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European Master's Degree in Human Rights and Democratisation:

Interference of the media with the exercise of justice: analysis of the effects on the presumption of innocence.

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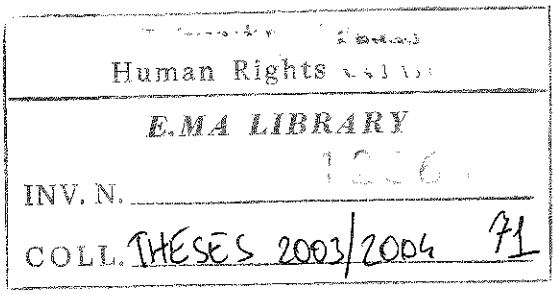

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The media coverage of criminal cases is increasing and journalists are not always respectful of the rights of the accused. Their reports are often likely to affect these rights, in particular the right to be presumed innocent. The influence of the media on the public opinion can create the conviction that the accused that has not yet been judged is guilty. The accused might then be victim of a social punishment. The freedom of expression and the presumption of innocence are both fundamental rights and a balance has to be struck between them in case of prejudicial pre-trial publicity. The significance of the freedom of expression in a democratic society is acknowledged but its limits are often forgotten by journalists. The presumption of innocence should be a strict limitation to the freedom of expression of journalists; the trial by media has no place in democratic society governed by the rule of law. This can be inferred from the wording of the European Convention, from the respective roles of the media and the judiciary and from the need to maintain the public's confidence and respect in the judiciary. The best solution would be to encourage the self-regulation by journalists themselves; it should consist in the adoption of professional codes of ethics.

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Introduction.

The importance of the freedom of expression in a democratic society has been consistently recognized; it is nowadays seen as an essential foundation of democracies. The freedom of expression helps promoting democracy and uncovers abuses. In particular, the pre-eminent role of the media in the exercise of the freedom of expression has been repeatedly emphasized. The significance of having a free media in a society is widely recognized; a free press, reporting freely on matters of public interest, plays a central role in the functioning of a democracy.

Media coverage of criminal proceedings has dramatically increased in the last decades. The public has been given insight and information of all kinds about specific cases, even before the beginning of the trial. Numerous criminal trials have been much publicized. In the name of the freedom of the media, it has long been commonplace to read detailed press reviews incriminating the accused, or conversely exonerating those subsequently proven guilty.

This does not happen without risk. This pre-trial publicity is often likely to affect the right to a fair trial. The right to a fair trial is a fundamental principle in criminal law. In particular, such publicity may affect the presumption of innocence of the accused person and his right [1] to be judged by an impartial tribunal. Although the freedom of the media is not seen as an absolute right by the European Convention, it seems that the limits set out by the Convention are often forgotten by journalists. The influence of the press on the public opinion can expose the accused to a social punishment .As the media become more pervasive and more influential, the potential for conflict between the freedom of the press and the defendant's right to a fair trial increases.

The issue of the conflict between the presumption of innocence and the freedom of the media is a topical question. The recent cases of Dutroux in Belgium or Cantat in France demonstrate this topicality. The French law on the strengthening of the presumption of innocence adopted in 2000 is also an example of the taking into consideration of the problem. That law prohibits the publication of pictures of an accused before his trial without his consent if this picture shows the person with handcuffs; that provision was recently applied against journalists who had published pictures of Cantat with handcuffs. The Recommendation on the provision of

[1] In order to make it simple, I will use "he" every time I talk about a person.

information through the media in relation to criminal proceedings adopted in 2003 by the Committee of Ministers of the Council of Europe identifies the same issue. Its second principle states that respect for the presumption of innocence is an integral part of the right to a fair trial, which is one of the central articles of the European Convention. The consequence of this is that "*opinions and information relating to on-going criminal proceedings should only be communicated or disseminated through the media where this does not prejudice the presumption of innocence of the suspect or accused*".

This issue was not only dealt with by the Council of Europe. The International Commission of Jurists established the Madrid Principles on the Relationship between the Media and Judicial Independence in 1994. Those principles state that the basic principle of freedom of expression in relation to criminal proceedings may be restricted by laws in the interest of the administration of justice to the extent necessary in a democratic society "*for the prevention of serious prejudice to a defendant*".

Although the acceptance in theory of the presumption of innocence as a limit to the exercise of the freedom of the media, journalists do not seem to pay attention to it. When someone is suspected of a crime or arrested, journalists just seem to consider him as guilty and tend to forget that this person has certain rights. Yet, those rights should be kept in mind by journalists and in case of conflict with the freedom of expression, the right of the accused should prevail. A responsible exercise of the freedom of the media should respect the rights of the accused. What I would like to demonstrate here is how to strike a balance between those two fundamental rights and why it is here argued that the rights of the accused should be perceived as a limit to the freedom of expression of journalists.

Our focus will be mainly based on the European Convention for the Protection of Human Rights and Fundamental Freedoms but some references will be made to the situation in the United States. Our point of view will mainly be a legal one. We will base our arguments on the case law of the European Court of Human Rights, on the national regulations of European countries and on cases from European countries .We will examine, through examples from different countries, how the problem of conflict between the freedom of the media and the rights of the accused is dealt with in Europe. This presentation does not tend to be exhaustive about the problems stemming from the difficult relationships between the media and the judiciary. It will limit itself to the potential clash with the presumption of innocence and to the potential influence on the jury.

The first chapter will briefly develop the notions of presumption of innocence and fair trial: What do they mean? Why do they exist? The freedom of expression will be analysed in the second chapter; in particular, we will examine its significance in a democratic society and the limits which are set out by article 10 of the European Convention. In the third chapter, we will develop the consequences of extensive media coverage and explain how it can affect the rights of the accused. We will examine the obligations of journalists in relation with criminal cases and how the media coverage happens in practice. We will focus on the presumption of innocence and the right to an impartial tribunal, which could be affected if the pre-trial publicity influences the jurors. The fourth chapter will develop the reasons why the presumption of innocence should always be respected by journalists when they report about criminal cases. In the fifth chapter, we will make concrete proposals for a better respect of the presumption of innocence by journalists reporting on criminal proceedings. We will examine the state regulation and the self-regulation and the different initiatives already taken in order to promote a responsible exercise of the freedom of the media.

Chapter I : The presumption of innocence.

The presumption of innocence is currently a basic principle of criminal law. It is widely accepted in most countries[2]. Few jurists would contest the significance of this principle. It is a presumption of law, which means the assumption of the truth of the innocence of a person.

I. 1. The "raison d'être" of the presumption of innocence.

The presumption of innocence is the cardinal principle of almost all the systems of criminal proceedings. It is widely accepted that a person accused of a crime is innocent until proven guilty according to law.

The justification of this principle could be summarized by the words of Blackstone, more than two hundreds years ago: "*the law holds that it is better that ten guilty persons escape than that one innocent suffer*"[3]. The ratio 10-1 has become known as the "Blackstone ratio". The maxim "*it is better that n guilty men escape than one innocent suffer*" became very widespread, even if legal commentators differ on the nature of this notion. However, there is no general agreement on what this ratio should be[4].

Nonetheless, the principle is there: the presumption of innocence exists in order to minimize the risk that innocent persons may be convicted and imprisoned[5]; it is preferable to let a guilty man go free than to condemn an innocent.

One of the reasons why the presumption of innocence is so fundamental is because of the value of liberty. The presumption of innocence is the "*preventive consequence*" of the protection of the individual liberty[6]. The individual liberty is one of the values underlying the rule of law[7]. In our democratic societies, the legal and political traditions provide a large measure of protection to personal liberty. This principle was set forth by the French

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[2] R. Kitai, *Presuming innocence* , in « Oklahoma Law Review », 55, p. 257 on http://www.oscn.net/applications/oscn/deliverdocument.asp?citeid=434233.

[3] W. Blackstone, quoted by A. Volokh, "*n guilty men*", in « University of Pennsylvania Law Review »,173, 1997 on http://www1.law.ucla.edu/~volokh/guilty.htm.

[4] For a very complete evolution of this « *n* guilty men" maxim, see A. Volokh, ibidem.

[5] N. Jayawickrama, *The Judicial Application of the Human Right Law* , Cambridge, 2002, p.550.

[6] *La présomption d'innocence*, Rapport de la Commission de réflexion sur la justice au Président de la République, Paris, 1997, p. 59.

[7] H.M. Hurd , *Moral combat*, Cambridge Studies in Philosophy and Law, Cambridge, 1999, p.205.

Declaration of the Rights of Man and of the Citizen in 1789[8] and came from the philosophical and political principles of the Age of Enlightenment. Article 5 of the European Convention also gives an eminent place to the concept of liberty. The citizen cannot be deprived of his personal liberty except in accordance with the law.

The constitutional character of the presumption of innocence and its inclusion as a principle of human rights and political morality only crystallized during the period of the Enlightenment. The presumption of innocence was recognized in the second half of the eighteenth-century as a basic constitutional right granted to every person. Later, the entrenchment of the presumption of innocence as one of the basic principles of the modern legal system finally occurred in the nineteenth century[9].

According to Rinat Kitai, the only valid justification for the presumption of innocence relates to the commitment of the State towards the individual under the social contract theory to refrain from convicting him when there is a possibility that he has done no wrong. This would reflect a rejection of the utilitarian approach because of the unwillingness to equate the risk of conviction of the innocent with other kinds of risks to society[10].

Another central notion in relation to this issue is the one of justice. The meaning of justice has always been debated by lawyers and philosophers. Similar discussions occurred about the notion of injustice. However, there is one case that everyone would consider to be an injustice: the conviction of an innocent person. The purpose of the presumption of innocence is to avoid this insufferable injustice[11].

The judge should be more on his guard against the injustice which condemns than the injustice which acquits. The acquittal of the guilty will only give rise to few discussions while the condemnation of an innocent will spread general dismay; the alarm caused by the punishment is greater than the one caused by the offence. Consequently, the danger of being

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[8] "Article II - The goal of any political association is the conservation of the natural and imprescriptible [i.e., inviolable] rights of man. These rights are liberty, property, safety and resistance against oppression.(...)

Article IV - Liberty consists of doing anything which does not harm others: thus, the exercise of the natural rights of each man has only those borders which assure other members of the society the enjoyment of these same rights. These borders can be determined only by the law."

[9] R. Kitai, *Presuming innocence, ibidem.*

[10] R. Kitai, *Protecting the Guilty,* in « Buffalo Criminal Law Review», vol.6, 2003, p. 1179, on http://wings.buffalo.edu/law/bclc/bclrarticles/6/2/kitai.pdf.

[11] T. Bingham, *The Business of Judging: Selected Essays and Speeches*, Oxford University Press, 2000, p. 269.

innocently punished will always seem greater than the danger of suffering from the acquittal of the guilty[12]. The recognition of this principle implies that there is always a risk of error in the exercise of justice; the fallibility of the judicial system cannot be ignored and justifies this privilege for the accused.

The presumption of innocence is based mainly on grounds of public policy relating to political morality and human dignity[13]. The aim of this principle is to protect the dignity of the persons[14]. It is based on the assumption that a person normally obeys the law and is testament to the belief that, until proven otherwise, people are basically honest and respectful of the laws. The Universal Declaration of Human Rights, which has inspired the members of the Council of Europe for the redaction of the European Convention for the Protection of Human Rights and Fundamental Freedoms, puts a great emphasize on human dignity. The principles of humane treatment and respect for human dignity are the basis for the more specific and limited obligations of States in the field of criminal justice[15]. According to Kant, respecting the dignity means acting in such a way that "*you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end*"[16].

I. 2. Definition of the presumption of innocence.

The presumption of innocence means that the accused is innocent of the crime which he is charged with until proven otherwise according to the law. It is also known as the principle "*in dubio pro reo*". The presumption of innocence is a fundamental right, incorporated in many international texts and in national legislations. The first text that recognized the presumption of innocence was the Declaration of the Rights of the Man and of the Citizen, of constitutional value, in 1789. Its article 9 stated that "*Every man is presumed innocent until having been declared guilty*". It has also found a place in the Universal Declaration of Human Rights (1948), in its article 11.1: "*Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had*

[12] J. Bentham, *A treatise on judicial evidence*, in J. Goldstein, A. Dershowitz, R. Schwartz, *Criminal Law : Theory and Process*, London, 1974, p. 283-284.
[13] R. Kitai, *Presuming the Innocence,* ibidem.
[14] V. Thiery, *La présomption d'innocence*, Lille, 2000, p.38 on http://www2.univ-lille2.fr/eddroit/recherche/publica.html; R. Kitai, *Presuming Innocence,* ibidem.
[15] General Comments n°9 on article 10 of the Covenant, Human Rights Committee, 1982.
[16] I. Kant, *The Moral Law(Groundworks of the Metaphysic of Moral)*, quoted by A. Clapham, *The Drittwirkung of the Convention*, in R. Macdonald, F. Matscher and H. Petzold, *The European System for the Protection of Human Rights,* Dodrecht, Kluwer, 1993, p.205.

all the guarantees necessary for his defence". Article 6.2 of the European Convention for the protection of Human Rights and Fundamental Freedoms states that "*Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law".* The presumption of innocence was incorporated in the International Covenant on Civil and Political Rights (1966), in its article 14.2 The African Charter on Human and People's Rights and the American Convention on Human Rights (1969) also establish the presumption of innocence, respectively in their articles 7.1(b) and 8.2. All these texts see the presumption of innocence as an absolute right: they make no provision for an exception to this principle.

In 1765, in "On Crimes and Punishment", Beccaria set out this principle: "*More than one witness is needed, because, so long as one party affirms and the other denies, nothing is certain and the right triumphs that every man has to be believed innocent*"[17]. Until the guilt has been established by a court, the accused should be seen and treated as innocent by everyone[18]. It should not be assumed that the presumption implies an actual belief that the accused is in fact innocent. Rather, this presumption exists primarily to establish the burden of proof.

The presumption of innocence provided for by article 6.2 of the European Convention of Human Rights applies to persons subject to a "criminal charge", which has the same autonomous meaning as it does under article 6.1 of the Convention[19]. The presumption of innocence may be infringed not only by a judge or a court but also by other public authorities[20]. It may be violated not only by general onus of proof but also by the concrete hearing of a criminal case by the authorities, including via public statements, made on the case in regard to the question of guilt[21].

Article 6.2 does not preclude the authorities from informing the public about criminal investigations in progress but in order to preserve the presumption of innocence, these

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[17] Cesare Beccaria, *On Crimes and Punishments*, quoted by K. Pennington, *Innocent until proven guilty: the origins of a legal maxim*, 2001 on http://faculty.cua.edu/pennington/Law508/InnocentGuilty.htm.
[18] J.-F. Chassaing, *Jalons pour une histoire de la présomption d'innocence*, in Collection Histoire de la Justice n°12 *:Juger les juges : du Moyen-Age au Conseil Supérieur de la Magistrature,* Paris, La Documentation française, 2001.
[19] R. Clayton, H. Tomlinson, *The law of Human Rights*, Oxford University Press, 2000, p.661; according to the established case-law of the Court, there are three criteria to be taken into account when deciding whether a person is "charged with a criminal offence" for the purposes of article 6, namely the classification of the proceedings under national law, their essential nature and the type and severity of the penalty that the applicant risked incurring.
[20] Allenet de Ribemont v. France, ECtHR, Judgment of 10/02/95.
[21] E. Werlauff, *Common European Procedural Law*, Copenhagen, 1999, p.222.

authorities should be discreet and circumspect[22]. The scope of article 6.2 is thus not limited to criminal proceedings that are pending but in certain instances, also to judicial decisions taken after the discontinuation of such proceedings or following an acquittal.

Nonetheless, the Court held that although the presumption of innocence applied to the whole of the criminal proceedings, it only applied to "*the particular offence charged .Once an accused has properly been proved guilty of that offence, Article 6 § 2 can have no application in relation to allegations made about the accused's character and conduct as part of the sentencing process, unless such accusations are of such a nature and degree as to amount to the bringing of a new 'charge'*"[23]. The protection of the presumption ceases as soon as the guilt has been established according to law.

Concerning the presumptions of fact or of law, the Court considered that they operate in every legal system and that the Convention does not prohibit such presumptions in principle but the State must "*confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence*"[24]. Article 6.2 is not breached by strict liability offences, which requires no *mens rea* element.
The right to be presumed innocent, although forming part of the general notion of a fair hearing under article 6, is not absolute, *"since presumptions of fact or of law ... are not prohibited in principle by the Convention, as long as states remain within certain limits"*[25].

I. 3. The place of the presumption of innocence in the right to a fair trial.

The presumption of innocence was incorporated in the article 6 of the Convention, whose central aim is to guarantee the right to a fair trial. It occupies a central place in the Convention system. A fair trial is a basic element of the notion of the rule of law and part of the common heritage of the Contracting States, according to the Preamble of the Convention[26]. Article 6 is the most often invoked provision of the Convention in front of the Strasbourg Court.

[22] F.G. Jacobs and R. White, *The European Convention on Human Rights*, Oxford University Press, 1996, p.150.
[23] Phillips v. United Kingdom, ECtHR, Judgment, of 05/07/2001, para.35.
[24] Salabiaku v. France, ECtHR, Judgment of 07/10/1988, para.28.
[25] Phillips v. United Kingdom, ECtHR, Judgment of 05/07/2001, para.33.
[26] C. Ovey and R. White, *The European Convention of Human Rights*, Oxford University Press, 2002, p.139.

Article 6.1 applies both to civil and criminal proceedings. The text of article 6.1 reads:

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Article 6.1 thus requires an independent and impartial tribunal established by law, public hearings and public judgements made in reasonable time. Many of the terms used in this provision bear an autonomous meaning. As stated before, the terms "criminal charge" have an autonomous meaning, which is the same than the one in article 6.2. Article 6.2 and 6.3 provide for specific rights in relation to criminal proceedings. These provisions must be read with those of Article 6.1. When a violation of article 6.1 has been found, no further inquiry will be made as to a possible violation of these provisions[27].

The minimum rights of article 6.3 can be seen as a non-exhaustive elaboration of the basic right to a fair trial[28]:

> 3. Everyone charged with a criminal offence has the following minimum rights:
> a to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
> b to have adequate time and facilities for the preparation of his defence;
> c to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
> d to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
> e to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Compliance with the specific rights set out in article 6 will not guarantee in itself that the trial is fair: the European Court will always examine the context of the proceedings as a whole[29]. A number of specific features of what should be a "fair trial" have emerged from the case law of the Court[30].

There should first be a procedural equality, which means a fair balance between the parties[31].

The parties have the right to have an adversarial trial, which means that "*both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations*

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[27] P. Van Dijk, G.J.H. Van Hoof, *Theory and Practice of the European Convention of Human Rights*, Kluwer, 1998, p. 458.
[28] A. Ashworth, *The Criminal Process: An evaluative study*, Oxford University Press, 1998, p.46.
[29] Kraska v. Switzerland, ECtHR, Judgment of 19/04/1993.
[30] For more details, see Ovey and White, op cit., p.155 and following.
[31] Borgers v. Belgium, ECtHR, Judgment of 30/10/1991, on the role of the *avocat general* which compromises the equality between the parties.

filed and the evidence adduced by the other party. In addition Article 6 § 1 requires (...) that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused"[32]. The fair trial of article 6 requires implicitly a reasoned decision[33].

The Court also recognized that the right to a fair trial implied, as a general rule, the presence of the accused at the first instance trial and during the appeal hearing, if an assessment of the character of the accused is of crucial importance in the proceeding[34]. Furthermore, the criminal defendant or the civil party should be able to effectively participate in the proceedings[35].

I. 4. Content of the presumption of innocence.

Article 6.2 is relatively brief. The European Court of Human Rights and the scholars have clarified the content of the presumption of innocence. The presumption of innocence implies that the prosecution has the burden of proof. It does not only imply an onus of proof requirement but also that "the *task of procuring the evidence against the accused lies with the prosecution; there can never be an onus on the accused to procure evidence against himself"*[36].The accused has no obligation, at any point of the trial, to demonstrate his innocence. The accused can only be sentenced by the Court on the basis of the evidence put forward during the trial. This evidence may refer to previous statements made by the accused.

Article 6.2 has also consequences for the treatment of the accused: he should be treated as innocent and nothing shall be done during the trial which could in anyway prejudge of his guilt. This principle applies to the treatment during the preliminary examination and the trial, as well as to the treatment of the accused detained on remand.[37] The presumption of innocence would be violated if "*a statement of a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved so according to law"*[38]. Public officials may not prejudge the outcome of a trial.

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[32] Rowe and Davis v. United Kingdom, ECtHR, Judgment of 16/02/2000, para.60.
[33] Van de Hurk v. Netherlands, ECtHR, Judgment of 19/04/1994.
[34] Kremzow v. Austria, ECtHR, Judgment of 21/09/1993.
[35] Stanford v. United Kingdom, ECtHR, Judgment, of 23/02/1994.
[36] E. Werlauff, ibidem, p. 221.
[37] P. Van Dijk, GJH Van Hoof, ibidem, p.459-461.
[38] Daktaras v. Lithuania, ECtHR, Judgment of 10/10/2000, para.41.

One could say that putting in evidence previous convictions of the accused at the beginning or in the course of the trial could breach article 6(2). Having established that in many contracting States, such information is regularly given to the Court before its decision on the guilt of the accused, the Commission concluded that such a procedure was not in breach of article 6 of the Convention. Nevertheless, the Court will assess the fairness of the trial as a whole and in particular cases, evidence of previous convictions could support the view that the trial had not been fair under article 6. [39]

The presumption of innocence also includes the right of the defendant to have an opportunity to exercise his right of defence[40]. The European Convention does not include as such the privilege of self-incrimination, nor the right to remain silent. Nonetheless, the Court has recognized the close link between the presumption of innocence and those privileges[41]. The right to remain silent can be defined as the right not to be compelled to testify against oneself or to confess guilt. The privilege of the prohibition against self-incrimination means that no one can be required to be his own betrayer, which is expressed by the Latin maxim "*nemo debet prodere se ipsum*".[42]

[39] J. Andrews, *Human Rights in criminal procedure: a comparative study*, Martinus Nijhoff Publishers, 1981, p.26; F.G. Jacobs and R. White, ibidem, p.150.
[40] Minelli v. Switzerland, ECtHR, Judgment of 25/03/1983; see also Weixelbraun v. Austria, ECtHR, Judgment of 20/12/2001: the Court found a violation of article 6.2 because the applicant's claim for compensation, after his acquittal, was dismissed because the suspicion that he was guilty has not been entirely dissipated; Hammern v.Norway, ECtHR, Judgment of 12/02/2003:there has been a violation of article 6.2 because of the refusal of compensation following acquittal, on ground of failure to show on balance of probabilities that the accused did not commit the acts in question; Baars v. Netherlands, ECtHR, Judgment of 28/10/2003.
[41] Heaney and MacGuinnes v. Ireland, ECtHR, Judgment of 21/12/2000; Funke v. France, ECtHR, Judgment of 25/02/1993, par.44; see also Murray v. United Kingdom, ECtHR, Judgment of 08/02/1996, par. 45.
[42] J. Andrews, ibidem, p. 98-99.

Chapter II : The freedom of expression .

« I *do not agree with a word you say but I will fight to the death for your right to say it* ».

This statement, attributed to the French philosopher Voltaire, expresses his commitment to the respect and the significance of the freedom of speech.

Since the appearance of the first democracies, the freedom of expression has always been a thorny issue. The challenge of ensuring the free expression of ideas had been quickly perceived. The freedom of expression is one of those "mutually *supporting rights"* (the others being the freedom of thought, of association and of assembly), which implicitly recognize the importance of the ability to form and express opinions[43].

In most democratic countries, the freedom of expression is protected by the Constitution. That is the case in France, Spain, Belgium, the United States and in many other countries. The international and regional instruments also recognize an eminent status to the freedom of speech; this is the case of article19 of the Universal Declaration of Human rights, article 19 of the International Covenant on Civil and Political Rights, article 13 of the American Convention on Human Rights and article 9 of the African Charter on Human and People's Rights.

II. 1. The definition of the freedom of expression.

On the European level, article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information an 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 the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

[43] N. Jayawickrama, ibidem, p.664.

The Convention was the first human rights instrument which made express provisions for limitations on the freedom of expression[44].

In the Handyside case, the European Court of Human Rights emphasized the significance of the freedom of expression, which constitutes "one *of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man*"[45].

According to article 10 of the Convention, the freedom of expression may be defined as the right to hold opinions and to receive and impart informations and ideas without interference. The term "interference" has been given a very broad sense by the Court; it primarily connotes legislative constraint and executive control[46]. Interference includes executive orders preventing publication[47], confiscation of published material or post-publication measures[48]. The right to hold opinions means that people have the right to express their opinions. The *right to receive informations and ideas* basically means that the government cannot restrict a person from receiving informations that others may be willing to impart to him[49].The *right to impart informations and ideas* implies that the opinions, informations and ideas should be freely communicated to others; the freedom of expression means freedom to express so as to be heard by others[50].

Thus, the freedom of expression implies that a speaker has the right to express his opinions and that a willing audience has the right to receive the communication; the state must not stand between the speaker and his audience[51] .Nonetheless, the right to receive information does not entail a right of access to information[52].

II. 2. The content of the freedom of expression .

The protection of the freedom of expression, set out in article 10(1), is extremely broad. It applies to all forms of expression, through any medium: written or spoken words, television

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[44] R. Clayton, H. Tomlinson, ibidem, p.1059
[45] Handyside v. United Kingdom, ECtHR, Judgment of 7/12/1976, para.49.
[46] A . Jeffery, *Free speech and Press : An absolute right ?* , in « Human Rights Quaterly », vol.8, n° 2, May 1986, p.199.
[47] Sunday Times v. United Kingdom, ECtHR, Judgment of 26/11/1992.
[48] Vereniging Weekblad Bluf v. Netherlands, ECtHR, Judgment of 9/02/1995.
[49] Leander v. Sweden, ECtHR, Judgment of 26/03/1987.
[50] N. Jayawickrama, ibidem, p.685.
[51] R. Clayton, H. Tomlinson, ibidem, p.1063.
[52] Leander v. Sweden, ECtHR, Judgment of 26/03/1987.

programmes and broadcasting[53], images[54] , books[55], paintings[56], films[57], statements in radio interviews[58], and information pamphlets[59].

Article 10 "is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend , shock or disturb the State or any sector of the population[60].These demands of pluralism, tolerance and broadmindedness are essential conditions for a democratic society. Thus, the protection of article 10 applies not only to the substance of the ideas and information expressed but also to the form in which they are conveyed[61].

II. 3. The freedom of the media.

The pre-eminent role of the media in the exercise of the freedom of expression has been repeatedly emphasised. The European Court frequently stresses the role of the press in a state governed by the rule of law: "*Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society »*[62]. Its role in imparting information is frequently recalled by the Court[63].

Freedom of the press has been accorded increasing recognition in recent years. The power of the media is more and more acknowledged; the significance and sensitivity of the freedom of

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[53] Autronic AG v. Switzerland, ECtHR, Judgment of 22/05/1990.
[54] Chorherr v. Austria, ECtHR, Judgment of 25/08/1993.
[55] Handyside v. United Kingdom, ECtHR, Judgment of 7/12/1976.
[56] Müller v. Switzerland, ECtHR, Judgment of 24/05/1988 : *« Admittedly, Article 10 does not specify that freedom of artistic expression, in issue here, comes within its ambit; but neither, on the other hand, does it distinguish between the various forms of expression. As those appearing before the Court all acknowledged, it includes freedom of artistic expression - notably within freedom to receive and impart information and ideas - which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds »*
[57] Otto-Preminger Institute v. Austria, ECtHR , Judgment of 20/09/1994.
[58] Barthold v. Germany, ECtHR, Judgment of 23/03/1985.
[59] Open Door Counselling and Dublin Well Woman v. Ireland, ECtHR, Judgment of 29/10/1992.
[60] Handyside v. United Kingdom, ECtHR, Judgment of 7/12/1976.
[61] Lehideux and Isorni v. France, ECtHR, Judgment of 23/09/1998; De Haes and Gijsels v. Belgium, ECtHR, Judgment of 24/02/1997, in which the Court recognized that the fact that the views are expressed in polemical language does not take them out of the protection of article 10; News Verlag GmbH v. Austria, ECtHR, Judgment of 11/01/2000.
[62] Castells v. Spain, ECtHR, Judgment of 26/03/1992, para. 43.
[63] News Verlag GmbH v. Austria, ECtHR, Judgment of 11/01/2000.

the press has become increasingly apparent, in particular with the expansion of the Council of Europe in the last ten years .The media in Central and Eastern Europe have played a major role in bringing down totalitarianism and are still a vital safeguard in new democracies.[64].

II.3. 1. Content of the freedom of the media:

The press has an obligation to impart information and ideas on political issues and on other areas of public interest and the public has the right to receive them; the press has a « professional duty » to inform the public[65].

While the media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent to them to impart ideas and information concerning matters that come before the courts just as in other areas of public interest[66]. Journalistic freedom may include exaggeration or even provocation[67].

II.3. 2. Function and importance of the freedom of the media.

According to the Madrid Principles on the Relationship between the Media and Judicial Independence, set out by the International Commission of Jurists, the function of the media is to gather and convey information to the public[68].

The significance of having free media in a society is widely recognized; a free press, reporting freely on matters of public interest, plays a central role in the functioning of a democracy[69] . The media afford the expression of ideas and opinions about the functioning of public institutions and make an informed public debate over matters of public interest possible.

The media also have the power to influence the political process and to shape the public opinion. The political media are important because "*a mature democracy depends on having*

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[64] C. Ovey and R. White, ibidem, p.209.
[65] Recommandation of the Committee of Ministers of the Council of Europe on the provision of information through the media in relation to criminal proceedings, 10/07/2003.
[66] Sunday Times v. United Kingdom, ECtHR, Judgment of 26/04/1979.
[67] Prager and Oberschlick v. Austria, ECtHR, Judgment of 22/03/1995 .
[68] Madrid Principles on the Relationship between the Media and Judicial Independence, International Commission of Jurists, 1994.
[6969] J. Sprack, *Publicity surrounding the trial*, in M. McMconville, G. Wilson, *The Handbook of the Criminal Justice Process*, New-York, Oxford University Press, 2002, p. 221.

an educated electorate, informed and connected through parliament and it is principally through the media that such an electorate can be formed"[70].

It plays a role of "*public watchdog*"[71], guarding against the abuse of power at all levels of society and ensuring accountability and transparency of political bodies and public authorities[72]. The right to free speech has the power to promote democracy, uncover abuses and advance political, artistic, scientific and commercial development[73]. It is one of the basic conditions for the progress of a democratic society and for the development of every individual.

This function is especially important when it comes to the exercise of justice. The principle, set out by the article 6 of the European Convention on Human Rights, is that everyone is entitled to a fair and public hearing. The fact that the trial should be public is obviously a guarantee against arbitrariness for the accused but it is also a way to provide the maintenance of the public's confidence in the administration of justice. The media reporting on judicial proceedings is generally accepted as supporting the principle that the administration of justice should be open to public scrutiny. The comments on court proceedings contribute to their publicity. Thus, the media have a special function: to comment on the administration of justice.

The fact that the courts are the forum for the settlement of disputes does not mean that there can be no prior discussion elsewhere, in the press or among the public at large[74]. In order to serve the interests of the community, the Courts need the co-operation of an enlightened public which is possible only if the public has respect for and confidence in the court's capacity to fulfil its function[75]. Very recently the Committee of Ministers of the Council of Europe stressed the importance of the media reporting on criminal proceedings «*in informing the public on criminal proceedings, making the deterrent function of criminal law visible as well as in ensuring public scrutiny of the functioning of the criminal justice system*"[76].

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[70] B. McNair, *Journalism and Democracy: An evaluation of the political public sphere*, London and New-York, Routledge Editions, 2000, p.1.
[71] Goodwin v. United Kingdom, ECtHR, Judgment of 22/02/1996.
[72] Declaration of the Committee of Ministers of the Council of Europe on freedom of political debate in the media, 12/02/2004, www.coe.int.
[73] C. Ovey and R. White, 2002, p.277.
[74] N. Jayawickrama, ibidem, p. 693.
[75] Sunday Times v. United Kingdom, ECtHR, Judgment of 26/04/1979.
[76] Recommendation of the Committee of Ministers of the Council of Europe on the provision of information through the media in relation to criminal proceedings, 10/07/2003.

It follows from the importance of the freedom of expression for the mass media in a democratic society that it is crucial to secure for journalists an effective enjoyment of their right to freedom of expression. Nonetheless, the freedom of expression is not absolute.
Restrictions to the freedom of the press are often perceived as censorship. It can be explained by historical reasons. The censorship of the press began not long after the invention of the printing press. The struggle for freedom of the press has always been seen as an inherent part of the struggle for democracy. In the beginning, the system of regulation was a very restrictive one. Restrictions occurred in two ways: censorship or mandatory licensing by the government in advance of publication and punishment for printed materials[77].

II. 4. Limitations to the freedom of expression.

The freedom of expression is not an absolute right. The European Convention expressly allows some limitations to this right. Certain restrictions are provided by article 10(1) and concern the regulation of broadcasting. The second paragraph of article 10 states that the exercise of the freedom of expression carries with it duties and responsibilities and provides that an interference with the freedom of expression will be justified under three conditions.

II. 4. 1. The regulation of broadcasting.

Article 10(1) provides that States may require the licensing of broadcasting, television or cinema enterprises. Article 10 of the Convention provides for a greater regulation of broadcasting than the written word; the state has the power to license broadcasting, cinema and television enterprises. The licensing of broadcasting is authorised by the Convention but should respect the demands of the second paragraph of article 10.
The margin of appreciation of the state in relation to licensing decisions is very wide[78].
The imposition of prior restraint on films, radio broadcasting and cinema is justifiable because of the unique capacity of these means of communication to reach very large audiences[79].

[77] Freedom of the press, The Columbia Encyclopedia, Sixth Edition, 2001 on http://www.bartleby.com/65/.
[78] Skyradio AG and others v. Switzerland, ECtHR, Judgment of 27/09/2001.
[79] N. Jayawickrama, ibidem, p.703.

II.4. 2. The restrictions allowed by article 10 (2).

Article 10 of the Convention, in its second paragraph, makes express provisions for limitations on the freedom of expression. Prior restraint on publication in the media is not as such incompatible with article 10; however, such interference requires very close scrutiny: even temporary restraints can be disastrous because news is a perishable commodity[80].

Article 10(2) states that the exercise of the freedoms in article 10(1) "*carries with it duties and responsibilities*". It implies that, in determining the necessity of the restrictions, these duties and responsibilities should be taken into account. Their scope depends on the situation of and the technical means used by the one who is exercising his freedom of expression[81]. The potential justifications of the interferences must be narrowly interpreted[82].
An interference with freedom of expression will be justified under article10 (2) if[83] :

- it is prescribed by law
- it is in pursuance with one of the legitimate aims listed in article 10(2)
- it is necessary in a democratic society.

II. 4. 2. 1. Prescribed by law.

The interference will be prescribed by law where the interference has some basis in domestic law, where the law is adequately accessible and where the law is formulated in such a way that a person can foresee the consequences which his action will entail.

II. 4. 2. 2. Legitimate aim.

The interference must further one of the legitimate purposes set out in article 10(2).
The legitimate aims which can potentially justify restrictions on the freedom of expression are

- the interests of national security;

[80] The Observer and Guardian Newspapers Ltd v. United Kingdom, ECtHR , Judgment of 26/11/1991.
[81] Handyside v. United Kingdom, ECtHR, Judgment of 07/12/1976.
[82] R. Clayton , H. Tomlison, ibidem, n° 15.179.
[83] For a more complete and deeper analysis of these conditions, see C. Ovey and R. White, ibidem, p. 198-216; R. Clayton, H. Tomlinson, ibidem, n° 15.177 and following.

- the interests of territorial integrity or public safety;
- the prevention of disorder or crime;
- the protection of health or morals;
- the protection of the reputation or the rights of others;
- preventing the disclosure of information received in confidence;
- maintaining the authority and impartiality of the judiciary.

Among those aims which can justify an interference with the freedom of expression obviously appear the crucial objectives of the presumption of innocence: the protection of the rights of others and the impartiality of the judiciary.

• *Protection of the reputation or the rights of others.*

This protection provides the right for an individual to pursue defamation proceedings; nevertheless, the limits of acceptable criticism are wider for a politician than for a private citizen[84]; those limits are even wider for a government.
Nonetheless, even if there is substantial damage to reputation, a successful claim in defamation may violate article 10. The Court, after a very detailed analysis of the factual issues of the case, stated that the vital interest in ensuring an informed public debate over a matter of local or national interest was sufficient to outweigh the interests of those who issued defamation proceedings to protect their reputation[85]. In subsequent cases, the Court also found that the personal interest of someone to protect his reputation was not sufficient to outweigh "*the important public interest in the freedom of the press to impart information on matters of legitimate public concern*"[86]. It reflects very well the tendency of the Court to rarely find that articles in the media can legitimate restrictions to the freedom of expression[87].

• *Maintaining the authority and impartiality of the judiciary.*

Maintaining the authority and the impartiality of the judiciary can be a justification for an interference with the freedom of expression; it overlaps with the right of an individual to have

[84] Lingens v. Austria, ECtHR, Judgment of 08/07/1986.
[85] Bladet Tromso and Stensaas v. Norway, ECtHR, Judgment of 20/05/1999.
[86] Bergens Tidende v.Norway, ECtHR, Judgment of 02/05/2000, para. 60.
[87] J.-P. Costa , *La liberté d'expression selon la jurisprudence de la Cour Européenne des Droits de l'Homme de Strasbourg* ,in « Actualité et Droit International », June 2001 on www.ridi.org/adi.

a fair trial where publicity would prejudice the interests of justice, under article 6(1). The protection of the right to a fair trial is its ultimate aim[88].

The phrase "authority of the judiciary" includes, in particular, the notion that the courts are- and are accepted by the public as such- the proper forum for the settlement of legal disputes and for the determination of a person's guilt or innocence on a criminal charge; further, it means that the public at large have respect for and confidence in the courts' capacity to fulfil that function[89].

Impartiality denotes lack of prejudice or bias. However, the Court has repeatedly held that what is at stake in maintaining the impartiality of the judiciary is the confidence which the courts in a democratic society must inspire in the accused, as far as criminal proceedings are concerned, and also in the public at large[90].

The Court emphasized the role of the media in imparting information, particularly when a public person is involved, taking into account that the limits for acceptable criticism are wider for a public person. Still, public persons enjoy the right to a fair trial set out in article 6 and "*...the limits of permissible comment may not extend to statements which are likely to prejudice, whether intentionally or not, the chances of a person receiving a fair trial or to undermine the confidence of the public in the role of the courts in the administration of criminal justice*"[91]. Maintaining the authority and the impartiality of the judiciary includes thus the protection of the rights of litigants[92].

The scope of the article 10(2) is broader than the one of article 6(2): pre-comments are potentially legitimate under article 10[93]. However, account should always be taken of the central position of article 6 in the Convention; according to the Court, the authority and impartiality of the judiciary are objectively determinable. Therefore, the margin of appreciation of the state to take measures to protect them is narrow[94].

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[88] D. Korff, *The guarantee of freedom of expression under article 10 of the European Convention On Human Rights,* in « Journal of Media Law and Practice », Dec. 1988, p. 149.
[89] R. Pekkanen, *Criticism of the judiciary by the media,* in P. Mahoney, F. Matscher, H. Petzold, L. Wildhaber, *Protecting Human Rights: The European perspective . Studies in memory of Rolv Ryssdal*, 2000, Koln, Carl Heymanns Verlag, p.1080.
[90] Worm v. Austria, ECtHR, Judgment of 29/08/1997.
[91] Worm v. Austria, ECtHR, Judgment of 29/08/1997, para. 50.
[92] Observer and Guardian v. United Kingdom, ECtHR, Judgment of 26/11/1991.
[93] R. Clayton, H. Tomlinson, ibidem, n°15.212.
[94] Sunday Times v. United Kingdom, ECtHR, Judgment of 26/11/1991.

The tone, the context, the impact and the intent of the publication in question will be considered very carefully by the Court, in order to determine whether the interference was justified. The Court recognized that judges should be protected from unjustified and untrue attacks but if the criticisms of judges form part of a public debate on the functioning of the judiciary, the restrictions would be hardly justifiable[95].

Thus, the Court found a violation of article 10 in a case where the applicant journalists had criticized in very virulent terms the judges of the Court of Appeal in a case of child abuse but where the articles had been part of a public debate in the country about that topic[96]. In another case, where the attacks against the impartiality of judges had been personal and destructive and where the applicant had not been prevented from criticizing the judgment rather than the judges, the Court found no violation of article 10[97]. The existence of a public debate in which the article can form part of will be a crucial element in determining whether the restrictions are justified.

II. 4. 2. 3. Necessary in a democratic society.

The state must not only establish that the interference with the freedom of expression was prescribed by law in pursuance of one of the aims listed in article 10(2) but it must also establish that the interference was necessary in a democratic society. The Court stated that the interference should occur in response to a pressing social need and should be proportionate to the legitimate aim pursued[98]. The burden is on the public authorities to show that the grounds for interference were relevant, sufficient and convincingly established[99].

In deciding whether the interference was necessary in a democratic society, the States enjoy a margin of appreciation because "*State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them* »[100].

The necessity of a restriction depends on the character of the expression, the means of communication, the duties and responsibilities of the persons exercising their freedom of

[95] C. Ovey and R. White, ibidem, p.208.
[96] De Haes and Gijsels v. Belgium, ECtHR, Judgment of 24/02/1997.
[97] Barfod v. Denmark, ECtHR, Judgment of 22/02/1989.
[98] Silver v. United Kingdom, ECtHR, Judgment of 25/03/1983.
[99] R. Clayton, H. Tomlinson, ibidem, n° 15.190.
[100] Handyside v. United Kingdom, ECtHR, Judgment of 07/12/1976, para. 48.

expression, the audience to which it is directed, the significance of the interference and the purpose for which the restriction is imposed[101].

Depending on the rights in issue or on the balancing of competing rights, the scope of the margin of appreciation will sometimes be broad and sometimes narrow. As stated above, the margin of appreciation of the States in taking measures to protect the authority and the impartiality of the judiciary is narrow.

[101] R. Clayton, H. Tomlinson, ibidem, n° 15.179.

Chapter III: The media coverage of criminal cases.

There is nowadays a real fascination of the media with murders and other high profile trials. The newspapers are full of reports on criminal pending cases. Certain kinds of crimes like murder, child abuse, terrorism, sexual violence are particularly newsworthy. The media coverage of criminal proceedings is not a new phenomenon. Criminal cases have always been a centre of interest for the media.

A glance at the nineteenth century's newspapers suggests that the coverage of crimes that are newsworthy today was already lurid and sensational at the time[102].The Dreyfus case is one of the first famous examples of a highly publicised criminal case. Captain Dreyfus was sentenced to life on Devil's Island for treason, in 1894 in France. At the very time that he was secretly arrested and interrogated by the army, a newspaper broke the story with the headline "*High Treason: Arrest of the Jewish Officer, A. Dreyfus.*" The sensational revelations in the press pushed the army to prosecute Captain Dreyfus. The news of Dreyfus' arrest and upcoming court martial produced a storm of newspaper stories. The French public was bombarded with details of supposed evidence, unfounded charges, wholly invented events, rumours, and gossip. By the time the court martial started, most of the public believed that Dreyfus was a traitor[103].

Although the media coverage of criminal proceedings is not new, it has been expanding in a very striking way in the last decades. Crime is a popular subject in the mass media and crime sells newspapers[104]. Newspapers are full of details about pending cases; this phenomenon is spreading worldwide. Rapid technological advancement, enhanced public expectations, and the institutional growth of the media can explain this explosion in coverage of criminal trials[105].

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[102] D. Corker, M. Levi, *Pre-trial Publicity and its Treatment in the English Courts*, in « Criminal Law review », 1996, p. 622; J. Knelman, *Trial by newspaper in nineteenth-century in England*, in« Journal of Media Law and Practice », vol.15, n°4, 1994, p. 106.

[103] The press divided itself between pro-Dreyfus and pro-army support. Even though another soldier confessed in 1899 to be the author of the spy memo that had started the whole matter, Dreyfus's conviction was only reversed in 1906.

[104] M. Davies, H. Croall, J. Tyrer, *Criminal Justice : An introduction to the Criminal Justice system in England and Wales*, London, Longman, 1995, p. 43.

[105] R. Hardaway, D.B. Tumminello, *Pretrial publicity in criminal cases of national notoriety: constructing a remedy for the remediless wrong*, in « American University Law Review », October 1996 on www.wcl.american.edu/journal/lawrev/46/hardtxt.html.

III. 1. The significance of media reporting on criminal proceedings.

The reporting on criminal proceedings is necessary in a democratic society, in order to ensure the public's confidence in the judiciary[106]. The media have a duty to gather and convey information to the public[107]. They have an obligation to inform the public about pending cases and the public has the right to receive such information. Their reports on criminal cases support the principle that the administration of justice should be open to public scrutiny. The comments on court proceedings contribute to their publicity. The public needs to be informed on criminal proceedings; such media reporting on criminal proceedings makes the deterrent function of criminal law visible[108].

To be able to serve the interests of the community at large, courts need the co-operation of an enlightened public which is only possible if the public has respect for and confidence in the court's capacity to fulfil its function[109]. Therefore, truthful and balanced reporting on the judiciary by the mass media is necessary not only for the public, as the main source of information in this area, but also for the judiciary itself[110].

III. 2. The obligations of journalists in reporting.

Journalists have certain obligations concerning the content of their reports. According to the case-law of the European Court of Human Rights, journalists should to a certain degree ensure that the information provided has an objective and factual basis; value judgements should also be made in good faith .Since the truthfulness of a fact can be proven but not that of a value judgement, it is required that value judgements are fairly drawn from established facts[111].

Article 10 of the European Convention provides that the exercise of the freedom of expression carries duties and responsibilities. By reason of those duties and responsibilities, the protection afforded by Article 10 to "*journalists in relation to reporting on issues of general*

[106] J. Sprack, ibidem, p.221.
[107] Madrid Principles on the Relationship between the Media and Judicial Independence, International Commission of Jurists, 1994.
[108] Recommendation of the Committee of Ministers of the Council of Europe on the provision of information through the media in relation to criminal proceedings, 10/07/2003.
[109] Sunday Times v. United Kingdom, ECtHR, Judgment of 26/04/1979.
[110] R. Pekkanen, ibidem, p.1081.
[111] Lingens v. Austria, ECtHR, Judgment of 8/07/1986.

interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism" [112]. The protection applies not only to information or ideas that are favourably received, but also to those that offend, shock or disturb. Furthermore, journalists should always give the person against whom the accusations are levelled an opportunity to comment on them[113].

The vocabulary used by the press is very important. Although the European Court has accepted that journalistic freedom covers polemical and aggressive tone and recourse to exaggeration or even provocation, it has also stated that journalists should refrain from using excessive language[114]. The tone and the manner in which an opinion or information is expressed is of great significance. The prohibition of a report which, though critical, is expressed in moderate terms and which is factual and objective will require greater justification than the interference with an article which makes wild assertions and which represents subjective suspicions as established facts[115].

As to the form of the publication, depending on the importance of the issue at stake, the European Court stated, in the Oberschlick case, that the limits of freedom of expression were not exceeded by choosing the form of criminal information for the article, even when no public prosecution had been instituted against the person accused by the article. The consequence of this choice was clearly that a significant number of readers were *"led to believe that a public prosecution had been instituted against [the man accused in the article]..."*[116].

III. 3. The media coverage in practice.

The obligation to provide objective and accurate information in good faith is not always respected in practice. The reports in the newspapers sometimes seem to go further than their duty to convey and gather information to the public. Very often, "sensationalism" takes precedence over objectivity. The "trial by media" occurs more and more often: the accused is judged by journalists in the media, even before the beginning of his trial in the courtroom.

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[112] Bergens Tidende v. Norway, ECtHR, Judgment of 02/05/2000, para. 53.
[113] Prager and Oberschlick v. Austria, ECtHR, Judgment of 26/04/1995.
[114] R. Pekkanen, ibidem, p. 1082.
[115] D. Korff, *The Guarantee of Freedom of Expression under article 10 of the European Convention on Human Rights* , in« Journal of Media Law and Practice », Dec. 1988, p.147.
[116] Oberschlick v. Austria, ECtHR, Judgment of 23/05/1991, para. 48.

Excessive language is very common; it happens mainly in the so-called tabloids but can also take place in "normal" newspapers. But it obviously depends on what we call "excessive language".

In practice, when someone is suspected of a crime or arrested by the police, the media coverage can become extensive very quickly. The media will then take sides; most of the time, the accused will be presented as guilty. Media sometimes believe in his innocence but it is less frequent.

Media often publish the name of the accused, his picture, details about his life and criminal records. Revelations of previous criminal records and confessions are known to be very damaging to the accused[117].In the name of the freedom of the media, it has long been commonplace to read detailed press reviews incriminating the accused, or conversely exonerating those subsequently proven guilty. The public is usually aware of countless details of the case and has been given insight and information of all kinds about specific cases even before the beginning of the trial. The major problem is that the media will influence the public opinion in such a way that the public will consider an accused innocent or - most of the time- guilty, even before the beginning of the trial.

III. 4. Examples of intense media coverage.

There are many examples of criminal cases in which the media coverage was really intense.

In France, in 1984, the Grégory Villemin case[118] was widely covered by the media from all over the country. The mother of the boy was suspected of the murder and was dragged through the mud by the media; her story aroused passions and the media divided themselves in pro- and against- Villemin. The whole family was exposed to the curiosity of the media. The mother spent many years in jail until 1993, when she was formally found innocent. The father spent also a lot of time behind bars for shooting the man he considered to be the assassin, the mother's cousin. After more than 20 years, the French audience has heard almost everything about the Villemin family but still does not know who the murderer of Grégory

[117] J. Cooke, *Contempt and the Media*, in « Journal of Media Law and Practice », April 1986, p. 3.
[118] Four-years-old Grégory Villemin was found floating in the river Vologne in October 1984, hands tied behind his back.

was. However, that case sowed doubt about the functioning of the police and the judiciary and about the objectivity of the journalists[119].

In Belgium, the famous Dutroux case has given rise to extensive media coverage since the arrest of Marc Dutroux in August 1996. He was accused of the abduction and rape of six young girls and teenagers and of the murder of four of them[120]. Since his arrest, he became known in the newspapers as "the monster of Marcinelle" (Marcinelle being the town where the victims were detained in one of Dutroux's houses); details about his life, his family, his previous records were widely spread in the media. When his trial started on the 1st March 2004, not many people in Belgium doubted his guilt. A poll about the case was even publicized a few days before the trial started; the citizens had been asked questions about the guilt of Dutroux, about the punishment he should be sentenced to and even, about their view on the death penalty[121].

In the United States, the case of OJ Simpson is another example of extensive media coverage but this time, in favour of the innocence of the accused. The football star was charged with the murders of his ex-wife and of her new boy-friend; because he was a celebrity that almost everyone knew and admired, the media coverage was huge and shaped a very favourable public opinion. Television was allowed in the court room, affording a double trial: one in the Courtroom, the other one in the court of the public opinion, through the media. If ever anyone began a case benefiting from a genuine presumption of innocence, it was the popular OJ Simpson. He was discharged by the jurors, despite prosecutors' and police claims that they had a great number of incriminating evidence[122] .

III. 4. 1 The conditions likely to give rise to intense media coverage.

If we look at these cases, we notice that there are some types of cases which are more likely to attract media's attention than others. Some authors have identified four types of trials that especially attract media's attention[123].

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[119] H. Trouille, *A look at French Criminal Procedure*, in « Criminal Law Review », Oct. 1994, p.740.
[120] *Les grandes dates de l'affaire Dutroux* , in«Le Soir», 23/02/2004.
[121] Although the death penalty was abrogated in 1996 in Belgian law, 66% of those polled said they were favourable to it.
[122] *Famous American Trials: The OJ Simpson Trial*, Law faculty, University of Missouri, on http://www.law.umkc.edu/faculty/projects/ftrials/Simpson/simpson.htm; see also www.cnn.com/US/OJ.
[123] R. Hardaway, D.B. Tumminello, ibidem.

The first category is the one of cases involving unusually sordid facts *"appealing to the nation's voyeuristic tendencies"*, such as the crimes of passion.

The second category includes the cases in which the nature of the crime is so atrocious or shocking that it gives rise to exaggerated media coverage. For instance, cases of child abuse or child murder, such as the Dutroux case or the Grégory case, usually receive extensive coverage because of the sensitivity of the topic.

Following the terrorist attacks of 11th September 2001, terrorism has become a very sensitive question and persons charged with offences related to terrorism seem, in practice, to be usually denied the benefit of the presumption of innocence. In France around New Year 2002, a young French man of Algerian origin called Adberrezak Besseghir was arrested by French police. He worked as a baggage handler at Charles de Gaulle airport; he was arrested when his car was searched in the airport car-park after a tip-off and was found to contain 3 handguns and explosive materials. His case was highly publicized in France, he was called "terrorist" in every newspaper. He was released from prison after 10 days, when the police found that he had been the victim of a set-up[124]. That case occurred at a time when fighting terrorism was one of the priorities; many people falsely link terrorism to Islamism. Being Muslim unfortunately did not plead in his favour. It is worth noting that in 1894 Dreyfus was also an easy target because of the largely widespread anti-Semitic attitudes in the French society.

The third category concerns the case in which the defendants are famous, such as the OJ Simpson case. In his case, the pre-trial publicity was very favourable to his innocence.

In Portugal, the case of the Casa Pia Institution broke in 2002[125]. After the disclosure of child abuses in state-run Casa Pia network of children's homes and the revelation of the possible existence of a paedophile network, every week brought new revelations in the media. Many politicians were accused of being part of this network. Although some of them are still waiting in jail for a trial, some have been exonerated and released. However, the shadow of the allegations made against them still falls over their political future.

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[124] S. Bouniot, *Abderazak Besseghir, " terroriste " engendré par notre ère sécuritaire*, in «L'Humanité», 14 /01/2003

[125] P. Falzon, *L'onde de choc Casa Pia fait trembler le Portugal*, in «L'Humanité», 16/09/2003; Casa Pia is a public institution which takes care of children in trouble; allegations about a paedophile network arose in 2002. Portugal has been racked by rumours that the state-run network of Casa Pia children's homes has been infiltrated by a paedophile ring. This ring supposedly supplies young boys to be sexually abused by well-known politicians and celebrities.

In the fourth category are the cases in which the victims are famous. One example is the trial of the presumed murderer of the Lindbergh's baby in 1935; Charles Lindbergh was a national hero and though the evidence against the accused has since been seriously questioned, the press presumed his guilt from the first headline.

Another example is the one of the murder of the French actress Marie Trintignant. She died in August 2003 when she was filming a movie in Lithuania, after a fight with her boyfriend, the famous French singer Bertrand Cantat. Cantat was tried in Vilnius and sentenced to 8 years of jail for the murder. There was huge interest particularly in the popular press and on television programmes because of their profile as celebrities[126]. Among the audience, some people were supporting Cantat's innocence and some others took the side of the Trintignant family. The case has focused attention on domestic violence in France[127]. Before the beginning of the trial, the mother of Marie Trintignant wrote a book about her daughter, in which she called Cantat "murderer". The Court of Appeal of Paris ordered her to insert a slip sheet recalling that Cantat benefited from the presumption of innocence[128]. Three newspapers were fined for the publication of Cantat's pictures with handcuffs, which is prohibited by the French law on the strengthening of the presumption of innocence of 2000. It is probably a good thing that the trial took place in Lithuania: the media coverage was so intense in France that the trial would have started in a very passionate atmosphere. In France, the presumption of innocence of Bertrand Cantat was dramatically affected by the reports in the media.

Another category could be the one of people accused of war crimes or genocide. The seriousness and nature of the crimes and the personality of the people usually accused of these crimes often lead to extensive media coverage. The coverage of cases such as these of Slobodan Milosevic or more recently Saddam Hussein brings the question whether a fair trial is possible for those persons, given the worldwide press campaign which has been orchestrated against them. In their case, for most of the people, the question whether they are guilty or not is not even a worthy question.

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[126] She was a famous actress and his father is a famous French movie-star of the fifties; her mother is a famous director. Cantat is the singer of a politically-engaged rock group.

[127] *The trial of Bertrand Cantat,* in «The Times», 16 March 2004, on www.timesonline.co.uk.

[128] The slip sheet reads : « L'éditeur rappelle (...) que toute personne est présumée innocente jusqu'à ce que sa culpabilité ait été légalement établie par un tribunal ».

III. 4. 2. The outcome of the media coverage.

The outcome of extensive media coverage varies from a case to another. It can sometimes be favourable to the accused, as it was in the case of OJ Simpson. Most of the times, however, it will be very detrimental to the accused. People like Dutroux or Dreyfus were seen as guilty by everyone, even before the beginning of their trial.
In any case, such intensive media coverage will be harmful to society and to the general notion of justice.

III. 5. The risks of an extensive media coverage: the impact on the rights of the accused person.

Such extensive media coverage of a case is likely to be very detrimental for the rights of the accused person. It can affect the person's right to privacy; it is also likely to affect his right to be presumed innocent until proven guilty by a tribunal.

A preliminary question is whether the European Convention is applicable to the behaviour of the media: are the media bound by the obligation to respect the presumption of innocence? This is known as the issue of the *Drittwirkung* of the Convention, that is, the extent to which the Convention is applicable to the behaviour of non-state actors[129].
Another controversial issue is whether the securing of the rights set out in the Convention requires the State to take steps to ensure their observation[130].

According to the case-law of the European Court of Human Rights, the presumption of innocence may be infringed by the courts and by other public authorities[131]. Furthermore, in Strasbourg, only Contracting Parties may be respondents; a journalist could not be directly sued before the European Court of Human Rights for the violation of the presumption of innocence of an accused. The question of private abuses of human rights can arise when the State is held responsible for a private violation, due to its failure to legislate or take other preventive action[132]. The idea that Convention rules can in some circumstances bind private

[129] A. Clapham, *The Drittwirkung of the Convention,* in R. Macdonald, F. Matscher and H. Petzold, *The European System for the Protection of Human Rights*, Dordrecht, Kluwer, 1993, p. 163.
[130] C. Ovey and R. White, ibidem, 2002, p.39.
[131] Allenet de Ribbemont v. France, ECtHR, Judgment of 10/02/1995.
[132] A. Clapham, ibidem, p.166.

parties came from the widely accepted consideration that the Convention does give rise to positive obligations in that the securing of certain rights can only be achieved by State action to regulate certain types of conduct[133]. It is now clear that the protection of the right to life in article 2 or the rights guaranteed in article 8 may require positive actions by States[134]. In fact, the Convention only impacts upon the conduct of private parties adjectivally when action is taken by the State to secure the rights set out by the Convention which requires or prohibits certain conduct by individuals; the duties imposed on the individuals would actually flow from the national law implementing the obligation of the State under the Convention[135]. Nonetheless, even if the media are not bound directly by the Convention, it is clear that their action can affect the rights of the accused.

III. 5. 1. The right to privacy.

The accused person has the right to privacy, as stated by article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which provides that "Everyone has the right to respect for his private and family life, his home and his correspondence". However, media reports sometimes affect this right by providing details about the life of the accused. The provision of information about suspects, accused or convicted persons or other parties to criminal proceedings should always respect their right to protection of privacy in accordance with Article 8 of the Convention[136]. In spite of its significance, this issue is beyond the scope of this analysis and will not be examined here.

III.5. 2. The presumption of innocence.

Presenting the accused person as guilty can seriously affect his right to be presumed innocent, as set out by article 6(2) of the European Convention for the Protection of Human Rights and

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[133] C. Ovey and R. White, ibidem, 2002, p. 38.

[134] McCann, Farrel and Savage v. United Kingdom, ECtHR, Judgment of 27/09/1995 ; Osman v. United Kingdom, ECtHR, Judgment of 28/10/1998; X, Y v. Netherlands,ECtHR, Judgment of 26/03/1985, para.23 : " in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves".

[135] C. Ovey and R. White, ibidem, p.39.

[136] Recommendation (2003) 13 of the Committee of Ministers of the Council of Europe on the provision of information through the media in relation to criminal proceedings.

Fundamental Freedoms. The presumption of innocence means that the accused is innocent of the crime which he is charged with until proven otherwise according to the law.

Until the guilt has been established by a court, the accused should be seen and treated as innocent by everyone[137]. The innocence or the guilt can only be decided by a tribunal on the basis of the evidence put forward during the trial.

The trial by media seriously affects the presumption of innocence, which is an essential part of the right to a fair trial. The right to a fair trial has always occupied a central place in the Convention system. It is a basic element of the notion of the rule of law and part of the common heritage of the Contracting States, according to the Preamble of the Convention[138]. The trial by media makes a fair trial impossible. The trial by media will have very detrimental effects for the rights of the accused.

The issue of the non-respect of the presumption of innocence by the journalists was early perceived by the Council of Europe. The Resolution of the Parliamentary Assembly on the ethics of journalism identified this problem already in 1993.It underlined the fact that the basic principle of any ethical consideration of journalism is the clear distinction that should be drawn between news and opinions; news should be based on truthfulness. Rumours must not be confused with news. On the other hand, opinions should always be expressed honestly and ethically. It stated that "*in journalism, information and opinions must respect the presumption of innocence, in particular in cases which are still sub judice, and must refrain from making judgments*"[139]. This resolution also called for the implementation of the right of reply, set out by the Resolution n° 26, adopted by the Committee of Ministers in 1974. The clash between the freedom of expression and the presumption of innocence was thus clearly identified by the Council of Europe.

The Recommendation on the provision of information through the media in relation to criminal proceedings adopted in 2003 by the Committee of Ministers concerns the same issue and made some proposals in order to find a balance between those conflicting rights[140].That text recommends that the Governments or Member States take all the measures necessary to

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[137] J.-F. Chassaing, ibidem.
[138] C. Ovey and R. White, ibidem, p.139.
[139] Resolution 1003, 1993, on the ethics of journalism, Parliamentary Assembly of the Council of Europe on www.assembly.coe.int.
[140] Recommendation (2003) 13 of the Committee of Ministers of the Council of Europe on the provision of information through the media in relation to criminal proceedings.

implement a number of principles appended to the recommendation. The second principle states that respect for the presumption of innocence is an integral part of the right to a fair trial, which is one of the central articles of the European Convention. The consequence of this is that "*opinions and information relating to on-going criminal proceedings should only be communicated or disseminated through the media where this does not prejudice the presumption of innocence of the suspect or accused*". Principle 9 states that a right of correction or reply should be recognized to everyone who has been the subject of incorrect or defamatory media reports in the context of criminal proceedings. Furthermore, any person who can show that that the provision of information is highly likely to result, or has resulted, in a breach of his or her right to a fair trial, should have an effective legal remedy (principle 11).

The International Commission of Jurists was also aware of this potential conflict. It established the Madrid Principles on the Relationship between the Media and Judicial Independence in 1994. Those principles state that the basic principle of freedom of expression in relation to criminal proceedings may be restricted by laws in the interest of the administration of justice to the extent necessary in a democratic society "*for the prevention of serious prejudice to a defendant*".

III. 6. The consequences of the interference with the presumption of innocence of the accused.

First of all, on a social point of view, such publicity which affects the right of the accused to be presumed innocent will have a great influence on the public opinion. It can be very detrimental to the life of the accused. If the media present him as guilty, the accused will be exposed to a social punishment which can ruin his life. The public might assume that the view expressed by the media is the truth and hence will consider him guilty. The sentence of the public opinion cannot be appealed.

It is also important to examine the consequences of extensive media coverage on the proceeding itself. This pre-trial publicity is obviously likely to reach the potential jurors, in the case of a judgement by a popular jury.

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III. 6 . 1 . Effects on the public opinion.

The media have a great influence on the public opinion[141]. There are good empirical evidences that show that the structure of the news agenda (which issues are highlighted, which are not) affects public opinion[142]. The press is said to be the "provided agency" of the public opinion; the press is the forum of public opinion, the place where the public opinion is formed[143].Its influence is necessary in order to shape the public opinion and to enlighten the public about matters of general interests[144]. Yet when it concerns criminal proceedings, journalists should be aware of the significance of their influence and should use it cautiously. In this field, media are almost the only source of information for the public. Despite the general principle of the publicity of the hearings, few citizens have access to the court room. Many people do not question the truthfulness of the information in the media.
The main power of the media is that they can choose to give importance to a fact or another; they usually push *"faits divers"* forward, as Pierre Bourdieu noticed in his essay "Sur la television"[145].

III. 6. 1. 1. Influence on the public opinion.

If the accused is presented as "the murderer", he will probably be considered as such by the public opinion. Here again, the wording of the article is crucial. The title "Police arrests the murderer of X" is obviously more striking than "Police arrests the presumed murderer of X" or even "Police arrests the man charged with the murder of X". Journalists who write first titles probably only think of the best way to attract the audience's attention.
Media are products of human beings; they are to be sold on the market and therefore produced for the market, and media people sometimes are not able to resist the temptation to offer only, what they think that their consumers want to get[146].

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[141] K. Asano, *The Crime of Reporting Crimes*, Department of Journalism and Mass Communication, Doshisha, 1984, on http://www1.doshisha.ac.jp/~kasano/FEATURES/2000/translation.html.
[142] B. McNair, *Journalism and Democracy: An evaluation of the political public sphere*, Routledge, New-York and London, 2000, p. 29.
[143] F. Inglis, *People's witness*, Yale University Press, New Haven and London, 2002, p.301, 51.
[144] F. Inglis, , ibidem, p. 345.
[145] P. Bourdieu, *Sur la television*, EditionsLiber, 1996.
[146] E. Markel, *Justice and the Media*, Conference Philippe Abravanel on Media and Justice, 7th Edition, Jan-April 2001, on www.justiceintheworld.org.

But the impact of such words on the public will be that they will assume that the person arrested is the murderer. Media are highly influential in the process of belief formation and are often responsible for people's first impressions[147]. The consequence of that assumption of guilt will be that the accused will be seen and treated as guilty by the public. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms.

III. 6. 1. 2. The social punishment.

Those allegations of guilt in the media expose the accused to a social punishment. The media can destroy the reputation of the accused and even where the accused is eventually found innocent, his reputation will probably be tarnished forever. The impact of such allegations of guilt has a dramatic effect on the life of the accused. The ability of the media to create and orchestrate a very high level of hostility towards the accused is dramatically impressive. The consequence will be that, even if he is later found innocent, the accused will always be perceived as guilty.

It will first of all affect the self-confidence of the person accused. Self-confidence is one of the most important elements of life for any person; when a person's reputation is smeared, when groundless accusations are levelled or false information spread this will affect his self-confidence. A person's reputation is particularly jeopardized in the event he is engaged in public activities and is a focus of public attention[148].

The social life of the person accused will also be damaged by those assumptions of guilt. The person who is presented in the newspapers as guilty of a crime (whatever it is) will probably hardly find (or even keep) a job or a house. The popular proverb "There is no smoke without fire" unfortunately becomes, in that kind of situation, a recurrent justification.

Furthermore, reputation will be hardly repaired. Even if the outcome of the trial is in favour of the innocence of the accused, the shadow of the accusation will remain. The publicity given to

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[147] T. B. Roydhouse, *Are jury members affected by media reports?,* University of New South Wales, 2001, on www.sentry.org.

[148] A. Zrvandian, *Comparative analysis of the new RoA Criminal Code, the defamation norms in the European countries, the criteria of the European Human Rights Court and the US Supreme Court practice*, Newsletter of Armenian Helsinki Committee, June 2003, on http://www.hra.am/ahc/english1/6new_e/main6_2.htm.

the sentence is often less important than the pre-trial publicity. It can even escape notice. What will remain are the allegations of guilt which were spread before the trial.

That social punishment can last for a long time; the sentence from the public cannot be appealed. There is nothing that the accused person can do; a libel trial is an unsatisfactory solution. Money that can be obtained from that action will never be able to compensate the damage to the reputation.

III. 6. 1. 3. Effect on the acceptance of the justice's decision.

One of the particularly perverse effects of the influence of the media on the public opinion lies in the potential dissent about the future decision taken by the tribunal. In a case where the press campaign has influenced the public opinion in such a way that the public is convinced of the guilt of the accused, the decision of the tribunal which would give a ruling in the opposite direction runs the risk of being challenged by the public. The legitimacy of a decision which would not be in accordance with the public opinion might be weakened; the public will challenge this decision that does not seem fair. The acceptance of the sentence as being fair is necessary to ensure respect for and confidence in the court's ability to settle disputes. Justice needs not only to be done but needs also to be seen to be done.

III. 6. 2. Effects on the proceeding itself.

The influence of the media on the public opinion might not be the only risk of such extensive media coverage. The question whether the media coverage is likely to affect the proceeding itself is worth being asked.

Between the breaking of a case, the beginning of the media coverage and the beginning of the trial of the accused person, a lot of time can have elapsed. During this period of time which can be relatively long, depending on the case, the publicity and the allegations of guilt are likely to reach persons who will be involved in the trial. This is the case of the judges and the potential jurors, in case of trial by a jury.

Article 6(1) guarantees the right to a fair trial before "*an independent and impartial tribunal established by law*". Before examining whether the independence and the impartiality of the judges and the jurors could be affected by such pre-trial publicity, we will first examine what

"independent and impartial tribunal" means, according to the case-law of the European Court of Human Rights.

III. 6. 2. 1. The right to an independent and impartial tribunal.

The requirement of article 6(1) means that there cannot be a fair trial (criminal or civil) before a court which is, or appears to be, biased against one of the parties[149].The Court emphasizes that *"it is of fundamental importance in a democratic society that the courts inspire confidence in the public and above all, as far as criminal proceedings are concerned, in the accused"*. To that end, the Court has constantly stressed that *"a tribunal, including a jury, must be impartial from a subjective as well as an objective point of view*[150]". The Court identifies two aspects to the requirement of independence and impartiality set out in article 6(1): the subjective and the objective elements.

First, the tribunal must be subjectively impartial. It means that *"no member of the tribunal should hold any personal prejudice or bias"*[151].The judge's lack of bias is presumed unless there is evidence to the contrary; there are few cases where the existence of subjective bias has been established since in practice *"such evidence can be very hard to come by"*[152]. However, it does not necessarily follow from the fact that a member of a tribunal has some personal knowledge of one of the witnesses in a case that he will be prejudiced in favour of that person's testimony. In each individual case it must be decided whether the familiarity in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal[153].

Secondly, the tribunal must also be impartial from an objective point of view. The objective elements mean that it must offer sufficient guarantees to exclude any legitimate doubt about the independence and the impartiality of the tribunal[154]. The defect in the tribunal can in this case derive from formal concerns about the body's structure and composition. The case-law of the Court has long established the principle that a tribunal shall be presumed to be free of personal prejudice or partiality. This principle reflects an important element of the rule of law, namely *"that the verdicts of a tribunal should be final and binding unless set aside by a*

[149] Van de Hurk v. Netherlands, ECtHR, Judgment of 19/04/1994.
[150] Gregory v. United Kingdom, ECtHR, Judgment of 25/02/1997, para. 43.
[151] Pullar v. United Kingdom, ECtHR, Judgment of 10/06/1996, para.30.
[152] C. Ovey and R. White, ibidem, p.160.
[153] Pullar v. United Kingdom, ECtHR, Judgment of 10/06/1996.
[154] Piersack v. Belgium, ECtHR, Judgment of 01/10/1982.

superior court on the basis of irregularity or unfairness". It must apply equally to all forms of tribunal, including juries. It is an important element in support of the confidence which the courts must inspire in a democratic society[155].

III. 6. 2. 2. The independence and impartiality of the professional judges.

Concerning the professional judges, the question arises whether intensive media coverage of a criminal case, presenting the accused as guilty even before the beginning of the trial, can affect the independence and the impartiality of these judges.
A very long time can elapse between the arrest of a suspect and the beginning of the trial. During this period, the judge will, as any citizen, be exposed to the media coverage of the case. He will probably read the allegations of guilt- or of innocence- in the newspapers, will hear about various and sometimes fanciful details about the accused person and about the case. The public opinion might be influenced by the assumptions of guilt spread by the media. Might the impartiality of the judge be influenced by the media reporting about the case? The answer to this question should be negative for different reasons.

First of all, a judge should be aware that there is a risk that he could be the one who will have to give a ruling in a specific case. When a person is suspected of a crime and when the media coverage increases, without any respect for the presumption of innocence, the professional judge should be able to hold himself aloof from the reports and from the allegations of guilt or of innocence. Judges can be relied on to ignore anything they have read in the newspapers or seen on television[156].

Furthermore, the professional judge is aware of the existence of the presumption of innocence and of its significance. He is supposed to know the principles of criminal law; ignoring the allegations of guilt made by journalists should not be a problem for the professional judge.

[155] Pullar v. United Kingdom, ECtHR , Judgment of 10/06/1996.
[156] T. Bingham, ibidem, p. 244.

III. 6. 2. 3. The independence and the impartiality of the jurors.

• *The institution of the jury.*

The trial by jury implies that a body of citizens, the jurors, will decide questions of fact in a jury trial. This institution exist in many countries: France, Belgium, Denmark, England and Wales, Italy, Spain, Portugal, the United States[157], ... The institution of the jury affords a participation of the citizens in the exercise of justice. Nonetheless this is not an essential feature of modern democracies since the Netherlands, "*a beacon of a liberal system of justice*", do not have juries[158].Depending on the criminal justice system at stake, the cases in which the defendant has a right to trial by jury can be very different. Juries can be used in criminal cases and in civil cases.In most criminal justice systems which require juries, panels are initially selected at random from the adult population of the district served by the court concerned.Depending on the country, the jury is generally required to decide the question of guilt only. However, in certain cases it can also be required to decide the sentence with the assistance of professional judges[159].

The institution of the jury has always had its detractors, both ancient and modern, as well as its proponents[160].The detractors put forrward the fact that it has the potential to undermine democracy by thwarting the will of the legislature and to produce perverse verdicts, pervaded by a certain amount of popular prejudice. Furthermore, juries are costly and slow down the process of justice[161].

On the other hand, juries are sometimes said to be the bastion of democracy, affording the judgement of the accused by his peers; juries enable the public's view of the criminal justice system to be reflected[162].

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[157] M.E.I. Brienen, E.H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems : The Implementation of Recommandation (85)11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure*, Nijmegen, Wolf Legal Productions,2000, pp. 306, 116, 207, 249, 513, 846, 768.
[158] Louis Blom-Cooper , *Article 6 and Modes of Criminal Trial,* in «European Human Rights Law Review», 2001, Issue 1, p. 4.
[159] M.E.I. Brienen, E.H. Hoegen, ibidem.
[160] Louis Blom-Cooper, ibidem, p.4.
[161] M. Davies, H. Croall and J. Tyrer, *Criminal Justice: An Introduction to the Criminal Justice system in Engalnd and Wales*, New-York, Longman, 1995, p. 187.
[162] M. Davies, H. Croall and J. Tyrer, ibidem, p.187-188.

• *The influence of the media on the jurors.*

The members of the jury are choosen among the population; they are "normal" citizens.The jurors , unlike the professional judges, are not really well prepared to take part in a trial. When the suspect is arrested and when the potential media coverage starts, they do not know that they will be a juror in that case. They have no reason, at that moment , to stand back from the reports in the newspapers.

It is usually felt that the jury verdict is most vulnerable to prejudicial publicity[163]. The jury is usually used in cases of serious criminal offences. Those cases are more likely to give rise to extensive media coverage. What is likely to create prejudice is jurors reading reports of material which would not be admissable in court under the rules of evidence; this would include the disclosure of previous convictions, hearsay evidence and confessions[164]. The assumptions made by the media that the accused is guilty can influence the potential jurors. Even though they are usually given instructions by the judge that they should make their decision solely upon the evidence in the case , jurors are normal citizens. They might be influenced by the media reports about the guilt of the accused. They are not supposed to be particularly aware of the significance of the presumption of innocence. Due to media coverage of criminal cases, jurors often know facts about criminal defendants and their alleged crimes before hearing any evidence in court.

• *The impartiality of the jurors.*

Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms provides that everyone is entitled to a fair and public hearing by an independent and impartial tribunal established by law. That notion of tribunal involves the jury trial [165]. The jurors must thus be independent and impartial. Does the media coverage of a case make it impossible to find impartial jurors? Is a fair trial still possible?

To assure fairness, jurors are supposed to be more neutral. The jury should decide a case according to the evidence which it hears and reads about within the confines of the

[163] J. Cooke, *Contempt and the Media*, in «Journal of Media Law and Practice», April 1986,
[164] J. Cooke, *Contempt and the Media*, in «Journal of Media Law and Practice», July 1986, p. 45.
[165] Gregory v. United Kingdom, ECtHR, Judgment of 25/02/1997.

courtroom[166]. The question that arises is whether the intense media coverage influences how jurors decide their verdicts. Does it prevent them from deciding cases solely from the evidence presented at trial?

It seems doubtful that jurors, who are not well prepared to take part in a trial, will be able to make a decision only on the basis of the evidences presented in the courtroom, without being influenced by the allegations of guilt –or innocence- made in the newspapers. Furthermore, the jurors are not conscious of this influence on their opinion. The evidence presented in the court will obviously have more impact on the jurors than the perusal of a newspaper.

Nonetheless, everyone does not agree on this risk of influence on the impartiality of the jurors by the media. The idea is sometimes expressed that the jury is capable of ignoring prejudicial coverage, provided that a clear direction is given to the jurors that they should make their decision solely upon the evidence in the case[167]. There would be no reason to believe that the jurors would do otherwise if a clear warning is effectively given to them.

Some researches into the effects of prejudicial publicity on trial found that jury is resilient to outside pressures; the jury does not seem to be swayed by adverse publicity for the defendant[168]. Furthermore, juries seem to "give *real weight to an instruction from the judge to disregard relevant previous convictions wrongly admitted*"[169]. Tom Bingham, while recognizing that it is desirable that the jurors should enter the courtroom with their minds as free as possible of preconceived notions about the facts or the guilt of the accused, puts his faith in the capacity of jurors to abide to decide the case according to the evidence they hear in court[170]. Nevertheless, other commentators do not agree. John Sprack underlines that the risk is from the cumulative effect of coverage over a period, by a number of different newspapers; by the time that the trial takes place some months (or years) later, the chance that the jury remember any specific article is slim but that does not mean that the overall effect of media coverage has had no prejudicial effect on the trial[171]. Some other commentators think that jurors who are exposed to factual pre-trial publicity are significantly more likely to convict a defendant than those not exposed when there has been no delay between the

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[166] Louis Blom-Cooper , ibidem, p.6.
[167] J. Sprack, ibidem, p.227.
[168] J. Cooke, *Contempt and the Media*,in «Journal of Media Law and Practice», April 1986, pp.2-3.
[169] L.S.E. Jury Project, quoted by J. Cooke, *Contempt and the Media,* in «Journal of Media Law and Practice», July 1986, p. 45.
[170] T. Bingham, ibidem, p.245.
[171] J. Sprack, ibidem, p.225.

exposure and the trial and that judicial admonitions appear to have no real effect on jury verdicts[172]. Several social sciences studies have established that pre-trial publicity can influence the evaluation of the defendant's likeability, sympathy for the defendant, pre-trial judgment of the defendant's guilt[173].

Still, knowing whether juries are able, in fact, to put a matter out of their minds following intensive media coverage of a case is a moot point, debated among psychologists. It seems doubtful that the jurors know the presumption of innocence, disregard the media and disbelieve it and are able to put out of their minds the things they have seen, read and heard in the media. Once an opinion is formed, it is not easy to rectify it and to take away the prejudice; it is easy to say that the verdict should only be raised according to the evidence heard in courts but "*it is disputable as to whether this miracle of psychological dexterity can actually be achieved, particularly by those unaccustomed to the feat*"[174].

This potential influence on jurors and its consequences for the fairness of the trial should be another reason to encourage the media to pay more attention to the rights of the accused and to the presumption of innocence in particular.

III. 6. 3. Dealing with the influence of the media on the trial: specific examples from France and England.

Some national laws include specific provisions aimed at dealing with the influence of the media on the right of the accused and on the trial. In France, the law on the strengthening of the presumption of innocence was adopted in 2000 and its purpose was to strengthen the presumption of innocence and to strengthen the rights of the victims. The English Contempt of Court Act 1981 aims at protecting the fairness of the procedure and authorizes the judge to take extreme measures such as staying the proceedings in case of prejudicial pre-trial publicity.

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[172] R. Hardaway, D.B. Tumminello,ibidem.
[173] J.A. Brandwood, *You say "Fair Trial" and I say "Free Press": British and American approaches to protecting defendant's rights in high profile trials,* in «New York University Law Review», Nov. 2000, on www.nyu.edu/pages/lawreview.
[174] M.D.Kirby, *Pre-trial Publicity- Free Speech v Fair Trial*, in R. Hardaway, D.B. Tumminello, «Journal of Media Law and Practice», Nov. 1985, p.227.

III. 6. 3. 1 The French law on the strengthening of the presumption of innocence[175].

This law contains new provisions concerning the presumption of innocence. The respect of this presumption was the central concern of the law-makers. It first includes provisions strengthening the rights of the defence and the respect of the adversarial aspect of the process. In the fifth chapter of the first part of the law, we find provisions related to the communication. In order to put a halt to the breach of the presumption of innocence of a person charged with a criminal offence, the public prosecutor can insert a rectification in the press or distribute a press release[176].

Article 92[177] of the law prohibits the diffusion of the picture of a person charged with a criminal offence before his trial without his consent if this picture shows the person with handcuffs or fetters or if this person is in temporary custody. This article also prohibits the publication of a poll concerning the guilt of a person charged with a criminal offence or concerning the sentence that should be pronounced. Those provisions were sharply criticized by the journalists; according to them, they limit the scope of application of the pictures of current events[178]. Article 92 has been applied very recently in the case of the French singer Bertrand Cantat. Three French newspapers were fined 5000 euros for the publication of pictures of Bertrand Cantat with handcuffs[179].

Still, while the provisions of the new law ensure a very wide protection of the presumption of innocence and should be approved, the fines which were pronounced in the Cantat case were

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[175] La loi du 15 juin 2000 renforçant la présomption d'innocence et les droits des victimes, on www.justice.gouv.fr/publicat/note150600.htm;

[176] article 91 of the law reads : « *lorsqu'une personne est, avant toute condamnation, présentée publiquement comme coupable de faits faisant l'objet d'une enquête ou d'une instruction judiciaire, le juge peut, même en référé, sans préjudice de la réparation du dommage subi, prescrire toutes mesures, telles que l'insertion d'une rectification ou la diffusion d'un communiqué, aux fins de faire cesser l'atteinte à la présomption d'innocence, et ce, aux frais de la personne, physique ou morale, responsable de cette atteinte* ».

[177]. Article 92reads : « *Lorsqu'elle est réalisée sans l'accord de l'intéressé, la diffusion, par quelque moyen que ce soit et quel qu'en soit le support, de l'image d'une personne identifiée ou identifiable mise en cause à l'occasion d'une procédure pénale mais n'ayant pas fait l'objet d'un jugement de condamnation et faisant apparaître, soit que cette personne porte des menottes ou entraves, soit qu'elle est placée en détention provisoire, est punie de 15000 euros d'amende.*

« II. - Est puni de la même peine le fait :« - soit de réaliser, de publier ou de commenter un sondage d'opinion, ou toute autre consultation, portant sur la culpabilité d'une personne mise en cause à l'occasion d'une procédure pénale ou sur la peine susceptible d'être prononcée à son encontre ;« - soit de publier des indications permettant d'avoir accès à des sondages ou consultations visés à l'alinéa précédent. »

[178] L. Girard, *La publication des photos de Bertrand Cantat condamnée,* in « Le Monde », 13 June 2004.

[179] L. Girard, ibidem.

probably not high enough to be dissuasive in practice. Given the impact that the diffusion of such pictures with handcuffs or fetters can have on the public, that provision must be seen as a very positive step towards a better consideration of the presumption of innocence as a limit to the freedom of the media.

III. 6. 3. 2. The English Contempt of Court Act.

Contempt of Court serves the primary function of protecting the integrity of courts proceedings. The law governing this area in England is contained primarily in the Contempt of Court Act 1981. It was adopted primarily to amend the United Kingdom law in the light of the European Court of Human Rights in the *Sunday Times* case[180].

In England, there is a growing body of recent case-law regarding jury trials which could be corrupted by publicity; applications are frequently made under the Contempt of Court Act 1981[181]. The Contempt of Court Act introduces a strict liability, without the need to prove *mens rea* in relation to publications which create a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced[182]; the proceedings should be active[183]. Section 2 provides that a person "*is not guilty of contempt of court under the strict liability rule in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith*"[184].

The law of Contempt of Court aims at stopping the publication of material prejudicial to the defendant, with the purpose of protecting the impartiality of the jury and the fairness of the trial. It will be done either by obtaining an injunction in advance prohibiting the publication or by prosecuting the wrongdoer after the event. The judge has the power to prohibit the publication of a name or other facts withheld from the public in court[185]. The judge deciding whether there is contempt of court must deal with allegations of biased media coverage.

In such a situation different strategies are available to cope with the biased media coverage. The most radical solution is to stay proceedings, on the basis that they could not be fair, due

[180] A.E. Boyle, *The Contempt of Court Act 1981*, in «The Human Rights Review», 1981,vol. VI, p. 148.
[181] D. Corker, M. Levi, ibidem, p. 625.
[182] J. Sprack, ibidem, p.222.
[183] Criminal proceedings are active once there is an arrest without warrant or a warrant of arrest or a summons is issued or an indictment is served; civil proceedings are active once the case is set down for trial or when a date for the trial is fixed.
[184] Contempt of Court Act, 1981, section 2.
[185] M.D.Kirby, ibidem, p.222.

to the prejudicial media coverage. This is obviously rare, although it is not really without precedent[186]. Another possibility for the judge is to discharge a particular jury on the basis of prejudicial publicity; this does not exclude the possibility of a retrial.

Although those measures are sometimes taken, there are also many cases where the media publicity has been held to be insufficient to stay proceedings, to discharge the jury or to hold that the conviction was unsafe; the reason given in these cases is that jurors are capable of ignoring prejudicial coverage, *"provided that a clear direction is given by the judge that they should make their decision solely upon the evidence in the case"*[187].

In general, the Contempt of Court Act 1981 provides that the perceived needs of the judicial system outweigh any other consideration such as freedom of speech[188]. Section 5 nonetheless holds that a publication on matters of general public interest which causes incidental and unintended prejudice to pending proceedings and which is a part of a discussion in good faith of public affairs is not contempt[189]; it creates a defence of discussion of public affairs.

The Contempt of Court Act 1981 offers a very extreme solution to extensive media coverage; there is always the theoretical risk that the possibility of staying the proceedings on the basis that they could not be fair would lead to a situation where the most notorious criminals escape justice because of hostile media coverage. Nonetheless, the English Court of Appeal has always been particularly anxious to ensure that this would not be the case[190]. This exorbitant power given to the judge might look disproportionate in other countries but it has to be understood in the specific context of England and Wales where the popular press is very powerful and influential.

It is clear nonetheless that in case of a conflict between the freedom of expression and the right to a fair trial, the criminal justice system in England ought to come down in favour of preserving the impartiality of the justice.

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[186] J. Sprack, ibidem, p.225; it happened in the *Reade* case in 1993, where the trial of police officers prosecuted following the successful appeals of those convicted of a bombing in Birmingham was stopped, partly on the basis of the publicity which had surrounded the case.
[187] J. Sprack, ibidem, p.227.
[188] J. Cooke, *Contempt and the Media*, in « Journal of Media Law and Practice », July 1986, p.42.
[189] M.D.Kirby, ibidem,p. 223.
[190] J. Sprack, ibidem, p.227.

Chapter IV: Striking the balance between the freedom of the media and the presumption of innocence.

The intense media coverage of certain criminal cases often has nefarious consequences for the basic rights of an accused. The previous chapter showed how the right to a fair trial can be affected by adversarial publicity in the media. The presumption of innocence of the accused is sometimes completely ignored by the media. It seems that they assume that as soon as someone is arrested or suspected, that person is guilty and if that person is guilty, he has no right. The freedom of expression would then take precedence over the rights of the accused.

The clash between those two competing rights is more and more frequent; a balance needs to be struck between those two fundamental rights of a democratic society. Both rights are sanctioned by the most important international human rights conventions. The European Convention for the Protection of Human Rights and Fundamental Freedoms gives them an outstanding place.

The media coverage is made in the name of the freedom of expression: journalists have the right to express their ideas, they have the duty to gather information to the public and the public has the right to receive information. The importance of the freedom of the media in a democratic society is widely recognized. On the other hand, the right to a fair trial and the presumption of innocence in particular are cardinal principles of criminal law. The presumption of innocence aims at protecting the supreme value of human dignity and at minimizing the risk of errors.

Still, when the clash between those two rights occurs, freedom of expression is too often looked at as if it was the most important right. This chapter aims at striking a balance between the freedom of the media and the presumption of innocence. It is here suggested that the presumption should always be kept in mind by journalists as well as their potential influence on the public opinion. The freedom of the media is obviously very important in a democratic society but given the power of the media, a responsible exercise of this right is necessary in order to protect the presumption of innocence. In practice, the presumption of innocence does not seem to be perceived by journalists as a threshold to their rights.

The balance should be struck in favour of the presumption of innocence for different reasons. The first reason relates to the wording of the European Convention. Article 10 provides, in its

second paragraph, conditions in which interferences with the freedom of expression are allowed. Article 6, on the other hand, states an absolute right to be presumed innocent. The balance in favour of the presumption of innocence is also necessary in order to respect the respective roles of the media and of the judiciary. The trial by the media has no place in a democratic society, governed by the rule of law and respectful of fundamental rights. The only place where a person can be judged is in a tribunal and not, under any circumstances, in the media. Finally, such a balance in favour of the presumption of innocence would help to maintain the confidence in the court's ability to be the proper forum for the determination of legal disputes.

IV. 1. The wording of the European Convention.

IV. 1. 1. The freedom of expression.

While exercising their freedom of expression, journalists often think that their right is absolute. At least, this seems to be obvious if one takes a close look at their reports. They seem to forget that Article 10 of the European Convention does not guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern.

Freedom of expression is not an absolute right; the second paragraph of article 10 of the European Convention regulates the circumstances whereby the right secured in article 10(1) may be restricted. An interference with freedom of expression will be justified under article10 (2) if it is prescribed by law, if it is necessary in a democratic society and if it is in pursuance with one of the legitimate aims listed in article 10(2) [191]. Those conditions were examined with more details in chapter II.

The margin of appreciation allowed to each Member State in restricting freedom of expression varies depending on the purpose and nature of the limitation and of the expression at stake.

[191] For an in-depth and more complete analysis of these conditions, see Ovey and White, ibidem, p. 198-216; R. Clayton, H. Tomlinson, ibidem, n° 15.177 and following.

The nature of the expression restricted needs to be weighed against the importance of the aim pursued by the restriction. Publications which contribute towards social and political debate receive a higher level of protection[192].

IV. 1. 1. 1. The legitimate aims.

Among the aims which can justify interference are the protection of the reputation or rights of others and the need to maintain the authority and impartiality of the judiciary. Those two aims could be invoked in order to justify limitations of the media in case of extensive media coverage which affects the presumption of innocence. Indeed, the protection of the rights of others and the authority and impartiality of the judiciary are crucial objectives of the presumption of innocence.

Concerning the protection of the rights or reputation of others, it can include the protection of the presumption of innocence. The fact of being described as guilty by the media can sully the reputation of the accused. Again, except for the possibility of commenting on the allegations, the accused can do nothing really satisfactory against the prejudice done to his reputation. Even if a trial for defamation occurs, its outcome will probably be less publicized that the initial detrimental publicity. There is no appeal possible against the social punishment resulting from an unfavourable publicity.

The need to maintain the authority and the impartiality of the judiciary overlaps with the right of an individual to have a fair trial where publicity would prejudice the interests of justice, under article 6(1).Maintaining the authority and the impartiality of the judiciary includes thus the protection of the rights of litigants[193].

IV.1. 1. 2. The case law of the European Court of Human Rights.

The Court rarely found that the interference with the freedom of expression was legitimate.
In the Lingens case, Lingens, a journalist, was convicted in Austria because he had used certain expressions ("basest opportunism", "immoral" and "undignified") about Mr. Kreisky, a Federal Chancellor at the time, in two articles published in a famous magazine. The Court

[192] C. Ovey and R. White, ibidem, 2002, p.278.
[193] Observer and Guardian v. United Kingdom, ECtHR, Judgment of 26/11/1991.

considered that the good faith of Lingens was undisputed and that the impugned expressions were to be seen against the background of a post-election political controversy. The interference with the freedom of expression was disproportionate and there was thus a violation of article 10.[194]

In the Bladet Tromso and Steensas case, the applicants were fined for defamation because they had published articles reproducing allegations of acts of cruelty to seals and of violations of the seal hunting regulations by some crew members of a vessel. The interference was aimed at protecting the reputation of the crew members. The Court took account of the overall background against which the statements in question had been made, notably the controversy that seal hunting represented at the time in Norway. The Court recalled the importance of the presumption of innocence but stated that in that case, the effect on the reputation was attenuated by different factors. It concluded that the interest of protecting the reputation of the crew members was not, in this case, important enough to outweigh the vital public interest in ensuring a public debate and that article 10 had been violated[195].

In the Bergens Tidende case, a journalist was sentenced by the Norwegian Supreme Court because he had denounced in his article the conditions in which a surgeon carried out plastic surgery operations and because the accusation had not been proven. The interference was "prescribed by law" and pursued the legitimate aim of protecting "the reputation or rights of others". Assessing whether it was necessary, the Court found that that the impugned articles, which recounted the personal experiences of a number of women who had undergone cosmetic surgery, concerned an important aspect of human health and as such raised serious issues affecting the public interest. The Court held that the statements were not excessive or misleading and that the surgeon had a chance to defend himself. The Court could not find that the undoubted interest of the surgeon in protecting his professional reputation was sufficient to outweigh the important public interest in the freedom of the press to impart information on matters of legitimate public concern[196].

In the Worm case, a journalist was sentenced for having exercised prohibited influence on criminal proceedings; he had written different article about H.A., who was a former minister

[194] Lingens v. Austria, ECtHR, Judgment of 08/07/1986.
[195] Bladet Tromso and Stensaas v. Norway, ECtHR, Judgment of 20/05/1999.
[196] Bergens Tidende v. Norway, ECtHR, Judgment of 02/05/2000.

involved in some criminal proceedings and who was sentenced for tax evasion. The articles described his behaviour during the trial. The Court found that the aim of the interference was to maintain the authority and impartiality of the judiciary. The Court, while emphasizing the role of the media in imparting information, stated that "*...the limits of permissible comment may not extend to statements which are likely to prejudice, whether intentionally or not, the chances of a person receiving a fair trial or to undermine the confidence of the public in the role of the courts in the administration of criminal justice*" [197]. The respective interests of the applicant and the public in imparting and receiving his ideas concerning a matter of general concern which was before the courts were not such as to outweigh the adverse consequences of the diffusion of the impugned article for the authority and impartiality of the judiciary in Austria. Because of the intention of the journalist of influencing the outcome of the trial, the Court found that the interference was necessary in order to maintain the authority and impartiality of the judiciary.

When the Court decides whether the interference was legitimate, it is usually the necessity of the interference which is disputed. In assessing this necessity, the Court pays attention to the existence of a public debate in which the article can form part of. In the cases referred to above, there was no doubt about the existence of a public debate in which the articles could take part of. The general context of the article is crucial: if it is part of a general public debate about a matter of public concern- like seal hunting or plastic surgery-, the Court is more likely to find that the interference was not necessary in a democratic society.
In the Worm case, one thing that seems to have led to the conclusion that the interference was legitimate is the noticing that the applicant wished to usurp the position of the judges dealing with the case. His intention of influencing the outcome of the trial by his article was a decisive element.

IV. 1. 2. The presumption of innocence.

The wording of article 6 of the Convention seems to indicate that the presumption of innocence is an absolute right; yet the European Court has decided that this principle is not absolute, *"since presumptions of fact or of law ... are not prohibited in principle by the Convention, as long as states remain within certain limits"*[198].

[197] Worm v. Austria, ECtHR, Judgment of 29/08/1997, para.50.
[198] Phillips v. United Kingdom, ECtHR, Judgment of 05/07/2001.

Article 6 does not provide any exception to the right to a fair trial. There is no case in which someone could be denied the benefit of the presumption of innocence.

IV.1. 3. Conclusion of the wording of the Convention.

The freedom of expression and the presumption of innocence are both fundamental rights enunciated by the European Convention for the Protection of Human Rights and Fundamental Freedoms. There is nonetheless an important difference between them: article 10 includes express provisions for limitation on the freedom of expression. On the other hand, article 6 does not provide any exception to the right to be presumed innocent.
The legitimate aims of the interferences include the protection of the rights or reputation of others and the need to maintain the authority and the impartiality of the judiciary. Those aims could justify interferences which would tend to protect the presumption of innocence.

Although the European Court has always widely interpreted the freedom of expression, the wording of article 10 pleads in favour of a real consideration of the presumption of innocence as a limit to the freedom of the media. This limit is not often taken into account by journalists. The Court has delivered few decisions finding that restrictions imposed by states on freedom of expression are in conformity with Article 10. Given the importance of having a free press in a democratic society, reporting freely on public matters, a wide conception of the freedom of the media is a good thing but should nonetheless be moderate when the exercise of this freedom is likely to affect the exercise of justice. In the Worm case, the Court recognised the potential effect of the media on the outcome of criminal proceedings and condemned the attempt of a journalist to exert prohibited influence on the outcome of the criminal proceedings.

IV. 2. The respective roles of the media and the judiciary.

The "trial by media" fails to take account of the respective roles of the media and of the judiciary. The importance of the role of the media in a democratic society is clearly established and the purpose here is not to diminish it. The importance of the press stems from the unique means it has at its disposal to gather, process and disseminate information to large audiences. The media's role is to inform and enlighten the public; it plays a role of public watchdog and guards against the abuses of power.

Another function of vital importance to society is the one of investigation. Investigative journalism has helped to expose corruption, fraud, and racketeering. The investigative capacity of the press is clearly a vital service to society[199].Society wishes to encourage the reporting of crime and its investigations; it is necessary for the health of the criminal justice system. In a direct sense, investigative journalism can help bringing crime to the attention of the authorities[200].

Furthermore, the media reports on the administration of justice are necessary; the fact that the public is aware of what is occurring when pursuing and trying an accused can be an incentive to all concerned to act efficiently. The media reporting of judicial proceedings is generally accepted as supporting the principle that the administration of justice should be open to public scrutiny. The comments on court proceedings contribute to their publicity.

In other words, the role of the media in a democratic society could be summarised as follows: to inform the public on matters of public concern in order to make an enlightened public debate possible, to investigate in order to bring crimes to the attention of the justice and to comment on the administration of justice in order to make it open to public scrutiny. Those roles are essential and should be nothing less than that. But it should not be much more than this neither.

Concerning the relations between the media and the judiciary, the media can to a certain extent help the judiciary to fulfil its function. The media can in fact be both an ally and an enemy of the fair trial guarantees. But the media should never prevent the judiciary from fulfilling its function and should never usurp it. The trial by media has no place in a democratic society. The role of the media can never be the one of deciding whether someone is guilty or not. The influence of the media on the public opinion, which was explained in the previous chapter, is so significant that reports about criminal proceedings, assuming the guilt of someone, can in practice have a similar effect to a judgement: the accused will be seen as guilty and will be sentenced to a social punishment.

[199] A. J. Jeferry, ibidem, p. 197.
[200] J. Sprack, ibidem, p.221.

The media should never interfere with the justice system in a way that jeopardizes the authority and the serenity of the latter. Journalists are more and more often acting "as if" they were judges. It is obviously not their role. The proper punishment should be left to the courts.

First, the media have no legal basis to do so. The judiciary is one of three cornerstones of modern democracies[201]. An independent judiciary is recognised as an essential feature of a free, democratic society[202]. A democratic society governed by the rule of law cannot tolerate that someone be judged by another institution than a tribunal. The courts are the proper forum for the determination of legal disputes especially with regard to criminal charges[203] and for the determination of a person's guilt or innocence. The justice system operates within the bounds and on the authority set by legislation.

Further, the media do not offer any guarantee to the accused. One of the features of the judicial branch of power in modern democracies is that the judiciary offers protection to the accused; everyone charged with an offence has certain rights. Those rights are acknowledged to the accused in order to protect him throughout the criminal process, without prejudice to the assessment of the court of whether the accused is guilty or not.
The European courts are bound by article 6 of the Convention which sets out the right to a fair trial. The right to a fair trial provides for that "*everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*".
It is thus clear that the only place where a person should be judged is a courtroom.

Article 6 of the European Convention, which sets out the right to be presumed innocent, also establishes other guarantees for the accused: the right to be informed of the nature and cause of the accusation, the right to have adequate means to prepare his defence, the right to defend himself in person or through legal assistance, the right to examine witnesses against him and the right to have the free assistance of an interpreter if it is necessary. All the guarantees set out by article 6 express the attachment to the rule of law. Those guarantees, which protect the citizens against arbitrariness, never find a place in a trial by the media.

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[201] R. Pekkanen, ibidem, p.1080.
[202] T. Bingham, ibidem, p.227.
[203] Worm v. Austria, ECtHR, Judgment of 29/08/1997.

Drawing the line between, on the one hand, acceptable criticism of the judiciary and comments on the administration of justice by the media and on the other hand, unacceptable interference with the justice system is not easy. The media must report on the administration of justice but should not prevent it from exercising its role and should not take the place of the judges. As soon as the rights of the accused are at stake and as soon as a fair trial seems to be jeopardized by the exercise of the freedom of the press, journalists should refrain from interfering with the judiciary. It is simply not their role.

IV. 3. Ensuring the respect and the confidence in the judiciary.

The courts do not and cannot operate in a vacuum. The fact that the courts are the proper forum for the settlement of disputes does not mean that there can be no prior discussion elsewhere, be it in the press or among the public at large[204].In order to serve the interests of the community at large, courts need the co-operation of an enlightened public. This is possible only if the public has respect and confidence in the court's capacity to settle the disputes[205].

This respect and this confidence can be undermined by a "trial by media". It might in the long run have nefarious consequences for the acceptance of the courts as the proper forum for the settlement of legal disputes. The trial by media might endanger the public's confidence and respect in the judiciary; it can have dramatic consequences for the ability of the courts to serve as a cornerstone of democracy[206]. Furthermore, the loss of respect and confidence may prove very difficult to restore.

If the outcome of a pre-trial press campaign towards an accused is that the public opinion is convinced of his guilt or his innocence, the legitimacy of the court's decision which settles the issue in the opposite sense can be highly damaged and can be questioned by the public. The courts might in that case no longer appear as the proper forum for the determination of legal disputes. If the decision of the court does not fit with the public opinion, this decision might seem unfair or false to the public, regardless of its legality. The legitimacy of the judiciary also stems from the acceptance of the decisions as legitimate. In the case of intense media

[204] N. Jayawickrama, ibidem, p. 693.
[205] Sunday Times v. United Kingdom, ECtHR, Judgment of 26/04/1979.
[206] R. Pekkanen, Ibidem, p. 1081.

coverage of a criminal case, the public, influenced by the media, forms its own opinion and is more likely to consider as unfair the decision of the judge that would not fit with its opinion.

The judges obviously cannot ignore the opinion of the public. They do not live the "*lives of hermits*"; they are in the world and are inevitably aware of the opinions of the citizens[207]. The situation in which the public and the judge split over the issue of the guilt of a person is unfortunate and can be dangerous for the authority of the judiciary. The decision of the judge must be fair to the public and must *look* fair.

In a democracy based on the rule of law, where the principle of the separation of powers is deep-rooted, it is necessary for the judiciary to have, as a part of its constitutional function, the power and the duty to enforce its orders and to protect the administration of justice against contempts which are likely to undermine it[208].

[207] T. Bingham, ibidem, p. 301.
[208] N. Jayawickrama, ibidem, p.719.

Chapter V : Practical solutions to ensure the respect of the presumption of innocence by journalists.

The previous chapter exposed why the presumption of innocence should be a strict limit to the freedom of expression. But there is still an important question to solve after those theoretical assumptions about the balance to be struck between these two fundamental rights: how can it be implemented in practice?

Usually, when you want to promote certain practices in a field, there are two ways of doing it: you impose it by means of a law or you try to convince the audience of its interest to adopt the good practice. In order to make journalists more aware of the importance of the presumption of innocence and in order to make them respect it, two solutions are possible.

The first solution would be that the state should regulate more strictly the exercise of the freedom of the press. The second would be to promote self-regulation by journalists themselves.

V. 1. The State regulation.

The State can choose to regulate the exercise of the freedom of the media; the breach of the presumption of innocence by the media can become a criminal offence. This solution is used in many countries.

The law can explicitly forbid the breach of the presumption of innocence by the media. It can for instance prohibit the publication of pictures of persons charged with a criminal offence. This is the case of the French law on the strengthening of the presumption of innocence of 2000, which prohibits the publication of pictures of an accused with handcuffs before the trial and the diffusion of a poll about the guilt of an accused[209]. The person guilty of this publication can be fined 15000 euros. A communiqué can also be published in order to put a halt to the breach of the presumption of innocence.

The Luxembourg law on the freedom of expression in the media of 13 May 2004 establishes the right of everyone to the respect of his presumption of innocence. The law sets out the possibility of publishing information amending the breach of the presumption of innocence. It

[209] *La loi du 15 juin 2000 renforçant la présomption d'innocence et les droits des victimes,* on http://www.justice.gouv.fr/publicat/note150600b.htm#t1c5.

also creates a right of subsequent information (*droit d'information postérieure)* which allows an accused to request the free diffusion of information. This provision aims at compelling the media to follow criminal cases through[210].

The English Contempt of Court Act 1981 creates strict liability for publications which create a substantial risk that the course of justice in the proceedings in question will be seriously impeded. It is a serious offence and can result in custodial sentence of up to two years imprisonment but a fine is more usual[211].

Nonetheless, if those laws can turn out to be efficient, I do not think that it is the best way of promoting a responsible exercise of the freedom of the press by journalists.

V. 1. 1. A priori measures.

If the law is used *a priori* to put a halt to the action of journalists that can affect the rights of the accused, that law runs the risk to be perceived as censorship. The idea that the imposition of prior restraint on speech violates the freedom of expression is largely widespread[212]. Nevertheless, prior restraint is not in principle incompatible with the freedom of expression, as set out by article 10 of the European Convention. However, such interference with the freedom of the press must be subject to strict scrutiny. The state that wants to establish pre-publications measures will have to fulfil the three conditions set out by article 10: the basis in the law, the pursuance of a legitimate aim and the necessity in a democratic society. The burden of establishing the necessity in particular will be a very heavy one[213]. Indeed, since "*news is a perishable commodity*", the measures that would delay its transmission can have very disastrous consequences in depriving it of all its value and interest[214].
Another impediment to the efficiency of such measures is that we usually do not know in advance the content of the articles in the media. In the case of an article that affects the presumption of innocence of an accused, that person is usually unaware of it before the publication of the article. In that case, it is too late to act.

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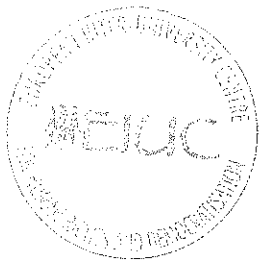
[210] *La loi sur la liberté d'expression dans les médias,* on http://www.gouvernement.lu/dossiers/medias_soc_information/loi_media/index.html.
[211] J. Sprack, ibidem, p. 222.
[212] N. Jayawickrama, ibidem, p.702.
[213] R. Clayton, H. Tomlinson, ibidem, n° 15181.
[214] The Observer and the Guardian Newspapers v. United Kingdom, ECtHR, Judgment of 26/11/1991.

Such preventive measures are thus not the best solution; the interferences with the freedom of expression are rarely found in conformity with the conditions of article 10(2) of the European Convention. Furthermore, even if those measures fulfil the three conditions, their effectiveness depends on the prior knowledge of the content of the article.



V. 1. 2. A posteriori measures.

Those regulations can also set out *a posteriori* measures.

This is the case of the defamation and libel laws. Those defamation laws do not concern the presumption of innocence as such; it only relates to the violation of the honour and the reputation. But it is sometimes the only way to ask reparation for the damage made to the presumption of innocence. Laws imposing sanctions for defamation or insult, while clearly interfering with the exercise of the right to freedom of expression, have generally been held by the European Court to satisfy part of the test for restrictions by serving the legitimate aim of protecting the "rights or reputations of others". The imposition of sanctions for defamatory speech must satisfy a "pressing social need", be proportionate to the harm legitimately found to have been done and not go beyond what is strictly necessary in the particular circumstances. Even if there is substantial damage to reputation, a successful claim in defamation may violate article 10[215]. The European Court has sometimes decided that the interest in ensuring an informed public debate over a matter of national interest was sufficient to outweigh the interests of those who issued defamation proceedings to protect their reputation[216] .

The European Court of Human Rights has limited in significant ways the discretion of governments and courts throughout Europe to sustain defamation actions. Decisions of the Court have clearly required a number of European countries to modify their law in order to reduce the burden of proof placed on the person accused of defamation[217]. The Court has established a number of principles which national courts are to consider in assessing claims for defamation. It recalled that the limits of acceptable criticism are wider as regards political figures and governments than as regards private individuals. It also ruled unanimously that the

[215] R. Clayton, H. Tomlinson, ibidem, n° 15203.
[216] Bladet Tromso and Steensas v. Norway, ECtHR, Judgment of 20/05/1999.
[217] S. Coliver, *Defamation Jurisprudence of the European Court of Human Rights,* in «Journal of Media Law and Practice», vol.13 n° 4, 1992, p.250.

requirement that journalists had to prove the truth of their statements "is *impossible of fulfilment and it infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 (art. 10) of theConvention*"[218].

The French law on the strengthening of the presumption of innocence and the Luxembourg law on the freedom of expression in the media are also used *a posteriori* or at least, in order to put a halt to the actual breach of the presumption of innocence.
In both cases, the sanctions applied on the basis of those regulations will usually be financial. Most of the times, the person sentenced for defamation will be fined. The person whose presumption of innocence or reputation has been affected will get money or sometimes will be entitled to the publication of information amending the breach of the right[219]. None of this solution is really satisfactory.
The financial compensation is never able to repair the damage made to the reputation. Reputation will be hardly repaired by money. For the accused that has been presented as guilty by the newspapers, the most difficult thing is to bear the social punishment which could be the consequence of the press campaign. This social punishment can last for a long time and money will not change anything to it. The media can destroy the reputation of the accused and even where the accused is eventually found innocent, his reputation will probably be tarnished forever. The impact of such allegations of guilt on the social life of the accused can be dramatic and money will not be able to compensate this impact.

Even if this financial compensation was satisfactory in its principle, in practice, the amount of the damages is usually modest. The journalists and the editor of the newspaper who published the picture of Bertrand Cantat with handcuffs, in violation of the French law on the strengthening of the presumption of innocence were fined 5000 euros[220] . The amount does not seem high enough to be really dissuasive for the newspapers.
In Finland, in 1993, a magazine published an article insinuating that a bank manager had been the star at a "madcap call-girl party" in the Finnish archipelago; the article included a large picture of him. In fact, this person had not attended the party at all. But one can easily imagine the consequences of such publication on the social life of the bank manager. The person who had written the article and the editor-in-chief of the magazine were both found guilty of

[218] Lingens v. Austria, ECtHR, Judgment of 8/07/1986, para.46.
[219] See the French law on the strengthening of the presumption of innocence and the Luxembourg law on the freedom of expression in the media, ibidem.
[220] L. Girard, ibidem.

purposeful libel in the press. They also had to bear the expenses of having the court's decision printed in the local newspaper. The Court of Appeal awarded the bank manager around 12600 euros of damages for mental suffering[221]. Given the potential consequences of the article on his professional and private life, this amount seems derisory.

What the victims of such allegations may want to obtain is the restoration of the truth. The publication of a court's decision or of information amending the violation of the reputation seem more adequate in doing so. But then, we are facing the fact that usually, these publications are less visible than the initial prejudicial publicity. The readers of a newspaper will probably remind the initial allegations of guilt but will maybe not even notice the article containing information about the innocence of the accused. Such publication can still be a first step towards the proving of the truth and the establishment of innocence.

V. 2. Self-regulation by journalists.

The other possibility to encourage the responsible exercise of the freedom of the press is to promote self-regulation by journalists themselves. Given the inadequacy of the law to ensure the respect of the rights of the accused by journalists, this solution should be privileged.

V. 2. 1 Arguments in favour of the self-regulation.

According to Claude-Jean Bertrand, apart from the usual laws against undue concentration or defamation," *the State's principal role should be encouraging the news media to tune in to and make itself accountable to the public"*. The State should encourage them to adopt professional codes of ethics, whose aim is to ensure the social responsibility of the media. The state should "*in no way concern itself with laying down the rules, nor directly concern itself with having them enforced*". The regulation of the media by the State is indispensable but should be kept to a minimum. In order to encourage the self-regulation, the role of the State should be limited to keeping its rules and institutions in second position to come into play only if self- regulation does not work, bringing financial assistance to the implementation of the self-regulation and giving special force to the professional codes by incorporating it in a law[222]. It is preferable that media owners and professionals reach agreement (without

[221] L. Sisula-Tulokas, *Contract and Tort Law: Twenty cases from the Finnish Supreme Court,* Helsinki, Kauppakaari, 2001, p.124.

[222] It is the case for instance in Denmark where the legal code of conduct was adopted by the Danish Parliament with the acceptance of the national union of journalists in 1992.

political intervention) on drawing up rules, providing for measures, and ensuring compliance with them.[223].

The professional codes of ethics should thus be adopted by journalists themselves and should establish the good practices of journalism. This is also the view of the Council of Europe. Since 1970 the Parliamentary Assembly of the Council of Europe, and also other institutions such as the European Parliament[224] , have been pressing for the elaboration of ethical codes for journalism[225].

The Ministers of the States participating in the 4th European Ministerial Conference on Mass Media Policy of the Council of Europe, in the Resolution on journalistic freedoms and human rights adopted in 1994, were convinced that *"all those engaged in the practice of journalism are in a particularly good position to determine, in particular by means of codes of conduct which have been voluntarily established and are applied, the duties and responsibilities which freedom of journalistic expression entails"*[226]. In order to promote the good practice of journalism, this resolution provided that encouragement should be given by public authorities or by those engaged in the practice of journalism to high quality systems of professional training for journalists.

The Madrid Principles on the Relationship between the Media and the Judicial Independence, established in 1994 by the International Commission of Jurists, state that *"the balance between independence of the judiciary, freedom of the press and respect of the rights of the individual (...) is difficult to achieve. Consequently, it is indispensable that one or more of the following measures are placed at the disposal of affected persons or groups: legal recourse, press council, Ombudsman for the press, with the understanding that such circumstances can be avoided to a large extent by establishing a Code of Ethics for the media which should be elaborated by the profession itself."*

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[223] C.-J. Bertrand, *The State and professional ethics,* "The media in a democratic society: reconciling freedom of expression with the protection of human rights" - Luxembourg - 30 Sept. - 1st Oct. 2002, Conference of the Council of Europe, on http://www.coe.int/T/e/com/files/events/2002-09-Media/default.asp.

[224] Resolution of 16 September 1992 on media concentration and diversity of opinions

[225] Recommandation 1215, 1993, on the ethics of journalism, Parliamentary Assembly of the Council of Europe on www.assembly.coe.int.

[226] Resolution No. 2: Journalistic Freedoms and Human Rights, 4th European Ministerial Conference on Mass Media Policy: The media in a democratic society - Prague, 7-8 December 1994 on http://www.coe.int/T/e/com/files/events/2002-09-Media/ConfMedia1994.asp#TopOfPage.

The solution recommended by the Council of Europe and the International Commission of Jurists is the self-regulation by journalists themselves; it appears to be the best solution to encourage the journalist to respect the presumption of innocence of the accused.

V. 2. 2. Self-regulation in practice.

Many initiatives have already been taken by the media and journalists in Europe to promote the responsible exercise of journalism[227].Self-regulation should consist in the set up of national press councils and in the adoption of codes of professional ethics.

V. 2. 2.1. The Press Councils.

The press council is a body instituted by the media to enhance their services to the public. It gathers together professional journalists; they usually admit also non-press members. One can concede that the State provides for the establishment of a council under a press act, but it seems preferable to avoid such State intrusion. Press councils in the world are usually set up *"to deter a Parliament from setting up an official council"* [228].
One of the functions of a press council is to adopt the professional code of ethics for journalists in one country. It will promote the good practice among journalists. It can also handle vocational training. The press council can be responsible for the enforcement of the ethics. Claude-Jean Bertrand summarizes the functions of press councils as to: *"defend media freedom and improve the media"*[229].

The adhesion to the press council (and hence to the codes of ethics adopted by it) by all journalists should be encouraged by the State. This adhesion should be showed off to advantage. Newspapers and journalists may find it morally image-enhancing. The ultimate goal is that all journalists become part of this press council and that those who are not part of it feel morally obliged to be so because of their isolation, being the only ones not respecting the good practice. Furthermore, it is a way to gain the public's confidence. As Claude-Jean

[227] Ibidem.
[228] C.-J. Bertrand, *The State and professional ethics,* "The media in a democratic society: reconciling freedom of expression with the protection of human rights" - Luxembourg - 30 Sept. - 1st Oct. 2002, Conference of the Council of Europe, on http://www.coe.int/T/e/com/files/events/2002-09-Media/default.asp.
[229] C.-J. Bertrand, *The case for Press Councils,* in «Intermedia», Nov.-Dec. 1990, vol.18, n°6, on www.presscouncils.org/ library/Intermedia_1990.doc.

Bertrand stressed it, *"quality pays: the world's best dailies are prosperous"*[230]. Still, it is also true that some tabloids are also prosperous. The fact that major media refuse to give the council recognition can be a major handicap to the efficiency of the press council.

Press councils already exist in many countries in Europe. For instance, in the United Kingdom, there is the *British National Union of Journalists* and also a press complaints commission; in France, there is the *National Syndicate of French Journalists* and the *National Federation of the French Press*; in Belgium, the *General Association of Professional Journalists of Belgium*; in Germany, the *German Press Council*[231]. An International Federation of Journalists also exists. Even though their usefulness and their efficiency are sometimes criticised[232], the press councils seem to be the best solution to ensure self-regulation of journalists.

V. 2. 2. 2. Codes of professional ethics.

The codes of professional ethics are aimed at ensuring the social responsibility of the media. These rules are adopted by the press councils and should be accepted by all journalists and newspapers. In most European Countries, such codes have already been adopted by the press councils. The codes of ethics lay down different rules promoting a responsible exercise of journalism. It includes prohibitions (such as not to tell untruths) but also prescriptions (such as using fair methods to obtain news)[233].

The International Federation of Journalists adopted a "Declaration of Principles on the Conduct of Journalists" in 1954 and amended it in 1986. This Declaration insists on the significance of the truth and on the fact that unfounded accusations are grave professional offences.

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[230] C.-J. Bertrand, *The State and professional ethics,* "The media in a democratic society: reconciling freedom of expression with the protection of human rights" - Luxembourg - 30 Sept. - 1st Oct. 2002, Conference of the Council of Europe, on http://www.coe.int/T/e/com/files/events/2002-09-Media/default.asp.

[231] See those examples and many others on the website of the Department of Journalism and Mass Communication of the University of Tampere, on www.uta.fi/ethicnet ; see also www.presscouncils.org.

[232] C.-J. Bertrand, *The case for Press Councils,* in «Intermedia», Nov.-Dec. 1990, vol.18, n°6, on www.presscouncils.org/ library/Intermedia_1990.doc.

[233] C.-J. Bertrand, *The State and professional ethics,* "The media in a democratic society: reconciling freedom of expression with the protection of human rights" - Luxembourg - 30 Sept. - 1st Oct. 2002, Conference of the Council of Europe, on http://www.coe.int/T/e/com/files/events/2002-09-Media/default.asp.

In the United Kingdom, the *British National Union of Journalists* adopted a "Code of Conduct" in 1994. It establishes, among other things, that journalists should ensure the fairness and the accuracy of the information they disseminate and that the persons criticized have a right of reply "*when the issue is of sufficient importance*"[234].

In France, the "Charter of the Professional Duties of French Journalists" was adopted in 1918 and revised in 1938 by the *National Syndicate of French Journalists*. The most interesting features of this Charter for our point are the fact that unfounded accusations are considered to be the most serious professional misconduct and that there is a requirement to respect justice[235].

The *General Association of Professional Journalists of Belgium* adopted a "Code of Journalistic Principles" in 1982. This Code insists on the separation of information and comment and on the respect for human dignity. In case of conflict between the freedom of expression and other fundamental rights, this code states that it is up to the editors (in consultation with the journalists concerned) to decide on their own responsibility to which right they will give priority[236].

The German "Press Code" was adopted in 1973 by the *German Press Council* and was updated in 1999. The most relevant provisions of this Code establish the importance of the respect for the truth and accurate informing of the public and state that *"there is no justification for publishing the names and photographs of offenders or victims in reports on accidents, criminal offences, criminal investigations or court proceedings"*. This Code also considers that unfounded allegations are contrary to the ethics; it recalls that the press should avoid making any comment in a report which could be construed as partisan or prejudicial to the issue and that an accused person must not be presented as a guilty party before legal judgement has been pronounced. It insists on the distinction that should be made between suspicions and proven guilt. Legitimate public interest, further, does not justify sensationalism[237].

Many other codes mention the presumption of innocence as an ethical principle that should be respected by journalists. This is the case of the Spanish "Deontological Code for the

[234] Website of the Department of Journalism and Mass Communication of the University of Tampere, on www.uta.fi/ethicnet/.
[235] Ibidem. Website of the Department of Journalism and Mass Communication of the University of Tampere, on www.uta.fi/ethicnet/.
[236] Ibidem. Website of the Department of Journalism and Mass Communication of the University of Tampere, on www.uta.fi/ethicnet/.
[237] Website of the Department of Journalism and Mass Communication of the University of Tampere, on www.uta.fi/ethicnet/.

Journalistic Profession" adopted in 1993 ; in the Croatian "Code of Ethics" adopted in 1993; in the Danish "National Code of Conduct" adopted in 1992; in the Finnish " Guidelines for Good Journalistic Practice" adopted in 1992[238]. The respect of the presumption of innocence is more and more frequently included in the media codes of ethics.

Most of the Codes insist on the importance of the truthfulness and the accuracy of the information spread by journalists. Those Codes usually promote the respect and the defence of human values like human life and dignity, tolerance, peace and rights, including the public's right to information. They encourage the fight for press freedom against any kind of censorship and the protection of press credibility by honourable behaviour. In the principles set out by those Codes, we usually find the respect of the privacy of people and the need to avoid unfounded accusations and information needlessly damaging to reputation as well as the need to separate news from opinions[239].

The existence of professional codes of ethics is obviously not sufficient. These codes should be respected by journalists and here again, as for the adhesion to the press council, it depends on the free will of journalists. If journalists do not find moral reasons to respect these codes, they should at least find an interest in doing so. The fact that the public knows that they respect a code of ethics can be an advantage for the newspapers and journalists. Their interest could be that the public might be wiling to buy newspapers which are respectful of the professional ethics. More, there can also be an economic argument for respecting a code of ethics: it seems that advertisers are more and more sensitive to the ethical conduct of the newspapers they are working with. Being known as one of the only newspapers which do not respect the professional ethics is probably something that no newspaper may wish for.

V. 2. 2. 3. Promotion of ethical behaviour by education and training.

The promotion of the ethical behaviour of journalists should be made through the education of journalists. If journalists know the meaning of the presumption of innocence and its significance in a democratic society, they might be more likely to respect it.

Journalism schools should include in their curriculum the basic notions of freedom of expression and its limits. Journalists would be then aware of their duties and responsibilities.

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[238] For other examples, see website of the Department of Journalism and Mass Communication of the University of Tampere, on www.uta.fi/ethicnet/.

[239] C.-J. Bertrand, *A synthesis of several dozen existing media codes of ethics*, on www.presscouncils.org/library/AAA_Synthetic_Code_5_03.doc.

They should also learn the basic rules of criminal law, such as the right to a fair trial, the presumption of innocence and the need to maintain the authority and the impartiality of the judiciary. Education should make journalists aware of the significance of the respect of the rights of the accused .

Journalists should be aware of the national regulation that could exist in their country, such as the French law on the strengthening of the presumption of innocence. Education could happen through schools but also through conferences, seminars and specialised publications. This should not only result in more efficient journalists and producers, but also professionals that are more aware of media responsibilities towards society and who know how best to fulfil them . Professional training, of course, should include ethical training[240].

V. 2. 2. 4. Proposals for a core content of the codes of ethics.

It is here suggested that it is necessary that some rules appear in every code of ethics that would be adopted. They form what I call the "core content of the ethics"; these rules should be kept in mind by all journalists. Some of these rules are already present in different codes of ethics around Europe but the ideal situation would be that all of them would be present in every text.

The first principle that should be kept in mind by journalists is the importance of the truth and of the accuracy of the information given to the public, especially because the media are usually the only source of information of the public and because many people do not question its truth. They should obviously always act in good faith.

The distinction should always be clearly drawn between the facts and the opinions. Journalists should be aware of the influence that their reports might have on the public opinion and be careful with it.

They should be aware of the potential conflict that can arise with other rights and should respect the right to privacy and the right to a fair trial to which everyone is entitled. Specifically, they should respect the presumption of innocence of the accused and should not treat him as a guilty part. The publication of the picture of the accused and of his previous records should be avoided; they are likely to influence the public opinion in a way that can be very detrimental to the accused. In a more general way, in the case of the coverage of a criminal case, they should try to stay as objective as possible towards the accused.

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[240] C.-J. Bertrand, *The case for Press Councils*, in «Intermedia», Nov.-Dec. 1990, vol.18, n°6, on www.presscouncils.org/ library/Intermedia_1990.doc.

In the third chapter, we underlined the importance of the words used by journalists in their reports.It is commonplace to call someone "murderer" or "child abuser" in the newspapers before a trial, even though everyone is presumed innocent until proven otherwise by a tribunal. The word "presumed"should always be used as long as there is no decision on the guilt of the accused.Education should make journalists aware of this distinction. The use of words like "murderer", "rapist", "paedophile" concerning persons who are still waiting for their trial must be avoided. The wording has a great influence on the perception of the public: someone who is called murderer in the newspapers will probably be perceived as a murderer by the audience. The impact of such a perception can lead to a social punishment for the accused. Presenting the accused as guilty can possibly affect the impartiality of the jurors.
Another important thing for the accused is the possibility of exercising a right of reply that should always be recognised to the persons criticized in the media.

Conclusion.

The relations between the media and the justice have always been ambiguous.

On the one hand, a free press, reporting freely on matters of public interests, is necessary in a democratic society; it plays a central role in the functioning of democracy. The media affords the expression of ideas and opinions about the functioning of public institutions and makes an informed public debate over matters of public interest possible. They play a great role in the information of the public. When media comment on court proceedings, they support the principle that the administration of justice should be open to public scrutiny; they contribute to the publicity of courts proceedings. The media reporting on criminal proceedings informs the public on these proceedings, makes the deterrent function of criminal law visible and ensures public scrutiny of the functioning of the criminal justice system.

On the other hand, the media coverage of criminal case sometimes dramatically affects the fundamental rights of the accused person. Examples of excessive media coverage are numerous. The recent Dutroux case, in Belgium, and Cantat case, in France, once more demonstrated how some cases could quickly attract the attention of the media and could lead to prejudicial press campaigns. Journalists have obligations concerning the content of their reports; they should to a certain degree ensure that the information provided has an objective and factual basis. They should always act in good faith and provide accurate and reliable information in accordance with the ethics of journalism. We insisted on the importance of the vocabulary used by journalists in their reports. Journalistic freedom covers polemical and aggressive tone and recourse to exaggeration or even provocation but journalists should refrain from using excessive language. In practice, those obligations do not seem to be always respected by journalists. Media often publish the name of the accused, his picture, details about his life and criminal records. The "trial by media" is more and more frequent. In the third chapter exposed the consequences of such extensive media coverage. The right to a fair trial is often highly damaged by the pre-trial publicity. In particular, journalists often seem to forget that every accused is presumed innocent until proven guilty according to law.

The presumption of innocence, set out by article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, is the cardinal principle of almost all the systems of criminal proceedings. This principle exists in order to minimize the risk that

innocent persons may be convicted and imprisoned. The purpose of the presumption of innocence is to avoid this insufferable injustice of the conviction of an innocent. It means that until the guilt has been established by a court, the accused should be seen and treated as innocent by everyone. The presumption of innocence does not imply an actual belief that the accused is in fact innocent. Even though the media are private parties which are not bind by the European Convention, it is clear that their reports can affect the presumption of innocence of the accused. If the accused is presented as guilty in the newspapers and is called "murderer" or "monster" or "rapist", the public is more likely to believe that the accused is guilty, even before the beginning of the trial. This influence on the public opinion is likely to expose the accused to a social punishment, which can ruin his social life. Furthermore, the reputation will be hardly repaired. Another risk is that the public opinion might challenge the sentence which would not fit with its view on the guilt of the accused. The acceptance of the sentence as being fair is necessary to ensure respect for and confidence in the court's ability to settle disputes.

The third chapter also presented the effetcs that media coverage can have on the proceeding itself. It asked the question whether the requirement of having an impartial tribunal can be damaged by the media coverage when the accused is going to be judged by a popular jury. Contrary to the professional judges, the jurors are not supposed to be aware of the importance of the presumption of innocence and are more likely to be influenced by prejudicial pre-trial publicity. Nonetheless, this influence should not be overestimated; it can be counterbalanced by instructions given to the jurors before the beginning of the trial, asking them to take the decision only on the basis of the evidences presented in the courtroom.

Some countries already perceived the potential influence of the media on the public opinion and on the tribunal. The examples of the French law on the strengthening of the presumption of innocence of 2001 and the English Contempt of Court Act of 1981 were explained. They show that different solutions are adopted to deal with the influence of the media reports on the proceedings. The French law prohibits the publication of pictures of an accused with handcuffs. The Contempt of Court Act gives the judge the possibility to stay the proceeding if it could not be fair, due to the prejudicial media coverage. Another possibility for the judge is to discharge a particular jury on the basis of prejudicial publicity. The French law has recently been applied in the Cantat case but we can maybe regret that the amount of the fine was not really dissuasive. The extreme solution of staying the proceeding is a very heavy procedure;

the discharge of a particular juror is less radical but might sometimes not be enough, if all the jurors have been influenced by the pre-trial publicity.

The fourth chapter demonstrated why journalists should always respect the presumption of innocence of the accused. The first argument that was developed is the one of the wording of the European Convention. Article 10 does not see the freedom of expression as an absolute right. The second paragraph of this article makes express provisions for limitation on the freedom of expression. This aspect of the right is often forgotten by journalists. The three usual conditions need to be fulfilled to justify the interference with the freedom of expression: it should be prescribed by law, it should further a legitimate aim and it should be necessary in a democratic society. The potential justifications for interfering with the freedom of expression under article 10(2) must be narrowly interpreted. Among the legitimate aims that can potentially justify restrictions on the freedom of expression, the protection of the reputation or rights of others and the need to maintain the authority and impartiality of the judiciary can be invoked to justify limitations of the freedom of the media in case of extensive media coverage which affects the presumption of innocence. Indeed, these two aims are also crucial objectives of the presumption of innocence. The protection of the rights or the reputation can include the protection of the presumption of innocence. The fact of being described as guilty by the media can sully the reputation of the accused.

The need to maintain the authority and the impartiality of the judiciary overlaps with the right of an individual to have a fair trial where publicity would prejudice the interests of justice, under article 6(1).Maintaining the authority and the impartiality of the judiciary includes the protection of the rights of litigants. The phrase "authority of the judiciary" includes the notion that the courts are and must be accepted by the public as the proper forum for the settlement of legal disputes and for the determination of a person's guilt or innocence on a criminal charge.

Nonetheless, the European Court is very protective towards the freedom of expression. It rarely finds that articles in the media can legitimate restrictions to the freedom of expression. We took a look at its case-law concerning the limits of the rights of the journalists when the aim is to protect the rights or the reputation of others or to maintain the authority and impartiality of the judiciary in the fourth chapter. The Court had to decide on different cases in which journalists affected the reputation and the presumption of innocence of persons. In

those cases, what was important was the existence of a public debate about a matter of public interest in which the article could form part of. If such a debate existed, the Court is more likely to find that the interference was not necessary. In assessing the necessity of the interference, the Court attaches a great importance to the general context of the article. In the Worm case, the Court came to the conclusion that the interference was legitimate because the applicant wished to usurp the position of the judges dealing with the case and his intention of influencing the trial by his article was clear. While article 10 makes express provisions for limitations on the freedom of expression, article 6(2) of the European Convention, on the other hand, does not make express provision for limitation to the presumption of innocence.

The second argument developed in favour of the respect of the presumption of innocence by the journalists relates to the respective roles of the media and of the judiciary. The role of the media in a democratic society was summarised like this: information of the public on matters of public concern in order to make an enlightened public debate possible, investigation in order to bring crimes to the attention of the justice and comment on the administration of justice in order to make it open to public scrutiny. The trial by media has no place in a democratic society governed by the rule of law: the role of the media can never be the one of deciding whether someone is guilty or not. The media have no legal basis to do so and do not offer any guarantee comparable to those set out by article 6 of the European Convention. The media must report on the administration of justice but should not prevent it from exercising its role and should not take the place of the judges.

The third argument concerns the public's confidence and respect in the judiciary; the trial by media might undermine this respect and this confidence in the court's capacity to settle the disputes, which are necessary for the acceptance of the courts as the proper forum for the settlement of legal disputes.

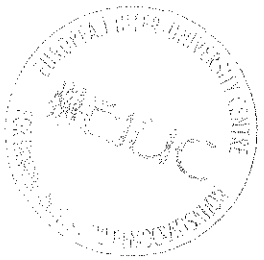
The fifth chapter examined the different solutions that can be used in order to make journalists respect the rights of the accused and made some proposals for a better respect of these rights. The State regulation is often used but does not seem to be the best solution. The *a priori* measures are often perceived as censorship, even though they are not prohibited as such by the European Convention. The other obstacle they should overcome is that we usually do not know in advance which articles will affect the presumption of innocence of the accused before their publication. The *a posteriori* measures are not satisfactory either because the person whose rights have been affected by the media will usually get money which will not

repair the damage made to his reputation. Reputation will be hardly repaired by money .For the accused that has been presented as guilty by the newspapers, the most difficult thing is to stand the social punishment which could be the consequence of the press campaign. This social punishment can last for a long time and money will not change anything to it.

The other possibility which should be privileged is the self regulation by journalists themselves. Journalists should be aware that the space of freedom which has been given to them should be used judiciously. The State should encourage them to adopt professional codes of ethics, whose aim is to ensure the social responsibility of the media.
Self regulation should consist of the establishment of national press councils. These councils adopt professional codes of ethics. This system is already functioning in many countries. The main challenge is that these press councils should gather all the journalists in a country and that they all would see an interest in signing up the codes of ethics. This interest could be that they do not want to be the only ones known as "not respecting the ethics". It is rather a moral interest but it can also be an economic interest. Most of the existing Codes insist on the importance of the truthfulness and the accuracy of the information spread by journalists, on the defence and the respect of human values and on the respect of the privacy of people and on the need to avoid unfounded accusation. The use and the respect for these codes should be systematized; we made some proposals for a core content of codes of ethics, which should emphasize the importance of avoiding unfounded accusations, of providing true and accurate information in good faith, of respecting the right to be presumed innocent of the accused, of using appropriate vocabulary and of guaranteeing a right of reply to those whose reputation has been hurt by their articles. Education is an indispensable step towards the awareness of the journalists of the importance to respect the rights of the accused.

What I have been demonstrating here are the risks of a trial by media and how it can affect the right of the accused. The impact of such media coverage can be very detrimental to the presumption of innocence in particular and also, to a lesser extent, the right to be judged by an impartial tribunal, when the accused is judged by a popular jury. These rights should always be respected by journalists. Even though this is accepted in theory, in the practice, journalists do not seem to be aware if it. The freedom of expression and the presumption of innocence are both fundamental rights whose significance in a democratic society is widely recognised. But contrary to the presumption of innocence, the European Convention makes express provisions for limitations to the freedom of expression. These limitations are often

forgotten by journalists in practice. The good functioning of a democracy needs a free press reporting on the administration of justice, as a matter of public interest, and an independent judiciary whose role is not usurped by journalists. Journalists should never confuse their role with the one judges occupy. The development and implementation of codes of ethics for journalists are an indispensable step towards an increased respect of the presumption of innocence in journalistic reports.



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