



**Tilburg Law School**

**LLM Law and Technology**

2019-2020

**Master's Thesis**

**The Assessment on Justifiability of the Licensing Mechanism for Online Broadcasting  
and Regulatory Policy Recommendations**

Author: **Göksu Özok**

Supervisor: **Emre Bayamlioğlu**

ANR: **u719391**

Second Reader: **Dr. Colette Cuijpers**

SNR: **2032920**

July 2020

## TABLE OF CONTENTS

|                                                                                                                                                         |    |
|---------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| INTRODUCTION.....                                                                                                                                       | 4  |
| 1. Background.....                                                                                                                                      | 4  |
| 2. Research Question .....                                                                                                                              | 9  |
| 2.1. Sub-questions.....                                                                                                                                 | 9  |
| 3. Structure and Methodology .....                                                                                                                      | 10 |
| CHAPTER I .....                                                                                                                                         | 11 |
| BROADCAST LICENSING MECHANISM IN THE FRAMEWORK OF ARTICLE 10 OF THE ECHR .....                                                                          | 11 |
| 1. The freedom of expression and the general regulatory regime of the press and broadcasting.....                                                       | 11 |
| 1.1. General considerations on freedom of expression and its scope .....                                                                                | 12 |
| 1.2. The freedom of the press and the press regime.....                                                                                                 | 14 |
| 2. How is broadcasting licensing mechanism regulated under Article 10 of ECHR and in the case law of the ECtHR?.....                                    | 17 |
| 2.1. The meaning of broadcasting.....                                                                                                                   | 17 |
| 2.2. A brief history of licensing mechanism .....                                                                                                       | 18 |
| 2.3. The meaning of the third sentence for traditional broadcasting and the broadcast regime .....                                                      | 19 |
| 3. Rationales aiming to justify the differential regulation between broadcasting media and the press media .....                                        | 22 |
| 3.1. Public Interest Rationale .....                                                                                                                    | 22 |
| 3.2. Economic Scarcity Rationale.....                                                                                                                   | 24 |
| 3.3. Pervasiveness and invasiveness of broadcasting .....                                                                                               | 25 |
| 3.4. Availability to children/Protecting children.....                                                                                                  | 26 |
| 4. Interim Conclusion .....                                                                                                                             | 27 |
| CHAPTER 2.....                                                                                                                                          | 29 |
| EXAMINATION OF THE CONDITIONS ENABLING THE ONLINE BROADCASTING LICENSING MECHANISM TO BE JUSTIFIED.....                                                 | 29 |
| 1. The ECtHR case law on licensing of online broadcasting in the framework of Article 10 .....                                                          | 29 |
| 1.1. General Remarks.....                                                                                                                               | 29 |
| 1.2. The three-step test.....                                                                                                                           | 31 |
| 2. Do the rationales aiming to justify differential regulation between printed media and traditional broadcast media apply to online broadcasting?..... | 35 |
| 2.1. Definition of online broadcast and the similarities between the traditional and online broadcasting .....                                          | 35 |

|                                                                                        |    |
|----------------------------------------------------------------------------------------|----|
| 2.2. Public Interest Rationale .....                                                   | 37 |
| 2.3. Economic scarcity rationale .....                                                 | 38 |
| 2.4. Pervasiveness and intrusiveness.....                                              | 39 |
| 2.5. Availability to children/Protecting children.....                                 | 41 |
| 3. Turkey as an example .....                                                          | 42 |
| 4. Interim Conclusion .....                                                            | 46 |
| CHAPTER 3.....                                                                         | 48 |
| REGULATORY POLICY OPTIONS AND RECOMMENDATIONS .....                                    | 48 |
| 1. General Remarks .....                                                               | 48 |
| 2. The regulatory policy options for online broadcasting media .....                   | 48 |
| 2.1. Subjecting online broadcasting media to the traditional broadcasting media regime | 49 |
| 2.2. Subjecting online broadcasting media to the press regime .....                    | 51 |
| 3. An evaluation of the regulatory policy options .....                                | 53 |
| CONCLUSION .....                                                                       | 55 |
| BIBLIOGRAPHY .....                                                                     | 59 |

# INTRODUCTION

## 1. Background

A broadcast licence is a legal contract between a broadcaster and a regulator. Such a licence brings licensees the responsibility to respect the terms of that licence. The regulator is entitled to take remedial action in the case where a licensee acts against the terms of the licence. A broadcast licence provides its owner the right to use a spectrum allocated to her. It protects the licensee against others willing to use and/or abuse the spectrum.<sup>1</sup> Traditionally, licensing regulation is envisaged for radio and T.V. broadcasting media ('traditional broadcasting'). However, it seems like it does not remain limited to traditional broadcasting only. Recently, Turkey has introduced the same licensing regulation<sup>2</sup>, and some other countries have introduced similar regulations<sup>3</sup>, to the broadcastings that are being aired on the Internet ('online broadcasting') on the grounds of protecting citizens from harmful material considering its power, influence and ability to impact immediately.<sup>4</sup> However, any licensing implementations on online broadcasting raise concerns on the compatibility of online broadcasting licensing mechanism with the European Convention on Human Rights ('the ECHR' or 'the Convention') and the case-law of the European Court of Human Rights ('the ECtHR' or 'the Court').

The Internet has expanded rapidly in recent years. The number of Internet users was 16 million in 1995 (0.4% of the world population) in the world.<sup>5</sup> By June 2020, there were 4648 million Internet users.<sup>6</sup> That constitutes 59.6% of the world population.<sup>7</sup> The World Wide Web has expanded drastically as well. In parallel, new web technologies have emerged. A Web user, currently, has access to a vast amount of information. Not only to the text and still graphics but also streaming videos and audios are available on the Web. These developments enable content

---

<sup>1</sup> Eve Salomon, *Independent Regulation of Broadcasting: A Review of International Policies and Experiences* (UNESCO 2016) p. 19.

<sup>2</sup> The Regulation on the Transmission of Radio, Television, and On-Demand Services on the Internet. The Official Gazette, 1 August 2019, no. 30849. <<https://www.resmigazete.gov.tr/eskiler/2019/08/20190801-5.htm>> accessed 6 July 2020.

<sup>3</sup> 'Saudi Arabia Now Forcing News Bloggers to Obtain Licenses, Promote Islam' (*fastcompany*, 2011) <<https://www.fastcompany.com/1716303/saudi-arabia-now-forcing-news-bloggers-obtain-licenses-promote-islam>> accessed 7 March 2020; 'Regulation of Internet Content Services in China (I)' (*zhonglun*, 2018) <<http://www.zhonglun.com/Content/2018/01-25/1135317692.html>> accessed 7 March 2020.

<sup>4</sup> *Betty Purcell and others v. Ireland* Application no. 15404/89 (16 April 1991).

<sup>5</sup> 'Internet Growth Statistics 1995 To 2019 - The Global Village Online' (*Internetworldstats.com*, 2020) <<https://www.internetworldstats.com/emarketing.htm>> accessed 28 July 2020.

<sup>6</sup> *ibid.*

<sup>7</sup> *ibid.*

providers to broadcast information in just the same way as their counterparts in the T.V. and radio industry.<sup>8</sup>

The licensing of broadcasting (both traditional and online broadcasting) bears the risk of violating the freedom of expression. One of the concerns is that the regulatory authority, that is entitled to issue broadcast licenses, might be subject to regulatory capture<sup>9</sup> by the political actors or the broadcast industry.<sup>10</sup> The decision of a dependent regulator on licensing would bear the risk of being subjective in terms of determining who would have a right to transmit the information.<sup>11</sup> Such dependency may affect the process of license granting or renewal. The regulator may refrain from issuing a license to the broadcasters who do not adopt its ideology. In this case, the broadcasters would tend to meet the biased requirements determined by the regulator. In order to obtain the license, the broadcasters would alter the content that they provide. As a result, regulators' decisions will directly affect the nature of the available content. Therefore, the risk of arbitrary decisions of the regulators raises questions.

Instances of such arbitrary decisions have been seen in the past. The National Television and Radio Commission in Armenia, the regulatory body for licensing, denied granting a licence to an Armenian broadcasting company on seven occasions without providing any tangible reasons. Another example of failure in renewing the license in order to enforce the political agendas can be found during 'the Troubles' in Northern Ireland. The U.K. government, in 1988, used licensing conditions to prevent broadcastings that aimed to enable the voices of some members of a political group to be heard.<sup>12</sup>

The influence of governmental officials on the regulatory body has also been seen outside Europe. One of the most evident instances occurred in the United States. The case was about the denial of the renewal of the license in 1970 and 1972 for a Miami television station

---

<sup>8</sup> Stephen J Shapiro, 'One and the Same: How Internet Non-Regulation Undermines the Rationales Used to Support Broadcast Regulation' (1999) 8 *Media L & Pol'y* p. 1.

<sup>9</sup> 'Regulatory capture occurs when a government's regulatory agency, which was created in the public interest, ends up advancing the political or commercial concerns of the very people, companies or entities it is supposed to be regulating.' 'What Is Regulatory Capture? Definition And Meaning - Market Business News' (*Market Business News*, 2020) <<https://marketbusinessnews.com/financial-glossary/regulatory-capture-definition-meaning/>> accessed 12 August 2020.

<sup>10</sup> Wendy M. Rogovin, 'The Regulation of Television in the Public Interest: On Creating a Parallel Universe in Which Minorities Speak and Are Heard', (1992) 42 *CATH. U. L. REV.* 51, 70-71.

<sup>11</sup> Eve Salomon, *Independent Regulation of Broadcasting: A Review Of International Policies And Experiences* (UNESCO 2016) p. 19.

<sup>12</sup> Clare Feikert-Ahalt, 'Limits On Freedom Of Expression: United Kingdom' (*Loc.gov*, 2019) <<https://www.loc.gov/law/help/freedom-expression/uk.php>> accessed 4 March 2020.

which is owned by the Washington Post.<sup>13</sup> The regulatory body attempted to deny the renewal as a punishment for Washington Post's coverage of the Watergate break-in.<sup>14</sup> Although these are the examples for traditional broadcast media, there is no guarantee such arbitrariness will not take place when licensing online broadcasting.

The licensing mechanism comprises the notion that individuals need permission to use a certain communication channel from the national regulatory authorities or governments.<sup>15</sup> Withholding such permission may induce censorship, coerces or punishments.<sup>16</sup> Even the sole possibility of losing permission causes self-censorship.<sup>17</sup> Morris Ernst expressed this issue in 1926 as follows: '*So long as the Government can determine which individuals shall be endowed with larynxes it does not need additional power to determine what shall be said*'<sup>18</sup>

The online broadcasting license may be new and rare. Currently, Turkey is the only signatory country of the ECHR implementing such mechanism. However, it has a great ability to enable the regulators to have control over what is aired. In this sense, it is likely that more governments will introduce regulation on online broadcast licenses into their systems. Nevertheless, the licensing mechanism may constitute a risk to freedom of expression. Therefore, the conditions under which such mechanism is compatible with the ECHR and the case-law of the ECtHR should be examined. The compatibility of the licensing mechanism for radio and T.V. broadcasting with human rights has been discussed in the literature, in particular by authors from the U.S. They examined whether there are legitimate aims that justify the differential regulation between each media.<sup>19</sup> The authors have discussed whether traditional broadcast should be regulated as printed media by making an analogy between the characteristics of printed and traditional broadcast media.<sup>20</sup>

---

<sup>13</sup> Ronald W Adelman, 'First Amendment and the Metaphor of Free Trade, The ' (1996) 38 Ariz L Rev 1125, 1153.

<sup>14</sup> *ibid*

<sup>15</sup> Robert Horvitz, 'Media Licensing, Convergence and Globalization' p. 3  
<[https://www.researchgate.net/publication/228199056\\_Media\\_Licensing\\_Convergence\\_and\\_Globalization](https://www.researchgate.net/publication/228199056_Media_Licensing_Convergence_and_Globalization)>  
accessed 28 July 2020.

<sup>16</sup> Christopher Weare, Titus Levi and Jordan Raphael, 'Media Convergence and The Chilling Effect Of Broadcast Licensing' (2001) 6 Harvard International Journal of Press/Politics p. 47-70.

<sup>17</sup> *ibid*

<sup>18</sup> Robert Horvitz, 'Media Licensing, Convergence and Globalization' p. 3  
<[https://www.researchgate.net/publication/228199056\\_Media\\_Licensing\\_Convergence\\_and\\_Globalization](https://www.researchgate.net/publication/228199056_Media_Licensing_Convergence_and_Globalization)>  
accessed 28 July 2020.

<sup>19</sup> Thomas W. Hazlett, 'The Rationality Of U. S. Regulation Of The Broadcast Spectrum' (1990) 33 The Journal of Law and Economics.; Josephine Soriano, 'The Digital Transition And The First Amendment: Is It Time To Reevaluate Red Lion's Scarcity Rationale' (2005) 15 Pub. Int. LJ.

<sup>20</sup> *ibid*.

The Court has prevented the governments from putting prior restraints to the print media. An independent and free press is seen as vital to the effective functioning of democracy. However, the Court was not that protective when it was determining that the governments might regulate the radio and T.V. broadcast. Plenty rationales have been set forth by the Court and commentators to justify this differential regulation. It is significant to understand the reasons behind the differential regulation between each media. In this way, it can be evaluated whether or not the same rationales could be applied to justify a licensing mechanism for online broadcasting. Thus, the same exercise that the U.S. authors did can be done for online broadcasting.

The differential regulation was firstly justified on technical grounds.<sup>21</sup> Accordingly, unlike printed media, broadcast media has suffered from the scarcity of frequency that was causing broadcasters to interfere with others' broadcasts ('scarcity doctrine').<sup>22</sup> To solve this interference problem, governments commenced to licence broadcasters and to regulate broadcast content.<sup>23</sup> However, a need for other grounds to justify the differential regulation arose when this technical ground started to lose its validity due to technological developments. In order to continue licensing traditional broadcast, the Court introduced different rationales based on the different social, technical and economic characteristics of both media.

Nonetheless, although it has an identical communicative capacity as the broadcast media, the Internet managed to remain free from such regulations until the recent past.<sup>24</sup> However, as explained, this situation started to reverse as it can be seen in Turkey. The Turkish government presents the same rationales mentioned above to regulate online broadcasting. Are these rationales also applicable to online broadcasting to justify the licensing mechanism in general? Moreover, regardless of the rationales applicable to online broadcasting, are there any other requirements that need to be met within the scope of the ECHR?

Since the idea of licensing online broadcasting is relatively new, there is a lack of research on its compatibility with human rights. Therefore, the author of this thesis aims to fill the gap in the literature by making the same kind of analogy as the U.S. authors have done regarding traditional broadcasting. In this manner, it is aimed to evaluate under which

---

<sup>21</sup> Dominika Bychawska-Siniarska, *Protecting the Right To Freedom Of Expression Under The European Convention On Human Rights* (Council of Europe 2017) p.94.

<sup>22</sup> Matthew L Spitzer, 'Controlling the Content of Print and Broadcast' (1985) 58 S CAL L REV 1349, 1352.

<sup>23</sup> Anne P Jones and Harry W Quillan, 'Broadcasting Regulation: A Very Brief History' [1985] 37 FED COMM LJ 107, 107.

<sup>24</sup> Stephen J Shapiro, 'One and the Same: How Internet Non-Regulation Undermines the Rationales Used to Support Broadcast Regulation' (1999) 8 Media L & Pol'y p. 2.

circumstances a licensing mechanism for online broadcasting is compatible with human rights as acknowledged in the way of the ECHR and within the jurisprudence of the ECtHR. By going one step further, the author tried to determine the appropriate regulatory option (regulating online broadcasting in the same way as print media or in another way) for online broadcasting.



## **2. Research Question**

In light of the above information, the following research question can be raised:

*Within the jurisprudence of the European Court of Human Rights and in the framework of freedom of expression, under what conditions could a licencing mechanism for online broadcasting be justifiable and how should it be regulated?*

### **2.1. Sub-questions**

The sub-questions raised to answer the main research question are as follows:

- 1. How is the licensing mechanism regulated in Article 10 of the ECHR and within the case-law of the ECtHR?*
- 2. Why is traditional broadcast regulated differently than the printed media?*
- 3. To what extent do the rationales aiming to justify the differential regulation of traditional broadcasting apply to online broadcasting?*
- 4. What are the different regulatory policy options for online broadcasting licensing mechanism, and which regulatory policy option should apply to it to comply with Article 10?*

### **3. Structure and Methodology**

The thesis consists of three chapters. In the first chapter, firstly, it is aimed to determine how the licensing mechanism could be situated within Article 10 of the ECHR and how it is handled within the case-law of the ECtHR. In order to do that, firstly the scope of freedom of expression, and the freedom of the press and the press regime are explained by using the case-law of the ECtHR. Under this part, Article 10 of the ECHR is examined. An expository approach is adopted when analysing the case-law of the ECtHR. In the second part of this chapter, firstly, the meaning of broadcasting in the scope of this thesis, a very brief history of broadcasting is given. Following, the third sentence of Article 10, which prescribes the differential regulation between printed and traditional broadcast media, is examined and the traditional broadcasting regime is explained. The press regime and traditional broadcast regime are regulated differently, the rationales behind the differential regulation are presented in the third part. Four prevailing rationales -respectively public interest, economic scarcity, pervasiveness and intrusiveness of traditional broadcasting, and protection of children- are determined as the reasons for differential regulation. It is discussed whether these rationales constitute a legitimate aim for licensing mechanism in general. Each rationale is discussed by also referring to the opposing views in the literature.

In the second chapter, firstly, the conditions (legitimacy, legality, necessity) that are necessary for the licensing mechanism to be justified are mentioned with an expository approach by using the case-law of the ECtHR. Herein, the three-step test, which used by Court to assess whether interference is justifiable, is explained. In the second section, firstly, the legitimacy requirement is analysed. To evaluate legitimacy condition, firstly, the similarities between traditional and online broadcast media are presented. Following this, the applicability of the rationales to online broadcasting is discussed. To present an example of licensing mechanism in practice and to evaluate the legality and necessity conditions, Turkey is used as an illustration since these two criteria depend on the specifics of national implementations, and hence they should be evaluated on the basis of a specific regulation.

In the last chapter, it is aimed to find an answer to the question regarding the regulation of online broadcasting license mechanism in the frame of Article 10. In this manner, different regulatory policy options that were discussed in the literature are presented. The regulatory policy options discuss whether traditional broadcasting or the press regime should apply to online broadcasting media.

## CHAPTER I

### BROADCAST LICENSING MECHANISM IN THE FRAMEWORK OF ARTICLE 10 OF THE ECHR

This chapter is divided into three sections. In section one, firstly, within the framework of Article 10 of the ECHR, general remarks on freedom of expression, including the scope of the right and the restrictions, are given. Following this, information on freedom of the press and the press regime is provided. In this way, it is aimed to put forward the different regimes regarding licensing regulation between press media and broadcast media. In the second section, after the meaning of broadcasting within the context of this thesis is explained, a very brief history of licensing mechanism is provided. Finally, the broadcasting regime and the legal basis of licensing mechanism are explained in connection with the third sentence of Article 10. The last section presents and explains the reasons/rationales that are aiming to justify the differential regulation between the press and the traditional broadcast media.

#### **1. The freedom of expression and the general regulatory regime of the press and broadcasting**

The freedom of expression is regulated under Article 10 of the ECHR. The freedom of the press, on the other hand, is not explicitly mentioned under Article 10. Nevertheless, the ECtHR presented some principles and rules granting the press a special status that enables the press to enjoy the freedoms incorporated in Article 10.<sup>25</sup> In the scope of this thesis, the freedom of the press is taken into hand in particular to present the differential regulatory regimes between the press and broadcast (radio and T.V.) media. As it is further explained, the freedom of press does not allow any permission, licence or control mechanism prior to publication. However, it brings a liability to the publishers over the content they have published. On the other hand, the broadcast media can be subject to prior restraints. It does not benefit fully from freedom of press regime in order to protect the citizens from the harmful content as it has a greater power, influence and ability to impact immediately<sup>26</sup>. Understanding the legal basis and the reasons behind the differential regulation of each media is significant to determine which regulatory regime could be applied to online broadcasting. Thus, freedom of the press providing a special

---

<sup>25</sup>Dominika Bychawska-Siniarska, *Protecting the Right to Freedom Of Expression Under The European Convention On Human Rights* (Council of Europe 2017) p. 87.

<sup>26</sup> *Betty Purcell and others v. v. Ireland* App no 15404/89 (ECHR 16 April 1991).

protection to the press requires further attention, whereas understanding the freedom of expression is equally important as the broadcasting regime is defined by its scope.

### 1.1. General considerations on freedom of expression and its scope

The right to freedom of expression is a fundamental human right.<sup>27</sup> It is significant since it constitutes a basis for the protection of all other fundamental rights.<sup>28</sup> The ECtHR, in its case law, emphasised the importance of the right to freedom of expression as one of the preconditions of a democratic society.<sup>29</sup> It stated that "*freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment*".<sup>30</sup>

States shall not interfere with the rights protected under Article 10 (*negative obligation*). However, they are also responsible for ensuring adequate protection of these rights among individuals by acting positively (*positive obligation*).<sup>31</sup> The positive obligation of states includes protecting individuals' rights against private or non-state actors.<sup>32</sup>

Article 10 is composed of two paragraphs.<sup>33</sup> The freedoms protected has been laid down in the first paragraph, whereas the conditions of legitimate restrictions are prescribed in the second.<sup>34</sup> Paragraph one also determines the scope of the right. Three elements of the freedom of expression are outlined in Article 10. These are outlined respectively:<sup>35</sup>

---

<sup>27</sup> The European Convention on Human Rights, Article 10.

<sup>28</sup> Toby Mendel and Eve Salomon, 'Freedom of Expression And Broadcasting Regulation' (2011) 8 CI Debates 1, 17.

<sup>29</sup> *Handyside v. United Kingdom* App no 5493/72 (ECHR 7 December 1976) § 49; *Lingens v. Austria* App no 9815/82 (ECHR 8 July 1986) § 42; *Özgür Gündem v. Turkey* App no 23144/93 (ECHR 16 March 2000).

<sup>30</sup> *Jersild v Denmark* App no 15890/89 (ECHR 23 September 1994) § 31.

<sup>31</sup> *Özgür Gündem v. Turkey* App no 23144/93 (ECHR 16 March 2000) § 43; *Fuentes Bobo v. Spain* App no 39293/98 (ECHR 29 May 2000) § 38; *Appleby and Others v. the United Kingdom* App no 44306/98 (ECHR 6 May 2003) § 39.

<sup>32</sup> UN Human Rights Committee (HRC), *General comment no. 34, Article 19, Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/34 para 7 <<https://www.refworld.org/docid/4ed34b562.html>> accessed 4 March 2020.

<sup>33</sup> 1. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

2. *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary"* The European Convention on Human Rights, Article 10.

<sup>34</sup> Rikke Frank Jørgensen, 'Internet and Freedom of Expression' (Master Thesis, Raoul Wallenberg Institute 2001) 33.

<sup>35</sup> The European Convention on Human Rights, Article 10.

- *The freedom to hold opinions*: brings states the obligation of not to indoctrinate its citizens and not to discriminate between those having different opinions and others.<sup>36</sup> This right also allows its owners to form and express their opposing thoughts freely.<sup>37</sup>
- *The freedom to impart information and ideas*: provides citizens the right to disseminate information and ideas through any lawful means and sources.<sup>38</sup>
- *The freedom to receive information and ideas*: provides citizens the right to seek and get information and ideas through any lawful means and sources.<sup>39</sup>

Not only individuals but also the legal entities are protected under Article 10.<sup>40</sup> The Court, in several cases, explicitly stated that Article 10 applies to "everyone".<sup>41</sup> Moreover, in *Autronic AG v. Switzerland*, the Court extended the protection "*not only to the content of information but also to the means of transmission or reception since any restriction imposed on the means necessarily interferes with the right to receive and impart information.*"<sup>42</sup> Such means of transmission include, among other things, oral<sup>43</sup> or printed forms,<sup>44</sup> radio broadcasts,<sup>45</sup> and electronic information systems.<sup>46</sup>

The *Autronic AG v. Switzerland* is significant. It extends the protection of the Article 10 to the means of transmission. As a result, any restriction that is made on the means of transmission would necessarily fall under the scope of the freedom of expression and requires an examination of compatibility with it. In other words, it allows us to analyse, within the frame of freedom of expression, whether a licensing mechanism could be introduced to different transmission means such as press, broadcast or Internet media. As a result, the licensing mechanism as a restriction by its very nature (explained further in the following parts) would need to meet the requirements defined by the ECHR and the case-law of ECtHR in order to be justifiable.

---

<sup>36</sup> Rikke Frank Jørgensen, 'Internet and Freedom Of Expression' (Master Thesis, Raoul Wallenberg Institute 2001) 34.

<sup>37</sup> *ibid.*

<sup>38</sup> *ibid.*

<sup>39</sup> *ibid.*

<sup>40</sup> *Autronic AG v. Switzerland* App no 12726/87 (ECHR 22 May 1990) § 47.

<sup>41</sup> *Sunday Times v UK* App no 6538/74 (ECHR 26 April 1979); *Markt Intern Verlag GmbH and Klaus Beermann v Germany* App no 10572/83 (ECHR 20 November 1989); *Groppera Radio AG and Others v Switzerland* App no 10890/84 (ECHR 28 March 1990).

<sup>42</sup> *Autronic AG v. Switzerland* App no 12726/87 (ECHR 22 May 1990) § 47; *Oberschlick v. Austria* App no 11662/85 (ECHR 23 May 1991) §57.

<sup>43</sup> *Schöpfer v. Switzerland* App no 25405/94 (ECHR 20 May 1998).

<sup>44</sup> *Handyside v. UK* App no 5493/72 (ECHR 7 December 1976).

<sup>45</sup> *Groppera Radio AG and Others* judgment of 28 March 1990 Series A no. 173.

<sup>46</sup> *Times Newspapers Ltd v. the United Kingdom* (nos. 1 and 2) 3002/3 and 23676/03 [2009] EMLR 14.

Freedom of expression is a qualified right.<sup>47</sup> In other words, it is not absolute. Thus, according to Article 10(2) it may be restricted when; 1) such restriction is *prescribed by law*,<sup>48</sup> 2) restriction aims to protect at least one of the *legitimate interests* listed in paragraph two,<sup>49</sup> and 3) restriction is *necessary in a democratic society* to protect the legitimate interest.<sup>50</sup> These three conditions are cumulative. The Court applies a 'three-step test'. It examines whether each of the conditions is met in order to evaluate the justifiability of the restriction.<sup>51</sup> A detailed explanation on three-step test is provided in the second chapter.

## 1.2. The freedom of the press and the press regime

The freedom of the press can simply be defined as '*the freedom of individuals to express themselves through the medium of the press*'.<sup>52</sup> It aims to prevent previous restraints upon publications and the censorship of ideas or opinions.<sup>53</sup> It gives individuals not only a right to impart their information and ideas before the public without having any prior permission but also gives the public a right to receive them.<sup>54</sup> However, the liability of publishers on the content which they have published remains. In other words, they can be held responsible for the improper, illegal or mischievous content of its publications.<sup>55</sup> Because it is considered that the publisher has the opportunity, knowledge and editorial control over her publication's content.<sup>56</sup>

Press freedom is an integral part of freedom of expression. The press enjoys the rights and freedoms that are under the scope of Article 10. Both the freedom of expression and the press covers the individual journalists' right of expressing their opinion, and press institutions' rights to inform people. In order to ensure the protection of a free press, both rights bring the states not only a negative obligation to avoid from intervening these rights, but also a positive

---

<sup>47</sup> Clare Feikert-Ahalt, 'Limits On Freedom Of Expression: United Kingdom' (*Loc.gov*, 2019) <<https://www.loc.gov/law/help/freedom-expression/uk.php>> accessed 4 March 2020.

<sup>48</sup> *Gaweda v Poland* Application no 26229/95 ECHR 2002 II; *Sunday Times v UK* (1979) 2 EHRR 245.

<sup>49</sup> *Observer and Guardian v UK* App no 13585/88 (ECHR 26 November 1991).

<sup>50</sup> *Tolstoy Miloslavsky v. the UK* [GC] App no 18139/91 (13 July 1995) § 59; *Długolecki v. Poland* App no 23806/03 (ECHR 24 May 2009).

<sup>51</sup> Rikke Frank Jørgensen, 'Internet and Freedom of Expression' (Master Thesis, Raoul Wallenberg Institute 2001) 39.

<sup>52</sup> 'Freedom of Press: The Concept' (*Shodhganga.inflibnet.ac.in*)

<[https://shodhganga.inflibnet.ac.in/bitstream/10603/52360/8/08\\_chapter%201.pdf](https://shodhganga.inflibnet.ac.in/bitstream/10603/52360/8/08_chapter%201.pdf)> accessed 3 July 2020 p.13.

<sup>53</sup> *ibid.*

<sup>54</sup> Rikke Frank Jørgensen, 'Internet and Freedom of Expression' (Master Thesis, Raoul Wallenberg Institute 2001) 38.

<sup>55</sup> 'Freedom of Press: The Concept' (*Shodhganga.inflibnet.ac.in*)

<[https://shodhganga.inflibnet.ac.in/bitstream/10603/52360/8/08\\_chapter%201.pdf](https://shodhganga.inflibnet.ac.in/bitstream/10603/52360/8/08_chapter%201.pdf)> accessed 3 July 2020 p.13.

<sup>56</sup> *ibid.*

obligation to improve the press freedom. The states have a role as a guarantor against the interference of private and public actors.<sup>57</sup>

Freedom of the press has mainly the following goals: *‘to protect the content delivered by the press’* and *‘to ensure that structural questions do not render the exercise of the functions of the press impossible or too difficult’*.<sup>58</sup> The structural questions may be some legal requirements or other conditions such as administrative obstacles to the media. It embodies, among others, excessive registration, accreditation and licensing requirements, unjustified denial of access to information or favouring state-owned media.<sup>59</sup>

Freedom of the press protects products and emissions of audio-visual communication media as well as printed publications. It includes, radio and T.V. However, the question of whether online content and the means used for transmitting such content are protected under press freedom remains controversial.<sup>60</sup> In this manner, the online editions of traditional media, Internet journalistic publications, blogs or any kind of non-professional journalistic activities stay in the grey zone.<sup>61</sup> Nevertheless, such activities, without any doubt, fall under the scope of freedom of expression.<sup>62</sup>

The third sentence of Article 10 sets up a regime that does not grant permission or licensing mechanism to the press. It acknowledges a different level of protection of freedom of expression between press and broadcast media by its wording. It brings an exemption for broadcasting by explicitly stating that it does not prevent *‘states from requiring the licensing of broadcasting, television or cinema enterprises’*. In contrast, it allows the press to benefit from the high-level protection of freedom of expression by excluding it from the scope of the third sentence. In other words, it renders possible states to bring a license obligation to broadcasters, whereas it forbids the implementation of such prior restraint to publishers. The different regulatory regime regarding broadcast media is explained further in the following parts.

---

<sup>57</sup> Majority Oji, 'Comparative Media Systems A Global View ff Press Freedom' (2000) 6 International Journal of Communication p. 422; *Özgür Gündem v. Turkey* App no 23144/93 (ECHR 16 March 2000) § 43.

<sup>58</sup> European Parliament, 'Press Freedom In The EU Legal Framework And Challenges' (2015) p. 4 accessed 28 July 2020 <<https://www.europarl.europa.eu/EPRS/EPRS-Briefing-554214-Press-freedom-in-the-EU-FINAL.pdf>>.

<sup>59</sup> *ibid.*

<sup>60</sup> *ibid.*

<sup>61</sup> *ibid.*

<sup>62</sup> *ibid.*

The Court considers, among other things, censorship prior to publishing as the most severe interference since it ceases the transmission of information and ideas.<sup>63</sup> It acknowledges the fact that even a temporary limitation may cause a loss in the value of information.<sup>64</sup> Thus, it subjects the measure taken prior to publication such as the licensing of journalists or prohibition of publication, to very strict control.<sup>65</sup> The Court states that Article 10 ‘*does not in terms prohibit the imposition of prior restraints on publication...*’.<sup>66</sup> Nevertheless, it emphasizes that ‘*the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court*’.<sup>67</sup>

Alongside determining the level of protection for the press media, the Court also identified the prerequisites of prior restraints in *RTBF*.<sup>68</sup> Accordingly, prior restraint should be based on clear and foreseeable national regulations; should be scrutinised in detail and justified; may be only for a temporary and limited time.<sup>69</sup> Nevertheless, in general, the requirement for prior authorisation before publication is not compatible with Article 10 and not acceptable in democratic societies.<sup>70</sup>

Finally, an example of strict scrutiny for press media and censorship incident prior to publication can also be seen in *Gaweda* case.<sup>71</sup> The domestic courts of Poland refused the registration of the title of a periodical on the ground that their title was conflicted with reality. The Court stated that such refusal is ‘*tantamount to a refusal to publish it*’ and stated that the laws regarding the registration of periodical were not clear and foreseeable, and it is dangerous as it prevents the transmission on information from the very beginning. The Court held that:

*Although Article 10 of the Convention does not in terms prohibit the imposition of prior restraints on publications..., the relevant law must provide a clear indication of the circumstances when such restraints are permissible and, a fortiori, when the consequences of the restraint are to block publication of a periodical completely. This is so because of*

---

<sup>63</sup> Dominika Bychawska-Siniarska, *Protecting the Right To Freedom Of Expression Under The European Convention On Human Rights* (Council of Europe 2017) p.35.

<sup>64</sup> *Sunday Times v UK (No. 2)* App no 13166/87 (ECHR 26 November 1991) § 51; *Observer and Guardian v UK* App no 13585/88 (ECHR 26 November 1991).

<sup>65</sup> *RTBF v. Belgium* App no. 5008/06 (ECHR 29 March 2011) § 114-115.

<sup>66</sup> *Sunday Times v UK (No. 2)* App no 13166/87 (ECHR 26 November 1991) § 51.

<sup>67</sup> *Observer and Guardian v UK* App no 13585/88 (ECHR 26 November 1991).

<sup>68</sup> *RTBF v. Belgium* App no. 5008/06 (ECHR 29 March 2011) § 114-115.

<sup>69</sup> *ibid.*

<sup>70</sup> *Wizerkaniuk v. Poland* App no 18990/05 (ECHR 5 July 2011).

<sup>71</sup> *Gaweda v Poland* App no 26229/95 (ECHR 14 March 2002).



*the potential threat that such prior restraints, by their very nature, pose to the freedom of expression guaranteed by Article 10<sup>72</sup>*

## **2. How is broadcasting licensing mechanism regulated under Article 10 of ECHR and in the case law of the ECtHR?**

### **2.1. The meaning of broadcasting**

Within the scope of this thesis, ‘*broadcasting*’ is used in two different ways to differentiate the medium where broadcasting takes place. Nevertheless, regardless of the medium that it is aired, broadcasting refers to ‘...*electronic transmission of radio signals that are intended for general public reception, as distinguished from private signals that are directed to specific receivers...*’<sup>73</sup>

The first type of broadcasting regarding its medium is named as ‘*traditional broadcasting*’ since it is the conventional way of broadcasting. Traditional broadcasters commonly distribute their radio or television content linearly. This means that the broadcast contents can be accessed by receivers only at the particular time that they are aired, and on the particular channel that they are offered.<sup>74</sup> Typical networks of the broadcast are, e.g. ‘*analogue and digital terrestrial television, cable, satellite, or broadband-based internet protocol television (IPTV)*’.<sup>75</sup>

Secondly, ‘broadcasting’ refers to the broadcastings that their content delivered via the public Internet.<sup>76</sup> Therefore, it is named as ‘*online broadcasting*’. Just like the traditional broadcasters, online broadcasters also use radio waves to transmit their services via the Internet.<sup>77</sup> Thus, phone lines are not needed.<sup>78</sup> Every Wireless Internet user has a radio receiver and antenna.<sup>79</sup> Unlike traditional broadcasters, online broadcasters propose ‘non-linear’

---

<sup>72</sup> *ibid* § 40.

<sup>73</sup> Roger Manvell, 'Broadcasting' (*Encyclopedia Britannica*) <<https://www.britannica.com/technology/broadcasting>> accessed 5 July 2020.

<sup>74</sup> European Parliament, ‘Regulating online TV and radio broadcasting’ (2019) <[https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS\\_BRI\(2018\)620217](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2018)620217)> accessed 5 March 2020 p.2.

<sup>75</sup> *ibid*.

<sup>76</sup> Tyler Cooper, 'Cable, Satellite, IPTV & OTT Streaming: What's the Difference?' - *Broadband Now*' (*Broadband Now*, 2016) <<https://broadbandnow.com/report/cable-vs-satellite-vs-iptv-vs-ott-streaming/#:~:text=Essentially%2C%20IPTV%20is%20a%20formally,Internet%20and%20streamed%20on%20demand.>> accessed 5 July 2020.

<sup>77</sup> 'Worldconnx - Wireless FAQ' (*Worldconnx.net*, 2020) <[http://www.worldconnx.net/wireless\\_faq#:~:text=Wireless%20Internet%2C%20commonly%20referred%20to,effective%20solution%20for%20Internet%20access.&text=Each%20Wireless%20Internet%20subscriber%20has%20a%20small%20radio%20receiver%20and%20an%20antenna.](http://www.worldconnx.net/wireless_faq#:~:text=Wireless%20Internet%2C%20commonly%20referred%20to,effective%20solution%20for%20Internet%20access.&text=Each%20Wireless%20Internet%20subscriber%20has%20a%20small%20radio%20receiver%20and%20an%20antenna.)> accessed 5 July 2020.

<sup>78</sup> *ibid*.

<sup>79</sup> *ibid*.

content. In other words, such content services have autonomy in offering users an opportunity ‘to decide what they want to watch, where to watch it, when, and on which device’.<sup>80</sup> To distinguish it from the former, the author chose to name it as ‘online broadcasting’. More information on online broadcasting is provided in the following chapter. The explanations in this part are only regarding the meaning of the third sentence for traditional broadcasting.

## 2.2. A brief history of licensing mechanism

The history of the licensing system should be taken into hand along with the history of media regulation. As it is mentioned in the first chapter, the licensing system itself is a way of regulating the media.

The history of regulations on media commences with the printed media from the mid-15<sup>th</sup> century in Western Europe.<sup>81</sup> With the expansion of the printing industry and trade, both state and the church were interested in controlling the content of what was printed and published in order to fight against the heresy or dissenting ideas. As it might be expected, licensing of all printers by the state and/or the requirement of prior approval by the church were used as a tool to control the content.<sup>82</sup> Such restrictions on printed media were lessened between the 16<sup>th</sup> and 19<sup>th</sup> centuries in North America and Western Europe. Freedom to publish was achieved in Britain and France at the end of the 1700s.<sup>83</sup> Austrian and Prussian Empires had followed them, and the restrictions on the rights of authors had decreased during the nineteenth century.<sup>84</sup> Whereas such rights have been gained until much later in the twentieth century in Japan or British colonies, in some countries, the freedom of the press is still at stake.<sup>85</sup>

After having learnt that radio waves, among other things, could be used for communication, broadcasting (radio and television) has come into use. Initially, some problems occurred due to the lack of spectrum. Stations tried to broadcast using the same frequency. Even though some broadcasters agreed on sharing their time, some intervened others' broadcasts by

---

<sup>80</sup> European Parliament, ‘Regulating online TV and radio broadcasting’ (2019) <[https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS\\_BRI\(2018\)620217](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2018)620217)> accessed 5 March 2020 p.2.

<sup>81</sup> Denis McQuail, '1. Introduction' (*Le.ac.uk*, 2020) <[https://www.le.ac.uk/oerresources/media/ms7501/mod2unit11/page\\_01.htm](https://www.le.ac.uk/oerresources/media/ms7501/mod2unit11/page_01.htm)> accessed 5 May 2020.

<sup>82</sup> *ibid.*

<sup>83</sup> *ibid.*

<sup>84</sup> *ibid.*

<sup>85</sup> *ibid.*; At the present time, in Lebanon, the publishers most obtain a license to provide their services. Freedom House, ‘License to Censor: The use of media regulation to restrict press freedom – Lebanon’ (2011) <<https://www.refworld.org/docid/4eccefc521.html>> accessed 28 July 2020.

using stronger signals.<sup>86</sup> Despite the increasing number of the spectrum, the same issue continued as '*the radio spectrum simply is not large enough to accommodate everybody*'.<sup>87</sup> This situation created the need for having a mechanism preventing station from interfering with each other.<sup>88</sup> As a ramification, this paved the way for the licensing mechanism regulated by the states. The governments, on this wise, have put restraints on licensees in favour of others.<sup>89</sup> Nevertheless, broadcast media has never achieved the same level of freedom enjoyed by the print media.<sup>90</sup>

### **2.3. The meaning of the third sentence for traditional broadcasting and the broadcast regime**

The third sentence of Article 10 permits the states to bring broadcasters an obligation to obtain a *broadcasting* license by its wording: '*This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises*'.<sup>91</sup>

The third sentence has been introduced to Article 10 at a later stage of the preparatory work on the Convention by virtue of technical reasons.<sup>92</sup> Thereat, there were only a limited number of frequencies. It did not constitute a problem since most of the European states had a monopoly on broadcasting at that time. However, with the entry of private media companies to the broadcasting market and dissolution of state monopoly, the available frequencies on which broadcasters willing to provide their services were not enough to accommodate everyone. Herein, the licensing mechanism was presented as a solution. Although the licensing mechanism was accepted as an interference to the freedom of expression and the freedom of the press, it was justified on the grounds that there was scarcity of frequencies (scarcity doctrine).<sup>93</sup> The necessity of allocating the frequencies was considered as a legitimate aim. In other words, the aim of this interference is deemed legitimate under the third sentence of Article

---

<sup>86</sup> 'Broadcasting - The History of Radio, The History Of Television, The Future Of Radio And Television, Cable Television' (*Law.jrank.org*, 2020) <<https://law.jrank.org/pages/4884/Broadcasting.html>> accessed 5 May 2020.

<sup>87</sup> *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190 (1943).

<sup>88</sup> *ibid.*

<sup>89</sup> Federal Communications Commission, 'The Scarcity Rationale For Regulating Traditional Broadcasting: An Idea Whose Time Has Passed' (2005) 2.

<sup>90</sup> Denis McQuail, '1.2 The Historical Background To Media Regulation' (*Le.ac.uk*, 2020) <[https://www.le.ac.uk/oerresources/media/ms7501/mod2unit11/page\\_02.htm](https://www.le.ac.uk/oerresources/media/ms7501/mod2unit11/page_02.htm)> accessed 5 May 2020.

<sup>91</sup> The third sentence of Article 10 of the ECHR.

<sup>92</sup> Dominika Bychawska-Siniarska, *Protecting the Right To Freedom Of Expression Under The European Convention On Human Rights* (Council of Europe 2017) p.94.

<sup>93</sup> *Demuth v Switzerland* App no 38743/97 (ECHR 5 February 2003) § 30.

10, although the interference meets none of the legitimate aims laid out in the second paragraph.<sup>94</sup> The Court expressed this matter in *Informationsverein Lentia v Austria* as follows:

*The purpose of that provision [the third sentence] is to make it clear that States are permitted to regulate by a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects. Technical aspects are undeniably important, but the grant or refusal of a licence may also be made conditional on other considerations, including such matters as the nature and objectives of a proposed station, its potential audience at national, regional or local level, the rights and needs of a specific audience and the obligations deriving from international legal instruments.*<sup>95</sup>

As a result, The Court did not wotedly apply the three-step test, which is evaluating whether a restriction to freedom of expression is justifiable, in cases regarding the licensing of broadcasting. There is no need for any legitimate aim listed in paragraph two since the legitimacy requirement already met under the third sentence for the reason that spectrum was scarce. However, the compatibility of the interference with the Convention must still be assessed considering the other requirements (*legality* and *necessity*) prescribed in the second paragraph.<sup>96</sup> Herein, the Court explained further:

*This may lead to interferences whose aims will be legitimate under the third sentence of paragraph 1, even though they do not correspond to any of the aims set out in paragraph 2. The compatibility of such interferences with the Convention must nevertheless be assessed in the light of the other requirements of paragraph 2.*<sup>97</sup>

In this manner, the examples of interferences can be seen in the case law of the ECtHR. Failure to provide reasons for refusal to grant a T.V. broadcasting license has been subjected to the case law of the Court.<sup>98</sup> An Armenian broadcasting company has joined seven different tenders subsequently to get a broadcasting frequency. The National Television and Radio Commission, the regulatory body for licensing which has its members appointed by the President of Armenia, awarded the tender to another company each time. However, it did not state any reasons. The ECtHR stated that all the decisions should be duly reasoned and transparent in order to prevent arbitrary interference. It concluded that there was an interference

---

<sup>94</sup> *Informationsverein Lentia v Austria* [GC] App nos 13914/88, 15041/89, 15717/89; 15779/89, 17207/90 (24 November 1993) § 32.

<sup>95</sup> *ibid.*

<sup>96</sup> *ibid*; *Groppera Radio AG and Others v Switzerland* App no 10890/84 (ECHR 28 March 1990) § 61.

<sup>97</sup> *Informationsverein Lentia v Austria* [GC] App nos 13914/88, 15041/89, 15717/89; 15779/89, 17207/90 (24 November 1993) § 32.

<sup>98</sup> *Meltex Ltd and Movsesyan v. Armenia* App no 32283/04 (ECHR 17 June 2008).

with the freedom to impart information and ideas of the Armenian broadcasting company, and the requirement of lawfulness was not met.

Nevertheless, this reasoning becomes irrelevant due to the technological developments in broadcasting techniques (e.g. digital broadcasting).<sup>99</sup> The ECtHR also acknowledged this fact in the *Informationsverein Lentia* case by stating that ‘*the technical progress made over the decades, justification of these restrictions can no longer today be found in considerations relating to the number of frequencies and channels available*’.

The applicability of the third sentence to traditional broadcasting still needs to be evaluated in the light of current developments. The reasoning which is used to justify the licensing mechanism (scarcity doctrine) for traditional broadcasting is losing its validity. There are alternative ways of preventing interference with regulatory tools which are less restrictive.<sup>100</sup> The licence requirement for modern types of devices becomes no longer justifiable when assessed under the necessity test.<sup>101</sup>

As a result, new rationales/legitimate aims are being introduced to continue licensing. The third sentence still allows a licensing mechanism but on different grounds. For instance, it is acknowledged even in democratic societies that placing restrictions on content to protect citizens –especially children- from harmful material is reasonable considering the broadcasting’s power, influence and ability to impact immediately.<sup>102</sup>

The new rationales constitute a legitimate aim -just like the scarcity rationale- to justify the implementation of the licensing mechanism. Nevertheless, license granting procedure or refusal of a license should still be evaluated in the frame of the second paragraph of Article 10. In other words, this restriction should be ‘prescribed by law’ and ‘necessary in a democratic society to pursue a legitimate aim’.<sup>103</sup>

As scarcity rationale justifying the licensing mechanism has begun to lose its validity, the applicability of new rationales/legitimate aims are discussed by the Court in order to

---

<sup>99</sup> Dominika Bychawska-Siniarska, *Protecting the Right to Freedom Of Expression Under The European Convention On Human Rights* (Council of Europe 2017) p.94.

<sup>100</sup> ‘One of these tools is the opening up of ranges of the spectrum for shared use, and the adoption of a certification system for devices which transmit data within these ranges’ D Simons, ‘The Legitimacy Of Licence Requirements For The Use Of Wireless Communications Devices’ (Article 19 Global Campaign for Free Expression 2005).

<sup>101</sup> *ibid.*

<sup>102</sup> *Betty Purcell and others v. v. Ireland* App no 15404/89 (ECHR 16 April 1991).

<sup>103</sup> *Informationsverein Lentia v Austria* [GC] App nos 13914/88, 15041/89, 15717/89; 15779/89, 17207/90 (24 November 1993) § 32.

continue licensing. These rationales are presented in the following part. By doing that it is aimed to evaluate whether the same rationales can be applied to online broadcasting to justify a regulation on online broadcasting license. In this way, it is aimed to determine which regulatory regime should be adopted in order to regulate online broadcasting: the regime of press or the regime of traditional broadcast.

### **3. Rationales aiming to justify the differential regulation between broadcasting media and the press media**

The printed media enjoys a high level of protection of Article 10 of the ECHR, unlike the broadcasting media. In other words, it is less likely to introduce a restriction to printed media than broadcast media. For example, it is possible to introduce a licensing mechanism (the licensing mechanism is a restriction of freedoms by its very nature) to broadcastings and not to the printed media. The Court aimed to justify this difference by presenting different rationales from past to present. The same exercise done by the Court for printed media and traditional broadcasting should also be done for traditional broadcasting and online broadcasting. In this way, we can have an insight into how to/not to introduce a licensing mechanism to online broadcasting. In the following part, the rationales aiming to justify the differential regulation between press media and broadcasting media is examined. When the occasion arises, the U.S. Court's decisions are also used for the reason that the conceptual discussion of the rationales are presented exhaustively by the U.S. Court.

#### **3.1. Public Interest Rationale**

Public interest, in a general manner, can be defined as *'the complex of supposed informational, cultural and social benefits to the wider society which goes beyond the immediate, particular and individual interests of those who communicate in public communication'*.<sup>104</sup>

Media has a significant role in rendering public interest. A well-functioning media is not only an efficient tool to inform, entertain and educate people or foster public debate but also promotes equity, accountability and fairness in society by enabling different opinions to be

---

<sup>104</sup> Denis McQuail, *Media Performance: Mass Communication And The Public Interest* (Sage Publications 1992) 3.

heard.<sup>105</sup> Its main goal is to ensure the public to take a role in democratic discourse by enabling the existence of a wide range of views and levels of opinion.<sup>106</sup>

The role of media and its function in a democratic society is one of the main principles established in the case law of the ECtHR and in Article 10 of the ECHR. The Court emphasized the task of media several times as imparting information and ideas in regards to the matters of public interest; acting as public watchdog; serving the need for impartial, independent and balanced news and information.<sup>107</sup> Although its reasoning was formulated primarily regarding to print media, it applied these principles also to the audio-visual media.<sup>108</sup>

At this point some questions arose: ‘If both the press and the broadcast media have the duty of rendering public interest, why does an obligation to obtain a license to provide their services apply only to broadcasters and not to newspapers?’, and ‘How does licensing mechanism help media to render public interest?’

The entry of the licensing mechanism to the history is with the liberalization of broadcasting markets.<sup>109</sup> The governments aimed to regulate market entry by introducing a licensing system after the abolishment of state monopoly in broadcasting.<sup>110</sup> Along with the entrance of new competitors in the broadcasting market, a new problem emerged: the scarcity of frequencies. The issue was that more broadcasters were willing to provide their services than the number of available frequencies. As a result, frequencies accepted as public goods,<sup>111</sup> governments took the initiative to allocate frequencies in order to prevent interference between channels domestically and internationally, thus, to enable competing for broadcaster’s voices to be heard clearly. This technical necessity, in conjunction with public interest rationale, paved the way for the justification of the licensing mechanism for broadcasting whereas such interference was strictly forbidden in printed media.

---

<sup>105</sup> Ralph Akinfeleye, ‘Fourth Estate of The Realm Or Fourth Estate Of The Wreck: Imperative Of Social Responsibility Of The Press’ (the University of Lagos, 2003) p. 31.

<sup>106</sup> ‘WACC | In the Public Interest: Public Broadcasting In Germany And Europe Under Review’ (Waccglobal.org, 2018) <<https://waccglobal.org/in-the-public-interest-public-broadcasting-in-germany-and-europe-under-review/>> accessed 5 July 2020.

<sup>107</sup> *Jersild v Denmark* App no 15890/89 (ECHR 23 September 1994) § 31.; *Centro Europa 7 S.R.L. and Di Stefano v. Italy* [GC] App no 38433/09 (7 June 2012) § 132.; Dirk Voorhoof, ‘Restrictions On Television Advertising And Article 10 Of The European Convention On Human Rights’ (1993) 12 *International Journal of Advertising* 189, 196.

<sup>108</sup> *Jersild v Denmark* App no 15890/89 (ECHR 23 September 1994) § 31; *Centro Europa 7 S.R.L. and Di Stefano v. Italy* [GC] App no 38433/09 (7 June 2012) § 132.

<sup>109</sup> Karen Donders, Caroline Pauwels and Jan Loisen, *Private Television In Western Europe* (Palgrave Macmillan 2013) p. 38-41.

<sup>110</sup> Stylianos Papathanassopoulos and Ralph Negrine, *European Media* (UK: Polity 2011) 31-36.

<sup>111</sup> Peter J. Humphreys, *Mass Media and Media Policy in Western Europe* (Manchester University Press 1996) p. 112.

In this manner, allocating the frequencies to the broadcasters who offer the best service is in the public interest. The licensing mechanism renders public interest through the formulation of license conditions. Governments use the licensing mechanism to develop the public interest by nudging private broadcasters to follow societal objectives,<sup>112</sup> such as protecting minors and ensuring diversity in politics and information.<sup>113</sup> The broadcasters who are not following societal objectives are in danger of the revocation of their licenses or not obtaining a new license in the renewal process. Therefore, it shapes the media system in the public interest by ensuring the content aired is in accordance with societal objectives. The licensing mechanism also promotes public interest through application requirements. It does not allow one person or organization to hold more than a certain number of licences.<sup>114</sup> Thus, it prevents the ownership concentration.

To sum up, the media has a role in acting in the public interest. This is the case for both the press and the broadcast media. However, a licensing mechanism is not applicable to press as it has no scarcity of sources as broadcast has. Nevertheless, the scarcity of frequencies is not enough to justify the different regulation (a licensing mechanism) between both media. Herein, the public interest rationale comes forward. Accordingly, the licensing mechanism helps broadcast media to act in the public interest, firstly, by nudging broadcasters to follow societal objectives; secondly, by ensuring the maintenance of the societal objectives by preventing the ownership concentration.

### **3.2. Economic Scarcity Rationale**

The economic scarcity rationale, or ‘industry structure rationale’ as Spitzer calls, aims to justify the greater regulation of broadcast media than print media based on the reason that economics of supply and demand in each industry differs. Hence, the broadcast media is subject to the licensing, whereas print media is not.<sup>115</sup> In other words, since the financial resources of broadcasters are not the same, there is a risk of monopolization or becoming oligarchical in the media industry. Under this theory, the inequality in having access to the medium will undermine the diversity of opinions expressed, therefore the functioning of democracy.<sup>116</sup> Thus, it is argued

---

<sup>112</sup> Mike Feintuck and Mike Varney, *Media Regulation, Public Interest and the Law* (Edinburgh, UK: Edinburgh University Press, 2006) p. 74-125.

<sup>113</sup> Andrey Rikhter, 'Broadcast Licensing Law: Experience in Central Asia And South Caucasus' OSCE p. 2.

<sup>114</sup> Michele Polo, *Regulation for Pluralism In The Media Markets.* " *The Economic Regulation Of Broadcasting Markets: Evolving Technology And The Challenges For Policy* (UK: Cambridge University Press 2007) p. 171-172.

<sup>115</sup> Matthew L Spitzer, 'The Constitutionality of Licensing Broadcasters' (1989) 64 NYU L Rev 990, 1020; Stephen J Shapiro, 'One and the Same: How Internet Non-Regulation Undermines the Rationales Used to Support Broadcast Regulation' (1999) 8 MEDIA L & POL'Y 19.

<sup>116</sup> *ibid.*



that the Government should regulate the broadcasting media to secure ‘a free market place of ideas through a variety of independent media outlets’.<sup>117</sup> On the other hand, under this theory, the print media does not suffer from the same problems; hence, cannot be constitutionally licensed.<sup>118</sup>

In this connection, the state monopoly in broadcast media and prevention of private broadcasters’ entry to the market has been discussed in *Radio ABC vs Austria*.<sup>119</sup> The Court, in accordance with the Commission’s report of 11 April 1996,<sup>120</sup> held that prohibiting private broadcasters to enter into market constitutes a restriction on the freedom to impart information, and was not necessary in a democratic society. Therefore, it infringed Article 10(2). This decision is significant to show that the Court gave importance to prevent monopolisation in the broadcast market and to create a diversity of opinion expressed.<sup>121</sup>

### 3.3. Pervasiveness and invasiveness of broadcasting

Broadcasting is the most common and effective means of communication. According to the *State of Online Video-2019 Report*, the average hours of watching T.V. per week is 8.03 globally.<sup>122</sup> The U.S. takes the lead with 10.33 hours per week. This number reduces to 9.83 in Italy, 9.38 in France, 8.46 in U.K. and 6.83 in Germany.<sup>123</sup> These statistics show that broadcasting is pervasive in our lives. It is also clear that whoever controls the access to audio-visual broadcasts and retains the authority to determine their content; they will be in a position to influence and direct the listeners and viewers.<sup>124</sup> Herein, a licensing mechanism is put forward to regulate broadcasting media which is a great part of our lives.

Moreover, as it was also discussed by the Court in *Betty Purcell v. Ireland*, traditional media has considerable power and influence.<sup>125</sup> They have a higher and more immediate impact than printed media. ‘The possibilities for the broadcaster to correct, qualify, interpret or comment on any statement made on radio or television are limited in comparison with those

---

<sup>117</sup> Walter Berka and Hannes Tretter, 'Public Service Media Under Article 10 Of the European Convention on Human Rights' [2013] EBU p. 11.

<sup>118</sup> Matthew L Spitzer, 'The Constitutionality of Licensing Broadcasters' (1989) 64 NYU L Rev 990, 1020.

<sup>119</sup> *Radio ABC vs. Austria* Application App no 19736/92 (ECHR 20 October 1997).

<sup>120</sup> *ibid.*

<sup>121</sup> Stephen J Shapiro, 'One and the Same: How Internet Non-Regulation Undermines the Rationales Used to Support Broadcast Regulation' (1999) 8 MEDIA L & POL'Y 19.

<sup>122</sup> See 'THE STATE OF ONLINE VIDEO 2018' (*Limelight.com*, 2020)

<<https://www.limelight.com/resources/white-paper/state-of-online-video-2018/#popular>> accessed 6 July 2020 for a detailed analyse based on gender, age and type of content.

<sup>123</sup> *ibid.*

<sup>124</sup> Eve Salomon, *Independent Regulation of Broadcasting: A Review of International Policies and Experiences* (UNESCO 2016) p. 15.

<sup>125</sup> *Betty Purcell and others v. Ireland* App no 15404/89 (ECHR 16 April 1991).

*available to journalists in the press*'. The Court also stated that it is likely that live statements involve a risk of transmitting coded messages which cannot be controlled even by conscientious journalists within the exercise of their professional judgment.<sup>126</sup> As a result, it held that the restrictions on broadcast media could be reasonably considered as 'necessary in a democratic society'.

A similar explanation was made by the U.S. Court. It held that since the audience is continually tuning in and out, they cannot protect themselves from unexpected program content despite the existing prior warnings.<sup>127</sup> To explain it further, the Court made an analogy. Accordingly, turning off the radio to avoid further offence when one hears indecent language is like running away after the first blow of an assault.<sup>128</sup> Neither of the acts does give a constitutional immunity to the offender or avoid harm which has already occurred.<sup>129</sup> Furthermore, the Court stated that the written media are not as intrusive as broadcasting since readers faced with an indecent material can disregard the content by averting their eyes.

To sum up, traditional broadcasting is deemed less worthy than printed media to benefit from the full protection of Article 10 as it is more pervasive in our lives and more intrusive.

### **3.4. Availability to children/Protecting children**

Another rationale aiming to justify the differential regulation between printed and broadcast media is broadcast's availability and accessibility to children. Accordingly, broadcasting has a uniquely invasive and pervasive nature that might have an adverse impact on the children audience. Although this rationale is similar to the previous one, it is taken into hand under a different heading. The reason behind that is that the governments place a particular importance on protecting children, and it can be seen very often in their discourse when making a regulation.

Although the hours of T.V. consumption are reducing every passing year, children still spend a significant amount of time watching T.V.<sup>130</sup> Moreover, it is accessible even to the children who cannot read.<sup>131</sup> The average hours of T.V. consumption among U.K. children

---

<sup>126</sup> *ibid.*

<sup>127</sup> *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978) at 748.

<sup>128</sup> *ibid.*

<sup>129</sup> *ibid.*

<sup>130</sup> 'Hours of TV Consumption By Children By Age UK 2019 | Statista' (*Statista*, 2020)

<<https://www.statista.com/statistics/397833/hours-of-media-consumption-by-children-by-media-uk/>> accessed 6 July 2020.

<sup>131</sup> *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978) at 749.

aged between zero to 8 are 14.35 hours, and 13.9 by children aged 8 to 12 per week.<sup>132</sup> This number rises to 16.2 hours by children aged zero to eight, and 32,2 hours by children aged 8 to 12 in the U.S.<sup>133</sup>

Moreover, the offensive expression might easily be adopted by the young without restricting the expression at the source. Children are considered as a special audience as they have ‘distinctive characteristics and needs’.<sup>134</sup> It is accepted that particular types of quality content should be encouraged while potentially harmful content such as violent programming and advertising is discouraged.<sup>135</sup> Therefore, broadcasting kept under higher scrutiny.<sup>136</sup> It includes the issuance of a broadcasting license that can be periodically assessed by regulatory bodies. Thus, the broadcasters who do not meet the criteria set by regulatory bodies (such as broadcasting at least 1500 hours of children’s programmes a year) may not obtain a broadcasting license during the renewal process.<sup>137</sup>

#### **4. Interim Conclusion**

The right to freedom of expression, along with the freedom of the press is protected under Article 10 of the ECHR. These rights and freedoms are not absolute and can be restricted under certain circumstances. Broadcast licensing mechanism is one of the restrictions to such rights and freedoms. The ECHR, by virtue of the third sentence of the Article 10, entitles states to establish a broadcast licensing mechanism for traditional broadcasts whereas it prevents printed media to be subjected to any kind of authorisation or licensing mechanism. In other words, the press and the broadcast media are subjected to a different level of scrutiny of Article 10, and they have different regimes. Although this differential regulation was justified prior on the grounds of the scarcity of frequencies, the Court acknowledged that this rationale becomes invalid due to the technological developments in broadcasting techniques. Thus, the ECtHR introduces various rationales to justify differential regulation between the press and

---

<sup>132</sup> 'Hours of TV Consumption by Children by Age UK 2019 | Statista' (*Statista*, 2020) <<https://www.statista.com/statistics/397833/hours-of-media-consumption-by-children-by-media-uk/>> accessed 6 July 2020.

<sup>133</sup> Puja Bhattacharjee, 'How Does Your Child's Screen Time Measure Up?' (*CNN*, 2017) <<https://edition.cnn.com/2017/11/15/health/screen-time-averages-parenting/index.html>> accessed 6 July 2020; also see 'Daily TV Consumption by Age Germany 2020 | Statista' (*Statista*, 2020) <<https://www.statista.com/statistics/380266/daily-tv-consumption-germany/>> accessed 6 July 2020 for the statistics on daily time spent watching television in Germany by age group.

<sup>134</sup> David Buckingham, 'A Special Audience? Children and Television' [2005] in J. Wasko (ed.), *A Companion to Television*, London: Blackwell, p. 468, 468.

<sup>135</sup> Jeannette Steemers and Alessandro D'Arma, 'Evaluating and Regulating the Role of Public Broadcasters In The Children'S Media Ecology: The Case Of Home-Grown Television Content' (2012) 8 *International Journal of Media & Cultural Politics* 67, 68.

<sup>136</sup> *ibid* p. 79.

<sup>137</sup> *ibid* p. 80.

broadcasting media, and the introduction of the licensing mechanism to the latter. These rationales are namely, ‘public interest rationale’, ‘economic scarcity rationale’, ‘pervasiveness and invasiveness of broadcasting’ and ‘availability to children/protecting children’. The applicability of those rationales to online broadcasting is one of the matters that should be discussed in order to evaluate whether a licensing mechanism can be introduced to online broadcasting and to determine a regulatory regime for online broadcasting. This issue is taken into hand in the next chapter.

## CHAPTER 2

### EXAMINATION OF THE CONDITIONS ENABLING THE ONLINE BROADCASTING LICENSING MECHANISM TO BE JUSTIFIED

This chapter is divided into four sections. In the first section, the licensing mechanism of online broadcasting is examined in the framework of Article 10 of the ECHR and the case-law of the ECtHR. In this section, the emphasis is placed on the fact that the online licensing mechanism is a type of restriction and can be justified only if it meets certain requirements (legitimacy, legality, necessity). Herein, the three-step test that is conducted by the Court regarding the justifiability of a restriction is explained. The second section, given the similarities between the traditional and online broadcast media and within the frame of the legitimacy requirement, evaluates whether the rationales aiming to justify the differential regulation between print and traditional broadcast media are applicable to online broadcast media. In the third section, Turkey is presented as an illustration of the exercise of online broadcasting license mechanism in practice. Moreover, the compatibility of such mechanism in Turkey with Article 10 is evaluated. Herein, an emphasize is placed on the legality and necessity conditions. The author decided to explain these two requirements using an example as they are evaluated on a case by case basis, unlike legitimacy requirement which can be evaluated in general regarding the licensing mechanism.

#### 1. The ECtHR case law on licensing of online broadcasting in the framework of Article 10

##### 1.1. General Remarks

The ECtHR has not taken into hand the licensing mechanism of online broadcasting, per se. However, as it is mentioned in Chapter 1, Article 10 includes the right to receive and impart information. Additionally, it is applicable to the numerous means and forms through which the information is transmitted and received.<sup>138</sup> Certain enterprises are expressly mentioned concerning the means of transmission in the last sentence of the first paragraph. The Internet as an information tool, inevitably, falls under the scope of Article 10.<sup>139</sup> The Court has also acknowledged that the Internet plays an important role in facilitating the dissemination of information and enabling the public's access to news considering its accessibility and capacity

---

<sup>138</sup> *Autronic AG v. Switzerland* App no 12726/87 (ECHR 22 May 1990) § 47; *De Haes and Gijssels v. Belgium* App no 19983/92 (ECHR 24 February 1997) § 48.

<sup>139</sup> European Courts of Human Rights, 'Internet: case law of the European Court of Human Rights' (2015) <[https://www.echr.coe.int/Documents/Research\\_report\\_internet\\_ENG.pdf](https://www.echr.coe.int/Documents/Research_report_internet_ENG.pdf)> accessed 6 July 2020 p.40.

to store a vast amount of information.<sup>140</sup> In addition, the Court asserted the significance of the right to receive information from private individuals and legal entities. It stated that not only the political and social news is protected by Article 10, but also cultural expressions and entertainment.<sup>141</sup> In this manner, online broadcasting as a means of communication and transmitting information benefits from the protection of Article 10.

However, like other media, the Internet is also subject to formalities, conditions, restrictions or penalties. Nevertheless, these interferences should be prescribed by law, legitimate and necessary in a democratic society. Thus, any measure limiting the public's access to information and ideas of public interest should be justified with a strong reason.<sup>142</sup> Any interference restricting access to the Internet is under the strict scrutiny of Article 10 and the ECtHR.<sup>143</sup> The Court, in *Ahmet Yildirim's Case*,<sup>144</sup> indicated that although it is not a complete ban to the Internet, a restriction on Internet access is still highly significant:

*(...) since the Internet has now become one of the principal means by which individuals exercise their right to freedom of expression and information, providing as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest.*<sup>145</sup>

Nevertheless, the Court added that such prior restraint is not necessarily incompatible with Article 10. However, a legal framework and effective judicial review to prevent any abuse of power should be in place.<sup>146</sup>

In this manner, the licensing mechanism for online broadcasting should also be considered in close relation with Article 10. In exactly the same way as traditional broadcasting, online broadcasting is a way to disseminate and transmit information. It plays an important role in promoting the public interest. Therefore, it requires at least the same level of protection as traditional broadcasting.

---

<sup>140</sup> *Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2)* App nos 3002/3, 23676/03 (ECHR 10 March 2009).

<sup>141</sup> *Khurshid Mustafa and Tarzibachi v. Sweden* App no 23883/06 (ECHR 16 December 2008).

<sup>142</sup> *Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2)* App nos 3002/3, 23676/03 (ECHR 10 March 2009) § 40-41.

<sup>143</sup> European Courts of Human Rights, 'Internet: case law of the European Court of Human Rights' (2015) <[https://www.echr.coe.int/Documents/Research\\_report\\_internet\\_ENG.pdf](https://www.echr.coe.int/Documents/Research_report_internet_ENG.pdf)> accessed 6 July 2020 p.46.

<sup>144</sup> *Ahmet Yildirim v. Turkey*, App no 3111/10 (ECHR, 18 March 2013).

<sup>145</sup> *ibid* § 64.

<sup>146</sup> *ibid*.

As it is explained before, the licensing mechanism is a restriction to freedom of expression by its very nature. In this manner, a licensing mechanism applied to online broadcasting inevitably constitutes a restriction. The question arises on whether such restriction could be justified, as it has been done for traditional broadcasting, also for online broadcasting. In order to justify its restriction on freedom of speech, any licensing regulation must be legitimate, legal and necessary in a democratic society.

## 1.2. The three-step test

Herein, the Court assesses the interferences with the freedom of expression by using a three-step test. Accordingly, the exercise of freedom of expression may only be interfered by the domestic authorities in the contracting states where three cumulative conditions are met:<sup>147</sup>

- The interference is prescribed by law.<sup>148</sup> The interference may be in the form of a ‘formality’, ‘condition’, ‘restriction’ or ‘penalty’.<sup>149</sup>
- The interference aims at protecting one or more of the interests or values counted in the second paragraph of Article 10.<sup>150</sup> These are as follows:  
*National security; territorial integrity; public safety; prevention of disorder or crime; protection of health; morals; reputation or rights of others; preventing the disclosure of information received in confidence; and maintaining the authority and impartiality of the judiciary*<sup>151</sup>
- The interference is necessary in a democratic society.<sup>152</sup>

The main goal of Article 10 is to secure everyone’s freedom of expression. Thus, interferences should be interpreted strictly. The Court explained the meaning of strict interpretation in *The Sunday Times* case as follows:

*Strict interpretation means that no other criteria than those mentioned in the exception clause itself may be at the basis of any restrictions, and these criteria, in turn, must be understood in such a way that the language is not extended beyond its ordinary meaning.*

---

<sup>147</sup> Dominika Bychawska-Siniarska, *Protecting the Right to Freedom of Expression Under The European Convention On Human Rights* (Council of Europe 2017) p.33.

<sup>148</sup> *Sunday Times v UK* App no 6538/74 (ECHR 26 April 1979); *Gaweda v Poland* App no 26229/95 (ECHR 14 March 2002)

<sup>149</sup> Paragraph 2 of The European Convention on Human Rights, Article 10.

<sup>150</sup> *Observer and Guardian v UK* App no 13585/88 (ECHR 26 November 1991).

<sup>151</sup> The European Convention on Human Rights, Article 10.

<sup>152</sup> *Tolstoy Miloslavsky v. the UK* [GC] App no 18139/91 (13 July 1995) § 59; *Długolecki v. Poland* App no 23806/03 (ECHR 24 May 2009).

*In the case of exceptional clauses (...) the principle of strict interpretation meets certain difficulties because of the broad wording of the clause itself. It nevertheless imposes a number of clearly defined obligations on the authorities.*<sup>153</sup>

In this way, the Court established a legal standard favourably balancing the freedom of the individual against the state's claim of overriding interest.<sup>154</sup> In case the Court finds that all three conditions are met, the interference of the governments will be considered justifiable.<sup>155</sup> Where the state has failed to prove one of the conditions, the Court will not continue examining the case and hold that the interference was not justified.<sup>156</sup> Thus, it will hold that freedom of expression was violated.

### 1.1.1. Legality

Legality condition requires any interference with the freedom of expression to have a basis in domestic law. The rule must be written and adopted by parliament. However, the Court held that the common law<sup>157</sup> and public international law rules<sup>158</sup> also satisfy this condition. Moreover, this condition refers to the quality of law. In this manner, the law has to be public, accessible, predictable and foreseeable.<sup>159</sup> The Court stated in *The Sunday Times* case:

*Firstly, the law has to be adequately **accessible**: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to **foresee**, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.*<sup>160</sup>

---

<sup>153</sup> *Sunday Times v UK* App no 6538/74 (ECHR 26 April 1979) § 194.

<sup>154</sup> Dominika Bychawska-Siniarska, *Protecting the Right to Freedom of Expression Under the European Convention on Human Rights* (Council of Europe 2017) p.33.

<sup>155</sup> *ibid.*

<sup>156</sup> *ibid.*

<sup>157</sup> *Sunday Times v UK* App no 6538/74 (ECHR 26 April 1979).

<sup>158</sup> *Autronic AG v. Switzerland* App no 12726/87 (ECHR 22 May 1990).

<sup>159</sup> Dominika Bychawska-Siniarska, *Protecting the Right to Freedom of Expression Under the European Convention on Human Rights* (Council of Europe 2017) p.40

<sup>160</sup> (emphasis added) *Sunday Times v UK* App no 6538/74 (ECHR 26 April 1979) § 49.



The formulation of the law with sufficient precision is significant as it enables individuals to regulate their conducts. The Court found in *Rotaru* case that the domestic law was not ‘law’ as it was not *formulated with sufficient precision to enable any individual – if need be with appropriate advice – to regulate his conduct*.<sup>161</sup>

The quality of law can also be seen in *Gaweda* case where the applicant’s request of registering two periodicals was refused by the Polish domestic courts. The domestic courts denied the registration on the ground that the titles were ‘in conflict with reality’ and ‘convey a false picture’.<sup>162</sup> The ECtHR, on the other hand, found that there was no law that requires a periodical’s title to consist of truthful information in domestic regulations. Thus, it concluded that the interpretation of the domestic courts on the refusal of the title of the periodical is a new criterion and was ‘*not formulated with sufficient precision to enable the applicant to regulate his conduct*’.<sup>163</sup>

Hence, the domestic courts should consider the quality of laws. They should first examine whether publicity and accessibility requirements are fulfilled. These requirements are met if the respective law is published or the individuals are aware of its existence and content. Afterwards, the predictability and the foreseeability of the legal provision must be assessed. The provision must be drafted in clear and precise terms that enable individuals to predict the consequences of violating the provision and regulate their conduct accordingly.

### **1.1.2. Legitimacy**

The interference must aim to protect at least one of the legitimate interests or values listed in Article 10(2). These are as follows: ‘*national security; territorial integrity; public safety; prevention of disorder or crime; protection of health; morals; reputation or rights of others; preventing the disclosure of information received in confidence, and; maintaining the authority and impartiality of the judiciary*’.<sup>164</sup> This list is exclusive. Thus, any interferences which do not pursue one of the mentioned legitimate interests are not valid.<sup>165</sup>

However, as it is explained in section 2.3. of the first chapter of this thesis, the third sentence of Article 10 permits states to introduce a licensing mechanism to broadcasting on the grounds of the scarcity of frequencies. Hence, unlike other interferences with the exercise of the

---

<sup>161</sup> *Rotaru v. Romania* App no 28341/95 (ECHR 4 May 2000) § 55.

<sup>162</sup> *Gaweda v Poland* App no 26229/95 (ECHR 14 March 2002).

<sup>163</sup> *Gaweda v Poland* App no 26229/95 (ECHR 14 March 2002) § 43, 48.

<sup>164</sup> The European Convention on Human Rights, Article 10.

<sup>165</sup> *Sunday Times v UK* App no 6538/74 (ECHR 26 April 1979) § 49.

freedom of expression, regulation on licensing mechanism is considered legitimate under Article 10. In other words, the legitimate interests listed in the second paragraph do not have to be present in a particular case. Hence, the legitimacy requirement was already met.<sup>166</sup> The three-step test applies to the matters regarding licensing mechanism differently than the other inferences. There is a presumption that the legitimacy condition is already met.

However, the reasoning based on the scarcity of frequencies commenced losing its validity. To continue licensing traditional broadcasting, the governments introduced new rationales which took the place of the scarcity of frequencies reasoning. These rationales should also be assessed regarding their validity for online broadcasting. In case the rationales are applicable to online broadcasting due to its similar characteristics with traditional broadcasting, it can be concluded that the legitimacy condition is also fulfilled for online broadcasting without even referring to the second paragraph. Such an assessment is made in the following section.

### 1.1.3. Necessity

The interference made in order to pursue legitimate interest should be necessary in a democratic society. It must comply *with the genuine interests of democracy and not merely political expediency in disguise*.<sup>167</sup> The Court developed a framework for the interpretation of necessity condition. This framework embodies three elements: ‘*the nature of democratic necessity*’, ‘*proportionality*’ and ‘*the margin of appreciation*’.<sup>168</sup>

A ‘pressing social need’ must justify the interference with respect to one or more of the legitimate aims.<sup>169</sup> The existence of such a need should be determined regarding the facts of the case and to the conjuncture of the given country at the time.<sup>170</sup> The state must base its action upon ‘*an acceptable assessment of the relevant facts*’.<sup>171</sup> Thus, the legitimate aims in the second paragraph must be narrowly construed.<sup>172</sup> The conditions for restriction should be interpreted strictly in a way that it does not go beyond those mentioned in the exception clause itself, and the language used in the clause should be understood as its ordinary meaning.<sup>173</sup>

---

<sup>166</sup> *Informationsverein Lentia v Austria* [GC] App nos 13914/88, 15041/89, 15717/89; 15779/89, 17207/90 (24 November 1993) § 32.

<sup>167</sup> Steven Greer, *The Exceptions to Articles 8 To 11 of The European Convention on Human Rights* (Council of Europe Publishing 1997) p. 14

<sup>168</sup> *ibid.*

<sup>169</sup> *Observer and Guardian v UK* App no 13585/88 (ECHR 26 November 1991) § 71.

<sup>170</sup> *Lingens v Austria* App no 9815/82 (ECHR 8 July 1986) § 51.

<sup>171</sup> *Oberschlick v. Austria* App no 11662/85 (ECHR 23 May 1991) § 60.

<sup>172</sup> Steven Greer, *The Exceptions to Articles 8 To 11 of The European Convention on Human Rights* (Council of Europe Publishing 1997) p. 14

<sup>173</sup> *Sunday Times v UK* App no 6538/74 (ECHR 26 April 1979) § 49.

The interferences must be ‘*proportionate to the legitimate aim pursued*’.<sup>174</sup> Proportionality should be differently assessed case to case depending on the background circumstances and the type of interference.<sup>175</sup> There should be relevant and sufficient reasons to justify the restriction.<sup>176</sup> The necessity must be ‘convincingly established’.<sup>177</sup> In this way, the necessity test aims at establishing a fair balance between the legitimate aim pursued and the measures implemented. The legitimate interest wanted to be protected should be proportional with the means (interference) used to reach that aim.<sup>178</sup> Interference could be a criminal conviction;<sup>179</sup> refusal to grant a broadcast licence;<sup>180</sup> prohibition of publication<sup>181</sup>, etc.

The ECtHR acknowledges that states have a certain ‘margin of appreciation’ when they limit freedom of expression since each state has its legal system, as well as their culture and history.<sup>182</sup> The margin of appreciation refers to the permitted discretion of states in applying the exceptions to the Convention. The Court respects the margin of appreciation of states. However, ‘*the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts*’.<sup>183</sup> Thus, the margin of appreciation is not unlimited.

## **2. Do the rationales aiming to justify differential regulation between printed media and traditional broadcast media apply to online broadcasting?**

### **2.1. Definition of online broadcast and the similarities between the traditional and online broadcasting**

As explained briefly in the first chapter, the main difference between traditional and online broadcasting services is how they propose their content. Traditional broadcasters distribute their services linearly, whereas online broadcasting has a characteristic of non-linear

---

<sup>174</sup> *Observer and Guardian v UK* App no 13585/88 (ECHR 26 November 1991) § 72

<sup>175</sup> *Lingens v Austria* App no 9815/82 (ECHR 8 July 1986) § 43.

<sup>176</sup> *Vogt v Germany* App no 1785/91 (ECHR 26 September 1995) § 52.

<sup>177</sup> *Barthold v Germany* App no 8734/79 (ECHR 25 March 1985) § 58; *Autronic AG v. Switzerland* App no 12726/87 (ECHR 22 May 1990) § 61

<sup>178</sup> Monica Macovei, *Freedom of Expression: A Guide to The Implementation of Article 10 of the European Convention on Human Rights* (2nd edn, Council of Europe 2004) p. 35.

<sup>179</sup> *Lingens v Austria* App no 9815/82 (ECHR 8 July 1986).

<sup>180</sup> *Autronic AG v. Switzerland* App no 12726/87 (ECHR 22 May 1990).

<sup>181</sup> *Sunday Times v UK* App no 6538/74 (ECHR 26 April 1979) § 49.

<sup>182</sup> Toby Mendel, *Freedom of Expression: A Guide to The Interpretation and Meaning Of Article 10 Of The European Convention On Human Rights* (Centre for Law and Democracy) p. 3.

<sup>183</sup> *Hertel v. Switzerland* App no. 25181/94 (ECHR 25 August 1998) § 46.

content service.<sup>184</sup> This enables users of online broadcasting services to choose the time, the place and device that they would like to access the content.<sup>185</sup>

Non-online content includes; ‘simulcasting-services’ which are, among others, radio programmes and T.V. channels that are offered by broadcasting organisations contemporaneously over the Internet; ‘webcasting’, or in other words, ‘web streaming’ services such as YouTube live channels; ‘T.V. catch-up’ or ‘replay’ services that allow users to access programmes at will within a pre-defined period of time after transmission (e.g. 7 to 30 days); ‘podcasts’, or in other saying, radio programmes which can be downloaded or streamed; and ‘video on demand’ services such as Netflix and Amazon.<sup>186</sup>

Additionally, according to a generally accepted definition from the International Telecommunications Union (ITU), ‘*online content delivery service without the intervention of an internet service provider in the control or distribution of the content*’ is deemed as ‘over-the-top’ services.<sup>187</sup> This term refers to ‘*high-quality online video services provided over the Internet*’.<sup>188</sup> Based on this definition Netflix, Hulu, Amazon, iTunes or a free online video available through a video sharing service such as Vimeo, YouTube or Twitch are considered as over-the-top services. End-users can access to over-the-top content on a P.C., laptop, tablet, smartphone etc. However, they often prefer to access to over-the-top content on web-enabled televisions or Internet-enabled devices such as Apple T.V. which is connected to a traditional T.V.<sup>189</sup>

Although online broadcasting is different from traditional broadcasting in terms of mentioned reasons, the possibility of accessing online broadcastings as rapidly and easily as traditional broadcasting renders it difficult to differentiate between broadcasting and online media. Despite all the advantages that are brought by internet broadcasting, it does not change the definition of broadcasting. It only develops and extends the scope of broadcasting to another

---

<sup>184</sup> European Parliament, ‘Regulating online TV and radio broadcasting’ (2019) <[https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS\\_BRI\(2018\)620217](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2018)620217)> accessed 5 March 2020 p.2.

<sup>185</sup> *ibid.*

<sup>186</sup> *ibid.*

<sup>187</sup> Myung-Eun Kim and Muzaffar Djalalov, ‘Glossary and Terminology Of IP-Based Tvrelated Multimedia Services’ (ITU 2014) p.6.

<sup>188</sup> European Parliament, ‘Regulating online TV and radio broadcasting’ (2019) <[https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS\\_BRI\(2018\)620217](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2018)620217)> accessed 5 March 2020 p. 2.

<sup>189</sup> Clay Halton, ‘Over the Top (OTT) Definition’ (*Investopedia*, 2019) <<https://www.investopedia.com/terms/o/over-top.asp>> accessed 6 July 2020.

medium, namely the Internet. As it is explained in the first chapter, both media technically use radio signals to transmit their services.

Moreover, considering that most of the end-users continue their habits and access the content on their T.V.s (e.g. watching Netflix on T.V.), it is hard to see immediately whether the services are proposed by an over-the-top service or a satellite T.V. This argument, on the other hand, does not exclude the usage of other devices such as P.C. or tablets. As it is explained further in detail below, the necessary steps that should be taken to access the content on devices other than T.V. are still as easy. Thus, it is quite hard to differentiate between two types of broadcastings.

Undoubtedly, online broadcasting proposes end-users a great variety of content that could be watched. Moreover, since it provides more personalized content (over-the-top service providers usually, upon their researches, invest in content which targets a certain demographic group), it attracts users more. Besides, as the ads in online broadcasting services are brief or skippable, users enjoy uninterrupted viewing. Nevertheless, none of these differences is adequate to think that traditional and online broadcasting have completely different characteristics. It only raises the number of users/audiences by facilitating access to the audio-visual contents.

To sum up, both types of broadcasting are not different from each other considering their technicalities, content they include, and the steps necessary to take to access the content. Herein, it should be asked whether it is possible to regulate online broadcasting in the same way as traditional broadcasting. In order to do that, the applicability of rationales justifying the licensing mechanism for traditional broadcasting should also be examined for online broadcasting.

## **2.2. Public Interest Rationale**

As it is mentioned before, the public interest rationale was introduced to justify the differential regulation between printed and traditional broadcast media. It is also a rationale to justify the licensing mechanism for traditional broadcasting. Its aim, by means of the introduction of a licensing mechanism, is to guarantee the existence of various views and opinions in media in order to enable the public to participate in democratic discourse

effectively.<sup>190</sup> As explained, a licensing mechanism ensures broadcast media to achieve the goals of public interest in two ways: by nudging broadcasters to follow societal objectives; and by ensuring the maintenance of the societal objectives by preventing the ownership concentration.

The public interest rationale is inextricable from the spectrum scarcity doctrine.<sup>191</sup> In case it is not possible to mention the existence of spectrum scarcity, anyone willing to broadcast can do so. It is clear that the scarcity of available frequencies is not present in cyberspace,<sup>192</sup> and the Internet can hardly be considered as a 'scarce' expressive commodity.<sup>193</sup> Hence, there would not be a need for government intervention since all ideas and views could be heard. In this case, the public interest rationale would be unnecessary. In this manner, one could argue that public interest doctrine does not apply to the Internet (also to online broadcasting), which is a medium with no scarcity of spectrum.

Nevertheless, it could also be argued that even though there is no scarcity of spectrum on the Internet, the online broadcasting media does not fulfil the aims underlying Article 10 of the ECHR. To be more specific, one could claim that online broadcasters may not follow societal objectives. Moreover, since the public's participation in democratic discourse is essential, an intervention of government is required. Therefore, a licensing mechanism for online broadcasting should also be introduced to nudge broadcasters to act in the public interest.

To conclude, irrespective of whether the public interest doctrine rides out the scarcity doctrine, a differential regulation between traditional broadcasting and online broadcasting cannot be justified. In other words, the public interest doctrine can also apply to online broadcasting and can be used as a legitimate ground.

### **2.3. Economic scarcity rationale**

Economic scarcity rationale is introduced to prevent the risk of ownership concentration in the media industry. In this way, it is aimed to provide the diversity of ideas and views expressed by diminishing the inequality in having access to the broadcasting medium through a licensing mechanism, hence, to promote the functioning of democracy.<sup>194</sup> The rationale, as a

---

<sup>190</sup> 'WACC | In the Public Interest: Public Broadcasting in Germany And Europe Under Review' (*Waccglobal.org*, 2020) <<https://waccglobal.org/in-the-public-interest-public-broadcasting-in-germany-and-europe-under-review/>> accessed 6 July 2020.

<sup>191</sup> Stephen J Shapiro, 'One and the Same: How Internet Non-Regulation Undermines the Rationales Used to Support Broadcast Regulation' (1999) 8 *Media L & Pol'y* p. 20.

<sup>192</sup> *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) at 845 (c).

<sup>193</sup> *ibid* at 870.

<sup>194</sup> Matthew L Spitzer, 'The Constitutionality of Licensing Broadcasters' (1989) 64 *NYU L Rev* 990, 1020.

result, paves the way for government regulation on broadcasting media and prevention of monopolies in the broadcast market.

Herein, the applicability of the rationale to the Internet should be examined. It can be argued that the Internet, by its very nature, prevents the existence of a monopoly.<sup>195</sup> Almost anyone can share their ideas and views on the Internet as it requires only a few economic recourses. Anyone who has an internet connection and a device to connect to the Internet can theoretically make herself heard.

Nonetheless, it can also be claimed that economic scarcity exists on the Internet.<sup>196</sup> The content providers who have greater economic resources would certainly be able to advertise their services and attract more users. For instance, an individual who has a web streaming service or her own personal webpage is less likely to have more visitors than YouTube or nbcnews.com that advertise their website regularly through different media.<sup>197</sup> Most of the time, an individual would not have a chance to make herself heard unless she has the resources to advertise her webpage. Therefore, just like traditional broadcast, the Internet has also led to economic barriers. From this point of view, the economic scarcity rationale is also applicable to online broadcasting and can be used as a legitimate ground.

#### **2.4. Pervasiveness and intrusiveness**

As reported by The State of Online Video 2018, the number of people watching online broadcasting is increasing, even though people use traditional sources more than they use online sources to watch videos.<sup>198</sup> According to 2018 data, the average hours per week of watching broadcast television is eight hours, whereas it is six hours and 45 minutes for online broadcasting.<sup>199</sup> It can be easily predicted that online broadcasting will be more pervasive in our lives in the future. Therefore, as mentioned in *Betty Purcell v. Ireland*, online broadcasting media has the power to influence the audience just like the traditional broadcast media.

---

<sup>195</sup> Fred H. Cate, 'Indecency, Ignorance, and Intolerance: The First Amendment and the Regulation of Electronic Expression' (1995) 5 J. ONLINE L p. 116; *Reno v. American Civil Liberties Union*, 521 U.S. 844.

<sup>196</sup> Stephen J Shapiro, 'One and the Same: How Internet Non-Regulation Undermines the Rationales Used to Support Broadcast Regulation' (1999) 8 Media L & Pol'y p.19-20.

<sup>197</sup> *ibid* p. 20.

<sup>198</sup> It should be noted that the statistics given includes every age group. It is observed that the audiences age 35 or younger use online broadcasting more than offline broadcasting. 'THE STATE OF ONLINE VIDEO 2018' (*Limelight.com*, 2020) <<https://www.limelight.com/resources/white-paper/state-of-online-video-2018/#popular>> accessed 6 July 2020.

<sup>199</sup> it should be noted that the given statistics is based on the responses from audiences in France, Germany, India, Italy, Japan, Philippines, Singapore, South Korea, The United Kingdom, and the United States. Thus, the average hours of watching per week differs. *ibid*.

As mentioned, the risk of being exposed to harmful content and the inability of protecting oneself from unexpected program content is another issue regarding broadcasting. The ECtHR has not discussed this issue in detail in its case law. However, the case-law of the U.S. Court and the debate in the U.S. literature provide an extensive conceptual debate.

According to the *Reno* case, the indecent material on the Internet can be seldom encountered by accident. Because, ‘*A document's title or a description of the document will usually appear before the document itself... and in many cases the user will receive detailed information about a site's content before he or she need take the step to access the document*’<sup>200</sup> Moreover, the Court emphasized that, unlike communications received by radio or television, the content on the Internet requires a series of affirmative steps to retrieve.<sup>201</sup>

However, it can also be argued that the Internet and the traditional broadcast media is not as different as the Court in *Reno* suggests in terms of invasiveness.<sup>202</sup> The developments facilitating ‘*the delivery of live, or real-time, audio and video over the Internet*’<sup>203</sup> render the possibility of providing the same services as traditional broadcasters and blur the differences between the Internet and television.

Firstly, the Court’s reasoning in *Reno* is flawed in terms of affirmative steps required and the harmful content which is encountered by mistake. An Internet user can also encounter indecent content without having a foreknowledge. This can be the case, especially in web streaming services through which any Internet user can broadcast. In most cases, streaming

---

<sup>200</sup> *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) at 854.

<sup>201</sup> See Stephen J Shapiro, 'One and the Same: How Internet Non-Regulation Undermines the Rationales Used to Support Broadcast Regulation' (1999) 8 Media L & Pol'y footnote 91 for the explanation of the affirmative steps that should be taken to access an information: ‘*An Internet user must first establish a connection to the Internet. A user who accesses the Internet directly through his phone line must run software that connects him to an Internet Service Provider (ISP), although he can configure his computer to automatically connect to the ISP when he turns on the computer. A user who has access to the Internet through a local network is already connected to the Internet and can forego this step altogether. The user must then run another program, commonly referred to as a browser, in order to access the Web. The user can configure his computer so that the browser opens automatically when he turns the computer on, thus eliminating this step as well. The user must then enter the address or "URL" of a Web search engine. Again, the user can configure the browser to automatically load the search engine when the browser opens. Finally, the user must enter the word or phrase for which he is searching. With a properly configured system, then, an Internet user can access content with only one additional step, namely performing a Web search. In addition, one cannot argue that, by configuring his system as described above, an Internet user has initially taken more affirmative steps than a radio listener or television viewer because many modern radios and televisions require the user to program available stations into the unit*’.

<sup>202</sup> Based on the similarities between traditional and Internet broadcasting, Keiser concludes that the Internet should also be regulated. Debra Keiser, 'Regulating the Internet: A Critique of Reno V. ACLU' (1998) 62 Albany Law Review 769, 782.

<sup>203</sup> See *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) at 870 stating that the Internet ‘includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue’.



services publish their terms and conditions on nudity or other harmful content on their webpages.<sup>204</sup> However, since it is up to the user to define the content and stream live, it is highly likely that the user may not follow the rules defined by the streaming service. In this case, the users watching that stream would be exposed to harmful content unexpectedly.<sup>205</sup>

Another situation where a user may encounter offensive material is when an Internet site uses pop-ups for pushing advertisements at the viewer. These pop-ups could be in written or in video format. Although these pop-ups could be blocked by changing the setting in the browser, the average Internet user might not be aware of the measures that could be taken.

The risk of encountering harmful material also applies when an Internet content provider intentionally tries to take advantage of the user's simple confusion. Saphiro illustrated this matter by giving the example of a user trying to access the Web page of White House located at 'www.whitehouse.gov'. However, the user, instead of typing the correct URL, enters to 'www.whitehouse.com' which includes pornographic material.<sup>206</sup>

The Internet user should indeed take additional steps<sup>207</sup> to access the information. However, the user does not have the knowledge of the content she is about to receive in none of these steps. The user may be exposed to harmful audio or video content unexpectedly. The damage has already been done when she receives it as in traditional media. The harm cannot be taken back by merely turning off the browser just as it is the case in traditional broadcast media.<sup>208</sup>

As a result, the online broadcast is undoubtedly as invasive and pervasive as traditional broadcast media. It has a great ability to influence our lives and alter our behaviour. Thus, this rationale equally applies to online broadcasting. It can thus be used as a legitimate ground.

## 2.5. Availability to children/Protecting children

Another rationale that is used to justify the licensing mechanism for broadcast media is 'protection of children' from the potentially harmful content. As explained before, online

---

<sup>204</sup> 'Update to Our Nudity And Attire Policy' (*Blog.twitch.tv*, 2020) <<https://blog.twitch.tv/en/2020/04/07/update-to-our-nudity-and-attire-policy/#:~:text=We%20don't%20permit%20streamers,of%20genitals%2C%20even%20when%20covered.&text=For%20all%20streamers%2C%20you%20must,of%20your%20pelvis%20and%20buttocks.>> accessed 6 July 2020.

<sup>205</sup> A popular streamer has been banned for streaming himself playing a game with naked woman. Jess Wells, 'Twitch Rejects Xqc'S Appeal After He Was Banned for Streaming Nudity' (*The Loadout*, 2020) <<https://www.theloadout.com/streamers/xqc/twitch-ban-naked-connect-four>> accessed 6 July 2020.

<sup>206</sup> Stephen J Shapiro, 'One and the Same: How Internet Non-Regulation Undermines the Rationales Used to Support Broadcast Regulation' (1999) 8 Media L & Pol'y p. 16.

<sup>207</sup> *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) at 870.

<sup>208</sup> Stephen J Shapiro, 'One and the Same: How Internet Non-Regulation Undermines the Rationales Used to Support Broadcast Regulation' (1999) 8 Media L & Pol'y 18.

broadcasting is intrusive and pervasive. This statement applies to the children as well. The children are also at risk of being exposed to harmful material via the Internet.<sup>209</sup> It is accessible even to pre-literate children.<sup>210</sup>

It could be argued that the Internet is mostly text-based. However, the amount of aural and visual content on the Internet is immensely mounting each day.<sup>211</sup> A child can easily access these visual or aural content on the Internet by simply clicking on the icon of an application. Studies show that around 41 per cent of children aged 3 to 5 use the Internet at home. This rate goes up to 57 per cent for the children aged 6 to 11 and 71 per cent for 12 to 17 years old.<sup>212</sup> It is more than likely that in the future, along with the developments in technology, the pre-literate children will be able to access the Internet content even easier owing to new user interfaces.

To conclude, the rationale of protecting the children is also applicable to online broadcasting as it is as pervasive and intrusive in children's lives as traditional broadcasting.

### 3. Turkey as an example

On July 2019, the Turkish government published a regulation, namely 'the Regulation on the Transmission of Radio, Television, and On-Demand Services on the Internet' ('The Regulation'), in the Official Gazette.<sup>213</sup> The new regulation has been introduced under the basis of article 29/A of 'the Law on the Establishment and Broadcasting Services of Radios and Televisions' ('Broadcasting Law')<sup>214</sup>. Broadcasting Law regulates '*the establishment, organization, duties, competence and responsibilities of the Radio and Television Supreme Council ('RTSC')*'.<sup>215</sup>

---

<sup>209</sup> *ibid* p. 21

<sup>210</sup> *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978) at 749.

<sup>211</sup> 'Youtube usage more than tripled from 2014-2016 with users uploading 400 hours of new video each minute of every day! Now, in 2019, users are watching 4,333,560 videos every minute. 300 hours of video are uploaded to YouTube every minute! Instagram users upload over 100 million photos and videos everyday. That is 69,444 million posts every minute!' Jeff Schultz, 'How Much Data Is Created on The Internet Each Day? | Micro Focus Blog' (*Micro Focus Blog*, 2019) <<https://blog.microfocus.com/how-much-data-is-created-on-the-internet-each-day/>> accessed 6 July 2020.

<sup>212</sup> The rate of children using Internet at home in years of 1997, 2000, 2001, 2003, 2010, 2011, 2012, 2013 and 2015 are respectively; 0,8, 7,3, 13,4, 15,1, 23,1, 27,8, 32,3, 34,0, 40,7. See Annex 2 at 'Home Computer Access And Internet Use - Child Trends' (*Child Trends*, 2018) <<https://www.childtrends.org/indicators/home-computer-access>> accessed 6 July 2020.

<sup>213</sup> The Regulation on the Transmission of Radio, Television, and On-Demand Services on the Internet. The Official Gazette, 1 August 2019, no. 30849. <<https://www.resmigazete.gov.tr/eskiler/2019/08/20190801-5.htm>> accessed 6 July 2020.

<sup>214</sup> Article 29/A of The law on the establishment, organization, duties, competence and responsibilities of the Radio and Television Supreme Council, 15.2.2011 no. 6112 <<https://www.mevzuat.gov.tr/MevzuatMetin/1.5.6112.pdf>> accessed 6 July 2020.

<sup>215</sup> Yaman Akdeniz, 'Analysis of the Draft Provision on the "Presentation of media services via Internet" to the Turkish Law No. 6112 on the Establishment of Radio and Television Enterprises and Their Media Services' [2018] OSCE p.6.

The Regulation develops a new understanding for the licensing of radio, and broadcast transmission took place on the Internet. It requires media service providers and internet transmission operators who are willing to provide their radio or broadcast services on the Internet to obtain a license from the RTSC. The licence that they obtain must be in accordance with the type of service they provide.<sup>216</sup>

The key terms defining the scope of the regulation are ‘media service providers’, and ‘platform operators’. According to Article 3(1)(1) of the Broadcasting Law, ‘media service provider’ is defined as the ‘*legal person who has editorial responsibility for the choice of the content of the radio, television and on-demand media services and determines the manner in which it is organized and broadcast.*’<sup>217</sup> The ‘internet transmission platform operator’, on the other hand, refers to ‘*an establishment that makes radio, television and/or on-demand audio-visual services available to users through its own URL address and/or via mobile applications*’<sup>218</sup>. Such URL address or mobile applications shall also be accessible through ‘*integrated television receivers, computers, smart phones, tablets, or similar devices*’.<sup>219</sup> The Internet service providers providing only hosting for radio, television and/or on-demand audio-visual services, e.g. GoDaddy, Hostinger.com, do not fall under the scope of the Regulation.

Individual communication services are also excluded from the Regulation’s scope. In this manner, individual communication service providers such as Twitter, Facebook, WhatsApp and Snapchat etc. do not need to obtain a license according to the Regulation.<sup>220</sup> ‘*platforms that are not dedicated to transmitting radio, television and on-demand broadcast services through*

---

<sup>216</sup> There are 3 types of licenses issued in the Regulation;

-Media service providers that request license for providing radio transmissions from internet should obtain INTERNET-RD broadcast license.

-Media service providers that request license for providing television transmissions from internet should obtain INTERNET-TV broadcast license.

-Media service providers that request license for providing on-demand transmissions from internet should obtain INTERNET-İBYH broadcast license.

<sup>217</sup> The translation belongs to Yaman Akdeniz, ‘Analysis of the Draft Provision on the “Presentation of media services via Internet” to the Turkish Law No. 6112 on the Establishment of Radio and Television Enterprises and Their Media Services’ [2018] OSCE p.8.

<sup>218</sup> Kayahan Cantekin, 'Turkey: New Regulation Requires Media and Platform Service Providers To Obtain Licenses For Offering Radio And Audiovisual Services On The Internet | Global Legal Monitor' (*Loc.gov*, 2019) <<https://www.loc.gov/law/foreign-news/article/turkey-new-regulation-requires-media-and-platform-service-providers-to-obtain-licenses-for-offering-radio-and-audiovisual-services-on-the-internet/>> accessed 6 July 2020.

<sup>219</sup> Article 4(1)(m) of The Regulation on the Transmission of Radio, Television, and On-Demand Services on the Internet. The Official Gazette, 1 August 2019, no. 30849

<<https://www.resmigazete.gov.tr/eskiler/2019/08/20190801-5.htm>> accessed 6 July 2020).

<sup>220</sup> *ibid* Article 2(2)(a)

*internet medium*<sup>221</sup> are also out of the scope of the Regulation.<sup>222</sup> The meaning of this provision is not clear enough to define the scope. This will be clearer when the regulatory authority issues more licenses. Nevertheless, the provision can be interpreted in a way that, for instance, YouTube or the individual YouTubers do not have to obtain a license, unless they broadcast a movie or series. On the other hand, the digital series platforms such as Netflix, or the organizations such as Digiturk, Tivibu enabling the transmission of broadcasting services, or the organizations publishing video news over the internet such as Deutsche Welle need to obtain a license to continue to do their broadcastings.

Remarkably, the Regulation also requires a license from the following broadcasters; the content or hosting providers in a foreign country; media service providers located in another country; media service providers broadcasting in Turkish and targeting Turkey; media service providers broadcasting in another language and providing commercial broadcasts but targeting to Turkey.<sup>223</sup>

The Regulation implicitly gives the rationales of implementing such licensing mechanism. In this manner, it can be understood from its wording that it is aimed to protect minors from contents that might harm their physical, mental or moral development.<sup>224</sup> On the basis of another national law,<sup>225</sup> the Regulation also aims to protect national security, public order, protection of life and property, public health and to prevent crime. Moreover, it requires online broadcasters not to violate individual rights and the privacy of individuals.

The Regulation imposes sanctions such as content blocking, removal or blocking access to content or the whole website for the broadcasters who do not comply with the rationales mentioned.<sup>226</sup> The noncompliance with the aims of the Regulation may also lead to revocation of the license or adversely affect the renewal process. Therewithal, the Turkish regulatory

---

<sup>221</sup> Gönenç Gürkaynak and others, 'Regulation On Radio, Television And On-Demand Broadcasts On The Internet - Media, Telecoms, IT, Entertainment - Turkey' (*Mondaq.com*, 2019) <<https://www.mondaq.com/turkey/broadcasting-film-tv-radio/834084/regulation-on-radio-television-and-on-demand-broadcasts-on-the-internet#:~:text=According%20to%20the%20Regulation%2C%20media,internet%20are%20obliged%20to%20obtain>> accessed 6 July 2020.

<sup>222</sup> Article 2(2)(b) of The Regulation on the Transmission of Radio, Television, and On-Demand Services on the Internet. The Official Gazette, 1 August 2019, no. 30849 <<https://www.resmigazete.gov.tr/eskiler/2019/08/20190801-5.htm>> accessed 6 July 2020).

<sup>223</sup> *ibid* Article 5(8)

<sup>224</sup> *ibid* Article 22(2)

<sup>225</sup> Article 8, 8(a), 9, 9(a) of the Law no 5651 on Regulation of Publications on the Internet and Combating Crimes Committed by Means of such Publications. The Official Gazette, 23 May 2007, no 26530 <<https://www.resmigazete.gov.tr/eskiler/2007/05/20070523-1.htm>> accessed 6 July 2020.

<sup>226</sup> Article 19 of The Regulation on the Transmission of Radio, Television, and On-Demand Services on the Internet. The Official Gazette, 1 August 2019, no. 30849 <<https://www.resmigazete.gov.tr/eskiler/2019/08/20190801-5.htm>> accessed 6 July 2020).

authority is known for its pro-government decisions when issuing administrative fines or revoking licenses for traditional broadcasting.<sup>227</sup> The probable risk of the Turkish regulatory authority being biased and influenced when issuing online broadcasting licenses causes concerns.<sup>228</sup> Currently, it is possible to access the information from the official website of the Turkish regulatory authority on which broadcasters have an online broadcasting license. However, it is not possible to find information on whose application has been denied.<sup>229</sup> In other words, there is a lack of transparency in the licensing procedure.

Turkey uses the rationale of ‘protecting the children’ as the main reason for justifying such regulation. On the grounds of the findings from the previous chapter, it can be said that ‘protection of the children’ is a rationale which can be used as a legitimate ground.

However, Turkey’s regulation regarding the licensing of the online broadcast is not clear in terms of determining the scope of the Regulation. The terms used in the Regulation do not provide clear insight. The rule is not foreseeable, and it paves the way for arbitrary interferences by the public authorities and the extensive application of the restriction.<sup>230</sup> This raises concerns on plausible censorship by the government.

Furthermore, the Regulation may lead to the revocation of the existing license or blocking access to media service providers’ website regardless of whether they are located inside or outside of Turkey. It means that a tremendous amount of information may be rendered inaccessible. As a result, the right of users to access and seek information regardless of frontiers may be violated. It also prevents broadcasters from transmitting the information. Hence, violate their right to impart information. If this turns out to be the case, it will result in the censorship of various broadcasters.<sup>231</sup> Moreover, there are less intrusive methods to the rights and freedoms. Filtering mechanism that is implemented by the individuals themselves; liability of broadcasters for the content that they broadcast are only a few examples of alternative methods.

---

<sup>227</sup> Enis Günaydın, ‘How Much Fine Did RTSC Issue In A Year And A Half To Each Channel?’ (*euronews*, 2020) <<https://tr.euronews.com/2020/05/19/rtuk-bir-bucuk-y-lda-hangi-kanala-ne-kadar-ceza-kesti>> accessed 28 July 2020.

<sup>228</sup> Yaman Akdeniz, ‘Analysis of the Draft Provision on the “Presentation of media services via Internet” to the Turkish Law No. 6112 on the Establishment of Radio and Television Enterprises and Their Media Services’ [2018] OSCE.

<sup>229</sup> As of the date of 22.07.2020, the total number of licensed online broadcasters are 859 (the numbers of Internet-radio, Internet-TV and on-demand broadcasting licenses are respectively 632, 225 and 2. ‘Organizations With Broadcasting Permission On The Internet (RD/TV/ODS) - RTSC | Radio And Television Supreme Council’ (*Rtuk.gov.tr*, 2020) <<https://www.rtuk.gov.tr/medya-hizmet-saglayicilar/3747/7046/internet-yayin-lisansli-veya-yayin-izni-olan-kuruluslar-listesi.html>> accessed 28 July 2020.

<sup>230</sup> Yaman Akdeniz, ‘Analysis of the Draft Provision on the “Presentation of media services via Internet” to the Turkish Law No. 6112 on the Establishment of Radio and Television Enterprises and Their Media Services’ [2018] OSCE p.14.

<sup>231</sup> *ibid* p.15

In this manner, the limitations brought by the Regulation are not proportionate to the legitimate aim pursued. Moreover, the non-transparency of Turkish regulatory authority in issuing and revoking licenses may pave the way for arbitrary decisions which will cause a chilling effect. The licensing mechanism is too intrusive to the rights and freedoms of the individuals. In line with this requirement, the restriction is not necessary in a democratic society, and the government's interference does not correspond to a pressing social need.

The example of Turkey shows that the evaluation on the compatibility of online licensing mechanism to the Convention is not as simple as it seems. Even though the Turkish licensing regulation meets the criteria of legitimacy, it failed to meet the criteria of legality and necessity. Herein, it can be argued that the Turkish government could also meet the legality requirement with several amendments in the Regulation. However, even in this scenario, the necessity condition would be unmet since, *inter alia*, there is always less restrictive measures to the freedom of expression exist. Therefore, it is not an easy job to justify such licensing mechanism, and any government that aims to introduce a similar regulation will face the same problem of meeting the requirement of 'necessary in a democratic society'.

#### **4. Interim Conclusion**

The ECtHR does not have any case law regarding online broadcast licensing mechanisms. Nonetheless, the case law concerning access to the Internet is useful to understand the point of view of the Court on such licensing mechanisms regarding freedom of expression and the press. Accordingly, introducing a licensing mechanism constitutes a restriction to the rights regulated under Article 10. However, such restriction can still be justified in case it is legitimate, legal and necessary in a democratic society to pursue a legitimate aim. The examination on justifiability is conducted under three-step test by the Court.

The characteristics of traditional and online broadcasting media are similar. This finding allows us to examine whether the rationales justifying the differential regulation for the former media is applicable to the latter. The interest in serving public needs also exists for online broadcasting irrespective of whether the scarcity doctrine is invalidated or not. Economic barriers occur for online broadcasters that lack resources to advertise their services. Just like traditional broadcasting, online broadcasting is pervasive and intrusive as well. Every single day it takes up more room in our lives. In connection with its pervasiveness and intrusiveness, it has a great influence on children's lives regardless of their literacy as online broadcasting is easily accessible to children of all ages. Therefore, it can be concluded that the rationales justifying the licensing mechanism for traditional broadcasting apply to online broadcasting as well. In

other words, the legitimacy requirement can be met. However, legality and necessity requirements should also be met for the licensing mechanism to be considered as justifiable. These requirements should be evaluated on a case-by-case basis as it differs according to the implementation in each country. Thus, the justifiability of the licensing mechanism should be evaluated for each country.

## **CHAPTER 3**

### **REGULATORY POLICY OPTIONS AND RECOMMENDATIONS**

This chapter is divided into three sections. In the first section, it is explained why it is important to discuss the regulatory policy options and to determine the appropriate one regarding online broadcasting media. In the second section, the regulatory policy options are given concerning the possibility of introducing a licensing mechanism to online broadcasting media. The third section provides an assessment of each regulatory policy option and a recommendation on which option should be applied.

#### **1. General Remarks**

As it is explained in the first chapter, the regimes of the press and the traditional broadcasting media have been regulated differently. Whereas it is not possible to introduce a licensing mechanism to the press media, it is accepted that such restraint is applicable to the broadcast media. This differential regulation in the media is a result of discussions lasting for decades. This thesis explores the same debate regarding online broadcasting media. In light of the findings from the previous chapters, the author aims to determine under which regime online broadcasting should be regulated. In other words, it is discussed whether a licensing mechanism should be introduced to online broadcasting media or not.

A licensing mechanism interferes with broadcasters' right to impart information, and users' right to receive information. Thus, such examination bears importance as it helps us to determine a regulatory policy option in order to mitigate or even eliminate the risk of violating the freedom of expression.

#### **2. The regulatory policy options for online broadcasting media**

The applicability of the licensing mechanism to online broadcasting has not been discussed in the literature excessively. It is mostly for the reason that the online broadcast licensing mechanism is not very common. Nonetheless, it does not mean that the governments will never adopt such a mechanism in the future. As it is presented above, Turkey is a good illustration of how this mechanism works in practice. This being the case, the regulatory policy options on how to regulate the licensing mechanism for online broadcasting should be discussed as it has practical importance.

As the information sources on the online licensing mechanism are not adequate, it is required to refer to the sources on traditional broadcasting once again. The similarities of the characteristics of traditional and online broadcasting enable us to make an analogy. Thus, the



regulatory policy options to the regulation of the traditional broadcasting mechanism are also effectual for online broadcasting.

These regulatory policy options are based on the possibility of introducing a licensing mechanism for online broadcasting. In this manner, it is possible to categorize the regulatory policy options under two headings. The first one argues that the online broadcast media should be regulated under the traditional broadcast regime. The second option, on the other hand, supports that online broadcasting media should be regulated under the press regime. The first heading can be divided into two categories considering the grounds on which they have based their arguments. An evaluation of each regulatory policy option is provided at the end of the Chapter.

## **2.1. Subjecting online broadcasting media to the traditional broadcasting media regime**

### **2.1.1. Introducing a licensing mechanism to online broadcasting media on the grounds of scarcity of frequencies**

The proponents of introducing a licensing mechanism to broadcasting media based their arguments on the scarcity of frequencies. The decision of the U.S. Court in the *Red Lion Case* is an example of this approach.<sup>232</sup> The Court argued that the scarcity of the broadcast spectrum caused interference of broadcasters' airing by the other broadcaster. As a result, '*the medium would be of little use because of the cacophony of competing voices, none of which would be clearly and predictably heard*'.<sup>233</sup>

The legal implication of this regulatory policy option is that broadcasting media would not be able to benefit from the high level of protection of Article 10 as printed media does. Thus, prior restraints to airing can be introduced. As a result, it would be possible to justify the licensing mechanism for broadcasting media.

However, the arguments based on scarcity commenced losing their validity owing to technological developments resolving the spectrum scarcity problem. Especially, considering the features of the Internet, it is not possible to mention the scarcity of spectrum in Internet media. Thus, it is not possible to justify a licensing mechanism for online broadcast media based on the scarcity of spectrum. Hence, a licensing mechanism for online broadcasting is out of the question on the ground of spectrum scarcity.

---

<sup>232</sup> *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367 (1969).

<sup>233</sup> *ibid.*

### **2.1.2. Introducing a licensing mechanism to online broadcasting media on the grounds of new rationales**

This regulatory policy option supports the regulation of broadcast media and the intervention of the government. The supporters of this approach are named as ‘interventionists’. They based their argument on the failure of television and newspapers in the marketplace of ideas.<sup>234</sup> Jerome Barron, the pioneer of this approach, stated this issue as follows:

*If the freedom of expression cannot be secured because entry into the communication media is not free but is confined as a matter of discretion by a few private hands, the sense of the justice of existing institutions, which freedom of expression is designed to assure, vanishes from some section of our population as surely as if access to the media were restricted by the government.*<sup>235</sup>

He accuses the proponents of subjecting the traditional broadcasting media to the press regime by ‘*confusing freedom of media content with freedom of the media to restrict access*’.<sup>236</sup> He even suggested in his book ‘Access to the Press: A New First Amendment Right’ that the regulation for broadcasting should also be extended to newspapers.<sup>237</sup>

In the same vein, Meiklejohn focused on securing access to broadcast media. Accordingly, the point of ultimate interest is the minds of ‘hearers’.<sup>238</sup> Therefore, the media should be rendered available in order to reach the hearers’ minds effectively.<sup>239</sup> Just like Barron, he also suggested a regulation (a licensing mechanism) by the hand of government rather than by private groups.<sup>240</sup>

Owen Fiss, another interventionist, also emphasized the significance of the government’s intervention in order to assure all relevant views would be heard. He argues that the market, even though it operates efficiently, serves the needs of rich who can attract enough advertisers to maintain the enterprise.<sup>241</sup> Herein, it is possible to see that, even though he does not explicitly state it, he refers to the economic scarcity rationale. Moreover, according to him, it is the government’s duty to protect the integrity of public debate by safeguarding the conditions but not to indoctrinate its own truth. Once again, a reference to the public interest

---

<sup>234</sup> Ian Ayres, ‘Halfway Home: On Powe’s American Broadcasting and the First Amendment’ (1988) 13 Law & Social Inquiry 413, 415.

<sup>235</sup> Jerome A. Barron, ‘Access to the Press. A New First Amendment’ (1967) 80 Harvard Law Review 1641, 1649.

<sup>236</sup> *ibid* p. 1651.

<sup>237</sup> *ibid* p. 1678.

<sup>238</sup> *ibid* p. 1641.

<sup>239</sup> *ibid*.

<sup>240</sup> *ibid* p. 1656.

<sup>241</sup> Owen Fiss, ‘Free speech and social structure’ (1985) 71 Iowa L. Rev. 1405, 1413.

rationale can be seen here. Starting from these rationales, he argues the extension of broadcast regulation also to the newspapers. He argues that the intervention of the government does not necessarily lead to censorship.<sup>242</sup>

The introduction of the licensing mechanism to traditional broadcasting media is discussed based on its pervasiveness and intrusiveness, and especially its effects on children. This argument is mostly used by the governments themselves as a prevailing reason. The British regulatory authority Ofcom states that radio and T.V. services located in the UK are regulated comprehensively. Moreover, it counts off the objectives that it aims to achieve by setting such high standards.<sup>243</sup> The practical application of these standards is set under a licensing regime.<sup>244</sup> Accordingly, the objectives stipulate the protection of the children against the harmful content in the first place.<sup>245</sup>

Turkey, currently, introduced a licensing mechanism to online broadcasting media for the very same reason. The Regulation on the Transmission of Radio, Television, and On-Demand Services on the Internet implicitly states that it is aimed to protect the physical and mental development of children from the harmful content by means of introducing a licensing mechanism to online broadcasting media.<sup>246</sup>

## **2.2. Subjecting online broadcasting media to the press regime**

The author of this thesis and the proponents of this approach argue that neither the printed media nor traditional broadcasting should be subject to a licensing mechanism.<sup>247</sup> In this view, the press regime should apply to broadcast as well. This regulatory policy approach is equally applicable to online broadcasting media considering the similar characteristics between traditional and online broadcasting media.

The legal implication of this view is that the governments must not introduce a licensing mechanism with broadcasting media just like they do not introduce in printed media. The broadcast media should enjoy the same high level of protection as the printed media. In other

---

<sup>242</sup> *ibid* p. 1416.

<sup>243</sup> Ofcom, 'Addressing Harmful Online Content A Perspective from Broadcasting and On-Demand Standards Regulation' (2018) p. 14 <[https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0022/120991/Addressing-harmful-online-content.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0022/120991/Addressing-harmful-online-content.pdf)> accessed 28 December 2019.

<sup>244</sup> *ibid*.

<sup>245</sup> *ibid*.

<sup>246</sup> *ibid* Article 22(2).

<sup>247</sup> Stephen J Shapiro, 'One and the Same: How Internet Non-Regulation Undermines the Rationales Used to Support Broadcast Regulation' (1999) 8 *Media L & Pol'y* 1 25-27.

words, the governments must not continue to license the broadcasters unless the interference is ‘proportionate to the legitimate aim pursued’.

The non-interference principle is defended on the ground that it prevents the regulatory capture.<sup>248</sup> The concern is that the regulatory authority that is entitled to issue broadcast licenses might be subject to capture by the broadcast industry.<sup>249</sup> Such capture may adversely affect the license granting or renewal process. Moreover, it may lead to censorship. Indeed, the instances of regulatory captures can be seen in history. Ronald W. Adelman has provided several examples of censorship in the US broadcast media as a result of regulatory capture.<sup>250</sup>

In a similar vein, Powe defines two types of abuse: favouritism and censorship.<sup>251</sup> The former refers to the regulatory authority’s ‘*illegitimate support of speech*’, whereas the latter refers to its ‘*legitimate hindrance of speech*’.<sup>252</sup> Powe stated the inevitability of censorship due to a licensing mechanism’s very nature as follows: ‘*abuses of licensing are an inevitable by-product of the decision to license and to supervise the licensees*’<sup>253</sup> With this approach, it is aimed to prevent the ramifications of the government’s and the regulatory authority’s bias.

Nonetheless, an opposing view argues that the existence of past regulatory captures does not justify the ending of all similar regulation in the future.<sup>254</sup>

*After all, one logical response to past regulatory abuse is a reformation of the system that will curb the abuses but leaves the benefits of the regulations intact. If, however, the abuses are endemic to the very existence of regulation, then the whole regime is suspect.*<sup>255</sup>

Nevertheless, such an argument is not convincing considering the arbitrary applications, especially in countries without a robust culture of democracy. In such countries, the violation of freedoms and rights is highly likely. Moreover, the lack of safeguards raises concerns on the oversight mechanism.

---

<sup>248</sup> See footnote 9 for the definition of ‘regulatory capture’.

<sup>249</sup> Wendy M. Rogovin, ‘The Regulation of Television in the Public Interest: On Creating a Parallel Universe in Which Minorities Speak and Are Heard’, (1992) 42 CATH. U. L. REV. 51, 70-71.

<sup>250</sup> See Ronald W Adelman, ‘First Amendment and the Metaphor of Free Trade, The ’ (1996) 38 Ariz L Rev 1125 for more details.

<sup>251</sup> Lucas Powe, ‘American Broadcasting and The First Amendment’ (1988) 75 Berkeley: University of California Press p. 193.

<sup>252</sup> Ian Ayres, ‘Halfway Home: On Powe’s American Broadcasting and the First Amendment’ (1988) 13 Law & Social Inquiry 413, 423.

<sup>253</sup> *ibid* p. 417.

<sup>254</sup> Wendy M. Rogovin, ‘The Regulation of Television in the Public Interest: On Creating a Parallel Universe in Which Minorities Speak and Are Heard’ (1992) 42 CATH. U. L. REV. 51, 70-71.

<sup>255</sup> Ronald W Adelman, ‘First Amendment and the Metaphor of Free Trade, The ’ (1996) 38 Ariz L Rev 1125, 1153.

### **3. An evaluation of the regulatory policy options**

The interventionists based their arguments on fulfilling the societal objectives and preventing the monopolization in the broadcast market. Moreover, the governments rely on the pervasiveness and intrusiveness of broadcasting media and its adverse impact on children in introducing a licensing mechanism to online broadcasting media. However, these arguments can be criticized on the ground that it does not clearly explain how to assure adequate safeguards to prevent the danger of censorship by the government.

The supporters of subjecting the online broadcasting media to the press regime provide persuasive reasonings by stating that a licensing mechanism may lead to favouritism and censorship. Indeed, there is a potential risk of regulatory capture in general. Such risk is even more likely in countries where democracy is not essential.

In the hands of a biased executive, the licensing mechanism may have more drawbacks than benefits. Indeed, the licensing mechanism would be helpful in nudging the broadcasters to follow societal objectives. However, by merely rejecting the license applications, the biased regulatory authority may cause a unilateralism in public debate. In the same vein, the licensing mechanism may render the entry to the online broadcasting market possible. However, this will not be the case if the regulatory authority refrains from issuing a licensing mechanism to broadcasters who adopted a dissenter opinion.

Moreover, in order to introduce a licensing mechanism, there should be a ‘pressing social need’ and ‘a fair balance between the individual’s fundamental right to freedom of expression and a democratic society’s legitimate right to protect itself’. In this manner, the restriction should be ‘proportional to the legitimate aim pursued’. It must not render the right itself illusory.<sup>256</sup>

The Internet is free from frontiers. As a result, an individual living in one country can access information that is in the other end of the world. There is a tremendous amount of information on the Internet. Licensing mechanism implemented by the governments and withholding the information at source prevents users from accessing and receiving a vast amount of information. Thus, such interferences will undoubtedly raise the question on the proportionality of this interference with the legitimate aim that is wanted to be achieved.

---

<sup>256</sup> Yaman Akdeniz, ‘Analysis of the Draft Provision on the “Presentation of media services via Internet” to the Turkish Law No. 6112 on the Establishment of Radio and Television Enterprises and Their Media Services’ [2018] OSCE p. 15.

Furthermore, relating to the proportionality requirement, the possibility of implementing less restrictive measure such as filtering software products remains. Such product enables individuals to implement their preferences as to content. It is mostly used by parents when deciding for their children. It blocks undesirable content. Comparing to the licensing mechanism, it is more flexible since it depends on personal preferences. Furthermore, it is less intrusive as there is no government interference.

However, it should be kept in mind that even the filtering mechanism is an interference with freedom of expression. Some argue that the filtering mechanism is not effective in screening out harmful material. They claim that it is over-inclusive and limits access to or filter educational material respecting prevention from drug abuse or AIDS.<sup>257</sup> However, developing technology will likely provide more advance filtering software. Either way, filtering software is less restrictive to freedom of expression than the licensing mechanism since it is up to individuals to decide to which content they would like to access. Besides, it is more effective in preventing access to harmful material than the licensing mechanism. The content aired by the broadcaster who did not obtain a license will remain accessible on the Internet until it is noticed. Herein, the filtering mechanism provides a more effective and less restrictive solution in preventing harmful material. As there is a less restrictive measure available, the licensing mechanism is not a proportionate mean to achieve legitimate aims.

In this manner, the existence of the filtering mechanism providing a less restrictive means for achieving the same aim renders the licensing mechanism unproportional. Moreover, the licensing mechanism has more drawbacks than benefits as it prevents the dissemination of a tremendous amount of content at source. There is also a high risk of using a licensing mechanism as a tool for censorship by the captured authorities. In the long term, it bears the risk of causing self-censorship. Therefore, the licensing mechanism is too restrictive to the rights and freedoms of individuals. It is not necessary in a democratic society. Therefore, applying the press regime to online broadcasting would be the optimal solution to prevent the probable violation of the freedom of expression.

---

<sup>257</sup> Yaman Akdeniz, 'Governing Pornography & Child Pornography on The Internet: The UK Approach The Governance Of The Internet' (2001) 32 University of West Los Angeles law review p. 20.  
<[https://www.researchgate.net/publication/265065154\\_Governing\\_Pornography\\_Child\\_Pornography\\_on\\_the\\_Internet\\_The\\_UK\\_Approach\\_The\\_governance\\_of\\_the\\_Internet](https://www.researchgate.net/publication/265065154_Governing_Pornography_Child_Pornography_on_the_Internet_The_UK_Approach_The_governance_of_the_Internet)> accessed 12 August 2020

## CONCLUSION

The Internet and the services which are provided through the Internet have expanded excessively. Owing to technical developments, streaming videos and audios are available on the Internet as well as textual material. Just like its counterpart radio and T.V., the Internet has a significant impact and influence on its users. For this very reason, some countries are aiming to control the available content on the Internet. A licensing mechanism for online broadcasting has been adopted already by a signatory country of the ECHR to achieve this purpose. It is likely to be accepted by other states in the future.

There is a possibility of regulatory authorities, which are entitled to issue the broadcast license, to be manipulated by the industry or the politicians. This will cause the decisions of the regulatory authorities to be biased when they issue a licence or renew the licence. This will inevitably result in a chilling effect, censorship or self-censorship. Therefore, the online licensing mechanism may constitute a danger to the freedom of expression and freedom of the press. In this manner, this thesis aims to find an answer to the following question: *Within the jurisprudence of the European Court of Human Rights and in the framework of freedom of expression, under what conditions could a licencing mechanism for online broadcasting be justifiable and how it should be regulated?*

Article 10 of the ECHR protects the right to freedom of expression, along with the freedom of the press. It is possible to bring some restrictions on such rights. The level of protection for different kind of media may differ. One media may be subjected to a restriction, whereas the other may not. Within the scope of this thesis, it is concluded that the press media enjoys a high level of protection of Article 10. Thus, it cannot be subjected to a licensing obligation. The broadcast media, on the other hand, does not benefit from such protection.

This differential regulation was justified on the grounds of the scarcity of frequencies. However, due to the developments in broadcasting techniques, the scarcity rationale has become invalid. In order to continue licensing, new rationales aiming to justify the differential regulation between press and broadcast media were introduced by the Court. There are four prevailing rationales; ‘public interest rationale’, ‘economic scarcity rationale’, ‘pervasiveness and invasiveness of broadcasting rationale’ and ‘availability to children/protecting children rationale’.

Examining the case law of ECtHR, it can be concluded that an online licensing mechanism is a restriction to the freedom of expression. Nevertheless, it can be justified if the regulation follows a legitimate aim, prescribed by law and necessary in a democratic society to pursue the legitimate aim. The online broadcast license is justifiable in case each of these conditions is met.

The first requirement should be considered within the frame of the mentioned rationales justifying the differential regulation between the press and traditional broadcast media. The research underlying this thesis reveals that traditional and online broadcasting possess the same characteristics. Thus, an evaluation of the applicability of the rationales to online broadcasting can be made.

In this sense, the online broadcasters are responsible for serving the public needs and following the societal objectives irrespective of the validity of the scarcity rationale. The broadcasters having less economic resources to advertise their services, suffer from economic barriers in the broadcasting market. Online broadcasting has an ability and power to influence and impact the users just like its ancestor radio and T.V. Presumably, it will be even more influential in our future lives. In the same vein, it is pervasive and intrusive in children's lives as well, irrespective of their literacy. Therefore, the rationales are applicable to online broadcasting and constitute a legitimate aim in terms of licensing regulations.

The legality and necessity requirements should be taken into account on a case-by-case basis because the implementation of the licensing mechanism may differ in each country. Turkey has been presented as an example of how to conduct such a compliance test. Based on this exercise, it can be concluded that Turkey uses 'the protection of children' as the primary rationale to justify the online licensing mechanism. However, it fails to meet the legality condition as the scope of the Regulation is not formulated with sufficient precision to enable individuals to regulate their conduct. Turkey failed to meet the necessity condition as well. It is mainly because the licensing mechanism prevents the dissemination of tremendous amount of information from the source. Moreover, the availability of filtering mechanism, which is less restrictive to freedom of expression renders licensing mechanism unproportional with the aim wanted to be achieved. Furthermore, there is a risk of a chilling effect in the broadcast media due to the non-transparency of the Turkish regulatory authority in the licensing procedure. This situation will undermine democracy in the society. Thus, the implementation of online broadcasting licensing mechanism is a violation of Article 10.



The illustration of Turkey shows that the justifiability of licensing regulation bears a high risk of violating the freedom of expression. This risk should be minimized or eliminated. In order to do that, different regulatory policy options have been introduced for traditional broadcasting in the literature. These regulatory policy options are discussed in the frame of the broadcasting and the press regime, and their applicability to traditional broadcasting. Based on the similarities between traditional and online broadcasting, regulatory policy options can be applied to the latter as well. Discussing the regulatory options, it can be concluded that online broadcasting should be regulated in the same way as to the press media, and should be free from any government intervention in terms of licensing. It can be argued that that regulatory option is the less intrusive one comparing to others when examined in the frame of Article 10. The other options fail to meet the condition of necessity in a democratic society and bear the risk of causing censorship in the online broadcasting media. Nevertheless, this regulatory policy option does not prevent the liability from the content of the broadcast. Moreover, it does not object to the implementation of other less restrictive measures by individuals.

Consequently, as an answer to the first half of the research question *-under what conditions is the online licensing obligation justifiable?-*, it can be concluded that there should be a legitimate aim in order for a licensing obligation for online broadcasting to be justifiable in the framework of the ECHR and within the jurisprudence of the ECtHR. The rationales justifying the introduction of a licensing mechanism to traditional broadcasting are applicable to online broadcasting. Thus, they can be used as a legitimate aim to justify licensing regulation. Secondly, the regulation on licensing mechanism should be legal. The regulation should be clear and not leave any space for arbitrary interference. This condition should be evaluated case-by-case. Finally, the licensing mechanism for online broadcasting should be necessary in a democratic society. This condition should also be evaluated case-by-case. A regulation regarding licensing mechanism can be necessary in a democratic society. Considering the technological developments, there are alternative methods to reach the aims that wanted to be achieved via the licensing mechanism. Thus, the licensing mechanism is not proportionate with the legitimate aim. Moreover, the Internet embodies a tremendous amount of information, and the licensing mechanism can prevent the information at the source. Hence, it is not persuasive to argue that the licensing mechanism is proportional to the legitimate aim. Therefore, it seems impossible to meet the ‘necessary in a democratic society’ requirement.

This finding brings us to the second half of the research question that is *‘how should the licensing mechanism for online broadcasting be regulated?’* This question refers to the

available regimes that have been evaluated, which are the press regime and the traditional broadcast regime. It can be concluded that online broadcasting should be regulated as press media. The reasons behind it are mainly the possibility of regulatory authorities to be captured by the government or by the industry; possessing the high risk of causing censorship; the prevention of dissemination of tremendous amount of information at the source; and the availability of a less restrictive measure, namely filtering software. In this manner, the online broadcasting licensing mechanism is not proportional to the legitimate aim wanted to be achieved and not necessary in a democratic society. Therefore, online broadcasting should be subject to press regime and should be free from licensing mechanism.

## BIBLIOGRAPHY

### 1) Primary Sources of Law

#### Regulations

1. Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5 <<https://www.refworld.org/docid/3ae6b3b04.html>> accessed 9 August 2020
2. The Law no 5651 on Regulation of Publications on the Internet and Combating Crimes Committed by Means of such Publications <<https://www.mevzuat.gov.tr/mevzuat?MevzuatNo=5651&MevzuatTur=1&MevzuatTertip=5>> accessed 9 August 2020
3. The Law no 6112 on the Establishment, Organization, Duties, Competence and Responsibilities of the Radio and Television Supreme Council <<https://www.mevzuat.gov.tr/mevzuat?MevzuatNo=6112&MevzuatTur=1&MevzuatTertip=5>> accessed 9 August 2020
4. The Regulation on the Transmission of Radio, Television, and On-Demand Services on the Internet. The Official Gazette, 1 August 2019, no. 30849 <<https://www.mevzuat.gov.tr/mevzuat?MevzuatNo=32695&MevzuatTur=7&MevzuatTertip=5>> accessed 9 August 2020

#### EU Case Laws

1. *Ahmet Yildirim v. Turkey* App no 3111/10 (ECHR, 18 March 2013)
2. *Appleby and Others v. the United Kingdom* App no 44306/98 (ECHR 6 May 2003)
3. *Autronic AG v. Switzerland* App no 12726/87 (ECHR 22 May 1990)
4. *Barthold v Germany* App no 8734/79 (ECHR 25 March 1985)
5. *Betty Purcell and others v. Ireland* App no 15404/89 (ECHR 16 April 1991)
6. *Centro Europa 7 S.R.L. and Di Stefano v. Italy [GC]* App no 38433/09 (7 June 2012)
7. *De Haes and Gijssels v. Belgium* App no 19983/92 (ECHR 24 February 1997)
8. *Demuth v Switzerland* App no 38743/97 (ECHR 5 February 2003)
9. *Długolecki v. Poland* App no 23806/03 (ECHR 24 May 2009)
10. *Dubowska and Skup v. Poland* App no 33490/96 (ECHR 18 April 1997)
11. *Fuentes Bobo v. Spain* App no 39293/98 (ECHR 29 May 2000)
12. *Galus v. Poland* App no 61673/10 (ECHR 15 November 2011)

13. *Gaweda v Poland* App no 26229/95 (ECHR 14 March 2002)
14. *Groppera Radio AG and Others v Switzerland* App no 10890/84 (ECHR 28 March 1990)
15. *Handyside v. United Kingdom* App no 5493/72 (ECHR 7 December 1976)
16. *Hertel v. Switzerland* App no. 25181/94 (ECHR 25 August 1998)
17. *Informationsverein Lentia v Austria* [GC] App nos 13914/88, 15041/89, 15717/89; 15779/89, 17207/90 (24 November 1993)
18. *Jersild v Denmark* App no 15890/89 (ECHR 23 September 1994)
19. *Khurshid Mustafa and Tarzibachi v. Sweden* App no 23883/06 (ECHR 16 December 2008)
20. *Kurlowicz v. Poland* App no 41029/0622 (ECHR, 22 June 2010)
21. *Lingens v. Austria* App no 9815/82 (ECHR 8 July 1986)
22. *Markt Intern Verlag GmbH and Klaus Beermann v Germany* App no 10572/83 (ECHR 20 November 1989)
23. *Meltex Ltd and Movsesyan v. Armenia* App no 32283/04 (ECHR 17 June 2008)
24. *Oberschlick v. Austria* App no 11662/85 (ECHR 23 May 1991)
25. *Observer and Guardian v UK* App no 13585/88 (ECHR 26 November 1991)
26. *Özgür Gündem v. Turkey* App no 23144/93 (ECHR 16 March 2000)
27. *Radio ABC vs. Austria* App no 19736/92 (ECHR 20 October 1997)
28. *Rotaru v. Romania* App no 28341/95 (ECHR 4 May 2000) § 55.
29. *RTBF v. Belgium* App no. 5008/06 (ECHR 29 March 2011)
30. *Schöpfer v. Switzerland* App no 25405/94 (ECHR 20 May 1998)
31. *Sunday Times v UK* App no 6538/74 (ECHR 26 April 1979)
32. *Sunday Times v UK (No. 2)* App no 13166/87 (ECHR 26 November 1991)
33. *Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2)* App nos 3002/3, 23676/03 (ECHR 10 March 2009)
34. *Tolstoy Miloslavsky v. the UK* [GC] App no 18139/91 (13 July 1995)
35. *Thorgeir Thorgeirson v. Iceland* App no 13778/88 (ECHR 25 June 1992)
36. *Vogt v Germany* App no 1785/91 (ECHR 26 September 1995) § 52.
37. *Wizerkaniuk v. Poland* App no 18990/05 (ECHR 5 July 2011)

## US Case Laws

1. *Federal Communications Commission v. League of Women Voters*, 468 U.S. 364 (1984)
2. *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978)
3. *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190 (1943)
4. *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997)

## 2) Secondary Sources of Laws

### Books

1. Bollinger L, *Images Of A Free Press* (University Of Chicago Press 1991)
2. Bychawska-Siniarska D, *Protecting The Right To Freedom Of Expression Under The European Convention On Human Rights* (Council of Europe 2017)
3. Donders K, Pauwels C, and Loisen J, *Private Television In Western Europe* (Palgrave Macmillan 2013)
4. Feintuck M and Varney M., *Media Regulation, Public Interest and the Law* (Edinburgh, UK: Edinburgh University Press, 2006)
5. Greer S, *The Exceptions to Articles 8 to 11 Of The European Convention On Human Rights* (Council of Europe Publishing 1997)
6. Humphreys P, *Mass Media And Media Policy In Western Europe* (Manchester University Press 1996)
7. Macovei M, *Freedom Of Expression: A Guide To The Implementation Of Article 10 Of The European Convention On Human Rights* (2nd edn, Council of Europe 2004)
8. McQuail D, *Media Performance: Mass Communication And The Public Interest* (Sage Publications 1992)
9. Mendel T, *Freedom Of Expression: A Guide To The Interpretation And Meaning Of Article 10 Of The European Convention On Human Rights* (Centre for Law and Democracy)
10. Papathanassopoulos S, and Negrine R, *European Media* (UK: Polity 2011)
11. Polo M, *Regulation For Pluralism In The Media Markets." The Economic Regulation Of Broadcasting Markets: Evolving Technology And The Challenges For Policy* (UK: Cambridge University Press 2007)

### Journal Articles

1. Adelman R, 'First Amendment and the Metaphor of Free Trade, The ' (1996) 38 Ariz L Rev 1125

2. Akdeniz Y, 'Analysis of the Draft Provision on the "Presentation of media services via Internet" to the Turkish Law No. 6112 on the Establishment of Radio and Television Enterprises and Their Media Services' [2018] OSCE
3. Akdeniz Y, 'Governing Pornography & Child Pornography On The Internet: The UK Approach The Governance Of The Internet' (2001) 32 University of West Los Angeles law review
4. Ayres I, 'Halfway Home: On Powe's American Broadcasting and the First Amendment' (1988) 13 Law & Social Inquiry 413
5. Barron J, 'Access to the Press. A New First Amendment' (1967) 80 Harvard Law Review 1641
6. Buckingham D, 'A Special Audience? Children And Television' [2005] in J. Wasko (ed.), A Companion to Television, London: Blackwell 468
7. Cate F, 'Indecency, Ignorance, and Intolerance: The First Amendment and the Regulation of Electronic Expression' (1995) 5 J. ONLINE L
8. Fiss O, 'Free speech and social structure' (1985) 71 Iowa L. Rev. 1405
9. Freedom House 'License to Censor: The use of media regulation to restrict press freedom – Lebanon' (2011) <<https://www.refworld.org/docid/4eccefc521.html>>
10. Hazlett T, and Sosa D, 'Was The Fairness Doctrine A "Chilling Effect"? Evidence From The Postderegulation Radio Market' (1997) 26 The Journal of Legal Studies
11. Horvitz R, 'Media Licensing, Convergence And Globalization' <[https://www.researchgate.net/publication/228199056\\_Media\\_Licensing\\_Convergence\\_and\\_Globalization](https://www.researchgate.net/publication/228199056_Media_Licensing_Convergence_and_Globalization)> accessed 28 July 2020
12. Jones A and Quillan H, 'Broadcasting Regulation: A Very Brief History' [1985] 37 FED COMM LJ 107
13. Keiser D, 'Regulating The Internet: A Critique Of Reno V. ACLU' (1998) 62 Albany Law Review
14. Kim M, and Djalalov M, 'Glossary And Terminology Of IP-Based Tvrelated Multimedia Services' (ITU 2014)
15. Mendel T, and Salomon E, 'Freedom of Expression And Broadcasting Regulation' (2011) 8 CI Debates
16. Oji M, 'Comparative Media Systems A Global View Of Press Freedom' (2000) 6 International Journal of Communication

17. Powe L, 'American Broadcasting And The First Amendment' (1988) 75 Berkeley: University of California Press
18. Rikhter A, 'Broadcast Licensing Law: Experience In Central Asia And South Caucasus' OSCE
19. Rogovin W, 'The Regulation of Television in the Public Interest: On Creating a Parallel Universe in Which Minorities Speak and Are Heard', (1992) 42 CATH. U. L. REV. 51
20. Salomon E, *Independent Regulation Of Broadcasting: A Review Of International Policies And Experiences* (UNESCO 2016)
21. Shapiro S, 'One and the Same: How Internet Non-Regulation Undermines the Rationales Used to Support Broadcast Regulation' (1999) 8 Media L & Pol'y 1
22. Soriano J, 'The Digital Transition And The First Amendment: Is It Time To Reevaluate Red Lion's Scarcity Rationale' (2005) 15 Pub. Int. LJ.
23. Spitzer M, 'Controlling the Content of Print and Broadcast' (1985) 58 S CAL L REV 1349
24. -- 'The Constitutionality of Licensing Broadcasters' (1989) 64 NYU L Rev 990
25. Steemers J, and D'Arma A, 'Evaluating And Regulating The Role Of Public Broadcasters In The Children'S Media Ecology: The Case Of Home-Grown Television Content' (2012) 8 International Journal of Media & Cultural Politics
26. Voorhoof D, 'Restrictions On Television Advertising And Article 10 Of The European Convention On Human Rights' (1993) 12 International Journal of Advertising
27. Weare C, Levi T, and Raphael J, 'Media Convergence And The Chilling Effect Of Broadcast Licensing' (2001) 6 Harvard International Journal of Press/Politics

### **Dissertation**

1. Jørgensen R, 'Internet And Freedom Of Expression' (Master Thesis, Raoul Wallenberg Institute 2001)

### **Official Documents**

1. Council of the European Union, EU Human Rights Guidelines on Freedom of Expression Online and Offline' (2014) [https://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/142549.pdf](https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/142549.pdf)> accessed 3 July 2020

2. European Parliament, 'Press Freedom In The EU Legal Framework And Challenges' (2015)
3. Federal Communications Commission, 'The Scarcity Rationale For Regulating Traditional Broadcasting: An Idea Whose Time Has Passed' (2005)
4. Ofcom, 'Addressing Harmful Online Content A Perspective From Broadcasting And On-Demand Standards Regulation' (2018) <[https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0022/120991/Addressing-harmful-online-content.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0022/120991/Addressing-harmful-online-content.pdf)> accessed 28 December 2019
5. UN Human Rights Committee (HRC), 'General comment no. 34, Article 19, Freedoms of opinion and expression' (2011), CCPR/C/GC/34 <<https://www.refworld.org/docid/4ed34b562.html>> accessed 4 March 2020
6. European Courts of Human Rights, 'Internet: case law of the European Court of Human Rights' (2015) <[https://www.echr.coe.int/Documents/Research\\_report\\_internet\\_ENG.pdf](https://www.echr.coe.int/Documents/Research_report_internet_ENG.pdf)> accessed 6 July 2020

### News Articles and Websites

1. Bhattacharjee P, 'How Does Your Child's Screen Time Measure Up?' (*CNN*, 2017) <<https://edition.cnn.com/2017/11/15/health/screen-time-averages-parenting/index.html>> accessed 6 July 2020
2. 'Broadcasting - The History Of Radio, The History Of Television, The Future Of Radio And Television, Cable Television' (*Law.jrank.org*, 2020) <<https://law.jrank.org/pages/4884/Broadcasting.html>>
3. Cantekin K, 'Turkey: New Regulation Requires Media And Platform Service Providers To Obtain Licenses For Offering Radio And Audiovisual Services On The Internet | Global Legal Monitor' (*Loc.gov*, 2019) <<https://www.loc.gov/law/foreign-news/article/turkey-new-regulation-requires-media-and-platform-service-providers-to-obtain-licenses-for-offering-radio-and-audiovisual-services-on-the-internet/>> accessed 6 July 2020
4. Cooper T, 'Cable, Satellite, IPTV & OTT Streaming: What's The Difference? - Broadband Now' (*Broadband Now*, 2016) <<https://broadbandnow.com/report/cable-vs-satellite-vs-iptv-vs-ott->



- streaming/#:~:text=Essentially%2C%20IPTV%20is%20a%20formally,Internet%20and%20streamed%20on%20demand.> accessed 5 July 2020
5. 'Daily TV Consumption By Age Germany 2020 | Statista' (*Statista*, 2020) <<https://www.statista.com/statistics/380266/daily-tv-consumption-germany/>> accessed 6 July 2020
  6. 'Feikert-Ahalt C, 'Limits On Freedom Of Expression: United Kingdom' (*Loc.gov*, 2019) <<https://www.loc.gov/law/help/freedom-expression/uk.php>>
  7. 'Freedom Of Press: The Concept' (*Shodhganga.inflibnet.ac.in*) <[https://shodhganga.inflibnet.ac.in/bitstream/10603/52360/8/08\\_chapter%201.pdf](https://shodhganga.inflibnet.ac.in/bitstream/10603/52360/8/08_chapter%201.pdf)> accessed 3 July 2020
  8. Günaydın E, 'How Much Fine Did RTSC Issue In A Year And A Half To Each Channel?' (*euronews*, 2020) <<https://tr.euronews.com/2020/05/19/rtuk-bir-bucuk-y-lda-hangi-kanala-ne-kadar-ceza-kesti>> accessed 28 July 2020
  9. Gürkaynak G and others, 'Regulation On Radio, Television And On-Demand Broadcasts On The Internet - Media, Telecoms, IT, Entertainment - Turkey' (*Mondaq.com*, 2019) <<https://www.mondaq.com/turkey/broadcasting-film-tv-radio/834084/regulation-on-radio-television-and-on-demand-broadcasts-on-the-internet#:~:text=According%20to%20the%20Regulation%2C%20media,internet%20are%20obliged%20to%20obtain>> accessed 6 July 2020
  10. Halton C, 'Over The Top (OTT) Definition' (*Investopedia*, 2019) <<https://www.investopedia.com/terms/o/over-top.asp>> accessed 6 July 2020
  11. 'Home Computer Access And Internet Use - Child Trends' (*Child Trends*, 2018) <<https://www.childtrends.org/indicators/home-computer-access>> accessed 6 July 2020
  12. 'Hours Of TV Consumption By Children By Age UK 2019 | Statista' (*Statista*, 2020) <<https://www.statista.com/statistics/397833/hours-of-media-consumption-by-children-by-media-uk/>> accessed 6 July 2020
  13. 'Internet Growth Statistics 1995 To 2019 - The Global Village Online' (*Internetworldstats.com*, 2020) <<https://www.internetworldstats.com/emarketing.htm>> accessed 28 July 2020
  14. McQuail D, '1. Introduction' (*Le.ac.uk*, 2020) <[https://www.le.ac.uk/oerresources/media/ms7501/mod2unit11/page\\_01.htm](https://www.le.ac.uk/oerresources/media/ms7501/mod2unit11/page_01.htm)>
  15. McQuail D, '1.2 The Historical Background To Media Regulation' (*Le.ac.uk*, 2020) <[https://www.le.ac.uk/oerresources/media/ms7501/mod2unit11/page\\_02.htm](https://www.le.ac.uk/oerresources/media/ms7501/mod2unit11/page_02.htm)>

16. 'Online Broadcasting Platforms, Including Netflix, Apply To TV Watchdog For License - Turkey News' (*Hürriyet Daily News*, 2019) <<http://www.hurriyetdailynews.com/online-broadcasting-platforms-including-netflix-apply-to-tv-watchdog-for-license-146270>> accessed 28 December 2019
17. 'Organizations With Broadcasting Permission On The Internet (RD/TV/ODS) - RTSC | Radio And Television Supreme Council' (*Rtuk.gov.tr*, 2020) <<https://www.rtuk.gov.tr/medya-hizmet-saglayicilar/3747/7046/internet-yayin-lisansiveya-yayin-izni-olan-kuruluslar-listesi.html>> accessed 28 July 2020
18. 'Regulation of Internet Content Services in China (I)' (zhonglun, 2018) <<http://www.zhonglun.com/Content/2018/01-25/1135317692.html>> accessed 7 March 2020
19. 'Saudi Arabia Now Forcing News Bloggers To Obtain Licenses, Promote Islam' (fastcompany, 2011) <<https://www.fastcompany.com/1716303/saudi-arabia-now-forcing-news-bloggers-obtain-licenses-promote-islam>> accessed 7 March 2020
20. Schultz J, 'How Much Data Is Created On The Internet Each Day?' | Micro Focus Blog' (*Micro Focus Blog*, 2019) <<https://blog.microfocus.com/how-much-data-is-created-on-the-internet-each-day/>> accessed 6 July 2020  
Manvell R, 'Broadcasting' (*Encyclopedia Britannica*) <<https://www.britannica.com/technology/broadcasting>> accessed 5 July 2020
21. Simons D, 'The Legitimacy Of Licence Requirements For The Use Of Wireless Communications Devices' (Article 19 Global Campaign for Free Expression 2005)
22. 'THE STATE OF ONLINE VIDEO 2018' (*Limelight.com*, 2020) <<https://www.limelight.com/resources/white-paper/state-of-online-video-2018/#popular>> accessed 6 July 2020
23. 'Update To Our Nudity And Attire Policy' (*Blog.twitch.tv*, 2020) <<https://blog.twitch.tv/en/2020/04/07/update-to-our-nudity-and-attire-policy/#:~:text=We%20don't%20permit%20streamers,of%20genitals%2C%20even%20when%20covered.&text=For%20all%20streamers%2C%20you%20must,of%20your%20pelvis%20and%20buttocks.>> accessed 6 July 2020
24. 'WACC | In The Public Interest: Public Broadcasting In Germany And Europe Under Review' (*Waccglobal.org*, 2018) <<https://waccglobal.org/in-the-public-interest-public-broadcasting-in-germany-and-europe-under-review/>> accessed 5 July 2020

25. Wells J, 'Twitch Rejects Xqc'S Appeal After He Was Banned For Streaming Nudity' (*The Loadout*, 2020) <<https://www.theloadout.com/streamers/xqc/twitch-ban-naked-connect-four>> accessed 6 July 2020
26. 'What Is Regulatory Capture? Definition And Meaning - Market Business News' (*Market Business News*, 2020) <<https://marketbusinessnews.com/financial-glossary/regulatory-capture-definition-meaning/>> accessed 12 August 2020
27. 'Worldconnx - Wireless FAQ' (Worldconnx.net, 2020) <[http://www.worldconnx.net/wireless\\_faq.php#:~:text=Wireless%20Internet%2C%20commonly%20referred%20to,effective%20solution%20for%20Internet%20access.&text=Each%20Wireless%20Internet%20subscriber%20has%20a%20small%20radio%20receiver%20and%20an%20antenna.](http://www.worldconnx.net/wireless_faq.php#:~:text=Wireless%20Internet%2C%20commonly%20referred%20to,effective%20solution%20for%20Internet%20access.&text=Each%20Wireless%20Internet%20subscriber%20has%20a%20small%20radio%20receiver%20and%20an%20antenna.)> accessed 5 July 2020
28. Yackley A, 'Turkey Pulls Plug On 20 Radio, TV Channels In Post-Coup Emergency Decree' (*reuters*, 2020) <https://www.reuters.com/article/us-turkey-media/turkey-pulls-plug-on-20-radio-tv-channels-in-post-coup-emergency-decree-idUSKCN12012K>

## **Lectures**

1. Akinfeleye R., 'Fourth Estate Of The Realm Or Fourth Estate Of The Wreck: Imperative Of Social Responsibility Of The Press' (the University of Lagos, 2003)