

**THE SCOPE OF PRIVATE LIFE OF A PUBLIC PERSON IN
FINLAND AND FRANCE**

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This thesis will aim to discover how Finnish and French law balance two seemingly contradictory constitutional rights: right to private life and right of expression. This thesis will use a functional comparative legal study approach to the topic in order to construct and provide a cohesive picture of each legal culture.

Objective and accurate description of each legal culture requires a careful study of both history of the press and the development of individual's rights. Democratisation and individualism created a society where the smallest protected unit was not a family but an individual. For the first time, it was acceptable to choose how much information a person wanted to share with each social community.

Freedom of thought and more notably, freedom to share ones ideas is realised by a free press. Transparency in a democratic society has been protected by giving freedom of expression the value of a constitutional and civil right. Politically powerful individuals' accountability to his voters has been acknowledged by limiting their right to protection.

With a greater access to information, there is also a responsibility to write and publish information that's truthful and respects the core are of privacy. Line between what's private or public is mostly drawn in legislation, court practice and inside the press by a common code of conduct. European Union law and European human rights law have a synchronizing effect on national law. Especially ECtHR case law has and continues to have a decisive role in the development of each legal culture.

Avainsanat: constitutional tradition, constitutional rights, international human rights compatibility, constitutionality, privacy, public sphere, democratisation, individualism

Muita tietoja:

Suostun tutkielman luovuttamiseen Rovaniemen hovioikeuden käyttöön: x

Suostun tutkielman luovuttamiseen kirjastossa käytettäväksi: x

Suostun tutkielman luovuttamiseen Lapin maakuntakirjastossa käytettäväksi:

(vain Lappia koskevat)

ABBREVIATIONS

EC	European Community
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
CJEU	Court of Justice of the European Union
CMM	Council for Mass Media
HATVP	la Haute Autorité pour la transparence de la vie publique (High Authority for Transparency in Public Life)
LaVM	Lakivaliokunta (Committee of Legal Affairs)
MEP	Member of the European Parliament
PeVL	Perustuslakivaliokunta (Constitutional Committee)
UJF	Union of Journalists in Finland
UDHR	Universal Declaration of Human Rights

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European Union

Charter of Fundamental Rights of the European Union (2012/C 326/02)

Finnish Acts

Asetus tiedotustoiminnan valvonnasta sota-aikana (5.12.1939/446)

Laki sananvapauden käyttämisestä joukkoviestimissä (13.6.2003/460)

Laki sotatilasta 1930 (303/1930)

Painovapauslaki 1/1919 (1/1919)

Perustuslaki (11.6.1999/731)

Rikoslaki (19.12.1889/39)

Tuomioistuinlaki (25.8.2016/673)

French Acts

Loi du 29 juillet 1881 sur la liberté de la presse

Code Civil

Code Pénal

Loi du 9 août 1849 sur l'état de siège.

La loi du 4 août 1914 sur les indiscretions de la presse

Loi du 31 juillet 1920 réprimant la provocation à l'avortement et à la propagande anticonceptionnelle

Loi du 2 juillet 1931 modifiant l'article 70 du Code d'instruction criminelle

Décret n°53-934 du 30 septembre 1953 portant réforme du contentieux administratif.

Constitution du 4 octobre 1958

Loi n° 70-643 du 17 juillet 1970 tendant à renforcer la garantie des droits individuels des citoyens (1)

Preparative Legislative work

HE 1/1998 vp

HE 184/1999 vp

HE 309/1993 vp

HE 54/2002 vp

HE 84/1974 vp

LaVM 11/2013 vp

LaVM 6/2000 vp

PeVL 23/1997 vp

PeVL 2/1990 vp

PeVM 25/1994 vp

Case Law

Constitutional Court of France (Conseil Constitutionnel)

Conseil Constitutionnel, Décision n° 99-416 DC du 23 juillet 1999.

Conseil Constitutionnel, Décision n° 94-352 DC du 18 janvier 1995.

Conseil d'Etat

Conseil d'Etat arrêt du 6 février 1998

High Court of Finland (Korkein oikeus)

KKO 2005:82

KKO:2011:72

KKO 2010:39

European Court of Human Rights

Fürst-Pfeifer v. Austria, 17 May 2016 (Applications nos. 33677/10 and 52340/10). (Pfeifer v. Austria 2007)

Niemietz v. Germany, 16 December 1992 (Application no. 13710/88). (Niemietz v. Germany 1992)

Axel Springer AG v. Germany, 7 February 2012 (Application no. 39954/08). (Axel Springer AG v. Germany 2012)

Loizidou v. Turkey, 23 March 1995 (Application no. 15318/89). (Loizidou v. Turkey 1995)

Mariapori v. Finland, 6 July 2010 (Application no. 37751/07). (Mariapori v. Finland 2010)

Von Hannover v. Germany, 24 June 2004 (Application no. 59320/00). (Von Hannover v. Germany)

1. INTRODUCTION

I was inspired to conduct this study as I wanted to know why the media coverage of the persons of politics seemed to be so different in France and Finland. When pondering the options in regards of how to define my research question, I made preliminary information mining to find the essential acts that would be relevant to this study. Findings let me understand that that both of the countries have included an article that protects the private life of an individual on their constitutional texts. Still my initial thought was that somehow the Finnish press had seemingly more liberty in choosing what they are going to publish and on which tone. I also remember coming across aggressive tabloid headlines more often when browsing Finnish tabloid press publications than what I did when while glazing through their French counterparts. Some authors¹ seem to support the idea that the French legal system seems to grant private life a relatively strong protection even on an international scale.

On the other hand this culture of silence could be facing the end of its era as French investigative journalism seems to be more eager to target domestic politicians. The protective wall seems to crumble especially when handling public fund usage. One big scandal that has without a doubt caught the attention of the grand public in France is the case of a right wing politician Francois Fillon. The presidential candidate saw his popularity melt after a highly publicised investigation about misuse of public funds to hire his own relatives². This is in conflict with how the press has handled some prior equivalent public secrets such as the case of the past president Francois Mitterrand his secret daughter³. The latter stayed out of headlights despite the fact that the daughter's living was financed from public funds. The presidential family secret was kept secret by the journalists, some of whom were fully aware of this arrangement⁴.

¹ See Picard 1999 & Trouille 1999, 199.

² Le Monde 31.1.2017, also reported in Le Parisien 23.3.2017, Lexpress 26.3.2018 and many other weekly and tabloid press.

³ Cabot 2016 in Paris Match.

⁴ Trouille 1999, 199.

1.1 Research Question and the Purpose of the Thesis

The decision to execute the comparison between Finland and France felt natural as studying each legal culture using native sources often delivers the most rigorous information available. This serves the quality of the comparative research minimising the margin of errors if the researcher has a sufficing level of at least passive comprehension of the language.

This is a comparative study aiming to educate the reader on civil rights legislation, culture and case law in Finland and France by discovering the most notable divergences and common factors between them. It is not my objective only to show the reader the substantive content of acts but equally to create an opportunity to truly see and understand the variation of legal thinking and heritage between these two European countries. After all, before there was a European Union (EU) and the need of unified civil rights law, there were two nations with rich and very unique cultures. EU itself strives to create the community symbols that are usually associable with natural countries, the most known ones being the flag and the official motto “*United in diversity*”⁵. Becoming a federation where legislative hegemony rests upon the shoulders of some distant politicians in the hemicycle of Brussels and standardising every aspect of life with a directive seems however very unlikely. It can thus be expected that the diversity within constitutional rights field will be only partially unified. By the end of this study the reader will know whether Finland and France are, on this particular field of constitutional law, united or different and if so, to which extent.

Considering the scope of a legal culture and all its sectors it would be impossible to inspect its every aspect meticulously. I’ve chosen to restrict the research only to examine a longstanding conflict between the protection of private life and the freedom of expression. As the result of international human rights treaties, and existing state-specific constitutional law, arguably every independent state has some applicable legislation on this field. Question of compatibility between the two is bound to happen as constitutional rights are tied to each legislative culture. Even if these articles would have identical wording and concern the exact same civil rights issue, the text’s identical interpretation can’t be fully guaranteed. Therefore the legal reality might differ greatly between countries even inside the same legal family.

⁵ The Official Website of the EU. The motto has been translated into all official EU languages. “*It signifies how Europeans have come together, in the form of the EU, to work for peace and prosperity, while at the same time being enriched by the continents many different cultures, traditions and languages.*”

In this study I pursue to cast light upon the rights of well known individuals notably in printed mass media, in both weekly press and in tabloids. Politically active individuals were chosen as a group of particular interest but the rights of other public persons (such as notorious social figures and artists) are considered as well. To fully understand the reasons and justifications behind both privacy and freedom of expression supporting arguments

According to Husa, the comparatist should acknowledge the possible cultural and educational bias that might affect his or her ability to find and comprehend foreign concepts and this way be as objective as possible. Arguably it is impossible for a person to completely cut the ties between one's native legal culture and perfectly integrate with the other. It is feasible, however, to cast an insightful view into another system if the possibilities of prejudice are eliminated.

1.2 About the Methodology and the Structure

Law is a product of multiple factors including not only substantive legal culture (law text and the preparatory works themselves, court case law, customary law and education of local lawyers) but also linguistic and general national culture and society structure. Hierarchy of political parties and ideologies should not be ignored and understanding general values of the natives serves to further clarify what is regarded as just. Most visible clues do appear on the legislative level but to comprehend why and how certain approaches have been chosen, it is necessary to review historical and social development in both countries.

The study uses a functional approach without restraining itself when the quality and nature of the subject at hand can effectively profit of methodological variation. This method has proved to serve the objectives of this study and allowed a productive acquisition of relevant information without breaking the coherence of subjects under study. Even though the preceding bachelor thesis has been used as the basis of this research, all the material as well as previous findings have been reviewed. Instead of pursuing to find the legislative reality, I now work more with the socio-cultural cause and consequence factor. Why has a certain legislative technique been chosen in a certain context? Is there a difference between a text of law and the legal reality? If there is, what are the historical and social reasons behind them?

The most important objective of comparative law is to find the factors that separate or connect the legal systems and cultures under study and explain these findings.⁶ The researcher should always aim to the highest accuracy and the most rigorous quality while conducting research and therefore find the most suitable sources describing the systems in question. Written law is merely a tip of an iceberg when it comes to sources that are relevant when discovering how and why the legal realities differ from one another. Cultural and historical factors play a significant part in the development of a legal reality. It is, therefore, indispensable to describe openly all the sources and pieces of information considered in this study.

Chapters 2 and 3 will go through Finnish and French press history, development of privacy as a liberty right and national legislation concerning protection of private life. Need for law doesn't emerge from a vacuum but is catalysed by contemporary world's needs and deficits that need to be fulfilled. This is why I have included some culturally and historically relevant information. As I advanced with research, studying the development of press act proved highly beneficial to overall understanding of the subject. It helped to uncover more sources when running into difficulties of finding relevant material, especially concerning the French law.

Chapter 4 will study the impact of European Union and European Convention on Human Rights on the national law and court practice. This is especially important considered that Finland has a dualistic and France a monistic approach to international treaties. The willingness to implement supranational law and European Court of Human Rights practice differs greatly as well. I will then proceed to introduce a conclusion of the findings in Chapter 5.

1.3 On the Sources

Each country has its own doctrines concerning the sources of law. These sources may (or may not) vary according to the specialised field of law in question, or they might have different place in norm hierarchy than in the other legal culture. In this research, I will take into consideration all the sources that serve the function of understanding the law and its systematic in both legal cultures. I've searched information from the same sources as

⁶ Husa 2015, 24%.

national lawyers in the native language of each system as well as from comparative legal research papers.

2. FROM CENSORSHIP TO SELF REGULATION – FINNISH PRESS AND PRIVACY

2.1 Terminology

History of written Finnish language is incredibly young as its orthography became stable only as late as the 1800's. It became an official language in 1863 after the passing of language act allowing Finnish to be used in administration and courtrooms. Consequently the heritage of written legal language doesn't have the same historic timespan as most of the older Continental-European languages. Finnish legal terminology is inevitably younger and has had a shorter timeframe to develop. A language adopts new terminology as real life concept becomes significant enough to require distinction from the others. This becomes relevant when timing the birth of legal concepts.

Etymology

Yksityiselämä (private life) doesn't appear in the etymologic dictionaries of Old-Finnish or even Middle-Finnish⁷. The etymologic dictionary of contemporary Finnish lists the word *yksityinen* (private) to be a derived adjective of *yksi* (one) and it's a neologism found in 1845.⁸ Its precursor *yksinomainen* (sole) was mentioned the first time in 1759 in the Finnish translation of the Swedish Civil code of 1734.⁹ According to the dictionary of contemporary Finnish, the sense of composed words beginning with *yksityis-* (such as *yksityiselämä*) are linked with the primary meaning of the adjective *yksityinen* (private). Consequently, everything that is private concerns only the individual in question or a very narrow group of people or an event outside the public sphere. Equally, the actions that are not connected to public duties or official state business are intimate or otherwise personal.¹⁰

On the other hand, *julkinen* (public) is the opposite of *yksityinen* and can be defined as information that is known by everyone or it can also stand for a public freely accessible

⁷ For instance: Ganander, C. 1940. *Nytt finskt lexicon: Uusi suomen sanakirja*. 3, S - Ö. Porvoo: WSOY.

⁸ Häkkinen 2004, 152.

⁹ Jussila 1998, 314.

¹⁰ Sadeniemi 2002, 695–696.

event. It can serve as a name for affairs that, in some way or another, concern public authorities and a title for those who work in a public office.¹¹ The word originates from the texts translated from Swedish to early Finnish by Michael Agricola in 1544.¹² This means that *yksityinen* (or its processor) has been adopted to written Finnish language nearly three hundred years after the first mention of its counterpart *julkinen*. It wouldn't be a surprise if the words existed in spoken language equally lengthy time, but since the Finnish law is a codified law, it is important to observe when they first appeared to the official texts of law.

Law

Considering the linguistic development of Finnish language, the local equivalent term for protection of the private life, *yksityiselämän suoja*, is a something that became part of Finnish liberty right vocabulary quite late. The constitutional right has existed in the legal culture in one form or another since the very beginning of its independent history. In fact, the Constitution of 1919 included protection of private life in two articles: inviolability of domicile and secrecy of telegraph and telephone communications. The formulation of the law became soon outdated and the impending legislative gap was filled with expansive interpretation of modernised liberty rights.¹³ In 1974 the term became an important part of freedom rights vocabulary when it was written into Finnish Criminal Act. The wording has since been adopted to the new Constitution.

It is important to acknowledge the difference between the Finnish terms *yksityiselämän suoja* and *yksityisyys*. They are frequently confused with one another and even applied as synonyms. This occurs both in everyday speech as well as in legislation and preparatory legislative work.¹⁴ Professor Saarenpää underlines the importance of respecting the definitions of each term. *Yksityisyys* is a generic term which encompasses most of the current areas of privacy protection and that doesn't need to be defined in an exact manner. On the other hand *yksityiselämän suoja*, which protects the intimate private life of an individual, is only a component of the earlier legal concept.¹⁵ Preparatory legislative work states that the right to privacy consists of right of an individual to create and maintain relationships to other people and familiarise with his environment without forgetting the right to autonomous

¹¹ Sadeniemi 2002, 54.

¹² Jussila 1998, 74.

¹³ Saraviita 2011, 180.

¹⁴ Ruotsalainen 2006, 34.

¹⁵ Saarenpää 2012, 241 and 313.

control over his life and body¹⁶. There are two dimensions to the legal protection granted by Finnish law: The protection can be either active or passive, meaning that the state has to act preventively so that no harm would be caused to the individual and that it should make sure that the framework for protection is effective. On the other words: Law maker has to produce privacy protection act and the state has to make sure these rights can be performed.

2.2 Drawing the Line Between Private and Public Life

The end of 1800's can be characterised as the golden era of legal positivism. This meant that the law wouldn't take a position concerning ideology, values or social institutions. In fact, the greatest objective of modern law was to enable individuals to lead their private life in a way that suited their personal beliefs and values. It was no longer seen necessary to guide citizens' moral compass using the law. They were judged to be capable to adapt their own actions to the common perception of good values. Social institutions, including family, were allowed to decide their internal code of conduct as they saw fit without unnecessary intervention by the state. This meant cutting the ties between the church (and its religious moral ideals) and the law as well as removing most of the ethical and social norms. Creating a state of law where formal equality before the law was decisive, was seen more important than realisation of individual or moral rights.¹⁷

The memoirs of Tabe Slinoor can be seen as a precedent of a publication that started to define the limits of private and public life in Finland. Slinoor wrote a serial story of her affair with Eric von Frenckell, who was 40 years her senior and already married. Slinoor herself took the initiative to consciously create a certain fame for herself. She used a publication as a tool to market a strictly tailored image of herself, ensuring that the public got to know her as the person she desired to be seen.¹⁸ Social studies researchers consider her publications to be among the first to pave the way for further portrayal of private life in mass media. The birth of Finnish tabloid press occurred only in the early 1960's.¹⁹ A proper breakthrough would have to wait even longer and Slinoor's writings were, in way, an example of a typical

¹⁶ HE 184/1999.

¹⁷ Pylkkänen 2004, 168.

¹⁸ Saarenmaa 2010, 59–60.

¹⁹ Jallinoja 1997, 85–85.

portrayal of public image of the era.²⁰ It wasn't before 1970's that the press (and the individuals themselves) started to open the doors to unscripted and unpolished public image.

2.3 Protecting the Family Sphere

The Finns have a reputation of being closed off and not keen on disclosing information about their personal life to strangers. Though this stereotype is slowly starting to lose its grounds, there are certain aspects of it that can still apply today. Without a doubt, most of the subjects have become somewhat less of a taboo. When speaking about the birth of the idea that something should or could be considered private, Jallinoja cites several mid-European researchers. It seems that the development of Finnish society followed as least partially the common trend already set on motion by more advanced and urbanised European nations. Publication of marriage guide during the 1800's marked the beginning of an era when even private matters began to be acceptable subjects of public discussion. It surely desensitised the common folk to the idea that even marital affairs could be discussed openly.

These guides didn't include real life characters, nor tales that would be presented as personal experiences. However, the explications were quite detailed and revealing. This non-personal and expert-like tone made it clear that the subject was up for a discussion but only when handled in a general manner. The juxtaposition of personal portrayal used in the press or biographies and the generalised tone of the marriage guides continues to exist still today. Common perception sees the non-personal speech of an expert to be a proper and acceptable way of treating the private life in a public media. On the other hand personal discourse is regarded as nonsense that seeks to reveal too much of what should in fact stay hidden within the family house.²¹

When it comes to appreciating the impact of law to family life, the very nature of Finnish law underlined the separation of church and law. This meant that family unit was free to decide about its inner dynamics and thus keep the household secrets to themselves. A good indicator of this is the development of women's rights: Equality between women and men within a marriage institution was attained in 1929. Up to that point it was up to the community itself to decide, what was generally acceptable or normal. The state interfered

²⁰ Saarenmaa 2010, 59.

²¹ Jallinoja 1997, 85-84.

family life as little as possible. In practice this meant that the sanctity of marriage and home was valued higher than, for example, the property rights of women or children's rights.²²

2.4 Finnish Press, from Censorship to the Freedom of Expression

In comparison with most of the other European countries the birth of Finnish press was greatly belated for a number of reasons such as language politics and strong state control over all forms of printed publications. There are three essential facts that need to be considered when comparing Finnish and French press. Firstly, Finland has a relatively brief history of independence: 100 years in fact. This seems short when compared to France that had a fairly well established state system even before the Great revolution of 1789. Finland was an official part of Sweden until 1809 before it became the Grand Duchy of Finland and thus a subject to the power of Russia until 1917. Secondly the Act on the Freedom of the Press (*Painovapauslaki 1/1919*) was passed as late as in 1919. Thirdly, its development was hindered by ordinances imposing censorship, which nullified the attempted press freedom reforms until the stabilisation of national security. (5.12.1939/446 *Asetus tiedotustoiminnan valvonnasta sota-aikana*).²³

2.4.1 Serving a Foreign Governance

History of Swedish press is that of Finnish press as the language used in first newspapers was indeed Swedish. First truly Finnish mass publications appeared around 1770. Those were more of an educative than a political nature and included subjects such as history and literature. The first women's paper saw its daylight in 1782, an economy paper was established in 1803 and the first proper periodical paper *Allmän Litteraturtidning* suffered censorship during the very first year of its existence. Later Frans Michael Franzén did his best to develop small-scale press by publishing texts that cast light upon foreign affairs. Again his efforts were partially futile. The Swedish act that forbid all the real newsworthy material, was also applicable in Finland. Only those foreign news that had already been published in the official Swedish newspaper were permitted to be republished in Finland.²⁴

²² Pylkkänen 2004, 168–172.

²³ Westman 1978, 97.

²⁴ Westman 1978, 98.

This Swedish ordinance by the King Gustav III from 1774 was briefly overthrown in 1792. As Finland became a part of Russia in 1809 and censorship was reintroduced, printed press didn't get to exercise the newly granted freedoms. The society was extremely desensitised to censorship and consequently there was no initiative to protect freedom of expression. In fact, it was perceived to be a legitimate tool to be used by a higher authority. It could be freely applied without raising any protests within the intellectual circles. The church as well as the university resumed their inner control over published material that was already practiced during the reign of Gustav III. Additionally, it was strictly forbidden to write about the events of the French revolution of 1789.²⁵ Finland shared a long common history with a neighbouring country and thus any outside disturbances could pose a danger to political stability.

Communality was regarded more favourably than individuality and the strong national government monitored closely the development of citizens' public opinion. It made sure that its policies were regarded as the common perception of how things are supposed to be. Therefore there was no reason why its actions would be up for criticism. Control over media was seen necessary in order to protect national security from disturbances arising from inside the country or provoked by external motivators. Especially the new liberal political currents were seen as a threat.²⁶ In this kind of atmosphere, a possibility of democracy wasn't even discussed as the country had a long history of being ruled by a strong monarch who made decisions without even consulting the local officials. The parliament wasn't allowed to assemble resulting into a reign of caretaker government that carried out the will of the general governor. The society was highly hierarchical as both the corporative system and church governance contributed intentionally to the deposition of people.

The close communications between Sweden and Turku, and more notably, between the intellectual scholars, didn't stop even after Finland was passed over to Russia. Finland also held to the Swedish law which meant that the censorship continued to affect the press and there existed no act that would guarantee any true and effective publication rights until the 1900's. Swedish continued to be the dominating language in press despite the fact that Finnish language press projects were highly desired. Finnish publications were even shorter lived than their Swedish counterparts. Finnish press' difficulties to secure its existence

²⁵ Leino-Kaukiainen 2015, 47.

²⁶ Tommila 1989, 61.

continued well until 1844 and even long after, finding a newspaper that lived more than six months was immensely difficult.²⁷

2.4.2 Pioneering the Freedom of the Press

Years from 1809 till 1840 are known as years of repression, bureaucracy and censorship. In 1829 Russia appointed general governor gave an ordinance to relaunch censorship. He also established local censor offices. This preventive censorship system followed closely the model already well established in Russia unifying the control in both countries. The intention was to make sure that the popular opinion would develop to the direction intended by the governance. Every publication had to undergo a strict preventive censorship by state officials. Because Finnish people had never seen a truly free press, they didn't resent the strict control and it seemed to be accepted amongst the highly educated as well. Finally in 1860's the preventive censorship was lifted and in the same decade Finnish language became equal²⁸ with Swedish language.

Equality between the languages and the freedom of the press got their first advocates when the statesman Johan Vilhelm Snellman launched Swedish-speaking newspaper *Saima*. In his writings he criticised heavily the unresponsive attitude of the educated towards censorship. Again, the approach to these subjects was more educational than newspaper-like as he wanted to explain and discuss about economy, education and Finnish-speakers' rights. The publication were not approved by the state officials and *Saima* was suppressed definitively in 1846.²⁹

Regardless of the short lived history of Saimaa, Snellman is regarded as the person who contributed into birth of the free Finnish press and changed the country's public life with everlasting results. He was greatly influenced by the new liberal principle of publicity, based upon the thoughts of John Stuart Mill, whose ideas had already taken root in Europe. He saw that the media should be free of governmental influences and that an individual should be able to present his views and contribute to the public discussion. However, Snellman wasn't opting for universal or unrestricted freedom of expression as he saw that the state should be able to restrict the right in case the national security was at danger. He found equally that the

²⁷ Westman 1978, U, 98–99.

²⁸ Rommi P, 1989, 79: Språkreskriptet 1963, Finnish became equal but not the sole official language. Swedish preserved its status as it was before the language act.

²⁹ Westman 1978, 100.

opinion bringing constructive new views into discussion was inevitably that of a well-educated person. The elite of the country should adopt the language of the common folk and help to construct an independent nation.³⁰

The ideas presented by Snellman didn't revolutionise Finnish public life. However they sparked conversation on the long neglected subject. During the first half of 1800's the political discussion was revolving mainly around language issues as Swedish continued to dominate over Finnish. Consequently, press publications were mainly written in Swedish (Despite the fact that Swedish-speakers formed the minority of the population.). Numbers evened out by 1860 and some of the Swedish-speaking press actively promoted Finnish nationalistic ideas to educated Swedish-speaking social class. This overlapped with a great improvement in national literacy of Finnish language, which built even better market situation for national press. A movement supporting the dominant position of Swedish was found in response to this linguistic unbalance. Soon the language issue eclipsed social and economic questions and became the basis upon which political parties were constructed. Political discussion was closely monitored to stay within the frames of Russian interests meaning that all public political discussion upon other national questions was not permitted.³¹

Later it was seen necessary to further advance the integration of the two countries. For some twenty years between 1890 and 1910, during the governance of Bobrikof, a pan-slavistic ideology was enforced. The Finnish periodical press releases were to know the strictest preventive control of yet. Events taking place in Russia were presented as news from homeland assimilating Finland as a solid part of Russian empire. As a consequence, press that strived to inspire discussion about social issues and education were silenced. In the end, even the formerly reasonably well established newspapers had to struggle in order to exist as the First World War and more notably, the civil war in Finland caused the great majority of newspaper and periodical papers to die out.³²

³⁰ Westman 1978, 100. Tommila 1989, 61.

³¹ Westman 1978, 101–102. In 1866 inspired and capable generation of students worked with Kirjallinen Kuukausilehti. The interest of this publication wasn't limited to promoting Finnish culture but spoke strongly to support establishing an independent country. Fennoman movement, whose interest was to promote Finnish to be the only official language in the country, created in 1869 its own newspaper Uusi Suometar.

³² Westman 1978, 101, 103.

2.4.3 Freedom of the Press in Independent Finland

Until the hour of independence of 1917, the national press was in constant internal quarrel and the discussion focus shifted into determinate how Finland should react to the dismantling of its autonomy. *Nya Pressen* and *Päivälehti* stated that Finland should strictly obey its legitimate obligations while *Uusi Suometar* cautioned that it is important to preserve Russia's confidence. By the end of 1910's the country saw a wave of political party's papers. Though they were ideologically worlds away from one another they had one common goal, which was to oppose to the russification of Finland.

Then again, the civil war of 1918 tore the society apart sorting citizens into monarchists and democrats. The political papers belonging to each side merged with in order to declare their alliances, reducing the number of newspapers into half of the original. It's safe to say that the press was heavily politicised. At the same time Finnish society continued to polarise and both right and left wings of politics had their own extremists.³³ It wasn't until around 1930's that the newspapers started, one by one, to declare themselves independent. This development peaked in 1960's, when none of the liberal Finnish-speaking political parties had their own newspaper.³⁴

Although it was the press itself that sought to control over what could or could not be published during the Continuation war of 1941-1944, the chances of getting shut down by stately authority doubled from the previous years. Between the years 1941 and 1944 as many as 1,3 million press articles were examined. Moreover, 30 000 required intervention and 5 000 were prohibited to be published altogether. Furthermore, the aim of the Martial act of 1930 (Laki sotatilasta 303/1930) was to stop the publication of information that could affect negatively in the defence of the country. Everything was done in order to stop essential national information from leaking to foreign powers. Censorship was also used to steer public mentality to the direction desired by stately authorities. Even after the war, public mentality towards preventive publication control was surprisingly favourable. This was notably due to the fact that earlier Finland had experienced only brief periods of true freedom of expression. This culture of silence was strongly internalised within the political world making the atmosphere immensely difficult to be transformed.³⁵

³³ Westman 1978, 103–106. *Päivälehti* later developed into *Helsingin Sanomat* which remains the most read national newspaper till today.

³⁴ Steinby 1964, 124.

³⁵ Steinby 1964, 88–90.

2.4.4 Birth of Modern Press

Despite the challenges faced during wartime, the development of press began to accelerate in 1945. Editorial know-how and technical machinery reached the same level with other Nordic countries by 1975. Finns reached a level of newspaper consumption that was comparable or even high when considering press culture worldwide. On the other hand, Finnish tabloid press was a late bloomer in comparison with other northern countries. In Sweden, Norway and Denmark tabloid papers printed out in respectable quantities already in the early 1970's, when Finnish *Ilta-Sanomat* struggled to survive with a distribution area that was limited to the capital city area. Economic depression of the year 1975 hit the tabloid press harder than the weekly press further hindering its chances to make a breakthrough in a market environment that was already satisfied by a large offering of publications with similar content.³⁶

Following the development of other European countries the mentality within Finnish popular culture was on the edge of liberation. Intellectuals and the church saw their influence wither as popular culture and scandal medialisaton became commonplace thus creating a juxtaposition of two environments of discourse: Intelligent educative discussion and popular tabloid publications. They coexisted without any notable interaction and although the atmosphere of separation continued to exist for a lengthy time, the moment can be seen as a dawn of free Finnish press.³⁷

While Finnish press continued to develop following closely the footsteps of more advanced foreign examples, movies started to be available to increasingly wide range of audience all over the world. Even though the stories were fiction, the cast playing the parts of heroes and heroines were real living people. It had the same impact on personification of movie characters as the theatre but had a greater popularising impact.³⁸ A star-culture, where a person was placed above an average citizen as something to be followed and worshipped, integrated to general popular culture to stay.

One of the first notable yellow press releases was *Hymy* found by Urpo Lahtinen in 1959. He draw his inspiration from the British paper *Daily Mirror* and was greatly impressed by its innovative way to create catchy headlines that would discuss actual world events in a shamelessly bold fashion. He headed back to Finland and established his own paper with an

³⁶ Westman 1978, 113, 118-119, 124.

³⁷ Saarenmaa 2010, 53.

³⁸ Jallinoja 1997, 81.

idea to spark up conversation in a way that no other paper did at the time. He uttered out a rumour claiming that he had been sued by Maria Callas, a famous opera singer, for a violation of her private life. In reality, Lahtinen hadn't actually published anything. The other papers were quick to take the bite and comment on the subject predicting that this would be the end of the tabloid style press. However, according to Lahtinen, this kind of publication was the best promoter for *Hymy* and the following print runs of the tabloid were considerably bigger than the previous ones. This encouraged him to continue publishing increasingly attention seeking headlines.³⁹

It was now clear that the colossal success of *Hymy* had had an impact on the content of other press releases (weekly, and tabloid). The way that it sought to profit from ridiculing people that were in sensible life situations and to introduce the real person behind the story. This accompanied with intimate life exposure and open resentment towards people of power seemed to launch tabloids to the popularity similar to other European countries. The demand for yellow press journalism was high and the Finns seemed to approve the newly gained freedom and quickly made *Hymy* the most popular tabloid of the 70's.⁴⁰ The Finnish tabloid press got its breakthrough around 1960's which was soon followed by the law maker's decision to add an article protecting the private life of an individual into the Finnish Criminal Code.

2.4.5 Lex Hymy

Tabloids and sensational publishing became a subject of national discussion in the 1970's when the relationship between content and privacy was rocky at the best. Publications handled more and more domains of life that traditionally would have been classified to belong to the inviolable private sphere. At times information sources used by the journalists were highly questionable. It was becoming increasingly difficult for a public person to keep his most intimate private affairs from leaking to the press. One of the crucial cases that proved the need for specific private life protection act was the case of Timo K. Mukka, a writer suffering from serious health issues. He deceased soon after reading a shocking newspaper article about himself and his passing was most likely accelerated by this distress. The public uproar that followed the tragedy speeded up the legislative process and resulted

³⁹ Lepokorpi 1983, 70, 76–78.

⁴⁰ Aho 2003, 319–320.

into a defamation article in the Finnish Criminal code (Rikoslaki, 19.12.1889/39) 27:3 a §, which was quickly given the nickname “Lex hymy”.⁴¹

The content of the article in question was, according to Mukka, extremely vicious and caused him great suffering. The headline appeared provocative even to an objective reader as it said: “You’ve got one foot in the grave, Timo K. Mukka”. (*“Riiput jo ristillä, Timo K. Mukka”*). The writer used the last days of his life trying to bring the writers before justice and was too obsessed to sleep or rest and therefore to heal. The stress led into a cardiac arrest and a steep overall decline of health until his death on 27th of March 1973.⁴² This unfortunate event was highly publicised and it raised the question of protection of private life to the public knowledge.

Popularity of Hymy was declining in the beginning of 1970’s as the readers got more and more used to the style of the yellow press. The competitors were also quick to mimic and develop a similar style. Consequently, to attract more readers, the tone of publications got increasingly aggressive, eventually leading into prosecution of journalists and then even into prison sentences. Whereas the death of Mukka was not in direct causality with the infamous text, it was enough to catalyse a discussion and eventually to provoke a change in law. It was the final straw in already tense atmosphere.⁴³ Where this didn’t seem to increase yellow press’s willingness to tone down the publications, there was now a clear message pronounced by the law maker: That the journalistic freedom doesn’t exist without responsibility and that the right to keep one’s private life out of the public sight is an equal right coexisting with the freedom of expression.

2.5 Law

The doctrine of the sources of law didn’t have a central position in Finnish legal thinking during the first years of independence. The dominating disciplinary idea was that a judgment should always be based on law and facts discarding all arbitrariness. This was later transformed in a notable way. Since the 70’s Finnish legal education has followed closely the models developed by Aarnio and Peczen. They argued that court judgments should accept a broader selection of sources of law but at the same time to define more precisely

⁴¹ Korhonen 2008, 114.

⁴² Paasilinna 2002, 219–221.

⁴³ Aho 2003, 333–335.

the relations between them. There exists two rules of characterisation: Firstly, the sources may be binding or facultative. Secondly, they are recognised either because a competent authority has pronounced them viable or because they act as the sources of substance that rely on their argumentative value or practicality.⁴⁴

Consequently, the primary sources of binding law in Finland have traditionally been that of the written law (published in the national gazette) and derived customary law. A decision to derive from either one could lead into sanctions or annulment of judgment that conflicts them. However, according to the Finnish Code of Judicial Procedure (Oikeudenkäymiskaari, 1.1.1734/4) customary law had a weaker position than the written law. It was binding only when an exact rule could not be found from a law text and in case the custom was equitable. Therefore, when there was no written applicable act the custom had a constitutive effect. It also influenced the interpretation of a legal norm in case where the intention of law maker didn't appear clearly from the act itself.⁴⁵

However, recent changes annulled the preceding articles from the Code of Judicial Procedure and moved them to the new Courts Act (Tuomioistuinlaki, 25.8.2016/673). Now the 3rd part of the chapter 9 article 1 of the new act states that only written law binds the judge's decision-making. The preceding act dates back to the year 1734, the time when Finland hadn't yet reached independency, and has since been modified so generously that rare article has remained in its original form. By the end of 90's it had undergone several comprehensive reforms.⁴⁶ This argues for keeping the previous practice in power regardless of the changes of 2016 since changes within the doctrine of law are a much longer process.

Finnish legal system recognises preparatory legislative work and court decisions as sources of law but those don't have a binding character. Choosing not to follow the rules set by these sources doesn't lead into sanctions but might cause a higher court to amend the judgement of preceding court. Both contribute into making more sense of unclear or unprecise text since they manifest the intention of the law maker.⁴⁷ Judgments of the higher courts don't have a binding character, meaning that the lower courts can derive from them if there exists reasonable grounds to do that. However, the higher court judgments should not be ignored

⁴⁴ Karhu 2005, 27–29.

⁴⁵ Aarnio 1999, 779.

⁴⁶ Frände 2017, 83–84.

⁴⁷ Cf. Mattila 2002, 274–275, who argues that preparative legislative work has always been an important source in Finnish law especially when compared to other legal cultures. Even though all the documentary that comes out of preparatory committees are translated into Swedish, vast majority of the procedure is conducted in Finnish since 1906. Thus the need to go through Swedish text isn't necessarily obligatory and I will proceed to focus on Finnish versions.

as they might still prove to be essential when constructing the grounds for a judgement. The secondary sources of law are the general principles of law that can be either binding or facultative depending on whether they have been written into an act or not. The former is binding as every other written primary source of law and the latter can help to determine both if the case solution is proportional and equally to strengthen individual's legal rights. Legal literature is left out of definition of binding source. They do however help to understand legal terminology, especially in the case of comparative law (and linguistics) where they offer a window to another legal culture.

The importance of non-written sources of law diminishes as the legislative text begins to cover majority of instances where secondary sources were previously needed. It is worth noting that especially the preparatory legislative texts on the field of constitutional rights law have been written decades ago. Consequently this makes them less useful when defining the norms applicability in contemporary cases.⁴⁸ The law texts themselves on the field of freedom rights have not aged well following that preparative text guidelines don't necessarily fit the modern context of interpretation. They should therefore be considered as sources law with caution.⁴⁹ The freedom rights have also undergone a massive reform in 1990's and finally a new Constitution (Perustuslaki, 11.6.1999/731) entered in force in year 2000. Specialised committees⁵⁰ may provide relevant guidelines on how to interpret acts.

As in all of the European legal systems, constitutions are at the peak of the legal pyramid. In the case of conflict, they hold a dominant position compared to other acts. When there exists a contradiction between the two the judge has a constitutional obligation to give priority to the constitution⁵¹. The article 106 of the current constitution states: "*If, in a case presented in before by a court of law, the application of an act would be in clear conflict with the constitution, the primacy will be given to the constitution.*" The following 107 article ads: "*If a provision in an article or another law of a lower level than an act is in*

⁴⁸ Frände 2017, 83. This is especially important to remember when interpreting procedural law which now recognizes the written law as sole binding source of law.

⁴⁹ Hallberg 2011, 35. Author speaks of right to ownership but the shame principle applies to all freedom rights since they all were radically modified either before or with the constitutional revision.

⁵⁰ For example constitutional law committee (*perustuslakivaliokunta*) and legal affairs committee (*lakivaliokunta*).

⁵¹ Viljanen 2011, 309.

conflict with the constitution or another act, it shouldn't be applied by a court of law or by any other public authority.”⁵²

Karhu addresses the need to take into consideration the contextual elements when deciding whether a source of law is relevant or not. The interaction between written law and a real life phenomenon belonging to its scope of application creates specialised categories with problems that share a common factor. As the perception of reality changes faster than juridical thinking, the norms texts of law have to be in interaction with different perceptions of reality depending on the time and place of the trial. Finnish criminal law system has its own specific principles and approach to law. It follows that the relevant sources of press law might differ of the ones central to, for example, obligations law. Criminal act act makes a clear difference between a public and a private person but when determining which one is at hand the approach should always be situation-specific. And in some cases, the institutionalised self-regulation of media can be taken into account.⁵³

2.5.1 Constitution

Finnish constitutional law has been strongly influenced by Swedish law beginning with the unification of Swedish regional laws in the middle of the 14th century. These laws with the ones to follow, were directly applicable in Finland. This setting didn't change when Finland was passed under Russian rule. Same laws and constitutional culture continued to apply until independence. From thereon, Finnish legislation continued to develop along the Pan-Scandinavianism movement that included culture and law. Focus was primarily in civil law and especially on the field of commercial and property law.⁵⁴

After becoming independent, the central interest of Finnish law maker was to pass laws that realised formal equality between individuals. The first wave of modernised legislation, which took into account the justness of substantive aspect of the law, can be traced back to the beginning of 19th century. However, individuals' rights didn't find themselves within the nucleus of constitutional law before the 1990's. Reason for this has been the political instability in Finland and the need to preserve stability within the society. Tradition of law, neutrality and consistency of legal system were prioritised over reforms and thus human

⁵² Unofficial translation (updated version of the year 2012) by Finnish Ministry of Justice used as the basis of translation of both articles.

⁵³ Karhu 2005, 31.

⁵⁴ Mattila 2002, 312-313.

rights issues gained wider visibility only after the country's accession first to EC in 1989 and then to the EU in 1995. Today, constitutional and human rights discussion is considerably more active and relations between individuals and the law have changed.⁵⁵

The right to the protection of the private life was recognised as constitutional right in 1995 as a part of a large constitutional reform. For the first time it could be found written under the same headline with the other freedom rights: "*Basic rights and liberties*" (*Perusoikeudet*).⁵⁶ Placing it directly next to the other freedom rights granted it with at least formally equal value. Later in the year 2000 the article was moved to the new Constitution without changing its wording. The article 10 of the said constitution states that: "*Everyone's private life, honour and the sanctity of the home are guaranteed. More detailed provisions on the protection of personal data are laid down by an Act.*"⁵⁷

The article protects privacy on vertically and horizontally. The exceptions are subject to an appreciation of necessity and they are only justifiable when written brought to force with an act. This protects the citizens from misuse of power as limitations to constitutional rights have to be accepted by a democratically elected parliament. The horizontal protection is accomplished by criminalising deliberate attacks against the private life of an individual.⁵⁸ The first phrase creates the law maker a constitutional obligation to take action when a revision or passing of a new text of law is needed for the protection of private life.⁵⁹ The article 22 declares: "*The public authorities shall guarantee⁶⁰ the observance of basic rights and liberties and human rights.*" Law maker is expected to develop the content and the scope of protection further. The legislative tool chosen should be appreciated case-by-case and thus giving the law maker a mandate to resort to the most rigorous and effective means available.

Preparatory legislative work explicitly names the right to protection of the private life as a new civil right that is no longer only a derivation of other liberty rights. The general wording of article 10 means that the content would be established further on by the law maker or the

⁵⁵ Pykkänen 2004, 168–169.

⁵⁶ Tiilikka 2003, 77.

⁵⁷ Unofficial translation (updated version of the year 2012) by Finnish Ministry of Justice.

⁵⁸ Saraviita 2011, 181.

⁵⁹ PeVM 25/1994. This obligation belongs to a special group of constitutional norms that oblige the law maker to act in preventive manner.

⁶⁰ See Pykkänen 2004, 172–173, who states that the modern constitutional rights development after accession to EU has aimed for strengthening the individuals' access to rights. The contrast to the past is noticeable since it empowered individuals to seek after their rights independently. Previously it was seen sufficient simply to add to the act a state officials' obligation to guarantee the existence of these rights.

courts. A seamless and exact list of the elements included in the framework of protection can't therefore be established. The decision to build this article in such a general form was a conscious choice: listing all the possible aspects of privacy might endanger the sought objective leaving out some important aspects that are equally worth protecting. The basis of right for private life is the individuals' right to live without arbitrary interference by either the state officials or a third person. The protection of family life and right to a personal identity are included in the constitution based right to the protection of private life.⁶¹

On the other hand the state may not limit the right to private life without an essential necessity for guaranteeing others basic rights or investigation of crime. Also the safety of an individual or that of the general public, investigating crimes against family life, judicial proceedings and deprivation of liberty might justify clearly framed limitations. A well-established reason imperative to the protection of conflicting constitutional right must be at hand for that the limitation to the respect of private life to be justified.

The Finnish constitutional tradition acknowledges a principle which forbids incrimination of behaviour that belongs to the protected core area of a constitutional right. The prerequisite of these limitations is that they must answer to a pressing social need and to be acceptable, taking into account the constitutional rights system as a whole. Principle of proportionality requires to carry out an assessment on whether incrimination is necessary for realising the intended protective function. Other options carrying less constitutional rights invasive effects than incrimination should be taken into consideration. Severity of the punishment shouldn't exceed what is deemed proportional. The principle of legality of criminal law requires all the limitations to be formulated into an act passed by a democratic parliament.⁶² It follows that the core area of right to privacy can't be made ineffective even by a legislative act. According to the Finnish Supreme Court: "*...emotional relationships, dating and family life undoubtedly fall within the scope of private life and even its core areas.*"⁶³

2.5.2 The Criminal Act

As states the article 8 of Finnish criminal act (Rikoslaki 13.12.2013/879):

⁶¹ HE 309/1993, 56.

⁶² Perustuslakivaliokunnan lausunto 23/1997 vp, 2.

⁶³ KKO 2005:82.

”Yksityiselämää loukkaava tiedon levittäminen

Joka oikeudettomasti

1) joukkotiedotusvälinettä käyttämällä tai

2) muuten toimittamalla lukuisten ihmisten saataville

esittää toisen yksityiselämästä tiedon, vihjauksen tai kuvan siten, että teko on omiaan aiheuttamaan vahinkoa tai kärsimystä loukatulle taikka häneen kohdistuvaa halveksuntaa, on tuomittava yksityiselämää loukkaavasta tiedon levittämisestä sakkoon.

Yksityiselämää loukkaavana tiedon levittämisenä ei pidetä sellaisen yksityiselämää koskevan tiedon, vihjauksen tai kuvan esittämistä politiikassa, elinkeinoelämässä tai julkisessa virassa tai tehtävässä taikka näihin rinnastettavassa tehtävässä toimivasta, joka voi vaikuttaa tämän toiminnan arviointiin mainitussa tehtävässä, jos esittäminen on tarpeen yhteiskunnallisesti merkittävän asian käsittelemiseksi.

Yksityiselämää loukkaavana tiedon levittämisenä ei myöskään pidetä yleiseltä kannalta merkittävän asian käsittelemiseksi esitettyä ilmaisua, jos sen esittäminen, huomioon ottaen sen sisältö, toisten oikeudet ja muut olosuhteet, ei selvästi ylitä sitä, mitä voidaan pitää hyväksyttävänä.”

The most substantive work for defining and assuring the protection of private life has been achieved by incriminating intentional actions that seek to distribute information that could cause harm to person's private life. Spreading illegally any information, insinuation or picture that belongs to the private sphere in a way that causes the victim harm or makes him a target of contempt, may give rise to criminal responsibility. The article 8 of the part 24 of the Finnish criminal act imposes liability to a fine to the distributor of such information and the article 8 a (13.12.2013/879) imposes liability to a fine or up to two years of sentence if the crime can be characterised to be an aggravated offence. Latter becomes applicable when the act causes great suffering or particularly great damage and is deemed aggravable when assessed as a whole.

The third paragraph states that the act isn't defamatory if the presentation of the said information, taken into consideration its contents, doesn't clearly exceed what can be deemed acceptable. On the other words: in a modern European society where a complete isolation from other individuals is an impossibility, a person has to tolerate to a certain degree some compromises to his individualistic rights. This necessity applies both normal citizens

and public persons but scales differently, resulting from the second paragraph of the cited article. What can generally be thought to cause suffering to a person concerned by the spread information crosses the line of what is considered acceptable.

When it comes to interpreting this article, it's good to keep in mind that since its original introduction to criminal act, only a few modifications have been passed implementing hardly any pertinent changes. The criminal act was in need of global technical updates which sought to standardise the language and expressions used within. It was not intentioned to change the way the opposing constitutional rights (freedom of expression and the right to private life) were balanced with one another. This means that the preparatory legislative work of the earlier versions of the article are still at least partially relevant.⁶⁴

As the society develops, the values that are deemed acceptable mutate accordingly. The decision to write an article with a general character was a conscious one. It expresses the people's expectation of holding political and public persons accountable for their actions. For this reason, the article needs to have a wording that's general enough to be interpreted in an adaptive way taking into account the society's changing values. Otherwise there is a real danger that the wording of an act would become obsolete rapidly.⁶⁵ The article is also neutral when it comes to the channels and ways of distributing information. This is vital as the information society keeps on inventing new tools to share information. It doesn't apply only to the printed press since it is applicable to Internet-publications and public demonstrations with flyers or handouts.

Most importantly the preparative work for the original article of 1974 already states that *yksityiselämä* is a term that can't and shouldn't be defined too narrowly. The danger is that some of the cases where protection is needed wouldn't fit into the scope of application. Diversity of possible case scenarios is immense and thus it is impossible to create an exhaustive list of all the possible violation to the private life. In principle, everything that hasn't expressively been excluded from the scope of private life belongs to the private sphere. On the other hand, actions and facts that have a significant social impact shouldn't enjoy this protection. The right to privacy shouldn't work as a tool to undermine citizens legally protected right to receive information about important social facts. The more pertinent this information is for the society, the stronger the right to information should be.⁶⁶

⁶⁴ HE 184/1999 vp, 12, 35.

⁶⁵ HE 184/1999 vp, 12.

⁶⁶ HE 84/1974 vp, 3.

2.5.3 Private Life of a Public Person

The second paragraph makes a difference between the scope of the protection of private life depending whether the victim corresponds to a certain criteria or not. If the targeted individual works either in politics or on economic sector or assumes a public office or his position is comparable to that of the earlier, certain limitations might apply. Two specific requirements must be met in order to this differentiation to be justifiable. First, the information should affect the evaluation of this person's capacity to occupy a public office. Second, public discussion on the matter is necessary seen its importance to the society. However the innermost core area of private life can't be stripped away from protection indefinitely. Even a public person, such as a politician, should enjoy basic protection⁶⁷. They have the right to protection of the core area of their private life similarly to private citizens. In general their family life, leisure-time activities, health, relationships and publicly non-relevant actions in office are thought to belong to this protected core area.⁶⁸

The law maker reasons narrowing the scope of protection for public persons with the particular role that political and governmental activity have in a democratic society. However, earlier wording of the article was characterised as misleading by the committee of legal affairs. It insisted on including the idea of personal accountability to the criminal law act along some technical changes in 2000. Sharing in public information concerning the private life is acceptable when it can have an impact on evaluating the capacities of the person assuming public office or other influential position in the society.⁶⁹ Those desiring to lead a political career have to be willing to accept narrowing of the protection of their private life as it is deemed necessary for transparency in democracy.

Right to privacy belongs to the self-autonomy of each person. In case where he chooses to provide the media with information about his private life, he no longer disposes of the right to forbid the treatment of the said information in media. The Supreme Court states that this doesn't create a presumption of waiving the control indefinitely. Information belonging to the core of private life that hasn't yet been published require consent of the person. Expressed

⁶⁷ KKO 2010:39.

⁶⁸ HE 84/1974 vp, 3.

⁶⁹ LaVM 6/2000 vp, 6. Strictly read, the earlier wording allows spreading information that concerns the acts of the person as a public person while practicing in a public office. The revision added phrasing that expresses explicitly that the information has to have a connection to the capacity to exercise public power but reveals aspects normally associated with private life. The committee of legal affairs expressed the importance of eliminating the possibility of confusion when interpreting the article since the first formulation allows a narrower scope of interpretation than the original intention of the law maker.

consent is thus needed for publishing any detail of private life. The fact that a person has voluntarily unveil aspects that would normally fall under protection doesn't mean that the press would have the right to publish other similar information.

Highest Court states in its decision of 2005 that mere curiosity doesn't suffice to legitimate overlooking the protection of private life in the name of freedom of expression. Information has to be essential to general interest of people in order to constitute an acceptable reason for a publication.⁷⁰ Later in 2010 the court makes a reference to the case of von Hannover v. Germany to underline that a publication of information with intention only to satisfy curiosity of certain criteria of readers doesn't serve this common interest.⁷¹ Interpretative guidelines for applying this article can thus be sought from ECtHR practice on article 8 of the European Convention on Human Rights in addition to Finnish highest court practice on article 10 of Finnish constitution.

2.5.4 Penalising Freedom of Expression

Originally, the non-aggravated act could lead into a prison sentence but this was changed in 2013 so that the penalty would be limited to a fine. The possibility of sentence was removed and added to the aggravated act. The change was provoked by the recent development of the European human rights law. Equally worth noting is that the ECtHR has pronounced unfavourably against Finland multiple times in cases handling the article 10 on liberty of expression. The committee of legal affairs states in its review that the threat of prison sentence might in reality pose an unnecessarily strong deterrence and therefore prevent relevant information from being published. This goes against the fundamental role of the press to keep the people informed about actions of those exercising public power. Committee of legal affairs underlines further that the suitability of prison sentence for defamation has been questioned by ECtHR. According to its practice, deprivation of freedom should occur only under exceptional circumstances and presents therefore an exception to the recommended consequence of a fine.⁷²

This was expressively stated in the case of Mariapori v. Finland⁷³: The applicant published a book in which she declared that a tax official had committed a perjury fully knowingly and

⁷⁰ KKO 2005:82 (kohta 12).

⁷¹ KKO:2010 :39 III 3 36.

⁷² Committee of legal affairs 11/2013 vp – HE 19/2013, 4.

⁷³ Mariapori v. Finland (Application no. 37751/07) paragraph 68.

intentionally. Because the spouse of the said official worked as a public prosecutor the prejudicial statement was omitted by the prosecution. Of the five thousand copies made, about a thousand had been distributed before a pre-trial investigation. Names and other personal information regarding both public officials were included and therefore the parties could be individualised with ease. Applicant answered charges for aggravated defamation for which The District Court found her liable and sentenced her to four months of conditional imprisonment. She also had to pay 5 000 € in compensation to the tax inspector. Reasoning stated that though the applicant may have had reason to criticise the company taxation system, she shouldn't have expressed her opinion in a defamatory manner.

The appeal court upheld by a majority the previous judgement reasoning that restrictions of the applicant's right to freedom of expression had been necessary and proportionate. The dissenting opinion would have freed the applicant from obligation to pay compensation since the criticism didn't exceed the limits of what was acceptable for civil servants to endure in the exercise of their official duties. Following appeal to the Supreme Court was refused and the case was brought before the ECtHR. The latter agreed that derogation from the right to privacy is justified as the basis for the limitation is pronounced by the constitution. However it also underlines that prison sentence (even a conditional one) isn't justified in a classic defamation case when the publication belongs to the public interest. The sentence was declared manifestly disproportionate.

This decision did far more than just change a penalty provision. It has a profound effect on how to find a balance between different constitutional rights. Additionally, it redefines (and in the case of these constitutional rights heightens) the threshold for incriminating the infringement of a constitutional right with prison sentence in order to protect another right that has an equal hierarchical value.

Conclusion is that before the initiative of the EHRC to abolish prison sentence for infringements against the private life, the core area of the said right and the right of expression could suffer extensive restrictions⁷⁴. In order to protect individual's private life, the journalist found guilty of defamation had to suffer a limitation to two of his constitutional rights. Right to freedom is one of the oldest constitutional and human rights principles from which the other more specific freedom rights were later derived from. Individual freedom to private life shouldn't be disproportionately prioritised over it or the freedom of expression.

⁷⁴ Parliamentary Assembly, in its Resolution 1577 (2007) part 13, gave a recommendation to abolishing prison sentence already in 2007. It suggested that the national act should be modified even if the sentence was no longer imposed in practice.

These rights are not mutually exclusive which results that an appropriate protection of all constitutional rights should be the starting point of legal analysis. My personal point of view is that prison sentence could already have been judged problematic seen the principle of legality in criminal law that has been written into article 6 of the national constitution.

It was not only the sanction that was changed but the requirements for aggravated act were updated to comply better the practice of The EHRC. The requirement of using mass media or otherwise publicly granting access to the information to a great audience was removed as aggravating quality. Otherwise the act would specifically target journalistic activity placing the press to an inferior position in comparison with a non-professionals. If the objective was to cause great suffering or particularly great damage and the act should be considered a serious crime when assessed as a whole.⁷⁵

2.6 Specialised Press Law Was Built to Secure the Freedom of Press

Throughout the history of Finland, moments of freedom of expression were brief in comparison with the dominating culture of silence that was forced upon all forms of media. This history could be assumed to encourage the press to embrace its role as the guardian of democracy and accountability of politics. As the independence was achieved and the instability caused by wars had passed the time was fruitful to build a free press. However, the act on the Freedom of the Press marked the birth of a juxtaposition of interests between media and ordinary citizens. In this light, the development seems extreme as it began with the simple intention of freeing Finland from decades of strong stately censorship and leading into one where the rights of individual became threatened instead.

2.6.1 Act on the Freedom of the Press

Finding a working balance, not only between different constitutional rights, but also between the actors profiting from these rights doesn't always go as planned. The Act on the Freedom of the Press (painovapauslaki 1/1919) was passed in 1919 and it became the first press freedom act in independent Finland. It only applied to printed mass media, a visual presentation, a map or a composition. It was a first step towards a modernised media

⁷⁵ Lakivaliokunnan mietintö 11/2013 vp.

legislature. The pioneering national act wasn't immune to imbalances and had to be revised later on.

At times a paper may publish an article that handles the person or his actions. Most of the time this means crafting a reportage about a public meeting or making a book-review, to mention a few examples. The tone of the said reportage or review can appear derogatory or misleading. Where a tactless article might be upsetting, the least time-consuming way to counter the problem is to use one's right to reply. This gives both, the criticised, and the journalist an opportunity to display their views equally. The right to reply was written into article 25 of the Press freedom act.

According to the exact wording the right of the said article, individual had a subjective right to a response. This means that any time a person found himself offended by a text published in a periodical media product, his response had to be published regardless if this offense could be observed objectively or not. In other words, the individual was the one who appreciated the necessity of realisation of this right. Sitting in a public office didn't (and still doesn't) mean waving away this right as long as public officer was named within the text and it concerned him personally.⁷⁶

Ylikangas highlights that the reality wasn't necessarily up to par with the wording of the article since very little could be done by an individual to protect his rights against press publication outside of a criminal procedure. It was actually the editor who dictated whether the response was printed out or not. He is the person mainly responsible of the final product and overall direction of the content and consequently his cooperation was vital. Ylikangas draws attention to the fact that the latter could refuse from publishing the response referring to a reasoning that didn't correspond perfectly to the two exceptions set by the act: published article had to be either of offensive or of criminal nature. No other reasoning was necessary. As a result, it was the responsibility of the journalist to appreciate the criteria. Ylikangas considers that this margin of appreciation might have led into weakening of the rights of a person to rectify erroneous information. And even if the act was followed to the letter, the journalist could still have the upper hand. Whereas the realisation of right to response could be delayed for a lengthy time, the journalist could publish his counter-response as long as he saw necessary.⁷⁷

⁷⁶ Niiranen 2003, 49, 51.

⁷⁷ Ylikangas 1999, 359–361.

2.6.2 Act on the Exercise of Freedom of Expression in Mass Media

This act has now been replaced by the Act on the Exercise of Freedom of Expression in Mass Media (Laki sananvapauden käyttämisestä joukkoviestinnässä 13.6.2003/460). Where the articles now instruct how to handle cases where the freedom of expression has been violated, the total number of legal provisions has been cut down considerably. Additionally, it's technology-neutral as it now includes printed press, internet publications, radio, non-editorial content and commercial publications as well. The key element is that a media tool was used to deliver the content, which means that statements made in a public demonstrations fall out of the scope of application. On the contrary, if a speech was later published using a social media platform, the act would apply.⁷⁸

2.7 Declaration of Guidelines for Journalists

“27. Highly delicate matters concerning people’s personal lives may only be published with the consent of the person in question, or if such matters are of considerable public interest. Protection of privacy must also be considered when using photographic materials.”⁷⁹

The Union of Journalists in Finland (UJF) releases and updates its declaration of guidelines for journalists. The current version in power dates to 1st of January 2014 and its paragraphs 26-29 handle the problematic of privacy. The most interesting of those is the mentioned paragraph 27 which underlines the exceptional nature of publishing intimate information. It sets roughly the same boundaries as the Criminal act, which are willing consent and requirement of considerable public interest. On the other hand it doesn't expressively mention that the publication is justified only when the information compromises person's capacity to successfully hold office. Nor does it make a difference between celebrities and office holders (politicians, state and municipality officials).

Council of Mass Media (CMM), rules of which has been ratified by UJF, gives statements over subjects that fall under the said declaration. Those who consider that a publication treats

⁷⁸ Niiranen 2003, 11–12.

⁷⁹ The Union of Journalists in Finland: Guidelines for journalists 2014.

them inappropriately or that it contains erroneous information, can bring their case before the council free of charge. It is seated by eight members of highly accomplished media professionals as well as five representatives of public who can't be in service of mass media. All associations and private companies that are in an affiliation with CMM are bound to follow its guidelines and decisions.⁸⁰

However, the union is press's self-regulatory instance which doesn't exercise legal jurisdiction and consequently its statements aren't legally binding. The statements may be used as a reference of reasoning by a judge especially when determining if a publication is considerably more intrusive than normal. In cases where offense doesn't require immediate criminal prosecution, CMM should be considered as the primary option before resulting into court.⁸¹ This is cost-effective and fast, especially in cases where the outcome seems uncertain.

Despite the lack of judicial power, these statements are used to determine what is regarded to be normal practice in media. On the other words, it might be relevant when assessing the applicability article 8 paragraph 3 of the Criminal act (concerning what can be deemed acceptable). Statements create a clear picture of what media professionals themselves deem to be the norm. However, a judgment will always be based on an act, but non legislative sources can help the judge to make relevant observations on common practice within the industry.⁸²

⁸⁰ UJF 2014, the recital & CMM 2008, general statement.

⁸¹ 12 §. Vastine- ja oikaisuvaatimus.

⁸² Karhu 2005, 35.

3. FROM PRIONEERING TO TRADITIONALISM – FRENCH CIVIL RIGHTS SYSTEM AND PRIVACY

This chapter will first discover and explain relevant terminology and proceed to analyse past and contemporary perception of privacy throughout the society. Then it will go through the French press and privacy law mainly focusing on the unstable relationship between the two. French press was born during the first years of democracy during and after the Great Revolution of the year 1789. Need to find a balance resulted in different legislative technique being used for the two which might have implications on how the domestic law works with modern supranational law.

3.1 Terminology

Legislation, similarly to all the other human acts of communication and social constructions are inseparable from language. A brief glance at the etymologic origins of central terms is vital in order for two reasons: Firstly it allows one to distance oneself from domestic terminology in order to avoid confusion with internalised presumptions thus minimising the danger of misinterpretations. Being a native Finnish legal professional, this has proved to be especially important since one of the studied systems is a native one. Secondly it facilitates the best assimilation to foreign culture and following the thought process of a native speaker. In an ideal case, this serves the objective of being able to make objective and accurate observations that are free of prejudice.

Etymology

The word *privé* originates from Latin word *privatus*, a word used to describe an ordinary citizen. In fact, it is a derived form of the word *privus* that translates into something that is isolated from or set apart from others. The sense of *privé* in old French refers to something that takes place in intimate or private sphere of a person but can equally stand for a person who is considered excessively informal. Expression *propriété privée*, in other words a property or a field to which the public doesn't have access, dates back to mid-1500's. Most importantly, the expression *la vie privée* stands for those aspects of one's life that is not made

public. Since 1367, Middle French gave the word another meaning designating something that doesn't have a part in public affairs and is an opposition of *public*, *politique* and *social*.⁸³ In the usage of 1850's the word *privé* referred either to a private person, something that is completely separate from public sector or an opposite of adjective public.⁸⁴ Contemporary definition of *privé* points towards private premises to where public doesn't have access, a matter that is a private and thus has nothing to do with the public sphere or public affairs or something that's isn't subjected to the authority and is to a large extent independent of a state.⁸⁵

Public derives from Latin word *publicus*, signifying something that concern the people, belongs to the state or is of public propriety or of public usage. The construction *la chose publique* (Lat. *res publica*) was used to describe everything that concerned administration or governance of an organised society. *La vie publique* contains all the actions of a public person (*l'homme public*) that he has completed by right of his position, as opposed to the concept of private life. Since renaissance it can simply refer to a person whose actions serve the interest of the grand public.⁸⁶ In 1850's the word *public* was understood to stand for something that concerns entire people and that is commune to the members of society, something that serves the common interest of all people, something that is in general or widespread knowledge.⁸⁷ In modern French, *public* is understood as the state and its communities, in other words the population (citizens), or all of those who are reached by a tool of media.⁸⁸

Law

As a legal term, *la vie privée* is without a doubt a newcomer in a text of law. It was originally introduced in the Universal declaration of human rights in 1948 and later adopted to the French Code Civil in 1970. Before this, the term privacy was considered to belong under better known roof term of liberty rights. Today, the term is considered to be independent from other freedom rights even though its content seems somewhat ambiguous and it can't

⁸³ Rey 2010, 1766, 1800.

⁸⁴ Boiste 1847, 574.

⁸⁵ Danièle Morvan 2005, 2086.

⁸⁶ Rey et al. 2010, 1800.

⁸⁷ Boiste et al. 1847, 574, 583; Synonyme of : particulier, personnel, familial and domestique.

⁸⁸ Morvan et Rey 2005, 2215.

be given an exact, absolute meaning. According to Dalloz dictionary of legal terminology, *la vie privée* is described as:

*“Désigne l’approbation, par chacun, des informations relatives à son existence, qui lui sont personnelles. Elle renvoie, par opposition à la vie publique, à la sphère des activités de la personne qui relèvent de l’intimité et que chacun peut décider de préserver du regard d’autrui : vie sentimentale, mœurs, état de santé, pratique religieuse, loisirs, etc...”*⁸⁹

According to this definition, everything that belongs to the private sphere of an individual can’t be distributed to the public knowledge without the permission of the said person. It is highly similar to the Finnish definition given by professor Saarenpää highlighting the presumption of privacy and importance of express consent from. The dictionary adds that because the difficulty to balance the right to private life with the freedom of expression, a special criteria must be met in order to breach this protection. It follows that it isn’t legal to publish a person’s photo via press unless it contributes to the public discussion about event with great interest to the general public or moment in contemporary history.

The interpretation of the term public in French press legislation seems to concern only affaires that have next to no links to the private sphere of the person in question.⁹⁰ Actions that serve directly the individual’s objective to develop or change something that’s public or information that can be accessed by everyone, are public. Consequently *la vie privée* covers everything that doesn’t occur or exist to serve the public interest.

3.2 History

The most notable changes on public perception on fundamental societal concepts, such as privacy, develop differently in each state. Conflicting interest of family and its members might affect individual’s freedom to draw the line between what is public and private.

⁸⁹ Serge et Debard 2015, 1071. Additionally: *La vie privée* should not be confused with *la vie personnelle* which is a broader term used mainly on the domain of labour law. The term is broader than the first because it includes all aspects of the life of an individual (even those that would be considered public by the definition of *la vie privée*) that don’t handle the performance of his contract of employment. It determines the extent of the usage of employers’ power. When it comes to these two terms, one can’t be used to interpret the extent of another.

⁹⁰ Lepage 2002, 71.

Individual rights have appeared to the European constitutional culture later than the protection granted to family units. The history of acknowledging an individual to be worth the protection begun during the Great Revolution of 1789.

3.2.1 Drawing the Line between Private and Public Life

The interest of the French government on the domain of economic activities, including industry and finances, has been strong throughout its history. Practicing a profession, owning a piece of property and trading was strictly surveyed and controlled by the state. In fact, many professions were only accessible for those capable of joining the guild designated to each profession. Overturning these restriction, apart from certain disciplines including lawyers and medics, was accomplished during the revolution of 1789. Professional freedom was one of the means with which the reformers sought to end excessive state control over individuals.⁹¹

At the very same time the separation of church and state, which was achieved during the revolution, resulted in a number of notable changes in both public and private spheres. Overturning the power of religion in public life happened violently and earlier than in other European countries because political secularisation was seen as a way to fight against the absolute power of the king and the influence of the pope. Individuals' freedom not to rely on religious guidelines when deciding on moral issues became reality and soon the church wasn't considered to have the authority to guide his private life.⁹²

Until this point the behaviour of a person was more or less dictated by social norms originating from history, philosophical concepts and religion. Living a fulfilling life instead of sacrificing oneself for the wellbeing of the community and allowing personal preferences to determine individual behaviour became acceptable. In a relatively short time-lapse the social restraints fell and a person was seen as something more than a person belonging to his family.⁹³

⁹¹ Debbasch et Pontier 1995, 160–161.

⁹² Debbasch et Pontier, J. 1995, 452.

⁹³ Debbasch et Pontier, J. 1995, 175, Cf. Jallinoja 1997, 80-81, who notes that on the other hand the literature underlines the absence of privacy within the family unit. Some researchers (here Jallinoja makes a reference to Sennett: *The fall of public man*, 1977) claim that the family control wasn't as strong as perceived before. She proposes that the conflicting literature results from the fact that the rise of individualism in the beginning of the 19th century happened simultaneously within private

This progress of secularisation didn't abolish catholic faith from French society but simply made it a subject belonging to the domain of private life. The difference was that the clergy and notably the papal influence was seen as harmful to the functionality of state politics. Catholic Church was stripped of its privileges losing its semi-official status as the stately church of France. Supremacy of the state in regards to religion was accepted and organised practice of religion were subjected to the power of legislative power of sovereign state. The church had to find ways other than stately matters to be present in the society and in peoples' lives.⁹⁴ Together these changes were liable to affect the idea how the line between private and public life should be drawn and especially, which private matters should be allowed to affect persons' public persona or actions.

The Catholic Church sought to fight the old regime and its secularistic undertone by promoting the role of the family in the society. Families became thus closed units that protected its honour by handling all potentially negative or scandalous affairs within the family community. In bourgeois homes the outside world was seen as a threat and family tribunals were held in order to seek a resolution to a problem without losing honour.⁹⁵ For example the criminal procedure act allowed a man to be prosecuted but only if the concubine lived in a different house than his legal wife. In that case the affair would extent outside of the family home and become public. In general family issues were discussed in correspondence but secrecy to outsiders was absolute.⁹⁶

Seeing its position weakening the Catholic Church went as far as to condemn most of the dominant modern epistemological schools of thought since those promoted the idea that society should be conducted and governed without religion and its guidelines. According to an official papal document, the church opposed strictly to naturalism and the right of man to freely express his thoughts as the human wisdom was not necessarily that of the church. The liberty to speak out ones' mind could mislead an individual from the word of the Bible. The fact that this could be carried out through using the press was expressively mentioned within the text.⁹⁷

On the other hand the political atmosphere was vigorously fighting against all the political changes that, in one way or another, were favourable to the church. As the second empire

and public sphere. In general, people begun to appreciate the person behind the public mask and individuality became more accepted within the family circle.

⁹⁴ De Montclos 1990, 86.

⁹⁵ Perrot, Michelle 1990, 151.

⁹⁶ Corbin, Alain 1990 pp. 566 & 604–605.

⁹⁷ Pope Bi. Pius IX 1864 part 3, paragraph 2.

failed and conservatives found themselves in power, secularisation advanced in all domains of life widening the gap between religion and politics. The power that the clerics were able to practice in public life was violently rejected.⁹⁸ Religion didn't disappear, since most French people consider themselves still Catholic today, and continued to play a strong role in the everyday life. However attitudes towards anything that had connection with the church, including private values and morals, were shunned from public life.

Meanwhile, the tendency to favour the separation between public and private life began to gain popularity amongst the social scientists and philosophes. Alexis de Tocqueville, who was a passionate advocate for peoples' right to determine the destiny of their society, researched the political system of the United States and found that individualism is a product of democracy. To him, individualism means that a person is free to isolate himself from the big community with his family and friends, and to create a space for himself. However he did acknowledge the threats this isolation could cause to a democratic society by stating that with time, the individual is keen to become self-absorbed and forget his origins. On the other hand as men become more equal as unjust control by powerful individuals should come to an end. Each individual is now the master of his own future as he owns nothing to no-one and expects nothing from others.⁹⁹ This idea has since been developed and diversified but still clearly lives up to the basic idea that individualism centred western democracies build their values upon: That the concept of private life is that of a society that allows the individual, if he so wishes, to be left alone.

3.2.2 Protecting the Family Sphere

Traditional French family life saw a notable change during the 19th century which created a great split between private and public life. Well until the 18th century home did not have separate spaces for family life and business and the whole apartment was considered open for visitors. During the following century, rooms of the house began to have their separate purpose and parts of the house became out of boundaries for outsiders. There was now a

⁹⁸ De Montclos 1990, 93–94. Cf. Mattila 2002, 370, who reminds that other reforms of the great such as the French Civil Act (Code Civil) were not as revolutionary as one could presume. Sure it presumed individualism and liberalism over earlier pre-revolutionary ideologies, meaning that it did contribute into new republican societal ideology. At the time, however, most of its content handled property rights. Thus other domains of law like family law remained highly conservative underlining traditional values.

⁹⁹ Alexis de Tocqueville 1951, 107–108.

clear polarisation between working and living spaces where the latter offered security, silence and comfort. Family developed thus into a safe space that protected its' members against threats of the outside world.¹⁰⁰

The conviction that the family is a tightly-knit unit whose integrity and reputation has to be upheld regardless the situation at hand is still dominant within the modern society. Personal living spaces are protected from outsiders with vigilance: Doors remain closed and windows are covered either with curtains or exterior shutters. According to Nadeau and Barlow, whose book I consult when discussing the delicate line between public and private, some subjects ought not to be discussed since those instantly make the French uncomfortable. The first one is money which is out of boundaries of a casual conversation. The second one is a bit more nuanced or sometimes even contradictory, and includes everything that has a connection to intimate relationships. This doesn't mean that the French would shy away from talking about what happens in a family house. However, they don't talk in a personal manner but choose to discuss the subject on a more abstract manner instead, rarely including any personal experiences.

3.2.3 Private Sphere of a Public Person

*"...dans le système français, les individus incarnent les institutions qu'ils dirigent. C'est la Patrie qui est reconnaissante aux grands hommes, pas le contraire."*¹⁰¹ A nation needs a strong charismatic leader that one can look up to, at least in France, where the person of the individual occupying a political seat might become more important than the profession he is exercising. In this kind of political environment it is imperial that those seeking to acquire political influence develop a strong and charismatic public persona.

The French embrace a concept of grandeur of public persons and this image is constantly fed by the local press. On every aspect of public life a person is promoted to stand on a podium for everyone else to admire, on the other words creating a cult of personality is a common practice. People still feel rather fondly towards old historical symbols and glory of the past kings. They have no problem with crowning a charismatic and well educated person as someone of greater importance. Politicians tend equally to enjoy of perks inaccessible to

¹⁰⁰ Debbasch et Pontier 1995, 253.

¹⁰¹ Nadeau et Barlow 2005, 46.

an average citizen. Higher state officials (and sometimes their close family) enjoy notable benefits financed from public funds.

The French are known to have a greatly more allowing attitude towards some of the acts of their leaders that would surely cause polemic elsewhere. Politicians' responsibility is to lead the country, not to function as a moral compass and what goes on within their private sphere is no-body else's concern. For example, even though adultery is generally disapproved in France as in many other countries, extra-matrimonial relationships of a public person doesn't usually raise a media brouhaha. When Francois Mitterrand was exposed to have a child out of wedlock it soon became apparent that even many journalists were aware of her existence. The news took years to surface because the affair was considered to be president's private matter.¹⁰² The public opinion would most likely remain unchanged even if he had a strong Catholic Christian because the doctrinal and normative aspects of religion are considered to be separate from public life. Only cultural aspects of Catholicism, such as churches and cemeteries, should be protected as cultural heritage and thus belong to public interests.¹⁰³

The culture of silence doesn't limit itself to romantic ventures of the powerful. Until recently it also included their spending habits even when the money spent came from the public funds. Financing of the political parties has lately been a magnifying glass and multiple cases of suspected corruption have surfaced.¹⁰⁴ The fact that now France is followed closely by GRECO (The Group of States against Corruption) seems to support this.¹⁰⁵ The thought that one should be financially and morally accountable is slowly becoming a common belief amongst voters and as some recent financial scandals indicate, politicians now have to take a full responsibilities of their actions in fear of negative press.

In fact, the large media coverage given to the latest Marine le Pen-cases shows us that the pressure created by the EU seems to have an encouraging effect on national journalism. The European parliament has religiously surveyed the money usage of its members and found that Le Pen wrongly paid her chief to staff Catherine Griset with EU funds when the latter worked within domestic political party and not in an EU organisation¹⁰⁶. Later it was also found that Le Pen used the same funds to pay the wages of another assistant who in reality

¹⁰² Nadeau et Barlow 2005 p. 46–59.

¹⁰³ Eko 2013, 124.

¹⁰⁴ Nadeau et Barlow 2005, 46 & 48. What's interesting is that the French see the act more as something detrimental to the family life than a breach of contract or trust.

¹⁰⁵ GRECO 2010. The organ, found in 1999 by the Council of Europe to fight corruption, has reported insufficiencies in legislation concerning funding of parliamentary candidates.

¹⁰⁶ Banks 2017.

was her bodyguard. Le Pen now lost some of her privileges until she repays all the misused funds. The Parliament has dismissed the MEPs protests on the case.¹⁰⁷ As France is part of the EU, it is expected to embrace the values and ideas of anticorruption that are set by the organisation. This strict approach sends a clear message to all the member states to no longer let corruption pass without countermeasures. French la Haute Autorité pour la transparence de la vie publique (HATVP, High authority for transparency in public life)¹⁰⁸ and its work on publishing financial assets of politicians and other notable society leaders brings to the general knowledge some factors that previously have passed unnoticed.

Until lately France has been an exception amongst the European countries as it didn't limit greatly the number of mandates that can be held concurrently by the parliamentarians. This led into some parliamentarians or senate members to have up to several political mandates at a time. Thus they had influence not only on a legislative level but on local executive organs as well and some of the MEP's held onto their local public offices. From French parliamentarians 82% and from senators 77% had a second elective post which is considerably higher than the European average. Two new acts that further restrict the possibilities to sit in multiple offices were passed in 2014 and should open a great number of offices for first timers¹⁰⁹ One elected parliamentarian is thus greatly influential throughout the country and on multiple levels of administration. In 1997 the Prime Minister M. Lionel Jospin made a general policy where he expressively forbade the minister of justice to interfere in individual cases in cases where this action could mislead the justice¹¹⁰. Having to release a public statement indicates strongly that at least to some extent, influence had been misused.

Though these political scandals seem, to limit themselves to the political life, the protective wall of privacy doesn't stand as absolute as inviolable as before. Mme Le Pen got highly criticised for falsely employing her friend and Francois Fillon was called out for employing family members under suspicious circumstances¹¹¹. In general, friendships and family

¹⁰⁷ Chastand, Faye & Piel 25.02.2017.

¹⁰⁸ HATVP 2018. <http://www.hatvp.fr/la-haute-autorite/#r-2> On its webpage the HATVP pronounces that its objective is to inform about possible conflicts of interest, to monitor assets of public officials (since 2013 disclosure of assets is obligatory) and to advance the transparency of government.

¹⁰⁹ DILA 2017. Numbers from the year 2012 when Loi organique du 14 février 2014 interdisant le cumul de fonctions exécutives locales avec le mandat de député ou de sénateur and loi du 14 février 2014 interdisant le cumul de fonctions exécutives locales avec le mandat de représentant au Parlement européen were yet not applicable. Their real impact can be observed after the national elections of 2017 and European elections of 2019.

¹¹⁰ Jospin 1997.

¹¹¹ Le Monde.fi & AFP 01.02.2017.

belong to the private sphere of person's life, however here these two cases show that the demand for political accountability could force high end politicians to give up some of their privacy.

3.3 Early History of the Printed Media in France

French press originates from the seventeenth century, about two hundred years after the invention and wider utilisation of printing technology. The first publications could be characterised more to be books than newspapers and the latter became mainstream considerably later. The first printed book written in French was called *Le livre des merveilles du monde* and its first edition became reality as early as 1470. Access to ground-breaking new production mechanism and general interest to cultivate oneself increased peoples' desire to learn more about recent events in contemporary world.¹¹²

Gazette has been considered to be the first proper French newspaper and its first copy, though undated and only handling foreign affairs, was released the 30th of May 1631. This weekly paper was received with great enthusiasm and thus began the new era of periodical mass publications. Although quite a few more modest distributions existed well before the *Gazette*, these occasional one page publications were small in number and very irregularly produced. Most of them were merely nothing more than simple leaflets.¹¹³

3.3.1 Conflict between Republicans and Monarchy

At the time, France was still under a strict rule of absolute monarchy. The royalty fought to keep what little was left of its influence in the society. Early press, who's newly found power became more and more apparent, was strictly in service of the king. During the latter quarter of 18th century the turmoil that overtook the whole occidental society's publishing activity began to have its influence in France. Struggle of the states of America to separate themselves from their mother country England played a significant part in forming independent French press. Louis XIII had a favourable attitude towards the movement and didn't oppose to the idea of the free distribution of information that found itself in heart of

¹¹² Livois 1965, 1 & 10.

¹¹³ Livois 1965, 1 & 10.

its values.¹¹⁴ The state of Virginia declared already in 1776 in its paragraph 12 that: “*That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments.*”¹¹⁵

Printed press didn't escape the heavy control of the state and despite the newly acquired freedoms the struggle for complete liberation continued well until the latter half of 1800's. During the historical event known as *Etats Generaux*, the spokesmen of lower social class protested having the least amount of votes when deciding on the affairs of their country even though they were in fact they made the vast majority of the population. They retreated from the negotiations to prepare a new constitution that would strip power from the noble and the priesthood. This gave birth to a pro-revolutionary paper called *le Journal des états généraux* and numerous other press publications with a similar objective. The style of these papers varied from government surveying and factual information delivering *Gazette nationale* into more of a sensational nature such as *Le Pere Duchesne*.¹¹⁶

Negotiations about the contents of a new constitution didn't result into an agreement that day. It did result into drafting of the Declaration of the Rights of Man and of the Citizen that guaranteed for the first time the very basic human rights to every man. Articles were formulated in a greatly general manner leaving specialised civil rights undefined. This could be why the declaration did not mention expressively the freedom of press. On the other hand it did include a general right to freedom from which all the other freedom rights were later derived. It also included a possibility to have derogate from the main rule under certain defined circumstances. Declaration of the Rights of Man of 1789 states: “*...any citizen thus may speak, write, print freely, except to respond to the abuse of this liberty, in the cases determined by the law.*”

Those who still advocated for monarchy saw the fast informative function of daily press and sought to take advance of it. As an attempt to affect people's general mentality, both the king and the queen ordered heavily favourable press publications to be released. The number of monarchic publications multiplied and as a result the juxtaposition of interests between revolutionaries and conservatives surfaced immediately. The creators and distributors of these monarchist journals were usually anonymous and the lifespan of the releases was

¹¹⁴ Livois 1965, 177.

¹¹⁵ NARA 2016. The Virginia Declaration of Rights of 1776 became the basis of Bill of Rights and was adopted by many states with minor modifications.

¹¹⁶ Charon 1991, 31. *Le Journal des états généraux* was first banned from being published, however it continued being published nearly immediately carrying the name *Lettre du comte Mirabeau a ses commettants*.

relatively short.¹¹⁷ The propagandisation of journalistic publications was a logical response to a strong sensationalistic phenomenon.

On 18th of August 1792 the minister Roland de la Platière created an instance called Bureau d'esprit which has been characterised to be a sort of a ministry of information. It established a prior censorship and distributed financial aid to publications carrying a message seen favourable to the reigning government. It also flooded the departmental authorities with exhortations and instructions in order to fortify the interior ministry's authority over the press.¹¹⁸ The lack of legislation (or the presence of a highly fragmented one) didn't thus automatically guarantee the freedom of expression seen that a preventive control was carried out under other pretexts.

The decline of freedom truly begun with legislation that obliged the papers to publish information about the author and the printer. The governing committee also used its' authority to print out texts carrying its' own agenda controlling activity that was supposed to belong to the director of the paper. Just prior to the reign of Napoleon Bonaparte, the committee decided altogether to make a list of allowed publications, thus striking down all the remaining independent press releases. The new emperor didn't hesitate to turn the press into a proper tool of propaganda that he used to repress those who opposed him. There was now one single nation-wide journal and four completely controlled newspapers that were first placed under the guidance of the senatorial commission of freedom of the press, then under a firm censorship practiced by the said commission. Additionally, every regional department needed to have its' own newspaper that would strictly be held under the control of a local prefect. Finally all of the major publications above were nationalised in 18 February 1811.³⁴

The repression continued well after the fall of Napoleon's empire and notably by Napoleon III, who continued to pass increasingly strict legislation against the press. His fall resulted in an unstable era where the number of titles published grew exponentially but at the same time many of the editors and newspapermen were brutally silenced.¹¹⁹

We can find a fairly accurate description of the differences between pre- and post-revolutionary concept of freedom from the famous speech held by Swiss born political activist and writer Benjamin Constant. The author makes a difference between the freedom

¹¹⁷ Charon 1991, 95–96.

¹¹⁸ Charon 1991, 120.

¹¹⁹ Charon 1991, 34 & 36.

of modern state citizens and that of the ancient regime. No one should be subjected to the law, to be detained, killed or mistreated resulting from arbitrary use of power by an individual or a body of individuals. He highlights that an individual should be able to choose his profession, manage his property, move and meet with other individuals as he pleases, practice the spiritual activity of his choice and fill his days with whichever activities he pleases. This should be possible without having to ask for permission or declare his motives. Constant makes a notion that ancient freedoms were notably the rights of a group, a society and not that of an individual.¹²⁰

He proclaims that the private life of a person belongs to himself if he doesn't aspire to have political powers¹²¹. He is considered to be one of the most notable defenders of freedom of the press. After his return to France from exile he started working with *Journal des débats*, becoming well known and respected expert on the field of journalism.¹²² His arguments and thoughts didn't result into changes in the press law immediately but they contributed to the discussion making it more accepting towards freedom rights.

3.3.2 Media and Politics

Revolution of 1789 showed that the line between private and public was unstable and bound to experience unpredictable changes in rapidly mutating society. The revolutionaries made the separation of public political life and domestic private their priority. This escalated to such an extent that disclosure of private interests in public could be seen counterrevolutionary. Private person was expected to fully embrace the spirit of revolution and accomplish an inner spiritual growth that was in harmony with the revolutionary movement. As a consequence, private life was considered less important than politics and the freedom to express one's personality and individuality was in danger to disappear. The most far reaching example of this was the fact that an actual civil uniform was considered to be imposed on people. Even though this project didn't see the daylight, a great plainness or shabbiness was commonly seen as a sign of patriotism.¹²³

¹²⁰ Benjamin Constant 1874, 258–259.

¹²¹ Constant 1827, 44, "La vie privée de tout citoyen qui n'aspire à aucune influence politique, je le répète, est sa propriété."

¹²² Livois 1965, 178.

¹²³ Hunt 1990, 19.

When reading the memoirs of leading politicians of the era in question one can see that they became considerably more impersonal than before. Describing private life of an individual was not in the centre of interest when constructing the new France and personal matters were cast bluntly aside. Even the writings of previously descriptive politicians started to revolve solemnly around public life.¹²⁴ Politician's public self began to separate from the private person as the individual behind the public mask stopped existing. The first one had no other interests than those of running the state, the latter staid out of spotlight with its intimate and domestic interests.

At the same time population centres, clubs and other private sites were hosting the cream of aristocratic and bourgeois circles. Women were not welcome to these nests of conviviality but were nevertheless gathering in similar fashion near sites more suitable for feminine presence such as local churches. Class distinction was still a common practice and these exclusive activities were a tool with which the higher class could separate itself from the general population. They served as a venue to discuss upon public affairs. Developing one's public person didn't leave too much time for societal activities and thus the role of a democratic parliament and professional politicians soared in popularity.¹²⁵ Family life coexisted with public life but there was little interaction between the two. What happened inside domestic walls wasn't meant to be seen by outsiders.¹²⁶

3.4 Law

Similar to Finnish legal system, France recognises several possible sources of law of different hierarchical and technical roles. The positive law in France (for example acts and constitution), international treaties, ordonnances and articles, prime over customary law.¹²⁷ This is due to the idea that modernised continental European legal cultures value written law over customary law. To this day, it is considered the parliament occupies the highest legislative authority. The article 34 of the constitution of 1958 establishes the written acts as the primary source of law. It provides a list of all the matters that need to be regulated on the level of parliamentary text of law. Amongst them can be found constitutional' liberty rights,

¹²⁴ Hunt 1990, 36.

¹²⁵ Perrot 1990, 341 & 355.

¹²⁶ Prost 1991, 51.

¹²⁷ See also: Mattila 2002, 369. French legal order was rather stabilised already in the Middle Ages apart from northern areas where customary law was still the dominating legal system. For example, family law was harmonised in the southern part of France and was based on canon law.

fundamental guarantees granted to citizens for the exercise of their civil and constitutional liberties and the independence of media. Therefore the law maker has an obligation to protect these rights by passing properly formulated legislation and to set up a legislative framework that guarantees the exercise of these rights.

This originates from the Declaration of the Rights of Man and of the Citizen and more exactly its article 6 stating that: *“The law is the expression of the general will. All the citizens have the right of contributing personally or through their representatives to its formation.”* It is a written expression of the principle that a nation should be governed and led by democratically chosen parliament whose primary objective is to pass acts within the frames of authority given to it by the sovereign. According to the monistic school of thought, an act can't be surpassed by any other instrument than another act equal of equal hierarchical position and thus it needs to be studied in detail in order to learn more about the development of legislated freedom rights in France.

Recent development on both national and international level have considerably weakened the law maker's absolute legislative power. The Conseil constitutionnel has actively practiced its role as the guardian of constitutional matters and compatibility of laws. More notably it is the EU and its ever growing number of transnational directly applicable law that challenges the highly protected sovereign status of a national parliament. The EU is becoming a sort of a super-state on top of the existing sovereign countries. Together with ECtHR it possesses the authority to surpass the national legislative authorities.¹²⁸ This has proven to be more problematic in France than in Finland even though both have the constitutional norms designed to deal with possible conflict situations between international and domestic law. According to the article 55 of the French Constitution of 1958 the general rule, under some reserves, is the supremacy of international law and treaties. The promulgation progress varies depending of the genre of treaty in question and constitutionality usually examined before the text can go through this process. Once a treaty has been found constitutional, a normal judge can't pronounce about compatibility issues. The subject will be discussed more closely under the headline reserved for European and International law in chapter 4.

Legal plurality is now seen more as a rule than an exception. The law is not territorially bound as countries no longer exercise legislative monopole on their soil. Moreover, the struggle between national and supranational law is not the only ideological juxtaposition that

¹²⁸ Malarie & Aynès 2014, 201.

shakes the traditional doctrine of law: Positivist law theory competes now with a more idealistic current which prefers to promote the reason and spirit of laws over strict literal interpretation of legal act. As a result the rules that don't result from written law can be found in either higher or lower position in regards to positive law. According to Mauraie and Aynès this is a natural development of law that originates from diversity of social constructions within population of a country. Contemporary qualitative erosion of legal texts and the ever accelerating flood of new legislation should equally be considered when addressing hierarchical value of laws.¹²⁹

Today, the dominating theory is that the judge does in fact practice normative power, which can be derived from the decisions of the highest French courts. In addition to the supreme national courts (Cour de cassation and Conseil d'état), the positive nature of their decisions is also known by the CJEU and the ECtHR. When passing judgments belonging under their jurisdiction, the last two draw arguments to their reasoning from the previous jurisprudence therefore affirming the acceptability of judge-made law. (At least on within the frame of European law and European human rights law). French judges feel opposed to doing this as this as they would contribute to the striping the law maker of its constitutionally guaranteed sovereignty.¹³⁰ According to Mattila, the role of court practice as source is still a highly controversial subject in French legal discussion. He shares the general contemporary opinion accepting CJEU and ECtHR practice is slowly gaining ground.¹³¹

Conseil d'État has affirmed that its decisions should to be respected at least by national local authorities. This can be seen in a case where a decision made by such authority was based on national legislation that wasn't in accordance with an EU directive. The decision was struck down after treatment of the case by the Conseil.¹³² Mauraie and Aynès call attention to the fact that even though the conflict between Constitution and international law continues to be discussed amongst the scholars, the question has become outdated in the environment of rapidly mutating contemporary law. The focus is shifting towards controlling the accuracy

¹²⁹ Mauraie & Aynès 2014, 201–202.

¹³⁰ Mauraie & Aynès 2014, 323.

¹³¹ Mattila 2002, 375. For more detailed discussion: Fartunova 2010, 210–218, who states that some high courts are more progressive than the others. Whereas Conseil Constitutionnel refuses to recognise as source of law or to make a direct reference to international norms, it does quote ECtHR practice especially in the case of freedom rights collisions. On the other hand Cour de Cassation and Conseil d'État seem considerably more willing to make a reference to European law and to grant primacy to these instruments.

¹³² Conseil d'Etat arrêt du 6 février 1998.

of Judge-made law and the maintenance of its high quality by the law maker and national or international judge.¹³³

Specialised legal encyclopaedias are highly popular and widely used by French lawyers to keep track of developing terminology. The collections offer exact definitions of the terminology on each field of law and organised alphabetically, thus having a high usability. They provide an excellent source of knowledge especially to foreign lawyers trying to understand the specialities of the French law.¹³⁴

3.4.1 Press Freedom Act of 29 July 1881

Further referred as the act of 1881 (Loi du 29 juillet 1881 sur la liberté de la press) marked a turning point in the history of freedom of the press and the freedom of expression as it introduced for the first time a detailed and precise codification of rights formerly regarded as abstract principles. Founding of this act was not an exact result of a deliberate effort to create an independent press but more like a natural consequence of struggle between the politicians and the press. Republicans acknowledged that the inability of conservatives to use press to push their ideologies didn't threaten their already well established authority. Republicans had already experience in working through the press and knew the limits of its power and how to control it. It's better to see that the liberation would happen within a controllable foreseeable frame than try to suppress the inevitable.¹³⁵

A throughout revision was needed since the constitution of the year 1875 didn't contain a single provision concerning freedom rights. It still embraced the ideas of the declaration of 1789 from which these rights were derived. For the sake of clarity and effectivity, a new act was considered indispensable as the field of these freedom rights was becoming increasingly difficult to navigate. This was due to multiple adjustments implemented to the system of freedom rights that caused a massive fragmentation of the existing legislation. According to the Ministry of Justice regnant, M. Le Garde des Sceaux, an act after another was passed without ever considering how they would work together in practice. A revision was conducted and its objective was to set up a unified set of rules that would clear up the normative chaos. The change was much needed as some of the acts were in an outright

¹³³ Malaurie & Aynès 2014, 348.

¹³⁴ Mattila 2002, 375-376.

¹³⁵ Bellanger 1972, 241–242.

collision with each other. The repressive policy had to give room for a new more contemporary act guaranteeing the French press the greatest liberty it had never possessed or would ever possess later on.¹³⁶

3.4.2 Act that Was ahead of its Time

The act had two principal functions of which the first was to gather all the general legislation that handled different means of publishing under the same act, so that there would be only one set of universal rules for everyone. The scope of application included all written media regardless of frequency of publication and all the liability rules that applied to all publications equally. The second objective was to grant the press its long sought after freedom by greatly abolishing suppressive measures practiced by the administrative police, such as pre-emptive measures and minimalising administrative procedures required to practice publishing activity. Moreover, the judicial responsibilities changed dramatically as all incrimination on the basis of an opinion was lifted, criminal responsibilities were determined more precisely and procedural rules in case of criminal process, were established.¹³⁷

After the entry in force, it became a subject of a heated conversation whether specialised press crimes should be included into Criminal act or if the general liability norms would suffice. Sitting commission underlined that modern press didn't exist at the moment of introduction of Criminal act and that the law maker hadn't taken any steps to further legislate or punish the criminal acts committed using the press. It was also argued that not all the criminal activities were distinctly inscribed in the existing criminal framework. In the end the law project was dismissed and common definitions, incriminations and sanctions would stay relevant. Not a single specified act found its way to Criminal Code.¹³⁸

As peoples' interest towards governmental matters grew steadily the main objective of this act was to abolish most of the restrictions that had limited journalists' freedom of expression. Incrimination of contempt of the state, the senate or the parliament was abandoned altogether. It was considered that the right to criticise and to discuss openly about subjects

¹³⁶ M. Le Garde des Sceaux in her commentary of 9th of November, concerning the law and its influence, directed to the highest ranking prosecutors that work as the head of prosecution in tribunals.

¹³⁷ Bellanger 1972, 8–9, 11.

¹³⁸ Bellanger 1972, 15–16.

revolving around the government was worth protecting. The element of unpredictability following such freedom did make some parliamentarians hesitant. However this could not act as an excuse to hinder public treatment of decisions or to stop the press from intervening during a governmental crisis.¹³⁹

3.4.3 Misuse of Freedom Leads into Stricter Regulation

The beginning of the 1880's was marked by releases that were considered to stumble between what was acceptable and what was not. This act didn't protect private family life, government or even the constitution from critique as even harshly formulated opinions no longer constituted a punishable defamatory act. Even slander and defamation enjoyed almost complete impunity and it was difficult to make the authors to respect the right to rectification or the right of reply. The press was truly free and soon it adopted a more violent and controversial style of writing. This resulted into general detrition of quality within the whole journalistic activity.¹⁴⁰ This change in content didn't pass unnoticed by the professionals of literature, who pointed out that the focus of the press had shifted from educating people into offering an amusement with the objective of serving ill-founded interests to the public. New sub-bar press was taking over the markets from their traditional and more civilized counterparts.¹⁴¹

This resulted into a situation where the politicians were extremely vulnerable to attacks launched by press. The act of 1881 gave near to no legal grounds to hold the journalist responsible for their writings and these kind of court cases were very rare. One remarkable historical occurring exists where a journalist was elected to be a parliamentarian only two months after been found guilty of defamation of the sitting president Casimir-Perier. The sentence was a year of imprisonment that didn't hinder his political career.¹⁴² Disappointed on the way how the case turned out, the latter decided to stand down from office. In his speech of resignation the president declared that he, along everyone else using notable political power in the country, had been hunted by inappropriate accusations by the press in the name of freedom of expression¹⁴³.

¹³⁹ Bellanger 1972, 15.

¹⁴⁰ Bellanger 1973, 243.

¹⁴¹ Anatole Leroy-Beaulieu, *La Revue Bleue* du 8 décembre 1897.

¹⁴² Bellanger 1972, 248.

¹⁴³ *Journal officiel* du 17 Janvier 1895, 15.

When handling subjects of political nature the problem of determining if a tone was acceptable or too aggressive was apparent. The problem of the act was that it left a judge significant room for appreciation when handling a case dealing with the press. In other words: The legal praxis became decisive and more important than literal interpretation of the act.¹⁴⁴ This caused the legislation to be overshadowed by the power of a judge which didn't necessarily correspond to the traditional positivistic view of the law.

It is highly possible that the lack of exact article on public persons' privacy protection, or restriction of the extent of this privacy, is due to these legislative decisions made during the formulation of first freedom rights. The absence of exact rules on this area was compensated by a strong judge and later by using a jury. As the problems became increasingly difficult to solve, the more difficult it became to maintain legal stability. This era highlighting the importance of case-by-case appreciation was cut short as the adoption of the Press liberty Act of 1881 was soon followed by a flood of law projects with the objective of moving certain affaires to be handled by la cour d'assises instead of le tribunal correctionnel¹⁴⁵. This way the power was solemnly in the hands of a professional judge instead of a jury composed of laymen.¹⁴⁶ This allowed a stricter control over criminal accountability of the press and eliminate a possible favouring that it received from the laymen.

3.4.4 Discrimination of Public and Private Person

The articles concerning defamation have been added to the act's third subsection which recognises multiple types of defamation the sanctions of which vary accordingly. First it establishes clear difference between defamation committed in private or in public, where the latter is committed via an instrument of mass media and is thus more relevant to this study. The crime can be committed against a private person, a group of people, a public person or a public national organisation.

Definition of a public person has been written into the act of 1881, and to be more exact, into its article 31 which has a list of recognised public functionaries. The list names ministers, senators, parliamentarians, public officials, agents of a public authority, a citizen

¹⁴⁴ Prévost-Paradol 1868, 216.

¹⁴⁵ Bellanger 1972, 23–24.

¹⁴⁶ Ministère de la Justice 2015. At the time the composition of courtrooms was determined in the law la code d'instruction criminelle de 1808 which created the jury institution that functioned as a part of la cour d'assises. On the contrary, le tribunal correctionnel only sat with professional judges.

who has a standing or temporary mandate to produce public services and even a witness when this giving his testimony before the court. In fact, every individual or group of individuals that have been charged with public functions could fit this definition. The intention of the law maker was to give the courts a possibility to determine more closely who belong to this list of the people chosen to be protected by the article. Applicability of the first paragraph of article 31 is thus appreciated case by case which has led to an abundant case law. The general doctrine seems to implicate that a claim is most likely set up for failure in cases where a subject fact has any connection to the private sphere of the person. The notoriety of the person doesn't affect the reach of this protected sphere.¹⁴⁷

The fine for non-public defamation is declared in the French criminal act (Code Penale). According to its article R621-1, non-public defamation targeting a private person is punishable either by a 1st class fine of 38 € or, in a case where aggravated circumstances¹⁴⁸ are present, by a 5th class fine of 1.500 €. Whereas the incrimination of these acts can be found in the articles R621-1, R625-7 and 29 of the act of 1881, the sums of these amends are established in the article R313-13 of the Criminal act. The accurate appreciation of consequences requires thus navigation between two highly technical acts.

However the incriminating articles of a public defamation aiming to hurt a private or public person or a public organ are not written into Criminal act but into the Press liberty act instead. According to the article 23, a public offense can occur in a form of speech or writing (such as writing, image or drawing) including newspaper publications. An infringement can lead to a fine of 12.000 € set by the article 32 it targets a private person. According to the article 31, the same fine can be imposed for committing defamation against the private life of a public person. If aggravating factors are present the fine in both cases can reach a sum of 45.000 €. Worth noticing is that imprisonment can only be sentenced for the aggravated act¹⁴⁹. Articles 31 and 32 are applicable only when the defamatory acts targeting the memory of the dead with intention to be prejudicial to the honour or reputation of the person or their heirs, spouse or legatees.

¹⁴⁷ Lepage Agathe 2002, 64–65 and 71.

¹⁴⁸ Non-public provocation to acts of discrimination, hatred or violence against an individual or group of people because of their origins or because they belong, in reality or supposedly, to an ethnic group, nationality, a presumed race or a specific religion.

¹⁴⁹ Code Penal, article 32 : Version en vigueur du 1 mars 1994 au 16 juin 2000.

3.5 First and Second World War and Censorship

Despite the fact that the censorship was aimed to only eliminate publications that were susceptible to hurt the sovereign state, it deeply hindered the growth of published media across the field. Keeping the national moral high was judged to be more beneficial than freedom of expression and the men of power were suspicious of foreign influences establishing ground in their country. In the following paragraphs I will show how throughout its history France has not shied away from using preventive control over press. This has inevitably had an effect on the modern attitude of journalists concerning the limitations set on publications. Many of the provisions that limit the liberty of the press date to this period and quite a few have been struck down by ECtHR.

Most constitutions include articles that in a way or another limit some of the liberty rights for that the state could function properly during warfare. It is clear that resources are directed towards military functions which, temporarily, take priority over many civil and freedom rights functions. At this time, in the point of view of a government, the press becomes both a tool and a possible threat as it can be used to manipulate the public opinion and to leak military secrets. The latter initiated a wave of reforms to prevent information leakage via press from happening. Most of it handled military affairs and were aimed to protect the troops but some were sought to protect those in power and force the press under strict state control.

First, the unwanted publications were pre-emptively censored by giving the military authority to prohibit a publication that might be such as to provoke or maintain disorder¹⁵⁰. Secondly, the censorship was extended by prohibiting all publications handling army or military operation in a way that was susceptible to offer beneficial information to the enemy or negatively affect the mentality of troops or citizens. Interior minister could prohibit any kind of publication of a foreign origin, including releases that were written in a foreign language that were printed either or in or outside of France.¹⁵¹ Right after the war, control reached even further to subjects such as contraception and abortion¹⁵². It was even forbidden to publish information about an ongoing civil case¹⁵³ which greatly restricted publics' access

¹⁵⁰ Loi du 9 août 1849, chapitre III article 9 paragraphe 4 and loi du 8 avril 1878 that concerned the state of siege.

¹⁵¹ La loi du 4 août 1914.

¹⁵² La loi du 31 juillet 1920, attempt on its own was punishable.

¹⁵³ La loi du 2 juillet 1931. The law was in force until it was abolished in 2004 because the ECtHR didn't consider it to be compatible with the 10th article of the convention. Arrêt de la Cour

to information. If the parties of a case that fell under the scope of application of the latter act, were to be public persons, this act could be used to avoid unwanted attention.

This development continued even after the First World War and the liberty of the press withered as legislation became more and more restrictive. Although the initial interest was to protect the troops and military interests, by its own actions the French press played a role in giving a reason to strip its liberties even further. War caused severe economic problems and divided the society leading equally to weakening of profitability in press markets. The press was incapable to offer any meaningful actual content outside of politics. Both extreme right and left released propagandist leaflets and launched personal attacks against anyone trying to hinder or influence their agenda. The press profited from the fact that public officials were left extremely vulnerable to attacks.¹⁵⁴

The bills trying to modify the act of 1881 were either passed in silence by specialised parliamentary committees or vigorously fought in parliamentary sittings by the press. The press sought to block every modification that could potentially weaken its rights to publish. The impact of this dead-end can be illustrated by the fact that it took a major national crisis to pass an act that banned incitement to terrorism (such as murder or pillage). This was caused by an article that explicitly and using insensitive wording encouraged the readers to try to commit a murder of a parliamentarian. The content was deemed grossly outside of good taste and contributed to the hardening attitudes towards the press.¹⁵⁵

A few decades between wars changed the relations of the government and the press where the first now became the main source of information for the publications. The newspapers were expected to distribute information provided by the ministers in exchange of secret subventions distributed to them. The literature states that some of the journalists and head of newspapers could be bought and for the others the only mean to survive competition was to accept these subventions.¹⁵⁶ All these shifts in power lead into slippery slope that finally places publishers under the dominance of the government.

européenne des Droits de l'Homme, affaire Du Roy et Malaurie c. France, n° 34000/96, du 3 octobre 2000.

¹⁵⁴ Bellanger 1972, 482–484.

¹⁵⁵ Bellanger 1972, 490–491. The law in question is la loi du 10 janvier 1936 and the article in question appeared in l'Action Française 22 septembre 1935.

¹⁵⁶ Bellanger 1972, 487–489.

3.6 Time after Wars

France needed to rebuild itself after the devastating Second World War and guarding the public moral was essential for the success. Unifying a country that was forcefully divided by foreign powers and that was financially weakened was not seen prone to negative and harmful influences. As mentioned before, the authorities used a preventive control to eliminate disadvantageous publications, however, some small progress was made during the 3rd republic. Control over publications was still exercised regularly but was now subjected to the principle of proportionality. Violating or surpassing the scope of authority was now highly monitored by Conseil d'État, the competent administrative body guarding private citizens against excessive usage of administrative power¹⁵⁷. Right to deny the free newspaper circulation was only meant to be enforced where there existed a direct threat to public order. Measures had to be strictly proportional to the threat at hand and the restrictions were given a character of exceptionality.

When the printed press saw its market dominance crumble, its modern competitors, such as cinema and radio, were soaring in popularity and overall consumption of media peaked. Press lost its dominant status as the biggest provider of information but profited from the development of the printing technology that followed. Journalism as a professional activity was getting the recognition it deserved as international organisations such as International Federation of Journalists and projects against false information were established. The representatives of French press participated actively in these international efforts.¹⁵⁸ This began a new era of evolution within the industry.

Press itself did go through a massive transformation as the published content evolved and the consumers developed as readers. This harnessed the press could be more diversely to serve varying societal interests and where the readers expected to expect to be educated about economy and other contemporary domains of life. Focus of the treated subjects shifted between the wars as the strictly political subjects didn't suffice to keep consumers faithful to a publication. On the other words; the journals needed to diversify their offering as lifestyle, mentality and social habits of the biggest consumer groups changed. Function of the press was no longer concentrated on political debates and informing the voters about the available candidates.¹⁵⁹

¹⁵⁷ In 1953, Décret n°53-934 du 30 septembre 1953 portant réforme du contentieux administratif transferred this competence to the newly found administrative courts.

¹⁵⁸ Bellanger 1972, 55 & 57.

¹⁵⁹ Bellanger 1972, 136–144.

At the very same time the French press reached the highest circulation numbers of its history across all the types of journalistic publications. This was mostly achieved by developing printing technology and ways to diffuse information. New machinery and modernisation of process were vital in order to reach higher numbers of printed editions. The lack of vigilance when upgrading the printing facilities with new innovations hindered the growth in comparison with the true potential. On the other hand the new rotary printing press machine revolutionised the markets making it increasingly challenging for smaller publications to survive. Lastly one must mention the drastically extended area of distribution by the means of railroad system and road traffic.¹⁶⁰ This laid the grounds for the birth of mass distributed press that could reach all the regions of the country. To survive the market pressure they also had to develop a style that had the potential to appeal a wider audience.

3.7 Civil act

As stated before, the term *la vie privée* was written onto French civil act (Code civil) in 1970 and it was the first time that this right was recognised by the means of written law to stand out amongst the other liberty rights. Civil act is the backbone of the French civil law, setting the general rules to which other civil law legislation has to conform. It would be erroneous to state that the right to private life didn't exist before. It was composed of various forms of property and profession rights including the same elements that would later create a base for more advanced forms of protection. Therefore an individual could be protected against unlawful limitations to privacy, even though the act lacked the specialised terminology and categories it has today.¹⁶¹

In France, the basis for notions of human dignity and liberty is built upon strict respect for individual privacy.¹⁶² The need for protection couldn't be ignored and courts found two alternative ways to establish what the Code civil failed to recognise. First, right to private life was derived from the Constitution of 1958 and more specifically from its article 66. It stands that: "*No one can be arbitrarily detained; and that the judiciary branch, guarantor of individual freedom, ensures respect for this principle under the conditions stated in the*

¹⁶⁰ Bellanger 1972, 139–140.

¹⁶¹ Picard 1999, 50.

¹⁶² Eko 2013, 123–124.

Law”¹⁶³. In addition to the classic liberty right (not to be detained), the court practice has shown that it englobes as well the right to marry and right to respect of private life¹⁶⁴.

Second source for protection was found in the Declaration of the Rights of Man and of the Citizen of 1789 and its second article which proclaims: “*The aim of every political association is the preservation of the natural and imprescriptible rights of Man. These rights are Liberty, Property, Safety and Resistance to Oppression.*” Support for this can be found from decision of 1999 made by the Conseil Constitutionnel concerning the creation of universal health coverage.¹⁶⁵ However, said declarations dates back to a state and a time that’s very different from the actual contemporary society. Acts mutate alongside the development of legislative technique and even the constitutional rights law can’t escape this reality. A modern act with exact paragraph of the protection of the private life became was needed.

As states the article 9 Code Civil in its applicable form:

« **Article 9**, Modifié par Loi n°94-653 du 29 juillet 1994 - art. 1 JORF 30 juillet 1994

Chacun a droit au respect de sa vie privée.

Les juges peuvent, sans préjudice de la réparation du dommage subi, prescrire toutes mesures, telles que séquestre, saisie et autres, propres à empêcher ou faire cesser une atteinte à l'intimité de la vie privée : ces mesures peuvent, s'il y a urgence, être ordonnées en référé. »

The French civil act now has a specific article passed in 1970¹⁶⁶ in its first book under the headline “Des droits civils” stating in its first paragraph that: “*Everyone has the right to respect for his private life.*” This general declaration does little to determine the exact coverage of the term la vie privée. It must be sought from the comprehensive law practice to bring more clarity to the scope of application. As mentioned, the right to privacy was not recognised as a civil right before it was expressively pronounced to be one by the Conseil Constitutionnel. Its value was secondary in comparison to all the other individual rights despite the fact that they were all written under the same title. It was the judgment declared

¹⁶³ Constitution du 4 octobre 1958 still applicable and holds the original wording in its article 66.

¹⁶⁴ Burgogue-Larsen 2005, 17.

¹⁶⁵ Conseil Constitutionnel, Décision n° 99-416 DC du 23 juillet 1999, part 45.

¹⁶⁶ Loi n°70-643 du 17 juillet 1970 - art. 22 JORF 19 juillet 1970.

about video-surveillance¹⁶⁷ by the Conseil that first got the right recognised as a proper civil and constitutional right.

3.8 Case Diana

One unfortunate historical event in particular has been quoted to have greatly affected the French tabloid press and paparazzi industry. The death of Diana, the Princess of Wales, in the fall of 1997 caused an uproar as it was suspected that the actions of paparazzi contributed to the fatal car crash. Diana and her then partner Dodi were relentlessly hunted by paparazzi throughout their holidays and unedited pictures of the couple was released in the printed press. Pictures of the two kissing and graphic shots from the scene of the car crash were sold for high sums and photographers used every means possible to capture a good shot.

After news of Princesses came out, the value of these shots plummeted. Publishing these pictures would be against good judgment. In fear of persecution all the major publication houses refused to buy the shots and paparazzi-style journalism became far less profitable. The risks characteristic to the profession were seen too great in relation with the monetary compensation available. Practices within the industry experienced a major change which still has an effect on French press.¹⁶⁸ However, this didn't result into new legislation and the shift in attitudes can't thus be seen from the legislation or court practice.

Despite having strongly functioning the legislative frame to protect the private lives of publicly known persons France tabloid press continues to thrive. It seems to be careful when choosing the person for a highly detailed and potentially intrusive article. Foreign royal family members and celebrities of various disciplines are portrayed without any greater hesitation. It seems that the smaller risk of a foreign person to pursuit a defamation case in court drives the press pick them as the target of aggressive headlines. Publications concerning domestic politicians are frequent nothing out of the ordinary but the publicised information knows different boundaries than in the case of entertainment celebrities. Even though the press article might reveal significant details about the person's intimate life, the focus of the publication is actually a stately matter such as corruption.¹⁶⁹

¹⁶⁷ Conseil Constitutionnel, Décision n° 94-352 DC du 18 janvier 1995.

¹⁶⁸ Guerrin 1998, in Paris Match.

¹⁶⁹ Guerrin 1998 & Trouille 2000, 201.

4. NATIONAL CONSTITUTIONS IN FACE OF EUROPEAN LAW AND EUROPEAN HUMAN RIGHTS LAW

European law and European human rights law have had a definitive impact on both member states especially on the field of constitutional law. Supranational law forces states to address existing human rights issues with greater attention than before. Finland and France have either had to change their legislation in cases where: the compatibility of a national act was questioned before ECtHR, or because established interpretation of formally compatible norm was not interpreted in a human rights compatible fashion. Since member states are subjected to the EU's legislative power and therefore have to respect the principle of subsidiarity they are expected to ensure that their national legislation is in accordance with the European primary and secondary norms. On the other hand both recognise the responsibility of respecting international treaties which hold a superior hierarchical position over constitution.

The Lisbon treaty strengthened the role of human rights in the heart of EU's activities notably because it made possible for the EU to become a contracting party to the European convention on human rights. Every member of the EU has ratified the human rights convention even prior to Lisbon meaning that they were already bound to respect the treaty. The admission does implicate, however, that the protected rights belong to the very core values of the European community. At the very same time, the Charter of fundamental rights¹⁷⁰ of the European Union became legally binding towards all the member states. It states in the preamble that: *“Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law.”*

Even though these two fields of law occupy their respective field of application they recognise similar issues when it comes to the principles of sovereignty and democracy. Some legal systems are more receiving of supranational law resulting from their constitutional cultures. Those which have a strong tradition of constitutional law could be more hesitant to renounce the supremacy of constitutional texts. Freedom rights have solid grounds on both

¹⁷⁰ Charter of Fundamental Rights of the European Union (2012/C 326/02) replaced the prior charter (2000/C 364/01). Even though its article 51 addresses national institution's responsibility towards realising the EU law as member states are implementing EU laws, it does send a clear message on EU's position towards respecting the rights of an individual.

countries' constitutions which makes them culturally nuanced. Change coming from outside of the culture is not always seen favourably. Pressure to conform to these changes grows as the human rights law becomes more and more pertinent on both European and international law.

Both are highly problematic when it comes to democracy. The way that referendum is used in each state can give indices on the general opinion on authority of supranational law over constitution. In Finland supranational laws are usually implemented without consulting the citizens. Referendum is always optional and doesn't oblige law maker to conform to the results. This applies equally to international and European law. In France a treaty that might have profound effects on the functions of national institutions have to be subjected to a binding referendum. Treaties concerning adhesion to the EU may be subjected to a referendum of a binding character by the president of the republic.¹⁷¹

4.1 European Convention on Human Rights Sets the Minimum Level of Protection

Each member state of the Council of Europe has ratified the first part of the Convention of the Protection of Human Rights and Fundamental Freedoms, some of them with reserves. On the contrary, the states have shown a lot less interest in ratifying any of the additional optional protocols of the convention. Therefore, the first part is thought to define a minimum level of protection that is expected from all the member states.¹⁷² Neither Finland nor France made reservations concerning the relevant articles 8 (Right to respect for private and family life) or 10 (freedom of expression)¹⁷³.

Article 8 includes the right to respect for private and family life. The fact that the right to privacy has been granted its own title and independent standing in the convention shows how progressive the convention was at the moment of creation¹⁷⁴. Its first part states that: *“Everyone has the right to respect for his private and family life, his home and his*

¹⁷¹ Finnish constitution chapter 4 article 53. In France, articles 11 and 88-5 of the constitution of 1958.

¹⁷² Pellonpää 2005, 313.

¹⁷³ Council of Europe, status as of 24/02/2018: All the reservations and declarations made by the member states. https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=Rc2eCfef

¹⁷⁴ As mentioned before, the equivalent article found its way into French Code Civil in 1970 and into the Finnish constitution in 2000.

correspondence.” The reasoning in the cases handled by ECtHR indicate that an exhaustive list of all possible definitions for the term private life can’t be established. At least person’s physical and psychological integrity, including the development of the personality in his relations with other human beings, should be respected¹⁷⁵.

Directly linked to this, the court has stated that professional or business activities are not generally excluded and underlines equally that the protection is not strictly restricted only to the most inner circle of private life (where he may live freely as he wishes without outside interference)¹⁷⁶. More importantly, the aspects concerning person’s identity including name and photo, should be respected. Person has a right to his image meaning that he can expect everything falling within the scope of private life not to be published without an expressed consent.¹⁷⁷

Now a judge has to choose if he will favour to protect the privacy spelled out in article 8 over freedom of expression in article 10. The first paragraph of article 10 states that: *“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”* Problem exists thus on both national and supranational law.

The court’s case law is extensive and numerous providing comprehensive guidelines for national judges to follow. The priority is to protect the individual against extensive state surveillance over their private life or defamatory acts committed by other private persons. The fact that someone uses political or administrative power doesn’t strip him of his right to have an intimate private sphere where cameras and journalists don’t have an access to. This is where things get a bit more complicated: The guidelines to make a convention respecting decision exists but Finland and France¹⁷⁸ seem to have different approach to constitutional compatibility issues.

¹⁷⁵ Pfeifer v. Austria 2007, part.35.

¹⁷⁶ Niemietz v. Germany 1992, part. 29.

¹⁷⁷ Axel Springer AG v. Germany 2012, part 83.

¹⁷⁸ For further discussion Koivu 2015, 114-115. Two studies have been conducted on whether the national courts actively practice the methods of interpretation set by the ECtHR. The first, conducted by Céline Lageot in 2014, showed that if they did, they didn’t refer to the ECtHR case law explicitly. The second, by Jean-Pierre Margénaud in 1998, implicated however that sometimes the national judges had outstanding knowledge of the application of the treaty.

4.2 Approach to Compatibility Issues

ECtHR has established an extensive case law that underlines the importance of transparency and appropriate balance between freedom of expression and protection of private life. So why do both Finland and France have to answer before the court in a regular basis concerning notably the conflict between articles 8 and 10?

4.2.1 Finland

Finland became a member country of the EU in 1995 which coincided conveniently with the new constitutional project. This gave the law maker an opportunity to clarify the appropriate order of importance between the constitution and a norm of international law. The preparatory work confirms that judges are expected to follow the instructions already on place during the previous constitution.¹⁷⁹ This quite recent reform makes Finnish constitution modernised and perhaps more flexible than many older constitutional laws as it came to power when ECtHR already had a strong foundation in its case law¹⁸⁰.

According to article 94 of the Finnish constitution, an international treaty is adopted or renounced by the parliament with either simple majority or the majority of two thirds. In the last paragraph of this article the constitution maker declares that: “*International obligation shall not endanger the democratic foundations of the Constitution*”¹⁸¹. As Finland uses a half monistic half dualistic system when bringing to force international treaties, the said treaties need to be implemented into national law before becoming applicable. Usually the provisions found in the treaty are transferred into national system in their original wording. ECHR has been brought into force with an act similar to other national acts which means it doesn't, at least in a formal sense, enjoy a higher position in comparison with the domestic law.¹⁸²

¹⁷⁹ HE 1/1998. It is worth noting that the constitutional law project changed tremendously Finnish constitutional legislation. Finland changed from a country with a system of three applying constitutional laws into a mono-constitutional country.

¹⁸⁰ For further discussion: Koivu 2015, 116–117. French constitution has gone through several minor reforms as well, the effectiveness of whom are still under debate or too recent to show a major change in domestic court practice.

¹⁸¹ Unofficial translation (updated version of the year 2012) by Finnish Ministry of Justice used as the basis of translation of this article.

¹⁸² Koivu 2015, 126–127.

Koivu found, however, that Finland's adherence to EU has increased the national courts' receptiveness of European human rights convention as a binding source of law. National courts have been shown to make references to ECtHR practice more frequently than before. The shift happened notably after Finland became a member state of the EU, which resulted into notable changes in the national legislation as well as an increase in general receptiveness to supranational sources of law. She equally mentions the important role of the constitutional reform to the process. National human rights provisions were harmonised with those of the treaty including the used language, which made the transition to European human rights law smoother.¹⁸³

This can be realised by following the principle of *lex posteriori* or alternatively the principle of *lex specialis*. Also whenever possible, judges are expected to interpret the national law in a way which will not engage country's international responsibility. From all the possible justifiable interpretative options a judge has to choose the one which contributes the best to upholding human rights.¹⁸⁴ A judge doesn't possess the authority to declare a text of national law incompatible with an international treaty. However, when the realisation of human rights norms are compromised by a national act, even a constitutional one, he will proceed to interpret said national act in a way that it conforms with international human rights law. If there exists a non-ambiguous contradiction between the two, a judge should apply the provision of international law favourable to the realisation of human rights. Civil procedure act states that the judge is only bound by law. Thus he doesn't have to wait for national legislative act to be changed or higher court practice to be readjusted in order to make a decision that respects human rights.

4.2.2 France

French constitution acknowledges the principle of primacy of international law over national legislation in the paragraph 14 of the preface to its constitution of the year 1946 stating that: "*La République française, fidèle à ses traditions, se conforme aux règles du droit public international.*" However, two requirements need to be met so that a treaty enters in force: Firstly the treaty has to be ratified respecting the chapter 6 of national constitution as well as paragraph 15 concerning principle of reciprocity to the preamble to the constitution of 1946.

¹⁸³ Koivu 2015, 355 & 358.

¹⁸⁴ PeVL 2/1990 vp, 2–3.

Next I will discuss the subject from the basis of two constitutional law articles written by two specialists Alain Pellet and Michel Troper.

The Effectiveness of this declarative phrase of paragraph 15 has been limited by the articles under the chapter 6 of the constitution of 1958. Contemporary ambiguity between the national and International norms results from the complexity of the procedures that are used to enter in force the international treaties.¹⁸⁵ Indeed, unconstitutionality might be the key factor why certain human rights norms haven't been applied the way HUDOC has presumed in the case of conflict of human rights. This applies at least in cases where the constitution secures the realisation of other right with the expense of another.

In France, the examination of Constitutionality should happen before the treaty is ratified. The traditional way is to use the procedure set by article 54 of the Constitution:

“Si le Conseil constitutionnel, saisi par le Président de la République, par le Premier ministre, par le président de l'une ou l'autre assemblée ou par soixante députés ou soixante sénateurs, a déclaré qu'un engagement international comporte une clause contraire à la Constitution, l'autorisation de ratifier ou d'approuver l'engagement international en cause ne peut intervenir qu'après la révision de la Constitution.”

As written in the article 55 of the Constitution, once the compatibility of a treaty has been confirmed by the Consel Constitutionnel, its text gets ratified and published. Once these steps have been completed the treaty should be given a superiority over national acts: *“Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l'autre partie.”* The provisions found in the treaty are not made into national acts meaning that it is directly applicable but not implemented with national legislation. This makes France a monistic legal system.

As already mentioned in the chapter 3.1, article 6 of the Declaration of Human rights states that *“La Loi est l'expression de la volonté générale.”* According to Michel Troper, the hierarchy of norms in French legal system bases itself on the theory that an act is valid and applicable when it has been found in procedure that respects the Constitution. This gives it the democratic justification of the will of the people, or more precisely the vote of their

¹⁸⁵ Pellet 2008. For further reading: La Constitution en 20 questions : question n° 11 Cinquantième anniversaire de la Constitution (2008).

(constitutionally elected) representatives. Therefore, a sovereign use of power is that of parliamentary legislative power. Applicability of supranational norms can therefore be justified with two optional theories. Firstly, in the case of EU law, the national Constitution authorises European law maker to pass legislation as the latter actually represents together the people of the Union. Secondly, in the end one might just admit that the general will of the people is decisive only when creating a constitution (and not a standard act). This would mean that a standard parliamentary law is not a work of a sovereign. As Troper says, this can be seen as an act that deprives the law maker its traditionally acknowledged democratic authorities.

According to Troper, the principle of *lex posteriori* has to be abandoned as it creates a paradox of legal hierarchy. Both Finland and France bring international treaties into force with an act which, according to the classic theory of the hierarchy of the norms, puts it under the constitution and under those acts that have been brought to force prior to the treaty. The national acts adopted later could derogate from the treaties as the latter only had a value of a standard act. This isn't the actual legal reality at least when talking about EU-derived law and European human rights law that actually place themselves between the constitution and a standard act. At least in classic French law this poses an immediate problem as the parliamentary acts, according to the classic theory, have an equal value to one another. Additionally, the derived law (as well as legal praxis) has been created with the mandate of the treaty and placed hierarchically under the treaty. In reality, they are expected to enjoy a privileged position vis-à-vis the national law.

An ordinary judge is obliged to grant supremacy to treaties and derived law over the national law. On the other hand they don't have the same obligation when there exists a collision of constitutional norm and a standard act. It follows that at least theoretically, the treaty and its derived law are better protected than the constitution itself. In France, only the Conseil d'état can decide that a constitutional norm has primacy over a treaty. The other courts can't make this kind of decision on their own without existing higher court practice. This results into a situation where the constitution authorises the creation of another norm of higher hierarchal position, which can be again surpassed by a lower ranking norm by a mandate given by a national court.

Traditionally it is presumed that, as the expression of will of the sovereign, the constitution remains at the very peak of norm hierarchy. The distinctive difference between the constitution and international treaty is that the latter can be thought to be a manifestation of certain core values instead of a true expression of the will of sovereign. These kind of

principles and values should only be compared and appreciated with the values of equal level and importance. Those are, for example, the principles of fundamental human rights. On the other words: sovereign isn't represented by the law maker. The true sovereign is the constitutional law maker who simply lends the law maker necessary authority to protect and guarantee the fundamental rights with a standard act. The constitution is thus free to organise the legal hierarchy quite freely without having to set absolute non-deviatable rules of this superiority.¹⁸⁶

Koivu, however, suggests that the reason why France (along other monistic states such as England and Sweden) is transitioning into applying ECtHR practice is that the treaty provisions aren't implemented into national law. Making the provisions a part of national law doesn't necessarily resolve the problematic that the French constitutional law tradition might have with supranational court practice but it might increase the willingness of the national judges to follow the said guidelines.¹⁸⁷

Finally, there is the principle of reciprocity, found in the paragraph 15 of the preamble to Constitution of the year 1946 which states that “*15. Sous réserve de réciprocité, la France consent aux limitations de souveraineté nécessaires à l'organisation et à la défense de la paix.*” In other words: In case other contracting party neglects to comply with the agreement, France is exempted from continuing respecting the staid treaty. However, this doesn't apply to the ECHR because of the objective character of human rights that exist for the protection of an individual that are “*...being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves.*”¹⁸⁸ A contracting party is bound to respect European human rights obligations despite possible omissions by other parties.¹⁸⁹

¹⁸⁶ Troper 2001. However, Troper also reminds that the theory of norm hierarchy shouldn't be regarded as something that sets in stone as a principle which give no room for derivation. It is a way to organise normative system in order to observe it as a logical entity. She equally notes that there is no principle of law that restricts the functions of positive law as there is not a principle that is obliged to conform to the rules of traditional legal logic. Therefore even logic defying hierarchical exceptions and changes doesn't constitute an invincible juridical problem. The key word is democracy and the sovereignty of a nation and the incontestable right of its people to decide for themselves. The constitution should remain as the supreme sovereign expression of the will of the people who originally gave the mandate to create this superior norm. As this is the fundamental idea behind democracy, losing it could result into denying the citizens of their right to determinate the basic values of their society.

¹⁸⁷ Koivu 2015, 358-359.

¹⁸⁸ Loizidou v. Turkey 1995.

¹⁸⁹ See also: Koivu 2015, 113.

5. CONCLUSIONS

Next I will present some notions that became apparent during and after the closer analyse of research material. In order to present the facts in pedagogically coherent way, I saw it necessary to divide the findings into three main categories according to their disciplinary relevance. The first notions will treat legislative technique and its relevance to the legal culture. A comparison of possible cultural factors, including the role of public servants and figures will follow. I will close this chapter with an explication how the media itself has had an influence to the birth of its current rights and obligations.

5.1 The Differences in Legislative Technique

First and foremost, both countries have acknowledged the right to privacy to be an independent civil and constitutional right. However, they consider it to be the product of fairly recent development of civil and human rights norms as can be seen from the fact that right to privacy used to be derived from the more traditional freedom rights. The protection of family life functioned as the primary source on which an individual could plead in case of unlawful harm to privacy. Secondly, they both have specialised legislation that addresses the right to private life. In Finland these norms can be found in Criminal Act and Act on the Exercise of Freedom of Expression in Mass Media. In France, the most important rules are spelled out in the constitutional texts and in the act of 1881.

In Finnish system, constitutional rights can be found in the constitution under the headline: “Constitutional rights”. Constitutional law text recognises them to have equal value in a case of conflict. On the other hand, article 10 lists six conditions under which a derivation from the protection of private life is possible, when there are only two of these exceptions in article 12 concerning the freedom of expression. Some restrictions to these rights can be found in administrative act, press act and criminal act. These restrictions can’t be excessive or too intrusive in a way that would nullify the innermost objective pursued by the constitutional right in question.

Finnish Criminal Act discriminates between a person that occupies a public office and a normal citizen placing more restrictions to the first than the latter. The criteria offered by the second paragraph of article 8 isn’t exhaustive and is mostly developed in court practice. It

corresponds to the second paragraph of article 8 in ECHR. On the contrary France hasn't implicated the same restriction into national law. Since the treaty has been ratified, at least in theory, the legal framework should suffice to produce into same result. A citizen can directly plead his case invoking directly to the treaty.

When it comes to the liberty of expression, civil act doesn't acknowledge the latter directly and the legislative base has to be sought from elsewhere. The primary source is the article 11 of The Declaration of the Rights of Man and of the Citizen that states: "*The free communication of thoughts and of opinions is one of the most precious rights of man: any citizen thus may speak, write, print freely, except to respond to the abuse of this liberty, in the cases determined by the law.*"

There exists four constitutional texts that are in power today: Constitution du 4 octobre 1958, Déclaration des Droits de l'Homme et du Citoyen de 1789, Préambule de la Constitution du 27 octobre 1946 and Charte de l'environnement de 2004. When comparing the two civil rights on the level of legislative choice, the discrimination between the two is apparent: Both have been codified to a constitutional text but only right to privacy has found its way to Code Civil meaning it belongs within the rights of an individual citizen on two levels of legislation. On the other hand, freedom of expression is a constitutional individual right but has been elaborated notably in the act of 1881 which is a text that addresses the press, not so much the individual.

Sometimes the real world events cause the legislation to be changes drastically. Especially when the border of good taste is crossed and acts of journalists are judged to be too extreme. In these cases not only lawyers but also by the national community as a whole criticise the existing legal framework, thus evoking change to the culture of celebrity hunt. Both Finnish and French modern press have faced a situation where public uproar has escalated a revision of existing legislation or code of conduct. In France, no legislative modifications were issued after the death of Diana but the code of conduct for paparazzi and the commercial profitability of sensation photographs was diminuend to a fraction what it used to be. The big tabloid prints became greatly more wary of the material they were offered.¹⁹⁰ While in Finland, the case of Mukka was the final straw that pushed law maker to incriminate unlawful intrusion of private life. The article is relatively modern considering it spells out (in general) what can be read from the decisions of EHRC.

¹⁹⁰ Guerrin 1998, in Paris Match.

5.2 Role of the Printed Media

In France, the development of the relations between the press and privacy is closely entwined with the history of freedom rights and development of the culture of political power. First years of its development were turbulent as: It was the end of the Great Revolution and beginning of democracy.

Compared to France, Finland's paper press is a late bloomer: The birth of Finnish political press happened in the beginning of 19th century. Before that, the media was strictly controlled by either Swedish or Russian authorities and until the end of 18th century it was also dominantly Swedish-speaking. This meant that an average citizen didn't have an access to public discussion before Finnish became equal with Swedish and the birth of Finnish-speaking press. Inner instability and foreign threats gave the government a strong mandate, generally accepted by intellectuals within the society, to practice preventive censorship over everything that was sought to be published. No uproar or even questioning of these actions occurred as the nation had never had more than a few months forth of formal freedom of expression. The watchdog journalism, already promoted by many liberal political movements in Europe, started to have a foothold in in Finland in 1850's only to be suppressed during the era of Russian governance.

Finnish periodical press became mainstream in the beginning of 19th century. However, preventive censorship made it nearly impossible to publish critique or other meaningful discussion about government or the state of the society. Additionally, the focus of this type of media was more about publishing information about subjects considered important by the professional associations that they represented. Publications increased in numbers only after the emergence of these societal organisations allowing people to have a forum to exchange views and ideas.¹⁹¹ In France the equivalent social constructions began to form shortly after the great revolution of 1789 in a form of social circles allowing people to discuss without being preventively censored. This contributed into sharp increase of periodical publications on all domains of life, including politics. A venue that allowed people to gather together to exchange views played favourably also to the birth of political professions. This doesn't mean that the press would have been under less stately control than in Finland. It shows, however, that journalistic activity has had a lot more time to develop and create a strong political and societal identity than in Finland.

¹⁹¹ Leino-Kaukiainen 1989, 344–345.

5.3 Legal Culture

Whereas in France, the term private and public were integrated into the written language quite early, around the latter half of 13th century, the first documented cases of those are 1845 for the first and 1544 for the second. Because Finnish language became the official language of legislation and administration only on the late 1800's, the legal terminology is bound to have a shorter history.¹⁹² However, the term private life has been added into the text of law almost simultaneously with the French version: 1970 in France (civil act) and in 1974 in Finland (criminal Act). In France, this was influenced by the implication of the term into the 12th article of the UDHR, and today the usage of *la vie privée* has stabilised. It is likely that the declaration was a catalyst that pushed Finnish law maker to adopt the term as well, but process was greatly accelerated by continuous effort to tempt the boundaries by some of the tabloid papers.

The late apparition of the term private in legal texts (in comparison with public) in Finland can be explained by the shift within the ideology of law itself. Positivist school of law regarded formal equality before the law to be more important than the actual content or access to rights it secured. This meant that everyone should be treated equally by the law, the personal qualities or social situation of individual was sought indifferent. The epoch of socio-political rights as well as international human rights began after the world wars. Before, the law didn't give individuals too many tools to request the court or authorities to take action for stopping an infringement taking place between private parties. As right the privacy is first and foremost destined to protect an individual than, for example a family as a whole (which was already protected much earlier), its separation from other freedom rights is tied notably to the development of international human rights law and more notably, to the work of ECtHR.

The court has an extensive case-law often critiqued fragmentary and incoherent. Nevertheless, it's been ratified and brought to force in both countries and equally acknowledged to have a superior position in comparison to national law. This supremacy doesn't work that well with the classic concept of sovereignty and hierarchy of law as the original idea of democracy insists that national constitution is will of the sovereign and thus justifiably untouchable by outside influencers. Finnish law maker has worked its way around this adding two constitutional norms that give a judge a possibility to surpass which ever

¹⁹² See also Mattila 2002, 384–387. French language was in similar conflict with Latin which resolved into French prevailing in the 18th century.

domestic text of law that is contrary to a ratified and implemented human rights treaty provision. Provisions found in the Convention are today part of the national legislation meaning that a judge can apply article 106 of the Constitution. Constitutionality and compatibility of a treaty is researched prior to the ratification but in case where a latter act is clearly in collision with it, a judge can (and should) secure individual's the access to these rights. This gives the judge a powerful tool to realise justice without having to wait for actions by the parliament or a higher court.

Quite similarly to the Finnish system, in France treaty's compatibility with constitution is reviewed before its ratification. The treaty is also directly applicable in both states. However, the importance of sovereignty and longstanding tradition to not to allow judges to create law or derive from the word of law maker does make the system inflexible. From all the possible alternatives the judges seem to have a tendency to choose the one that is compatible with national constitutional legal tradition even though this might engage country's responsibility for breaching the ECHR. This has led me into conclusion that French legal culture has not adapted to the European human rights law as quickly as the Finnish one. As the right to private life and the freedom of expression are both protected as constitutional rights in France, it seems that the numerous cases handling the breach of articles of the convention rise from this problematic.¹⁹³

At first glance it would make more sense to make the conclusion that the separation of church and state in France since 1789 (apart from a brief re-institution of state religion after Napoleon I was forced to step down) would have a great impact on the development of individual rights and more importantly, cause differences on law maker's perception of privacy. My initial presumption was that this would constitute one of the most prominent differences between the two states. I based the idea upon the fact that the separation of church and state doesn't exist in Finland. The Finnish Constitution guarantees a privileged position to the Lutheran church in its article 76 stating that the inner organisation and governance is pronounced by an act. Even some religious ceremonies are broadcast on national tv-channels and state officials are free to carry symbols of religion in their clothing.

However, the positivistic theory of law and the separation of law and religious moral does exist since the end of 1800's. As mentioned by Lauha¹⁹⁴, family, religion and lifestyle

¹⁹³ See also: Koivu 2015, 117, who states that French courts have been found to be slow in implementing references to European law practice and giving priority to ECHR-based human rights protection over national constitutional protection.

¹⁹⁴ Lauha 2004, 200–201.

choices were left to be determined by the communities themselves. Along the new era of civil and political rights in the 1960's, the law now addresses more the needs of an individual to access to his rights. This follows the common European trend set by the ECtHR whose decisions can be used as a primary source of law without fear of breaching the national constitution (as mentioned earlier). As the EU consists of multiple nations with a high variety of religious communities, the ECtHR bases its appreciations on a consensus that can be found from common constitutional heritage of its member states. Based on the found material, religion and secularity of state thus seem to influence the current legal reality considerably less than I expected.