence in the Enlarged Europe of the New Millennium*, edited by Paul L.C. Torremans, Kluwer Law International, Netherlands, 2000, p. 152.

⁴⁷³ L'Observatoire des libertés, in AFP (Agence France Presse), 'Immersion, Piss Christ', une photographie d'art controversée, vandalisée à Avignon', *Website France 24, l'actualité Internationale 24/24*, 18 April 2011. [Own translation]. Available online at : <http://www.france24.com/fr/20110418-piss-christ-avignon-vandalisme-photographie-andres-art-crucifix-urine-integristes-jesus-croix-institut-civitas>.

⁴⁷⁴ Kevin Boyle, 'Chapter 1- Overview of a Dilemma : Censorship versus Racism', in *Striking a balance: Hate speech, Freedom of Expression and non-discrimination*, edited by Sandra Coliver, Contributing Editors Kevin Boyle and Frances D'Souza, XIX (Article 19) – International Centre Against Censorship, Human Rights Centre, University of Essex, 1992, p.1.

⁴⁷⁵ Kevin Boyle, 'Chapter 1- Overview of a Dilemma : Censorship versus Racism', in *Striking a balance: Hate speech, Freedom of Expression and non-discrimination*, edited by Sandra Coliver, Contributing Editors Kevin Boyle and Frances D'Souza, XIX (Article 19) – International Centre Against Censorship, Human Rights Centre, University of Essex, 1992, p.1.

and the truth, whether secular or religious. It has almost always ended in disaster in the constricting of debate, the suppression of dissent and the corruption of the truth".⁴⁷⁶

If then, we can blame the ECtHR for instance for not being clear on 'directions' to follow and leaving this to the margin of appreciation of the States, maybe shall we be thrilled instead that there is no clear rule where the unavoidable could not be changed anymore. In the cases studied previously, *Theo Van Gogh's murder* and *the Piss Christ*, freedom of expression is hurt by freedom of religion and apparently vice versa. What is to be noticed is that in both cases States did allow a 'wide' or 'normal' freedom of expression. It is only sections of population that rejected it with virulence. A too frank free speech messaged through artistic means hurts the sensitivity of 'believers', feeling offended by it. This is paradoxical in some way as Art is usually seen as the bridge between two worlds, the point of agreement between two cultures or civilisations. As held by Mrs Hennicot, there is a potential for "*artistic expression to cross cultural barriers [...] open-minded, that believe expression no matter where they come from are valuable and equal*".⁴⁷⁷ Explaining how Arts are "*food for brain and oxygen against intolerance*",⁴⁷⁸ she puts her finger on the core of the problem: intolerance. Intolerance brings fanaticism, fundamentalism and could as well open Pandora's box.

Nonetheless, it is hard to match two visions so poled apart,⁴⁷⁹ which could be two worlds Western and Eastern if our world were bipolar, or a generational clash for instance. It is easier to explain this diptych by the two different waves described by Philippe

⁴⁷⁶ Kevin Boyle, 'Chapter 1- Overview of a Dilemma : Censorship versus Racism', in *Striking a balance: Hate speech, Freedom of Expression and non-discrimination*, edited by Sandra Coliver, Contributing Editors Kevin Boyle and Frances D'Souza, XIX (Article 19) – International Centre Against Censorship, Human Rights Centre, University of Essex, 1992, p.3.

⁴⁷⁷ Erna Hennicot- Schoepges, The Language of Art and Music, *Conference by The Institute for Cultural Diplomacy: "the language of Art & Music: An international Symposium on the Potential for Artistic Expression to Cross Cultural Barriers and the Relationship between Art, Culture and International Relation*, Berlin, February 17th - 20th 2011. Video available online at : <http://www.youtube.com/watch?v=IDIISxjNKg>.

⁴⁷⁸ Erna Hennicot- Schoepges, The Language of Art and Music, *Conference by The Institute for Cultural Diplomacy: "the language of Art & Music: An international Symposium on the Potential for Artistic Expression to Cross Cultural Barriers and the Relationship between Art, Culture and International Relation*, Berlin, February 17th - 20th 2011. Video available online at : <http://www.youtube.com/watch?v=IDIISxjNKg>.

⁴⁷⁹ Erik Sengers, 'The Religious Market and its Regulation', Vol. 9 *Ecclesiastical Law Journal*, 2007, 294-307p., p. 299.

Portier,⁴⁸⁰ especially arising with modernity in Western part. This duality resides in the Catholic erosion and the return to religion. But this would leave apart all other religions and beliefs. So let adapt the formula to an erosion of religious beliefs and a return to the spirituality. The second one finds a clear explanations in Portier's idea, close to Bourdieu's explanations on sociology. Portier wrote that "*through nowadays provocations which affect any religion independently from their success, would be expressed actually, overflowing from the regulated philosophy of the Enlightenment philosophers, the desire quasi nihilist of an absolute power*".⁴⁸¹ This is absolutely understandable in our society, especially since the globalisation. Since the institution of a global village, new communication and technologic means, perpetual progress, modernity, changes, some Human Beings for instance would tend to replace the adage '*Memento Mori*', by a classy and hedonistic '*F*ck me I'm famous*',⁴⁸² David Guetta's formula for '*Carpe Diem*'. We forget the myth of Icarus believing in our own super-power.

There is inevitably a gap then between the one who accept and anticipate these new 'values', and the one still leaving in troglodyte houses or refusing the progress. To me it seems unfortunately impossible to fully combine both. I deeply think that a 'fundamentalist of the progress' could not be a firm spiritual believer in any God without contradicting himself. This might be one of the reasons for which Julius Evola already in 1982 did a tribute to Orient for keeping intact values, that the Western part tend to lose progressively.⁴⁸³ Similarly to René Guénon the author considered the division between Occident and Orient as a division between modernity and tradition. However, observing the recent incident created by Ultra-catholic activists, it seems that the West is not atheist yet. If similarly to Fouad Laroui I used to think that free speech should be unlimited,⁴⁸⁴ I do understand and agree with the nuance between being able to say

⁴⁸⁰ Philippe Portier, 'La critique contemporaine du religieux : essai d'interprétation', in Dir. Danielle Corrigan-Carsin, *La Liberté de Critique*, Lexis Nexis, Litec, Paris, 2007, 215p, p.148.

⁴⁸¹ Philippe Portier, 'La critique contemporaine du religieux : essai d'interprétation', in Dir. Danielle Corrigan-Carsin, *La Liberté de Critique*, Lexis Nexis, Litec, Paris, 2007, 215p, p.150. [Own translation]

⁴⁸² David Guetta, Album: *F*ck me I'm famous*, 77'08 mn, Label EMI, released 9 June 2008.

⁴⁸³ Julius Evola, *Orient et Occident*, Éditions Archè, 1982 ; *L'Europe ou le déclin de l'Occident*, Rémi Perrin, 2000.

⁴⁸⁴ Fouad Laroui's testimony, in Alexandre Héraud, *L'assassinat de Théo Van Gogh*, voyages au bout d'une vie- volume 12, E-dite, 2006, Paris, p.85.

everything and the action of saying it, and risking to hurt someone. Indeed, as pointed out by Scanlon, “*what people can say can cause injury, can disclose private information, can disclose harmful public information. It’s not a free zone where you can do anything because nothing matters. Speech matters*”.⁴⁸⁵

Although, to the question “*Can we laugh about anything?*”, the French humorist Pierre Desproges gave a very persuasive argumentation in his show. While faking being a judge during a Tribunal where the guest was Jean-Marie LePen, leader of the very far right-wing party in France (Front National), Desproges found the opportunity to repeat the importance of words and comedy while discussing the limits of a free speech. Desproges said so : “*If it is true that humour is the politeness of despair[...] Laughter can desecrate foolishness, exorcise true sorrow, castigate mortal anguish, then yes we can laugh about anything, we must laugh about anything: war, misery and death*”.⁴⁸⁶ This reminds us of the maxim ‘*Castigat ridendo mores*’. And if comedy can cure the mores, shouldn’t it be the same with free speech and art ? If the artwork of Serrano has created debate on art, about what should be consider as art or not, this is a pity that Van Gogh’s short-film has not been considered as such. It has been considered as an arrogant frontal attack, not as the work of an artist. Paul Kearns illustrates the dimension in which Art should be taken. Kearns wrote : “*Freedom of expression is intrinsic to democracy as freedom of religion, and art, treated as art, in no way rules against the latter, and does not purport to. Art, not necessarily even cognitive, simply offers itself and invites the appropriate meditative (aesthetic) attitude. It is generous, not constricting, and is not the exertion of the will that its contemplation, results in real-life disaccord. Art is an option for its reader or viewer, not an imposition*”.⁴⁸⁷ Art needs a special step back to be understood, we could consider granting a wider scope to freedom of expression regarding Art. It does not include insane free speech, hatred speech organised in public places but about emotions conveyed, about the power of Arts as depicted by Mrs Hennicot.⁴⁸⁸ And for the ‘highly sensitive souls’, special precautions

⁴⁸⁵ Tim Scanlon, in Nigel Warbuton, *Free speech, a short introduction*, OUP, NY, 2009, p.4.

⁴⁸⁶ Pierre Desproges, ‘ Réquisitoire contre LePen’, *Le tribunal des flagrants délires*, 1982. Available online at : http://www.youtube.com/watch?v=4Af_ygcMUC8. [Own translation]

⁴⁸⁷ Paul Kearns, *The Legal Concept of Art*, Hart Publishing, 1998, 304p, p. 27.

⁴⁸⁸ Erna Hennicot- Schoepges, *The Language of Art and Music, Conference by The Institute for Cultural Diplomacy: “the language of Art & Music: An international Symposium on the Potential for Artistic*

could be taken. If we remember well the exhibition *Sensation* during which the polemic artwork of Chris Offili was displayed,⁴⁸⁹ it gave birth to the idea of warning signs put up to warn the sensitive audience. Thinking about it, this is a practical way to prevent ones to be shocked, whereas the others are not deprived from Art or from the message. It thus would respect the definition of 'a freedom to receive and impart informations'.

Nonetheless, it might be because this nuance between being able to say everything and the action of saying it, is so weak yet that the ECtHR tends to restrict freedom of expression conflicting with other rights or freedoms, when recently striking a balance. Indeed, according to François, the ECtHR started with a logic of extending freedom of expression and now moves to a logic of restricting it.⁴⁹⁰ In a same manner, France for instance keeps enriching its 1881 Law on Press to frame free speech. This lead Pradel to beg and hope that the amendments will find an end. Pradel indeed quoted Balzac for justification : “ *the nation having forty thousand laws has none*”.⁴⁹¹

There still subsists a risk of striking the wrong balance as evoked. Indeed, restriction of free speech can be understandable when impinging on other freedoms. Nevertheless, it is to fear as well that according too much credit to another freedom would bring us back centuries before. And 'the numerous dead we should praised' would have died for nothing, only for us to get bogged down into a politically correct muteness, or worse in a silence dictated by censorship. As held by Kearns, “ *censorship is, we perceive, the enemy of the free artistic spirit, that needs to spread its wings well beyond the properties of polite society, in order to gratify its ontological inner nerves and heart*”.⁴⁹² For instance, regulation of free speech by obscenity or morality laws is sometimes hardly justifiable as these Statutes are established according to arbitrary standards. From there, from an arbitrary censorship, the link to dictatorship is easy to draw. No need to

Expression to Cross Cultural Barriers and the Relationship between Art, Culture and International Relation, Berlin, February 17th - 20th 2011. Video available online at : <http://www.youtube.com/watch?v=IDIISxjNKg>.

⁴⁸⁹ Exhibition *Sensation*, at the Royal Academy of Art in London, 18 September – 28 December 1997.

⁴⁹⁰ L. François, *Le conflit entre la liberté d'expression et la protection de la réputation ou des droits d'autrui : la recherche d'un juste équilibre par le juge européen : D. 2006*, chron. 2953 et s.

⁴⁹¹ Honoré de Balzac, *Le médecin de campagne*, 1833, in Jean Pradel, 'La liberté d'expression, jusqu'où? Brèves remarques sur quelques affaires récentes', in Dir. Danielle Corrigan-Carsin, *La Liberté de Critique*, Lexis Nexis, Litec, Paris, 2007, 215p, p.140. [Own Translation]

⁴⁹² Paul Kearns, *The Legal Concept of Art*, Hart Publishing, 1998, 304p, p. 175.

explain the title of the artwork : “*Where they burn books they will ultimately burn people*”⁴⁹³. Memories of the Catholic Inquisition for instance or more recently of the dictatorships during the World War II shall give us the taste to fight for freedom. Maybe the easiest way to keep intact our freedoms as nowadays protected, would be not to abuse them.

Regarding the question of a positive obligation by States, one could be of the opinion that if religion for instance is made a private matter, there is no positive obligation as such. There would be more a negative obligation as mentioned by Labuschagne,⁴⁹⁴ an obligation not to impede the exercise of the freedom. Nonetheless, there is a positive obligation of the State to adapt itself and the laws to the requirements developed and demanded by the changing society. As illustrated by some changes in Netherlands, it is crucial to modify the law to integrate new elements in the society.

Mrs Hennicot held that religion shall be seen as “*peace-making*”.⁴⁹⁵ And this is a factor we do not frequently consider. If religions, in their diversity could be a factor of unification instead of separation, the problematic would be most probably different. Let’s hope that our constant changing society will evolve in that direction. But for now, the significant problem of retaliation of religious groups (Intolerance, censorship, Fatwa, violence,...), cannot be part of a viable democracy. There is a need in our new century to impose limits in the balance between an offending free speech and a risk of retaliation which should not be possible at all.

The limits to freedom of expression shall be imposed regarding John Stuart Mill’s theory as a consequentialist principle and utilitarian concept,⁴⁹⁶ even implying the idea of a ‘greater good’ devoid of any dictatorial connotation or reference to Voltaire’s Pangloss in

⁴⁹³ Ivan and Katja Eastwood, *When they burn books...*, Wales, Letterpress, Edition of 13, 2009. (exhibition in John Rylands Library, Deansgate, Manchester, 2011).

⁴⁹⁴ B.C. Labuschagne, ‘Religious Freedom and Newly-Established Religions in Dutch Law’, Vol. 44 *Netherlands International Law Review* Issue 2 , 1997, pp 168-185, p. 185. doi:10.1017/S0165070X00004435.

⁴⁹⁵ Erna Hennicot- Schoepges, *The Language of Art and Music, Conference by The Institute for Cultural Diplomacy: “the language of Art & Music: An international Symposium on the Potential for Artistic Expression to Cross Cultural Barriers and the Relationship between Art, Culture and International Relation*, Berlin, February 17th - 20th 2011. Video available online at : <http://www.youtube.com/watch?v=IDIISxjNKg>.

⁴⁹⁶ John Stuart Mill, *On liberty*, Chapter 2, 1859.

*Candide*⁴⁹⁷. This would legitimately amount to the saying “*The right to swing my fist ends where the other man's nose begins*”. We could also hope to be guided by our reason, however, perhaps not everyone possesses a healthy mind, or what seems reasonable to one could appear extreme to another. As studied, a few authors, and among them Pradel⁴⁹⁸ or Labuschagne,⁴⁹⁹ insist in having faith in judges regarding the correct balance to strike. If freedoms are abused, offending certain persons, the balance will more rightly be struck case by case to avoid arbitrary, the greatest enemy of a democratic society. With faith in judges, and perhaps also in humanity, the encroachment of freedoms on each other shall be solve in the name of democracy.

III – Censorship: for or against ?

III.A- Hungary, 2010-2012: Hungarian laws shackle freedom of expression.

III.A.1. Historical developments of the Hungarian Constitution and the protection of fundamental rights

In 2012 it could seem obsolete to mention the end of the communist bloc with the fall of the USSR when talking about eastern European countries. However, as it has been recalled for a few months,⁵⁰⁰ a legacy of this era still remains in Hungary and is perceptible through the national Constitutional provisions for instance. Especially as the 1949 Hungarian Constitution survived through the times,⁵⁰¹ until the adoption of the 2011 Constitution; Hungary was then the only country from the former Eastern bloc with the same Constitution it had under the communist era when it integrated the Union. The current Hungarian Prime Minister, Mr. V. Orban considers that “ *“post-communist” is not just an adjective, it is a political structure, involving fragile political*

⁴⁹⁷ Voltaire, *Candide*, Libro, J'ai Lu, 2004, 96p. (Original version 1759).

⁴⁹⁸ Jean Pradel, 'La liberté d'expression, jusqu'où? Brèves remarques sur quelques affaires récentes', in Dir. Danielle Corrignan-Carsin, *La Liberté de Critique*, Lexis Nexis, Litec, Paris, 2007, 215p, p.140.

⁴⁹⁹ B.C. Labuschagne, 'Religious Freedom and Newly-Established Religions in Dutch Law', Vol. 44 *Netherlands International Law Review* Issue 2 , 1997, pp 168-185, p. 185. doi:10.1017/S0165070X00004435.

⁵⁰⁰ *Inter alia*, Andras Bozoki, 'The Crisis of Democracy in Hungary 2012', 3 February 2012, online contribution. Available at: <http://www.deliberatelyconsidered.com/2012/02/the-crisis-of-democracy-in-hungary-2012/>.

⁵⁰¹ Stephen Istvan Pogany, 'Constitutional Reform in Central and Eastern Europe: Hungary's transition to democracy', *International and Comparative Law Quarterly*, Vol. 42, April 1993, p. 334.

institutions, weak parties, and an economy in which the old elite, and its lucrative and powerful cartels and monopolies, is entrenched".⁵⁰² It has been held further that too less attention has been paid to the "*the constitutional problems posed by the transition from relatively monolithic political, legal and economic systems, in which power and decision-making were concentrated, to a greater or lesser extent, in a single political party or ruling elite, to the formation of Western-style pluralistic democracies committed to fundamental freedoms and democratic processes and the development of successful market economies*".⁵⁰³ The 1949 Constitution⁵⁰⁴ has nonetheless been reformed and amended throughout the years. The 1972 revised Constitution⁵⁰⁵ focused more on the consecration of social and economic rights, whereas the 1989 revised Constitution⁵⁰⁶ would 'liberate' civil and politic rights, defined as "*characteristics of western Constitutions*".⁵⁰⁷ Although, the 1972 Constitution did proclaim rights to 'pursue scholarly or artistic activities', and the equality among citizens to exercise their freedom of conscience and religion, and a "*qualified freedom of expression*".⁵⁰⁸ These rights were to be exercised according to the section 54(2) of the 1972 Constitution, "*in accordance with the interests of the socialist society*".⁵⁰⁹ The 1989 Constitution has however much more importance hence it must be considered as the first step on the way towards democracy in Hungary. Round Tables were organised from June 13 to September 18 in 1989 to reform the institutions and notably amend the Constitution instituting a real democratic society.⁵¹⁰ Following these Round Tables the reformed 1989 Constitution was proclaimed.

⁵⁰² E.L., 'Hungary's politics Orbán and the wind from the east', *The Economist* website, 14 November 2011. Available online at : <http://www.economist.com/blogs/easternapproaches/2011/11/hungarys-politics?page=4>.

⁵⁰³ Stephen Istvan Pogany, 'Constitutional Reform in Central and Eastern Europe: Hungary's transition to democracy', *International and Comparative Law Quarterly*, Vol. 42, April 1993, p.333.

⁵⁰⁴ Hungary, *Hungarian Constitution*, 1949.

⁵⁰⁵ Hungary, *1972 Hungarian Constitution*, amending the 1949 Constitution.

⁵⁰⁶ Hungary, *1989 Hungarian Constitution*, amending the 1972 reformed Constitution, in force on 1 January 1990.

⁵⁰⁷ Stephen Istvan Pogany, 'Constitutional Reform in Central and Eastern Europe: Hungary's transition to democracy', *International and Comparative Law Quarterly*, Vol. 42, April 1993, p.336.

⁵⁰⁸ Stephen Istvan Pogany, 'Constitutional Reform in Central and Eastern Europe: Hungary's transition to democracy', *International and Comparative Law Quarterly*, Vol. 42, April 1993, p.336.

⁵⁰⁹ Stephen Istvan Pogany, 'Constitutional Reform in Central and Eastern Europe: Hungary's transition to democracy', *International and Comparative Law Quarterly*, Vol. 42, April 1993, p.336.

⁵¹⁰ Stephen Istvan Pogany, 'Constitutional Reform in Central and Eastern Europe: Hungary's transition to democracy', *International and Comparative Law Quarterly*, Vol. 42, April 1993, p.338.

It emphasised the Hungarian shift towards democracy in guaranteeing the rule of law and separation of powers and consecrating more thoroughly human rights.⁵¹¹ A great responsibility since then weighted on the Hungarian Constitutional Court, in charge of “*securing the rule of law in Hungary*”,⁵¹² and as well of safeguarding human rights and their application. Pogany observed the irony residing in these democratic reforms, mentioning that “*this entire process of constitutional reform that the bulk of the laws providing for the democratisation of the political process in Hungary, for the recognition of human rights and fundamental freedoms, [...] should have been adopted by a legislature which, in 1989, had itself not been democratically elected*”.⁵¹³ However, the Preamble of the 1989 Constitution précised the ‘interim’ nature of the amended Constitution in the await of a full new one.⁵¹⁴ The Preamble of the 1989 Constitution reads “*In order to facilitate the peaceful political transition to a constitutional state realising a multi-party system, parliamentary democracy and a social market economy, the National Assembly, pending the adoption of a new Constitution, establishes the text of the Hungarian Constitution as follows [...]*”.⁵¹⁵ This Constitution enabled the recognition of “*the inalienable and inviolable human rights*”,⁵¹⁶ and other rights such as the right to life and human dignity,⁵¹⁷ the freedom of thought, conscience and religion,⁵¹⁸ and the freedom of communication⁵¹⁹.⁵²⁰ Furthermore, the Constitution broadened this recognition of fundamental rights when acknowledging the rules set up

⁵¹¹ Stephen Istvan Pogany, ‘Constitutional Reform in Central and Eastern Europe: Hungary’s transition to democracy’, *International and Comparative Law Quarterly*, Vol. 42, April 1993, p.340. ; Istvan Sziker, ‘The police Act and the national security in service of the fight against terrorism, underlying principles and legal framework’, in Gabor Halmai (ed.), *Hungary: Human Rights in the Face of Terrorism*, Human Rights Series 1, Vandeplass Publishing, USA, 2006, 115p., p.62.

⁵¹² Stephen Istvan Pogany, ‘Constitutional Reform in Central and Eastern Europe: Hungary’s transition to democracy’, *International and Comparative Law Quarterly*, Vol. 42, April 1993, p.341.; Stephen Istvan Pogany, ‘Human Rights In Hungary’, *International and Comparative Law Quarterly*, Vol.41., July 1992, p.676.

⁵¹³ Stephen Istvan Pogany, ‘Constitutional Reform in Central and Eastern Europe: Hungary’s transition to democracy’, *International and Comparative Law Quarterly*, Vol. 42, April 1993, p.339.

⁵¹⁴ Stephen Istvan Pogany, ‘Constitutional Reform in Central and Eastern Europe: Hungary’s transition to democracy’, *International and Comparative Law Quarterly*, Vol. 42, April 1993, p.340.

⁵¹⁵ Hungary, *1989 Hungarian Constitution*, 1989, Preamble.

⁵¹⁶ Hungary, *1989 Hungarian Constitution*, 1989, Section 8(1).

⁵¹⁷ Hungary, *1989 Hungarian Constitution*, 1989, Section 54(1).

⁵¹⁸ Hungary, *1989 Hungarian Constitution*, 1989, Section 55(1).

⁵¹⁹ Hungary, *1989 Hungarian Constitution*, 1989, Section 60(1).

⁵²⁰ Stephen Istvan Pogany, ‘Constitutional Reform in Central and Eastern Europe: Hungary’s transition to democracy’, *International and Comparative Law Quarterly*, Vol. 42, April 1993, p.346.

by International law in its section 7(1),⁵²¹ which took full importance regarding the consecutive accession of Hungary to the ECHR, and signature for instance of the ICCPR.⁵²²

However regarding freedom of expression, it is to be noticed that a 'qualified freedom of expression' was granted by the previous Constitution, even within the limits of the 'interests of the socialist society', whereas the 1989 Constitution only expressly grants a freedom of communication. The freedom of communication can be completed by the commitment made at that time by the representatives of the party state to "*report events of the Hungarian political life as well as social, political and economic processes impartially*" in the public media".⁵²³ This must be viewed as the fulfilling the requirement of the international standard⁵²⁴ of freedom of expression enabling to 'receive informations'.

Nonetheless, in 1990 the party state control did not cease and because the opposition "*could not find the time to prepare a law on press freedom before the change of regime*",⁵²⁵ the two presidents of radio and television public services were appointed by the President of the Republic on suggestion of its Prime Minister.⁵²⁶ In late winter 1991, public broadcasting services were put under governmental control until the 1996 democratic media law,⁵²⁷ which instituted a National Radio and Television Commission whose members were elected by the parties, and president appointed by both the Prime Minister and President.⁵²⁸ The development of this new measure was better in theory regarding the respect of democratic standards far from a governmental arbitrary

⁵²¹ Hungary, *1989 Hungarian Constitution*, 1989, Section 7(1).

⁵²² Stephen Istvan Pogany, 'Constitutional Reform in Central and Eastern Europe: Hungary's transition to democracy', *International and Comparative Law Quarterly*, Vol. 42, April 1993, p.353.

⁵²³ Laszlo Majtenyi, 'Curbing the Freedom of the press: The case of Hungary', *Osteuropa Recht*, 58. Jahrg., Heft 1, Beilage, 2012, pp.37-41, p. 38.

⁵²⁴ *Inter alia*, Eleanor Roosevelt and René Cassin et al., *Universal Declaration of Human Rights*, 1948, Article 19; United Nations, *International Covenant on Civil and Political Rights* (ICCPR), 1966, Article 19; Council of Europe, *the European Convention on Human Rights*, Article 10(1).

⁵²⁵ Laszlo Majtenyi, 'Curbing the Freedom of the press: The case of Hungary', *Osteuropa Recht*, 58. Jahrg., Heft 1, Beilage, 2012, pp.37-41, p. 38.

⁵²⁶ Laszlo Majtenyi, 'Curbing the Freedom of the press: The case of Hungary', *Osteuropa Recht*, 58. Jahrg., Heft 1, Beilage, 2012, pp.37-41, p. 38.

⁵²⁷ Hungary, *Media law Act No I of 1996*, 1996.

⁵²⁸ Laszlo Majtenyi, 'Curbing the Freedom of the press: The case of Hungary', *Osteuropa Recht*, 58. Jahrg., Heft 1, Beilage, 2012, pp.37-41, p. 38.

control, than in practice were political strings and arrangements “*violated the spirit of the law*”.⁵²⁹ Nonetheless, a little attention shall be given to these facts if we consider that the country integrated the standards and the protection conferred by the ECHR when it accessed the convention. Hungary thus testifies of a real dialectic toward democracy. The process is not immaculate as good intentions in legislation sometimes took a detour, but still it is impressive regarding a rapid shift of its institution and legal provisions since 1989. A certain impatience among the politicians has been described concerning the constraints imposed by ‘a democratic society’, notably the rule of law and separation of powers,⁵³⁰ which if respected could only guarantee the prosperity of the democracy.

Having said this, one shall remember that the institution of the Constitutional Court as the watchdog of the fundamental rights is one of the core change in Hungary thanks to its amended 1989 Constitution. The Hungarian Constitutional Court is a motor of the integration of the fundamental rights on a similar pattern as is the CJEU. Although one should only applaud this global successful transition to democracy, critics have also aroused regarding the pressure weighting on the Hungarian Constitutional Court due to its central role.⁵³¹ Can the democratic society really prosper when disagreements among the government are solved by the Constitutional Court,⁵³² whereas the national Constitution is covered with the blasters of the too numerous amendments?

The past two decades show us that democracy still exists in Hungary in spite of the concerns linked to the Constitutional Court’s role, while the Constitution survived until 2011. Since the renewal of the Hungarian basic law, the equation seems then to differ.

III.A. 2. Critical analysis of the Hungarian Media Acts and new Constitution

⁵²⁹ Laszlo Majtenyi, ‘Curbing the Freedom of the press: The case of Hungary’, *Osteuropa Recht*, 58. Jahrg., Heft 1, Beilage, 2012, pp.37-41, p. 39.

⁵³⁰ Stephen Istvan Pogany, ‘Constitutional Reform in Central and Eastern Europe: Hungary’s transition to democracy’, *International and Comparative Law Quarterly*, Vol. 42, April 1993, p.355.

⁵³¹ Stephen Istvan Pogany, ‘Constitutional Reform in Central and Eastern Europe: Hungary’s transition to democracy’, *International and Comparative Law Quarterly*, Vol. 42, April 1993, p.343.

⁵³² See 48/1991. (IX.26.) AB határozat, in *Magyar Kozldny*, No. 103, 26 Sept. 1991, p.2111.

As it has been already mentioned above, in April 2011 the party of Mr. V. Orban, prime minister, armed with a two-thirds supermajority in Parliament, managed to enact the new Hungarian Constitution. This rapid change of Constitution has been described as “*the result of a unilateral governmental process, which did not reflect a national consensus*”,⁵³³ whereas Orban “*provided only two months for parliament and society to consider the issue*”.⁵³⁴ However, it should be clearly pointed out at this place that this “*autocratic turn*”⁵³⁵ in the Hungarian regime is only a further step in a precedent started previously by the legislation on medias. Indeed, through the recent Media Acts⁵³⁶ prospers the Hungarian tradition of the executive’s control over national media, as the appointment of president of radio or television by the heads of executive for instance.⁵³⁷ Such tradition is absolutely contrary to the EU requirements on legal restrictions imposed on media,⁵³⁸ and anyone shall be stunned to see it prospering. The Media Acts are then the first step of a too strong executive taking advantage of its influence to control gradually the three regent powers, using media as a tool to undermine opposition and information. Freedom of expression is thus crucially jeopardised through these Acts, and the threat is pursued by the lack of transparency surrounding the enactment of both Media Acts and Constitution.

III.A.2.a. On the Media Acts’ provisions

⁵³³ Andras Bozoki, ‘The Crisis of Democracy in Hungary, 2012’, Deliberately considered website, 3 February 2012. Online Article, available at: <http://www.deliberatelyconsidered.com/2012/02/the-crisis-of-democracy-in-hungary-2012/>.

⁵³⁴ Andras Bozoki, ‘The Crisis of Democracy in Hungary, 2012’, Deliberately considered website, 3 February 2012. Online Article, available at: <http://www.deliberatelyconsidered.com/2012/02/the-crisis-of-democracy-in-hungary-2012/>.

⁵³⁵ Andras Bozoki, ‘The Crisis of Democracy in Hungary, 2012’, Deliberately considered website, 3 February 2012. Online Article, available at: <http://www.deliberatelyconsidered.com/2012/02/the-crisis-of-democracy-in-hungary-2012/>.

⁵³⁶ Hungary, *Press and Media Act, Act CIV of 2010 on the freedom of the press and fundamental rules governing media content*, 9 November 2010.; Hungary, *Media Law, Act CLXXXV of 2010 on media services and mass media*, 21 December 2010.

⁵³⁷ Laszlo Majtenyi, ‘Curbing the Freedom of the press: The case of Hungary’, *Osteuropa Recht*, 58. Jahrg., Heft 1, Beilage, 2012, pp.37-41, p. 38.

⁵³⁸ Laszlo Majtenyi, ‘Curbing the Freedom of the press: The case of Hungary’, *Osteuropa Recht*, 58. Jahrg., Heft 1, Beilage, 2012, pp.37-41, p. 40.

The polemic 2010 Media Acts⁵³⁹ enacted by the current Hungarian government has been the target of many critics. The recent Media Acts are supposed to be only a national concern because of Hungary's national sovereignty regarding its own legislation. However, they progressively became a worldwide concern, and particularly a European one when the enactment of the Hungarian Media Acts raised a collective indignation due to their provisions. Indeed, as addressed recently by Fukuyama, "*the most disturbing thing happening in Hungary is the centralization of power in a government-controlled Media Authority, and its intimidation of opposition media. Taking away the frequency of an opposition-aligned radio station is something right out of Hugo Chavez's playbook*".⁵⁴⁰ It has been rightly held that "*in the last one and half year or so press in Hungary has lost much of its previous freedom – and it was far from satisfactory even before*".⁵⁴¹ This curb of freedom of expression in Hungary is due to a direct or indirect influence of the government on any audio-visual media means.⁵⁴² Although, free press in Hungary still subsists thanks to a few reasons. Among them are the national tradition of "*the one-and-a-half-century-old tradition of press freedom*"⁵⁴³ since the 1848 Revolution, the "*courage of editors who protested against the media law by publishing blank front pages*",⁵⁴⁴ and the architecture of medias nowadays (e.g. the uncontrollable worldwide web). The consensus among the critics is that the aim of the Hungarian government is not to "*have a monopoly on the media, but to maintain a hegemony on infotainment and to control the masses who are not curious enough to look informations in various channels*".⁵⁴⁵ Indeed, more and more the public television channel has been turning into 'tabloids', with the governmental aim described as "*to*

⁵³⁹ Hungary, *Press and Media Act, Act CIV of 2010 on the freedom of the press and fundamental rules governing media content*, 9 November 2010.; Hungary, *Media Law, Act CLXXXV of 2010 on media services and mass media*, 21 December 2010.

⁵⁴⁰ Francis Fukuyama, 'What's Wrong with Hungary?', *The American Interest* website, 6 February 2012. Online contribution available online at: <http://blogs.the-american-interest.com/fukuyama/2012/02/06/whats-wrong-with-hungary/>.

⁵⁴¹ Laszlo Majtenyi, 'Curbing the Freedom of the press: The case of Hungary', *Osteuropa Recht*, 58. Jahrg., Heft 1, Beilage, 2012, pp.37-41, p. 38.

⁵⁴² Laszlo Majtenyi, 'Curbing the Freedom of the press: The case of Hungary', *Osteuropa Recht*, 58. Jahrg., Heft 1, Beilage, 2012, pp.37-41, p. 38.

⁵⁴³ Laszlo Majtenyi, 'Curbing the Freedom of the press: The case of Hungary', *Osteuropa Recht*, 58. Jahrg., Heft 1, Beilage, 2012, pp.37-41, p. 38.

⁵⁴⁴ Laszlo Majtenyi, 'Curbing the Freedom of the press: The case of Hungary', *Osteuropa Recht*, 58. Jahrg., Heft 1, Beilage, 2012, pp.37-41, p. 38.

⁵⁴⁵ Laszlo Majtenyi, 'Curbing the Freedom of the press: The case of Hungary', *Osteuropa Recht*, 58. Jahrg., Heft 1, Beilage, 2012, pp.37-41, p. 38.

depoliticize the news, or remove political issues from media reports".⁵⁴⁶ The measures have been defined by the critics as clearly aiming at 'curbing press freedom',⁵⁴⁷ with a tight control of "*the policies of news agencies and state television, editing culture including outright forgery and manipulation, as well as the mass dismissal of employees have created an atmosphere of fear and self-censorship among journalists and television reporters*".⁵⁴⁸ This is a scary turn of events for democracy, especially for a European Union Member. In addition, we cannot help but analyse these changes as a serious regress of the country compared to what was a brilliant transition to democracy. Majtenyi précised that if the Media law, which entered into force on the 1st January 2011, had been enacted a few years before, it would be very doubtful that with such provisions "*conflicting with the core values of the European Union*",⁵⁴⁹ Hungary would have been able to access the European Union. Both the enactment process and provisions can be regarded as being appalling.

Firstly, on the Media Acts in themselves, both their scope and philosophy are contrary to the EU standards: "[they] *transgress the boundaries of European constitutional democracy, that have been affirmed by the Constitutional Court of Hungary. European legislative tradition is to respect the difference between the legal restrictions imposed on respective types of media*".⁵⁵⁰ The 2010 Media Acts created a media supervisory authority where the decisional board and mastermind are all close to Fidesz, Orban's centre-right party.⁵⁵¹ The Acts, enabled thorough restrictions on medias, without providing any sincere ground for it ; No official reason had been given to

⁵⁴⁶ Andras Bozoki, 'The Crisis of Democracy in Hungary, 2012', Deliberately considered website, 3 February 2012. Online Article, available at: <http://www.deliberatelyconsidered.com/2012/02/the-crisis-of-democracy-in-hungary-2012/>.

⁵⁴⁷ Laszlo Majtenyi, 'Curbing the Freedom of the press: The case of Hungary', *Osteuropa Recht*, 58. Jahrg., Heft 1, Beilage, 2012, pp.37-41, p. 37.

⁵⁴⁸ Andras Bozoki, 'The Crisis of Democracy in Hungary, 2012', Deliberately considered website, 3 February 2012. Online contribution, available at: <http://www.deliberatelyconsidered.com/2012/02/the-crisis-of-democracy-in-hungary-2012/>.

⁵⁴⁹ Laszlo Majtenyi, 'Curbing the Freedom of the press: The case of Hungary', *Osteuropa Recht*, 58. Jahrg., Heft 1, Beilage, 2012, pp.37-41, p. 39.

⁵⁵⁰ Laszlo Majtenyi, 'Curbing the Freedom of the press: The case of Hungary', *Osteuropa Recht*, 58. Jahrg., Heft 1, Beilage, 2012, pp.37-41, p. 40.

⁵⁵¹ Andras Bozoki, 'The Crisis of Democracy in Hungary, 2012', Deliberately considered website, 3 February 2012. Online Article, available at: <http://www.deliberatelyconsidered.com/2012/02/the-crisis-of-democracy-in-hungary-2012/>.

empower “*the new Authority to monitor and severely sanction the printed press*”.⁵⁵² The grounds mentioned are broad and unclear :“*the offense to any public interest, any kind of hate-speech, constitutional law and order, human dignity*”.⁵⁵³ These ‘arbitrary’ sanctions are most commonly very heavy fines, which are “*so high that they silence media outlets*”,⁵⁵⁴ and could bring enterprises to bankruptcy.⁵⁵⁵ Moreover, as described above, the media authority seems to benefit from a wide control the authority can discretionary impose through penalties on any medias⁵⁵⁶: “*not only to radio or television programs that fail to abide by the media laws, but also to print or electronic media, even to bloggers*”.⁵⁵⁷

Secondly, the enactment of the Media Acts shall be criticised. The media laws were drafted and decided in a very secret atmosphere,⁵⁵⁸ lacking of transparency. Whereas the laws are supposed to regulate the modalities of freedom of information have neither been publically disclosed, nor being subject to any official debate, being kept far from any scrutiny.⁵⁵⁹ This is mainly due to a circumvention of the rules on public disclosure of law, the drafts being prepared by “*pro forma MPs, instead of the government itself [...] which are not subject to the disclosure safeguards*”.⁵⁶⁰ Furthermore, also regarding the direction of the supervisory media authority, some anti-democratic regulations have slipped into it as well. The president of the National Media and Infocommunications Authority (NMIA) is appointed for a duration of nine years renewable, by the Prime

⁵⁵² Laszlo Majtenyi, ‘Curbing the Freedom of the press: The case of Hungary’, *Osteuropa Recht*, 58. Jahrg., Heft 1, Beilage, 2012, pp.37-41, p. 41.

⁵⁵³ Laszlo Majtenyi, ‘Curbing the Freedom of the press: The case of Hungary’, *Osteuropa Recht*, 58. Jahrg., Heft 1, Beilage, 2012, pp.37-41, p. 41.

⁵⁵⁴ Andras Bozoki, ‘The Crisis of Democracy in Hungary, 2012’, *Deliberately considered website*, 3 February 2012. Online Article, available at: <http://www.deliberatelyconsidered.com/2012/02/the-crisis-of-democracy-in-hungary-2012/>.

⁵⁵⁵ Laszlo Majtenyi, ‘Curbing the Freedom of the press: The case of Hungary’, *Osteuropa Recht*, 58. Jahrg., Heft 1, Beilage, 2012, pp.37-41, p. 41.

⁵⁵⁶ Hungary, *Media Law, Act CLXXXV of 2010 on media services and mass media*, 21 December 2010, Article 1 (1) and Article 203.

⁵⁵⁷ Andras Bozoki, ‘The Crisis of Democracy in Hungary, 2012’, *Deliberately considered website*, 3 February 2012. Online contribution, available at: <http://www.deliberatelyconsidered.com/2012/02/the-crisis-of-democracy-in-hungary-2012/>.

⁵⁵⁸ Laszlo Majtenyi, ‘Curbing the Freedom of the press: The case of Hungary’, *Osteuropa Recht*, 58. Jahrg., Heft 1, Beilage, 2012, pp.37-41, p. 39.

⁵⁵⁹ Laszlo Majtenyi, ‘Curbing the Freedom of the press: The case of Hungary’, *Osteuropa Recht*, 58. Jahrg., Heft 1, Beilage, 2012, pp.37-41, p. 39.

⁵⁶⁰ Laszlo Majtenyi, ‘Curbing the Freedom of the press: The case of Hungary’, *Osteuropa Recht*, 58. Jahrg., Heft 1, Beilage, 2012, pp.37-41, p. 39.

Minister himself.⁵⁶¹ The president of the NMIA has the power then to appoint and dismiss at his discretion a deputy, and a director general to conduct the office.⁵⁶² In a quasi-nepotistic functioning of public services regarding the media,⁵⁶³ it is obvious that if friends or colleagues are the one appointed, the opposition does not stand a chance to be part of the Media Council.⁵⁶⁴ Moreover, a fund has been created, depriving the economic independence of certain public media providers which have been affiliated to this fund.⁵⁶⁵ This would lead to a complete centralisation of both journalists and programmers, broadcasting a single programme which will be distributed to the different public channels. With centralised media broadcasting, very close from a unique TV Channel, a strict and discretionary control of medias (*i.e.* silencing the opposition and freedom of expression), it seems that Hungary lead tightly by its government has taken a massive leap in the past.

Both the Media Acts and Hungarian Constitution have been widely criticised either for their 'not very democratic' provisions, but most of all for their rapid and non-transparent procedure of enactment.

III.A. 2.b. On the Media Acts' enactment

On the Media Acts firstly, the amendment already made in January 2011 on anti-democratic changes on media law going against the freedom of expression are still

⁵⁶¹ Hungary, *Media Law, Act CLXXXV of 2010 on media services and mass media*, 21 December 2010, Article 102 (2) a and Article 136 (11)-(12); Hungary, *the amended Act C. on Electronic Communication*, 2003, Article 14 (2). ; Laszlo Majtenyi, 'Curbing the Freedom of the press: The case of Hungary', *Osteuropa Recht*, 58. Jahrg., Heft 1, Beilage, 2012, pp.37-41, p. 39.

⁵⁶² Laszlo Majtenyi, 'Curbing the Freedom of the press: The case of Hungary', *Osteuropa Recht*, 58. Jahrg., Heft 1, Beilage, 2012, pp.37-41, p. 39.

⁵⁶³ See, Eötvös Károly Institute, Hungarian Civil Liberties Union, Hungarian Helsinki Committee, 'The second wave of legislation by Hungary's new Parliament – Violating the rule of law', link hosted by *Association Européenne pour la défense des Droits de l'Homme (website)*, 13 December 2010 p. 5. Available online at : [http://www.aedh.eu/plugins/fckeditor/userfiles/file/D%C3%A9mocratie%20et%20citoyennet%C3%A9/2%20Hungarian NGOs assessing the-second wave of legislation December2010 1.pdf](http://www.aedh.eu/plugins/fckeditor/userfiles/file/D%C3%A9mocratie%20et%20citoyennet%C3%A9/2%20Hungarian%20NGOs%20assessing%20the%20second%20wave%20of%20legislation%20December2010%201.pdf)

⁵⁶⁴ Laszlo Majtenyi, 'Curbing the Freedom of the press: The case of Hungary', *Osteuropa Recht*, 58. Jahrg., Heft 1, Beilage, 2012, pp.37-41, p. 40.

⁵⁶⁵ Laszlo Majtenyi, 'Curbing the Freedom of the press: The case of Hungary', *Osteuropa Recht*, 58. Jahrg., Heft 1, Beilage, 2012, pp.37-41, p. 39.

ongoing. The German newspaper, Spiegel, insisted on the unlawfulness of the Acts in explaining that the controversial media law “*drastically limits freedom of the press, and many journalists in Hungary believe that it is unconstitutional. It was quickly railroaded through the Parliament, published on Dec. 31, 2010, and became law a day later*”.⁵⁶⁶ The European Union intervened repeatedly to threaten to sanction Hungary if the country did not regularise its situation and infringements of fundamental principles, principally within its Media provisions. For instance, pressured by the European Commission, the Hungarian government amended provisions of the Media Acts, whereas the Hungarian Constitution Court annulled a few anti-democratic provisions.⁵⁶⁷ Nonetheless, these changes are just an amelioration of a whole situation, hostile to fundamental rights and where freedom of expression is still on the ‘hot seat’. Bozoki scarily described the atmosphere as follows: “*the power to limit the freedom of the press remains on the books. The broadcasting operations of Budapest’s last opposition radio station, Klubrádió, were suspended. In its aftermath, television reporters carried out a hunger strike, calling for honest and transparent public media to be restored*”.⁵⁶⁸ The Association XIX-Article 19, published for instance a statement calling Hungary for comprehensive Media Law Reform.⁵⁶⁹ The association briefly welcomed the recent changes amended by the Hungarian government in February 2011.

However, it also details in four pages the anti-democratic provisions that remain so far and that are not in compliance with the EU and International standards. The reclamation of the association emphasised the jeopardy threatening freedom of expression in the numerous anti-democratic provisions, mostly evoked previously. The association blames both the media’s authority powers to punish, and the high level of

⁵⁶⁶ Martin U. Müller, *Muted protests- Why are the European Companies silent about Hungarian Media Law ?*, Spiegel online, 19 January 2011. Available online at : <http://www.spiegel.de/international/business/0,1518,740294,00.html>

⁵⁶⁷ Andras Bozoki, ‘The Crisis of Democracy in Hungary, 2012’, *Deliberately considered* website, 3 February 2012. Online contribution, available at: <http://www.deliberatelyconsidered.com/2012/02/the-crisis-of-democracy-in-hungary-2012/>.

⁵⁶⁸ Andras Bozoki, ‘The Crisis of Democracy in Hungary, 2012’, *Deliberately considered* website, 3 February 2012. Online contribution, available at: <http://www.deliberatelyconsidered.com/2012/02/the-crisis-of-democracy-in-hungary-2012/>.

⁵⁶⁹ XIX Article 19 (Global Campaign for free expression), *Hungary: Article 19 Calls for Comprehensive Media Law Reform*, 1 March 2012, available online at : <http://www.article19.org/data/files/pdfs/reports/hungary-article-19-calls-for-comprehensive-media-law-reform.pdf>.

sanctions and fines allowed by the law. The statements reads that “*the media authority’s powers to punish media for coverage issues are unprecedented and prohibited by international law*”.⁵⁷⁰ It then précised that in spite of the few changes amended in 2011, the vagueness of the terms in the Press and Media Act and the remaining of the provisions on excitement to hatred or discrimination against minority groups, gives an unlimited possibility for the Media Council to censor and restrict the law arbitrarily.⁵⁷¹ In a nutshell, the association also reproaches the unrestricted powers of the Media Council, the appointment of heads of supervisory bodies in Media services, the single regulatory system for all medias, the governments control over former independent broadcasters,⁵⁷² the lack of protection of journalistic sources,⁵⁷³ and finally the powers granted to the Media Council enabling it to restrict severely internet-based news outlets⁵⁷⁴.⁵⁷⁵ One could only agree with these reclamations, especially as they have been published after the amendments of the Media law by the Hungarian governments.

Considering the foregoing, it is to be understood then that the changes brought to the Media laws are very slight, and that once again the other part of the iceberg, which is now uncovered, needs to be change. It is almost unbelievable that a ‘democracy’ as Hungary can shift so quickly into an autocracy. Should we wait for Orban to wear military outfits and officially request full-powers to sanction the country? Such question seems to be on a few people’s mind. The Hungarian Bozoki, former Minister of Culture,

⁵⁷⁰ XIX Article 19 (Global Campaign for free expression), ‘Hungary: Article 19 Calls for Comprehensive Media Law Reform’, 1 March 2012, p.2. Available online at : <http://www.article19.org/data/files/pdfs/reports/hungary-article-19-calls-for-comprehensive-media-law-reform.pdf>.

⁵⁷¹ XIX Article 19 (Global Campaign for free expression), ‘Hungary: Article 19 Calls for Comprehensive Media Law Reform’, 1 March 2012, p.2. Available online at : <http://www.article19.org/data/files/pdfs/reports/hungary-article-19-calls-for-comprehensive-media-law-reform.pdf>.

⁵⁷² Eötvös Károly Institute, Hungarian Civil Liberties Union, Hungarian Helsinki Committee, ‘Assessing the first wave of legislation by Hungary’s new parliament’, link hosted by *Association Européenne pour la défense des Droits de l’Homme* (website), 23 July 2010, p. 3. Available online at: <http://www.aedh.eu/plugins/fckeditor/userfiles/file/D%C3%A9mocratie%20et%20citoyennet%C3%A9/1%20Hungarian%20NGOs%20assessing%20legislation%20July2010.pdf>.

⁵⁷³ Hungary, *Press and Media Act, Act CIV of 2010 on the freedom of the press and fundamental rules governing media content*, 9 November 2010, Article 6 (1) and (3).

⁵⁷⁴ Hungary, *Media Law, Act CLXXXV of 2010 on media services and mass media*, 21 December 2010, Article 189. of the Media Law.

⁵⁷⁵ XIX Article 19 (Global Campaign for free expression), ‘Hungary: Article 19 Calls for Comprehensive Media Law Reform’, 1 March 2012, p.2. Available online at : <http://www.article19.org/data/files/pdfs/reports/hungary-article-19-calls-for-comprehensive-media-law-reform.pdf>.

asked on his blog: “*Is it possible for my country to return to an authoritarian system as a fully-fledged member of the European Union ?*”.⁵⁷⁶ Hopefully the country will come back from the ‘dark-side’, and the Union is trying to push it in the right way especially since the enactment of the new Constitution.

Following up on the enactment of the Media Acts, the main party lead by Mr. V. Orban enacted the Hungarian Constitution. As previously mentioned, the enactment of the Constitution has been very fast. It has also been blamed for being secretive, contrary to a principle of transparency. This contributed to a disrespect of freedom of expression in the line of the Media Acts’ enactment, since the population has been maintained far from up-to-date informations on the situation and has had no true possibility to participate in this theoretical representative democracy.

III.A. 2. c. On the Constitution’s enactment

As it has been already mentioned above, the new Hungarian Constitution has been highly criticised in Hungary and abroad. However, the problems do not that much reside in the Constitutional provisions themselves, but more in the procedure of its enactment. Indeed, the Constitution is a big reformulation of the 1989 Constitution, with inherits of about 80% of the previous provisions,⁵⁷⁷ though bringing a few changes. The Constitution affirms a strict split-up with the communist era from which the previous Constitution was affiliated to.⁵⁷⁸ In that manner, the new Hungarian Basic law would aim at affirming by its symbolism,⁵⁷⁹ a step towards a respected democracy.

Nonetheless, the Hungarian Constitution has been criticized for divers reasons regarding its content. Among certain changes, the new Basic law for instance affirms the

⁵⁷⁶ Andras Bozoki, ‘The Crisis of Democracy in Hungary 2012’, 3 February 2012, online article. Available at: <http://www.deliberatelyconsidered.com/2012/02/the-crisis-of-democracy-in-hungary-2012/>.

⁵⁷⁷ Dr. András Jakab, ‘Continuity with Deficiencies: The New Hungarian Basic Law’, *Lunchtime seminar, Conference at University of Luxembourg*, 30 May 2012.

⁵⁷⁸Grégor Puppinc (Dir.), Alessio Pecorario (Adviser), *Memorandum on the Hungarian Nex Constitution of April 2011*, European centre for Law and Justice, 19 May 2011, p.3-6. Available online at : http://eclj.org/pdf/eclj_memorendum-hungarian-constitution_20110519.pdf.

⁵⁷⁹ Dr. András Jakab, ‘Continuity with Deficiencies: The New Hungarian Basic Law’, *Lunchtime seminar, Conference at University of Luxembourg*, 30 May 2012.

nation's Christian and conservative values in its Preamble,⁵⁸⁰ at the expense of proclaiming multiculturalism and enabling non-Christian to identify themselves to the Constitution.⁵⁸¹ In a same line, the Separation of the State and Church is inscribed in the Constitution, although it précised the duty for the State to 'cooperate' with Churches.⁵⁸² Death penalty is not explicitly mentioned anymore in the Hungarian Constitution.⁵⁸³ The protection of human dignity and right to life has been redrafted in a manner it triggered critics, as the provision seems to implicitly reject abortion: "[...] *the life of the foetus shall be protected from the moment of conception*".⁵⁸⁴ Then, even if these doubts are not unanimous,⁵⁸⁵ another critic on the Constitution targets its definition of the marriage, which involves "*the conjugal union of a man and a woman*",⁵⁸⁶ which would exclude for some the possibility of a same-sex union. The new Hungarian Basic law is then mostly criticised for a discriminatory nature, a nationalist atmosphere and the reinforcement of conservative values.

Both the Media Acts and Hungarian Constitution have been widely criticised either for their 'not very democratic' provisions, but most of all for the procedure of enactment of both laws.

Moreover, on the enactment of the new Hungarian Basic Law, critics have aroused world widely, from Hilary Clinton in US to the stage of the European Parliament. Crowded demonstrations of Hungarian citizens followed the enforcement of the new Constitution. Knowing that the 1989 Constitution would annul any law contradicting

⁵⁸⁰ Hungary, *Fundamental Law of Hungary*, 25 April 2011, National Avowal of Faith, p.1. Available online at: http://tasz.hu/files/tasz/imce/alternative_translation_of_the_draft_constituion.pdf.

⁵⁸¹ Dr. András Jakab, 'Continuity with Deficiencies: The New Hungarian Basic Law', *Lunchtime seminar, Conference at University of Luxembourg*, 30 May 2012.

⁵⁸² Hungary, *Fundamental Law of Hungary*, 25 April 2011, Article VI, p.8. Available online at: http://tasz.hu/files/tasz/imce/alternative_translation_of_the_draft_constituion.pdf.

⁵⁸³ Dr. András Jakab, 'Continuity with Deficiencies: The New Hungarian Basic Law', *Lunchtime seminar, Conference at University of Luxembourg*, 30 May 2012.

⁵⁸⁴ Hungary, *Fundamental Law of Hungary*, 25 April 2011, Article II, p.7. Available online at: http://tasz.hu/files/tasz/imce/alternative_translation_of_the_draft_constituion.pdf.

⁵⁸⁵ Dr. András Jakab, 'Continuity with Deficiencies: The New Hungarian Basic Law', *Lunchtime seminar, Conference at University of Luxembourg*, 30 May 2012.

⁵⁸⁶ Hungary, *Fundamental Law of Hungary*, 25 April 2011, Article K, p. 5. Available online at: http://tasz.hu/files/tasz/imce/alternative_translation_of_the_draft_constituion.pdf.

it,⁵⁸⁷ it seemed easier for V. Orban, according to the critics, to enact a new Constitution.⁵⁸⁸ Bozoki goes further insisting on the fact that due to repealed statute that had retroactive effect by the Constitutional Court in autumn 2010, “*Fidesz immediately retaliated by amending the Constitution and limiting the Constitutional Court’s jurisdiction*”.⁵⁸⁹

The attention should be also drawn to the Constitutional Court and its competences. The Constitutional Court had seen then its competence dangerously reduced. It now may only repeal if necessary and assess “*the constitutionality of legislative acts related to the central budget, central taxes, stamp duties and contributions, custom duties and central requirements related to local taxes exclusively in connection with the rights to life and human dignity, the protection of personal data, the freedom of thought, conscience and religion or with rights related to the Hungarian citizenship*”.⁵⁹⁰ The Constitutional Court has then been excluded from budget and financial issues which are now competences of the Parliament only,⁵⁹¹ and the Constitutional Court has been designed to be a Court of national resort for citizens with the suppression of *actio popularis*.⁵⁹² Consequently, it has been as well alleged by the critics that the new Constitution is seen as V. Orban’s campaign to undermine democracy and consolidate his power.⁵⁹³ The Constitution is said to “*tightens the government’s grip on the news media and the courts and dismantles democratic aspects of the judiciary. (...) the government passed a measure that critics said seriously weakened the independence of*

⁵⁸⁷ Stephen Istvan Pogany, ‘Human Rights In Hungary’, *International and Comparative Law Quarterly*, Vol.41., July 1992, p.676.

⁵⁸⁸ Andras Bozoki, ‘The Crisis of Democracy in Hungary 2012’, 3 February 2012, online article. Available at: <http://www.deliberatelyconsidered.com/2012/02/the-crisis-of-democracy-in-hungary-2012/>.

⁵⁸⁹ Andras Bozoki, ‘The Crisis of Democracy in Hungary 2012’, 3 February 2012, online article. Available at: <http://www.deliberatelyconsidered.com/2012/02/the-crisis-of-democracy-in-hungary-2012/>.

⁵⁹⁰ Grégor Puppincq (Dir.), Alessio Pecorario (Adviser), *Memorandum on the Hungarian Nex Constitution of April 2011*, European centre for Law and Justice, 19 May 2011, p.22. Available online at : http://eclj.org/pdf/eclj_memorandum-hungarian-constitution_20110519.pdf.

⁵⁹¹ Dr. András Jakab, ‘Continuity with Deficiencies: The New Hungarian Basic Law’, *Lunchtime seminar, Conference at University of Luxembourg*, 30 May 2012.

⁵⁹² Grégor Puppincq (Dir.), Alessio Pecorario (Adviser), *Memorandum on the Hungarian Nex Constitution of April 2011*, European centre for Law and Justice, 19 May 2011, p.25. Available online at : http://eclj.org/pdf/eclj_memorandum-hungarian-constitution_20110519.pdf.

⁵⁹³ P. Karasz and M. Eddy, « Opposition Protests Constitution in Hungary », *NY Times*, 2nd January 2012., <http://www.nytimes.com/2012/01/03/world/europe/rare-opposition-protests-in-hungary.html>.

the nation's central bank".⁵⁹⁴ It has also been reproached to the Constitution that it did not mention in its Preamble contrary to the previous one, "*the ideas of democracy, republic and human rights*".⁵⁹⁵

Although, Fukuyama seems more reserved on the critic of the Constitution in itself, but more concerned by the way powers are allocated, and especially the way "*the Orbán government was using those powers*".⁵⁹⁶ Similarly to the drafting of the Media Acts, there is a problem of transparency of the law making process, especially regarding the secrecy of the drafting session and an inadequate public consultation.⁵⁹⁷ The lack of transparency has been raised by the Venice Commission: "*The most serious concern regards the procedural ground. The Venice Commission argued that the Hungarian government lacked transparency, failed to adequately consult with the opposition, and rushed the constitutional process*".⁵⁹⁸ It also concerns the aim and necessity of a new Constitution which have been questioned by critics.⁵⁹⁹ This lack of transparency is reinforced by the questions of the Cardinal laws' value. These Cardinal laws indeed contained details and provisions,⁶⁰⁰ which cannot be can only by modify by a super-majority in Parliament. This is a problem for instance, when these regulate police issues,

⁵⁹⁴ P. Karasz and M. Eddy, « Opposition Protests Constitution in Hungary », *NY Times*, 2nd January 2012., <http://www.nytimes.com/2012/01/03/world/europe/rare-opposition-protests-in-hungary.html>.

⁵⁹⁵ Andras Bozoki, "The Crisis of Democracy in Hungary 2012", 3 February 2012, online contribution, available at: <http://www.deliberatelyconsidered.com/2012/02/the-crisis-of-democracy-in-hungary-2012/>.

⁵⁹⁶ Francis Fukuyama, 'What's Wrong with Hungary?', *The American Interest* website, 6 February 2012. Online contribution, available online at: <http://blogs.the-american-interest.com/fukuyama/2012/02/06/whats-wrong-with-hungary/>.

⁵⁹⁷ See, Eötvös Károly Institute, Hungarian Civil Liberties Union, Hungarian Helsinki Committee, 'Comments on the Process of Framing the New Constitution of Hungary', link hosted by *Association Européenne pour la défense des Droits de l'Homme* (website), 10 March 2012, p. 1-6. Available online at: [http://www.aedh.eu/plugins/fckeditor/userfiles/file/D%C3%A9mocratie%20et%20citoyennet%C3%A9/3%20Comments on the Process of Framing the New Constitution of Hungary EKI HCLU HH C.pdf](http://www.aedh.eu/plugins/fckeditor/userfiles/file/D%C3%A9mocratie%20et%20citoyennet%C3%A9/3%20Comments%20on%20the%20Process%20of%20Framing%20the%20New%20Constitution%20of%20Hungary%20EKI%20HCLU%20HH%20C.pdf).

⁵⁹⁸ Grégor Puppincq (Dir.), Alessio Pecorario (Adviser), *Memorandum on the Hungarian New Constitution of April 2011*, European centre for Law and Justice, 19 May 2011, p.20. Available online at : http://eclj.org/pdf/eclj_memorandum-hungarian-constitution_20110519.pdf.

⁵⁹⁹ See, Eötvös Károly Institute, Hungarian Civil Liberties Union, Hungarian Helsinki Committee, 'The Third Wave – the New Constitution of Hungary', link hosted by *Association Européenne pour la défense des Droits de l'Homme* (website), 14 April 2011, p. 1-2. Available online at: [http://www.aedh.eu/plugins/fckeditor/userfiles/file/D%C3%A9mocratie%20et%20citoyennet%C3%A9/4%20Hungarian NGOs assessing the draft Constitution of Hungary 20110414.pdf](http://www.aedh.eu/plugins/fckeditor/userfiles/file/D%C3%A9mocratie%20et%20citoyennet%C3%A9/4%20Hungarian%20NGOs%20assessing%20the%20draft%20Constitution%20of%20Hungary%2020110414.pdf)

⁶⁰⁰ European Commission (Venice Commission), *Opinion on the New Constitution of Hungary*, Opinion No. 621/2011, 20 June 2011, Strasbourg, p. 5, para. 20. Available online at: <http://www.aedh.eu/plugins/fckeditor/userfiles/file/D%C3%A9mocratie%20et%20citoyennet%C3%A9/5%20Opinion%20Venice%20Commission.pdf>

which are supposed to be in the competence of the executive, whereas the latter cannot modify the regulations.⁶⁰¹

III.A. 3. Conclusions

If on the paper, the provisions of the Constitution on freedom of expression are respectable, as analysed above, the Media Acts' ones breach the freedom. In practice, both the Constitution and the Media Acts can easily violate freedom of expression by the disrespect of fundamental rights through the secrecy with which operate the Hungarian despots-to-be. For now, with such arbitrary manners of the executive, Hungary does not respect the level of protection of freedom of expression prescribed by the European standards of protection.

All the questionable movements in Hungary have been certainly followed by the institutions at the European level. Consequently, in January 2012, Mr. V. Orban's government had then been given a month by the EU institutions to make changes. A failure to do so would be grounds for the Commission to levy fines or take Hungary to the European Court of Justice on the ground of Article 258 TFEU. The Commission statement from January 2012 on the matter clarified a number of issues Hungary had to solve. Mainly, it included: the independence of the national central bank, the measures concerning the judiciary and in particular mandatory early retirement of judges and prosecutors at the age of 62 instead of 70, and the independence of the national data protection authority^{602,603} A heated debate in the European Parliament illustrates the tense atmosphere surrounding Hungary due to its various polemic policies. On the 18th January 2012, the European Deputy Daniel Cohn-Bendit intervened after the demonstrations in Hungary. Within a few minutes Cohn-Bendit recalled the values of

⁶⁰¹ Dr. András Jakab, 'Continuity with Deficiencies: The New Hungarian Basic Law', *Lunchtime seminar, Conference at University of Luxembourg*, 30 May 2012.

⁶⁰² On the dismissal of the data protection Commissioner before his mandate, which results in a breach of EU law because of a required independence. See, Online Article, 'Draft law on data protection and freedom of information', *Hungarian Civil liberties Union Website*, 29 June 2010. Available at: <http://tasz.hu/en/freedom-information/draft-law-data-protection-and-freedom-information>.

⁶⁰³ EU Commission, 'Statement of the European Commission on the situation in Hungary on 11 January 2012', *Memo/12/9*, 11 January 2012, Brussels.

the EU, which he accused Hungary not to respect. The deputy addressed directly to Orban that “*the European Union is not a mat on which you clean off your shoes, it is a common house we build together.*”⁶⁰⁴ He also stated that freedoms were breached in Hungary, where minorities and intellectuals start fearing for their lives. Telling Mr Orban that Hungary was going toward the wrong direction, the same direction as “*Castro and Chavez, the direction of totalitarianism*”,⁶⁰⁵ Cohn-Bendit asked Orban why the Hungarian Constitution was the Constitution of a Hungary from the past and which scared people.⁶⁰⁶ Following up on this, different procedures have been launched against Hungary. The European Commission has decided to refer Hungary to the CJEU because of a specific tax levied on the turnover of telecoms operators, breaching EU rules.⁶⁰⁷ The Commission also started infringement proceedings, on 17 January against Hungary over the three concerns previously evoked : judicial appointments, the independence of the central bank, and data-protection regulation.⁶⁰⁸ Responding to the Commission, negotiations concerning a credit facility to Hungary opened following the infringements procedure, during which “*the EU had made it clear to Hungary's government that [it]would require changes in the law to safeguard the independence of the central bank*”.⁶⁰⁹ Hungary could not be more the centre of the EU's attention. Debates, changes requests, demonstrations and pamphlets from critics are still ongoing regarding the Hungarian anti-democratic provisions on Media and within its Constitution. Whereas, a real respect of the law to fit it into the standards of a ‘democratic society’ are still expected, and hopefully not for nothing.

⁶⁰⁴ Daniel Cohn-Bendit, Intervention at the European Parliament, 18 January 2012. Video available online at: <http://www.youtube.com/watch?v=a6HEoRVWNY0>. [Own translation]

⁶⁰⁵ Daniel Cohn-Bendit, Intervention at the European Parliament, 18 January 2012. Video available online at: <http://www.youtube.com/watch?v=a6HEoRVWNY0>. [Own translation]

⁶⁰⁶ Daniel Cohn-Bendit, Intervention at the European Parliament, 18 January 2012. Video available online at: <http://www.youtube.com/watch?v=a6HEoRVWNY0>.

⁶⁰⁷ EU Commission, ‘Digital Agenda: Commission refers Hungary to Court for failure to end special tax on telecom operators’, *Press Release*, reference IP/12/286, 22 March 2012. Available online at : <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/286&format=HTML&aged=0&language=EN&guiLanguage=en>.

⁶⁰⁸ Online Article, ‘Hungary versus Europe’, *European Voice Website*, March 2012, last access 8th March 2012. Available online at: <http://www.europeanvoice.com/article/2012/march/hungary-versus-europe/73981.aspx>.

⁶⁰⁹ Online Article, ‘Hungary moves to quell EU concerns’, *European Voice Website*, March 2012, last access 8th March 2012. Available online at: <http://www.europeanvoice.com/article/2012/april/hungary-moves-to-quell-eu-concerns/74098.aspx>.

As previously held, the recently enacted Hungarian Media Acts are breaching EU standards regarding the legal restrictions possibly imposed on the different types of media.⁶¹⁰ Anyone would be shaken with fear when examining the capacity of the Hungarian authorities to monitor the printed press, as well as to conduct broadcasted channels and silence opposition, including opposed speech. This is not only against the principle of rule of law, but also against the standards of a democratic society as established in Europe.⁶¹¹ Both media law and constitution were drafted in a very secret atmosphere,⁶¹² lacking of transparency and contravening the citizens' right of information.

Freedom of expression confers a right to know, and a right to benefit from informations and imparting them without the arbitrary control of a few despots. The Hungarian Media acts testify of an endangered democracy in the country, which cause great harm to freedom of expression as it is both a tool for controlling the mass and as well the possibility for opponents to express their views.

This undermining of freedom of expression is correlated to the new Hungarian basic law. Indeed, the change of Constitution has been described as a real coup.⁶¹³ medias, religion, popular artists and intellectuals, schools, are progressively monitored or shaped on a same pattern. Regarding the past and tradition of Hungary, its fight for freedom of expression and its transition toward democracy, one could only agree with Mr Fukuyama in saying that it "*would be both a surprise and a very great shame if Hungary were to take the lead once again, but in the wrong direction toward the incremental dismantling of democracy and constitutional government*".⁶¹⁴

⁶¹⁰ Laszlo Majtenyi, 'Curbing the Freedom of the press: The case of Hungary', *Osteuropa Recht*, 58. Jahrg., Heft 1, Beilage, 2012, pp.37-41, p. 40- 41.

⁶¹¹ E.g., ECtHR, *Karata v. Turkey*, Application No. 23168/94 of the 8th July 1999, para. 54; on the standards of a democratic society regarding violations of Article 10 ECHR.

⁶¹² Laszlo Majtenyi, 'Curbing the Freedom of the press: The case of Hungary', *Osteuropa Recht*, 58. Jahrg., Heft 1, Beilage, 2012, pp.37-41, p. 39.

⁶¹³ Andras Bozoki, 'The Crisis of Democracy in Hungary 2012', 3 February 2012, online contribution. Available at: <http://www.deliberatelyconsidered.com/2012/02/the-crisis-of-democracy-in-hungary-2012/>.

⁶¹⁴ Francis Fukuyama, 'What's Wrong with Hungary?', *The American Interest* website, 6 February 2012. Online contribution, available online at: <http://blogs.the-american-interest.com/fukuyama/2012/02/06/whats-wrong-with-hungary/>.

Even if fundamental rights are rightly proclaimed in the new Constitution, these rights are themselves directed by strictly rigid cardinal laws independent from the Constitution. Moreover, the process of enactment of laws due to a lack of separation of powers, contributed through its secrecy and non-transparency to maintain population in a haze to the detriment of its right of information and expression.

III.B- The Irving case- prohibition of Holocaust denial and hatred speech

III. B. 1. The Oxford Union's invitation

In 2007, what is described as “*the world's most prestigious debating society*”,⁶¹⁵ the Oxford Union Society established in 1823, invited polemic guests to discuss the topic of free speech.⁶¹⁶ These guests were Alexander Lukashenko, Nick Griffin, and the also very controversial guest, David Irving. As it is commonly known, Lukashenko is the President of Belarus, the “*the last remaining true dictatorship in the heart of Europe*”.⁶¹⁷ Griffin is a British member of the European Parliament and the chairman of the far-right British National Party, but he also well-known for having been convicted or charged with incitement to racial hatred and ‘anti-multicultural’ statements.⁶¹⁸ The analyses in this part of the present work will be focused on the person of Mr. David Irving , due to not only an impressive judicial record but especially due to his ultra-controversial statements, in particular on the Holocaust, whereas considered as an historian. It should be pointed out in this context that David Irving had been invited to debate on the same platform at the Oxford Union in 2001 already,⁶¹⁹ however as this invitation resulted in campaign and demonstrations against it, the debate was cancelled. This was not the first time that Irving is invited to speak or debate at a platform, which ends being cancelled as testified by the author.⁶²⁰ The presence of the polemic guests to this debate at the Oxford Union triggered demonstrations especially against the two British.

⁶¹⁵ The Oxford Union Society, ‘About us’, presentation on the *Oxford Union Website*. Online resources available at : http://www.oxford-union.org/about_us.

⁶¹⁶ Nigel Warbuton, *Free speech, a short introduction*, OUP, NY, 2009, p.39.

⁶¹⁷ Condoleezza Rice, in Jill Dougherty, ‘Rice: Russia's future linked to democracy’, *CNN International Website*, 20 April 2005. Available online at: <http://edition.cnn.com/2005/WORLD/europe/04/20/rice.dougherty/index.html>.

⁶¹⁸ *Inter alia*, Andrew Pierce, ‘BNP leader Nick Griffin may be blocked from Queen's garden party’, *The Telegraph Website*, 21 May 2009. Available online at: <http://www.telegraph.co.uk/news/politics/5362870/BNP-leader-Nick-Griffin-may-be-blocked-from-Queens-garden-party.html>.

⁶¹⁹ *Inter alia*, Matthew Taylor, ‘Irving and Griffin spark fury at Oxford Union debate’, *The Guardian website*, 27 November 2007. Available online at : <http://www.guardian.co.uk/uk/2007/nov/27/highereducation.studentpoliticseducation>.

⁶²⁰ David Irving, during the ‘Late Late Show’, RTE Television, March 2008. Video available online at: <http://www.youtube.com/watch?v=c82WPNFBNnM&feature=related>.

Petitions were signed on the Downing Street for the British Prime Minister to ban the debate,⁶²¹ demonstrations before and during the event lead to chaos when “*demonstrators broke through the security cordon*”,⁶²² forcing the speakers to debate in separate rooms under the chants and songs of hundreds of anti-fascists demonstrators.⁶²³

Whereas the Union was accused of glorifying anti-Semitism,⁶²⁴ to justify the invitations on reasonable grounds, the president of the Oxford Union at that time, Luke Tryl stated that “*The Oxford Union is famous for its commitment to free speech and although I do think these people have awful and abhorrent views I do think Oxford students are intelligent enough to challenge and ridicule them*”.⁶²⁵ However, this debate has had a national, or even international impact due to the protestations, and echoes it could have. Is everyone intelligent enough to ‘challenge’ these kinds of hatred speech and not to acknowledged the guests as talented speaker revealing a truth? Should Britain have condemned Irving or prevent him to speak? The British laws on freedom of expression have been evoked previously.⁶²⁶ More precisely on the prohibition of Holocaust denial in itself, it is not an offence as such in the United Kingdom. Although, such action could be prosecuted if “*it is done in a manner that also constitutes incitement to racial hatred as defined under British law*”.⁶²⁷ Consequently, there is nothing as such in the United Kingdom which can prohibit David Irving of ‘abusing’ his free speech. The British laws are designed in a way that they could include an harmful speech in the scope of

⁶²¹ ⁶²¹ Mark Townsend, ‘Row as Oxford Union votes to hear Irving’, *The Observer Website*, 25 November 2007. Available online at : <http://www.guardian.co.uk/uk/2007/nov/25/religion.highereducation>.

⁶²² Matthew Taylor, ‘Irving and Griffin spark fury at Oxford Union debat’, *The Guardian website*, 27 November 2007. Available online at : <http://www.guardian.co.uk/uk/2007/nov/27/highereducation.studentpoliticseducation>.

⁶²³ Matthew Taylor, ‘Irving and Griffin spark fury at Oxford Union debat’, *The Guardian website*, 27 November 2007. Available online at : <http://www.guardian.co.uk/uk/2007/nov/27/highereducation.studentpoliticseducation>.

⁶²⁴ Mark Townsend, ‘Row as Oxford Union votes to hear Irving’, *The Observer Website*, 25 November 2007. Available online at : <http://www.guardian.co.uk/uk/2007/nov/25/religion.highereducation>.

⁶²⁵ Luke Tryl, in Deborah Lipstadt, ‘Oxford Union: David Irving invited to speak at Oxford Union along with other people with "awful and abhorrent views"’, on *Deborag Lipstadt's Blog*, 13 October 2007. Available online at: <http://lipstadt.blogspot.com/2007/10/david-irving-invited-to-speak-at-oxford.html>.

⁶²⁶ See Part I. National Legislations, United Kingdom.

⁶²⁷ Laurent Pech, ‘The Law of Holocaust Denial in Europe: Towards a (qualified) EU-wide Criminal Prohibition’, *Jean Monnet Working Paper*, No 10/09, NYU School of Law, New York, 2009, p. 6. Available online at: <http://centers.law.nyu.edu/jeanmonnet/papers/09/091001.pdf>.

protection of freedom of expression. Whereas in other countries as it will be observed, Holocaust denial is considered by the domestic courts or legislators as an abuse of right of the freedom of expression,⁶²⁸ which shall not be protected by the national legislations. Perhaps, the United Kingdom does not face the same ‘responsibility’ or duty to remember as Germany for instance. Although, this lack of legislation in Britain does not prevent an harmful speech which can have a broader impact in easily crossing the English borders. To better understand the impact and tension surrounding the 2007 events at the Oxford Union Society, let’s come back on David Irving’s profile.

III. B. 2. David Irving: The Holocaust denier

David Irving was born in 1938 in England. Failing to graduate in Physics and rejected from the Royal Air Force, Irving moved quickly to Germany where he worked as a steelworker in Ruhr.⁶²⁹ Back to England, Irving started to write about Germany, its history, and especially its leaders during the Third Reich. His first book⁶³⁰ already created controversy and polemic as he described the air raid on Dresden, Germany, as “*the worst single massacre in European history*”.⁶³¹ Followed then, a series of books on the subject, for instance *Göring*,⁶³² *Nuremberg the last Battle*,⁶³³ *Hess: The missing years 1941-45*,⁶³⁴ and so on. He has been considered as the “*brightest new star in the historical firmament*”,⁶³⁵ and is now usually described as a discredited historian.⁶³⁶ This controversy created by Irving went beyond the political correctness with his book

⁶²⁸ Laurent Pech, ‘The Law of Holocaust Denial in Europe: Towards a (qualified) EU-wide Criminal Prohibition’, *Jean Monnet Working Paper*, No 10/09, NYU School of Law, New York, 2009, p. 1. Available online at: <http://centers.law.nyu.edu/jeanmonnet/papers/09/091001.pdf>.

⁶²⁹ Andrew Walker, ‘Profile: David Irving’, *BBC News Website*, 20 February 2006 (last updated). Available online at: http://news.bbc.co.uk/2/hi/uk_news/4449948.stm.

⁶³⁰ David Irving, *The Destruction of Dresden*, Focal Point Publications, New Edition, 1974, 255p. Originally published in 1963.

⁶³¹ Andrew Walker, ‘Profile: David Irving’, *BBC News Website*, 20 February 2006 (last updated). Available online at: http://news.bbc.co.uk/2/hi/uk_news/4449948.stm.

⁶³² David Irving, *Göring*, Focal Point Publications, New Edition, 1991, 592p.

⁶³³ David Irving, *Nuremberg, the last Battle*, Focal Point Publications, Unabridged edition, 1997, 388p.

⁶³⁴ David Irving, *Hess: The Missing Years, 1941-45*, Macmillan, 1987, 371p.

⁶³⁵ Andrew Walker, ‘Profile: David Irving’, *BBC News Website*, 20 February 2006 (last updated). Available online at: http://news.bbc.co.uk/2/hi/uk_news/4449948.stm.

⁶³⁶ *Inter alia*, Nigel Warbuton, *Free speech, a short introduction*, OUP, NY, 2009, p.32.

*Hitler's war*⁶³⁷ for which he is more famous, where he tried to get into the Führer's mind, and through his own radical statements following the thirteen years of researches for the book and the publication of the book.⁶³⁸ According to this book, Hitler did not have a clue about the final solution exterminating millions of Jews in Europe, at least until 1943. Irving has insisted for a very long time that there was no evidence of such things: "*He offered £1,000 to anyone who could produce a written document showing that Hitler had given such an order*".⁶³⁹ Irving continued denying that historians and public could not prove this,⁶⁴⁰ and held as well that "*the Nazi gas chambers did not exist and that six million Jews did not die*".⁶⁴¹ For all above mentioned reasons, Irving began, as already stated, being seen as an Holocaust denier and discredited as an historian. This has been increased and comforted by the lawsuits Irving has been involved in.

III. B. 3. Lawsuits

III. B. 3. a. Conviction by Germany and vain application before the ECtHR, 1990's.

After his conviction in Germany in early 1990s, Irving tried in vain to bring an action before the ECtHR. In May 1992, Irving was convicted to pay a fine of 10,000 DM by the Munich District Court for insulting and blackening the memory of the deceased under Sections 185, 189 and 194 of the German Penal Code.⁶⁴² The conviction found its ground in the fact that the author had held two years before, during an information meeting, that "*no gas chambers had ever existed in Auschwitz, that these gas chambers were*

⁶³⁷ David Irving, *Hitler's War: And the War Path*, Focal Point Publications, Millenium Edition, 1991, 863p. (Originally published in 1977).

⁶³⁸ Andrew Walker, 'Profile: David Irving', *BBC News Website*, 20 February 2006 (last updated). Available online at: http://news.bbc.co.uk/2/hi/uk_news/4449948.stm.

⁶³⁹ Andrew Walker, 'Profile: David Irving', *BBC News Website*, 20 February 2006 (last updated). Available online at: http://news.bbc.co.uk/2/hi/uk_news/4449948.stm.

⁶⁴⁰ *Inter alia*, David Irving, during the 'Late Late Show', RTE Television, March 2008. Video available online at: <http://www.youtube.com/watch?v=c82WPNFBnM&feature=related>.

⁶⁴¹ Andrew Walker, 'Profile: David Irving', *BBC News Website*, 20 February 2006 (last updated). Available online at: http://news.bbc.co.uk/2/hi/uk_news/4449948.stm.

⁶⁴² European Commission of Human Rights, *David Irving v. Germany - Decision on admissibility*, Application No. 26551/95, June 1996, p.1-2. Available online at: http://www.concernedhistorians.org/content_files/file/le/50.pdf.

fakes built up in the first post-war days and that the German tax payers had thus paid about 16 billion German marks for fakes".⁶⁴³ This judgment enabled the Munich District Court to state that the extermination of Jews during the Third Reich was an established historical fact.⁶⁴⁴ Irving's fine was increased to 30,000 DM upon order of the Public Prosecutor's Office when the Munich Regional Court dismissed his appeal; the Munich Regional Court upheld the previous judgment confirming that the mass murders of Jews were a "*historically proven fact which was common knowledge and did not require any further proof*".⁶⁴⁵ In 1993, the Bavarian Court of Appeal upheld the previous ruling and dismissed the appeal; in 1994 finally the Federal Constitutional Court refused to receive Irving's complaint.⁶⁴⁶ Pursuing Irving's attempts failure, he filed a complaint before the Strasbourg Court. His action directed against Germany was claimed on the grounds of a violation of his right to fair trial (Article 6 ECHR) as the Federal Constitutional Court did not admit his application, and also on the ground of a violation of his freedom of expression (Article 10 ECHR).⁶⁴⁷ The Commission of the European Court of Human Rights which dealt with the admissibility of his application reasoned the dismissal of this one by the qualified historically established facts, upholding the Regional Court's ruling. It also accepted this restriction to freedom of expression as it has been legitimately limited by law, in the aim of guaranteeing the public order, under the limitations allowed by Article 10(2) ECHR. The Commission concluded that the restrictions were "*relevant and sufficient reasons for the applicant's conviction. The interference with his freedom of expression can therefore be considered*

⁶⁴³ European Commission of Human Rights, *David Irving v. Germany - Decision on admissibility*, Application No. 26551/95, June 1996, p.1-2. Available online at: http://www.concernedhistorians.org/content_files/file/le/50.pdf.

⁶⁴⁴ European Commission of Human Rights, *David Irving v. Germany - Decision on admissibility*, Application No. 26551/95, June 1996, p.2. Available online at: http://www.concernedhistorians.org/content_files/file/le/50.pdf.

⁶⁴⁵ European Commission of Human Rights, *David Irving v. Germany - Decision on admissibility*, Application No. 26551/95, June 1996, p.2. Available online at: http://www.concernedhistorians.org/content_files/file/le/50.pdf.

⁶⁴⁶ European Commission of Human Rights, *David Irving v. Germany - Decision on admissibility*, Application No. 26551/95, June 1996, p.2. Available online at: http://www.concernedhistorians.org/content_files/file/le/50.pdf.

⁶⁴⁷ European Commission of Human Rights, *David Irving v. Germany - Decision on admissibility*, Application No. 26551/95, June 1996, p.2-3. Available online at: http://www.concernedhistorians.org/content_files/file/le/50.pdf.

as 'necessary in a democratic society'.⁶⁴⁸ Irving was defeated by the justice, and his type of speech was condemned under the German legislation. This is a strong disrepute for the controversial author, whose name is tainted with the connotation of Holocaust denial since then.

As previously mentioned, Irving had been prosecuted, then convicted at first by the Munich District Court. This Court acted under section 185, 189 and 194 of the German Criminal Code,⁶⁴⁹ enabling a lawful conviction of Irving under different grounds. These grounds are the offenses of insult,⁶⁵⁰ the violation of the memory of the dead,⁶⁵¹ and request to prosecute for defamation of a deceased person who lost his life during the National Socialist or another authoritarian regime.⁶⁵² Sections 185 and 189 precise that both offenses can lead to imprisonment not exceeding two years or lead to a fine. These sections of the German Criminal Code are interesting provisions of the German legislation testifying of Germany's will to condemn not only the memory of the dead, as a correlation for instance of human dignity, but also to establish a certain frontier regarding the Holocaust that cannot be crossed. Germany is then one of the few States which decided on its own to prohibit 'outrageous' or 'fake' allegations regarding the Shoah, instituting then a legal ground for a national duty of memory and respect, similarly to the French 'memorial' laws.⁶⁵³ Surprisingly, freedom of expression is not even mentioned in these restrictions brought by the German criminal law. Thus, the type of speech held by Irving leading to his conviction does not enter the scope of

⁶⁴⁸ European Commission of Human Rights, *David Irving v. Germany - Decision on admissibility*, Application No. 26551/95, June 1996, p.4. Available online at: http://www.concernedhistorians.org/content_files/file/le/50.pdf.

⁶⁴⁹ Germany, *German Criminal Code*, in the version promulgated on 13 November 1998, Federal Law Gazette [Bundesgesetzblatt] I p. 3322, last amended by Article 3 of the Law of 2 October 2009, Federal Law Gazette I p. 3214; available online at: <http://legislationline.org/documents/section/criminal-codes>. last accessed 13th June 2012.

⁶⁵⁰ Germany, *German Criminal Code*, in the version promulgated on 13 November 1998, Federal Law Gazette [Bundesgesetzblatt] I p. 3322, last amended by Article 3 of the Law of 2 October 2009, Federal Law Gazette I p. 3214, Section 185.

⁶⁵¹ Germany, *German Criminal Code*, in the version promulgated on 13 November 1998, Federal Law Gazette [Bundesgesetzblatt] I p. 3322, last amended by Article 3 of the Law of 2 October 2009, Federal Law Gazette I p. 3214, Section 189.

⁶⁵² Germany, *German Criminal Code*, in the version promulgated on 13 November 1998, Federal Law Gazette [Bundesgesetzblatt] I p. 3322, last amended by Article 3 of the Law of 2 October 2009, Federal Law Gazette I p. 3214, Section 194(2).

⁶⁵³ See, Jean Pradel, 'La liberté d'expression, jusqu'où? Brèves remarques sur quelques affaires récentes', in Dir. Danielle Corrigan-Carsin, *La Liberté de Critique*, Lexis Nexis, Litec, Paris, 2007, 215p, p.134.

freedom of expression as guaranteed under Article 5 of the German Basic law.⁶⁵⁴ It is only to be considered as offenses, either insults or defamation.

In this line of thoughts, Irving was condemned by the national courts for denying an historically established fact which results in the German law in being considered as a lie.⁶⁵⁵ In addition, the European Commission of Human Rights will define as well the Jewish Holocaust as a clearly historically established fact which cannot be denied.⁶⁵⁶ The Commission's decision came to confirm the provisions of Section 194(2) of the German Criminal Code, which allows prosecution for defamation without a need to prove any evidence when the victim of the speech is any deceased person during the third Reich. This strong prohibition of Holocaust denial in Germany is understandable regarding the history of the country, and a certain responsibility regarding the past and duty to remember.

In a nutshell, these prohibitions do not contravene free speech under the German law because Holocaust denial considered as a lie is not protected under the general provisions of Article 5 German Basic law. Moreover, if Irving's type of speech would have been protected under European standards, Germany would not breach these standards as consecrated by the CFR⁶⁵⁷ or the ECHR,⁶⁵⁸ when considering that Sections 185,189, and 194 of the German Criminal Code could be the restrictions to freedom of speech, which are prescribed by law.⁶⁵⁹

III.B.3. b. The Lipstadt Trial, 2000.

The above mentioned approach of Mr. David Irving continued as well by his attempt to sue Deborah Lipstadt. Deborah Lipstadt is an American Scholar and also Professor of

⁶⁵⁴ German Basic Law (*Grundgesetz*), Article 5, 1949.

⁶⁵⁵ Eric Barendt, *Freedom of Speech*, 2nd edition, OUP, NY, 2005, 526p, p. 60.

⁶⁵⁶ European Commission of Human Rights, *David Irving v. Germany - Decision on admissibility*, Application No. 26551/95, June 1996, p.2. Available online at: http://www.concernedhistorians.org/content_files/file/le/50.pdf

⁶⁵⁷ Charter of Fundamental Rights of the European Union, OJ 2010/C 83/02, 30.3.2010., Article 11.

⁶⁵⁸ Council of Europe, *the European Convention on Human Rights*, Article 10.

⁶⁵⁹ On restrictions prescribed by law, Lorna Woods, 'Freedom of Expression in the European Union', *European Public Law*, Volume 12, Issue 3, Kluwer Law International, 2006, p. 376.

Modern Jewish History and Holocaust Studies at the Emory University in Atlanta.⁶⁶⁰ In her book *Denying the Holocaust*,⁶⁶¹ Lipstadt referred to Irving as an ‘Holocaust denier’, and describing him *inter alia* as “*One of the most dangerous spokesperson for Holocaust denial[...]*”.⁶⁶² Consequently to the publication of this book in 1994, Irving introduced two years later an action for libel against Lipstadt and her publisher Penguin Books. In libel suits under the British law, the burden of proof relies on the defendant, not on the plaintiff.⁶⁶³ This explains the challenge of the a time-consuming trial, described by Irving’s words in its opening statement of the trial : “*To justify her allegations of manipulation and distortion, it will not suffice for Professor Lipstadt to show, if she can, that I misrepresented what happened, but the following that I knew what happened; and that I perversely and deliberately, for whatever purpose, portrayed it differently from how I knew it to have happened*”.⁶⁶⁴ The researches to support Lipstadt’s statements took several years, and included visits to archives and Auschwitz,⁶⁶⁵ and helped by her lawyers, she managed to prove Irving wrong during the trial in 2000 in London. Irving who sought to re-establish its already stained reputation had been fiercely taken down by the outcome of the trial. He was by then officially discredited as an historian and categorised under the label of Holocaust denier. Moreover, he was bankrupted by the three million dollars that cost him the two-month trial.⁶⁶⁶ Progressively refused by publishers, he will end up creating his own structure to publish his book.⁶⁶⁷

This example illustrates a limit of freedom of expression in United Kingdom embodied in the offense of libel. Libel consists in a false publication targeting someone. It could be

⁶⁶⁰ Emory University, ‘Faculty Members Deborah E. Lipstadt’, *Emory University Website*. Online resource, available at: <http://www.religion.emory.edu/faculty/lipstadt.html>.

⁶⁶¹ Deborah E. Lipstadt, *Denying the Holocaust, The Growing Assault on Truth and Memory*, Penguin, July 1994, 304p.

⁶⁶² Deborah E. Lipstadt, in Nigel Warbuton, *Free speech, a short introduction*, OUP, NY, 2009, p.32.

⁶⁶³ Nigel Warbuton, *Free speech, a short introduction*, OUP, NY, 2009, p.32.

⁶⁶⁴ David Irving, Opening statement of the Trial *Irving v. Penguin Books Ltd*, No. 1996-I-1113, 2000 WL 362478 (Q.B. April 11), Tuesday 11 January 2000. Available online at : <http://www.fpp.co.uk/Legal/Penguin/opening/opening1.html>.

⁶⁶⁵ Nigel Warbuton, *Free speech, a short introduction*, OUP, NY, 2009, p.35.

⁶⁶⁶ Helen Gibson, ‘History Wins, Irving loses’, *Time World website*, 24 April 2000. Available online at: <http://www.time.com/time/world/article/0,8599,2050527,00.html>.

⁶⁶⁷ Helen Gibson, ‘History Wins, Irving loses’, *Time World website*, 24 April 2000. Available online at: <http://www.time.com/time/world/article/0,8599,2050527,00.html>.

prosecuted under different Acts as the Libel Act 1843,⁶⁶⁸ or the Defamation Act 1952,⁶⁶⁹ these having been repealed and so the criminal offense under the Coroners and Justice Act 2009.⁶⁷⁰

The Lipstadt trial is an interesting example, especially after treating the previous conviction of Irving in Germany. As analysed, Germany had specific law and provisions on Holocaust denial, restricting the possibility to emit this type of speech to zero. Whereas in United Kingdom, the trial focused on the offense of libel. Lipstadt had the burden to prove the absence of defamation, or the truth of her statements for Irving to lose the trial. The problematic of Irving's statements has not been treated then by the English Court, the UK being deprived of laws on Holocaust denial then. This is a different approach where a harmful speech can go through as the laws are more relaxed granting a wider scope of protection. Nonetheless, the trial for defamation enabled Lipstadt to prove materially the wrong of Irving's statements in exposing an historical truth. Thus she managed to fight a bad speech with a good one, permitting an understanding of Irving's wrong without convicting by automatism only.

III. B. 3. c. Banned and imprisoned, Austria 2006.

In parallel, Irving had been officially banned from countries in which the national laws did not tolerate his type of speech and his statements, such as Canada and Germany,⁶⁷¹ South Africa, Australia and New Zealand.⁶⁷² When recently visiting Austria to give a lecture to a far-right student fraternity, Irving was arrested on the motorway on a

⁶⁶⁸ United Kingdom, *Libel Act 1843*, 1843 Chapter 96 6 and 7 Vict, 24th August 1843, available online at: <http://www.legislation.gov.uk/ukpga/Vict/6-7/96>. Last accessed 13th June 2012.

⁶⁶⁹ United Kingdom, *Defamation Act 1952*, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, Chapter 66, available online at : http://www.legislation.gov.uk/ukpga/1952/66/pdfs/ukpga_19520066_en.pdf. Last accessed 13th June 2012.

⁶⁷⁰ United Kingdom, *Coroners and Justice Act 2009*, 2009 c. 25, January 2010, Part 2, Chapter 3, Section 73. Available online at : <http://www.legislation.gov.uk/ukpga/2009/25/section/73> <http://www.legislation.gov.uk/ukpga/2009/25/section/73>. Last accessed 13th June 2012.

⁶⁷¹ Helen Gibson, 'History Wins, Irving loses', *Time World* website, 24 April 2000. Available online at: <http://www.time.com/time/world/article/0,8599,2050527,00.html>.

⁶⁷² Focal Point Publication website, 'Banned from countries around the World', *David Irving and Real History*. Online resource available at : <http://www.fpp.co.uk/Irving/index.html>.

warrant dating from 1989.⁶⁷³ Irving was then judged in a Vienna Court, and he pleaded guilty of having denied the Holocaust during the two speeches he gave in Austria in 1989, including *inter alia* “a call for an end to the “gas chambers fairy tale”, and that Adolf Hitler had helped Europe's Jews and that the Holocaust was a myth”.⁶⁷⁴ Nonetheless, is it on sincere statements or is it because Austrian laws on Holocaust denial are described as “stiffest laws against denying the Holocaust and Irving could have faced a maximum of 10 years in prison”,⁶⁷⁵ but Irving précised that his views had changed since. The author explained that in his previous speeches and statements he “made a mistake when [he] said there were no gas chambers at Auschwitz”.⁶⁷⁶ Nonetheless, the Vienna Court sentenced him to three years of imprisonment on the 20th February 2006 after having been in custody since November 2005.⁶⁷⁷ After an appeal to the Vienna Court of Appeal, his sentence was reduced due to the “triumph”⁶⁷⁸ of his lawyers, as described in Irving’s website. He was then released on the 21st of December 2006 after four hundred days in “Austria’s oldest jailhouse”.⁶⁷⁹

Irving’s conviction in Austria is double-edged. First, similarly to Germany, Austrian laws prohibit Holocaust denial for understandable reasons, as human dignity, respect for the dead, duty or responsibility to remember. Particularly, if people can be manipulated by this type of speech distorting the truth, even more because Irving is an ‘historian’ the danger is more important. Moreover, this legal prohibition is more comprehensible if the offensive type of speech is not protected in itself in the scope of freedom of expression. Then it is not a restriction from a freedom of expression, only an abuse of right in certain manner. Second, this conviction is also very dangerous in itself because

⁶⁷³ Online Article, ‘Holocaust denier Irving is jailed’, *BBC News Website*, 20 February 2006 (last updated). Available online at : <http://news.bbc.co.uk/2/hi/europe/4733820.stm>.; Nigel Warbuton, *Free speech, a short introduction*, OUP, NY, 2009, p.35.

⁶⁷⁴ Online Article, ‘David Irving jailed for Holocaust denial’, *The Guardian* website, 20 February 2006. Available online at : <http://www.guardian.co.uk/world/2006/feb/20/austria.thefarright>.

⁶⁷⁵ Online Article, ‘David Irving jailed for Holocaust denial’, *The Guardian* website, 20 February 2006. Available online at : <http://www.guardian.co.uk/world/2006/feb/20/austria.thefarright>.

⁶⁷⁶ Online Article, ‘Holocaust denier Irving is jailed’, *BBC News Website*, 20 February 2006 (last updated). Available online at : <http://news.bbc.co.uk/2/hi/europe/4733820.stm>.

⁶⁷⁷ Online Article, ‘David Irving jailed for Holocaust denial’, *The Guardian* website, 20 February 2006. Available online at : <http://www.guardian.co.uk/world/2006/feb/20/austria.thefarright>.

⁶⁷⁸ Focal Point Publication website, ‘Austria’s arrest’, *David Irving and Real History*. Online resource available at: http://www.fpp.co.uk/Austria/arrest_2005/index.html.

⁶⁷⁹ Focal Point Publication website, ‘Austria’s arrest’, *David Irving and Real History*. Online resource available at: http://www.fpp.co.uk/Austria/arrest_2005/index.html.

it enabled to elevate Irving as a 'speech martyr' allowing new proselytes of Irving. If Austrian laws are rightfully convicting Holocaust denial, it could be. Perhaps shall the justice make sure that the reasons for the sentence are truly understood by the public not to comfort a distortion of the truth.

III. B. 4. Reflections on the Oxford Union's invitation and legalisation of Holocaust denial

The demonstrations against the debate set at the Oxford Union made even more sense, regarding that Irving had been released a few months before from jail, for a conviction for having once again denied the Holocaust. The audience was strongly divided regarding the attendance of the polemic guests, especially on the topic of free speech. Karen Pollock, the chief executive of the UK's Holocaust Educational Trust, stated in 2006 when Irving was condemned by Austria that "*Holocaust denial is anti-Semitism dressed up as intellectual debate. It should be regarded as such and treated as such*".⁶⁸⁰ The question arising would be should we deny to those 'abuser of freedom of expression' the right of free speech? And if so, shall it be sanctioned?

A part of the doxa, raises the problems triggered by the criminalisation of Holocaust denial turned into an offence. Warbuton rightly insisted on the fact that Irving's last conviction and imprisonment in Austria elevated him from the status of a discredited historian to a "*free speech martyr*".⁶⁸¹ Lipstadt was said to be dismayed by Irving's sentence in Austria, explaining "*I am not happy when censorship wins, and I don't believe in winning battles via censorship... The way of fighting Holocaust deniers is with history and with truth*".⁶⁸² This is a very understandable statement, as the risk of condemning and convicting under the law could trigger only the simple prohibition without a real understanding of the facts and the importance to despise Holocaust denial.⁶⁸³ Through the 2000 trial in London opposing Irving and Lipstadt, the refutation

⁶⁸⁰ Karen Pollock, in Online Article, 'Holocaust denier Irving is jailed', *BBC News Website*, 20 February 2006 (last updated). Available online at : <http://news.bbc.co.uk/2/hi/europe/4733820.stm>.

⁶⁸¹ Nigel Warbuton, *Free speech, a short introduction*, OUP, NY, 2009, p.35.

⁶⁸² Deborah E. Lipstadt, in Online Article, 'Holocaust denier Irving is jailed', *BBC News Website*, 20 February 2006 (last updated). Available online at : <http://news.bbc.co.uk/2/hi/europe/4733820.stm>.

⁶⁸³ Nigel Warbuton, *Free speech, a short introduction*, OUP, NY, 2009, p.35.

of Irving's statements had been possible, and with it a full understanding of why these statements shall not be acceptable. This idea is comforted by Dershowitz, implicitly criticising restrictions over free speech: "*One reason why false and offensive speech is permitted in most liberal democracies is precisely because the best answer to bad speech is good speech, rather than censorship*".⁶⁸⁴

Nevertheless, another part of the doxa as mentioned through the demonstrations and the convictions of Irving, seem to think that his statements are intolerable, and should be prohibited, even condemned. According to Peter Thatchell the freedom of expression should be prohibited in such circumstances, he even stated that "*Tens of millions of lives may have been saved if the free speech of Nazis had been suppressed early on*".⁶⁸⁵ This seems to be the legal opinion in France for instance, where 'memorial laws' were enacted such as the *loi Gayssot* and added to the 1881 law on freedom of Press.⁶⁸⁶ It has been explained that the enactment of legislations 'pro criminalisation' of Holocaust denial were eased due to a "*quasi unanimous public abhorrence for these horrendous crimes that fundamentally explains legislative action and why any attempt to deny or downplay the Nazi crimes continues to be viewed as morally intolerable*".⁶⁸⁷ France has had interesting jurisprudences regarding the convictions of Holocaust deniers,⁶⁸⁸ thanks mainly to the figures of the 'Front National' (FN) namely Le Pen or even Gollnisch, and French xenophobic nationalists hiding their anti-Semitism behind this quest for the historic truth. People stopped counting the convictions of Mr Le Pen relating to Holocaust denial. In 1987 for instance, Le Pen described the extermination of Jews during a radio interview, as a "point de detail",⁶⁸⁹ and was ordered to pay a heavy

⁶⁸⁴ Alan Dershowitz in, Deborah E. Lipstadt, *History on Trial: My Day in Court with a Holocaust Denier*, Harper Perennial, 2006, p. 304.

⁶⁸⁵ Peter Thatchell, in Julian Joyce, 'The limits to freedom of speech', *BBC News Website*, 26 November 2007. Available online at : http://news.bbc.co.uk/2/hi/uk_news/7113186.stm.

⁶⁸⁶ See above, Part II- B through the example of the *Piss Christ*.

⁶⁸⁷ Laurent Pech, 'The Law of Holocaust Denial in Europe: Towards a (qualified) EU-wide Criminal Prohibition', *Jean Monnet Working Paper*, No 10/09, NYU School of Law, New York, 2009, p. 21. Available online at: <http://centers.law.nyu.edu/jeanmonnet/papers/09/091001.pdf>.

⁶⁸⁸ See, Roger Errera, 'Chapter 17- In defence of civility: Racial Incitement and group libel in French law', in *Striking a balance: Hate speech, Freedom of Expression and non-discrimination*, edited by Sandra Coliver, Contributing Editors Kevin Boyle and Frances D'Souza, XIX (Article 19) – International Centre Against Censorship, Human Rights Centre, University of Essex, 1992, p. 152-153.

⁶⁸⁹ See, Roger Errera, 'Chapter 17- In defence of civility: Racial Incitement and group libel in French law', in *Striking a balance: Hate speech, Freedom of Expression and non-discrimination*, edited by Sandra

fine for these statements.⁶⁹⁰ Bruno Gollnisch for instance was No2 of the FN party, and a lecturer at the University Jean Moulin Lyon 3 in Japanese Civilisation. He was suspended from his post and prohibited to enter the University on the University President's warrant, after having held statements minimising, even denying the Holocaust.⁶⁹¹

The problematic arising is that prohibiting Holocaust denial impinges cruelly on freedom of expression. Considering that freedom of expression is not an absolute one, it can be restricted, usually by reasons foreseen by law.⁶⁹² Another problem is that such prohibition goes against freedom of opinion, and as well freedom of thoughts. In this manner, it is a form of restriction curbing even more fundamental rights. However, how to protect or defend the indefensible? The answer could reside in the need to establish standards to protect history and memory, but also human dignity. Human dignity being recognised as the supreme rights among others, this attack on freedom of expression and other fundamental rights, shall then be deemed as acceptable.

Nevertheless, Spain for instance did not seem favourable to such opinion. Indeed, whereas the section 607(2)⁶⁹³ of the Criminal Code "*punishes by imprisonment for one to two years the dissemination of ideas and doctrines that deny or justify genocide or that purport to rehabilitate regimes or institutions responsible for these crimes*",⁶⁹⁴ this section has been held by the Spanish Constitutional Court to be unconstitutional as contrary to the freedom of expression defined by Article 20(1) of the Spanish Constitution.⁶⁹⁵ The Spanish Court rules that it could not be held that the simple communication of ideas could not be sanctioned and considered contrary to human

Coliver, Contributing Editors Kevin Boyle and Frances D'Souza, XIX (Article 19) – International Centre Against Censorship, Human Rights Centre, University of Essex, 1992, p. 153.

⁶⁹⁰ Cour d'Appel de Versailles, *Le Pen c. UNADIF*, 18 March 1991.

⁶⁹¹ Online Article, 'Gollnisch interdit de séjour à Lyon 3', *Radio espace Lyon* website, 3 December 2004. Available online at : <http://www.radioespace.com/infos/locales/18792/gollnisch-interdit-de-sejour-lyon-3> ; Audrey Henrion, 'Lyon Politique : Gollnisch réclame son salaire de prof', *La Tribune de Lyon* online, 17 May 2010. Available online at : <http://www.tribunedelyon.fr/print.php?actus=20386>.

⁶⁹² *Inter alia*, French Republic, *Declaration of the Rights of Man and of the Citizen*, 1789, Article 11.

⁶⁹³ Kingdom of Spain, *Código Penal Ley Orgánica* 10/1995, 23 November 1995, Section 607(2).

⁶⁹⁴ Laurent Pech, 'The Law of Holocaust Denial in Europe: Towards a (qualified) EU-wide Criminal Prohibition', *Jean Monnet Working Paper*, No 10/09, NYU School of Law, New York, 2009, p. 23. Available online at: <http://centers.law.nyu.edu/jeanmonnet/papers/09/091001.pdf>.

⁶⁹⁵ Laurent Pech, 'The Law of Holocaust Denial in Europe: Towards a (qualified) EU-wide Criminal Prohibition', *Jean Monnet Working Paper*, No 10/09, NYU School of Law, New York, 2009, p. 23. Available online at: <http://centers.law.nyu.edu/jeanmonnet/papers/09/091001.pdf>.

dignity, so atrocious that these ideas are.⁶⁹⁶ On an American model of the ‘marketplace of ideas’, Spain seemed then to agree with the fact that no one can condemn “*the expression of an idea simply because society finds the idea itself offensive or disagreeable*”^{697, 698}

However, with the time, the International and Regional law framework forced the creation of new standards and a certain harmonisation regarding the condemnation of genocide deniers. This has been possible through provisions against racism and speech hatred.⁶⁹⁹ Firstly, the ECHR progressively reviewed its approach to a more radical one, after “*waves of applications from Holocaust deniers*”.⁷⁰⁰ The 1998 case *Lehideux and Isorni*,⁷⁰¹ is a first step toward this radicalisation. Even if the Court defined the breach of Article 10 ECHR to be disproportionate, it held that “*the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded by Article 10*”⁷⁰² and thus be criminally punished. The *Garaudy* case⁷⁰³ is a more recent and even more striking example. In the latter, Mr. Garaudy was prosecuted under denial of crimes against humanity, public defamation of a group of people, incitement to racial hatred and discrimination, in late 1990s by national courts under the 1881 French law on Press, for his books ‘*The Founding Myths of Modern Israel*’.⁷⁰⁴ Garaudy’s application was rejected and his type of speech was held to be out of the scope of Article 10 ECHR. The ECtHR stood firmly on the matter of revisionism enouncing three major points. First, the

⁶⁹⁶ see Spanish Constitutional Court, *Judgment 235/2007*, 7 November 2008, para. 6.

⁶⁹⁷ American Case law, *Texas v. Johnson*, 491 US 397 (1989).

⁶⁹⁸ Laurent Pech, ‘The Law of Holocaust Denial in Europe: Towards a (qualified) EU-wide Criminal Prohibition’, *Jean Monnet Working Paper*, No 10/09, NYU School of Law, New York, 2009, p. 25. Available online at: <http://centers.law.nyu.edu/jeanmonnet/papers/09/091001.pdf>.

⁶⁹⁹ *Inter alia*, United Nations, *International Covenant on Civil and Political Rights* (ICCPR), 1966, Article 20(2) ; United Nation, *International Convention on the Elimination of All Forms of Racial Discrimination*, signed 21 December 1965, entered into force 4 January 1969, Article 4.

⁷⁰⁰ Laurent Pech, ‘The Law of Holocaust Denial in Europe: Towards a (qualified) EU-wide Criminal Prohibition’, *Jean Monnet Working Paper*, No 10/09, NYU School of Law, New York, 2009, p. 34. Available online at: <http://centers.law.nyu.edu/jeanmonnet/papers/09/091001.pdf>.

⁷⁰¹ ECtHR, *Lehideux and Isorni v. France*, Application No 24662/94, 23 September 1998.

⁷⁰² Netherlands Institute of Human Rights, Utrecht School of Law, ‘Lehideux and Isorni v. France, case law’, *Institute’s website*, last updated 19 April 2012. Available online at: <http://sim.law.uu.nl/SIM/CaseLaw/hof.nsf/0/2eb5afd8f89c9af6c12566900036cbf5?OpenDocument>.

⁷⁰³ ECtHR, *Garaudy v. France*, Application No. 65831/01, December 2003.

⁷⁰⁴ Laurent Pech, ‘The Law of Holocaust Denial in Europe: Towards a (qualified) EU-wide Criminal Prohibition’, *Jean Monnet Working Paper*, No 10/09, NYU School of Law, New York, 2009, p. 34. Available online at: <http://centers.law.nyu.edu/jeanmonnet/papers/09/091001.pdf>.

quality of historian is denied to whom denies an historically established fact as the Holocaust.⁷⁰⁵ Second, revisionism and Holocaust denial were defined as “*the most serious forms of racial defamation of Jews and of incitement to hatred of them*”,⁷⁰⁶ and finally it was considered as a “*a serious threat to public order*”.⁷⁰⁷ The ECtHR finally took position on this sensitive matter which is ‘Holocaust denial or shall we restrict free speech’.

This is a position that the European Union followed and integrated, when pressured by a few Members, notably France or Germany who already enacted laws prohibiting the Holocaust denial. A collective consensus has been found among the EU Members to restrict the scope of freedom of expression regarding the Holocaust denial. If the EU Members were divided by their legislations,⁷⁰⁸ some strictly prohibiting genocide denial, others more liberal thinking that freedom of expression impeded the criminalisation of such hatred speech,⁷⁰⁹ a general conditional prohibition has been harmonised at EU level.⁷¹⁰ The EU 2008 framework decision of the Council of the European Union,⁷¹¹ defining racism and xenophobia as threats and offences, emphasised the necessity to define a common policy to fight them: “*It is necessary to define a common criminal law approach in the European Union*”.⁷¹² The implementation in 2008 of the framework

⁷⁰⁵ Laurent Pech, ‘The Law of Holocaust Denial in Europe: Towards a (qualified) EU-wide Criminal Prohibition’, *Jean Monnet Working Paper*, No 10/09, NYU School of Law, New York, 2009, p. 34. Available online at: <http://centers.law.nyu.edu/jeanmonnet/papers/09/091001.pdf>.

⁷⁰⁶ Laurent Pech, ‘The Law of Holocaust Denial in Europe: Towards a (qualified) EU-wide Criminal Prohibition’, *Jean Monnet Working Paper*, No 10/09, NYU School of Law, New York, 2009, p. 35. Available online at: <http://centers.law.nyu.edu/jeanmonnet/papers/09/091001.pdf>.

⁷⁰⁷ Laurent Pech, ‘The Law of Holocaust Denial in Europe: Towards a (qualified) EU-wide Criminal Prohibition’, *Jean Monnet Working Paper*, No 10/09, NYU School of Law, New York, 2009, p. 35. Available online at: <http://centers.law.nyu.edu/jeanmonnet/papers/09/091001.pdf>.

⁷⁰⁸ EU Network of Independent Experts on Fundamental Rights, *Combating Racism and Xenophobia Through Criminal Legislation: The Situation in the EU Member States*, Opinion no. 5-2005, 28 November 2005, p. 79.

⁷⁰⁹ Laurent Pech, ‘The Law of Holocaust Denial in Europe: Towards a (qualified) EU-wide Criminal Prohibition’, *Jean Monnet Working Paper*, No 10/09, NYU School of Law, New York, 2009, p. 3. Available online at: <http://centers.law.nyu.edu/jeanmonnet/papers/09/091001.pdf>.

⁷¹⁰ Laurent Pech, ‘The Law of Holocaust Denial in Europe: Towards a (qualified) EU-wide Criminal Prohibition’, *Jean Monnet Working Paper*, No 10/09, NYU School of Law, New York, 2009, p. 1. Available online at: <http://centers.law.nyu.edu/jeanmonnet/papers/09/091001.pdf>.

⁷¹¹ Council of the EU, Council Framework Decision No 2008/913/JHA, on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328, 6.12.2008, p. 55–58.

⁷¹² Council of the EU, Council Framework Decision No 2008/913/JHA, on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328, 6.12.2008, p. 55–58, Preamble, para. 5.

decision conducted towards the legal obligation of Member States to criminalise genocide denial,⁷¹³ under the condition that this denial is *either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting*.⁷¹⁴

III. B. 5. Conclusions

As it has been demonstrated above, globally, there is then a movement toward the legal prohibition of Holocaust denial. The different views of the States on enacting laws prohibiting Holocaust denial found a compromise in the minimum standards brought by the International law and European law. Pech underlined that what is striking in national rulings dealing with this matter, is that the courts have invariably upheld the compatibility of Holocaust denial laws with the right to freedom of expression,⁷¹⁵ whereas free speech seemed to exclude Holocaust denial. The ECtHR decided to restrict the scope of freedom of expression not to include Holocaust denial. Free speech finds there a limit, when its scope is restricted for reasons of human dignity, respect, or memory. If Luke Tryl invited Irving to debate having enough faith in the auditors to challenge Irving's idea,⁷¹⁶ the President of the association might have undermined the impact of the invitation. At a time where our world is reduced to a global village, someone from another continent could follow the debate and be less equipped than the Oxford students to challenge these ideas, especially when looking at the supportive messages Irving receives on his facebook fan page.⁷¹⁷ Among the authors who were

⁷¹³ Council of the EU, Council Framework Decision No 2008/913/JHA, on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328, 6.12.2008, p. 55–58, Article 1(1)(c).

⁷¹⁴ Council of the EU, Council Framework Decision No 2008/913/JHA, on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328, 6.12.2008, p. 55–58, Article 1(2).

⁷¹⁵ Laurent Pech, 'The Law of Holocaust Denial in Europe: Towards a (qualified) EU-wide Criminal Prohibition', *Jean Monnet Working Paper*, No 10/09, NYU School of Law, New York, 2009, p. 5. Available online at: <http://centers.law.nyu.edu/jeanmonnet/papers/09/091001.pdf>.

⁷¹⁶ Luke Tryl, in Deborah Lipstadt, 'Oxford Union: David Irving invited to speak at Oxford Union along with other people with "awful and abhorrent views" ', on *Deborag Lipstadt's Blog*, 13 October 2007. Available online at: <http://lipstadt.blogspot.com/2007/10/david-irving-invited-to-speak-at-oxford.html>.

⁷¹⁷ Online resource, 'David Irving Official Fan Page', *Facebook website*. Available online at: <https://www.facebook.com/pages/David-Irving-Official-Fan-Page/343659606556>.

opposed to the condemnation of Irving in Austria, it is true that elevating Irving to a free speech martyr is an unwanted consequence; However, perhaps the criminalisation of Holocaust denial is also for people thinking that because they are allowed to say everything, they can say it.⁷¹⁸ Although one can only agree firmly with Lipstadt and Warbuton on the point that censorship is no answer to bad speech, one growing up in a country where Holocaust denial is prohibited will not necessarily know there is a prohibition without understanding its reasons. These prohibiting laws give a standard to respect, and delimit boundaries, which can still be crossed when breaching the law.

Furthermore, these prohibitions take more and more sense in a context of rise of extremists views. A wave of extremisms is arising in Europe, which could scare anyone caring for a democratic society. In Greece, the neo-Nazi party entered the Parliament after the legislative elections.⁷¹⁹ In Germany, the far right wing party (National Democratic Party) gains votes and impact,⁷²⁰ in Hungary the right-wing extremists seem to gain in popularity every day.⁷²¹ In France, Le Pen was second at the presidential elections in 2002; his daughter scored almost 20% in the 2012 presidential elections, meaning that one French voter out of five actually voted for the far right nationalist party, and it is to fear that the FN will be very successful during the June 2012 legislative elections.⁷²² Fortunately, the first round of the elections so far did not allow an astonishing success of the FN in the Parliament. The far left party obtained about 12% during the presidential elections, which is not that better.

⁷¹⁸ Cf. Fouad Laroui's testimony, in Alexandre Héraud, *L'assassinat de Théo Van Gogh*, voyages au bout d'une vie- volume 12, E-dite, 2006, Paris, p.85.

⁷¹⁹ Rob Cooper, 'Rise of Greek neo-Nazis : Ultra-right party Golden Dawn wants to force immigrants into work camps and plant landmines along Turkish border', *Daily Mail* online, 7 May 2012. Available online at: <http://www.dailymail.co.uk/news/article-2140686/Greek-elections-2012-Neo-Nazi-party-Golden-Dawn-want-force-immigrants-work-camps.html>.

⁷²⁰ Christian Pfaffinger, 'Germany's Far-right turns to Environmentalist', *Spiegel* online, 4 March 2012. Available online at: <http://www.spiegel.de/international/zeitgeist/german-neo-nazis-make-environment-a-campaign-issue-a-825564.html>.

⁷²¹ Keno Verseck, 'Hungary's rising right, Roma defenseless against extremist vigilantes', *Spiegel* online, 28 April 2011. Available online at: <http://www.spiegel.de/international/europe/hungary-s-rising-right-roma-defenseless-against-extremist-vigilantes-a-759586.html>.

⁷²² Online Article, 'François Hollande est élu président de la République avec 51,9% des voix', *Le Monde* online, 6 May 2012. Available online at: http://www.lemonde.fr/election-presidentielle-2012/article/2012/05/06/election-presidentielle-2012-resultats-du-second-tour_1696623_1471069.html.

Because of the economic crisis, loneliness or boredom of human beings, extremists views are scarily increasing in Europe. And if the Historian Watt commented against criminalisation of Holocaust denial on Irving's conviction in Austria, saying that "*We need to have this stuff out in the open, to thrash out the reality before the witnesses are all dead*",⁷²³ at least these regulations could be a safety net against intolerable views whose impacts are the worst to fear.

III.C. Conclusions

The Hungarian recent legislative changes and the Irving example are two opposite examples to illustrate the dilemmas surrounding free speech and its protection. In the first case, it is commonly obvious that freedom of speech is shackled, and democratic values are progressively imprisoned to the good of the Hungarian oligarchy and especially the Fidesz party lead by V. Orban. In the second case, the debate is still unsolved. To the respect of memory, history and human dignity, free speech shall be shackled,⁷²⁴ whereas some argue that chaining up bad speech is not the better way to progress and understanding the core of the problems.⁷²⁵ Can we be mitigated when the choice comes to chose between for or against censorship? Firstly it is to argue that arbitrary censorship is unbearable, and for the sake of fundamental rights we shall fight against it with any possible means. Secondly, it must be understood, that free speech is not unlimited, and it finds its limits in the balance of the freedom of expression with other fundamental rights, as presented previously. Censorship is in that way, a means to limit free speech when it is balanced with other rights, which must be protected while affected by a bad speech. However, this censorship must found reasonable grounds in the law and the core values of a democracy, not grounds in the Head of State's mind.

⁷²³ Donald Cameron Watt, in Helen Gibson, 'History Wins, Irving loses', *Time World* website, 24 April 2000. Available online at: <http://www.time.com/time/world/article/0,8599,2050527,00.html>.

⁷²⁴ E.g., Peter Thatchell, in Julian Joyce, 'The limits to freedom of speech', *BBC News Website*, 26 November 2007. Available online at : http://news.bbc.co.uk/2/hi/uk_news/7113186.stm.

⁷²⁵ *Inter alia*, Deborah E. Lipstadt, in Online Article, 'Holocaust denier Irving is jailed', *BBC News Website*, 20 February 2006 (last updated). Available online at : <http://news.bbc.co.uk/2/hi/europe/4733820.stm>.

Firstly, free speech needs to be guaranteed and protected to ensure the standards and the prosperity of a democratic society. If Hungary and the Hungarian leaders at the origins of the Constitutional modifications hide in the beginning of the year 2012 behind the excuse of the legacy of the communist era,⁷²⁶ one could discern that replacing a Constitution inherited from the Soviet influence by one with dictatorial connotation is no good excuse. The changes brought to the Hungarian legislation, both in the field of medias, directly in relation to freedom of expression, in the sense it regulates the freedom to both “*impart and receive informations*”,⁷²⁷ and with the new Hungarian Basic Law as well, are to be described as ‘anti-democratic’. This is simply identified through a governmental control over public services and the reorganisation of medias in a single entity, broadcasting to selected programmers.⁷²⁸ The ‘Damocles sword’ also threatening the potential dissident or ones not responding to the new Hungarian standard shows the crucial problem in the Hungarian democracy. To illustrate the impact of the changes made by the government, the critics pointed out that the name of the country has been changed, from the ‘Republic of Hungary’ to simply ‘Hungary’.⁷²⁹ Is the Hungarian democracy really endangered? It is to fear so, if the government, lead by V. Orban and the Fidesz progressively lay an invisible hand on public services, but also on banks,⁷³⁰ as well influencing the Constitutional Court whose role is crucial.⁷³¹

If some criticise the Media Acts, the Constitution is less the target of critics. Although Media Acts cannot be held unconstitutional since the repeal of the 1989 Constitution. Fukuyama stated that he was less bothered by the Constitution than by the way V. Orban was using his powers.⁷³² Inheriting from a former Hungarian traditions, V. Orban

⁷²⁶ See, Daniel Cohn-Bendit, Intervention at the European Parliament, 18 January 2012. Video available online at: <http://www.youtube.com/watch?v=a6HEoRVWNY0>.

⁷²⁷ Council of Europe, *ECHR*, 1950, Article 10 (1).

⁷²⁸ Laszlo Majtenyi, ‘Curbing the Freedom of the press: The case of Hungary’, *Osteuropa Recht*, 58. Jahrg., Heft 1, Beilage, 2012, pp.37-41, p. 40.

⁷²⁹ Hungary, *Fundamental Law of Hungary*, 25 April 2011, Article A, p.3. Available online at: http://tasz.hu/files/tasz/imce/alternative_translation_of_the_draft_constituion.pdf.

⁷³⁰ P. Karasz and M. Eddy, « Opposition Protests Constitution in Hungary », *NY Times*, 2nd January 2012., <http://www.nytimes.com/2012/01/03/world/europe/rare-opposition-protests-in-hungary.html>.

⁷³¹ Andras Bozoki, ‘The Crisis of Democracy in Hungary 2012’, 3 February 2012, online article. Available at: <http://www.deliberatelyconsidered.com/2012/02/the-crisis-of-democracy-in-hungary-2012/>.

⁷³² Francis Fukuyama, ‘What’s Wrong with Hungary?’, *The American Interest* website, 6 February 2012. Online article available online at: <http://blogs.the-american-interest.com/fukuyama/2012/02/06/whats-wrong-with-hungary/>.

probably shows his impatience on a similar pattern as the former leaders⁷³³ regarding the ropes that democracy instituted as safeguard for the country. Hungary is the centre of attention for diverse problems previously evoked. It is as well, if the government pursue its plan, intentional or not, to progressively master and control the society, disregarding the crucial principle of separation of powers and the rule of law. The opposition being shadowed, and the critics being silenced,⁷³⁴ let's just hope that the situation will not evolve even more. If Hungary was a model of eastern European countries with its transition towards democracy,⁷³⁵ it starts becoming since 2010 to be a model of eastern European country en route for a dictatorship.⁷³⁶

Regarding Hungary's history and previous successful battle to arrive at such level of democracy in a short time, this would indeed be a shame if Hungary keeps going towards the wrong direction. With the European Union's surveillance, through recommendations, infringements procedures or pressure from other Member States, it is to wish that the country will go back on track. It is to hope then that the European Union, affected by the economic crisis and weakened Members will not be as forceless as the too numerous non-binding rulings or provisions that is characteristic of International Law. The European Union law being an integrated law of the Member States, we could optimistically expect a positive outcome from a European interference. In this issue, the arbitrary censorship imposed by a power-hungry government, which undermines fundamental rights and among them freedom of expression, shall not be tolerated. It could not even be excused by the legacy of communism after such a transition towards democracy, neither by the Member State sovereignty.

Secondly, regarding the Irving example and the debate around Holocaust denial as protected or not by the freedom of speech, a distinction needs to be drawn. On the

⁷³³ Stephen Istvan Pogany, 'Constitutional Reform in Central and Eastern Europe: Hungary's transition to democracy', *International and Comparative Law Quarterly*, Vol. 42, April 1993, p.355.

⁷³⁴ Francis Fukuyama, 'What's Wrong with Hungary?', *The American Interest* website, 6 February 2012. Online contribution available online at: <http://blogs.the-american-interest.com/fukuyama/2012/02/06/whats-wrong-with-hungary/>.

⁷³⁵ Stephen Istvan Pogany, 'Constitutional Reform in Central and Eastern Europe: Hungary's transition to democracy', *International and Comparative Law Quarterly*, Vol. 42, April 1993, p.343.

⁷³⁶ See, Daniel Cohn-Bendit, Intervention at the European Parliament, 18 January 2012. Video available online at: <http://www.youtube.com/watch?v=a6HEoRVWNY0>.

Constitutional German model mentioned in Article 5 of its Constitution,⁷³⁷ a distinction needs to be expressed between the freedom of opinion (*Meinungsfreiheit*), and established facts. Freedom of opinion needs to be protected within the scope of freedom of expression, any opinion could equal another, and none should be censored for that. However, when someone denies a fact, which moreover has been qualified of 'historically established' as the Holocaust,⁷³⁸ this is not a statement anymore, this is a lie. Indeed the German definition of *Meinungsfreiheit* also covers the expression of facts, unless this enters the scope of defamation⁷³⁹ as soon as "*the disseminator knows they [statements upon facts] are false*".⁷⁴⁰ Thus law shall not negatively or positively protect a lie. In this sense, the ECtHR has denied to Holocaust denial the status of free speech as protected by the scope of Article 10 ECHR. Two outcomes can result of it. Firstly, Holocaust denial could be seen as a restriction of freedom of speech. Secondly, in another hypothesis, free speech would not include Holocaust denial, hence the latter is not considered in the scope of free speech, it is not a restriction it would only be another type of speech, a deviant speech, an 'abuse of law'.⁷⁴¹ In that case free speech would not include Holocaust denial, free speech shall be fight for, beyond restrictions. Nonetheless, if it is not the case, free speech including Holocaust denial has to be balanced with other freedoms, especially when it is harmful to them. On this reflection, Lipstadt précised that freedom of speech shall be used as a shield rather than a sword.⁷⁴² Then, if Holocaust denial is obviously an insult to the memory of the deaths and victims of a terrible era, an offense to human dignity, the supreme fundamental right, Holocaust denial should be considered as an offense, a dangerous one which distorts truth and history.

⁷³⁷ German Basic Law (*Grundgesetz*), Article 5, 1949.

⁷³⁸ European Commission of Human Rights, *David Irving v. Germany - Decision on admissibility*, Application No. 26551/95, June 1996, p.4. Available online at: http://www.concernedhistorians.org/content_files/file/le/50.pdf.

⁷³⁹ *Inter alia*, French Republic, *Loi 1881 on Press*, 29 July 1881, Article 29.

⁷⁴⁰ Eric Barendt, *Freedom of Speech*, 2nd edition, OUP, NY, 2005, 526p, p. 60.

⁷⁴¹ ECtHR, *Garaudy v. France*, Application No. 65831/01, December 2003, para. 5. Garaudy's statements where recognised as an abuse of law when the ECtHR upheld the application of Article 24bis, 29, and 32 of the French *Loi 1881 on Press*, 29 July 1881.

⁷⁴² Deborah E. Lipstadt, *Denying the Holocaust, The Growing Assault on Truth and Memory*, Penguin, July 1994, 304p.

Nonetheless, the statements of the authors about elevating an author such as Irving to the status of free speech martyr is to be agreed with.⁷⁴³ I do not think that the debate staging Irving at the Oxford Union in 2007 should have been cancelled, Irving should have the right to participate within the limits of free speech on holocaust denial as acknowledged by the ECtHR, and about ten countries of the Union, among them France and Germany having strict and clear provisions. It has been argued in France for instance that the legislators were acting as historians in instituting 'memorial laws'.⁷⁴⁴ However, it seems that legislators were only answering a positive duty from the States to strike a balance between freedoms and protect others such as Human dignity. These very framed legislations are even more important when some Europeans tend to forget or reject the 2nd World War horrors, and extremism arises from European horizons.⁷⁴⁵ It reassures that these laws will help some not to forget, and try to protect democratic values and mild speech.

Censorship pro or against? The answer should be against, with the exception of a free speech so extremist it contravenes the core values of a democracy as respected by the democratic Member States and European Institutions.⁷⁴⁶

⁷⁴³ *Inter alia*, Nigel Warbuton, *Free speech, a short introduction*, OUP, NY, 2009, p.35.

⁷⁴⁴ Jean Pradel, 'La liberté d'expression, jusqu'où? Brèves remarques sur quelques affaires récentes', in Dir. Danielle Corrigan-Carsin, *La Liberté de Critique*, Lexis Nexis, Litec, Paris, 2007, 215p, p.134.

⁷⁴⁵ *See*, Part III-B.

⁷⁴⁶ E.g. Council of Europe, *ECHR*, 1950, Article 17.

IV. General Conclusions

In Voltaire's affirmation opening this study "*I despise what you say, but will defend to the death your right to say it*",⁷⁴⁷ a certain idea of free speech arose already. This is the idea that free speech is so terribly important that it should take precedence over anything else. Consequently, in a such a line of thinking, the primacy of a 'market-place of ideas' shall be respected no matter of the consequences.⁷⁴⁸ This precedence implied by Voltaire's maxim is a strong one, as even personal tastes are set aside in this battle for an unshackle free speech, free from any lead, censors or domination.

However, along this study and thanks to various subjects, this battle to the death for freedom of expression is nuanced through different elements. Firstly, that freedom of expression is a major fundamental right that must be protected, although is it not absolute.⁷⁴⁹ Secondly and consequently, this non-absolute right must then be balanced with other interests, taking into account other factors.⁷⁵⁰ Especially, when this unshackled free speech is offending and hurtful. Its protection then is not an ultimate goal to be researched by any means when free speech is not protection-worthy.

To attain this level of protection, proportionate to the nature of the speech, the European institutions mainly, then the Member States, have a crucial role to play. Following international standards emerging,⁷⁵¹ the ECtHR instituted for instance this tri-degree of protection of free speech according to its nature: political, artistic or commercial.⁷⁵² This is the main gradual protection offered to free speech. In addition, this protection is completed according to the definition the Member States make of free speech, and the protection they decide to grant. For instance, the German Basic law

⁷⁴⁷ Voltaire (François-Marie Arouet), in Nigel Warbuton, *Free speech, a short introduction*, OUP, NY, 2009, p. 1.

⁷⁴⁸ Laurent Pech, 'The Law of Holocaust Denial in Europe: Towards a (qualified) EU-wide Criminal Prohibition', *Jean Monnet Working Paper*, No 10/09, NYU School of Law, New York, 2009, p. 25. Available online at: <http://centers.law.nyu.edu/jeanmonnet/papers/09/091001.pdf>.

⁷⁴⁹ Council of Europe, *Freedom of Expression in Europe, case-law concerning Article 10 of the European Convention on Human Rights*, Human Rights files, No. 18, Council of Europe Publishing, 2007, 184p, p. 7.

⁷⁵⁰ E.g., ECtHR, *Hachette Filipacchi Associés (Paris-Match) v. France*, Application no. 71111/01 of 14 June 2007.

⁷⁵¹ *Inter alia*, Georg J. Benston, 'Government Constraints on Political, Artistic, and Commercial Speech', *20 Connecticut Law Review*, 1987-1988, p.303.

⁷⁵² Lorna Woods, 'Freedom of Expression in the European Union', *European Public Law*, Volume 12, Issue 3, Kluwer Law International, 2006, p. 374.

enables as previously observed,⁷⁵³ an innovative definition including academic free speech, enlarging thus the level of protection granted to free speech.⁷⁵⁴ Subsequently, there is through the legal protection of freedom of expression, a real dialectic of the role of the States.

From these short explanations is sketched already the frame of freedom of expression dilemmas emerging from this study. Indeed, two main unsolved problems, also defined as dilemmas are arising from the previous developments. These dilemmas enable to denounce the paradox of the protection of freedom of expression during our 21st century. On the one hand, there is a necessity to strike a balance between difference interest, thus limiting free speech.⁷⁵⁵ On the other hand, there is the question of the States, shall they intervene or adopt a *laissez-faire* policy on the Dutch model.⁷⁵⁶

First of all, the focus must be on a balance of interests. These four examples above studied permitted to analyse and understand in each case the problem revolving around free speech when contravening other interests. Different and various interests have been opposed to free speech, and are constantly opposed to it. In the second part, with the examples of *Theo Van Gogh's murder*⁷⁵⁷ and the *Piss Christ*,⁷⁵⁸ freedom of expression saw the firm, violent and revolted opposition of freedom of religion. Moreover, the third part, allowed a reflection on censorship. In this debate around censorship imposed or not on free speech, various interests opposed free speech. For instance, there is with Hungary the basic notion that in erasing democracy, free speech will disappear with the rule of law and separation of powers. These principles will not be able to guarantee a free speech and vice-versa. Within the *Hungarian example*,⁷⁵⁹ this is the interests of a few, an oligarchy, which is liberticidal, notably towards freedom of speech. In the last

⁷⁵³ See, Part I.C. 1.

⁷⁵⁴ German Basic Law (*Grundgesetz*), 1949, Article 5.

⁷⁵⁵ See, Sandra Coliver (ed.), Contributing Editors Kevin Boyle and Frances D'Souza, *Striking a balance: Hate speech, Freedom of Expression and non-discrimination*, XIX (Article 19) – International Centre Against Censorship, Human Rights Centre, University of Essex, 1992,

⁷⁵⁶ Paul Scheffer's testimony, in Alexandre Héraud, *L'assassinat de Théo Van Gogh, voyages au bout d'une vie*- volume 12, E-dite, 2006, Paris, p. 44.

⁷⁵⁷ Part II. A.

⁷⁵⁸ Part II. B.

⁷⁵⁹ Part III. A.

case study, the *Irving example*,⁷⁶⁰ the balance of interests must respect a sensitive or offended audience. The European movement towards a criminalisation of Holocaust or genocides denial⁷⁶¹ put some flesh on the problem and the focus on balancing rights as well, as human dignity.

Numerous factors are the cause of this clash between the interests, that can be explained by a different view of interpretation and use of the freedom. Some would use freedom of speech without boundaries, and some would always feel offended anyway. This dilemma on balancing interests and different uses of freedoms is increased by contradicting traditions in the 21st century. More than ever, two streams are opposed. Consequently, anything trapped in the middle of these two streams is subject to contrary and destructive influences. Both traditional inheritances and a culture of the progress create opposing, thus contradicting more. Standards are not the same in section of population, in different countries also even in Europe. And this is increased by a growing multicultural diversity mixing even more ready-made conception of standards of life, and of different ways of living.

Moreover, there is unfortunately also a paradox between progress and multiculturalism which renders the task of the State to legislate even harder. Indeed, the progress dialectic tends to impose one frame of mind only, in a same shape individuals tend to find a universal agreement on matters. This is well illustrated by fashion for instance. Celebrities, designers and shops decide of the clothes to wear, individuals want them and wear them, thus ending a cycle, shops will sell these clothes only and so on. This is the same for technologies, trends of food, restaurants, or music for instance. Whereas, with the melting pot of multiculturalism, the traditions, religions, standards, habits and hobbies are completely mixed and disharmonised. Thus, it is harder with a multicultural society to find compromise, especially regarding the unique pattern progress tends to impose. This duality creates then two streams which are hard to gather in one, especially when one limits or offends the other.

⁷⁶⁰ Part III. B.

⁷⁶¹ See, Laurent Pech, 'The Law of Holocaust Denial in Europe: Towards a (qualified) EU-wide Criminal Prohibition', *Jean Monnet Working Paper*, No 10/09, NYU School of Law, New York, 2009, p. 25. Available online at: <http://centers.law.nyu.edu/jeanmonnet/papers/09/091001.pdf>.

In so far, it seems that religion and *more* often and paradoxically do not progress with such a new level of protection conferred to freedom of expression. This lead to different standards of morals, and actions, which contribute to the collision and opposition of different freedoms. The other way round is also valid. An abused free speech, such as Holocaust denial qualified of an “*abuse of right*”,⁷⁶² is not compatible with other rights either.

Solutions must be found to these growing contradictions to institute a prosper society and democracy. To me, the previous study fed with the four examples enounced, enabled to distinguish at least three solutions to manage the balance of interests, and leading to the role of the State.

Firstly, what has been described and repeated by different authors, would be a certain trust and faith in judges ruling over cases, and in charge of striking a balance. As mentioned already, authors as Labuschagne⁷⁶³ or Pradel,⁷⁶⁴ explained that having faith in judges as the necessary element to strike a correct balance. This is indeed, a daring but reliable scheme that the authors imagine here in giving the democracy’s sake into the arbiters of the law’s hands. This could be then a first solution to the problematic of balance of interests, which needs to be solve to avoid terrible events as *Theo Van Gogh’s murder*,⁷⁶⁵ or the misunderstanding among a same nation as during the *Piss Christ events in Avignon*.⁷⁶⁶

Nonetheless, this is a very heavy role weighing on the judges, if they are the guarantee of the democracy and respect of fundamental rights. It is to be hoped that in such circumstances, legislators and executive could help in legislating or instituting certain core values to give them guidance. In addition, such heavy role relying on the judges can only function in a true democracy where separation of power is respected. In a case as

⁷⁶² Laurent Pech, ‘The Law of Holocaust Denial in Europe: Towards a (qualified) EU-wide Criminal Prohibition’, *Jean Monnet Working Paper*, No 10/09, NYU School of Law, New York, 2009, p. 1. Available online at: <http://centers.law.nyu.edu/jeanmonnet/papers/09/091001.pdf>.

⁷⁶³ B.C. Labuschagne, ‘Religious Freedom and Newly-Established Religions in Dutch Law’, Vol. 44 *Netherlands International Law Review* Issue 2 , 1997, pp 168-185, p. 185. doi:10.1017/S0165070X00004435.

⁷⁶⁴ Jean Pradel, ‘La liberté d’expression, jusqu’où? Brèves remarques sur quelques affaires récentes’, in Dir. Danielle Corrigan-Carsin, *La Liberté de Critique*, Lexis Nexis, Litec, Paris, 2007, 215p, p.140.

⁷⁶⁵ Part II. A.

⁷⁶⁶ Part II. B.

Hungary, if the separation of powers continue to disappear, the anyone at the Head of State can rule upon fundamental freedom and erase their name from the constitutional principles.

Secondly, there is the legitimate solution of deciding and striking a balance to the prime respect of the 'only' declared absolute right. As enounced previously, this is human dignity.⁷⁶⁷ A strong and absolute right reaffirm by all means, especially after the inhumanity of the second world war. It thus would be easy to institute limits through human dignity. Indeed, if freedom of speech has to be limited, then it can legitimately be limited when infringing or impinging on human dignity. This would be for instance, one of the way to justify censorship over Holocaust denial, and the criminalisation of genocide denial. Indeed, such hurtful speech go against human dignity, then could shall not benefit from the protection conferred to free speech. In a matter of fact, the ECtHR ruled that it was out of the scope of the protection conferred by Article 10 ECHR.⁷⁶⁸

Thirdly, a certain proportionality must be respected and implied while striking a balance between different rights. We know that the proportionality test of the ECtHR usually refers to the violation by the State, and if such infringement would be necessary in a democratic society. In a same manner, to limit freedom of expression in competition with other rights, it should be analysed if the limitation of free speech is necessary regarding the standards of a democratic society, if the offense cause by freedom of expression impinges on other rights. Then, we should then be guided to strike this balance, by the standards of a typical democratic society. For instance, the analysed examples below gave the opportunity to observe 'liberticidal freedoms'. This shall give the indication and direction of what is right and what must be stopped. Indeed, if a free speech completely prevents the use and practice of freedom of religion, or if someone is killed for his speech like Van Gogh, in the name of religion, this is a liberticidal freedom. Something is then so wrong that it endangers democracy, conducted by fanaticism and fundamentalism.

⁷⁶⁷ ECtHR, *Pretty v. the United Kingdom*, Application No. 2346/02 of 29 April 2002, para. 65; ECtHR, *Vereinigung Bildender Künstler v. Austria*, Application No 68354/01 of 25 January 2007, para. 8.

⁷⁶⁸ E.g., ECtHR, *Lehideux and Isorni v. France*, Application No 24662/94, 23 September 1998; ECtHR, *Garaudy v. France*, Application No. 65831/01, December 2003.

This limitation by striking a balance is also directed by the State, and here arise the question of its responsibility. Indeed, these three solutions to guide, protect or limit freedom of expression direct us to the second problematic of the topic, regarding the dialectic role of the State on the protection of freedom of expression.

Before, freedom of expression has been most commonly protected by the law through negative obligations. These negative obligations are for instance, the prohibition of censorship, prohibition of charges on publication, the prohibition to filter public speaker with no reasons. Nowadays, after the study of our four examples in part II and part III, there is a question arising concerning the role of the State. Should the State itself intervene or stay out of these issues? Is there a need for more regulations to frame a developing and enriching society? For instance and as observed, Netherlands is pretty relax and liberal within its legislation and standards or tolerance among the population. The Kingdom has even gradually modified its legislation to integrate a multicultural diversity inherent to a new Dutch society. However, the Van Gogh incident, echo to the assassination of Pim Fortyun two years before in Netherlands, could testify that what is allowed by the States is not digested by certain section of the population. There would be then a positive obligation of States to limit freedom of expression when it is offending, which is a hard task. Yet, the general movement in Europe tending to prohibit genocide denial shows a slow and progressive dialectic towards a positive obligation of States to protect interests that could be offended by an unlimited free speech for instance. Therefore, there is a sort of need of censorship to prevent offenses and damages, moral damages as well as physical with demonstrations entailed. Unfortunately, free speech shall then not be unlimited, because too many persons can abuse of words and their meaning without care. Especially, in a context of growing extremism as mentioned before, where right-wing parties do not pay attention to a common duty of memory not to forget human atrocities committed in the past century. It is particularly dangerous to allow anyone to speak about anything when people can still be so easily manipulated, and others will always be thirsty for power.

A contrario, if there is a positive obligation of too liberal states to intervene to limit damages of unlimited freedoms, States like Hungary would have an obligation to respect fundamental rights that the political scheme seems to undermine. In a society evolving

in an anti-democratic manner, freedom of speech is nonetheless still possible; especially for instance, thanks to mainly the architecture of the worldwide web which does not ease governmental controls and censorships. However, it is to fear that new instruments such as the ACTA agreements could help even more States willing to undermine freedom of expression. Let's hope that States and society would go towards a broader protection of freedom of expression, not towards its limitation.

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