

THE ARTICLE 19 FREEDOM OF EXPRESSION HANDBOOK

**International and Comparative Law,
Standards and Procedures**

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International and Comparative Law, Standards and Procedures

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Ann Naughton edited the text and Susan Hay, Elizabeth Schofield and Fiona Harrison copy-edited and proofread the book. Susan York created the index and designed and formatted the handbook.

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PREFACE

This handbook brings together, organized by topic, summaries of decisions from courts around the world which establish precedents *protective* of the rights to freedom of expression, assembly, association and access to information. Also included are summaries of the most relevant international case-law (protective as well as restrictive of freedoms), and basic information about the main human rights treaties and procedures for filing complaints with intergovernmental bodies. The handbook is intended to be of use to diverse groups including lawyers, researchers and human rights campaigners.

Aims of the Handbook

The premise of this book is that, in whatever forum the right to freedom of expression is challenged, lawyers and campaigners seeking to defend the right should present the most powerful international and comparative law and jurisprudence available. As more countries ratify the international and regional human rights treaties, arguments that national judges should, at the least, apply international law as an aid to interpreting domestic law gain in persuasiveness. The rationale is all the stronger in the many countries whose constitutions, especially those drafted or revised since the formation of the United Nations, incorporate principles of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and/or regional human rights treaties.

Countries throughout the Commonwealth have traditionally looked to decisions of the Privy Council and the British courts for persuasive reasoning. More recently, courts in common law jurisdictions have consulted the decisions of the Supreme Courts of such countries as India and the United States as well as the decisions of the European Court and Commission of Human Rights. A major aim of ARTICLE 19 in compiling this book is to make available the judgments of courts from a greater diversity of countries and thereby to facilitate the process of "cross-fertilization".

Courts in civil law jurisdictions also have referred to the reasoning of courts in other jurisdictions. There is good reason for this increasing trend. First, in countries which have a court authorized to interpret and apply the constitution, freedom of expression law increasingly is made by the courts rather than the legislature. Second, and relatedly, most constitutions protect the right to freedom of expression in similar terms. Thus a judgment of a court construing a constitutional clause may provide interesting insights; this is especially true for countries which share a common legal tradition, espouse a similar commitment to freedom of expression, are in the same region, and/or are parties to the same human rights treaty.

Most of the cases summarized in this book are from common law jurisdictions. This primarily reflects the traditional emphasis on precedent and, concomitantly, the greater number of appellate decisions in those jurisdictions (although constitutional interpretation akin to the role of precedent is, as noted, developing in a number of civil law countries). In addition, the fact that research for this book was conducted primarily from London limited our research of non-common law jurisdictions. In subsequent updates of the handbook, ARTICLE 19 hopes to include more cases from a wider range of legal traditions.

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Most of the case summaries collected in this book were submitted by contributors from around the world. Quotations from judicial opinions not written in English were translated by the contributor, unless otherwise specified, and thus are not official. While ARTICLE 19 edited the submissions and pursued follow-up information, the fact that some case summaries are more detailed than others and that we have few or no cases to address some important substantive areas is a reflection of the material available to us and not of any priorities or express decisions on our part. We stopped collecting cases in January 1993 (although we were able to incorporate a few received thereafter).

In order to keep the handbook to a manageable length, we decided not to address certain topics closely related to freedom of expression, including the rights to freedom of religion, correspondence and trade union activity.

Organization of the Handbook

Part I offers an introduction to the role of international and comparative jurisprudence in national courts. Chapter 1, by Soli Sorabjee, a leading free speech advocate and former Attorney-General of India, underscores the importance of freedom of expression to a democratic society and the impact of international and comparative law in developing positive case-law in India.

Chapter 2 describes the treaties and other international instruments that provide significant international protection of the rights to freedom of expression, assembly, association and access to information.

Chapter 3 addresses the impact of international and comparative law on the reasoning of national courts. It includes a brief description of the theories pursuant to which national courts apply international law, surveys the status of international treaty law in the domestic law of several countries, and offers examples of applications by national courts of international and comparative freedom of expression law.

Part II, comprising the bulk of the book, summarizes judgments of national courts that are protective of freedom of expression and the most pertinent decisions of international courts and other tribunals. The cases are organized by topic and are divided into chapters on positive protections of freedom of expression (Chapter 4); standards for assessing the legitimacy of restrictions (Chapter 5); restrictions based on threats to national security or public order (Chapter 6); content-related restrictions (Chapter 7); injunctions and other forms of prior restraint (Chapter 8); and time, place, manner and other non-content related restrictions (Chapter 9).

Part III offers an introduction to the international procedures by which people who have suffered freedom of expression violations may seek international scrutiny and redress. This part provides sufficient information to enable the reader to evaluate whether pursuit of an international remedy would be worthwhile in a particular case and, if so, how to comply with the minimal prerequisites for pursuing such an international remedy.

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ABBREVIATIONS

International and Regional Treaties and Treaty Bodies

ACHPR (African Charter)	African Charter on Human and Peoples' Rights
ACmHPR (African Commission)	African Commission on Human and Peoples' Rights
ACHR (American Convention)	American Convention on Human Rights
ADDRDM (American Declaration)	American Declaration on the Rights and Duties of Man
CSCE	Conference on Security and Cooperation in Europe
EC	European Community
ECHR (European Convention)	European Convention on Human Rights
ECtHR (European Court)	European Court of Human Rights
ECmHR (European Commission)	European Commission of Human Rights
ECJ	European Court of Justice (EC Court)
HRC (Committee)	Human Rights Committee
IACmHR (Inter-American Commission)	Inter-American Commission on Human Rights
IACtHR (Inter-American Court)	Inter-American Court of Human Rights
ICCPR (International Covenant)	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
OAS	Organization of American States
OAU	Organization of African Unity
OP (Optional Protocol)	First Optional Protocol to the ICCPR
UDHR (Universal Declaration)	Universal Declaration of Human Rights
UN	United Nations

Case Reporters

AC	Appeal Cases (includes cases of Privy Council, House of Lords and Court of Appeal)	J	Journal
AIR	All India Reports	L	Law
ALJR	Australian Law Journal Reports	LR	Law Reports
Common L Bull	Commonwealth Law Bulletin	LRC	Law Reports of the Commonwealth (London, Butterworths)
D & R	Decisions and Reports (of the ECmHR)	NCLR	Nigeria Constitutional Law Reports
ECR	European Court (of Justice) Reports	NLR	Nigeria Law Reports
EHRR	European Human Rights Reports (Strasbourg)	NJ	Netherlands Journal
HRLJ	Human Rights Law Journal	SA	South Africa Law Reports
		SCR	Supreme Court Reports
		WLR	Weekly Law Reports

Court Abbreviations

CA	Court of Appeal	HP	High Principal Court (Lusaka, Zambia)
CC	Constitutional Court	SC	Supreme Court
FCC	Federal Constitutional Court (Germany)	STC	Sentencia del Tribunal Constitucional (Spain)
HC	High Court	TGI	Tribunal de grande instance (France)

Miscellaneous Abbreviations

NGO	Non-governmental organization
Ors	Others

TABLE OF CASES

NATIONAL COURTS

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<i>GB-INNO-BM v. Confédération du Commerce Luxembourgeois Asbl</i> , Case No. C-362/88, 1991 2 CMLR 80	4.10
<i>Nold v. EC Commission</i> , Case No. 4/73, 1974 ECR 491	2.7
<i>Society for the Protection of Unborn Children (SPUC) v. Grogan</i> , Case No. C-159/90 1991 3 CMLR 849	2.5, 2.7
<i>Stichting Collectieve Antennevoorziening Gouda et al. v. Commissariaat voor de Media</i> , Case No. C-288/89, ECJ 25 July 1991	9.2
<i>Wachauf v. Germany</i> , Case No. 5/88, 1989 ECR 2609	2.7

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<i>Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism</i> , Advisory Opinion OC-5/85 of 13 Nov. 1985, Series A no. 5, 7 HRLJ 74 (1986)	2.4, 2.5, 3.3, 4.5.1, 4.14, 5.1, 5.1.2, 8.3
<i>Enforceability of the Right of Reply or Correction</i> , Advisory Opinion OC-7/85 of 29 Aug. 1986, Series A no. 7	1, 2.4, 7.3
<i>Exhaustion of Remedies (Articles 46(1)(a) and 46(2) of the ACHR)</i> , Advisory Opinion OC-11/90 of 10 Aug. 1990, Series A no. 11	10.2.5.d

INTERNATIONAL COURT OF JUSTICE

<i>North Sea Continental Shelf</i> case (<i>FRG v. Denmark; FRG v. Netherlands</i>), 1969 ICJ 3 (20 Feb. 1969)	3.1.2
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PART I

INTERNATIONAL AND COMPARATIVE FREEDOM OF EXPRESSION LAW: ITS ROLE IN NATIONAL COURTS

CHAPTER 1

THE IMPORTANCE AND USE OF INTERNATIONAL AND COMPARATIVE LAW: THE INDIAN EXPERIENCE

by Soli J Sorabjee

Freedom of expression has been humanity's yearning, in times ancient and modern. Cato's anguished *cri de coeur* "Where a man cannot call his tongue his own, he can scarce call anything his own", articulates an almost universal lament.

Censorship, whose essence is suppression of expression, has also been an ancient and an almost universal phenomenon. It has surfaced in one form or another at different times in different societies governed by different systems. Plato was its respectable exponent. Milton, who thundered in his famous *Areopagitica*, "Give me liberty to know, to utter and to argue freely according to conscience, above all liberties", became Cromwell's official censor.

What is the reason for this paradox? Freedom of expression and censorship pull in different directions. Their aims and purposes are conflicting. For 10 people who wish to speak and spread the truth as they see it, there are 1,000 people who do not wish to hear it and do not want others to hear it, especially if what is said or written challenges the conventional dogmas and practices.

What impels censorship is a complicated network of causes, one of which is the compulsive psychological need to prevent unpalatable utterances and images. Another is political or religious vested interests in preserving the *status quo* and frequent invocation of the bogey of national security. Last but not least is the social and moral factor motivated by a fervent desire for the preservation of a "clean" society. Underlying all of these causes is one persistent phenomenon: intolerance. Its genesis is an invincible assumption of infallibility. It is nurtured by the fear of the power of ideas that challenge and censure the existing order - ideas which seem dangerous to the authorities and certain groups and therefore, in their view, require suppression. Thus, there are potential conflicts between freedom of expression and other interests, and onslaughts on freedom of expression from different sources are frequent. Freedom of the press, an integral part of freedom of expression, understandably has been the favourite target of censors around the world.

In an orderly, civilized society freedom of expression cannot be absolute, and this raises crucial issues of the permissible limits of restrictions on freedom of expression. Such issues involve consideration of the nature of the restriction, its scope and extent, its duration and the presence or absence of an efficacious corrective machinery to challenge the restriction. Generally it is the judiciary which performs the task of reconciling freedom of expression with certain imperatives of public interest such as national security, public order, public health or morals, and individual rights such as the right to reputation and the right of privacy. The crux of the matter is whether censorship is ever justifiable and, if so, in what circumstances.

Victims of censorship, particularly journalists, have turned to the judiciary for protection. By and large an independent judiciary in free democratic societies has proved a good sentinel on the *qui vive*. Where national courts have been unsympathetic, international tribunals on occasion have provided a measure of relief. The European Court and Commission of Human Rights at Strasbourg

have played an important role in developing free speech jurisprudence as have, to a relatively limited extent, the Inter-American Court and Commission of Human Rights at San José.

The fascinating part is the manner in which the courts perform their delicate balancing act, the different trends and varying emphases reflected in their judgments, and the different conclusions reached by them. The reasons are obvious. Constitutions and laws vary from country to country, the stages of socio-political development and the evolution of jurisprudence are different, and judges who hail from different backgrounds and cultures do not share the same perceptions. For example, the US Supreme Court refused to restrain the *New York Times* from publishing official documents which were classified as top secret.¹ A similar decision would be unthinkable in the UK where judges have adopted a deferential stance towards governmental assertions of national security interests. The injunction issued by the House of Lords prohibiting newspapers from publishing extracts from the *Spycatcher* book, which was freely available in other parts of the world, would never have been countenanced by a US court. What is of utmost interest are the approaches and reasoning of judges in dealing with free speech issues and the fruitful possibility of adapting and applying good reasoning in resolving similar issues in the courts of other countries.

Complaints of libel are frequent. There is a considerable body of case-law dealing with questions like the limits of legitimate criticism, whether erroneous statements about public figures can be regarded as defamatory in the absence of malice or reckless disregard of truth. That has raised the vexed questions: Who is a public figure? What are the criteria for determining this question? What is the permissible latitude of criticism regarding public figures? The reverberations of the landmark judgment of the US Supreme Court in *New York Times v. Sullivan* have been felt in different parts of the world.² The European Court at Strasbourg has also laid down salutary principles in this branch of law in the *Lingens* case.³

Invasion of privacy is another significant source of litigation, considerable judge-made law on the subject in many countries reflects differing perceptions about the value of privacy, the right to be left alone and the norms for adjudging the validity of restrictions on individual privacy which are necessitated by such interests as investigation into crime or national security.

Speech which is hurtful to people by virtue of their membership of a racial or religious group has raised many interesting and baffling legal issues. It is educative both for judges and lawyers to learn about the outlook and reasoning of different judicial tribunals which have grappled with this problem.⁴

Courts of other countries may not wholly adopt the reasoning of the US Supreme Court in *Sullivan* or the European Court in *Lingens*. The decision of a US court to allow a march by neo-Nazis through Skokie, an area largely populated by Jewish Holocaust survivors, would be regarded with

¹ 403 US 713 (1971).

² 376 US 254 (1964).

³ Judgment of 8 July 1986, Series A no. 103, 8 EHRR 103.

⁴ For a thorough discussion of this issue, see *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* (London: ARTICLE 19/University of Essex, 1992).

horror by some judges.⁵ Indeed it would be anomalous if national courts accepted wholesale the judgments of "foreign" courts. But the outlook and reasoning of foreign courts having similar legal traditions and values can and do influence the approach of national courts which may imperceptibly, and often without express articulation, adopt a less restrictive attitude after their attention has been drawn to these sources. The immense value of freedom of expression and the expansive judicial interpretation placed on it by other courts can usefully be invoked by judges of national courts who are anxious to protect free speech in order to narrowly interpret potentially restrictive statutes and thus neutralize their effect.

Let me draw on the Indian experience. One of the questions which arises in a libel action is whether the future publication of the alleged defamatory material can be prohibited by an injunction. Initially, the attitude of judges in India was strict and unsympathetic to the alleged libeller. Recently, judges have accorded greater recognition to the public interest involved and the importance of the right to know. This change has been partly influenced by the decision of Lord Denning in *Fraser v. Evans*⁶ confirming the refusal of an injunction against future publication and his dictum that it is important in the public interest that the truth should out.

An important issue arose before the Bombay High Court regarding the legality of an order of the Police Commissioner prohibiting a meeting where there would be criticism of the emergency declared by Mrs Gandhi in June 1975 and the actions of officials during the emergency period. The High Court was sympathetic but anxious to fortify its conclusions by other precedents. It drew support from the judgment of the Supreme Court of Canada in *re. Alberta Legislation*⁷ which emphasized that freedom of discussion is essential to enlighten public opinion in a democratic state and that it cannot be curtailed without affecting the right of the people.⁸

Important issues concerning freedom of expression arise because of governmental control of television in India. Apart from the judgments of the US courts, useful guidance has been derived from courts in the Caribbean which have been outstanding in vindicating freedom of expression. In one case the state-owned Trinidad and Tobago Television refused permission to Mr Surujrattan Rambachan to transmit a political broadcast.⁹ Justice Dayalsingh of the High Court struck down the action as violative of Mr Rambachan's freedom of expression. In a landmark judgment, the court ruled that radio and television broadcasts are part of the public domain, and government must ensure the free and fair flow of information over the air waves to the public from all legitimate sources. This case has not merely helped litigants but has provided encouragement to media persons and has been an eye-opener for governments. Indian judges cannot remain unaffected by what their judicial colleagues have done in the Caribbean, a former British colony like India.

⁵ *Collin v. Smith*, 578 F.2d. 1197 (7th Cir. 1978).

⁶ [1969] 1 All ER 8.

⁷ [1938] 2 SCR 100.

⁸ *Nathwani v. Commissioner of Police*, Bombay 78 Bom L R, 1.

⁹ *Rambachan v. Trinidad and Tobago Television Co. Ltd and Attorney-General of Trinidad and Tobago*, decision of 17 July 1985 (unreported).

The Indian government, like many other governments, does not take kindly to a critical press. Of the various measures designed in the past to teach the press a lesson, one was a steep hike in the import duty on newsprint - a scarce commodity in India - levied by Rajiv Gandhi's government in 1986. Several newspapers challenged the levy in the Supreme Court on the grounds that it was an insidious method employed by the government to suppress press freedom. The contention of the government was that the press, like any other person or business, did not enjoy any immunity from fiscal burdens and the question about the steepness of the hike in import duty was beyond the ken of the courts.

The difficulties felt by the Supreme Court of India¹⁰ in deciding this ticklish issue were considerably lessened by the judgment of the US Supreme Court in the case of *Alice Lee Grosjean*.¹¹ In that case a Louisiana statute which imposed a similar tax was struck down because "in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guarantees. A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves".

The Supreme Court of India recently had to deal with a case which concerned the issue of the right of reply. Professor Manubhai Shah published a study paper which was strongly critical of the working of the government-controlled Life Insurance Corporation (LIC). A reply to Professor Shah's article was published in *Yogakshema*, a magazine of the LIC. Shah's request that his article should also be published in the same magazine was refused. The Supreme Court held that LIC's refusal was "unfair because fairness demanded that both viewpoints were placed before the readers".¹² The attention of the Supreme Court was not drawn to the advisory opinion of the Inter-American Court of Human Rights delivered on August 29, 1986 and consequently the Supreme Court had no occasion to examine the social dimension of the right to reply based on the important postulate that "the formation of public opinion based on true information is indispensable to the existence of a vital democratic society".¹³

Judgments of the European Court of Human Rights were cited before the Supreme Court of India in deciding the case of *S Rangarajan v. P Jagjivan Ram* which involved the legality of the ban on a film which was hurtful to the feelings of certain sections of the community, namely the Scheduled Castes who are regarded as "untouchables" in India.¹⁴ The film opposed the government's policy of reserving posts in public services in favour of Scheduled Castes. The case generated strong emotions and the Supreme Court was alive to the sensitive nature of the issue before it. The Court derived valuable assistance from the decisions of the European Court to the effect that the ambit of freedom of expression covers not only information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, "but also those that offend, shock or disturb the state or

¹⁰ *Indian Express Newspapers v. Union of India*, AIR [1986] SC 515.

¹¹ *Grosjean v. American Press Co.*, 297 US 233 (1936).

¹² *Manubhai Shah v. Life Insurance Corp. of India*, [1992] 3 SCC 637.

¹³ *Enforceability of the Right of Reply or Correction*, Advisory Opn. OC-7/85 of 29 Aug. 1986.

¹⁴ *Rangarajan v. Jagjivan Ram and Others; Union of India and Others v. Jagjivan Ram*, Supreme Court [1990] LRC (Const.) 412, 30 March 1989, [1989] 2 SCR 204.

any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'".¹⁵

There is no Freedom of Information Act in India, and there is no law which confers the right to know. Nevertheless, the Supreme Court of India in the landmark judgment of *S P Gupta v. Union of India* deduced the right to information from the guarantee of free speech and expression contained in Article 19 1(a) of the Constitution of India. Its reasoning is clearly influenced by the doctrine developed by the US courts that certain unarticulated rights are immanent and implicit in the enumerated guarantees.¹⁶

Judgments of Indian courts in turn have furnished useful guidance to other countries including Pakistan, Bangladesh, Malaysia and other countries in the region where the problems faced are not dissimilar to those encountered in India. Likewise, judgments of the national courts of these countries can be helpful in other national courts for resolving issues of free speech occasioned by similar tensions and conflicts.

No country has a monopoly on democracy or freedom of expression. No court has a monopoly on truth or wisdom. Each has to make its individual contribution to the quest and attainment of a just and decent society in which freedom of expression is cherished as an indispensable value. In that quest may we be guided by the humble spirit of the Vedic saying: "Let noble thoughts come to us from all sides".

There can be no doubt about the usefulness of the present volume to judges, lawyers, lawmakers, media workers, human rights activists and all those concerned with upholding freedom of expression. Its true value lies in the rich base of information it succinctly and skilfully provides for the development of general principles about freedom of expression and the scope of permissible restrictions in operational democracies which respect the rule of law and cherish freedom of expression as a fundamental value.

¹⁵ *Handyside v. United Kingdom*, Judgment of 7 Dec. 1976, Series A no. 24, 1 EHRR 737.

¹⁶ AIR [1982] SC 149.

CHAPTER 2

INTERNATIONAL INSTRUMENTS: FREEDOM OF EXPRESSION PROVISIONS

This chapter introduces the treaties and other international instruments that provide the most significant international protections of the rights to freedom of expression, assembly and association. Interpretations of the scope of these freedoms by international courts and other adjudicative bodies are summarized by topic in Part II. Part III provides information about the bodies that monitor government compliance with the instruments and accept complaints of violations from individuals.

The chapter begins, in Section 2.1, with an introduction to the Universal Declaration of Human Rights, the pre-eminent statement of human rights to which all people are entitled.

The next four sections, 2.1-2.5, offer basic information about the major human rights treaties that protect freedom of expression, namely the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights, the American Convention on Human Rights and the European Convention on Human Rights. Each section provides basic facts about the treaty, such as when it entered into force and the number of countries that have accepted its obligations; highlights unusual aspects of the treaty's protection of freedom of expression, assembly and association; and briefly describes any relevant doctrines of construction.

Section 2.6 analyzes and compares the provisions of the four human rights treaties. Sections 2.7 and 2.8 offer information about European instruments - the European Community treaties, and the documents of the Conference on Security and Cooperation in Europe (CSCE) - which though of less relevance for freedom of expression than the human rights treaties, are certainly important.

Articles of the instruments discussed in this chapter most relevant to the rights to freedom of expression, assembly and association are reproduced in Appendix A. The states parties to the various treaties are listed in Appendix B.

2.1 THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

Adopted unanimously by the General Assembly on 10 December 1948, the Universal Declaration is the most important elaboration of the human rights obligations set forth in the United Nations Charter. While at the time of adoption it was widely viewed as a statement of principles, it has acquired increasing legal significance over the decades. The Proclamation of Teheran, marking the Universal Declaration's 20th anniversary and endorsed by the UN General Assembly, declared that the Universal Declaration "states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community."¹ In 1971, the UN Secretary-General observed:

¹ Final Act of the International Conference on Human Rights, 4, para. 2, UN Doc. A/CONF 32/41, endorsed by the General Assembly in GA Res. 2442 (XXIII), 19 Dec. 1968; 23 GAOR, Supp. No. 18 (A/7218), 49.

During the years since its adoption the Declaration has come, through its influence in a variety of contexts, to have a marked impact on the pattern and content of international law and to acquire a status extending beyond that originally intended for it. In general, two elements may be distinguished in this process: first, the use of the Declaration as a yardstick by which to measure the content and standard of observance of human rights; and, second, the reaffirmation of the Declaration and its provisions in a series of other instruments. These two elements, often to be found combined, have caused the Declaration to gain a cumulative and pervasive effect.

The Universal Declaration was the first step in the formulation of the International Bill of Human Rights, which was completed in 1976 with the entry into force of the two main international human rights treaties, the International Covenant on Civil and Political Rights (discussed below) and the International Covenant on Economic, Social and Cultural Rights.

The entry into force of the Covenants did not in any way diminish the widespread impact of the Universal Declaration. On the contrary, as stated in a UN manual,

[T]he very existence of the Covenants, and the fact that they contain the measures of implementation required to ensure the realization of the rights and freedoms set out in the Declaration, give greater strength to the Declaration.²

The Declaration protects all people and applies to all governments:

[I]t is, as its title implies, truly universal in its application and applies to every member of the human family, everywhere, regardless of whether or not his Government accepts its principles or ratifies the Covenants ...³

The Universal Declaration has had tremendous impact on the development of both international and national human rights law. Virtually all human rights treaties adopted by UN bodies since 1948 elaborate principles set forth in the Declaration. Both the American and the European Conventions on Human Rights declare in their preambles that the principles to which they give effect are those set forth in the Declaration, and the CSCE states pledged in the Helsinki Final Act to act "in conformity with the purposes and principles of the Charter of the UN and with the Universal Declaration". Moreover, many countries have modelled clauses of their constitutions and statutes on the Universal Declaration, and national courts have invoked its norms.⁴

As stated by Chief Justice Muhammad Haleem of Pakistan:

² *United Nations Action in the Field of Human Rights* (New York: United Nations, 1983), UN Doc. ST/HR/2/Rev.2, UN Sales No. E.83.XIV.2, Chap. II, para. 67, 14.

³ *Id.* at 68.

⁴ Substantial parts of the Declaration have been incorporated in the constitutions of several countries, including Algeria, the Ivory Coast, Madagascar and Cameroon. See *UN Action in the Field of Human Rights*, UN Doc. ST/HR/2/Rev.1 (1980), 21; and *UN Action in the Field of Human Rights* (1983), Chap. II.F, para. 75. In addition, many constitutions have based their protections of fundamental rights and freedoms on those set forth in the Declaration. See, e.g., Section 3.2.1 *infra*.

The result is that the Universal Declaration is now widely acclaimed as a Magna Carta of humankind, to be complied with by all actors in the world arena. What began as mere common aspiration is now hailed both as an authoritative interpretation of the human rights provisions of the UN Charter and as established customary law ... constituting the heart of a global bill of rights.⁵

Article 19 of the Universal Declaration proclaims the right to freedom of expression, which includes freedom "to seek, receive and impart information and ideas through any media and regardless of frontiers." Article 20 declares the right to peaceful assembly and association, including the right not to be compelled to belong to any association. These rights are limited by Article 29, which permits restrictions "solely for the purpose of securing ... respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." Moreover, the rights set forth in the Universal Declaration "may in no case be exercised contrary to the purposes and principles of the United Nations".

2.2 THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The International Covenant is an elaboration of the civil and political rights set forth in the Universal Declaration. As of February 1993, 116 countries had ratified or acceded to it.

The Human Rights Committee monitors compliance with the International Covenant and determines individual complaints against governments which have ratified the International Covenant's First Optional Protocol.⁶ The pronouncements of the Committee are among the most authoritative statements of the obligations imposed by the International Covenant.

Article 19 sets forth the right to freedom of opinion, expression and information. Paragraph 1 asserts the absolute right to hold opinions "without interference". Paragraph 2 states the positive content of freedom of expression: namely, the "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." Paragraph 2, unlike paragraph 1, may be subjected to restrictions as set forth in paragraph 3 (see Section 2.6.5 *infra*).

In a general comment concerning Article 19, the Human Rights Committee emphasized the three requirements imposed by paragraph 3 with which any restriction must comply:

[W]hen a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. Paragraph 3 lays down conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be 'provided by law'; they may only be imposed for one of the

⁵ "The Domestic Application of International Human Rights Norms", in *Developing Human Rights Jurisprudence: The Domestic Application of International Human Rights Norms*, Report of a Judicial Colloquium in Bangalore (Commonwealth Secretariat, Sept. 1988), 97.

⁶ See Section 10.2.1 *infra* for more information about the Human Rights Committee.

purposes set out in sub-paragraphs (a) and (b) of paragraph 3; and they must be justified as 'necessary' for that State party for one of those purposes.⁷

Article 20 requires states parties to prohibit by law (though not necessarily to declare criminal) any propaganda for war and any incitement to discrimination, hostility or violence on national, racial or religious grounds.⁸

Article 21 protects the right of peaceful assembly, and Article 22 safeguards the right to freedom of association, "including the right to form and join trade unions".

2.3AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

The Assembly of Heads of State and Government of the Organization of African Unity adopted the African Charter on Human and Peoples' Rights in 1981 and it entered into force in 1986. As of January 1993, 49 of the 51 OAU member states were parties to the Charter.

The African Commission on Human and Peoples' Rights, established to promote compliance with the Charter, has been functioning only since 1987. Because of the short time in which the Charter has been in force and the low number of cases considered by the Commission, there is little indication of how the Charter will be applied in practice.

The Charter is distinctive because of its enhanced protections of peoples' rights, including the rights to free disposition of natural resources, development and a satisfactory environment, in addition to individual rights. It also includes a chapter on the individual's duties to the family and society. Of particular interest is Article 25 which obliges states parties to "promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter" and to ensure that the rights as well as corresponding duties are understood.

The Charter's protection of freedom of expression, set forth in Article 9, differs from the protection afforded by other treaties in that it does not expressly include a right to receive ideas or to impart information. Article 9 is also unusual in that it does not include any express restrictions. Rather it is subject only to the general restrictions set forth in Articles 27-29, the most pertinent of which requires the individual to exercise protected freedoms "with due regard to the rights of others, collective security, morality and common interest."

Similarly, the right to free association, set forth in Article 10(1), is not subject to any particular restrictions. Article 10(2) provides that no one may be compelled to join an association, except as required by the duty of solidarity stated in Article 29.

In contrast, the right "to assemble freely", stated in Article 11, is subject to "necessary restrictions provided for by law, in particular, national security, the safety, health, ethics and rights and freedoms of others." The words "in particular" suggest that the list is illustrative and not exhaustive.

⁷ *Report of the Human Rights Committee to the General Assembly*, 38th Sess., Supp. No. 40, 1983 (A/38/40), Annexe VI, General Comment 10.

⁸ See Section 7.4 *infra*.

2.4 AMERICAN CONVENTION ON HUMAN RIGHTS AND AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN

The General Assembly of the Organization of American States (OAS) adopted the American Declaration of the Rights and Duties of Man on 2 May 1948, several months before the UN adopted the Universal Declaration. The American Convention on Human Rights, adopted in 1969, elaborates and expands upon the obligations set forth in the American Declaration, grants additional powers to the Inter-American Commission, and established the Court of Human Rights.⁹ All 35 members of the OAS are obliged (though not legally bound) to comply with the Declaration; 23 of those (but not the United States or Canada) are states parties to the Convention.

Article 13 of the Convention sets forth the positive protection of, and permissible restrictions on, the right to freedom of expression in five sub-paragraphs. Paragraph 1 states the positive right in terms nearly identical to those of the International Covenant. Although it does not specify that everyone is entitled to hold opinions without interference, that protection is assumed to be implicit. Paragraph 2 explicitly prohibits prior censorship and sets forth the grounds upon which subsequent liability may be imposed. In an advisory opinion, the Inter-American Court ruled that a requirement that journalists be licensed violates the prohibition of prior censorship.¹⁰

Paragraph 3 is unprecedented among the human rights treaties examined here in that it expressly prohibits indirect methods of restricting expression, such as unfair allocation of newsprint or broadcasting frequencies, and prohibits such methods by private persons as well as by government. It thus imposes a positive obligation on governments to restrain private action that might impair the free exercise of the rights to seek, receive and impart information and ideas.¹¹ Paragraph 4 permits prior censorship of "public entertainments" for the sole purpose of protecting the morals of children and youths and only if prescribed by law. Paragraph 5 requires states parties to prohibit war propaganda and advocacy of national, racial or religious hatred.¹²

Article 14 also has no parallel among the human rights treaties. It requires states parties to ensure that anyone injured by "inaccurate or offensive statements" published by the mass media has a right to reply or make a correction using the same media organ. Article 14(3) requires that every organ of mass communication shall have a person who may be held liable for violations of honour or reputation. The Inter-American Court, in an advisory opinion, has declared that Article 14 obliges states parties to adopt such legislative or other measures as may be necessary to give effect to the right of reply.¹³

⁹ See Section 10.2.2 *infra*.

¹⁰ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 Nov. 1985, Series A No. 5. See Sections 4.5.1, 5.1 and 8.3 *infra* for further discussion of the case.

¹¹ See Section 4.7 *infra*.

¹² See Section 7.4 *infra*.

¹³ *Enforceability of the Right of Reply or Correction*, Advisory Opinion OC-7/86 of 29 Aug. 1986. See Section 7.3 *infra* for cases concerning the right of reply.

Articles 15 and 16 of the American Convention protect the rights to freedom of peaceful assembly and association, subject only to restrictions which are prescribed by law and "necessary in a democratic society" to protect national security, public safety or public order, public health or morals, or the rights or freedoms of others.

2.5 EUROPEAN CONVENTION ON HUMAN RIGHTS

The Council of Europe has developed an extensive body of law, jurisprudence and standards regarding freedom of expression, access to information, and the related rights to freedom of peaceful assembly and association. The primary statement of law is the Convention for the Protection of Human Rights and Fundamental Freedoms (referred to in this handbook as the European Convention on Human Rights or ECHR); it is the oldest of the human rights treaties discussed in this handbook (it was adopted in 1950 and entered into force in 1953) and its implementation procedures are the most developed.

Article 10 of the European Convention protects freedom of expression, and Article 11 protects freedom of peaceful assembly and association. The European Court of Human Rights (established in January 1959) has issued more than two dozen judgments addressing Article 10 issues and two judgments concerning Article 11.¹⁴ Articles 10 and 11 have been further elaborated by reports and decisions of the European Commission of Human Rights. Decisions and recommendations of the Committee of Ministers (the political and executive arm of the Council of Europe) add additional guidance, particularly concerning access to information.¹⁵

The judgments of the European Court of Human Rights are legally binding only on the state party against which an application has been filed; however, because they constitute authoritative interpretations of the Convention's obligations, they are to be applied by the courts of all states parties to the European Convention (currently numbering 26) whenever questions concerning Convention rights arise.¹⁶

In addition, Article 10 has implications for the law of the European Community (EC). The institutions of the EC have declared that they are bound to consider the European Convention in the exercise of their powers,¹⁷ and the European Court of Justice has consistently held that fundamental

¹⁴ J Polakiewicz & V Jacob-Foltzer, "The European Human Rights Convention in Domestic Law: The Impact of Strasbourg Case-Law in States where Direct Effect is Given to the Convention", 12 *Human Rights L J* (1991), 65. As of 31 Dec. 1990, the Court had delivered a total of 235 judgments.

¹⁵ For more information about the Commission, the Court and the Committee of Ministers, see Section 10.2.3 *infra*.

¹⁶ See Appendix B for a list of the parties to the ECHR. Until its dissolution on 31 Dec. 1992, the Czech and Slovak Federal Republic (CSFR) was a member of the Council as well as a party to the ECHR. The Council has taken the position that the newly-formed Czech and Slovak Republics must apply for membership and may not automatically assume the CSFR's seat and treaty obligations. Accordingly, as of 1 Feb. 1993, the two new republics held only observer status.

¹⁷ See the Preamble to the Single European Act and Art. F of Title I of the Maastricht Treaty on European Union, discussed in Section 2.7 *infra*.

human rights, especially as set forth in the European Convention, are "enshrined in the general principles of Community law".¹⁸

The European Convention also has considerable influence outside Europe. Its provisions are consulted in construing similar provisions of the International Covenant;¹⁹ the American Convention;²⁰ and national constitutions and laws.²¹

Paragraph 1 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." But, pursuant to paragraph 2, the exercise of these freedoms "may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society" in order to protect various public and private interests. The respondent state must establish that any restriction: (1) is "prescribed by law", (2) has a legitimate aim (namely, one of those enumerated in paragraph 2), and (3) is "necessary in a democratic society" to promote that aim.²²

2.6 COMPARISON OF THE PROTECTIONS AFFORDED BY THE HUMAN RIGHTS TREATIES AND INSTRUMENTS

2.6.1 General Obligations

Upon ratifying any of the four human rights treaties discussed above (the International Covenant, the American Convention, the African Charter and the European Convention) states parties accept two kinds of obligations: (1) to adopt such legislative or other measures as may be necessary to give effect to the rights protected by the treaty, and (2) to remedy violations of those rights. Thus, Article 2 of the International Covenant states in relevant part:

2. Where not already provided for by existing legislative or other measures, each State Party ... undertakes ... to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

¹⁸ E.g., *Society for the Protection of Unborn Children (SPUC) v. Grogan*, Case No. C-159/90 [1991] 3 CMLR 849, in particular the opinion of Advocate General Van Gerven at paras. 30-31.

¹⁹ See D McGoldrick, *The Human Rights Committee* (Oxford: Clarendon Press, 1991).

²⁰ E.g., in the *Compulsory Membership of a Journalists' Association* case (note 10 supra), the Inter-American Court of Human Rights ruled that a restriction on freedom of expression, to be "necessary" within the meaning of Art. 13(2) of the ACHR, had to comply with the test of necessity articulated by the European Court concerning Art. 10(2) of the ECHR. See Section 5.1 infra.

²¹ E.g., *DPP v. Mootoocarpn*, SC, Mauritius, Judgment of 21 Dec. 1988, in [1989] LRC (Const.), 768, citing *The Sunday Times v. United Kingdom*. See A Lester, "Freedom of Expression" in R Macdonald, F Mather & H Petzold (eds.), *The European System for the Protection of Human Rights* (The Hague, 1993).

²² *The Observer and Guardian v. the United Kingdom (Spycatcher case)*, at para. 59(a); *The Sunday Times (II)*, (companion *Spycatcher* case). For an expanded discussion of this three-part requirement see Section 5.1 infra.

3. Each State Party undertakes:

- a. To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- b. To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system ... ;
- c. To ensure that the competent authorities shall enforce such remedies when granted.

Article 2 of the American Convention requires the adoption of legislative or other measures in similar language. Although the American Convention does not have a provision spelling out the right to an effective remedy in as great detail as Article 2(3) of the International Covenant, Article 1 requires states parties "to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms".

The European Convention has been construed to impose the dual obligation to adopt legislative or other necessary measures and to provide an effective remedy, which receives reinforcement through mechanisms of the European Commission and Court.

The dual obligation is set forth in abbreviated form in Article 1 of the African Charter, which provides that states parties "shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them." There has been little discussion of the extent of the obligations imposed by Article 1; in the absence of authoritative statements to the contrary, advocates should urge that the dual obligation under the African Charter is as compelling as under the other treaties.

2.6.2 Right to Hold Opinions Without Interference

Both the Universal Declaration of Human Rights and the International Covenant declare that the right to freedom of expression includes the right "to hold opinions without interference". Although neither the American Convention nor the European Convention contain similar language, they are generally understood also to protect absolutely the right to hold, as contrasted with the right to express, opinions. The African Charter does not explicitly protect the freedom to hold opinions without interference.

2.6.3 Right to Seek, Receive and Impart Information and Ideas

The Universal Declaration, the International Covenant and the American Convention all protect the right "to seek, receive and impart information and ideas". The European Convention does not expressly protect the right to "seek" information and ideas, but is widely assumed to protect this right implicitly. The African Charter does not expressly protect the right to impart information or to

receive opinions and ideas, but discussions of the African Commission suggest that these rights may be implicitly protected.

2.6.4 Kinds of Information and Ideas Protected

The protection of the International Covenant and the American Convention extends to information and ideas "of all kinds ... [expressed] either orally, in writing or in print, in the form of art, or through any other media", whereas Article 10 of the European Convention, by its terms, protects only "information and ideas" and states that it does "not prevent States from requiring the licensing of broadcasting, television or cinema enterprises". However, it is widely accepted that the European Convention's protection includes the concepts expressly included in the International Covenant and the American Convention.

The European Court of Human Rights has applied Article 10's protection to expressions made orally, in writing and in print, and has referred to Article 19(2) of the International Covenant in supporting its conclusion that the European Convention protects artistic expression.²³ The European Court has also referred to the text and drafting history of Article 19 to support its conclusion that the European Convention fully protects the *content* of broadcasts, and permits regulation only of its technical aspects.²⁴

2.6.5 Permissible Grounds for Restrictions

The Universal Declaration, International Covenant, American Convention and African Charter all set forth essentially the same three-part test for determining the legitimacy of restrictions on freedom of expression: (1) any restriction must be provided by law; (2) it must serve one of the legitimate purposes expressly enumerated in their texts; and (3) it must be necessary.²⁵ The grounds for permissible restriction under the African Charter are formulated differently (though they may well be interpreted to impose similar requirements in practice) and are discussed in Section 2.3 *supra*.

There is some variation among the Universal Declaration, International Covenant, American Convention and European Convention concerning the legitimate purposes for which a freedom may be restricted. Article 29 of the Universal Declaration permits restrictions to freedom of expression (and other substantive rights) only to secure "due recognition and respect for the rights and freedoms of others and ... the just requirements of morality, public order (meaning the absence of breaches of the peace) and the general welfare". The International Covenant is somewhat more detailed, permitting restrictions to protect "the rights or reputations of others", national security (assumed to be implicit in the Universal Declaration), "*ordre public*" (which in addition to public order includes the general welfare and even public policy), and "public health or morals".

The American Convention follows the language of the International Covenant except that it adopts the term "public order" rather than the broader "*ordre public*". The European Convention also avoids the term "*ordre public*" and uses instead the more specific phrase, "the prevention of

²³ *Müller v. Switzerland*, at para. 27.

²⁴ *Groppera Radio A G & Ors v. Switzerland*, at para. 61. See Section 4.6 *infra*.

²⁵ This test is elaborated upon in Section 5.1 *infra*.

disorder or crime". In addition to the other restrictions stated in the International Covenant and American Convention, the European Convention includes restrictions necessary to protect "territorial integrity or public safety", the confidentiality "of information received in confidence", and "the authority or impartiality of the judiciary".

2.6.6 Permissible Restrictions on Freedom of Assembly and Association

The four human rights treaties state the rights to freedom of peaceful assembly and association, and permissible limitations, in similar terms.

Article 21 of the International Covenant guarantees the right to peaceful assembly and Article 22 protects freedom of association. Both prohibit restrictions except where: (1) imposed in conformity with the law; and (2) "necessary in a democratic society" in the interests of "national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others". The list of restrictions differs from those which may be imposed on freedom of expression only in that "public safety" has been added, and "the rights and freedoms of others" has been substituted for "the rights or reputations of others".

Articles 15 and 16 of the American Convention guarantee the rights to peaceful assembly and freedom of association. Article 16(1) is unusual in that it expressly protects freedom of association "for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes." Permissible restrictions are the same as those which may be imposed on expression except that, like the International Covenant clauses, they include public safety and substitute the "rights and freedoms of others" for the "rights or reputations of others". It is noteworthy too that the American Convention does not use the term *ordre public* but rather only the narrower term "public order".

The International Covenant, the American Convention and the European Convention all make clear that their protections of freedom of association do not bar the imposition of "lawful restrictions" on the exercise of the freedom by members of the armed forces and police. The clauses have been interpreted as allowing governments to prohibit strikes within these professions and to impose other restrictions which would not be considered "necessary" if imposed against others. The European Convention extends the proviso to the freedom of assembly as well as association, and to include "the administration of the State" as well as the police and armed forces. The American Convention goes so far as to permit the *destruction* of the freedom of association of these professions.

The African Charter is unusual in several respects. First, the permissible restrictions on freedom of association are stated in terms different from those on freedom of assembly. While freedom of association is subject only to the general duties and restrictions imposed by Articles 27, 28 and 29, freedom of assembly may also be restricted, when necessary and provided for by law, "in the interest of national security, the safety, health, ethics and rights and freedoms of others." Second, the list of permissible restrictions differs from those in the three other treaties: the safety and health to be protected are not those of an amorphous "public" but are of "individuals" (possibly making the African Charter's restrictions narrower in this sense than those of the other treaties); and the list includes the "ethics of others" rather than "public morals". Third, members of the police and armed forces are not expressly subject to greater restrictions. Fourth, and perhaps most importantly, Article 10(2) expressly provides that, subject to the Charter's obligation of solidarity, "no one may be compelled to join an association". This protection is included in the Universal Declaration but was left out of the three other treaties.

2.6.7 Relation Between the Right to Freedom of Expression and Other Treaty Rights

The right to freedom of expression protected by the four human rights treaties considered here must be read in light of the treaties as a whole. Thus, the scope of the right is limited by some provisions (in addition to those set forth in the articulation of the right itself), and expanded by others.

Freedom of expression may be limited by the right to a fair judicial hearing;²⁶ the right to privacy;²⁷ and provisions which permit derogations from the right to freedom of expression, in time of war or other public emergency, but only to the extent strictly required by the exigencies of the situation.²⁸

All four of the treaties have provisions which permit restrictions on freedoms when exercised for the purpose of destroying or unlawfully limiting the treaty rights or freedoms of others.²⁹

The European Convention has a provision, not found in the other treaties, which authorizes states parties to impose restrictions on the political activity of aliens regardless of whether such restrictions otherwise would violate their rights to freedom of expression, association or assembly or the equal enjoyment of those rights.³⁰

In addition, the International Covenant and the American Convention also require, and the European Convention permits, restrictions on the advocacy of national, racial and religious hatred.³¹

Freedom of expression is *extended* by the prohibition of discrimination in all four of the treaties. Thus states parties are bound to ensure the rights recognized by the treaty without discrimination on *any* ground.³²

Several rights are associated with freedom of expression. The rights to freedom of peaceful assembly and association³³ are closely related, especially to freedom of political expression. In the two freedom of assembly cases decided by the European Court, the Court addressed the freedom of

²⁶ See Art. 14 of the ICCPR, Art. 8 of the ACHR, Art. 7 of the ACHPR, and Art. 6 of the ECHR. See also Section 7.6 *infra*.

²⁷ See Art. 17 of the ICCPR, Art. 11 of the ACHR, and Art. 8 of the ECHR. There is no corresponding provision of the African Charter. See also Section 7.2 *infra*.

²⁸ See Art. 4 of the ICCPR, Art. 27 of the ACHR and Art. 15 of the ECHR.

²⁹ See Art. 5 of the ICCPR, Art. 29 of the ACHR, Art. 17 of the ECHR, Arts. 27 and 28 of the ACHPR, and Section 7.4 *infra*.

³⁰ See Section 4.15.1 *infra*.

³¹ See Section 7.4 *infra*.

³² See Art. 2 of the ICCPR, Art. 1 of the ACHR, Art. 2 of the ACHPR and Art. 14 of the ECHR.

³³ These rights are protected by Arts. 21 and 22 of the ICCPR, Arts. 15 and 16 of the ACHR, Arts. 10 and 11 of the ACHPR, and Art. 11 of the ECHR.

expression and assembly issues together, and most of the doctrines developed in relation to Article 10 of the European Convention are applicable to Article 11 as well.³⁴

Also related is the right to use one's own language³⁵ and the right to participate in genuine and periodic elections. The latter right is discussed in this handbook in the context of the right of opposition parties to have access to government-controlled media during campaign periods.³⁶

Other related rights - which lie beyond the scope of this handbook - include the right to respect for the confidentiality of correspondence³⁷ and telephone conversations³⁸; freedom of thought, conscience and religion; and the right to engage in trade union activity.

2.7 EUROPEAN COMMUNITY

The Treaty of Rome, concluded in 1957, is the foundation of the European Community. Neither it, nor any secondary legislation made under it, confers on individuals the right to freedom of expression.

However, certain Treaty provisions, particularly those relating to the free movement of goods, services and persons may indirectly protect the right to freedom of expression (particularly relating to commercial speech) insofar as such a right is a necessary corollary to the exercise of those freedoms.

Fundamental rights and freedoms, including freedom of expression, form an integral part of Community law which the European Court of Justice (ECJ) will uphold.³⁹ The European Convention on Human Rights, to which all 12 EC members are party, is of particular significance. However, while the ECJ will apply fundamental rights in assessing national measures that implement community legislation,⁴⁰ it will not interfere where the measure challenged as incompatible with the European Convention is a matter of purely national law⁴¹ or does not in some way implicate commercial activity.⁴²

³⁴ See Sections 4.13 and 4.14 *infra*.

³⁵ See Section 4.11 *infra*.

³⁶ See Sections 4.2.2 and 4.2.3 *infra*.

³⁷ See, e.g., *Silver and Others v. United Kingdom*, Judgment of 25 March 1983, Series A no. 61.

³⁸ See, for example, *Malone v. United Kingdom*, Judgment of 2 Aug. 1984, Series A no. 82.

³⁹ *Nold v. EC Commission*, Case No. 4/73, 1974 ECR 491.

⁴⁰ E.g., *Wachauf v. Germany*, Case No. 5/88, 1989 ECR 2609.

⁴¹ *Cinéthèque S.A. v. Fédération Nationale des Cinémas Français*, Case Nos 60-61/84, 1986 1 CMLR 365.

⁴² *SPUC v. Grogan*, note 18 *supra*.

The free movement of goods is assured by Articles 30-36 of the Treaty. In essence, these provisions prohibit member states from introducing or maintaining any quantitative restrictions or measures on the import or export of goods in free circulation within the Community. Article 36, however, permits prohibitions or restrictions on grounds, *inter alia*, of public morality, public policy or public security, so long as such prohibitions or restrictions do not constitute a means of arbitrary discrimination or a disguised restriction on trade between member states. In addition, the ECJ has developed the doctrine of a "rule of reason" or "mandatory requirements" under which such prohibitions or restrictions may be imposed on a number of specific grounds of which consumer protection is perhaps the most relevant.

Thus, subject to the exceptions mentioned above, a member state may not restrict the import or export of published materials or of news or other information by electronic means (such as provided by news agencies). Special rules apply in relation to broadcasting.

The rules governing the free movement of services, set out in Articles 59-66, concern the right to provide services from one member state to another and the right of citizens to move across borders to receive services. As the jurisprudence of the ECJ has made clear, ancillary to those rights are the rights of the service provider to provide information and the right of the consumer to receive information about those services. Therefore, unless a restriction on the giving or receiving of such information may be justified on grounds of imperative public interest (Articles 56 and 66) or on grounds that the activity is connected with the exercise of official authority (Article 55), it would be contrary to Community law. However, only the service provider or its agents have a right under Community law to disseminate information about its services; Community law essentially is limited to activities that have a commercial aspect. Thus, in a case concerning Ireland's ban on the provision of information by counselling centres about where to obtain lawful abortions in Great Britain, the ECJ ruled that EC law did not apply because the Irish centres did not have any commercial ties with the British clinics.⁴³

Articles 48-51 of the Treaty guarantee the free movement of workers (excluding those employed in the public services), and Articles 52-58 (right of establishment) ensure that citizens of the Community have the right to take up and pursue activities in any member state. These rights may be prohibited or restricted only on grounds of imperative public interest or exercise of official authority. Thus, for example, a member state may not prohibit a company from establishing a newspaper with the specific purpose of attacking government policy, unless it can justify the restriction on one of the two permissible exceptions.

The Single European Act⁴⁴ was signed by the 12 member states in 1986 for the purpose of eliminating remaining barriers to the single internal market by 31 December 1992.

The member states signed the Treaty on European Unity at Maastricht (the "Maastricht Treaty") in December 1991. The Treaty, once ratified by all member states, will enlarge the scope of

⁴³ Id. In a parallel case brought under the European Convention, however, the European Court of Human Rights ruled that Ireland's ban violated the right of women of child-bearing age to receive information and the right of counselling centres and counsellors to impart information. *Open Door Counselling and Dublin Well Woman Centre v. Ireland*, Judgment of 29 Oct. 1992, Series A no 246, discussed in Sections 4.12 and 7.9 *infra*.

⁴⁴ OJ 1987, L 1.

Community competence and increase the European Parliament's powers. It pledges the member states to full economic and monetary union, including the creation of a single currency by 1 January 1999, and to the development of a common foreign and security policy with a view to the eventual creation of a common defence policy.

Article F of Title I of the Maastricht Treaty acknowledges the Community's commitment to fundamental human rights: "The Union shall respect fundamental rights, as guaranteed by the European Convention on Human Rights ... and as they result from the constitutional traditions common to the Member states as general principles of Community law."⁴⁵

2.8 CONFERENCE ON SECURITY AND COOPERATION IN EUROPE

In 1975, representatives from 35 countries participated in the Conference on Security and Cooperation in Europe (CSCE) and signed the Helsinki Final Act of 1975. The 35 included all of the countries of Europe except Albania, as well as Canada, the United States and the Soviet Union. Since 1991, Albania, Croatia, Slovenia, and the independent states of the former Soviet Union have also joined.⁴⁶

The Helsinki Final Act and subsequent CSCE documents are political declarations, not treaties; although they are thus not legally binding, this does not deprive them of all legal significance.⁴⁷ In practical terms, the political and moral strength of their obligations may be even more important than their precise legal status.⁴⁸

The Helsinki Final Act includes four "baskets" of promises, of which Basket III is of greatest relevance to human rights. One of Basket III's sections, titled "Information", calls for improvement in the free flow of information across borders in the print, cinema and broadcasting media. Little progress was made in expanding human rights protections until the advent of *perestroika*.

In the Vienna Concluding Document issued in January 1989, the participating states declared their commitment to "make further efforts to facilitate the freer and wider dissemination of information of all kinds, to encourage co-operation in the field of information and to improve the working conditions for journalists." They further declared their commitment, in accordance with the International Covenant and the Universal Declaration, to "ensure that individuals can freely choose their sources of information".⁴⁹

⁴⁵ [1992] 1 CMLR 719.

⁴⁶ A list of the current members of the CSCE is included in Appendix B.

⁴⁷ See J A Frowein, "The Interrelationship between the Helsinki Final Act, the International Covenants on Human Rights and the European Convention on Human Rights", in T Buergenthal (ed.), *Human Rights, International Law and the Helsinki Accord* (New York: Monclair, 1977), 71.

⁴⁸ P Malanczuk, "Freedom of Information and Communication: Recent Developments in the Helsinki Process", in 3 *Hague Yearbook of Int'l Law* (1990), 89, 97.

⁴⁹ Vienna Concluding Document, para. 34.

Moreover, the Document reflects dramatic progress on the contentious question of the right of states to jam incoming radio and television broadcasts. Whereas, formerly, leaders of the Soviet Union had insisted on the right to jam broadcasts as an aspect of their sovereignty, the Vienna Document requires the participating states to "ensure that radio services operating in accordance with the ITU Radio Regulations can be directly and normally received in their states". While the provision does not expressly prohibit jamming, that has been its effect and indeed was its intent.

The Conference on the Human Dimension (CHD), which took place in Copenhagen in June 1990, produced a document of considerable significance for human rights generally. In particular, the participating states agreed to ensure that any restrictions on fundamental rights and freedoms must be provided by law and ... consistent with their obligations under international law, in particular the International Covenant on Civil and Political Rights, and with their international commitments, in particular the Universal Declaration of Human Rights. ... Any restriction on rights and freedoms must, in a democratic society, relate to one of the objectives of the applicable law and be strictly proportionate to the aim of that law.⁵⁰

Importantly, the above language parallels the three-part test for restrictions articulated by the European Court of Human Rights (legality, legitimacy of purpose, and proportionality). In addition, the participating states expressly recognized the "important expertise" of the Council of Europe in the area of human rights and invited consideration of ways in which the Council might contribute to the "human dimension of the CSCE".⁵¹

In the Copenhagen Document, the participating states also accepted a statement of the right to freedom of expression which closely parallels Article 10 of the European Convention.⁵² The Document of the October 1991 Moscow Meeting of the Conference on the Human Dimension reaffirmed and further elaborated this standard by acknowledging "the right of the media to collect, report and disseminate information, news and opinion".⁵³

At the Copenhagen meeting, along with the clear recognition of the right to freedom of expression consistent with international standards, the participating states also committed themselves to combat advocacy of national, racial and religious hatred in all its forms. Until the Copenhagen meeting, this subject had only been raised by Western delegates in regard to anti-Semitism in the former Soviet Union. The new concern reflected the serious threat that rising racism, xenophobia and ethnic hatred posed to the goals of security and co-operation throughout the new Europe. The participating states declared their firm intention to intensify their efforts to combat "totalitarianism, racial and ethnic hatred, anti-Semitism, xenophobia and discrimination against anyone". They furthermore committed themselves to "promote understanding and tolerance", "provide protection against any acts that constitute incitement to violence" and "recognize the right of individuals to effective remedies".

⁵⁰ Copenhagen Document of the Conference on the Human Dimension, para. 24.

⁵¹ *Id.* at para. 28.

⁵² See Appendix A for text of para. 9.1.

⁵³ See Appendix A for text of para. 26.

It is interesting to note that, while this document goes further than the International Covenant, the European Convention or the American Convention in committing governments to take affirmative measures to combat racism and incitement to hatred, it shies away from the controversial provisions of the International Covenant and the American Convention which require the prohibition of incitement to hatred or discrimination not leading to violence.

CHAPTER 3

RELEVANCE OF INTERNATIONAL AND COMPARATIVE LAW IN NATIONAL COURTS

This chapter begins with a discussion of the three ways in which international law may be applied by national courts: as treaty law, as customary law and as an aid in construing national law. Section 3.2 offers information about the status of treaties in the national law of various countries, as well as illustrative cases in which courts have invoked international and comparative law. The cases are organized by legal tradition and/or human rights treaty. The chapter concludes with a few examples of the use by one international tribunal of the law of another.

3.1 THREE WAYS IN WHICH INTERNATIONAL LAW MAY BE APPLIED BY NATIONAL COURTS¹

Advocates may urge national courts to apply international freedom of expression law pursuant to any of three theories. First, if the country is a party to a treaty which protects freedom of expression, and if the treaty is deemed to be part of domestic law, then the advocate may call on the national court to apply the treaty directly. Second, the court may be requested to apply provisions of the Universal Declaration of Human Rights, either as reflective of customary international law binding on all nations or else as an authoritative interpretation of the human rights clauses of the UN Charter. Third, the advocate may draw to the court's attention pertinent international and comparative law and urge the court to consider these sources in construing provisions of national law.

"Direct incorporation" of international law into national law pursuant to the first two theories results in international law that binds courts. For that reason, direct incorporation may appear more powerful than the third theory, "indirect incorporation", which leaves application of international law wholly to the court's discretion. Various rules of interpretation and application, however, often create substantial obstacles to direct incorporation.

3.1.1 Treaty Law²

A court will consider applying a treaty provision only if the treaty has been made part of domestic law. In some countries, international law and national law are regarded as entirely separate legal systems (called a "dualist" approach); courts in such systems may apply treaties (or customary norms) directly only when they have been "transformed" or "incorporated" into domestic law, usually by act of the legislature. In other countries, which follow a "monist" approach, international law is part of national law.

¹ For further elaboration of the role of international law in national law see S Coliver and F Newman, "Using International Human Rights Law to Influence US Foreign Population Policy", 20 *New York U J of Int'l L & Politics* (1987) 53; R Lillich, "Invoking International Human Rights Law in Domestic Courts", 54 *Cin L Rev* (1985) 367. See also Bangalore Principles in Appendix C.

² See generally, F G Jacobs and S Roberts, *The Effect of Treaties in Domestic Law* (London: Sweet & Maxwell, 1987).

In most monist countries, courts will apply treaty provisions only if they are deemed to be "self-executing". To be self-executing, a treaty must (a) reflect either by its language or its drafting history that its clauses are intended to be directly applicable in domestic courts, and (b) impose obligations which are specific, mandatory and capable of implementation without further acts of the legislature.³ The civil and political rights clauses of the main human rights treaties are widely accepted to be self-executing.⁴

Whether a treaty becomes part of national law automatically or through express incorporation makes little difference in the way it is applied. More significant is the status of treaties *vis-à-vis* the constitution and statutes, and whether the courts may invalidate constitutional or statutory provisions that violate a treaty. Thus, in some countries, treaties are accorded constitutional status (*e.g.*, Austria); in some they are inferior to the Constitution but superior to all ordinary law, including statutes enacted subsequent to the treaty's entry into national law (*e.g.*, Argentina, Belgium, France, Luxembourg, Netherlands, Spain and Switzerland); and in some they are of equal status with ordinary law, and thus subject to the normal rules concerning conflict of laws (*e.g.*, Brazil, Germany, Italy, the US).

The American Convention has been made part of national law by several Latin American countries. At least 17 countries consider the European Convention to be part of their domestic law⁵, and many of those have also incorporated the International Covenant. The International Covenant is part of the law of some civil law countries in Asia. However, to our knowledge, no African court has applied a clause of the African Charter or the International Covenant as binding law, and human rights treaties are not directly enforceable in the courts of most common law and many civil law countries. In countries where treaties are not directly enforceable by the courts, their provisions may nonetheless provide persuasive guidance in construing provisions of national law (as discussed in Section 3.1.3 *infra*).

3.1.2 Customary International Law

Customary international law, including the "general principles" of international law, is part of the domestic law of most countries. Customary international law is like common law in that it is unwritten, but is different in at least two significant respects: (1) customary international law is made by the actions (including diplomatic declarations) of states rather than being "discovered" by judges; and (2) customary law is constantly growing as more norms achieve international consensus, while common law shrinks with the enactment of each new statute. The attractiveness of an argument based on customary international law is that a customary norm binds all governments, including those that have not recognized it and even those that have not ratified any human rights treaties, so long as they have not expressly and persistently objected to the norm's development.⁶

³ S Riesenfeld & F M Abbott, "Foreword: Parliamentary Participation", 67 *Chicago-Kent L Rev* (1991) 293, 295.

⁴ The US government does not follow this majority trend. See discussion of status of international law in US law, Section 3.2.1 *infra*.

⁵ See Section 3.2.2 *infra* for a list of the 17 countries.

⁶ *North Sea Continental Shelf (FRG v. Denmark; FRG v. Netherlands)*, 1969 International Court of Justice 3, 41-44 (20 Feb. 1969).

There are, however, two significant problems that confront lawyers who seek to assert freedom of expression claims based on this theory.

First, most countries that recognize customary international law as part of their national law consider that it is pre-empted by subsequent legislation, and sometimes even by executive acts.⁷ Second, only the most widely accepted principles of freedom of expression law - such as that people should not be imprisoned for the peaceful expression of their beliefs - may be considered customary norms. Customary norms traditionally have emerged from consistent state practice followed from a sense of legal obligation.⁸ While unanimous acquiescence is not required, the practice must at least be widespread.⁹ Quite often there are disagreements as to the scope of a customary norm as well as the point at which it ripened into binding law.

On the other hand, government practice in negotiating and approving international instruments, especially in the human rights field, has been accorded an increasingly important role in the development of customary law.¹⁰ Moreover, it is well accepted that governments must apply new norms as they arise.¹¹ Thus, Articles 19 and 20 of the Universal Declaration (on freedom of expression, peaceful assembly and association) are generally accepted to be declaratory of customary norms, and an advocate could credibly argue that widespread acceptance of the treaties and other instruments discussed in Chapter 2 has fleshed out the content of those norms, at least regarding areas where the main human rights treaties offer comparable protections.

3.1.3 Aid in Construing National Law

While lawyers in some countries may be successful in urging a court to apply international law as treaty or customary law, most will be well-advised to concentrate on "indirect incorporation". This method is more likely to be acceptable to judges in most countries and often has as great an impact on interpretation of relevant law as would direct incorporation. As long as a judge is willing to apply international law principles, the theory of incorporation makes little if any practical difference. Most courts that have applied human rights provisions of international instruments have done so as a means of interpreting national law rather than as directly binding law.

Courts have been particularly receptive to international law arguments where the national constitution was modelled in relevant part on an international instrument or where the government is party to one of the human rights treaties. As discussed below, many Commonwealth countries have modelled their constitutions on the European Convention and/or the Universal Declaration (including Canada, Cyprus, The Gambia, Hong Kong, Malta, Mauritius, Nigeria, Singapore, most

⁷ However, many of them apply the principle that a statute or executive act should be construed, wherever possible, to be consistent with customary law. See, e.g., Lord Denning's opinion in *Trendtex Trading Corp. v. Central Bank of Nigeria* [1977] QB 529, 554 (CA).

⁸ *North Sea Continental Shelf*, note 6 supra at 44.

⁹ *Id.* at 41; and I Brownlie, *Principles of Public International Law* (4th edn, 1990), 6-7.

¹⁰ S Coliver & F Newman, note 1 supra at 70. Strong support for this view is supplied by Art. 38(1)(c) of the Statute of the International Court of Justice, which directs the Court to apply "the general principles of law recognized by civilized nations".

¹¹ See *North Sea Continental Shelf*, note 6 supra.

Caribbean territories), and a few other countries based their fundamental rights provisions on the European Convention (*e.g.*, Spain) or African Charter (*e.g.*, Tanzania).

The following comments by a US state supreme court judge provide some insights into the arguments judges are likely to find most persuasive in supporting the applicability of international law:¹²

It is potentially a powerful argument to say to a court that a right which is guaranteed by a ... constitutional provision ... surely does not fall short of a standard adopted by other civilized nations.

It is a much more difficult, and riskier, argument to tell a court that it must displace some law of a state ... with an external international standard.

A lawyer considering the use of international human rights law in a national court ... must consider carefully whether he or she means to claim the international document as a source of standards for the proper application of the nation's own law, or as a source of legally binding obligations. A lawyer must tell a court clearly whether he or she is asserting a claim under international law, or presenting an international norm in support of a desired interpretation of ... domestic law.

To point to the international standard as a goal or an achievement to be matched may prove very successful. To point to it as an external law to be obeyed may backfire. It may backfire because, unless the legally binding nature of the international source is clear and strong, opposing counsel and the court may give more time and attention to refuting the claim that the international source has binding force than to looking at the substance of the human rights in question. ...

If ... you argue that a court should look to international instruments to assist it in interpreting a domestic statute or constitution, then you are asking the court to do what it is empowered to do and using international law in the process. Moreover, an advocate wishing to invoke international human rights norms reasonably could argue that an applicable domestic law already contains the protections that the claimant contends, but that, if the court were not to accept this view, then the court might well find itself running afoul of national policy as expressed by the ... government through its participation in international human rights activities and declarations.

3.2 USE OF INTERNATIONAL AND COMPARATIVE LAW BY NATIONAL COURTS

3.2.1 Common Law Jurisdictions

Privy Council

The Judicial Committee of the Privy Council and other courts in the Commonwealth have looked to the European Convention, the International Covenant and the Universal Declaration in interpreting

¹² H Linde, "Comments", 18 *Int'l Lawyer* (1984), 77. Justice Linde of the Oregon State Supreme Court authored the majority opinion in *Sterling v. Cupp*, 290 Or 611 (1981), in which he interpreted a provision of Oregon's Constitution so as to be consistent with the international obligations of the US.

constitutional protections of fundamental rights. As noted by Lord Wilberforce, writing for the Judicial Committee of the Privy Council in *Minister of Home Affairs v. Fisher*, reference to these principles is particularly appropriate in construing constitutional clauses "which are drafted in a broad and ample style which lays down principles of width and generality" and/or which were influenced in their drafting by a human rights treaty or declaration. He noted that many of the post-British colonial constitutions, including those of most Caribbean countries, fall into this category. In construing the chapter on fundamental rights and freedoms of the Bermuda Constitution, he observed:

[T]his Chapter, as similar portions of other constitutional instruments drafted in the post colonial period, starting with the Constitution of Nigeria, and including the constitutions of most Caribbean territories, was greatly influenced by the European Convention for the Protection of Fundamental Rights and Freedoms (1953). That Convention was ... in turn influenced by the Universal Declaration of Human Rights of 1948. These antecedents, and the form of Chapter 1 itself, call for a generous interpretation avoiding what has been called the 'austerity of tabulated legalism' suitable to give to individuals the full measure of the fundamental rights and freedoms referred to.¹³

In subsequent cases the Privy Council affirmed Lord Wilberforce's reasoning, observing that the same broad interpretation should be given to the fundamental rights clauses of the constitutions of the Republic of Singapore,¹⁴ Mauritius¹⁵ and The Gambia¹⁶. Thus, regarding the Constitution of The Gambia, the Privy Council stated that the fundamental rights clauses should be given "a generous and purposive construction."¹⁷

Australia

The High Court of Australia (the highest court) has declared that Australia's accession to the First Optional Protocol to the International Covenant on Civil and Political Rights

brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence

¹³ *Minister of Home Affairs v. Fisher* [1980] AC 319, 329 (PC). The Privy Council, called upon to decide the rights of the natural mother to remove her child from the wardship of the court, construed Bermuda's constitutional protection of the family to be consistent with Art. 8 of the European Convention and Art. 24 of the International Covenant (protecting private and family life).

¹⁴ *Ong Ah Chuan v. Public Prosecutor* [1981] AC 648 (PC).

¹⁵ *Société Union Docks and Ors v. Government of Mauritius* [1985] AC 585, 605 (per Lord Templeman).

¹⁶ *Attorney-General of The Gambia v. Momodou Jode* [1984] AC 689, 700 (per Lord Diplock).

¹⁷ *Id.* These Privy Council and other cases are discussed at greater length in an excellent article by A Lester, "Freedom of Expression: Relevant International Principles" in *Developing Human Rights Jurisprudence: The Domestic Application of International Human Rights Norms* (Commonwealth Secretariat, 1988).

on the development of the common law, especially when international law declares the existence of universal human rights.¹⁸

The Court was called upon to apply Australia's common law tradition of refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies. In refusing to apply the common law, the Court stated that this doctrine was contrary to international standards as well as to the fundamental anti-discrimination values of the common law.

The High Court of Australia cited Article 10 of the European Convention and decisions from the US, Canada, South Africa and a number of other jurisdictions in ruling that Australia's constitutional guarantee of representative government implicitly protects freedom of political communication.¹⁹

Canada

While duly ratified treaties do not automatically become part of Canadian law, the Supreme Court has emphasized that the Canadian Charter of Rights and Freedoms should generally be presumed to provide protection at least as great as that afforded by similar provisions of international human rights treaties ratified by the government:

Canada is a party to a number of international human rights conventions which contain provisions similar or identical to those in the Charter. Canada has thus obliged itself internationally to ensure within its borders the protection of certain fundamental rights and freedoms which are contained in the Charter. The general principles of constitutional interpretation require that these international obligations be a relevant and persuasive factor in Charter interpretation. ... The content of Canada's international human rights obligations is, in my view, an important *indicia* of the meaning of the 'full benefit of the Charter's protection.' I believe that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.²⁰

The Human Rights Law Section of the Department of Justice is charged with ensuring that Canadian laws, both federal and provincial, are consistent with the International Covenant and other international obligations, and Canadian courts often cite the Covenant as providing guidance in construing corresponding rights in the Charter. For example, the Canadian Supreme Court cited Article 20 of the International Covenant in deciding the compatibility with the Charter of a statute

¹⁸ *Mabo v. Queensland* (1992) 66 ALJR 408.

¹⁹ *Australian Capital Television Pty Ltd v. The Commonwealth; New South Wales v. The Commonwealth* (No. 2) (1992) 66 ALJR 695, 30 Sept. 1992. For further discussion of these cases, see Sections 4.2.1 and 4.2.3 *infra*.

²⁰ *Re. Public Service Employee Relations Act* (1987) 1 SCR 313, 350 (per Dickson CJ, dissenting). Although Chief Justice Dickson dissented on the merits of the case, the Court has followed his statement of the role of international human rights treaties in interpreting the Charter.

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prohibiting racist speech,²¹ and a lower court relied on Article 19 of the International Covenant in interpreting the Charter's right to freedom of expression and information.²²

Cyprus

Having attained independence from the UK in 1960, Cyprus ratified the European Convention in 1962, and the legislature promptly incorporated it into domestic law. The Convention is superior to all statutes, whether prior or subsequent, but is inferior to the Constitution.²³ Cyprus accepted the right of individual petition to the European Commission only in January 1989. Because many of the fundamental rights protections of the Constitution were based on the Convention, the Supreme Court has often referred to the Convention as an aid in construing constitutional protections.²⁴

Hong Kong

The Hong Kong Court of Appeal held that Article 19 of the International Covenant governed the proper approach for determining whether to restrain a newspaper's freedom of expression. The case involved contempt proceedings brought by the Attorney-General against the defendants for publishing material which allegedly prejudiced the fair trial rights of a criminal defendant. Among the grounds relied on by the newspaper was the freedom of expression provision (Article 16) of Hong Kong's Bill of Rights, which is modelled on Article 19 of the International Covenant.²⁵

India

The Supreme Court has ruled that, although national courts are not bound by human rights treaties ratified by India, they should nevertheless construe domestic law in accordance with the state's obligations under such treaties whenever a doubt concerning a statute's interpretation arises. The Court stressed the need for harmonization whenever possible, especially in light of the fact that the fundamental civil and political rights guaranteed by the Indian Constitution broadly follow the rights set forth in the International Covenant.²⁶ The Court has frequently cited international law and jurisprudence with approval.²⁷

Malaysia

²¹ *R v. Andrews* [1988] 43 CCC (3d) 193.

²² *International Fund for Animal Welfare Inc. v. Canada (Minister of Fisheries and Oceans)* [1986] 5FTR 193 (TD), reviewed on other grounds, [1989] 1 FC 335, 19 FTR 159.

²³ Constitution, Art. 25. See *Mallachtou, Toulla Y v. Christodolous Arnefti*, Cypriot Supreme Court, Judgment of 20 Jan. 1987, summarized in 14 *Common L Bull* (1989), 50.

²⁴ J Polakiewicz & V Jacob-Folzer, "The European Human Rights Convention in Domestic Law: The Impact of Strasbourg Case-Law in States where Direct Effect is Given to the Convention", 12 *Human Rights L J* (1991), 65, 73. See also Section 7.6.2 *infra*.

²⁵ *Attorney-General v. South China Morning Post*, CA, 8 Sept. 1987.

²⁶ *Jolly George Verghese v. Bank of Cochin*, AIR [1980] SC 470; *Kubic Dariusz v. Union of India*, AIR [1990] SC 605.

²⁷ See, e.g., *Rangarajan v. Jagjivan Ram and Ors* (citing the European Court judgment in *Handyside*), discussed in Section 6.2.4 *infra*; *Hussainara Khatoon v. Home Secretary, State of Bihar*, AIR 1979 SC 1369 (referring to the ECHR to assist in determining the requirements of a speedy trial under India's Constitution); *State of Madras v. VG Row*, 1952 SCR 597, 607.

The Federal Court of Malaysia, citing Lord Wilberforce's statement,²⁸ added that "a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way."²⁹

Malta

The European Convention was ratified in 1967, but was incorporated into domestic law by act of Parliament only in 1987. That act grants precedence to the Convention over ordinary legislation.³⁰ Malta acceded to the International Covenant in September 1990.

Mauritius

The Supreme Court of Mauritius has made clear that the European Convention and decisions of the European Court are relevant in construing national law.³¹ It noted that the chapter of the Constitution of Mauritius concerning fundamental rights and freedoms is modelled on the European Convention, and that in determining what "law" the courts of Mauritius should apply it was appropriate to consult the European Court's interpretation of the phrase "prescribed by law".

New Zealand

The Court of Appeal observed that "[e]ven though treaty obligations not implemented by legislation are not part of our domestic law, the courts, in interpreting legislation, will do their best comfortably with the subject matter and policy of the legislation to see that their decisions are consistent with our international obligations."³²

Nigeria

The Supreme Court of Nigeria, noting that treaties are not the law of the land, nevertheless invoked international law as an interpretative guide in construing the common law of diplomatic immunity.³³ A High Court judge remarked: "In as much as and for as long as the Federal Government of Nigeria remains... [committed to] the Universal Declaration of Human Rights, for so long would Nigerian courts protect and vindicate fundamental human rights entrenched in the Declaration."³⁴ Concerning the role of comparative law in construing constitutional guarantees of fundamental rights, the Supreme Court has expressly noted the relevance of "decisions in other

²⁸ See *Minister of Home Affairs v. Fisher*, note 13 supra.

²⁹ *Dato Menteri Othman bin Baginda v. Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29, 32B (per Raja Azlan Shah Ag LP).

³⁰ European Convention Act of 19 Aug. 1987, Art. 3(1).

³¹ *DPP v. Mootoocarp* [1989] LRC (Const) 768, 771 (Judgment of 21 Dec. 1988, per Glover CJ). For further discussion of this case, see Sections 5.2 and 7.6.3 infra.

³² *Huakina Development Trust v. Waikato Valley Authority and Ors* [1987] 2 NZLR 188, 229 (per Richardson, J).

³³ *African Reinsurance Corporation v. Gantaye* [1986] 3 NWLR 811. See Section 3.2.3 infra, for Nigerian decisions which refer to the African Charter.

³⁴ *Molokwu v. Commissioner of Police* (per Agbakoba J), reported in Chief Gani Fawehinmi (ed.), *Law of Habeas Corpus* (1986), 96.

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countries with similar constitutional provisions".³⁵ The Court has furthermore stated: "It is clear that a constitutional document must be interpreted not only broadly but also without the usual technical inhibition of the interpretation of ordinary statutes."³⁶

Papua New Guinea

The Supreme Court of Papua New Guinea referred to the judgments of courts in Bermuda, Canada and The Gambia and applied a test virtually identical to that set forth by the European Court in ruling that a law which prohibited private broadcasting for two years after a contract had been awarded violated the Constitution's guarantee of freedom of expression.³⁷

United Kingdom

Treaties do not become part of the law of the UK until they have been incorporated by Parliament. However, they may, and some judges have said that they should, be consulted as aids in interpreting ambiguous statutes, unsettled common law and judicial discretion.³⁸ If the terms of a statute, enacted after the UK's acceptance of a relevant treaty, are ambiguous and are "reasonably capable" of being construed so as to be consistent with the treaty, then the terms should be construed so as to carry out the treaty obligation.³⁹ On the other hand, if the terms of a statute "are clear and unambiguous they must be given effect to, whether or not they carry out Her Majesty's treaty obligations."⁴⁰ Moreover, simply because Parliament has conferred wide discretion on a Minister or an administrative body does not mean that the empowering legislation is vague; on the contrary, "to presume that [discretion] must be exercised within [European] Convention limits would be to go far beyond the resolution of an ambiguity."⁴¹

In the *Derbyshire County Council* case, the Court of Appeal of England ruled that the common law, where it is uncertain, should be interpreted to be consistent with human rights treaties even though these are not incorporated into national law. Lord Balcombe, delivering the leading opinion, stated:

Article 10 has not been incorporated into English domestic law. Nevertheless it may be resorted to in order to help resolve some uncertainty or ambiguity in municipal law. ... Thus (1) Article 10 may be used for the purpose of the resolution of an ambiguity in English primary or subordinate legislation. ... (2) Article 10 may be used when considering the principles upon which the court should act in exercising discretion,

³⁵ *Archbishop Okogie v. Attorney-General of Lagos State* [1981] 2 NCLR 337, 353.

³⁶ *Id.*

³⁷ *The State v. NTN Pty Ltd and NBN Ltd*, SC, 7 April 1987 (No. SC 323), 14 *Common L Bull* (1988), 45. See Section 4.6 *infra* for discussion of the merits of the case.

³⁸ E.g., *R v. Home Secretary, Ex parte Brind* [1991] 1 AC 696, per Lord Bridge of Harwich, 747-8, per Lord Roskill, 749-50, per Lord Ackner, 761; *Derbyshire County Council v. Times Newspapers Ltd* [1992] 3 All ER 65 (CA), per Lord Balcombe, affirmed 18 Feb. 1993, [1993] 2 WLR 449, per Lord Keith of Kinkel.

³⁹ *Garland v. British Rail* (1983) 2 AC 751, Lord Diplock 771.

⁴⁰ *Salomon v. Commissioners of Customs & Excise* [1967] 2 QB 116, per Lord Diplock, 143.

⁴¹ *R v. Secretary of State, Ex parte Brind* [1991] 1 AC 696, per Lord Bridge of Harwich, 747.

e.g., whether or not to grant an interlocutory injunction. ... (3) Article 10 may be used when the common law (by which I include the doctrine of equity) is uncertain. ... Even if the common law is certain the courts will still, when appropriate, consider whether the United Kingdom is in breach of Article 10.⁴²

Lord Balcombe noted that his discussion of Article 10 of the European Convention was equally applicable to Article 19 of the International Covenant. The Court, after considering case-law of the European Court and of US and South African courts, ruled that a local government body may not sue for libel for non-financial damage to its governing reputation.

In affirming the judgment, Lord Keith of Kinkel, writing for a unanimous Appellate Committee of the House of Lords, stated that "it was appropriate" for the Court of Appeal "to have regard to the Convention" in light of the fact that "the law of England was uncertain upon the issue lying at the heart of the case".⁴³ He approved "the balancing exercise requisite for purposes of Article 10 of the Convention" that the Court of Appeal conducted. He made clear, however, that the House of Lords did not need to rely upon the European Convention owing to the fact that "in the field of freedom of expression there [is] no difference in principle between English law on the subject and Article 10 of the Convention [T]he common law of England is consistent with the obligations assumed by the Crown under the treaty in this particular field."⁴⁴

The Court of Appeal, Civil Division (England and Wales) cited the relevance of Article 10 of the European Convention, even though not raised by any of the parties, in a case involving a challenge to a union's leafleting campaign to persuade supermarket customers not to buy a certain product. The Court stated that, in keeping with Article 10, "it is relevant to bear in mind that in all cases which involve a proposed restriction on the right of free speech the court is concerned, when exercising its discretion, to consider whether the suggested restraint is necessary".⁴⁵

The Court of Criminal Appeal (Northern Ireland) ruled that an ambiguous statutory provision should be interpreted in conformity with the European Convention. The Court invoked Article 7 of the European Convention (which prohibits the imposition of a penalty heavier than the one applicable at the time the criminal offence was committed) in reducing a term of imprisonment.⁴⁶

United States

⁴² *Derbyshire County Council v. Times Newspapers Ltd*, per Lord Balcombe, note 38 supra.

⁴³ *Derbyshire County Council v. Times Newspapers Ltd* per Lord Keith of Kinkel, note 38 supra. See Section 7.1.4 infra for further discussion of these cases.

⁴⁴ Id. at 12. Lord Keith also quoted extensively from judgments of the Privy Council (*Hector v. A-G of Antigua and Barbuda*), US courts (including *New York Times v. Sullivan*), and South Africa (*Die Spoorbond v. South African Railways*). See Sections 6.2.4, 7.1.3 and 7.1.4 infra for summaries of these cases as well as the substance of the *Derbyshire County Council* case.

⁴⁵ *Middlebrook Mushrooms Ltd v. Transport and General Workers Union and Ors*, CA, Judgment of 16 Dec. 1992, *The Times* Law Report 18 Jan. 1993. See Section 7.10 infra for further discussion of this case.

⁴⁶ *R v. Deery* [1977] NI 164.

Under the United States Constitution, treaties are the "supreme law of the land", of equal dignity with federal statutes. Conflicts between treaty clauses and existing US law are resolved according to four rules. First, a treaty may not infringe certain provisions of the US Constitution (including the First Amendment, protecting freedom of expression).⁴⁷ Second, if a treaty and a federal statute conflict, the more recent prevails.⁴⁸ Third, if a treaty and state law conflict, the treaty controls.⁴⁹ Fourth, courts should endeavour to construe a treaty and a statute on the same subject so as to give effect to both.⁵⁰ In particular, courts should construe a treaty which affects important rights "in a broad and liberal spirit, and when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred."⁵¹

However, the US Supreme Court applies the doctrine that only self-executing clauses of treaties may be enforced by courts, in the absence of implementing legislation.⁵² Courts are to look at several factors in deciding whether a clause is self-executing, including the language and purpose of the treaty as a whole, the nature of the obligation imposed by the clause, and the capacity of the judiciary to apply the provision.⁵³ US courts have been far more conservative than European and other courts in finding all but a few human rights treaty provisions to be non-self-executing.

The US ratified the International Covenant in 1992.⁵⁴ However, in depositing the instrument of ratification, President Bush attached a declaration (added by the US Senate) that the entire treaty is not self-executing.⁵⁵ It is unclear whether such a declaration is acceptable under international law (or whether it so substantially undermines the treaty's "spirit and purpose" as to invalidate the ratification). It is also unclear whether courts are bound to apply the declaration, but it is unlikely that the US Supreme Court as currently constituted would do so, in which case the Covenant could not be considered judicially enforceable.

US courts are bound to apply customary international law "as often as questions of right depending upon it are duly presented for their determination."⁵⁶ Courts are to construe statutes so as to be consistent with customary norms but, in practice, where a customary norm requires an interpretation

⁴⁷ *Reid v. Covert*, 354 US 1, 16-17 (1957).

⁴⁸ *Id.* at 18 n. 34.

⁴⁹ *Zschernig v. Miller*, 389 US 429, 440-41 (1968).

⁵⁰ *Asakura v. City of Seattle*, 265 US 332, 342 (1924).

⁵¹ *Id.*

⁵² *Foster v. Neilson*, 27 US (2 Pet) 253, 254 (1829).

⁵³ *People of Saipan v. US Dept. of Interior*, 502 F.2d 90, 97 (9th Cir 1974), cert. denied, 420 US 1003 (1975).

⁵⁴ The US is also a party to the Genocide Convention, but its provision concerning incitement to genocide has not been incorporated into US law.

⁵⁵ Statement of the Advice and Consent of the US Senate to Ratification of the International Covenant on Civil and Political Rights, dated 2 April 1992.

⁵⁶ *The Paquete Habana*, 175 US 677, 700 (1900).

more generous to individual rights than a statute, courts generally have given effect only to the statute.

US courts have referred to international standards in several cases to provide guidance in construing constitutional provisions.⁵⁷

Zimbabwe

The Supreme Court of Zimbabwe, in invalidating orders for whipping as a "punishment which in its very nature is both inhuman and degrading", considered judgments of the European Court as well as the rejection of the practice of corporal punishment in many western democracies.⁵⁸ The Court relied, in particular, on the case of *Tyrer v. United Kingdom*,⁵⁹ from which it quoted extensively.

3.2.2 Civil Law Jurisdictions in Europe and Asia

The European Convention on Human Rights is part of the domestic law (either as a direct consequence of ratification or else through a special act of incorporation) of 17 countries. These are Austria, Belgium, Cyprus, Finland, France, Germany, Greece, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, Portugal, San Marino, Spain, Switzerland and Turkey.⁶⁰ The six countries of Western Europe which have not incorporated the Convention are Denmark, Iceland, Ireland, Norway, Sweden and the UK. It is not yet clear what status the courts of Bulgaria, Hungary and Poland will accord to the Convention.⁶¹

The law of some of these countries is discussed below. The law of Cyprus, Malta and the UK (which along with Ireland are the only common law countries in Europe) is discussed in Section 3.2.1 *supra*.

⁵⁷ For instance, courts have looked to UN declarations as evidence of "evolving standards of decency that mark the progress of a maturing society" in examining the lawfulness of a punishment (*Estelle v. Gamble*, 429 US 97, 102 (1976)); and to the Universal Declaration for assistance in deciding a local county's obligation to "relieve and support" its needy residents (*Boehm v. Superior Court*, 178 Cal App 3d 494 (1986)). In 1988, in holding unconstitutional the execution of youths aged 15 years and younger, Justice Stevens, writing for a four-judge plurality of the Supreme Court, cited the International Covenant, the American Convention and the Fourth Geneva Convention as well as the practice in Western European countries and the Soviet Union (*Thompson v. Oklahoma*, 487 US 815 (1988)). However, one year later, Justice Scalia, writing for a five-judge majority, rejected the relevance of international law and the law and practice of other countries in construing the Constitution's prohibition of cruel and unusual punishment to be consistent with the imposition of capital punishment on youths for crimes committed at the age of 16 years or older (*Stanford v. Kentucky*, 109 SC 2969 (1989)). Justice Scalia's reasoning focused on the language of the Eighth Amendment and does not necessarily preclude courts from finding international and comparative law relevant in construing other provisions.

⁵⁸ *Stephen Ncube v. The State; Brown Tshuma v. The State; Innocent Ndhlovu v. The State*, SC, Judgment No. 156/87, *Common L Bull* (1988), 593. Subsequently, the Constitution was amended to permit courts to continue to impose moderate corporal punishment on juveniles, and to permit parents to beat their children.

⁵⁹ European Court of Human Rights, Judgment of 25 April 1978, Series A no. 26.

⁶⁰ J Polakiewicz & V Jacob-Foltzer, note 24 *supra* at 65-66. The discussion of European law in this section relies to a considerable extent on this well-researched study.

⁶¹ For example, a Hungarian trial court rejected the direct relevance of decisions of the European Court. *Eorsi Matyas v. Balazs Horvath*, Metropolitan Court Budapest, No. 20.Bf.V.8460/1992/3, decision of 29 Jan. 1993. The Constitutional Court has accepted an appeal in the case. See Section 7.1.3 *infra*.

Austria

The European Convention was ratified by Austria in 1958 and, upon formal publication, became part of domestic law. With adoption of the Amendment to the Federal Constitution of 4 March 1964, it was raised to the level of constitutional law with retroactive effect. Everyone within the government's jurisdiction is entitled to rely on the Convention's substantive protections, and the courts and administrative authorities must observe its obligations directly.⁶² The Constitutional Court may review all statutes and administrative decrees for compatibility with both the Constitution and the European Convention. Many Austrian laws have been amended in response to decisions of the European Court or Commission. The influence of Strasbourg case-law grew in the 1970s and has been even more pronounced since the mid-1980s.⁶³

Austria ratified the International Covenant in 1978 and its First Optional Protocol in 1987. However, the International Covenant has not been incorporated into Austrian law and is not directly applicable by the courts.

Belgium

In Belgium, international treaties become part of domestic law after ratification by Parliament and formal publication. The European Convention was ratified and published in 1955, and thus became part of domestic law.⁶⁴ In May 1971, the Supreme Court ruled that directly applicable provisions of international law must be provided primacy over conflicting national legislation. The Court stated: "When the conflict is one between a rule of domestic law having direct effect within the domestic legal order, the rule established by the treaty must prevail; its pre-eminence follows from the very nature of international treaty law".⁶⁵ However, consistent with a widely accepted principle of international law, if a provision of domestic law provides a more favourable guarantee of human rights than the European Convention, the domestic provision prevails. While the Court of Cassation may set aside the final judgment of a lower court and order rehearing on the ground of conflict with Belgian law, it may set aside a judgment as violative of the European Convention only after a judgment by the European Court.

Finland

Finland ratified the International Covenant in 1975 and the European Convention in May 1990 (after joining the Council of Europe a year earlier). Although treaties do not automatically become part of domestic law, Parliament promptly enacted implementing legislation for each treaty. The treaties have the status of ordinary law so that, at least in principle, subsequently enacted laws are to prevail over the treaties.⁶⁶

⁶² See, e.g., Constitutional Court, Decision of 16 March 1987, B154/85, reported in (1987) HRLJ 365; Decision of 27 June 1986, *Collection of Constitutional Court Decisions*, No. 10948/85, *Impala/Die ganze Woche*. For a comprehensive commentary on the application of the ECHR by the Austria courts, see Ermacora, Nowak & Tretter, *Die Europäische Menschenrechtskonvention in der Rechtsprechung der österreichischen Höchstgerichte* (1983).

⁶³ See Section 4.10 *infra* for a case in which the Constitutional Court applied Art. 10.

⁶⁴ See Act of Approval in *Moniteur Belge/Belgisch Staatsblad* on 19 Aug. 1955.

⁶⁵ Supreme Court (*Cour de Cassation/Hof van Cassatie*), 27 May 1971, Pas., 1971, I, 886, Case of *Fromagerie Franco-Suisse "Le Ski"*.

⁶⁶ J Polakiewicz & V Jacob-Folzer, note 24 *supra* at 74-75.

France

According to Article 55 of the French Constitution, treaties, once signed, ratified and published, take precedence over all domestic statutes. All courts are empowered to construe and apply treaties, so long as they are self-executing, and to set aside a domestic statute if it is contrary to a treaty. Since courts are not empowered to set aside statutes as contrary to the Constitution (other than the *Conseil constitutionnel*, prior to the statute's promulgation by Parliament), the result is that treaties enjoy a stronger protection than the Constitution *vis-à-vis* conflicting statutes. The *Conseil constitutionnel* has refused to review a statute's conformity with treaties on the ground that treaty review (unlike constitutional review) is the province of the other courts.⁶⁷

Although France signed the European Convention in 1950, the Convention was not ratified (and published) until May 1974. Beginning in the 1980s French courts have cited Article 10 of the European Convention in a number of cases. For instance, in 1988, the Paris *Cour d'appel* invoked Article 10 as well as the 1789 Declaration of the Rights and Duties of Man and the Citizen in refusing to ban Martin Scorsese's film, *The Last Temptation of Christ*.⁶⁸ The *Conseil d'Etat* (the highest administrative court) ruled that banning the public display and sale to minors of certain journals was a permissible limitation on press freedom within the scope of Article 10(2).⁶⁹ The Paris civil court rejected a lawsuit by the Moroccan government against a television and two radio stations for reporting about a book critical of the Moroccan King and government in an unbalanced manner; while the court did not mention Article 10, the State Prosecutor discussed Article 10 and the European Court's *Lingens* judgment⁷⁰ in his opinion.⁷¹

Germany

The Federal President may ratify or accede to a treaty only with the consent of both houses of parliament; the law granting consent also serves to transform the treaty into domestic law.⁷² The European Convention was ratified and incorporated into the domestic law of the Federal Republic of Germany in 1952, and the International Covenant, in 1973; both became part of the law of the states of the former German Democratic Republic upon reunification in 1990.⁷³ Both treaties are accorded the status of federal statutes. In an important 1987 judgment enhancing the European Convention's significance, the Constitutional Court (FCC) ruled that fundamental rights under the

⁶⁷ Decision No. 74-75 DC of 15 Jan. 1975, *Recueil des décisions du CC* (1975), 19.

⁶⁸ Paris *Cour d'appel*, 27 Sept. 1988, *Gaz. Pal.*, 21 Oct. 1988.

⁶⁹ *Conseil d'Etat*, 9 Jan. 1990, *Société des éditions de la Fortune*.

⁷⁰ See Section 7.1.1 *infra*.

⁷¹ R Errera, "Press Freedom in France", in ARTICLE 19 (ed.), *Press Law and Practice: A Comparative Study of Press Freedom in European and Other Democracies* (London: ARTICLE 19, 1993), 59-60.

⁷² R Herzog (President of the FCC), "The Hierarchy of Constitutional Norms and Its Function in the Protection of Basic Rights", 13 *Human Rights LJ* (1992), 90, 92-93.

⁷³ U Karpen, "Press Freedom in Germany", in *Press Law and Practice*, *id.* at 81.

Basic Law should be construed in accordance with the Convention where to do so would widen their scope of protection.⁷⁴

Italy

The European Convention was ratified by Italy in 1955 and incorporated into domestic law by the Act of 4 August 1955. While certain judicial opinions have ascribed to it the status of constitutional or quasi-constitutional law, the Constitutional Court and the Court of Cassation have accorded it the status only of ordinary law which may be overridden by subsequent legislation.⁷⁵ Most allegations of Convention breaches made in domestic courts have concerned criminal procedure. Although the Court of Cassation has recognized that the Convention in principle is directly applicable in Italian law, several of its judgments, including recent ones, maintain that these rules are programmatic and are intended merely for the guidance of the legislature.⁷⁶ Italy ratified the International Covenant in 1978.

Japan

Article 98(2) of Japan's Constitution states that "[t]reaties concluded by Japan and established laws of nations shall be faithfully observed." Japan has ratified the International Covenant and its courts may enforce the Covenant's provisions.

The Grand Bench of the Supreme Court, in criticizing a trial judge for refusing to allow a non-journalist to take notes in court (the policy being to allow only members of the "reporters' club" to take notes), observed that Article 21 of Japan's Constitution was consistent with Article 19 of the International Covenant:

The freedom to come into contact with and absorb this information, etc., is a derivative principle that naturally follows from the meaning and purpose of [Article 21] The provisions of Article 19(2) of the International Covenant on Civil and Political Rights ... reflect nothing other than the same intent.⁷⁷

The Court concluded that the judicial policy of prohibiting non-journalists from taking notes during a trial was "an exercise of the courtroom policing power lacking a rational basis."

Luxembourg

Treaties become part of domestic law upon approval by the legislature and publication,⁷⁸ and self-executing provisions may be applied by the courts. In a 1950 decision, the *Cour de cassation* ruled that, "in case of a conflict between provisions of an international treaty and those of a subsequent domestic law, the international law must prevail over domestic law".⁷⁹ Luxembourg ratified the

⁷⁴ 74 FCC 358, 370 (1987).

⁷⁵ J Polakiewicz & V Jacob-Folzer, note 24 supra at 83. See also *Corte Cost.*, 22 Dec. 1980, No 188, *Giur. Cost.* 1980, I, 1612; 14 April 1986, No 91, *Giur. Cost.* 1986, I, 518.

⁷⁶ *Id.* at 84.

⁷⁷ *Repeta v. Japan*, 43 *Minshû* 89, SC (Grand Bench), 8 March 1989, translated in 22 *Law in Japan* (1989), 40-42.

⁷⁸ Constitution, Art. 37.

⁷⁹ Cour Supérieure de Justice (Cass. crim.): *Huberty c. MP*, 8 June 1950, *Pasicrisie luxembourgeoise*, Vol. XV, 41;

European Convention in 1953 and the International Covenant in 1983 and, accordingly, their provisions take precedence over national statutes, even if subsequently enacted. The Luxembourg courts often apply or look for guidance in construing national law to decisions of the European Court and Commission of Human Rights, including on freedom of expression issues,⁸⁰ as well as to decisions of the Belgian and French courts. While lower courts have considered the International Covenant to be self-executing and have tended to invoke the Covenant along with the Convention, in 1991, the *Cour de cassation* ruled that the Covenant is not self-executing⁸¹, a decision that has been criticized by legal scholars.

The Netherlands

Article 93 of the Constitution of the Netherlands (the *Grondwet*) provides that ratified treaties and "resolutions of international institutions" that may be binding on all persons are part of domestic law, and Article 94 provides that "statutory regulations" which conflict with such instruments are inapplicable. The Supreme Court (*Hoge Raad*) has ruled that the European Convention and the International Covenant are part of the national law, and that their provisions take precedence over ordinary law.⁸² There is no constitutional review of statutes enacted by Parliament⁸³ and similarly, statutes cannot be invalidated as inconsistent with a treaty, although courts may refuse to apply them. Over a seven year period (1980-86), the *Hoge Raad* ruled that there had been a violation of the European Convention on 35 occasions and a violation of the International Covenant in two cases.⁸⁴ While the *Hoge Raad* will apply the human rights treaties to restrain executive, administrative and private action, it remains reluctant to invalidate statutes, tending instead to defer to the legislature's responsibility for modifying legislation so as to comply with treaties.

Norway

Norway ratified the European Convention in 1952 and the International Covenant and its First Optional Protocol in 1972. Courts have referred to their provisions in construing domestic law, but they are not part of domestic law and thus cannot be directly applied by the courts. Norwegian law is "presumed to be in accordance with" ratified treaties and, in theory, the courts must interpret statutes so as to be "in harmony with" any treaty provision on the same subject.⁸⁵ While the courts

Chambre des Métièrs c. Pagni, 14 July 1954, *Pasicrisie luxembourgeoise*, Vol. XVI, 151.

⁸⁰ See, e.g., *CEPAL c. Bever*, Cour Supérieure de Justice, 13 Nov. 1989, no. 9637 du rôle, reprinted in A Spielmann, A Weitzel & D Spielmann, *La Convention européenne des droits de l'homme et le droit luxembourgeois* (Brussels: Nemesis, 1991), 461-71.

⁸¹ Decision of 14 March 1991.

⁸² HR 18 April 1961, NJ 1961, 273 (re. ECHR); and HR 11 Feb. 1986, NJ 1986, 673.

⁸³ Art. 120 of the Constitution.

⁸⁴ H Lubberdink, "Some Observations on the Role of Constitutional Norms, International Norms and Legal Principles in the Netherlands Legal System with Respect to the Inviolability of Statute Law", 13 *Human Rights L J* (1992), 93, 96, citing P van Dijk in Zwolle (ed.), *De plaats van de Hoge Raad in het huidige staatsbestel* (1988), 185.

⁸⁵ E Sandene (President of the Supreme Court, Oslo), "A Survey of Norwegian Law Concerning the Hierarchy of Constitutional Norms in the Protection of Fundamental Rights", 13 *Human Rights L J* (1992), 98, 100.

have embraced a number of human rights standards in this manner, they have not yet embraced the freedom of expression standards of the European Convention or the International Covenant.⁸⁶

Poland

Poland ratified the International Covenant in 1977 and the European Convention in 1992. The status of international law in Polish domestic law is very unclear. At least as of the end of 1991, the Constitution did not establish the priority of international law over national law, nor did it set forth rules for solving possible conflicts between international and national laws.⁸⁷ Nor had the Constitutional Tribunal been granted competence to review the consistency of national statutes with international law.

Portugal

The European Convention and the International Covenant were both ratified in 1978 and entered into domestic law promptly upon publication (in keeping with Portugal's monist approach to international and national law). Treaties have a status superior to ordinary law but inferior to the Constitution.

Spain

Article 10.2 of Spain's Constitution provides: "The norms relative to basic rights and liberties which are recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements on those matters accepted by Spain." Moreover, Article 96.1 states: "Validly concluded international treaties once officially published shall constitute part of the internal [legal] order". Thus, human rights treaties are incorporated both directly and indirectly into domestic law. When applied directly as treaties, they have a status below that of the Constitution; when used indirectly to interpret the Constitution they have a status at least equivalent to, and some would argue higher than, the Constitution.

Spanish courts *must* follow interpretations, when directly relevant, of the European Court so long as such interpretations do not narrow the scope of a right as recognized in the Constitution,⁸⁸ and *should* apply the interpretations of non-authoritative bodies, such as the European Commission and the Human Rights Committee as interpretative guides in applying Spanish law.⁸⁹

The Supreme Court noted the relevance of the International Covenant in interpreting the Constitution for the first time in July 1979. The Court ruled that, consistent with the Covenant and the Universal Declaration, Article 22 of the Constitution protecting freedom of association had to be interpreted broadly and restrictions could only be permitted as an exception.⁹⁰

⁸⁶ S Wolland, "Press Freedom in Norway", in *Press Law and Practice*, note 71 supra at 118.

⁸⁷ K Dzialocha (Judge of the Polish Constitutional Tribunal), "The Hierarchy of Constitutional Norms and Its Function in the Protection of Basic Rights", 13 *Human Rights L J* (1992), 100, 110.

⁸⁸ Constitutional Court, STC 19/83, 14 March, F Jco 2; 30/86, 21 Feb., F Jco 4; 6/88, 21 Jan., F Jco 5.

⁸⁹ Sentencias 53/85, 16 April, F Jco 6; Judgment of 14 Aug. 1979.

⁹⁰ STS (*Sentencia del Tribunal Supremo*) of 3 July 1979 in *Aranzadi* 3.182.

The Supreme Court first referred to Article 10 of the European Convention in August 1979 in ruling constitutional the state's privatization of the state-owned papers and closure of papers which had no buyers. The Court stated that its decision was based on the Constitution and also on Article 10 (which it quoted in full) and Article 19 of the International Covenant, "they being provisions which control the interpretation of [the relevant] ... article of the Constitution according to Article 10(2) of the same Constitution."⁹¹ The Constitutional Court has referred to the European Convention in more than 70 cases.

Sweden

Although the legal relevance of international human rights treaties in Swedish law is the subject of some debate, the prevailing view is that such treaties are not part of domestic law. Thus, in the recent *Radio Nova* case, the Administrative Court of Appeal upheld a provision of the Local Radio Act even though it concluded that it probably was incompatible with the European Convention stating that "[t]he European Convention is not directly applicable in the Swedish legal system."⁹² The Supreme Court declined to hear the appeal.

Switzerland

No government decree or other act of transformation is required to integrate duly ratified treaties or binding principles of customary law into Swiss domestic law. Treaty provisions that are self-executing are directly applicable by the courts.⁹³ Switzerland ratified the European Convention in 1974, and acceded to the International Covenant in June 1992. Owing to the absence of a detailed catalogue of fundamental rights in Swiss federal law, the Federal Court has often applied the European Convention's provisions at least since the mid-1980s. In principle, the European Convention (and other aspects of public international law) take precedence over domestic law; however, it is generally accepted that Parliament may enact new constitutional provisions that contradict public international law. While the Federal Court has not clearly decided the issue, it appears that provisions of the European Convention are accorded precedence over federal and cantonal statutes, even if enacted subsequent to the Convention's entry into force.⁹⁴ Nevertheless, federal statutes may not be invalidated on the ground of inconsistency with the Convention or, for that matter, the Constitution.

Turkey

The 1954 Act authorizing ratification of the European Convention also incorporated the Convention into Turkish law. In 1987, Turkey recognized the right of individual petition to the European Commission (but with limiting reservations eventually declared ineffective by the Commission).⁹⁵

⁹¹ STS of 14 Aug. 1979 in *Aranzadi* 4.676.

⁹² This quotation is from a report of the European Commission in which it ruled inadmissible an application challenging the Swedish court's decision. See *Roda Korsets and Ors v. Sweden*, Admissibility Decision of 15 Jan. 1993, App. No. 18424/91. See also H-G Axberger, "Freedom of the Press in Sweden", in *Press Law and Practice*, note 71 *supra* at 153.

⁹³ A Haefliger, "The Hierarchy of Constitutional Norms and its Function in Protecting Human Rights," 13 *Human Rights L J* (1992), 81-89.

⁹⁴ *Id.* at 87.

⁹⁵ See *Chrysotomos v. Turkey*, App. Nos. 15299, 15300 and 15318/89, Decision of 4 March 1991. See also J Polakiewicz & V Jacob-Folzer, note 24 *supra* at 140.

The Constitutional Court declared in 1963 that the fundamental rights set forth in the 1961 Constitution corresponded to the rights contained in the European Convention⁹⁶, and thereafter began to interpret fundamental rights in light of the Convention. However, as of March 1991, the Constitutional Court had not invoked the Convention in interpreting the Constitution.⁹⁷

3.2.3 Use of the African Charter on Human and Peoples' Rights

Botswana

The Court of Appeal of Botswana, in a unanimous judgment, declared certain forms of punishment unconstitutional. In so ruling, it commented on the relevance of treaties and international and comparative case-law to its deliberations:

[I]t is only right that the indebtedness of the Court should be expressed to counsel for the accused for having made available to it, by means of photocopies, the numerous judgments, Articles and Conventions to which reference was made by them in the course of argument. ... [S]peaking for myself, the existence of many of them was quite unknown.⁹⁸

In a second case, the Court of Appeal reaffirmed the importance of Botswana's treaty obligations, particularly under the African Charter, as an aid in interpreting constitutional protections of fundamental rights and freedoms. In striking down a law which denied citizenship to children of a Botswana mother and a foreign father but not to those of a Botswana father and foreign mother, Judge President Amissah, writing for the Court, stated:

[W]e should so far as is possible interpret domestic legislation so as not to conflict with Botswana's obligations under the [African] Charter or other international obligations. ... I am in agreement that Botswana is a member of the community of civilised States which has undertaken to abide by certain standards of conduct, and, unless it is impossible to do otherwise, it would be wrong for its Courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken. The principle, used as an aid to construction ... adds reinforcement to the view that the intention of the framers of the Constitution could not have been to permit discrimination purely on the basis of sex.⁹⁹

The Court also quoted Lord Wilberforce's statement in *Fisher*.¹⁰⁰

Nigeria

While treaties, including the African Charter, are not part of the domestic law of Nigeria, various courts have referred to the African Charter for guidance in construing provisions of domestic law.

⁹⁶ Judgment of 1 July 1963, Esas 207/1963, Karar 175/1963, in AMKD, Vol. 1 (2nd edn), 360, 364.

⁹⁷ See J Polakiewicz & V Jacob-Folzer, note 24 supra at 140-41.

⁹⁸ *The State v. Petrus and Anor* (1985) LRC (Const.) 699, 702.

⁹⁹ *Attorney-General v. Unity Dow*, Appeal Court of Botswana, Civil Appeal No. 4/91 (1992), 53-54.

¹⁰⁰ *Minister of Home Affairs v. Fisher*, note 13 supra.

Thus Judge Omo-Agege (of the High Court) held that, although no procedure is specified for the enforcement of the African Charter Ratification Act, "the courts are enjoined to give full effect and recognition to the provisions of the Charter".¹⁰¹ Judge Eniola (of the High Court) referred to the provisions of the African Charter in halting the planned execution of 12 under-aged boys convicted and sentenced to death. Judge Eniola observed, "by signing international treaties, we have put ourselves before the window of the world, we dare not unilaterally breach any of the terms without incurring some frowning of our international friends."¹⁰² Similarly, in a 1992 decision, Judge Morounkeji Onalaja declared that "the African Charter of Human and Peoples' Rights ...[is] part of the law of the Federal Republic of Nigeria".¹⁰³

Tanzania

The Court of Appeal of Tanzania, in declaring unconstitutional and thus null and void a law which denied bail to persons charged with various offences, noted the relevance of the African Charter:

Since our Bill of Rights and Duties was introduced into the Constitution ... in February 1985, that is, slightly over three years after Tanzania signed the Charter, and about a year after ratification, account must be taken of that Charter in interpreting our Bill of Rights and Duties.¹⁰⁴

3.2.4 Use of the American Convention on Human Rights

Argentina

The Supreme Court of Argentina noted that an international treaty becomes federal law when ratified and published in accordance with Article 31 of the Constitution. Moreover, "when a State ratifies a treaty with another State, it binds itself internationally to make its administrative and judicial authorities apply it to the situations contemplated by the treaty, whenever it contains sufficiently specific definitions of such situations that make possible its immediate application."¹⁰⁵ Any part of a law enacted by Congress which violates a validly incorporated treaty offends the division of powers established by the Constitution and thus is unconstitutional. Such a law would also violate the Vienna Convention on the Law of Treaties (part of federal law) which "assigns conventional law primacy over domestic law. This international primacy is part of Argentina's domestic law."¹⁰⁶ The Court further noted that

¹⁰¹ *Bamidele Opeyemi v. Professor Grace Alele-Williams*, Suit No. B/6M/89.

¹⁰² *Mohammed Garuba & Ors v. Lagos State Attorney-General*, Suit No. ID/559M/90.

¹⁰³ *Gani Fawehinmi & Ors v. The President*, Suit No. M/349/92.

¹⁰⁴ *DPP v. Pete*, CA, Judgment of 16 May 1991, Crim. Appeal No. 28 of 1990.

¹⁰⁵ *Eknekdjian v. Sofovich*, SC, decision of 7 July 1992, 20.

¹⁰⁶ *Id.* at 18.

violation of an international treaty can occur either by the establishment of domestic laws that prescribe an activity clearly contrary to that treaty, or by the failure to establish laws that make possible compliance with the treaty.¹⁰⁷

Because the American Convention had been duly ratified and published, the Court ruled that Article 14(1) (requiring states parties to ensure the availability of a right of reply) is part of Argentina's domestic law and, accordingly, that the court was obliged to give effect to this right. The Court emphasized that the right derived directly from the American Convention and not from Argentina's Constitution.¹⁰⁸

3.3 USE BY ONE INTERNATIONAL TRIBUNAL OF THE LAW OF ANOTHER

The Inter-American Court of Human Rights ruled that a restriction on freedom of expression, to be "necessary" within the meaning of Article 13(2) of the American Convention, had to comply with the test of necessity articulated by the European Court concerning Article 10(2) of the European Convention.¹⁰⁹

The European Court of Human Rights referred to Article 19(2) of the International Covenant, which specifically includes within the right to freedom of expression information and ideas "in the form of art", in confirming its conclusion that Article 10 of the European Convention protects artistic expression.¹¹⁰

The European Court referred to the drafting history of Article 19 of the International Covenant in supporting its conclusion that the third sentence of Article 10(1) of the European Convention permits regulation only of technical aspects of broadcasting and not of the content of broadcasts.¹¹¹

¹⁰⁷ Id. at 16.

¹⁰⁸ Id. at 15.

¹⁰⁹ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 Nov. 1985, Series A No. 5.

¹¹⁰ *Müller v. Switzerland*, para. 27, also discussed in Section 4.8 *infra*.

¹¹¹ *Groppera Radio AG & Ors. v. Switzerland*, para. 61.

PART II

JUDGMENTS OF NATIONAL COURTS AND INTERNATIONAL TRIBUNALS

INTRODUCTION TO PART II

Part II is premised on the notion that lawyers and campaigners who defend freedom of expression and related freedoms should invoke the most powerful law available, from whatever jurisdiction, in support of their arguments.

This part includes summaries of decisions from national courts around the world which are *protective* of freedom of expression and related rights as well as summaries of the most relevant decisions of international tribunals both protective and restrictive of those rights. We have included *all* of the most relevant international decisions in light of the fact that the international standards form an integrated body of law and, accordingly, it is important for litigators and campaigners to be aware of the negative as well as positive precedents.

We have not tried to give even a rudimentary picture of the freedom of expression jurisprudence of the more than 50 countries from which we have gathered cases; rather, we have focused on bringing together, organized by topic, reasoning from cases which free speech advocates in other jurisdictions may find useful in bolstering their arguments. While some of the lower court decisions may reflect minority views on the bench, we have done our best to verify that all of the decisions cited remain good law and have not been overturned.

We do not warrant that the cases included are the most significant in a given area. We have relied heavily on the submissions of our contributors (supplemented by our own research, particularly from the US, UK and Commonwealth jurisdictions). As stated in our opening invitation, we encourage readers to send us additional cases.

Chapter 4 consists primarily of quotations from cases offering reasons for valuing different categories of freedom of expression, assembly, association and access to information. The facts and holdings of these and many more cases are summarized in the following chapters organized by topic.

Chapter 5 sets forth the common standard applied by most of the intergovernmental bodies and many national courts in assessing the legitimacy of any restriction on freedom of expression or related rights.

Chapter 6 includes decisions of courts that rejected government claims that a restriction on expression was necessary in order to safeguard national security or public order.

Chapter 7 brings together cases in which national courts rejected claims to restrict the right to freedom of expression (or a related right) based upon the expression's content.

Chapter 8 comprises cases in which courts were asked to enjoin or in other ways restrict expression in advance of publication. Included are cases involving licensing requirements, orders suspending publication of a newspaper or enjoining circulation of a particular issue, and customs and other trans-border controls aimed at excluding information or ideas from entering the country.

Chapter 9 summarizes cases in which the government attempted to justify a restriction on the ground that the manner of expression was unduly disruptive. Although in practice these restrictions are often applied with the intention of silencing or reducing the impact of expression with which the

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government disagrees, the justification for the restriction is framed in content-neutral language. The chapter also includes cases involving the regulation of broadcasting.

Within each section, any relevant decisions of international tribunals are included first, followed by cases decided by national courts arranged in alphabetical order by country.

Where the status of a court is unclear it is specified in parentheses following the court's name; unless otherwise stated, a High Court in a Commonwealth jurisdiction is a court of first instance that decides cases raising substantial issues, and a Supreme Court is the highest appellate court. Because frequent mention is made of the judgments of the European and Inter-American Courts of Human Rights, they are referred to by their case names only; full citations may be found in the table of cases.

CHAPTER 4

POSITIVE PROTECTIONS OF FREEDOM OF EXPRESSION AND INFORMATION

4.1 IMPORTANCE OF FREEDOM OF EXPRESSION GENERALLY

United Nations

Freedom of expression and information has been recognized as an essential foundation of democratic society by institutions and governments around the world. The United Nations General Assembly, at its first session, declared:

"Freedom of information is a fundamental human right and ... the touchstone of all of the freedoms to which the United Nations is consecrated."¹

Council of Europe

The European Court of Human Rights has repeatedly emphasized the fundamental importance of freedom of expression in a democratic society:

Freedom of expression constitutes one of the essential foundations of such [democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to Article 10(2), it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'.²

The Court, noting that even military secrets do not fall outside the scope of Article 10, recently emphasized that freedom of expression "is not restricted to certain categories of information, ideas or forms of expression".³

Canada

The Supreme Court of Canada observed that freedom of expression is a fundamental freedom of every society that purports to be a representative democracy, regardless of the existence of an express constitutional protection:

Freedom of expression is not a creature of the Charter [of Rights and Freedoms]. It is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of Western society. Representative democracy as we know it today, which is in great part the product of

¹ G.A. Resolution 59(I), 14 Dec. 1946.

² *Handyside v. United Kingdom*, para. 49. See also *The Sunday Times v. United Kingdom*, para. 64.

³ *Hadjianastassiou v. Greece*. For a discussion of the case's facts and holding, see Section 6.1 *infra*.

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free expression and discussion of varying ideas, depends upon its maintenance and protection.⁴

France

The *Conseil constitutionnel* of France has declared that freedom of expression, including freedom of the press, constitutes one of the essential safeguards of all other rights and liberties.⁵

India

The Supreme Court of India stated:

This Court must be ever vigilant in guarding perhaps the most precious of all the freedoms guaranteed by our Constitution. The reason for this is obvious. The freedom of speech and expression of opinion is of paramount importance under a democratic Constitution which envisages changes in the composition of legislatures and governments and must be preserved.⁶

And, moreover:

It is our firm belief, nay, a conviction which constitutes one of the basic values of a free society to which we are wedded under our Constitution, that there must be freedom not only for the thought that we cherish, but also for the thought that we hate.⁷

Israel

In ruling that expression may be restrained in the interest of preserving the public peace only when there is an "imminent probability" that a breach of the peace will result, the Supreme Court of Israel observed:

Freedom of expression is closely bound up with the democratic process. It serves not only as a means and an instrument but also as an aim in itself. Freedom of expression is a superior right which, together with the similar right to freedom of conscience, constitutes the prerequisite to the realization of almost all other freedoms. The supreme value contained in freedom of expression remains permanent and unalterable.⁸

South Africa

⁴ *Retail, Wholesale and Department Store Union v. Dolphin Delivery Ltd* [1986] 2 SCR 573 (per McIntyre J).

⁵ CC, 10-11 Oct. 1984, 78.

⁶ *Sakal Papers Ltd v. Union of India*, AIR [1962] SC 305.

⁷ *Naraindas v. State of Madhya Pradesh*, 1974 (3) SCR 624, 650.

⁸ *Kol Ha'am Company Lmt & Al-Itihad Newspaper v. Minister of the Interior*, High Court 73/53, discussed in *Selected Judgments of the Israeli Supreme Court*, Vol. I (1948-53), 90. This case is discussed further in Section 8.2 infra.

The Appellate Division of the Supreme Court of South Africa (the highest court), in referring to legislation which imposes restrictions on freedom of speech, stated:

The freedom of speech - which includes the freedom to print - is a facet of civilisation which always presents two well-known inherent traits. The one consists of the constant desire by some to abuse it. The other is the inclination of those who want to protect it to repress more than is necessary. The latter is also fraught with danger. It is based on intolerance and is a symptom of the primitive urge in mankind to prohibit that with which one does not agree. When a Court of law is called upon to decide whether liberty should be repressed - in this case the freedom to publish a story - it should be anxious to steer a course as close to the preservation of liberty as possible. It should do so because freedom of speech is a hard-won and precious asset, yet easily lost.⁹

Spain

The Constitutional Court observed that:

The maximum scope that freedom of ideology has in our Constitution must be pointed out, since it is the basis, together with the dignity of the person and his inviolable, inherent rights, of all other fundamental rights and freedoms ...¹⁰

United States

Justice Cardozo of the Supreme Court wrote:

Freedom of thought and speech ... is the matrix, the indispensable condition of nearly every other form of freedom.¹¹

In a similar vein, Justice Brandeis stated:

[T]he greatest menace to freedom is an inert people It is hazardous to discourage thought, hope and imagination. The path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies, and the fitting remedy for evil counsel is good counsel.¹²

The Supreme Court stated:

Public opinion plays a crucial role in modern democracy. Freedom to form public opinion is of great importance. Public opinion, in order to meet such responsibilities, demands the condition of virtually unobstructed access to and diffusion of ideas. The fundamental principle involved here is the people's right to know. The freedom of speech guaranteed by the Constitution embraces at the least the liberty to discuss

⁹ *Publications Control Board v. William Heinemann Ltd and Ors* 1965 (4) SA 137(A), 160E-H (per Rumpff JA).

¹⁰ *Punto y Hora*, STC 20/1990, *Boletín de Jurisprudencia Constitucional* 107, 48.

¹¹ *Palko v. Connecticut*, 302 US 319 (1937).

¹² *Whitney v. California*, 274 US 357, 375 (1927).

publicly all matters of public concern without previous restraint or fear of subsequent punishments.¹³

Furthermore:

The ultimate good desired is better reached by free trade in ideas - the best test of truth is the power of thought to get itself accepted in the competition of the market.¹⁴

4.2 POLITICAL EXPRESSION AND INFORMATION

4.2.1 General Protections

Council of Europe

The European Court has declared, and frequently reaffirmed, that "freedom of political debate is at the very core of the concept of a democratic society".¹⁵ The European Court has considered information and opinions concerning the following political matters, and in each case has emphasized the special protection to which political expression is entitled:

- (a) a politician's or public official's fitness to exercise his public functions (*Lingens*, *Oberschlick* and *Schwabe*);
- (b) a government's failure to investigate and prosecute murders of people involved in a separatist movement (*Castells*).¹⁶

Australia

The High Court of Australia (the highest court) ruled that Australia's Constitution guarantees freedom of political communication. Although the Constitution includes neither a Bill of Rights nor any other express guarantee of freedom of expression, the Court ruled that the Constitution's guarantee of representative government implicitly protects freedom of political communication. The Court reasoned that central to the concept of representative government is the notion of accountability of representatives, and that:

Indispensable to that accountability and that responsibility is freedom of communication, at least in relation to public affairs and political discussion. ... Freedom of communication in relation to public affairs and political discussion cannot be confined to communications between elected representatives and candidates for election on the one hand and the electorate on the other. The efficacy of representa-

¹³ *Thornhill v. Alabama*, 310 US 88 (1940).

¹⁴ *Abrams v. United States*, 250 US 616, 628 (1919) (dissenting opinion, joined by Brandeis J).

¹⁵ *E.g., Lingens v. Austria*, para. 42.

¹⁶ See Sections 6.2 on criticism of government and 7.1.1 on defamation *infra* for a more extensive discussion of the above cases.

tive government depends also upon free communication on such matters between all persons, groups and other bodies in the community.¹⁷

Citing decisions of the European Court and the courts of a number of other jurisdictions, the High Court concluded:

Freedom of communication in the sense just discussed is so indispensable to the efficacy of the system of representative government for which the Constitution makes provision that it is necessarily implied in the making of that provision.¹⁸

Canada

In 1938, long before Canada adopted its Charter of Rights and Freedoms, the Supreme Court ruled that Parliament had, by necessary implication, legislative power to protect the right to free public discussion and, correspondingly, that provincial legislators lacked the power to limit the right. The Court based this conclusion on the fact that freedom of political expression and debate is implicit in parliamentary government because parliaments "derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy administration and defence and counter-attack; from the freest and fullest examination and analysis from every point of view of political proposals."¹⁹

India

The Bombay High Court ruled that, even during times of national emergency, it was impermissible for the government to stifle political debate. In a case in which a Bombay-based monthly magazine challenged wide-ranging restrictions imposed by the official censor during the 1975-77 State of Emergency, the court reasoned as follows:

True democracy can only thrive in a free clearing-house of competing ideologies and philosophies - political, economic and social - and in this the press has an important role to play. The day this clearing-house closes down would toll the death knell of democracy. It is not the function of the censor acting under the Censorship Order to make all the newspapers and periodicals trim their sails to one wind or to tow along in a single file or to speak in chorus with one voice. ... Under the Censorship Order the censor is appointed the nurse-maid of democracy and not its gravedigger. Dissent from the opinions and views held by the majority and criticism and disapproval of measures initiated by a party in power make for a healthy political climate, and it is not for the censor to inject into this the lifelessness of forced conformity. Merely because dissent, disapproval or criticism is expressed in strong language is no ground for banning its publication.²⁰

¹⁷ *Australian Capital Television Pty Ltd v. The Commonwealth; New South Wales v. The Commonwealth (No. 2)* [1992] 66 ALJR 695, 703 (per Mason CJ).

¹⁸ *Id.* at 704. See further discussion of this case in Section 4.2.3, *infra*. See also *Nationwide News Pty Ltd v. Wills*, discussed in Section 7.1.3 *infra*.

¹⁹ *Re. Alberta Legislation* [1938] 2 SCR 100 (per Duff J).

²⁰ *Binod Rao v. M R Masani* (1976) 78 Bom. LR 125. See also *Nathwani v. Commissioner of Police*, in Section 6.2.4 *infra*.

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Nigeria

The Enugu High Court, in invalidating a law which prohibited seditious publications, emphasized that:

Freedom of speech is, no doubt, the very foundation of every democratic society, for without free discussion, particularly on political issues, no public education or enlightenment, so essential for the proper functioning and execution of the processes of responsible government, is possible.²¹

Spain

The Constitutional Court affirmed the special status enjoyed by freedom of political expression within the hierarchy of fundamental freedoms:

Article 20 of the Constitution [on freedom of expression] ... guarantees the maintenance of free political communication, without which other rights guaranteed by the Constitution would have no content, the representative institutions would be reduced to empty shells, and the principle of democratic legitimacy ... which is the basis for all our juridical and political order would be completely false.²²

Sri Lanka

The Chief Justice of the Supreme Court, in ruling that pamphlets which were highly critical of the government were nevertheless constitutionally protected, emphasized the importance to democracy of the public's right to receive information and opinions from sources independent of the government:

Freedom of speech and expression consists primarily not only in the liberty of the citizen to speak and write what he chooses, but in the liberty of the public to hear and read what it needs The basic assumption in a democratic polity is that government shall be based on the consent of the governed. The consent of the governed implies not only that consent shall be free but also that it shall be grounded on adequate information and discussion aided by the widest possible dissemination of information from diverse and antagonistic sources...

Freedom of discussion must embrace all issues about which information is needed to enable the members of a society to cope with the exigencies of their period. It is essential to enlighten public opinion in a democratic state; it cannot be curtailed without affecting the right of the people to be informed through sources, independent of the government, concerning matters of public interest. There must be untrammelled publication of news and views and of the opinions of political parties which are critical of the actions of government and expose its weakness. Government must be prevented from assuming the guardianship of the public mind. Truth can be sifted

²¹ *The State v. The Ivory Trumpet Publishing Co.* [1984] 5 NCLR 736, High Court, Enugu, 31 Jan. 1983. See Section 6.2.3 *infra* for more information about the facts and holding in this case.

²² *Voz de España* case, STC of June 81, *Boletín de Jurisprudencia Constitucional* 2, 128, para. 3.

out from falsehood only if the government is vigorously and constantly cross-examined ...²³

4.2.2 Right of Government Opponents to Have Their Views Published by Government-Controlled Media

Council of Europe

In the view of the European Commission, although Article 10 does not grant a general right of access to the broadcast media, a political party would be entitled to broadcasting time if other parties were given such time:

It is evident that the freedom to 'impart information and ideas' included in the right to freedom of expression under Article 10 of the Convention, cannot be taken to include a general and unfettered right for any private citizen or organisation to have access to broadcasting time on radio or television in order to forward its opinion. On the other hand, the Commission considers that the denial of broadcasting time to one or more specific groups or persons may, in particular circumstances, raise an issue under Article 10 alone or in conjunction with Article 14 of the Convention. Such an issue would, in principle, arise for instance if one political party was excluded from broadcasting facilities at election time while other parties were given broadcasting time."²⁴

In that case, an association which sought to broadcast its own political programmes on television during a campaign period challenged the British Broadcasting Corporation's (BBC) policy of offering broadcasting time only to political parties with representation in Parliament or with parliamentary candidates. The Commission ruled the application inadmissible.

Belize

The Court of Appeal of Belize held that the refusal of the Belize Broadcasting Authority (BBA) to authorize the broadcast of a political programme violated the applicants' rights to both freedom of expression and protection from non-discrimination.²⁵ A leader of the opposition party which previously had been part of the government and the managing director of a TV station in Belize City requested permission from the BBA to broadcast a series of monthly half-hour programmes. The programmes would reply to the current government's statements about the economy, many of which were critical of the former government's policies. The BBA denied consent on the ground that the proposed programmes were party political broadcasts.

²³ *M Joseph Perera & Ors v. Attorney-General*, SC App. Nos. 107-109/86, decision of 25 May 1987 (per Sharvananda CJ). For a discussion of the facts and reasoning of this case, see Section 6.2.4 *infra*.

²⁴ *X and the Association of Z v. the United Kingdom*, European Commission, Admissibility Decision of 12 July 1971, App. No. 4515/70, 38 *Collected Decisions* 86 (1971); *Euro Yearbook of Human Rights* 14, 538.

²⁵ *Belize Broadcasting Authority v. Courtenay and Hoare*, Court of Appeal, 20 June 1986; (1988) LRC (Const.) 276; 13 *Common L Bull* (1987), 1238.

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In ruling that the BBA had acted arbitrarily, Chief Justice Moe stated: "[T]oday television is the most powerful medium for communications, ideas and disseminating information. The enjoyment of freedom of expression therefore includes freedom to use such a medium."²⁶

The Court of Appeal, expressly affirming the Chief Justice's statement, held that the BBA's refusal to broadcast the programmes was arbitrary and discriminatory and violated the applicants' constitutional rights both to freedom of expression and protection from discrimination. The Court made clear that political parties must be given the opportunity to reply on TV to statements made by the government which "provide information or explanation of events of prime national or international importance or ... seek the co-operation of the public in connection with such events."²⁷ Only where there is a "general consensus of opinion" does the opposition not have a right to reply. The Court concluded that the BBA was obliged to ensure that equal time be granted to telecasts of politicians of opposing views.

India

The Indian Supreme Court implicitly recognized the right of reply in cases involving political debate conducted in the columns of a government-owned publication. A public sector undertaking, the Life Insurance Corporation of India (LIC), republished in its house journal an article favourable to itself but refused to republish a rejoinder that had accompanied the article in the original periodical. The Court held that LIC's refusal was unlawful on the ground that, owing to LIC's status as an instrument of government, it had a duty of fairness to its readers. Moreover, "fairness demanded that both viewpoints were placed before its readers, however limited be their number, to enable them to draw their own conclusions."²⁸

Trinidad and Tobago

The High Court ruled that "the fundamental right of free speech demands opening up of the television media to political broadcasts" subject only to reasonable limitations.²⁹ Mr Rambachan, an opposition Member of Parliament, had complained about the refusal of state-owned Trinidad and Tobago Television (TTT) to broadcast his pre-recorded political speech. In ruling that the station's action violated the right to free speech, Justice Deyalsingh cited Indian and US authorities and observed:

[W]ith television being the most powerful medium of communication in the modern world, it is in my view idle to postulate that freedom to express political views means what the constitution intends it to mean without the correlative adjunct to express such views on television. The days of soap-box oratory are over, as are the days of political pamphleteering

The Court concluded that the government could be compelled to enact broadcasting regulations which allocate time for political broadcasts even during periods between general elections. Both

²⁶ Id. LRC at 284.

²⁷ Id. citing *Halsbury's Laws of England* (4th edn, Vol. 8, para. 1134).

²⁸ *Manubhai Shah v. Life Insurance Corp. of India* [1992] 3 SCC 637.

²⁹ *Rambachan v. Trinidad and Tobago Television Co. Ltd and Attorney-General of Trinidad and Tobago*, decision of 17 July 1985 (unreported).

TTT and the Attorney-General appealed, and the appeal was settled by a consent order affirming Justice Deyalsingh's ruling.³⁰

Zambia

In the midst of the campaign for the 1991 Zambian parliamentary and presidential elections, the Zambian National Broadcasting Corporation (ZNBC), controlled by the ruling United National Independence Party (UNIP), refused to broadcast political advertisements by the leading opposition party, the Movement for Multi-Party Democracy (MMD). The ZNBC claimed that statements included in the advertisements, such as that UNIP had engaged in "27 years of mismanagement", were libellous. The MMD's National Executive Committee sought an injunction to compel ZNBC to broadcast MMD's advertisements as they were and, in particular, to stop ZNBC "from discriminating against the MMD ... by refusing to advertise on both radio and television lawful election notices and campaign materials ... and/or ... [by] editing or censoring such lawful notices and campaign materials" A judge of the principal High Court (in Lusaka) initially granted the injunction,³¹ and the ZNBC complied although it broadcast a disclaimer along with the advertisements explaining that they were being broadcast only because of a court order. Several days later, however, the judge revoked the injunction, and the MMD was only able to have the advertisements broadcast after it agreed to various deletions.³²

The principal High Court (Lusaka), in a related case, ruled unconstitutional a directive issued by President Kaunda during the lead-up to multi-party elections, instructing the three government-controlled newspapers not to give coverage to statements made by MMD members or to accept advertisements from the MMD.³³ The petitioners, various MMD officials, contended that: (1) because the newspapers were acquired with, and supported, by public funds, they should publish for the benefit of all citizens without discrimination; and (2) the directive violated the constitutional prohibition of discrimination in the performance by any public authority of its functions as regards their rights as citizens to receive information and ideas and also as participants in the political process entitled to impart information and ideas. The High Court, in ruling the directives unconstitutional, stated:

[T]he nature of the directive is such that it cannot command any other interpretation even from those really hostile to the petitioners. The discrimination was against the petitioners and their followers and in favour of the UNIP leaders and their members.

The Court noted that:

³⁰ A Lester, "Freedom of Expression: Relevant International Principles", in *Developing Human Rights Jurisprudence* (Commonwealth Secretariat, 1988), 30.

³¹ *Vernon Johnson Mwaanga v. The Zambia National Broadcasting Corp. and Another* (1991) HP 1331 (High Court: Lusaka), 14 Aug. 1991.

³² Former US President Carter, head of an election observation team, criticized ZNBC for censorship, and another observer stated that ZNBC's deletion of the MMD's reference to "27 years of mismanagement" appeared indefensible. National Democratic Institute for International Affairs & Carter Center of Emory University, *The October 31 1991 National Elections in Zambia*, 42-43.

³³ *Arthur Wina & Others v. the Attorney-General* (1990) HP/1878 (High Court: Lusaka).

[I]f the newspapers had been privately owned by UNIP or indeed by any other persons or body then management would be at liberty to determine what to publish in them and what not to publish subject of course only to legal restrictions such as the interest of security, public safety, public order or public health.

The Court further held that the directive was unconstitutional because it was not reasonably justifiable in a democratic society and that it violated the constitutional protection of freedom of expression. The Court stated:

Since the petitioners were not allowed to publish their views on political matters through the government newspapers, and by necessary implication even through the radio and TV, they were denied the enjoyment of their freedom of expression

The Court commented on the proper role of publicly-owned media:

[I]n the case of newspapers they are supposed to be run on the basis of journalistic principles and ethics free from any outside interference. These principles dictate the coverage of all newsworthy events regardless of the source of such news. Anything less than this, and it is very easy for the general public to assess whether or not a given newspaper is working according to sound journalistic principles and ethics, is not acceptable from a publicly owned medium - print or other.

4.2.3 Other Election Campaign Issues

Australia

The Australian High Court (the highest court) invalidated provisions of a broadcasting law which prohibited all political advertising on radio and television during all Commonwealth, territorial, state and local elections. The Court stated that it had to "scrutinize with scrupulous care restrictions affecting free communication in the conduct of elections for political office for it is in that area that the guarantee fulfils its primary purpose."³⁴

The Court accepted that the ban was intended "to safeguard the integrity of the political process by reducing pressure on parties and candidates to raise substantial sums of money, thus lessening the risk of corruption and undue influence"; "to terminate the advantage enjoyed by wealthy persons and groups in gaining access to use of the airwaves"; and to reduce the trivialization of political debate which results from very brief political advertisements.³⁵ While recognizing that these were legitimate interests that could perhaps justify certain restrictions on advertising, the Court ruled that they could not justify the sweeping restrictions contained in the ban. In particular, it noted that the "replacement regime", whereby free airtime was to be granted during election campaigns to political parties and candidates, was heavily weighted in favour of established political parties, discriminated against new and independent candidates, and entirely excluded persons and groups who were not candidates but wished to comment on matters that were at issue in the elections.

Belgium

³⁴ *Australian Capital Television Pty Ltd v. The Commonwealth; New South Wales v. The Commonwealth (No. 2)*, note 17 supra.

³⁵ *Id.* at 705-7.

The State Council declared a statute banning publication of the results of public opinion polls during pre-election periods to be in violation of Article 10 of the European Convention and thus also the Belgian Constitution.³⁶ The Council reasoned that the consequences sought to be prevented by the ban were not among the grounds for permissible restrictions enumerated in Article 10(2).

Germany

The Constitutional Court (FCC) ruled that a public broadcasting station is not required to broadcast announcements of one side to a political debate, so long as it remains neutral and does not broadcast announcements by any side. In 1975 a plebiscite was held in the area of Montabaur on whether the area should remain part of Rheinland-Pfalz or change to Hessen. A local nationalist organization claimed that the plebiscite was void because, among other reasons, the public broadcasting station did not permit it to broadcast its views on television. The FCC rejected the claim because neither side in the plebiscite debate were granted TV or radio access.³⁷

Luxembourg

Several candidates of a political party that did not hold seats in the legislature challenged the decision of RTL, a private broadcasting company, to grant them less airtime during the election campaign period than candidates of parties holding seats. RTL had entered an agreement with the government to grant airtime to political parties and had developed guidelines for allocating time. The applicants claimed that the allocation of time was discriminatory and, *inter alia*, violated Article 3 of the First Protocol to the European Convention which commits states parties to "undertake to hold free elections at reasonable intervals ... under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature." The *Conseil d'Etat* (the supreme administrative court) ruled that RTL's decision did not comply with the Constitution's prohibition of discrimination and thus declared it null and void.³⁸

4.2.4 Private Interference with Political Expression

The Netherlands

In The Netherlands, all publishing media have accepted the authority of an Advertising Code Commission which interprets the voluntary Advertising Code, a non-binding statement of guidelines. In 1980, a political foundation sought to have published in Amsterdam an advertisement criticizing South Africa's apartheid policy. The Commission determined that the advertisement failed to meet the Code's decency standard. As a result, publishers controlling 90 per cent of the market declined to accept the advertisement. The Amsterdam court of first instance concluded that, owing to the Commission's influence, the foundation had effectively been kept from publishing its political views. The advertisement could have been rejected only if it had lacked taste or decency in the view of the overall majority of the Dutch people and would have caused readers to detest the periodical in which it was placed. The court held that this was not the situation in this case.³⁹

³⁶ Belgium State Council (*Conseil d'Etat/Raad van State*), 17 Feb. 1989.

³⁷ 42 FCC 53 (1975).

³⁸ *Allard c. Ministre d'Etat*, Conseil d'Etat (Comité du contentieux), Judgment of 28 May 1984, published in A Spielmann, A Weitzel & D Spielmann, *La Convention européenne des droits de l'homme et le droit luxembourgeois* (Brussels: Nemesis, 1991), 343-7.

³⁹ *Hof Amsterdam*, 30 Oct. 1980, NJ 1981, 422. See also Section 7.10 *infra* on property rights of others.

4.2.5 Parliamentary Privilege

Most countries afford either absolute or some form of qualified privilege for statements made by witnesses as well as Members of Parliament during meetings of the national or local legislatures or their committees.

Australia

The Supreme Court (the upper trial court) of New South Wales defined the privilege as prohibiting the use of statements made by a Member of Parliament or a witness before Parliament or a parliamentary committee which would have the effect of preventing that MP or parliamentary witness from exercising his or her freedom of speech in Parliament (or before a committee) or of punishing him or her for having done so.

The Court ruled that the privilege is sufficiently important that a trial judge has the power to exclude evidence on the basis of parliamentary privilege even when not requested to do so by a party to the case (although recognizing that it would be most exceptional to do so). In the instant case the President of the Senate was granted leave to intervene to raise the privilege in a case involving the re-trial of a Justice of the High Court of Australia.⁴⁰

France

In France, Article 41 of the 1881 Press Act confers total immunity for speeches made in Parliament, for documents and reports made public by Parliament, and for good faith reporting of public sessions of Parliament. Parliament has no authority to penalize anyone.⁴¹

Ireland

The Supreme Court stated:

[I]t is relevant to note the absolute immunity conferred on members of each House of the Oireachtas [Parliament] by ... [the Constitution] which provides that the members shall not in respect of any *utterance* in either House be amenable to any court or any authority other than the House itself. ...

[A member] could not be made answerable to any court for his utterances in the House even if he had been guilty of the greatest contempt of court. He could affect the most serious criminal trial but could not be attacked for contempt of court in respect of something said in the House.⁴²

⁴⁰ *R v. Murphy* (1986) 5 NSWLR 18; 13 *Common L Bull* (1987), 1227.

⁴¹ Parliament may create special committees (*commissions de contrôle*) whose workings are secret. Publication of information relating to the work of such committees is an offence.

⁴² *Attorney-General v. The Sole Member of the Tribunal of Inquiry into the Beef Processing Industry* [1993] ILRM 81, 125 (SC 21 Aug. 1992, per O'Flaherty J).

Accordingly, the Supreme Court upheld a ruling that a member of the Dail or Senate could not be compelled by a Tribunal of Inquiry to explain utterances made by him in the Parliament or to disclose the source of information on which such utterances were based.

United Kingdom

The ninth article of England's Bill of Rights of 1688 guarantees freedom of speech to all members of both Houses of Parliament. No MP or peer may be brought before the civil or criminal courts for any utterance in parliamentary proceedings, although their statements outside Parliament are not protected.⁴³

Reports of parliamentary proceedings enjoy a qualified privilege, so long as they are fair, accurate and made in good faith. That principle was established in 1868 in a case concerning publication by *The Times* of extracts from a House of Lords debate which included unflattering comments about someone who had alleged that a Law Lord had lied to Parliament. *The Times* was sued for libel. The Court held in favour of *The Times*, stating that just as the public had an interest in learning about what took place in the courts, so it was entitled to know what was said in Parliament; and only malice or a distorted report would destroy that privilege.⁴⁴

4.3SYMBOLIC SPEECH

Many forms of expression involve some element of conduct, whether it be handing out leaflets, posting a sign, marching in a procession, or amplifying a speech with a microphone. While governments may seek to regulate the purely expressive aspect of the communication, they also often regulate the conduct, often through "time, place or manner" regulations.⁴⁵

A related category of speech, sometimes called "symbolic speech", refers to expression without the use of words or where words are used to convey only part of the message.⁴⁶

Sri Lanka

As observed by the Supreme Court of Sri Lanka, in a unanimous opinion:

There is ample authority that 'speech and expression' extend to forms of expression other than oral or written -- placards, picketing, the wearing of black armbands, the burning of draft cards, the display of any flag, badge, banner or device, the wearing of a jacket bearing a statement, etc.⁴⁷

⁴³ G Robertson & A Nicol, *Media Law* (London: Longman, 1990), 298.

⁴⁴ *Wason v. Walter* [1868] LR 4 QB, 73.

⁴⁵ See Section 9.1 infra.

⁴⁶ For a discussion of the distinction between speech and conduct, see E Barendt, *Freedom of Speech* (Oxford: Clarendon Press, 1987), 45-46. For a critique of the distinction, see L Tribe, *American Constitutional Law*, 2nd edn (Foundation Press, 1987), 827.

⁴⁷ *Amaratunga v. Sirimal & Ors*, SC App. No. 468/92, 5, decided on 6 March 1993, citing a number of decisions of the US Supreme Court.

United States

The Supreme Court has ruled the following forms of symbolic speech to be protected: displaying a US flag with a peace symbol attached;⁴⁸ wearing a US army uniform in a manner calculated to discredit the armed forces;⁴⁹ flying a red flag in symbolic opposition to organized government;⁵⁰ and wearing an armband to express opposition to the Vietnam War.⁵¹

The Supreme Court has furthermore ruled that freedom of expression protects the "emotive function" of communication no less than its "cognitive content"; it thus ruled that the wearing of a jacket bearing the words "Fuck the Draft" was protected expression.⁵²

4.4 MATTERS OF GENERAL PUBLIC INTEREST

Council of Europe

The European Court has ruled that discussion about matters of legitimate public concern is entitled to the full protection of Article 10 of the European Convention and, in particular, that for purposes of Article 10 protection, "there is no warrant ... for distinguishing ... between political discussion and discussion of other matters of public concern."⁵³ The Court has expressly found the following matters to be of legitimate public interest:

- (a) information about the activities and possible wrongdoing of the security services (*Spycatcher*);
- (b) matters, including the status of settlement negotiations, concerning the health risks of legal drugs and the locus of legal and moral responsibility for resulting injuries (*The Sunday Times*);
- (c) criticism of the police department (*Thorgeirson*);
- (d) published opinion alleging a court's lack of impartiality (*Barfod*).

Not only matters of public significance are entitled to protection; also deserving are mundane pieces of information such as radio and television programme schedules.⁵⁴

⁴⁸ *Spence v. Washington*, 418 US 405 (1974).

⁴⁹ *Schacht v. United States*, 398 US 58 (1970).

⁵⁰ *Stromberg v. California*, 283 US 359 (1931).

⁵¹ *Tinker v. Des Moines Independent Community School District*, 393 US 503, 509 (1969).

⁵² *Cohen v. California*, 403 US 15, 26 (1971).

⁵³ *Thorgeirson v. Iceland*, para. 64.

⁵⁴ *Geillustreerde Pers v. The Netherlands*, Commission Report of 6 July 1976, 8 D & R 5 (1976), App. No. 5178/71.

4.5 PRESS FREEDOM AND THE PUBLIC'S RIGHT TO KNOW

4.5.1 General Principles

Council of Europe

The European Court of Human Rights has repeatedly stressed "the pre-eminent role of the press in a state governed by the rule of law."⁵⁵ It has, moreover, declared that:

"Whilst the press must not overstep the bounds set [for the protection of the interests set forth in Article 10(2) of the European Convention] ... it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'."⁵⁶

In emphasizing that the press' role includes the communication of ideas and opinions, the Court expressly rejected the contention that "the task of the press was to impart information, the interpretation of which had to be left primarily to the reader".⁵⁷

Furthermore,

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.⁵⁸

Penalties against the press for publishing information and opinions concerning matters of public interest are intolerable except in the narrowest of circumstances owing to their likelihood of "deter[ring] journalists from contributing to public discussion of issues affecting the life of the community".⁵⁹

The European Court has frequently noted the relevance of a restriction directed against the press in ruling the restriction incompatible with Article 10; namely, in challenging defamation convictions;⁶⁰ prior restraints;⁶¹ the confidentiality of judicial proceedings;⁶² and injunctions against

⁵⁵ *Thorgeirson v. Iceland*, para. 63; *Castells v. Spain*, para. 43.

⁵⁶ *Thorgeirson v. Iceland*, para. 63; *Castells v. Spain*, para. 43; *The Observer and Guardian v. United Kingdom (Spycatcher case)*, para. 59(b); *The Sunday Times v. United Kingdom (II)* (companion *Spycatcher* case), para. 65.

⁵⁷ *Lingens v. Austria*, para. 45.

⁵⁸ *Castells v. Spain*, para. 43.

⁵⁹ *Lingens v. Austria*, para. 44.

⁶⁰ *Id.* at paras. 41-42, 44; *Oberschlick v. Austria*, para. 58; *Thorgeirson v. Iceland*, para. 63; *Castells v. Spain*, para. 43.

allegedly unlawful advertising.⁶³ The Court has stressed the special role of the press in five of the six cases in which the applicant was a journalist or a newspaper;⁶⁴ and has also noted the special role of the press in several cases in which the statement at issue was published in the press. For instance, in the *Barthold* case, the Court expressly criticized measures which restrict people from communicating information to the press on the ground that the measures are liable to hamper the press in the performance of its special function of informing the public.⁶⁵

Organization of American States

The Inter-American Court of Human Rights has declared that:

When freedom of expression is violated ... it is not only the right of that individual [journalist] that is being violated, but also the right of all others to 'receive' information and ideas.⁶⁶

Since freedom of expression "cannot be separated from the right to use whatever medium is deemed appropriate to impart ideas and to have them reach as wide an audience as possible,"⁶⁷ journalism is in effect "specifically guaranteed by the Convention."⁶⁸ The Court concluded that "freedom and independence of journalists are assets that must be protected and guaranteed" and that "it is the mass media that make the exercise of freedom of expression a reality."⁶⁹

Argentina

The Supreme Court of Argentina observed:

Among the liberties the Constitution consecrates, freedom of the press is one of the most important ones, to the extent that, without its due protection, there would exist only a deteriorated or purely nominal democracy. Furthermore, it could be said that, although [the article protecting press freedom] proclaims merely individual rights, it is clear that the Constitution, when regulating freedom of the press, protects fundamentally its own democratic essence against any tyrannical influences.⁷⁰

⁶¹ *The Observer and Guardian v. UK (Spycatcher case)*, para. 60.

⁶² *The Sunday Times v. United Kingdom*, para. 65.

⁶³ *Barthold v. Germany*, para. 58.

⁶⁴ The five press cases in which the Court ruled a restriction incompatible with Art. 10 are *Lingens*, *Oberschlick*, *The Observer and Guardian*, *The Sunday Times*, and *Thorgeirson*. The one press case in which the Court upheld a restriction is *Markt Intern*, which involved commercial speech.

⁶⁵ *Barthold v. Germany*, para. 58. See also *Castells v. Spain*, para. 43.

⁶⁶ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, para. 30.

⁶⁷ *Id.* at para. 31.

⁶⁸ *Id.* at para. 73.

⁶⁹ *Id.* at para. 81.

⁷⁰ *Ekmekdjian v. Sofovich*, SC, decision of 7 July 1992; for further discussion of the case, see Section 7.3 *infra*.

France

The *Conseil constitutionnel* of France has affirmed that freedom of expression and freedom of the press are the right not only of those who write, edit and publish, but also of those who read.⁷¹

India

The Indian Supreme Court has stated that newspapers constitute the Fourth Estate of the country, and that, while press freedom is not expressly protected by the Constitution, it is implicitly protected by the guarantee of free speech and expression. Freedom of expression serves four broad purposes: (1) it helps an individual to attain self-fulfilment; (2) it assists in the discovery of truth; (3) it strengthens the capacity of an individual to participate in a democratic society; and (4) it provides a mechanism by which to establish a reasonable balance between stability and social change. In sum, what is at stake is the fundamental principle of the people's right to know.⁷² More lyrically stated, "[f]reedom of the press is the ark of the Covenant of democracy."⁷³

Ireland

The High Court, in dismissing charges of seditious libel against several journalists, declared in an 1868 case:

Our civil liberty is largely due to a free press, which is the principal safeguard of a free state, and the very foundation of a wholesome public opinion.⁷⁴

Namibia (South West Africa)

The Supreme Court of South West Africa, in setting aside a ruling of the Cabinet of the Interim Government of South West Africa that *The Namibian* should pay R20,000 as a deposit for newspaper registration, emphasized that:

If freedom of speech is to have any significance in a democratic country, its concomitant, freedom of the press, must also be recognised because it is only by reaching a large number of people and rallying their support that these freedoms can be utilised for the benefit of society.⁷⁵

Spain

The Constitutional Court observed that, under Spain's Constitution, the right to freedom of expression has "a dimension of institutional guarantee, protecting the freedom of public opinion".

⁷¹ CC, 29 July 1986, 110.

⁷² *Indian Express Newspapers (Bombay) v. Union of India*, AIR [1986] SC 515, [1985] 2 SCR 287; 13 *Common L Bull* (1987), 40.

⁷³ *Bennet Coleman and Co. v. Union of India*, AIR 1973 SC 106.

⁷⁴ *R v. Sullivan and R v. Pigot* [1868] 11 Cox CC 44.

⁷⁵ *Free Press of Namibia (Pty) Ltd v. Cabinet for the Interim Government of South West Africa*, (per Levy J), 1987 (1) SA 614, 623G, SC of South West Africa, Judgment of 9 Nov. 1986. See Section 8.2 *infra*.

This feature confers on the right to freedom of expression "a value which is beyond that which is common to every fundamental right".⁷⁶

United States

The Supreme Court has made clear that press freedom is not to be confined to newspapers but embraces every sort of publication:

These indeed have been historic weapons in the defence of liberty, as the pamphlets of Thomas Paine and others abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.⁷⁷

4.5.2 Access to Newsprint

India

The Supreme Court of India examined the constitutionality of an import duty on newsprint which had been progressively increased over time and which had a crippling effect on many newspapers. The Court ruled:

In view of the intimate connection of newsprint with the freedom of the press, the tests for determining the *vires* of a statute taxing newsprint have, therefore, to be different from the tests usually adopted for testing the *vires* of other taxing statutes.⁷⁸

While ordinary tax statutes were to be upheld unless they were openly confiscatory, it was sufficient, ruled the Court, in the case of a tax on the press, to show "a distinct and noticeable burdensomeness, clearly and directly attributable to the tax."⁷⁹ In light of evidence showing the burdensome nature of the tax, the Court ordered the government to study the tax's impact on the newspaper industry, reconsider the entire question of an import tax on newsprint within a period of six months, and refrain from further collection of the tax until the results of the reconsideration had been completed.

Trinidad and Tobago

The Constitution of Trinidad and Tobago sets forth the guarantee of freedom of the press in a clause independent of the guarantee of freedom of expression. The High Court has held that this separation - not found in most other constitutions - is significant and calls for particular attention to the rights and needs of the press. The applicant, a newspaper publishing company, was obliged by law (as were all businesses) to obtain approval from the Central Bank to purchase foreign currency necessary to buy newsprint and other publication materials which had to be imported. In 1983, the bank introduced an allocation system for the purchase of foreign currency in view of the country's worsening balance of payments position. In 1988, the allocation of foreign currency to all purchasers was cut to 30 per cent of the 1987 allocation. The High Court ruled that application of

⁷⁶ *Soria Semanal* case, STC 105/86, *Boletín de Jurisprudencia Constitucional* 64/65, 1048.

⁷⁷ *Lovell v. City of Griffin*, 303 US 444 (1938) (per Hughes CJ).

⁷⁸ *Indian Express Newspapers (Bombay) v. Union of India*, note 72 supra at 540.

⁷⁹ *Id.*

this dramatic cut to the applicant violated the constitutional protection of freedom of the press, which was to be given "a broad and purposive meaning".⁸⁰ The press was not to be hindered in its access to newsprint which required, in this circumstance, that it be given preferential treatment *vis-à-vis* other foreign currency purchasers. The Court stated:

[T]he press must not be hindered from having the commodity in which it communicates - otherwise it would be forced to close. Freedom of the press is not the right of the media only, it is a fundamental right of the individuals or people of this country; it is the right of society. Therefore, any infringement of that right against any person, be it a newspaper or the electronic media is an infringement against society. ...

It has been argued that this case centres around the right to purchase foreign exchange to import newsprint and that freedom of the press does not include the right to import newsprint. In my opinion, if a country ... does not manufacture newsprint and graphics, how then can a newspaper publish without importing its essential needs - newsprint? It follows from this that it must obtain the foreign currency to pay for it.⁸¹

The Court concluded that the company was entitled to receive an allocation of foreign exchange of at least 75 per cent of the amount it had purchased the previous year.

4.5.3 Government Subsidies

Germany

The Constitutional Court (FCC) ruled that government subsidies for the press are constitutional so long as they do not distinguish between publications on the basis of the opinions expressed. The German Postal Service offered certain publication materials to periodically published newspapers at a reduced price of 50 per cent of cost, thus amounting to a government subsidy of the remaining 50 per cent. A dispute arose when the government refused the discount to a publication on the ground that it did not publish news but only editorial comment. In upholding the distinction, the FCC noted that while press freedom could be violated by a subsidy scheme which "supported only enterprises of a certain ideology", this was not the basis for the distinction in the instant case.⁸²

India

The High Court of Andhra Pradesh held that the state must not discriminate unfairly against any particular newspaper in placing government advertisements. In a case brought by a publisher who claimed that he was the target of such discrimination, the Court ruled that, while the government could not be compelled to enter into an advertising contract with any newspaper, it was obliged to allocate its advertisements even-handedly:

The Government spends a considerable portion of the funds in its hands in paying for Government advertisements. The purpose of issuing advertisements is to educate

⁸⁰ *T & T Newspaper Publishing Group Ltd v. Central Bank of Trinidad and Tobago and Another*, High Court (Lucky J), 21 March 1989, (1990) LRC (Const.) 391, 409.

⁸¹ *Id.* at 409-10.

⁸² 80 FCC 124, 134 (1989).

the public about the activities of the Government, to promote its policies, and in cases where the Government or Government companies are carrying on business or trade to advertise its wares. It is not expected of the Government to exercise this power in order to favour one set of newspapers or to show its displeasure against another section of the press. It should not use the power over such large funds in its hands to muzzle the press or as a weapon to punish newspapers which criticize its policies and actions.⁸³

4.5.4 Freedom of Circulation and Distribution

Privy Council

The Privy Council affirmed the importance of freedom of circulation in examining a Maltese government circular which prohibited government employees from taking the *Voice of Malta*, a weekly paper of the Malta Labour Party, into government hospitals. The Privy Council ruled that the circular infringed the newspaper editor's right, protected under the Constitution of Malta, to impart ideas and information without interference. The Privy Council rejected the government's contention that the restriction was slight and thus could be ignored; *any* restriction on freedom of expression, including freedom of circulation, must be shown to be necessary to promote a legitimate aim.⁸⁴

Germany

The Constitutional Court (FCC) ruled that activities related to the distribution of publications are protected under press freedom. As stated by the FCC: "Functions auxiliary to the press are protected if they are necessary to run a free press." Since publishing houses themselves do not usually distribute their products, they are dependent on distributors. In this case, the FCC quashed the conviction of the distributor of a magazine for homosexuals for distributing a publication containing pictures which could harm the moral health of youth. The FCC ruled that, in convicting the distributor, the lower court had not properly taken into account the constitutional status of the distributor's right to press freedom.⁸⁵

India

The Supreme Court ruled that "freedom of circulation of newspapers is necessarily involved in freedom of speech and expression" and hence is also constitutionally protected.⁸⁶

United States

The US Supreme Court recognized more than a century ago that "[l]iberty of circulating is as essential to the freedom of speech as liberty of publishing; indeed without the circulation the publication would be of little value."⁸⁷

⁸³ *Ushodaya Publications Pvt Ltd v. Government of Andhra Pradesh*, AIR [1981] AP 109, 117.

⁸⁴ *Oliver v. Buttigieg* [1967] AC 115, discussed in A Lester, "Relevant International Principles", note 30 supra at 35.

⁸⁵ 62 FCC 230 (1982).

⁸⁶ *Sakal Papers Ltd v. Union of India*, note 6 supra.

⁸⁷ *Ex parte Jackson*, 96 US 727 (1877).

4.5.5 Right to Determine Format of Presentation

Council of Europe

The European Commission recognized that the manner in which information is communicated is an aspect of press freedom.⁸⁸ The case concerned the efforts of the UK's Channel 4 TV to present daily news coverage of a high profile trial in the form of re-enactments of trial highlights by professional actors. The judge presiding over the trial ruled that Channel 4 could not report on the trial in this way. The European Commission concluded that the ruling interfered with press freedom as protected by Article 10(1) of the European Convention because the manner in which information is imparted is important to the message. Nevertheless, the Commission ruled that the interference was justified by the government's interest in safeguarding the trial's fairness.⁸⁹

In a second case, the European Commission similarly found that restrictions on the *manner* in which information was to be broadcast (as distinct from restrictions based on subject matter) constituted an interference with press freedom and editorial independence. The case concerned a ministerial order made under Section 31 of Ireland's Broadcasting Authority Act which prohibited RTE (Ireland's public broadcasting service) from broadcasting, *inter alia*, any interview or report of an interview with a spokesperson of several named organizations, including Sinn Fein, a registered political party. To comply with the order, RTE issued guidelines that prohibited the applicant journalists from "broadcasting interviews, or reports of interviews, with representatives of the listed organizations"; using footage other than "mute film or stills to illustrate any reportage relating to any of the listed organizations"; and broadcasting any programme relating to these organizations without first obtaining the approval of their superiors. The Commission noted that these restrictions interfered not only with "the choice of the material the applicants may broadcast but also on their editorial judgement."⁹⁰ "Considering the eminent role of journalists in the dissemination of information", the Commission concluded that the order constituted an interference with freedom of expression. However, it ruled that the interference was justified by the government's interest in protecting national security, territorial integrity and public safety and in preventing disorder and crime.⁹¹

India

The Indian Supreme Court struck down as contrary to freedom of expression various restraints fixing the maximum number of pages that could be published by a newspaper according to the price charged, and prescribing the number of supplements that could be issued. The Court held that the freedom of a newspaper to publish any number of pages is an integral part of freedom of speech and expression.⁹²

⁸⁸ *Hodgson & Ors v. United Kingdom*, App. No. 11553/85, and *Channel Four Television v. United Kingdom*, App. No. 11658/85, 10 EHRR 503.

⁸⁹ The Commission concluded that, although there had not been a violation of Art. 10, there had been a violation of Art. 13, guaranteeing the right to an effective remedy, because Channel 4 had had no standing to challenge the judge's ruling. Since none of the parties involved in the trial challenged the ruling, Channel 4 had no domestic remedy.

⁹⁰ *Purcell et al v. Ireland*, App. No. 15404/89, Admissibility Decision of 16 April 1991, 12 *Human Rights L J* (1991) 254, 258.

⁹¹ For further discussion of the case, see Section 6.1 *infra*.

⁹² *Sakal Papers Ltd v. Union of India*, note 6 *supra*.

4.5.6 Right to Gather Information

Austria

The Constitutional Court ruled that, consistent with Article 10 of the European Convention, government officials may not hinder the procurement of information accessible to the public except when necessary to promote one of the aims listed in Article 10(2). The Court held that destruction by the police of a journalist's film of a demonstration violated the journalist's constitutional rights.⁹³

India

The Supreme Court ruled that, where the press seeks to interview prisoners sentenced to death and where the prisoners themselves are willing to be interviewed, it is unreasonable for the authorities to deny permission. In a 1982 case in which a jail superintendent had denied a journalist's request to interview two convicted prisoners, the Court observed:

[T]he right claimed by the [journalist] is not the right to express any particular view or opinion but the right to means of information through the medium of an interview of the two prisoners who are sentenced to death. ... We do not see any reason why newspapermen, who can broadly, and we suppose without great fear of contradiction, be termed friends of the society, should be denied the right of an interview⁹⁴

Japan

The Supreme Court, recognizing the important role of the press in serving the public's "right to know", has emphasized that the press must have freedom to gather news:

"[I]n a democratic society, the reports of the mass media provide the people with important materials on which to base their judgments as they participate in the nation's politics, and serve the people's 'right to know'. Consequently, it goes without saying that the freedom to report facts, along with the freedom to express ideas, is grounded in the guarantees of Article 21 [of the Constitution] ..., which provides for freedom of expression. Moreover, in order that the contents of the reports of such mass media may be correct, the freedom to gather news for informational purposes, as well as the freedom to report, must be accorded due respect in light of the spirit of Article 21"⁹⁵

4.6 BROADCASTING FREEDOM

Council of Europe

⁹³ Decision of 16 March 1987, B154/85 (1987) HRLJ 365.

⁹⁴ *Prabha Dutt v. Union of India*, AIR [1982] SC 6.

⁹⁵ *Kaneko v. Japan*, 23 Keishu 1490, SC (Grand Bench), 26 Nov. 1969 (translated in H Itoh & L Beer, *The Constitutional Case Law of Japan* (1978), 248). In this case, the Court upheld an order compelling four television stations to turn over for use as criminal evidence film they had taken during a train station clash between students and police.

Broadcasting freedom enjoys the protection of Article 10 of the European Convention. The European Court has ruled that, while "states are permitted to control by a licensing system the way in which broadcasting is organized in their territories, particularly in its technical aspects", any restrictions on content must comply with the requirements of paragraph 2 of Article 10.⁹⁶

Thus, in the case of *Autronic AG v. Switzerland*, the Court and Commission agreed that Switzerland had breached Article 10 by preventing a private company from picking up television signals from a Soviet telecommunications satellite and rebroadcasting them in Switzerland. The Swiss authorities claimed that under the International Telecommunication Convention, reception of these programmes had to be subject to the consent of the broadcasting state in order to protect the secrecy of satellite communications.

The Court first reiterated its prior rulings that Article 10 applies to "everyone", including profit-making corporate bodies.⁹⁷ Moreover, it applies "not only to the content of information but also to the means of transmission or reception since any restriction imposed on the means necessarily interferes with the right to receive and impart information."⁹⁸ The Court next emphasized that, in examining interferences with rights under Article 10, the court's "supervision must be strict, because of the importance of the rights in question ... [and that] the necessity for restricting them must be convincingly established."⁹⁹

The Court noted that the signals which the applicant company sought to rebroadcast were uncoded and intended for the general public in the then-Soviet Union and thus could not be considered confidential. It drew attention to the significance of subsequent developments, including the signature by the Council of Europe member states of the European Convention on Transfrontier Television, which permits reception of uncoded television broadcasts from telecommunications satellites without requiring the consent of the authorities in the transmitting state. Consequently, the Court concluded that the interference at issue could not be found necessary either to prevent the disclosure of confidential information or to prevent disorder in telecommunications.¹⁰⁰

In *Groppera Radio & Ors v. Switzerland*, the Court, while affirming that any regulation of the *content* of broadcasting must comply with the requirements of Article 10(2), ruled that the regulation at issue did not breach Article 10. At issue was a Swiss law prohibiting licensed cable companies from broadcasting programmes from stations that did not comply with international telecommunications and radio treaties and agreements. This had the effect of prohibiting the broadcast of programmes produced in and broadcast from Italy. The applicants complained that the ban on cable retransmissions from Italy infringed their right to impart information and ideas regardless of frontiers. The Court balanced the interests of the Swiss authorities and the rights of the applicants and others to receive information through the retransmissions. Noting that the legislation

⁹⁶ *Groppera Radio & Ors v. Switzerland*, para. 62; *Autronic AG v. Switzerland*, paras. 47 and 52.

⁹⁷ *Id.* at para. 47.

⁹⁸ *Id.*

⁹⁹ *Id.* at para. 61.

¹⁰⁰ See also M. O'Boyle, *The Right to Speak and Associate under Strasbourg Case Law with Reference to Central and Eastern Europe*, Connecticut J Int'l L (June 1993, forthcoming).

was content-neutral and intended to prevent Swiss stations from circumventing regulations by operating from the other side of the border, the Court concluded that Switzerland had not overstepped its margin of appreciation.

Recently, the European Commission concluded that the Austrian government's broadcasting monopoly (the only complete broadcasting monopoly in western Europe) violated the Article 10 rights of various applicants for licences for broadcast and cable access.¹⁰¹ The government sought to justify its complete monopoly as necessary to prevent the emergence of local private monopolies, the draining away of advertising revenue from the Austrian Broadcasting Corporation (ÖRF), and a reduction in the overall balance and objectivity of programmes. The Commission rejected those arguments, noting that the other Convention states had adopted various arrangements to balance competing rights and interests and concluded that it could "therefore not assume that private broadcasting would necessarily bring about the difficulties indicated by the Government."¹⁰² The Commission acknowledged that the structure of ÖRF "provides guarantees ensuring the plurality and objectivity of opinions" but concluded, nevertheless, that:

[N]o allowance is made at all within the Broadcasting Corporation for private initiative, for instance on a local or regional level, which would enable the applicants to enjoy their freedom to impart information within the meaning of Article 10 of the Convention.¹⁰³

The case has been referred to the Court, which is likely to issue its judgment by early 1994.

The European Convention on Transfrontier Television (ECTT), adopted by the Committee of Ministers and opened for signature by the member states of the Council of Europe on 5 May 1989, entered into force on 1 May 1993 upon ratification by seven states.¹⁰⁴ In its preamble, the states parties, *inter alia*, state that Article 10 of the European Convention "constitutes one of the essential principles of a democratic society"; "reaffirm[] their commitment to the principles of the free flow of information and ideas and the independence of broadcasters"; and "affirm[] the importance of broadcasting for the development of culture and the free formation of opinions in conditions safeguarding pluralism and equality of opportunity among all democratic groups and political parties." In Article 4, the parties further declare that they shall:

ensure freedom of expression and information in accordance with Article 10 of the Convention ... and shall guarantee freedom of reception and shall not restrict the retransmission on their territories of programme services which comply with the terms of this Convention.

¹⁰¹ *Informationsverein Lentia and Others*, Commission Report adopted 9 Sept. 1992, App. Nos. 13914/88, 15041/89, 15717/89, 15779/89 and 17207/90. The decision was unanimous as to one applicant and 14 votes to 1 as to the other four applicants.

¹⁰² *Id.* at para. 83.

¹⁰³ *Id.* at para. 84.

¹⁰⁴ The following states had ratified the ECTT as of May 1993: Cyprus, Italy, Malta, Poland, San Marino, Switzerland, United Kingdom and the Holy See.

European Community

The European Community (EC) has recognized the freedom to provide television broadcasting services. The Council of the EC has stated that the freedom to provide these services is a "specific manifestation in Community law of a more general principle, namely the freedom of expression as enshrined in Article 10(1) of the [European] Convention".¹⁰⁵ The European Court of Justice (the Court of the EC) has examined the compatibility of exclusive rights to broadcasting within a country with Article 10 of the European Convention.¹⁰⁶

The EC Council Directive on Broadcasting of 3 October 1989, which was made part of national legislation in all member states by October 1991, seeks to harmonize the rules governing broadcasting within the EC. The Directive establishes the principle of freedom of reception and retransmission of television broadcasts coming from another member state. Broadcasts may only be suspended under certain strict conditions, including the need to protect minors. The Directive also allows for a right of reply to an assertion of incorrect facts in a television programme. The Directive includes objectives for the promotion of European works, requiring member states to reserve a specified percentage of air time or budget for European works created by independent producers.¹⁰⁷

Finland

The Constitutional Committee of the Finnish Parliament (which decides the constitutionality of draft laws prior to their enactment), in a statement about the draft law on the Broadcasting Act, ruled that freedom of speech requires that citizens have certain rights *vis-à-vis* broadcasting enterprises, and that broadcasting enterprises have obligations towards the citizenry.¹⁰⁸ Moreover, freedom of speech not only prohibits certain executive and legislative actions, it also requires certain active measures (*status positivus*) by public authorities and the legislature in order to promote the practical realization of the freedom.¹⁰⁹

Papua New Guinea

The Supreme Court of Papua New Guinea declared that a 1986 act which prohibited private TV broadcasting for two years violated the Constitution's guarantee of freedom of expression. The applicants had entered into a contract in 1985 with the previous government to establish a commercial TV station, and had been granted licences which authorized the commencement of broadcasting in 1986. The Supreme Court ruled that: (1) the 1986 act prevented the applicants from exercising their constitutional right to freedom of expression; (2) the government bore the burden of establishing that the act came within one of the permissible restrictions set forth in Section 38(2) of the Constitution, namely to protect national defence, public safety, public order, and the exercise of the rights and freedoms of others; (3) in addition, the government had to establish that the Act was

¹⁰⁵ Council Directive of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in member states concerning the pursuit of television broadcasting activities (89/552/EEC).

¹⁰⁶ ECJ, *Elliniki Radiophonia Teleorassi-Anonimi Etairia v. Dimotiki Etairia Plirioforissis*, Case No. C-260/89, Judgment of 18 June 1991 (unreported).

¹⁰⁷ Reported in General Affairs Council Press Release, 3 Oct. 1989 meeting, 8774/89 (Presse 166).

¹⁰⁸ *Statement of the Constitutional Committee 8/1961*.

¹⁰⁹ *Statement of the Constitutional Committee 2/1986*.

"necessary" and "reasonably justified in a democratic society"; and (4) the government had not met that burden.¹¹⁰

4.7 MEDIA PLURALISM

International Standards

Article 19 of the International Covenant, Article 13(3) of the American Convention and Article 10 of the European Convention arguably give rise to a right of the public to receive information and opinions from a diversity of sources and, it can be argued, correspondingly impose an obligation on governments to ensure media pluralism. While Article 10 of the European Convention limits the guarantee of freedom of expression to freedom from "interference by public authority", there is no corresponding provision in Article 19 of the International Covenant and Article 13 of the American Convention. Article 19's drafting history reveals that such language was discussed but ultimately rejected by the drafters following the expression of concern by a number of government delegations that control of the media by private groups could jeopardize press freedom as much as state interference.¹¹¹ As stated by the Human Rights Committee in its only General Comment on Article 19:

[B]ecause of the development of modern mass media, effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression in a way that is not provided for in paragraph 3 [of Article 19]."¹¹²

Paragraph 3 of Article 13 of the American Convention is unprecedented among the other human rights treaties examined in this handbook in that it: (1) expressly prohibits indirect methods of restricting expression, such as unfair allocation of newsprint or broadcasting frequencies, and (2) prohibits such methods by private persons as well as by government. It thus expressly imposes a positive obligation on government to restrain private action that might impair the free exercise of the right both to impart and to receive information and ideas.

Council of Europe

The European Court and Commission of Human Rights have ruled that various articles of the European Convention impose positive obligations on member states to take action and not merely to refrain from interference.¹¹³ Concerning press freedom, the Commission has stated that the right

¹¹⁰ *The State v. NTN Pty Ltd and NBN Ltd*, SC, 7 April 1987 (No. SC 323); 14 *Common L Bull* (1988), 45.

¹¹¹ See UN Doc. A/500, para. 35. See also G Malinverni, "Freedom of Information in the European Convention on Human Rights and in the International Covenant on Civil and Political Rights", 4 *Human Rights Law Journal* (1983), 443, 451; D McGoldrick, *The Human Rights Committee* (Oxford: Clarendon Press, 1991), 459-79.

¹¹² Adopted by the HRC at its 461st meeting on 27 July 1983, UN Doc. A/38/40, 109.

¹¹³ See *Marckx v. Belgium* ("there may be positive obligations inherent in an effective respect for family life" under Art. 8); *Plattform Ärzte für das Leben v. Austria* (Art. 11, regarding the right to peaceful assembly, obliges the state to take measures to protect protesters from counter-demonstrators, although the obligation is to take reasonable measures and does not include the obligation to succeed).

to information and opinions might raise an issue "where a State fails in its duty to protect against excessive press concentrations".¹¹⁴

In a 1992 report on the merits of a case challenging the Austrian government's broadcasting monopoly, the Commission observed that "Article 10 is based on the idea that a pluralism of opinions must be safeguarded."¹¹⁵ Accordingly, even one-sided programmes are preferable to a monopoly so long as a sufficient number of frequencies are available to ensure that a diversity of views will be broadcast. Moreover, the fact that the Austrian Broadcasting Corporation provides "guarantees ensuring the plurality and objectivity of opinions" did not suffice to justify the monopoly because "no allowance is made at all ... for private initiative, for instance on a local or regional level, which would enable the applicants adequately to enjoy their freedom to impart information".¹¹⁶ The Commission found unconvincing the government's claims that, in a small country such as Austria, a government monopoly was justifiable as necessary to prevent the emergence of private monopolies and to maintain the financial viability of the public broadcasting system. The Commission noted that other countries in Europe had found ways of balancing the competing interests without completely barring the access of private parties to broadcasting.¹¹⁷

In a 1974 resolution, the Council of Europe's Committee of Ministers (the political and executive arm of the Council of Europe) recommended that member states examine the introduction of public aid to the press, including subsidies for various categories of newspapers.¹¹⁸ In 1978, the Parliamentary Assembly of the Council of Europe called for the enactment of national laws restricting press monopolies and concentrations, recognized the likely need of public subsidies to ensure financial viability of newspapers, and recommended that any form of selective aid should be administered only by an independent body.¹¹⁹ The Committee of Ministers declared in 1982 that:

[S]tates have the duty to guard against infringements of the freedom of expression and information and should adopt policies designed to foster as much as possible a variety of media and a plurality of information sources, thereby allowing a plurality of ideas and opinions.¹²⁰

Support for the interpretation that Article 10 of the European Convention imposes positive obligations may also be found in the final report on the European Convention of the Sevilla-colloquium of 1985:

¹¹⁴ *Geillustreerde Pers v. The Netherlands*, note 54 supra; G Malinverni, note 111 supra at 451.

¹¹⁵ *Informationsverein Lentia and Ors v. Austria*, Commission Report of 9 Sept. 1992, App. Nos. 13914/88, 15041/89, 15717/89, 15779/89 and 17207/90, para. 82.

¹¹⁶ *Id.* at para. 84.

¹¹⁷ *Id.* at para. 83.

¹¹⁸ Resolution (74)43.

¹¹⁹ Recommendation 834 (1978).

¹²⁰ Committee of Ministers, Declaration on the Freedom of Expression and Information, 29 April 1982, reprinted in Council of Europe DH-MM (91) 1. See also Section 4.12.1 supra.

5. The notion 'necessary in a democratic society', as such, is not only fundamental in the supervision of the duty of the public authorities not to damage or interfere in the exercise of the right to freedom of expression and information, but also implies the obligation of States Parties to ensure plurality and to correct inequalities.

The Parliamentary Assembly's 1990 opinion on private, non-commercial local radio in Europe stated that "safety mechanisms should be set up to enable local radio stations to maintain or create areas of communication guaranteeing democratic forms of expression, cultural diversity, independence and professionalism ...".¹²¹

The Committee of Ministers and the Parliamentary Assembly have continued to urge states to take positive measures to promote press pluralism while ensuring that they do not influence the content of press coverage or link government aid in any way to editorial policy.¹²²

The preamble to the European Convention on Transfrontier Television (which entered into force on 1 May 1993 upon ratification by seven countries) affirms the importance of broadcasting for the development of culture and the free formation of opinions in conditions safeguarding pluralism and equality of opportunity among all democratic groups and political parties. It states:

[T]he continuous development of information and communication technology should serve to further the right, regardless of frontiers, to express, to seek, to receive and to impart information and ideas, whatever their source.

France

The *Conseil constitutionnel* of France has held that the right to freedom of the press, in addition to being a right of those who write, edit and publish, is also a right of the public to read and, moreover, to be able to choose from a diversity of views. This right of the public necessitates a degree of press pluralism, at least for general dailies, making press pluralism an aim of constitutional value. For that reason, the *Conseil* ruled unconstitutional a clause of the Act of 1 August 1986 on concentration of press ownership which would have allowed greater press concentration than the previous law.¹²³

Germany

The Federal Constitutional Court (FCC) noted that the guarantee of the public's right to information in the Basic Law requires the establishment of a public broadcasting system which reflects both external pluralism (that is, pluralism of views broadcast) and internal pluralism (that is, in the composition of its governing board). Private stations must also be permitted to operate but their existence does not diminish the obligations of the public station concerning pluralism since the public's constitutional right to information can only be enforced against a public broadcaster and not against a private broadcasting station. Parliament must establish the rules governing the public broadcasting system as well as the framework for admission of private broadcasters. The

¹²¹ Opinion, 23 Nov. 1990, ADOC6344. See also Report on the Situation of Local Radio in Europe, 12 Dec. 1990, ADOC6343.

¹²² See generally D Voorhoof, "From Government Regulation to Market Regulation: The Press in a New Environment" (University of Ghent, Dec. 1992).

¹²³ CC, 29 July 1986, 110.

requirements concerning pluralism of private broadcasters may be less strict than for public broadcasters. A *Land* (state) parliament has wide discretion in establishing the framework for private broadcasting stations and may decide to require them to include on their governing boards representatives of various social groups. The Basic Law only requires that the composition of the governing board provide an appropriate safeguard for diversity of opinion; it does not dictate the actual composition.¹²⁴

4.8 ARTISTIC EXPRESSION

Council of Europe

In the *Müller* case, the European Court upheld an obscenity conviction and fine for painting sexually explicit paintings at an exhibition open to the public including children. However, in doing so, the Court made clear that artistic expression comes within the protection of Article 10 and "affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds."¹²⁵ The Court confirmed its interpretation with reference to Article 19(2) of the International Covenant which expressly extends protection to the field of art. The European Commission, in its report on the same case, commented that "freedom of expression is of fundamental importance in [a] democratic society. ... Through his creative work the artist expresses not only a personal vision of the world but also his view of the society in which he lives. To that extent art not only helps shape public opinion but is also an expression of it and can confront the public with the major issues of the day" ¹²⁶

4.9 ACADEMIC AND EDUCATIONAL FREEDOM

The right to receive and impart information and ideas, guaranteed by the Universal Declaration, the International Covenant and the three main regional human rights treaties, includes the right to be free from governmental interference with the content of curriculum and the hiring of professors and teachers. Any restriction on the operation of schools and universities must be manifestly necessary for the promotion of a legitimate aim. While the preservation of public order in a democratic society undoubtedly is a legitimate aim, restrictions may not be imposed simply to silence government critics.

Nigeria

In the following Nigerian cases, judges established certain minimum protections of academic and educational freedom, including the right of professors to a fair hearing before they may be terminated from a publicly-funded university, the right of members of faculties of public universities not to be dismissed from their employment merely because of government disapproval of their political views, the right of students not to be expelled or forcibly transferred to another part of the country for exercising their right of political expression, the right of academic staff not to

¹²⁴ 83 FCC 238 (1991).

¹²⁵ *Müller & Ors v. Switzerland*, para. 27.

¹²⁶ *Id.* Commission Report, adopted 8 Oct. 1986, para. 70.

have their contracts terminated by the government but only by the governing council of their institutions, the right of parents and others to own and operate elementary and secondary schools, and the right of individuals to establish and operate universities in the absence of specific legislation to the contrary.

Several professors at the University of Lagos were dismissed for leading a campaign to remove the University Vice-Chancellor. They filed suit, and the Lagos High Court declared their termination illegal and ordered reinstatement. The Court of Appeal reversed. The Supreme Court, reaffirming the High Court judgment, ruled that the plaintiffs held their appointments not at the pleasure of the government but rather under the University of Lagos Act 1967 which required that they be given a fair hearing before they could be removed by the University Governing Council.¹²⁷

The Supreme Court maintained a similar position in a subsequent case when it ruled that "constitutionally entrenched provisions, particularly those safeguarding individual rights, should not, save in a fascist system, be lightly trampled upon."¹²⁸

Bala Usman, a professor at the Ahmadu Bello University, was deemed to have resigned his appointment by participating in politics and, in particular, joining the People's Liberation Party. President Babangida endorsed Dr Usman's retirement as being "in the public interest". Judge Kumai Bayan Aka'ahs, in declaring Dr Usman's removal to be illegal, observed that "President Ibrahim Babangida cannot be said to have been acting in the public interest when he purportedly approved the retirement of the plaintiff as the President is merely attempting to give legal cover to an illegality already committed against the plaintiff."¹²⁹

Similarly, Judge Moni Fafiade condemned the "retirement in the public interest", on orders of President Babangida, of two lecturers at the Obafemi Awolowo University. In the suit filed by both lecturers challenging their forced retirement, the judge ruled that the court was competent to hear the case as the letters of retirement were prima facie illegal.¹³⁰

Nigerian courts have also intervened to stop the expulsions and transfers to other parts of the country of students considered to be government opponents. In one celebrated case, the Supreme Court, in ruling that students were entitled to a fair hearing before they could be expelled or otherwise punished, observed:

Our human resources are our greatest asset and unless we use them to advantage, the Nigerian nation will be the loser. We cannot afford to lag behind while other nations march forward and enjoy the full benefit of their developed human resources. A university student is a priceless asset and he is on the threshold of a world of useful service to the nation, we cannot afford to destroy him by stigmatising him with guilt of offences unless proved guilty by a court.¹³¹

¹²⁷ *Olaniyan v. University of Lagos* [1985] 2 NWLR (part 9) 599.

¹²⁸ *Eperokun v. University of Lagos* [1986] 2 NWLR (part 34) 162 (per Ayo Irikefe CJN).

¹²⁹ *Bala Usman v. Ahmadu Bello University*, reported in *The Guardian*, 14 May 1990.

¹³⁰ *Professor Omotoye Olorode & Anor. v. Professor Babs Fafunwa*, Suit No. M/651/90.

¹³¹ *Garba v. University of Maiduguri* [1986] 2 NWLR 550, 576 (per Obaseki JSC).

In June 1992, the Academic Staff Union of Universities (ASUU) of Nigeria declared an industrial action to press for university autonomy and improved conditions of service. The Armed Forces Ruling Council banned the ASUU, and threatened to dismiss all striking lecturers if they failed to call off the strike within 48 hours. The ASUU President challenged the government's power to dismiss the lecturers. In her ruling on the *ex parte* motion, Judge Dolapo Akinsanya restrained the government from carrying out the threat and, in particular, "from interfering in the existing contract of employment entered into between individual academic staff and the Governing Councils of all Federal and State Universities in Nigeria."¹³²

The Lagos State government published its intention to abolish private primary education in Lagos. Archbishop A O Okojie and various parents challenged this plan as unconstitutional.¹³³ The Federal Court of Appeal of Nigeria (Lagos Division) held that Section 36(1) (guaranteeing the right "to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference") protects the right "of parents and guardians to bring up their children and wards and to educate them in the best institutions they can think of and in the best traditions and manners they think such children and wards should be educated."¹³⁴ In so holding, the Court expressly followed the reasoning of the US Supreme Court (set forth *infra*).

Moreover, the Court held that the word "medium" in Section 36(2) - which permits any person to "own, establish and operate any medium for the dissemination of information, ideas and opinions" - applies to media other than the mass media and was to be interpreted broadly to include any "agency for the dissemination of knowledge". Furthermore, "proprietors, teachers and students alike must be protected in their exercise of the right to freedom of expression."¹³⁵ Section 18 of the Constitution, obliging the government to direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels, could not and was not intended to minimize in any way the enjoyment of that right. Accordingly, parents and others were entitled to own and operate private schools.

The Supreme Court of Nigeria ruled that, in the absence of specific legislation regulating the establishment of universities, the applicants had a right under the constitutional protection of freedom of expression to establish a university.¹³⁶

United States

The Supreme Court, in invalidating a state statute prohibiting private education, affirmed the right of parents to direct the education of their children:

¹³² *Attahiru Jega v. Armed Forces Ruling Council & Ors*, Suit No. LD/2267/92.

¹³³ It is worth noting that, unlike courts in many Commonwealth countries, the courts of Nigeria have the power to declare legislative acts unconstitutional under the Constitution of 1979, although this power was suspended in 1984 when the military resumed control.

¹³⁴ *Archbishop Okojie & Ors v. The Attorney-General of Lagos State*, [1981] 2 NCLR 337, 1 NLR 218, 30 Sept. 1980 (Fed. Ct App.: Lagos).

¹³⁵ *Id.* at 253.

¹³⁶ *Ukaegbu v. A-G of Imo State* [1985] LCR 867.

[The Act under consideration] unreasonably interferes with liberty of parents and guardians to direct the upbringing and education of children under their control. ... The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.¹³⁷

4.10 COMMERCIAL ADVERTISING

United Nations

The Human Rights Committee declared in a recent decision that all forms of expression, including commercial speech (other than expression which offends Article 20, concerning incitement to hatred), are entitled to the same degree of protection:

Article 19, paragraph 2, must be interpreted as encompassing every form of subjective ideas and opinions capable of transmission to others, which are compatible with article 20 of the Covenant, of news and information, of commercial expression and advertising, of works of art, etc.; it should not be confined to means of political, cultural or artistic expression. In the Committee's opinion, the commercial element in an expression taking the form of outdoor advertising cannot have the effect of removing this expression from the scope of protected freedom. The Committee does not agree either that any of the above forms of expression can be subjected to varying degrees of limitation, with the result that some forms of expression may suffer broader restrictions than others.¹³⁸

Thus, under the International Covenant, commercial expression is to receive greater protection (relatively speaking) than under the European Convention in that under the Convention, commercial speech may be subjected to a greater degree of restriction than other forms of expression.

Council of Europe

Information of a commercial nature is protected under Article 10 of the European Convention although the European Court has granted governments a wider margin of appreciation to restrict commercial speech than other forms of expression.¹³⁹ Thus, in the *Markt Intern* case, while the European Court ruled that commercial speech is entitled to protection, it also accorded the national courts a wide margin of appreciation to impose restrictions. *Markt Intern*, a consumer magazine, had published an accurate account of a chemist's dissatisfaction with a mail-order firm. The German courts ruled that the story created a false impression and thus constituted unfair competition and

¹³⁷ *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 US 510 (1925) (per McReynold J).

¹³⁸ Human Rights Committee, 47th Session, *Ballantyne and Davidson v. Canada*, Communication No. 359/1989, and *McIntyre v. Canada*, Communication No. 385/1989, UN Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev. 1, 5 May 1993 Annex, para. 11.3. For further discussion of this case see Section 4.11 *infra*.

¹³⁹ *Markt Intern Verlag GmbH and Klaus Beermann v. Germany*, para. 33.

injured the reputation or rights of others. A divided Court, in a vote of 9 to 9 (with the casting vote of the President of the Court), upheld the German court's judgment and rejected arguments in favour of extending a greater measure of protection to commercial speech.

In the *Barthold* case, the European Court ruled that a statement should not be treated as commercial speech if its primary purpose is to inform the public about a topic of legitimate public interest. The German courts had issued and upheld an injunction against a veterinary surgeon on the ground that information he had given a journalist concerning his own practice in the course of urging the need for more comprehensive veterinary night services violated the prohibition on advertising by members of the "liberal professions". The Court concluded that the publicity Dr Barthold may have received was secondary to "the nature of the issue being put to the public at large" and that the German courts' prohibition of any statement that might have a slight advertising effect was likely to discourage "members of the liberal professions from contributing to public debate on topics affecting the life of the community" as well as "to hamper the press in the performance of its task of purveyor of information and public watchdog."¹⁴⁰

In a concurring opinion, Judge Pettiti emphasized the importance of advertising to the ability of private parties to impart information, especially via the electronic media:

The great issues of freedom of information, of a free market in broadcasting, of the use of communication satellites cannot be resolved without taking account of the phenomenon of advertising; for a total prohibition of advertising would amount to a prohibition of private broadcasting, by depriving the latter of its financial backing. ... [A]ny restriction imposed should answer a 'pressing social need' and not mere expediency.¹⁴¹

European Community

The European Court of Justice has ruled that a national restriction in one member state on the distribution of advertising literature lawfully disseminated in another member state is incompatible with Community law unless justifiable under Article 36 or under the "rule of reason". Advertising is a necessary corollary to the free movement of goods and, moreover, since consumer protection depends heavily on adequate information, exclusion of advertisements cannot be justified on consumer protection grounds.¹⁴²

The European Community has adopted a number of directives concerning advertising in the interest of protecting consumers, particularly those most at risk such as children and young people. Directives regulate the advertising of foodstuffs¹⁴³ and medicinal products for human use,¹⁴⁴ and

¹⁴⁰ *Barthold v. Germany*, para. 58.

¹⁴¹ *Id.* at 27-28.

¹⁴² *GB-INNO-BM v. Confédération du Commerce Luxembourgeois Asbl*, Case No. C362/88, 1991 2 CMLR 801.

¹⁴³ Council Directive on labelling foodstuffs, OJ 1979 L 33/1, amended OJ [Official Journal] 1989 L186/17.

¹⁴⁴ Council Directive on the advertising of medicinal products for human use, OJ 1992 L113/13.

ban misleading advertising.¹⁴⁵ A directive has been proposed which would regulate tobacco advertising.¹⁴⁶

Austria

The Austrian Constitutional Court held that commercial advertising is protected by Article 10 of the European Convention, which is incorporated into Austrian law, although the protection afforded may be more restricted than that afforded to expression of political ideas.¹⁴⁷ Moreover, the Court noted that Article 10, which protects the imparting of information and ideas, has a broader scope than Article 13 of the Austrian Basic Law which expressly protects the expression only of opinions. The Court ruled that the Austrian Broadcasting Corporation had violated the guarantee of freedom of expression when it rejected, without explanation, an application to broadcast weekly radio commercials. The Court reasoned that, in light of Article 10, the Corporation should be required to be available to everyone for lawful commercial advertising and did not have the privilege of using its discretion to choose between certain enterprises. In another case the Constitutional Court ruled that a broadcasting company had to give reasons for refusing to broadcast a paid advertisement.¹⁴⁸

Canada

The Supreme Court of Canada, in considering the constitutionality of two provisions which prohibited commercial advertising directed at children under 13 years of age, ruled that commercial advertising is entitled to constitutional protection. The Court cited the European Court's judgment in *Handyside* in concluding, first, that speech may not be excluded from protection based upon its content alone; second, that expression which constitutes a threat or act of violence is not protected, and third, in light of the fact that "the rights and freedoms guaranteed in the [Canadian] Charter should be given a large and liberal interpretation ... there is no sound basis on which commercial expression can be excluded from the [Charter's freedom of expression] protection". The Court, however, ruled that the statutory provisions in question were precise, served a legitimate purpose of protecting children from undue influence, and were necessary to achieve that purpose, and thus were justifiable under Section 1 of the Charter which permits limitations similar to those set forth in Article 10(2) of the European Convention.¹⁴⁹

In a second case, the Canadian Supreme Court, in affirming the importance of commercial speech, noted the reasoning of the US Supreme Court that not only the speaker but also the listener has an interest in freedom of commercial expression.¹⁵⁰

United States

¹⁴⁵ Council Directive on misleading advertising, OJ 1984 L250/17.

¹⁴⁶ Proposal for a Council Directive on advertising of tobacco products in the press and by means of bills and posters, OJ 1989 L124/5, amended OJ 1990 L119/7.

¹⁴⁷ Constitutional Court, Decision of 27 June 1986, B658/85, reported in (1987) 8 HRLJ 361.

¹⁴⁸ *Id.*

¹⁴⁹ *Irwin Toy Ltd v. Quebec (A-G)* [1989] 1 SCR 927 (per Dickson CJ).

¹⁵⁰ *Ford v. Quebec (A-G)* [1988] 2 SCR 712.

In 1976, the Supreme Court ruled that even "purely commercial" speech is entitled to constitutional protection. It did so in the course of invalidating a Virginia statute which prohibited pharmacists from advertising prescription drug prices. It rejected the state's claim that price competition would impair the professionalism of licensed pharmacists, and noted society's strong interest in "the free flow of commercial information". The Court recommended that the state pursue an alternative approach, namely:

to assume that ... information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.¹⁵¹

Thus, the Court premised protection of commercial speech primarily on the right of consumers to *receive* information. (Indeed, the case was brought by consumers rather than pharmacists.)

The Court suggested, however, that protection of commercial speech might be less extensive than for other types of speech, that false or misleading advertising clearly could be prohibited, and that broader regulation of "time, place and manner" of commercial speech might be justified.

In subsequent cases, the Court made clear that commercial speech does not receive the full range of constitutional protection accorded other forms of speech. In the *Central Hudson* case, the Court invalidated a state agency's prohibition of all "promotional advertising" by electric utilities that encouraged customers to buy more electricity. The Court articulated a four-part test: (1) the speech must concern lawful activity and not be misleading; (2) the state interest advanced by the restriction must be substantial; (3) the regulation must directly advance that state interest; and (4) the regulation cannot be more extensive than is required to serve the interest.¹⁵² Applying this test, the Court held that the ban was impermissibly broad. It reasoned that, while the state had a "substantial interest" in promoting energy conservation, the ban also applied to speech which encouraged the use of energy-saving devices or services, and thus was over-broad.

4.11 LANGUAGE RIGHTS

United Nations

The Human Rights Committee issued a decision in May 1993 declaring that Quebec's "French only" sign law (described in the section on Canada below) violated Article 19(2) of the International Covenant. First, the Committee rejected the Quebec government's contention that commercial advertising falls outside the ambit of Article 19.¹⁵³ Freedom of expression includes the right to use the language of one's own choosing even in such fields as trade. Second, the Committee observed that the only legitimate aim that could be served by the sign law was the protection of the right of the francophone minority to use their own language, guaranteed by Article 27 of the International Covenant. Third, the Committee concluded that the sign law was not necessary "in order to protect the vulnerable position in Canada of the francophone group". The Committee reasoned:

¹⁵¹ *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 US 748, 770 (1976).

¹⁵² *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 477 US 557, 566 (1980).

¹⁵³ This conclusion of the Committee is discussed at greater length in Section 4.10 *supra*.

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For example, the law could have required that advertising be in both French and English. A State may choose one or more official languages, but it may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one's choice.¹⁵⁴

The Committee called on the government of Canada to remedy the violation and requested a report within six months regarding the measures taken.¹⁵⁵

The Committee further concluded that there had been no violation under Article 27 on the ground that Article 27 applies to states and not provinces and, accordingly, that English speakers could not be considered to comprise a linguistic minority.

Council of Europe

In a 1963 case, the European Commission gave its opinion that freedom of expression does not include the right to be taught in one's original language.¹⁵⁶ In light of developments in European law concerning language rights, it is possible that the Commission would reach a different decision today.

Canada

The Supreme Court of Canada ruled that Section 58 of the Quebec Charter of the French Language requiring the exclusive use of the French language for all public signs, posters and commercial advertising was inconsistent with the guarantee of freedom of expression under Section 2(b) of the Canadian Charter of Rights and Freedoms. Section 58 provided that any business which violated the prohibition was liable to a fine of C\$125 to C\$2,300 for each day it continued the violation after receiving a citation. Five businesses which had been fined challenged the law.

The Court upheld the conclusion of the lower courts that freedom of expression includes the freedom to express oneself in the language of one's choice:

Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice. Language is not merely a means or a medium of expression. It is, as the preamble of the Charter of French language itself indicates, a means by which a people may express its cultural identity.¹⁵⁷

The Court also concluded that the fact that the signs displayed by the respondents had commercial purposes did not remove them from the scope of protected expression.

¹⁵⁴ *Ballantyne and Davidson v. Canada and McIntyre v. Canada*, note 138 supra at para. 11.4.

¹⁵⁵ Two of the 18-member Human Rights Committee dissented from the majority's decision on the Art. 19 violation; one dissented because in his view the applicants had not exhausted their domestic remedies and the other, on the ground that the sign law was a legitimate means of preserving the rights of the francophone minority under Art. 27.

¹⁵⁶ *Belgian Linguistic Case: 23 Inhabitants of Alsemberg and Beersel v. Belgium*, App. No. 1474/62; *X v. Belgium*, App. No. 1769/62, *Yearbook VI* (1963) 444, 454-56.

¹⁵⁷ *Ford v. Quebec (A-G)*, note 150 supra.

The Court noted that the law served a legitimate purpose, namely to ensure that the reality of Quebec society is communicated through the "*visage linguistic*". However, the Court concluded that the legitimate purpose was adequately served by requiring the display of all signs in the French language and, accordingly, that the "French only" requirement was disproportionate.

Subsequently, Quebec's legislature amended Section 58 so as to make clear that it intended in so doing to abrogate the Charter's freedom of expression protection (which the Charter permits so long as the intent to abrogate is expressly stated). Several English-speaking businesses filed a successful challenge with the UN Human Rights Committee (discussed above).

New Zealand

The New Zealand Court of Appeal (by a vote of 3 to 2) ordered the government to refrain from allocating FM radio frequencies for several weeks until after it had received and considered the recommendations of the Waitangi Tribunal regarding allocation of frequencies for Maori-language programming. The Radio Communications Act permits the government to dispose of almost all available radio frequencies by creating a system of registration of 20-year transferable management rights and licences. It does not however prescribe criteria to be taken into account in the initial allocation of the licences.

In 1986 the Waitangi Tribunal held that the Treaty of Waitangi obliged the Crown to recognize and protect the Maori language. Although it did not make any specific recommendations, it reserved the right to do so at a later time. After the Maori Council brought to the Tribunal's attention the Crown's plan to allocate an inadequate number of frequencies to the Maoris, the Tribunal asked the Crown to delay the allocation for a few weeks until after it had issued its recommendations. The Crown refused to do so.

The High Court ordered the Crown to delay the tender process, and the Crown appealed. The government acknowledged that it was bound to consider the Tribunal's 1986 general recommendations, that the Maori argument for FM frequencies was reasonable and that allocation of frequencies for Maori programmes would benefit the Maori culture, albeit indirectly and in a limited way. The Court of Appeal concluded that the government was obliged to consider the specific recommendations expected to be issued by the Tribunal.¹⁵⁸

4.12 ACCESS TO INFORMATION

Article 19 of the Universal Declaration, Article 19 of the International Covenant and Article 13 of the American Convention all protect the right "to seek" and "impart" information and ideas as an integral aspect of the right to freedom of expression; although Article 10 of the European Convention does not expressly protect the right to "seek" information and ideas, it is likely that the European Court would find that this right receives implicit protection.¹⁵⁹ Article 9 of the African Charter expressly protects the right of every individual to receive information.

Council of Europe

¹⁵⁸ *Attorney-General v. New Zealand Maori Council*, Court of Appeal, Sept. 1990.

¹⁵⁹ See the Report of the Council of Europe on *Activities in the Mass Media Field*, DH/MM (83) I, 5.

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In its case-law, the European Court has made clear that the European Convention's strong protection of freedom of expression rests in significant measure on the public's right to know. For instance, in referring to the special protection to be accorded to the press, the Court has repeatedly stated:

Not only does it [the press] have the task of imparting such information and ideas [on matters of public interest]: the public also has a right to receive them.¹⁶⁰

The public's right to know is also an intrinsic aspect of informed political debate crucial to genuine democracy:

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society ...¹⁶¹

The European Court has ruled that the right to receive information "basically prohibits a Government from restricting a person from receiving information that others may wish or may be willing to impart to him."¹⁶²

In the recent *Open Door Counselling* case, the European Court ruled that Ireland had exceeded its margin of appreciation in issuing an injunction prohibiting family planning counsellors from providing non-directive counselling to women about where to obtain abortions outside of Ireland. (Abortion is illegal in Ireland.) The Court noted that the counsellors wished to impart, and women wished to receive, the information. The Court observed that it was not a criminal offence under Irish law to travel abroad to obtain an abortion, and that the injunction applied to information about services lawful in other Council of Europe countries that "may be crucial to a woman's health and well-being."¹⁶³ The Court concluded that the injunction was over-broad and thus violated Article 10 of the European Convention because it "imposed a 'perpetual' restraint on the provision of information to pregnant women concerning abortion facilities abroad, regardless of age, state of health or their reasons for seeking counselling on the termination of pregnancy".¹⁶⁴

The Court noted other circumstances that supported its conclusion that the injunction was disproportionate. First, the counselling that was prohibited was non-directive; the Court found that there could be "little doubt that following such counselling there were women who decided against a termination of pregnancy. Accordingly, the link between the provision of information and the

¹⁶⁰ *Thorgeirson v. Iceland*, para. 63; *Castells v. Spain*, para. 43; *The Observer and Guardian v. United Kingdom*, para. 59(b); *The Sunday Times v. United Kingdom (II)* case, para. 65.

¹⁶¹ *Lingens v. Austria*, para. 42.

¹⁶² *Leander v. Sweden*, para. 74 and *Open Door Counselling and Dublin Well Woman Centre v. Ireland*, para. 55 (affirming that women have a right to receive information about family planning options which, however, may be subject to various restrictions, discussed below).

¹⁶³ *Open Door Counselling and Dublin Well Woman Centre v. Ireland*, para. 72.

¹⁶⁴ *Id.* at para. 73.

destruction of unborn life [was] not as definite as contended."¹⁶⁵ Second, the information was not made available to the public at large. Third, the government did not seriously contest the fact that information concerning abortion facilities abroad was obtainable from other sources in Ireland, although "in a manner that was not supervised by qualified personnel and thus less protective of women's health."¹⁶⁶ Fourth, the injunction appeared to have been largely ineffective in protecting the life of the unborn since Irish women continued to obtain abortions in Great Britain in large numbers.¹⁶⁷ Fifth, the available evidence, which the government did not contest, suggested that the injunction had "created a risk to the health of those women who are now seeking abortions at a later stage ... and who are not availing [themselves] of customary medical supervision after the abortion has taken place." Sixth, the injunction had more adverse effects on women who lacked education or resources to find the existing information.¹⁶⁸

United States

James Madison, a leading figure in the drafting of the US Constitution, emphasized the importance of an informed citizenry to democratic governance:

A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own Governors must arm themselves with the power which knowledge gives.

4.12.1 Government-Held Information

Council of Europe

The Committee of Ministers of the Council of Europe in 1982 adopted a declaration in which the Council's members reaffirmed the importance to a democratic society of freedom of information including, in particular, access to information in the public sector:

The member states of the Council of Europe,

1. Considering that the principles of genuine democracy, the rule of law and respect for human rights form the basis of their co-operation, and that the freedom of expression and information is a fundamental element of those principles; ...
4. Considering that the freedom of expression and information is necessary for the social, economic, cultural and political development of every human being, and constitutes a condition for the harmonious progress of social and cultural groups, nations and the international community; ...

¹⁶⁵ *Id.* at para. 75.

¹⁶⁶ *Id.* at para. 76.

¹⁶⁷ *Id.*

¹⁶⁸ For further discussion of this case, see Section 7.9 *infra*.

8. Aware that a free flow and wide circulation of information of all kinds across frontiers is an important factor for international understanding, for bringing peoples together and for the mutual enrichment of cultures,
 - I. Reiterate their firm attachment to the principles of freedom of expression and information as a basic element of democratic and pluralist society;
 - II. Declare that in the field of information and mass media they seek to achieve the following objectives: ...
 - c. *the pursuit of an open information policy in the public sector, including access to information*, in order to enhance the individual's understanding of, and his ability to discuss freely political, social, economic and cultural matters.¹⁶⁹

The state's obligation not to interfere with the communication of information is particularly strong where the information is of vital concern to the recipient's private or family life. Thus, the European Court has ruled that Article 8 of the Convention (which guarantees the right to private and family life) imposes an obligation on governments to ensure that individuals are able to seek review of denials by the government of information of vital interest to their private or family life. The Court held that the reviewing authority should be independent of the agency which refused the original request for information.¹⁷⁰

In the *Gaskin* case, the Court decided that an individual who had been in government care as a foster child had a vital interest in files about his childhood development and history. It also noted that both individuals and the government have an interest in maintaining the confidentiality of documents provided in confidence (the government's interest arising from its need to encourage the flow of confidential information). The Court concluded that the applicant had a right of access to information held by the government of vital personal interest, and that the UK had violated Article 8 by failing to establish an authority independent of the agency which held the information to decide on requests for information. However, the Court found no violation of Article 10, making clear that the right under discussion gives rise to a presumption of access only to information vital to one's private life.

In the *Leander* case,¹⁷¹ the Court considered a request from a person who had been denied a post of some sensitivity with the Swedish government based on information kept in a secret police-register which the government refused to disclose on national security grounds. The Court, in ruling that the government's denial was compatible with the European Convention, nevertheless did state that the government's margin of appreciation in matters of national security was not without bounds:

[I]n view of the risk that a system of secret surveillance for the protection of national security poses of undermining or even destroying democracy on the ground of defending it, the Court must be satisfied that there exist adequate and effective guarantees against abuse.

¹⁶⁹ Declaration on the Freedom of Expression and Information, Adopted by the Committee of Ministers on 29 April 1982, reprinted in Council of Europe DH-MM (91) 1 (emphasis added). See also Section 4.7 supra.

¹⁷⁰ *Gaskin v. United Kingdom*.

¹⁷¹ *Leander v. Sweden*, para. 60.

Recently, the European Commission unanimously declared admissible several applications raising issues of national security and the right of access to personal files. Several members of the Dutch peace movement have challenged the denial of access to information which they believe the Counter-Intelligence Detachment (CID) of the Dutch military intelligence services has collected about them.¹⁷² This belief is based on information, published by an anti-militarist group that had illegally broken into the CID offices, that the applicants and dozens of others were listed in secret files as "dangerous to the State".

The applicants claimed that they were entitled under Article 8 of the European Convention to know what, if any, information the CID was holding about them because: (1) any CID surveillance of them would have constituted an unjustified interference with their right to respect for private life, especially in light of the fact that the CID was not authorized to investigate civilians; and (2) the information might give an incorrect impression or include false facts and thus could jeopardize their futures, for instance, when seeking employment. The government emphasized the need for the secret services to be able to work in total secrecy; contended that a government can never reveal whether information is held on a particular person, let alone the information itself; and maintained that disclosure of the requested information would reveal the pattern of the services' activities and would endanger employed agents and informers. The Commission concluded that the applications raised sufficiently complex issues of fact and law to require a determination on the merits. (As of 1 May 1993, the Commission had not ruled on the merits.)

While the decision as to admissibility cannot be read as an indication of the Commission's inclination on the merits, it nevertheless is to be welcomed that the Commission did not automatically accept the government's assertion of the need for secrecy to safeguard national security and public safety. It is to be hoped that the Commission will reach a decision that continues the reasoning of the European Court in its unanimous holding in the *Spycatcher* cases that restraint on publication of information about the British security services could no longer be justified on the ground that publication would embarrass the government.¹⁷³

In sum, although the European Court has ruled that the right to receive information does not entail a general presumption of access to information held by the government, a limited presumption, such as of access to information concerning personal records or of general public interest, is by no means precluded. Moreover, although there is no binding case-law establishing a general presumption, the Committee of Ministers adopted a Recommendation and Declaration calling on member states to recognize such a presumption. The Recommendation on the Access to Information Held by Public Authorities, adopted in 1981, urges member states to grant "[e]veryone within [their] jurisdiction ... the right to obtain, on request, information held by the public authorities other than legislative bodies and judicial authorities ... , subject only to such limitations and restrictions as are necessary in a democratic society for the protection of legitimate public ... and private interests".¹⁷⁴ It is further recommended that the right should include the right to a decision within a reasonable time, a statement of reasons for any refusal, and a right to seek a review of any denial.

¹⁷² *Case of V & Nine Ors v. The Netherlands*, European Commission Decision of 4 March 1991, App. Nos. 14084/88 *et al*, reprinted in 12 *Human Rights LJ* (1991), 282-84.

¹⁷³ See Section 6.1 *infra*.

¹⁷⁴ Rec. No. R(81)19, adopted by the Committee of Ministers on 25 Nov. 1981 at the 340th meeting of the Ministers' Deputies, reprinted in Council of Europe DH-MM (91) 1.

The Committee of Ministers followed the above Recommendation with the Declaration quoted at the beginning of this section.¹⁷⁵

European Community

The EC Council Directive on the Freedom of Access to Information on the Environment calls on member states to ensure access to environmental information held by public authorities, subject to various exceptions.¹⁷⁶ Although the European Court and Commission have never considered

the right of access to environmental information, the European Convention is fully consistent with the Directive; arguably Article 6 of the Convention, guaranteeing a right to a fair hearing by an independent tribunal in determination of "civil rights and obligations" requires judicial review of refusals of environmental and other information in certain circumstances.¹⁷⁷

France

The Act of 17 July 1978 created the right of everyone to have access to public documents, subject to certain enumerated exceptions.¹⁷⁸

India

The Supreme Court has recognized the right to know as an integral part of the constitutional right to freedom of speech and expression. In a 1981 case, the government sought to withhold correspondence between the Union Law Minister, the Chief Justice of India, and the chief justices of some high courts concerning the government's controversial policy of transferring high court judges from one state to another. In ruling that the government had to disclose the correspondence, the Supreme Court stated that "the concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression ...".¹⁷⁹

In a 1975 case, the Indian government sought to withhold certain documents issued to the police regarding security arrangements for the Prime Minister's travels within the country. In ruling that the government had to make public all documents that would not endanger public order or the Prime Minister's security, the Supreme Court stated:

In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the

¹⁷⁵ Adopted on 29 April 1982 at the Committee's 70th session.

¹⁷⁶ OJ 1990, L158/56.

¹⁷⁷ See S Weber, "Environmental Information and the European Convention on Human Rights", 12 *Human Rights LJ* (May 1991), 177, 184.

¹⁷⁸ See R Errera, "Press Freedom in France", in ARTICLE 19 (ed.), *Press Law and Practice: A Comparative Study of Press Freedom in European and Other Democracies* (London, 1993), 69-70.

¹⁷⁹ *S P Gupta v. Union of India*, AIR 1982 SC 149.

concept of freedom of speech, though not absolute, is a factor which should make one wary when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security.¹⁸⁰

South Korea

In a 1989 judgment, the Constitutional Court recognized a fundamental constitutional right of access to public information in the possession of state agencies.¹⁸¹ The petitioner had asked a local registry office to release to him public documents concerning the title to certain property, but the concerned officials had failed to act upon his request.

The threshold question was whether the petition was admissible in view of the requirement to exhaust any other available remedies before pursuing a petition to the Constitutional Court. The Court decided to accept the petition, creating an exception to the exhaustion requirement in cases where either: "(1) attempts to obtain relief by established administrative or judicial procedures were plainly futile, or (2) the procedures to be followed in exhausting other remedies were so complex or opaque that it would be fundamentally unfair to deprive a petitioner of recourse due to failure to exhaust theoretically available alternative channels of review."¹⁸²

On the merits, the Court ruled that citizens have a right to information which was infringed by the officials' refusal to disclose the requested documents. The scope of the right remains to be determined. The judgment is noteworthy for the additional reason that the petitioner had phrased his claim as based on interference with his property rights rather than his right to information.

The Netherlands

Although there is no constitutional presumption of access to government information, the 1978 Openness in Government Act, as amended in 1991, imposes a statutory obligation of openness. The highest administrative court has ruled that administrative information held by the government may not, and in principle should not, be withheld from the public.¹⁸³

The administrative court further ruled that the government could not withhold information about the result of negotiations concerning a new government coalition even though disclosure could have a negative impact on implementation of the achieved agreement. Information about the agreement was precisely the sort of information which the Act required to be made public.¹⁸⁴

¹⁸⁰ *State of Uttar Pradesh v. Raj Narain*, AIR [1975] SC 865, 884; 4 SCC 428.

¹⁸¹ *Case 88-Honka 22*, Constitutional Court, Judgment of 4 Sept. 1989.

¹⁸² J M West & Dae-Kyu Yoon, "The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex?", 40 *Amer. J Int'l L* (1992) 71, 113, summarizing the judgment of the Court.

¹⁸³ ARRvS 27 July 1982, Nr A01.0380.

¹⁸⁴ ARRvS 5 Dec. 1986.

New Zealand

The New Zealand Official Information Act 1982 provides a qualified right of access to all information held by Ministers of the Crown, government departments and organizations (such as state-owned enterprises) and statutory bodies. This includes a right of access to information, which is directly enforceable by the courts and subject to a limited number of statutory reasons for withholding such information. Regarding "official information", the operative principle is that information should be made available unless a good reason exists for withholding it. Official and personal information may be withheld to protect any of the following broad interests: to prevent prejudice to the security, defence and international relations of New Zealand; to preserve the confidentiality of information entrusted to the government; and to maintain the law, the safety of any person, or the economy of New Zealand.¹⁸⁵

Where any other reason is relied upon for withholding information - such as the protection of privacy, commercial information, or the workings of government - an assessment must be made as to whether the public interest in releasing the information outweighs the need to withhold it. If the decision-maker or the Parliamentary Ombudsman (charged with reviewing decisions to withhold information) is ambivalent, he or she must err on the side of releasing the information.¹⁸⁶

Sweden

Chapter 2 of the Freedom of the Press Act (one of Sweden's constitutional documents), known as the Principle of Public Access to Official Records, is considered one of the most important foundations of Swedish democracy. The essence of the principle is that all documents are public unless there is an explicit statute which regulates otherwise. This presumption of openness is a distinctive feature of the Swedish legal and political systems; it may be the strongest statement of government transparency in Europe.¹⁸⁷ Under the Act any Swedish citizen may request to see any documents in the files of a state or municipal agency, regardless of whether the document concerns the requesting party. Authorities are legally required to comply. The Secrecy Act of 1980 delineates permissible exceptions, including for information relating to national security, foreign policy and affairs, criminal investigations and the personal integrity (privacy) or financial circumstances of individuals. Refusal of an information request may be appealed, ultimately to the Supreme Administrative Court.¹⁸⁸

4.12.2 Court Hearings and Documents

Council of Europe

The rationale for holding court hearings in public is two-fold. First, as stated by the European Commission, "the public nature of the proceedings helps to ensure a fair trial by protecting the litigant against arbitrary decisions".¹⁸⁹ Second, "[c]ombined with the public pronouncement of the

¹⁸⁵ Section 6 of the Act.

¹⁸⁶ *Commissioner of Police v. Ombudsman* [1988] 1 NZLR 385.

¹⁸⁷ H-G Axberger, "Press Freedom in Sweden" in *Press Law and Practice*, note 178 supra at 160.

¹⁸⁸ *Id.*

¹⁸⁹ *Axen v. Federal Republic of Germany*, Report of 14 Dec. 1981, B.57.

judgment, the public nature of the hearings serves to ensure that the public is duly informed, notably by the press, and that the legal process is publicly observable. It should consequently contribute to ensuring confidence in the administration of justice."¹⁹⁰ Thus, under the European Convention, the public has a right, independent of the parties, to attend hearings. Moreover, the press arguably could invoke this passage to support a claim for standing to raise the right of public access. On the other hand, in several cases the European Court has approved closures of hearings based only on the consent of the parties, thus suggesting that the public interest in access under the European Convention may not be very strong.¹⁹¹

In *The Sunday Times* case, the European Court recognized the right of the public to information about matters that come before the courts, even while the matters are still under judicial consideration:

There is general recognition of the fact that the courts cannot operate in a vacuum. Whilst they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialised journals, in the general press or amongst the public at large. Furthermore, whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest.¹⁹²

Canada

The Supreme Court (per Dickson J) stated:

Many times it has been urged that the privacy of litigants requires that the public be excluded from court proceedings. It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered. As a rule, the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings.¹⁹³

Ireland

The Supreme Court rejected a request from the directors of a company to close a court trial concerning a claim of unlawful dismissal by the chief executive officer. The directors asserted that information would be disclosed that would be seriously prejudicial to the legitimate interests of the company. In ruling that a trial could be closed to the public only if a public trial would operate to deny justice in the particular case, the Court stated:

¹⁹⁰ Id.

¹⁹¹ See, e.g., *Le Compte, Van Leuven and De Meyere v. The Netherlands*, Judgment of 23 June 1981, para. 43. See also P van Dijk and G J H van Hoof, *Theory and Practice of the European Convention on Human Rights* (Kluwer, 2nd edn, 1990), 325-28.

¹⁹² *The Sunday Times v. United Kingdom*, para. 64. See also Section 7.6.1 infra.

¹⁹³ *Nova Scotia (A-G) v. MacIntyre* [1982] 1 SCR 175.

The issue before this court touches on a fundamental principle of the administration of justice in a democratic state, namely the administration of justice in public. ... Justice is administered in public on behalf of all the inhabitants of the State. ... The primary object of the courts is to see that justice is done and it is only when the presence of the public or public knowledge of the proceedings would defeat that object that the judges [have] any discretion to hear cases other than in public.¹⁹⁴

4.13 FREEDOM OF PEACEFUL ASSEMBLY

Council of Europe

Article 11 of the European Convention protects freedom of peaceful assembly. The European Court has ruled that "the freedom to take part in a peaceful assembly ... is of such importance that it cannot be restricted ... so long as the person concerned does not himself commit any reprehensible act".¹⁹⁵ In the words of the European Commission, "the right to freedom of peaceful assembly ... is a fundamental right in a democratic society, and like the right to freedom of expression, is one of the foundations of such a society."¹⁹⁶

Activities protected by Article 11 include the activities of political parties, the conduct of elections under Article 3 of the First Protocol to the Convention,¹⁹⁷ marches, public processions, and public and private meetings.¹⁹⁸ Article 11's protection of peaceful assembly extends to demonstrations which are peaceful in intent but which lead to violence or disorder committed by other parties.¹⁹⁹ An individual continues to enjoy the right to peaceful assembly if he or she remains peaceful even though other demonstrators may engage in sporadic violence or other punishable acts.²⁰⁰

The European Court ruled that reprimanding a lawyer for participating in, and refusing to give information about, a demonstration during which unidentified protestors defaced buildings violated the European Convention.²⁰¹ Although the professional reprimand was a light penalty, the Court ruled that it nevertheless was not "necessary in a democratic society": "The pursuit of a just balance

¹⁹⁴ *In Re. R Limited* [1989] IR 126, 134, SC (per Walsh, J).

¹⁹⁵ *Ezelin v. France*, para. 53.

¹⁹⁶ *Rassemblement Jurassien and Unité Jurassienne v. Switzerland*, App. No. 8191/78, Decision of 10 Oct. 1979, 17 D & R 93, para. 119.

¹⁹⁷ *Denmark, Norway, Sweden and The Netherlands v. Greece* (the Greek case), Commission Report of 18 Nov. 1969, 12 *Yearbook of Human Rights*, 170, 171, para. 392.

¹⁹⁸ *Plattform Ärzte für das Leben v. Austria*, para. 72; *Christians Against Racism and Fascism v. United Kingdom*, App. No. 8440/78, Decision of 16 July 1980, 21 D & R 138, para. 148.

¹⁹⁹ *Plattform Ärzte für das Leben v. Austria*, para. 72. See also Section 6.2.5 *infra*.

²⁰⁰ E.g., *Ezelin v. France*, para. 53.

²⁰¹ *Id.*

must not result in *avocats* being discouraged, for fear of disciplinary sanctions, from making clear their beliefs on such occasions."²⁰²

Furthermore, the right to peaceful assembly obliges the authorities to take positive measures to prevent counter-demonstrators from inhibiting the exercise of the right:

A demonstration may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote. The participants must, however, be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents; such a fear would be liable to deter associations ... from openly expressing their opinions on highly controversial issues affecting the community. ...

Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11.²⁰³

While the authorities must take "reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully, they cannot guarantee this absolutely and they have a wide discretion in the choice of means to be used".²⁰⁴

Germany

The Constitutional Court (FCC), invalidating a local permit which banned anti-nuclear demonstrators from an area within 10 kilometres of a nuclear power plant construction site, stressed the importance to a democratic society of the right to assemble peaceably. It noted that, while the population can express its will at general and local elections, during the four to six years between elections individuals cannot have a direct influence on political decisions:

In a political system which does not provide for referenda, assemblies are an important means to criticize, to detect failures and in general to make opposing views public. ... In light of the importance of freedom of assembly, the freedom may be restricted only if the rights of others are being infringed and only if those rights are of constitutional status.²⁰⁵

India

The Supreme Court of India, observing that the right of assembly is well-recognized in free democracies, ruled that the area of restriction on this freedom must be very narrow.²⁰⁶

²⁰² Id. at para. 52.

²⁰³ *Plattform Ärzte für das Leben*, para. 32.

²⁰⁴ Id. at para. 34.

²⁰⁵ 69 FCC 315 (1985) (*Brokdorf* case). For the ruling in this case, see Section 9.1.2 *infra*.

²⁰⁶ *Himat lal v. Commissioner of Police, Gujarat*, AIR 1973 SC 87.

Namibia (South West Africa)

The Supreme Court of South West Africa struck down Section 2 of the Protection of Fundamental Rights Act 1988, which made it a criminal offence to incite strikes and boycotts against educational institutions, employers, public services, and industries. The Court concluded that the section violated the freedom of expression guaranteed by the Bill of Fundamental Rights because it had the effect of forbidding individuals from advocating peaceful demonstrations which expressed legitimate and lawful ideas, and thus was over-broad.²⁰⁷

The Supreme Court held that a notice prohibiting the holding of gatherings had to be in such terms that persons to whom it was announced or published could know precisely what type of gathering was prohibited, where it was prohibited and for what period of time. The prohibition of a procession organized by the Catholic Church did not accord with the requirements of the Riotous Assemblies Act because: (1) one of the notices had an erroneous date (prohibiting assemblies for the period "31 May 1986 to 1 May 1986"); and (2) a statement in the notices that *bona fide* church meetings were not prohibited was ambiguous.²⁰⁸

South Africa

The Supreme Court of South Africa (Cape Division) stated:

Freedom of speech and freedom of assembly are part of the democratic right of every citizen of the Republic and Parliament guards these rights jealously for they are part of the very foundation upon which Parliament itself rests.²⁰⁹

United Kingdom

Members of a group of animal rights supporters were convicted of obstructing a highway and of conduct likely to constitute a breach of the peace for engaging in a protest in the city centre and in the doorway of a shop which sold furs. The Queen's Bench Divisional Court (England) quashed the convictions. Judge Otton, in a concurring opinion, quoted Lord Denning:

[T]he right to demonstrate and the right to protest on matters of public concern ... are rights which it is in the public interest that individuals should possess, and indeed that they should exercise without impediment so long as no wrongful act is done. It is often the only means by which grievances can be brought to the knowledge of those

²⁰⁷ *Namibian National Students' Organisation & Ors v. Speaker of the National Assembly for South West Africa & Ors*, 1990 (1) SA 612, SC of South West Africa, 17 Feb. 1989.

²⁰⁸ *Wolf v. Cabinet of the Territory of South West Africa & Anor*, 1986 (4) SA 53 (per Levy J). See Sections 6.2.4 and 6.2.5 *infra* for cases involving demonstrations against the government, and Section 9.1.2 *infra* for cases involving permit requirements for public demonstrations.

²⁰⁹ *S. v. Turrell & Ors* 1973 (1) SA 248C, 256G.

in authority As long as all is done peaceably and in good order without threats or incitement to violence or obstruction of traffic it is not prohibited.²¹⁰

4.14 FREEDOM OF ASSOCIATION

Council of Europe

Article 11 of the European Convention protects freedom of association. The European Court has defined the right to associate as the capacity of citizens to "join without interference by the State in associations to attain various ends."²¹¹ An association includes a "voluntary grouping for a common goal."²¹² Article 11 does not protect the general right to meet others socially,²¹³ nor does it safeguard the right of members of a trade union to be protected from working with or alongside non-union members.²¹⁴

The Court has also found that freedom of association does not apply to associations which have been established by statute or which fulfil a statutory or common law duty, or form part of a public institution. The Court upheld legislation requiring doctors in Belgium to be members of the Belgian *Ordre Des Médecins*, a regulatory body for the profession, and, in a UK case, the Court upheld compulsory membership of the Senate of the Inns of Court and Bar as a prerequisite for practice.²¹⁵ In both cases the professional organizations were found to be established by law and were therefore not associations within the meaning of Article 11.

Article 11 rights do not apply to persons wishing to form an association the objects of which involve illegal activities.²¹⁶ In the *Van der Heijden* case, the Commission rejected an application from an employee who was dismissed from employment with an immigration foundation because of the employee's membership of a political party hostile to immigrant workers. The Commission found that the views of the employee ran counter to the aims of the employing organization.²¹⁷

Organization of American States

The Inter-American Court, in an advisory opinion, held that while compulsory membership in a professional association may be acceptable in the case of lawyers and doctors, similar requirements

²¹⁰ *Hirst and Agu v. Chief Constable of West Yorkshire* (1986) 85 Cr. App. Rep. 143, 151; quoting Lord Denning's dissent in *Hubbard v. Pitt*, [1975] 3 All ER 1, 10-11.

²¹¹ *Association X v. Sweden*, App. No. 6094/73, Decision of 6 July 1977, D & R 9, 5.

²¹² *Young, James & Webster v. United Kingdom*, Commission Report of 14 Dec. 1979, para 167; Judgment of 13 Aug. 1981, Series A no. 44.

²¹³ See, e.g., *McFeeley v. United Kingdom*, App. No. 8317/78, Decision of 15 May 1980, D & R 20, 44, and *X v. United Kingdom*, App. No. 9054/80, Decision of 8 Oct. 1982, reported in 5 EHRR 260.

²¹⁴ *Young, James & Webster v. United Kingdom*, note 212 supra at para. 167.

²¹⁵ See *Le Compte, Van Leuven and De Meyere v. The Netherlands*, Judgment of 23 June 1981, Series A no. 43, para. 65 and *X v. United Kingdom*, supra note 213.

²¹⁶ *X v. Austria*, App. No. 8562/79, D & R 26, 89.

²¹⁷ *Van der Heijden v. The Netherlands*, App. No. 11002/84, Decision of 8 March 1985, D & R 41, para 271.

cannot be placed on journalists without violating the right to freedom of expression guaranteed by Article 13 of the American Convention.²¹⁸

Mauritius

The Supreme Court of Mauritius held that the Registrar of Associations failed to respect the right to freedom of association protected by Section 13 of the Constitution by invalidating an election conducted by an association at its general meeting. Section 13 guarantees associations "autonomy in the conduct of their affairs". The power to invalidate an election therefore lay only with the association or with the courts. Accordingly, the Court ordered the former managing committee of an association to turn over the books, documents and funds of the association to the applicants, who were the newly-elected officers.²¹⁹

Nigeria

Following a nationwide protest against the murder of students at the Ahmadu Bello University in May 1986, the government directed that all lecturers "who are not teaching what they are paid to teach" be flushed out of the system. The Academic Staff Union of Universities (ASUU) challenged the legality of the directive. The government argued that the ASUU lacked the *locus standi* to maintain the suit. Judge Idowu Agoro dismissed the objection on the ground that the ASUU, as a trade union, had the legal right to protect and defend the interests of its members.²²⁰

United States

The US Supreme Court has ruled that an association cannot be made illegal in the absence of a clear showing that the group is actively engaged in lawless conduct or in such incitement to lawless action as would itself be punishable as a clear and present danger of harm that could not otherwise be prevented by less restrictive means.²²¹

Moreover, an individual cannot be punished for joining or associating with an association unless the association is engaged in unlawful activity and the individual is shown (a) to have known of its illegality, and (b) to have had the specific intent of furthering its illegal aims.²²² Thus, the Supreme Court invalidated an Arizona statute that required state employees to take a loyalty oath and proscribed criminal penalties for employees who, after taking the oath, became or remained members of the Communist Party or other organization having as one of its purposes the violent overthrow of the government. A teacher who refused to take the oath brought a suit for declaratory relief.

²¹⁸ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, para 34. See Section 8.3 *infra* for a full discussion of this case.

²¹⁹ *Ragavoodoo v. Apaya and Registrar of Associations*, SC Mauritius, [1985] MR [Mauritius Reports] 18, 28 Feb. 1985.

²²⁰ *Academic Staff Union of Universities v. Prof. Jubril Aminu & Anor*, Suit No. LD/943/86.

²²¹ *E.g., Noto v. United States*, 367 US 290, 297-98 (1961). In this case, the Court reversed a conviction for membership of the Communist Party because the evidence did not suffice to show that the Party had engaged in unlawful advocacy.

²²² *Elfbrandt v. Russell*, 384 US 11 (1966).

The Supreme Court invalidated the statute as unconstitutional because it did not require a showing that the employee was an active member with a specific intent to assist in the achievement of unlawful aims. Stated Justice Douglas for the majority:

[A] `blanket prohibition of association with a group having both legal and illegal aims' would pose `a real danger that legitimate political expression or association would be impaired.²²³

Furthermore:

A law which applies to membership without the `specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms. It rests on the doctrine of `guilt by association' which has no place here."²²⁴

Moreover, in several cases, the Court has ruled that mere membership in the Communist Party could not suffice to justify denial of an opportunity to practise law,²²⁵ to receive a security clearance,²²⁶ or to travel abroad with the protection of a US passport.²²⁷

The Supreme Court struck down a state law which made it a criminal offence, as an improper solicitation of legal business, to advise another that his or her legal rights had been infringed and to refer him to a particular attorney or group of attorneys for assistance. The NAACP (National Association for the Advancement of Colored People), which was in the midst of searching for individuals who were willing to become plaintiffs, without paying fees, in public school desegregation cases, challenged the law. In rejecting the state's claims, the Court noted the importance of litigation as a form of political expression, especially for members of minority groups who could not hope to prevail through the ballot:

In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment ... for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts And under the condition of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.²²⁸

In a separate case, the Court ruled that the NAACP was not required to disclose to the state of Alabama the names of its members. Although it filed its charter, designated a place of business and

²²³ Id. at 15, citing *Scales v. US*, 367 US 203, 229.

²²⁴ Id. at 19.

²²⁵ *Schware v. Board of Bar Examiners*, 353 US 232 (1957).

²²⁶ *Green v. McElroy*, 360 US 474 (1959).

²²⁷ *Aptheker v. Secretary of State*, 378 US 500 (1964).

²²⁸ *NAACP v. Button*, 371 US 415, 429-30 (1963).

appointed an agent to receive service of process, the Alabama Attorney-General nevertheless insisted that the NAACP could not engage in business in the state until it disclosed its membership list. In rejecting that claim, the Court noted:

This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. ... Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."²²⁹

The Court has also ruled that political parties and candidates may not be compelled to disclose the names of contributors where the evidence shows a "reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties."²³⁰ Thus, the Court struck down, as applied to the Socialist Workers Party (SWP), provisions of an Ohio statute that required every political party to report the names and addresses of campaign contributors and recipients of campaign disbursements. The Court accepted the lower court's findings that known SWP members were subject to both governmental and private hostility and harassment.²³¹

4.15 PERSONS ENTITLED TO THE RIGHT TO FREEDOM OF EXPRESSION

4.15.1 Non-Citizens

International Standards

Under Article 1 of the European Convention, contracting states are obliged to secure the Convention's rights and freedoms to "everyone within their jurisdiction", including aliens, stateless persons and persons lacking legal capacity, such as children or the severely disabled. Although there are only 26 states parties to the European Convention, applications have been filed with the European Commission by nationals from more than 80 countries.²³² However, Article 16 of the European Convention permits contracting states to impose restrictions on the political activity of aliens even if such restrictions would otherwise violate Article 10. Neither the European Court nor the Commission has yet interpreted the term "political activity" within Article 16.²³³

The other human rights treaties discussed in this handbook similarly extend the right to freedom of expression to all persons subject to the jurisdiction of the state party.²³⁴

²²⁹ *NAACP v. Alabama ex rel Patterson*, 357 US 449, 462 (1958).

²³⁰ *Buckley v. Valeo*, 424 US 1, 70 (1976) (*per curiam*).

²³¹ *Brown v. Socialist Workers '74 Campaign Committee*, 459 US 87, 91 (1982).

²³² D Gomien, *Short Guide to the European Convention on Human Rights* (Strasbourg: Council of Europe, Directorate of Human Rights, 1991), 3.

²³³ *Id.* at 85.

²³⁴ See Art. 1 of the ACHR, Art. 1 of the ACHPR, and Art. 2 of the ICCPR.

Zambia

The High Court ruled that the Constitution's rights extend to all those living in Zambia. The petitioner, William Banda, and others requested a permit in order to address a political rally. The permit was granted, but Mr Banda's name was deleted from the permit on the ground that he was not a Zambian citizen and that some members of the recently-elected ruling party (the Movement for Multi-Party Democracy) believed that Mr Banda's speech would be provocative. He sued on the ground that his right to freedom of assembly as guaranteed by the Zambian Constitution had been violated. The late Judge Chitoshi of the High Court, in ruling in his favour, stressed that the Zambian Constitution guarantees rights and freedoms to all persons in Zambia and not merely to citizens.²³⁵

4.15.2 Prisoners and Other Convicted Persons

Council of Europe

The European Court, in ruling that a prisoner is entitled to have access to a particular magazine, affirmed that prisoners have the right of access to information.²³⁶

The European Commission concluded that a sentence for treachery in time of war which included a lifetime prohibition on participating in publishing activities violated Article 10 of the European Convention. The Belgian government contended that the punishment was justifiable under Convention articles concerning the right to life, liberty and security of the person. The Commission rejected the argument, stating:

Where the penal sanction in question involves a deprivation or restriction of the right to freedom of expression, it runs counter to the whole plan and method of the Convention to seek its justification in [these] articles ... rather than in Article 10.²³⁷

Belgium

The Civil Court of Luik (Liège), relying on Article 10 of the European Convention, ruled that prisoners are entitled to freedom of expression and information and, accordingly, that a prisoner was entitled to receive a particular magazine unless there were reasons consistent with Article 10(2) why he should not. Moreover, the Court ruled that the state has a positive duty to guarantee the effectiveness of human rights protection, especially regarding persons, such as prisoners, who are within the government's custody.²³⁸

4.15.3 Public Employees

Council of Europe

Under the European Convention, probationary civil servants may have their freedom of expression substantially circumscribed, although the Court has ruled that the basis for restriction is not a lesser

²³⁵ *William Banda v. The Attorney-General* (1992) HP/1005.

²³⁶ *Herczefalvy v. Austria*.

²³⁷ *De Becker v. Belgium*, Report adopted 8 Jan. 1960.

²³⁸ Voorz, Rechtbank Luik, 31 Jan. 1989, *Jurisprudence de Liège, Mons et Bruxelles* (JLMB), 1989, 241.

standard of protection under Article 10 but rather the absence of any right to civil service employment.

In two cases concerning public school teachers on probationary status, the European Court found Germany's requirement that all civil servants must swear allegiance to, and duly uphold, the Constitution and its values to be compatible with Article 10. In one case, Ms Glasenapp, who was not a member of the Communist Party, was dismissed from her position after she publicly stated her support for an "international people's kindergarten", supported by the Party, and refused to dissociate herself from the Party.²³⁹ In a second case, Mr Kosiek was dismissed from his probationary position because, as a leading representative of an extreme right-wing party, he had demonstrated approval of objectives inimical to the Constitution.²⁴⁰ In both cases, the Court decided that there had been no interference with Article 10 rights since neither applicant had a right to civil service employment and both had been dismissed not because of their views *per se* but because those views reflected a lack of commitment to Germany's democratic system.

It is noteworthy that the International Labour Organization, after conducting an inquiry into these and similar cases, concluded that Germany was in violation of its obligations under the ILO Discrimination (Employment and Occupation) Convention, 1958.²⁴¹

The above decisions of the European Court should not be looked to in interpreting similar obligations under the Universal Declaration, the International Covenant or the American Convention, since all three protect the right of every citizen to have access, on general terms of equality, to public service employment.²⁴²

Malawi

Dunduzu Chisiza, a well-known actor, was under contract to the Ministry of Education who paid him a charity fee to organize a programme of performances at public schools. After he declared support for multi-party democracy, the Minister of Education, Kate Kainja, cancelled his contract and the contracts of his colleagues on the programme on the ground that, because the recent drought had required the closure of schools for an extended period, all education time remaining in the year had to be devoted to classes. Mr Chisiza sued the Minister of Education, noting that only five schools had been closed owing to the drought and claiming that his contract had been cancelled because of his political opinions. He sought K10,000 for lost earnings.

The High Court in *Dunduzu Chisiza Jr v. Minister Kate Kainja* (1993) ruled that the Minister had exceeded her authority and that her action had violated Mr Chisiza's right to freedom of expression. Accordingly, the court ordered that Mr Chisiza be paid K7,000 more than requested (making a total award of K17,000), presumably to serve as punitive and exemplary damages. The Court of Appeal affirmed the judgment and the K17,000 award.

United States

²³⁹ *Glasenapp v. Germany*.

²⁴⁰ *Kosiek v. Germany*.

²⁴¹ D Gomien, note 232 supra at 63.

²⁴² See Art. 21(2) of the UDHR, Art. 25(c) of the ICCPR and Art. 23(1)(c) of the ACHR.

The US Supreme Court ruled unconstitutional a statute which called for the discharge of any public employee who knowingly became a member of the Communist Party or of any party whose purposes included the overthrow of government by unlawful means. The Court held that to be valid a statute may penalize an employee only if he or she has the specific intent of furthering the organization's illegal aims.²⁴³

The Supreme Court ruled that a teacher could not be dismissed from public employment for writing a letter to a newspaper unless the letter included (a) false statements which the teacher knew or reasonably should have known were false, or (b) statements which interfered with the teacher's performance of classroom duties or with the operation of the school.²⁴⁴

Moreover, a teacher who makes out an arguable claim that his or her dismissal was motivated by the exercise of free speech rights is entitled to a full hearing on the reasons for dismissal, and the burden rests with the school to show that the decision was not primarily motivated by protected conduct or expression. The Court noted that a teacher's relationship with his or her employers is "not the kind of close working relationship ... for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning."²⁴⁵

A public employee is entitled to exercise his or her right to freedom of expression in private as well as in public. A public employee does not "forfeit his protection against governmental abridgement of freedom of speech if he decides to express his views privately rather than publicly."²⁴⁶

4.15.4 Military Personnel

Council of Europe

In a recent case against Greece, the European Court made clear that military service personnel are entitled to the protection of Article 10, although they owe "an obligation of discretion in relation to anything concerning the performance of [their] duties".²⁴⁷

Greece

The Council of State (*Symvoulío tis Epikrateias*, the highest court whose functions and organization are similar to France's *Conseil d'Etat*) declared unconstitutional disciplinary regulations of the airforce that prohibited service personnel from making statements to the press or publishing anything without the prior consent of the Ministry of Defence.²⁴⁸

²⁴³ *Elfbrandt v. Russell*, 384 US 11 (1966).

²⁴⁴ *Pickering v. Board of Education*, 391 US 563 (1968).

²⁴⁵ *Id.* at 570.

²⁴⁶ *Givhan v. Western Line Consolidated School Dist.*, 439 US 410, 573 (1979).

²⁴⁷ *Hadjianastassiou v. Greece*, para. 46. This case is discussed at greater length in Section 6.1 *infra*.

²⁴⁸ *To Syntagma 13* (1987), 341, discussed in J Polakiewicz & V Jacob-Foltzer, "The European Human Rights Convention in Domestic Law: The Impact of Strasbourg Case-Law in States where Direct Effect is Given to the Convention", 12 *Human Rights LJ* (1991), 65, 82.

4.15.5 Corporate and Other Legal Entities

Council of Europe

The European Convention's protections extend to legal, as well as natural, persons (including profit-making corporate bodies).²⁴⁹

4.15.6 Members of Professions

Council of Europe

²⁴⁹ *Autronic AG v. Switzerland*, para. 47. See also Section 4.6 supra.

The European Court concluded that "members of the liberal professions" must be permitted to contribute "to public debate on topics affecting the life of the community" and thus must be able to make critical statements about their profession even if to do so might have a secondary effect of advertising their own business.²⁵⁰

Luxembourg

The Disciplinary Council of the Medical Board ruled that statements critical of the operation of hospitals made by a hospital employee were not inconsistent with professional dignity and thus did not constitute a disciplinary offence within the meaning of the act concerning the organization of and functions of the medical board.²⁵¹

²⁵⁰ *Barthold v. Federal Republic of Germany*. See also Section 4.10 supra.

²⁵¹ Conseil de discipline du collège médical, 2 Feb. 1982, published in A Spielmann *et al.*, *La Convention européenne des droits de l'homme et le droit luxembourgeois*, note 38 supra.

CHAPTER 5

ASSESSING THE LEGITIMACY OF RESTRICTIONS

This chapter sets forth the common standard applied by most of the treaty bodies in assessing the legitimacy of any restriction to freedom of expression or related rights. This standard provides a useful analytical framework for the lawyer or campaigner arguing against the legitimacy of a given restriction, regardless of the substantive ground given for the restriction.

5.1 INTERNATIONAL STANDARDS

The Universal Declaration, the International Covenant, the American Convention and the European Convention all set forth essentially the same three-part test for determining the legitimacy of restrictions on freedom of expression.¹ The states participating in the CSCE process have also pledged to observe the same test.² Clearly, courts in countries bound by the treaties must apply the three-part test if their governments are to meet their international obligations. In addition, in light of the concurrence among the leading human rights instruments and because all countries are obliged to observe the Universal Declaration, a strong argument can be made that courts of all countries should, and arguably are obliged to, apply the three-part test.

The first prong of the test requires that any restriction must be provided by law.³ Second, any restriction must serve one of the legitimate purposes expressly enumerated in the text.⁴ Third, any restriction must be shown to be necessary. The Universal Declaration requires that any restriction be only "for the purpose of securing due recognition and respect" for enumerated interests "in a democratic society"; the International Covenant and the American Convention require that they be "necessary" to protect the listed interests; and the European Convention combines the two concepts of "necessity" and "democratic society" to require expressly that any restriction be "necessary in a democratic society". Even though the American Convention does not specify that restrictions must be necessary in a *democratic* society, the Inter-American Court has ruled that any restriction must meet the test set forth by the European Court.⁵

¹ The test used by the HRC in applying Art. 19 of the ICCPR is stated in a general comment in *Report of the Human Rights Committee to the General Assembly*, 38th Sess., Supp. No. 40, 1983 (A/38/40), Annex VI, General Comment 10.

The fact that the African Commission has not embraced the same test does not mean that it has rejected it or that it applies a radically different test. In fact, Art. 11 of the African Charter expressly states that exercise of the right to assemble freely may be limited only as "necessary" and "provided for by law", "in particular" to promote "national security, the safety, health, ethics and rights and freedoms of others".

² See Section 2.8 *supra*.

³ The UDHR uses the phrase "determined by law"; the ICCPR, "provided by law"; the ACHR, "established by law"; and the ECHR, "prescribed by law".

⁴ See Section 2.6.5 *supra* for a discussion of the permissible grounds for limitation.

⁵ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*.

5.1.1 European Convention on Human Rights

The European Court of Human Rights has developed an extensive body of jurisprudence elaborating this three-part test. As a preliminary point, the Court has stressed that, in evaluating a particular restriction, it is faced "not with a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted".⁶

To be "prescribed by law" a restriction must be "adequately accessible" and foreseeable, that is, "formulated with sufficient precision to enable the citizen to regulate his conduct".⁷ The restriction, however, does not need to be codified; it is sufficient if it is "reasonably foreseeable" from case-law. Thus, the European Court ruled that providing information about where to obtain abortion services outside of Ireland was prescribed by law, even though it was not a criminal offence to have an abortion outside of Ireland; on its face, the relevant constitutional provision (by which the state guaranteed that it would "defend and vindicate" the right to life of the unborn, "with due regard to the equal right to life of the mother") suggested that regulatory legislation would be introduced, and no legislation had been introduced that banned non-directive counselling. Nevertheless, the Court concluded that Irish law granted a high degree of protection to the unborn and accordingly that it was sufficiently clear from Irish case-law that infringement of this constitutional right by private individuals as well as by the state could be actionable.⁸

In order to have a legitimate aim, a restriction must be in furtherance of, and genuinely aimed at, protecting one of the permissible grounds listed in Article 10(2); that list is exhaustive.⁹

To be "necessary" a restriction does not have to be "indispensable", but it must be more than merely "reasonable" or "desirable". A "pressing social need" must be demonstrated, the restriction must be proportionate to the legitimate aim pursued, and the reasons given to justify the restriction must be relevant and sufficient.¹⁰

To assess whether an interference is justified by "sufficient" reasons, the European Court will consider any public interest aspect of the case.¹¹ Where the information subject to restriction involves a matter of "undisputed public concern", the information may be restricted only if it appears "absolutely certain" that its dissemination would have the adverse consequences legitimately feared by the state.¹²

⁶ *The Sunday Times v. United Kingdom*, para. 65.

⁷ *Id.* at para. 49.

⁸ *Open Door Counselling and Dublin Well Woman Centre v. Ireland*, paras. 59-60. See Section 4.12 *supra* for the holding in this case.

⁹ *E.g.*, *The Sunday Times v. United Kingdom*.

¹⁰ *Handyside v. United Kingdom*, paras. 48-50; *The Sunday Times v. United Kingdom*, para. 62.

¹¹ *The Sunday Times v. United Kingdom*, para. 63.

¹² *Id.* at paras. 65-66.

The breadth of a restriction is also relevant. An absolute restriction (such as the prohibition of disclosure of all information concerning all pending cases) is unacceptable; a court may approve an interference with expression only when it is "satisfied that the interference was necessary having regard to the facts and circumstances prevailing in the specific case before it."¹³ The practice of other contracting states is another factor to consider in assessing a restriction's necessity.¹⁴

The contracting states have a certain margin of appreciation in determining the necessity of a restriction, but this margin "goes hand in hand with a European supervision".¹⁵ This supervision must be strict and is not limited to ascertaining whether the government has exercised its discretion reasonably, carefully and in good faith; rather, the necessity for any restriction "must be convincingly established".¹⁶

The scope of the margin of appreciation varies according to the aim at issue. For example, protection of morals is accorded a wide margin because national authorities are considered to be in a better position than the European Convention bodies to assess the need for the interference.¹⁷ An aim which is more objective in nature, such as maintaining the authority of the judiciary, is accorded a narrower margin of appreciation.¹⁸

5.1.2 American Convention on Human Rights

The Inter-American Court has held that, to be lawful, any restriction on freedom of expression must meet several requirements. In particular, the restriction: (1) must be "established by law" and precisely defined; (2) the ends sought to be achieved must be legitimate, that is, they must be covered by one of the aims listed in Article 13(2) of the American Convention; and (3) the restriction must be "necessary to ensure" one of the legitimate aims.¹⁹ The Court elaborated that to be "necessary", a restriction had to comply with the test of necessity articulated by the European Court concerning Article 10(2) of the European Convention. In particular, "it must be shown that [a legitimate goal] cannot reasonably be achieved through a means less restrictive of a right protected by the Convention."²⁰

¹³ *The Observer and Guardian v. United Kingdom*, para. 65. See also *Open Door Counselling and Dublin Well Woman Centre v. Ireland*, para. 73.

¹⁴ E.g., *Marckx v. Belgium and Dudgeon v. United Kingdom*.

¹⁵ *The Sunday Times v. United Kingdom*, para. 59.

¹⁶ *The Observer and Guardian v. United Kingdom*, para. 59(c).

¹⁷ E.g., *Müller v. Switzerland*, paras. 33-35.

¹⁸ *Handyside v. United Kingdom*, para. 48; *The Sunday Times v. United Kingdom*, paras. 79-81.

¹⁹ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*.

²⁰ *Id.* at 186.

5.2 NATIONAL STANDARDS

India

The Supreme Court expressly rejected an approach that would simply balance the right to freedom of expression and countervailing social interests, in language similar to that of the European Court:

There does indeed have to be a compromise between the interest of freedom of expression and social interests. But we cannot simply balance the two interests as if they are of equal weight. Our commitment to freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have a proximate and direct nexus with the expression.²¹

Mauritius

The Supreme Court ruled that European Court case-law regarding what restrictions may be viewed as "necessary in a democratic society" should be consulted in construing Section 12 of the Constitution, which "restrains the courts from doing any act, even under the authority of any law, that is "not reasonably justifiable in a democratic society".²² Moreover, in determining what "law" the courts of Mauritius should apply, it was appropriate to consult the European Court's interpretation of the phrase "prescribed by law".

Papua New Guinea

The Supreme Court applied a test virtually identical to that set forth by the European Court for assessing restrictions on freedom of expression in ruling that a law which prohibited private broadcasting for two years violated the Constitution's guarantee of freedom of expression.²³

Sri Lanka

The Supreme Court of Sri Lanka has similarly required that any restriction on freedom of expression be narrowly drawn:

Laws that trench on the area of speech and expression must be narrowly and precisely drawn to deal with precise ends. Over-breadth in the area has a peculiar evil, the evil of creating a chilling effect which may deter the exercise of that freedom. The threat of sanctions may deter its exercise as patently as the application of sanctions. The State may regulate in that area only with narrow specificity.²⁴

United States

²¹ *Rangarajan v. Jagjivan Ram and Ors; Union of India and Others v. Jagjivan Ram*, decided on 30 March 1989, SC [1990] LRC (Const) 412, 427; 1989 (2) SCR 204.

²² *DPP v. Mootoocarpn* [1989] LRC (Const.) 768, 773 (Judgment of 21 Dec. 1988, per Glover CJ). For further discussion of this case, see Section 3.2.1 *supra* and Section 7.6.3 *infra*.

²³ *The State v. NTN Pty Ltd and NBN Ltd*, SC, 7 April 1987 (No. SC 323), 14 *Common L Bull* (1988), 45.

²⁴ *M Joseph Perera & Ors v. Attorney-General*, SC App. Nos. 107-109/86, decision of 25 May 1987 (per Sharvananda CJ), 20.

In emphasizing that any limitations on freedom of expression must be the least restrictive possible, the US Supreme Court stated:

Even though the Government's purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.²⁵

²⁵ *Shelton v. Tucker*, 364 US 479, 488 (1960).

CHAPTER 6

RESTRICTIONS BASED ON THREATS TO NATIONAL SECURITY OR PUBLIC ORDER

This chapter focuses on decisions of courts that have rejected government claims that a restriction on expression was necessary in order to safeguard national security or public order. It also discusses rulings of the European Court and Commission, most of which have upheld restraints based on national security grounds, and decisions of the Human Rights Committee, all of which found that detentions based on mere assertions of public order threats violated the International Covenant.

The national security cases are discussed in Section 6.1. Section 6.2 collects a range of public order cases in which the government sought to justify a restriction on the ground that the expression at issue showed contempt for the government, was likely to disturb the constitutional order, or was deemed likely to lead to an imminent breach of the peace. National security differs from public order in that, to justify a restriction based on the needs of national security, the government must show a greater gravity of potential harm but does not need to show the same degree of imminence or likelihood of harm.

6.1 NATIONAL SECURITY

All the human rights treaties discussed in this handbook permit restrictions on freedom of expression in the interest of protecting national security. Generally, governments are accorded wide latitude in determining when national security is threatened, although the interest legitimately should be invoked only when the threat is to a state's territorial or national integrity and not merely to a given government.

Council of Europe

The European Court has issued two judgments and the European Commission has declared inadmissible two applications concerning national security restrictions on freedom of expression. The Commission hardly questioned the government's assertion of the national security threat; the Court in one case showed at least a measure of scepticism emphasizing that, even in the area of national security, a government's discretion is not unfettered.

In a case against Greece, the European Court recently ruled that the applicant's conviction for disclosure of classified secrets did not violate Article 10 of the European Convention. The applicant, an officer in the Greek air force, was found guilty by a military court of having disclosed for a fee to a private arms manufacturing company classified information concerning an air force study on guided missiles. He was sentenced to five months' imprisonment and his appeals were unsuccessful.

The European Court made clear that: (1) military service staff are entitled to the protections of Article 10, although they owe "an obligation of discretion in relation to anything concerning the performance of [their] duties",¹ and (2) even military information classified as secret does not fall outside the scope of Article 10:

¹ *Hadjianastassiou v. Greece*, para. 46.

Of course, the freedom of expression guaranteed by Article 10 applies to servicemen just as it does to other persons within the jurisdiction of the Contracting States Moreover, information of the type in question does not fall outside the scope of Article 10, which is not restricted to certain categories of information, ideas or forms of expression²

The Court concluded, however, that the conviction and sentence were intended to protect national security, and that they lay within "the margin of appreciation which is to be left to the domestic authorities in matters of national security".³

In the two *Spycatcher* cases, the European Court for the first time rejected a government's claim, albeit on narrow grounds, that an interference with freedom of expression was necessary to protect national security. The UK government had claimed that it was necessary to enjoin the press from publishing any information from the book *Spycatcher*, the memoirs of a former intelligence officer, even after the book had been published in the United States and several other countries. The government reasoned that the continued injunction was necessary in order to preserve the confidence of other governments in the secrecy of information held by its intelligence services. The Court ruled that, once the information had been published elsewhere, the interest of the press and public in imparting and receiving information outweighed the government's interest in protecting the reputation of its security services.⁴ However, the Court also held that the government was entitled to enforce the injunction prior to publication elsewhere.⁵

In the *Purcell* case, 16 journalists and producers of radio and television programmes challenged the Irish Broadcasting Ban, a ministerial order made pursuant to Section 31 of the Broadcasting (Authority) Act 1960, as amended, which prohibits interviews and reports of interviews with representatives of several proscribed organizations as well as Sinn Fein, a registered political party which supports the aims of the IRA, a proscribed paramilitary group. The ban extends to all statements regardless of subject matter and makes no exception for election campaign periods.

The European Commission accepted that the ban imposed restrictions on the broadcasters' editorial judgment and thus interfered with their freedom of expression. However, the Commission noted the impact of radio and television, the limited effectiveness of corrections or retractions and even the possibility of coded messages. It also suggested that the ban did not unjustly infringe Sinn Fein's rights to expression and to participate in elections since, under Article 17, no group or person has the right to pursue activities which aim at the destruction of any of the rights and freedoms enshrined in the Convention.⁶ Accordingly, the Commission concluded that the interference was justified in the interests of protecting national security and preventing disorder and crime. Many observers were disappointed that, in light of the importance of the issues, the Commission did not make a ruling on the merits, thereby precluding consideration of the case by the European Court.

² Id. at para. 39.

³ Id. at para. 47.

⁴ *The Observer and Guardian v. United Kingdom*, para. 69. See also discussion of this case in Section 8.1 *infra*.

⁵ Id. at para. 59(b).

⁶ *Purcell v. Ireland*, App. No. 15404/89, Admissibility Decision of 16 April 1991.

The Commission has not yet decided on the admissibility of an application by journalists and others challenging a narrower ban imposed by the UK government (prohibiting the broadcast of words spoken by members of Sinn Fein and all proscribed organizations, but permitting the same words to be read by an actor or reported by a journalist).⁷

Recently, members of Sinn Fein in Northern Ireland filed an application challenging the UK ban as a violation of their freedom of expression and right to political participation. The Commission has yet to rule on the application's admissibility.

In a 1970s case, Pat Arrowsmith filed an application with the European Commission challenging her conviction and seven-month sentence for having "incited disaffection".⁸ She had distributed to British troops stationed in Northern Ireland leaflets which criticized Britain's policies and indicated means of assistance for those who chose to leave the army. Eleven members of the Commission accepted the government's claim that the conviction and sentence were necessary to protect national security and prevent disorder in the army. Only one member dissented, quite strongly, on the ground that, in his opinion, the pamphlets did not pose an imminent threat to national security. The case was not referred to the European Court. It is quite possible that the *Arrowsmith* case, decided in 1978, would be decided differently today in light of the judgments of the European Court in the *Spycatcher* and *Greek* cases.

The European Committee on Crime Problems published a report in 1986 on the problem of extortions made under terrorist threats.⁹ The report includes an extensive discussion of the role of the mass media and concludes that:

Any intervention by the public authorities might upset an often fragile equilibrium. For this reason the committee considers that in relations between the authorities and the media, even in cases as serious as those discussed in this report, any attempt to formalise relations or to bring them within a legal framework is likely to be damaging. Such relations must be established in a climate of trust, particularly during the period of crisis which occurs in such situations.¹⁰

The Committee recommended that government interference with broadcasting freedom should be limited to two exceptional circumstances: (1) when the media threaten to hamper apprehension of terrorists, such as by broadcasting the plans of the police; or (2) when broadcasts incite or tend to vindicate terrorist actions.¹¹

Germany

⁷ *Brind & Ors v. United Kingdom*, App. No. 18714/91.

⁸ *Arrowsmith v. the UK*, 19 D & R 22 (1978), Commission Report adopted 12 Oct. 1978.

⁹ This select committee of experts was established by the Council of Europe in 1958 to promote harmonization among the member states of their penal legislation, and has met annually since 1964.

¹⁰ *Extortions Under Terrorist Threats* (Strasbourg 1986); 12 *Common L Bull* (1986), 836.

¹¹ *Id.*

The Constitutional Court (FCC) affirmed that journalists may not be prosecuted pursuant to the *Mosaiktheorie* for publishing non-secret information collected from different sources, even if pieced together so as to present an overall picture which could threaten national security.¹² This controversial case concerned *Der Spiegel's* publication of an article which, in challenging the effectiveness of German and NATO military defence forces, relied on information which the government claimed included military secrets. The prosecution filed criminal charges, including disclosure of military secrets, against the publisher and some journalists and obtained a warrant to search *Der Spiegel's* offices and seize all documents related to the article. The FCC, by a split vote of 4 to 4, upheld the search but on narrow grounds. In so doing, the FCC affirmed the presumption against searches of newspaper premises and made clear that the suspicion of criminal activity could not be based on *Mosaiktheorie* since it is an essential function of the press to collect pieces of information, arrange them and draw conclusions. The FCC concluded that there was sufficient other evidence to support a reasonable suspicion of criminal activity and accordingly that the search was lawful.¹³

Ireland

The Supreme Court delivered a unanimous judgment upholding a High Court decision that RTE, Ireland's national broadcasting service, had acted arbitrarily by refusing to broadcast interviews with a strike-leader owing to his membership of Sinn Fein.¹⁴ Section 31 of the Broadcasting (Authority) Act 1960, as amended, allows the Minister to order broadcasters to refrain from broadcasting matter likely to promote or incite to crime or that would tend to undermine the authority of the state. Pursuant to that Act, the Minister had issued an order prohibiting interviews or reports of interviews with spokespersons for Sinn Fein or broadcasts by representatives of Sinn Fein or made by, or on behalf of, or advocating, offering or inviting support for Sinn Fein. The applicant, a member of Sinn Fein, had been elected as his union's spokesperson.

The High Court ruled that RTE had misinterpreted the ministerial order by applying it to mere members of Sinn Fein, and had infringed its obligations of fairness and impartiality by arbitrarily refusing to allow the views of the workers involved in a major industrial dispute to be put forward by their chosen spokesperson. While access to broadcasting is a privilege and not a right, access may not be denied on arbitrary grounds. The five-member Supreme Court unanimously upheld the High Court's decision. Chief Justice Finlay stated:

I accept the importance of the purpose and objective of the ministerial order made pursuant to Section 31, namely, to prohibit the broadcasting of matter which would be likely to undermine the authority of the State. The relevance of that objective in my view clearly is that RTE, which has a legal duty to obey the ministerial order, is entitled to take reasonable and practical steps for its implementation in the light of the fundamental importance of that objective. Even applying that principle to ... this case, a ban on the broadcasting of any subject or under any circumstances by a

¹² 20 FCC 162 (1966) (*Der Spiegel* case).

¹³ Public outrage prompted by the article led to the collapse of the coalition government and was a major factor in provoking a total revision of the law of treason and an amendment of the law of disclosure (Criminal Code Section 97B) to allow a limited defence of good faith belief that disclosure was necessary to stop unlawful activity.

¹⁴ *O'Toole v. RTE, SC*, judgment of 30 March 1993. See also *Purcell* case in Council of Europe section supra.

person who is a member of Sinn Fein, cannot, in my view, be justified as an implementation of the order.

Justice O'Flaherty added:

[T]he liberty of expression guaranteed [by the Irish Constitution] is obviously not such that can be invoked to undermine public order or morality or the authority of the State. However, someone speaking on an innocuous subject on the airwaves, even though he is a member of an organisation which includes in its objects a desire to undermine public order or the authority of the State, is neither outside the constitutional guarantee nor is he within the ministerial order. The extent to which he is entitled to expect to have his views broadcast is not in issue in these proceedings; only that he should be treated equally with others when his views do not transgress either the Constitution or the law.

Israel

The Supreme Court of Israel, sitting as the High Court of Justice, ruled that the Chief Military Censor's decision to censor a newspaper article which criticized the Director of the Israeli Intelligence Service violated the journalist's right to freedom of expression and the public's right to receive information and ideas.¹⁵ The Court recognized the need to "strike a balance" between the values of state security and other values such as freedom of movement, freedom of speech and human dignity. Although the continued existence of democracy depends on state security, the Court held that restricting freedom of expression is justified only in extraordinary circumstances which give rise to a serious and almost certain threat to public order. In invoking the "imminent probability test",¹⁶ the Court examined: (1) the degree of injury to security that publication could cause; and (b) the degree of probability that the injury would occur. The Court, in overturning the Censor's decision, emphasized that any party who wishes to show that a prior restraint on publication is lawful bears a heavy burden of proof.

The Supreme Court of Israel, sitting as the High Court of Justice, struck down as vague a directive of the Israeli Broadcasting Authority which prohibited interviews with "public personalities identified with those who see the PLO as the exclusive or legitimate representative" of the Palestinians.¹⁷ In particular, the Court ruled that the directive could not be applied until the Authority assigned a clear and unequivocal definition to the terms "public personalities" and "identified with ... the PLO".

South Korea

In 1992, a majority of the Constitutional Court of the Republic of Korea ruled that the term "military secrets" for purposes of the Military Secrets Protection Act - penalizing unauthorized collection and intentional or negligent disclosure of military secrets - had to be defined with greater precision than previously:

¹⁵ *Meir Schnitzer and Ors v. Chief Military Censor*, HC 42 (4) PD 611 (1988); 24 *Israeli L Rev* 304.

¹⁶ See *Kol Ha'am Company Lmt. & Al-Ittihad Newspaper v. Minister of the Interior*, High Court 73/53 (per Agranat J), discussed in Section 8.2 *infra*.

¹⁷ *Zikhrony v. Broadcasting Authority*, HC 37 (1) PD 757 (per Levine J); 15 *Israel Yearbook on Human Rights* (1985), 281.

The definition of military secrets is ambiguous and misleading enough to restrict the freedom of information and expression. [Accordingly,] there needs to be a more exact and detailed specification. Everything related to military affairs cannot be defined as a military secret.¹⁸

In two consolidated cases challenging the National Security Act (NSA) of the Republic of Korea, under which hundreds of political dissidents were prosecuted in the 1980s, the Constitutional Court in 1990 held that the law was constitutional only if interpreted somewhat more narrowly than its broad language might have seemed to permit.¹⁹ In May 1991, the Democratic Liberal Party pushed through minor amendments to the NSA, designed to bring it into compliance with the Court's ruling; these limit punishment of conduct "sympathetic" to North Korea only when such conduct is coupled with knowledge that it would "endanger the security of the nation or the basic liberal democratic order."²⁰

Namibia (South West Africa)

The Supreme Court of South West Africa ruled that a provision of the Internal Security Law which punished the "withholding of information" did not impose a duty on persons in possession of information concerning terrorism to communicate that information to the police; before information could be considered to have been withheld, it must have been requested. Moreover, in the present case, those detained under this law had to be released because, although some of the reasons advanced by the detaining authority were legitimate, others were illegitimate and it was impossible to tell which reasons were decisive.²¹

The Netherlands

In 1916, the Supreme Court of The Netherlands ruled, in what remains the leading case on the issue, that a publication may not be punished or prevented from publishing simply on the ground that it *might* endanger the nation's safety. Rather, the government must establish that, based on experience, it may reasonably be assumed that, under the given circumstances, the feared consequences *would* occur.²²

Spain

Egin, a Basque newspaper, published a communiqué from ETA, an armed Basque separatist group, which defended ETA's terrorist activities. The Supreme Court upheld the conviction and two-year sentence of the publisher, who then brought the case before the Constitutional Court claiming a violation of his fundamental right to freedom of expression. Both sides cited Article 10(2) of the European Convention in their arguments.

¹⁸ "Military Secrets Protection Act Lacks Legitimacy on Freedom of Information Grounds", *Korea Times*, 26 Feb. 1992, cited in J M West & Dae-Kyu Yoon, "The Constitutional Court of the Republic of Korea", 40 *Amer. J Int'l L* (1992), 71, 107-08.

¹⁹ *Case 89-Honka-113*, Constitutional Court, Judgment of 2 April 1990.

²⁰ J M West & Dae-Kyu Yoon, "The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex?", 40 *Amer. J Int'l L* (1992) 71, 106-07.

²¹ *Cabinet for Interim Government of South West Africa v. Bessinger and Ors*, 1989 (1) SA 618 (per Levy J, Berker JP and Henning AJ concurring).

²² HR 6 Nov. 1916, NJ 1916, 1223.

The Constitutional Court held that the Supreme Court had failed to distinguish between expression that supported terrorism and the mere reproduction of a communiqué written by someone not associated with the newspaper. The Court ruled that the latter form of expression was protected by the right to freedom of information. The Court stated that:

both the right of the journalist to inform and the rights of his readers to receive full and accurate information constitute, in the last resort, an objective institutional guarantee, which effectively prevents the imputation of any criminal will on the part of those who only transmit information.²³

On a challenge brought by the parliaments of Catalonia and the Basque Country to various provisions of the Anti-Terrorism Act (Organic Law 9/84), the Constitutional Court ruled two provisions unconstitutional.

First, the Court ruled that, under the Constitution, an individual's freedom of speech may not be suspended if he or she is accused of *supporting* terrorist activities (although the right may be suspended on suspicion that a person *belongs* to a terrorist organization or in emergency situations on a general basis). Accordingly, the Court ruled unconstitutional a provision which made it a criminal offence to "lend support to terrorism by any means of information".

Second, the Court ruled unconstitutional a provision which provided for the closing, by judicial decree, of any newspaper that supported terrorism, on grounds that: (1) the provision amounted to an individual suspension of freedom of speech; (2) even if viewed as a punishment rather than a suspension of a fundamental right, it was disproportionate; and (3) it would lead to self-censorship by journalists, who would fear the consequences of reporting on terrorists' activities, and thus was incompatible with the right to impart and receive information.²⁴

6.2 PROTECTION OF PUBLIC ORDER

Under international law, governments are entitled to restrict expression when necessary to protect public order so long as the means of restriction are proportionate to the threat. However, there are few international decisions which provide guidance as to when expression may be deemed to constitute a threat to public order. What the decisions of the Human Rights Committee and European Court (discussed in Section 6.2.1) make clear is that a government must support any restriction with concrete allegations of how the accused's exercise of his freedom of expression threatens public order or state security, and that any restriction must be necessary to protect public order. Moreover, accusations which are true or made in good faith are entitled to protection.

The decisions of the US Supreme Court provide the most extensive reasoning as to the kinds of expression which lawfully may and may not be restricted. In particular, the US cases distinguish

²³ *Egin case*, STC 159/86, *Boletín de Jurisprudencia Constitucional* 68, 1447 para. 8.

²⁴ *Second Anti-Terrorism Act case*, STC 199/87, *Boletín de Jurisprudencia Constitucional*, 81.

between mere *advocacy* of ideas which, if acted upon, could possibly (but not imminently or with sufficient likelihood) lead to unlawful activity, and *incitement* to lawless action. Accordingly, a separate section (6.2.2) is devoted to an examination of US case-law.

The common law crime of seditious libel is discussed in Section 6.2.3. Although the British courts have narrowed this crime so that it now serves virtually no purpose (beyond punishing conduct already punishable as incitement to disorder), this anti-democratic vestige of British colonial rule persists throughout the Commonwealth.

Section 6.2.4 brings together a number of cases in which convictions (or charges) based on criticism of the government were overturned or rejected on the ground that the expression at issue did not pose a sufficiently palpable threat to public order.

Section 6.2.5 collects cases in which the government sought to restrain peaceful assemblies or other lawful forms of expression on the ground that onlookers were likely to be so offended as to be provoked to violence. Courts have rejected convictions in such circumstances reasoning that the government is obliged to protect the peaceful expression of ideas however offensive and even to take affirmative steps to protect peaceful protesters from hostile reactions.

6.2.1 International Cases

6.2.1.a Human Rights Committee

In a series of decisions, the UN Human Rights Committee has made clear that the government bears the burden of proving, with *specific* evidence, that imprisonment of a person is *necessary* to protect public order or some other aim listed in Article 19(3) of the International Covenant.

In a case against Madagascar, the Committee ruled that house arrest and detention violate the right to freedom of expression even when the person detained has challenged the legitimacy of the government. Monja Jaona, a leader of an opposition political party and a presidential candidate, challenged the results of the 1982 presidential elections and called for a new election. Shortly thereafter he was placed under house arrest and then detained at a military camp. The Human Rights Committee found that his rights had been violated because "he suffered persecution on account of his political opinions". Accordingly, the Committee ordered that he be awarded compensation, and that the government take steps to ensure that similar violations did not occur.²⁵

In several cases against Uruguay, the Human Rights Committee found that the government had violated Article 19. In one case, the applicant had been arrested, held incommunicado for many months and later convicted of belonging to a subversive association. The applicant claimed that the true reason for his arrest and conviction was that he had contributed information on trade union activities to a newspaper opposed to the government. The government failed to supply the Committee with a concrete factual analysis of the offence of subversive association. Accordingly, the Committee found that the applicant's rights had been violated and declared that the government "was under an obligation to provide the victim with effective remedies, including his immediate release and compensation for the violations which he [had] suffered ...".²⁶

²⁵ *M Jaona v. Madagascar*, Communication No. 132/1982, Decision of 6 April 1985, 24th Session, Committee Report, 1985, Annex IX, para. 14.

²⁶ *L Weinberger Weisz v. Uruguay*, Communication No. 28/1978, views adopted 29 Oct. 1980, 11th Session, Committee

In a related case, the Committee made clear that, in order for detention for subversive activities to be legitimate, the government must explain what is meant by "subversive activities"; it is not enough that the government makes only a general charge. As stated by the Committee,

[T]he State party has never explained the scope and meaning of "subversive activities", which constitute a criminal offence under the relevant legislation. Such an explanation is particularly necessary in the present case, since the author of the communication contends that he has been prosecuted solely for his opinions.²⁷

In a third case against Uruguay, the Committee similarly found a violation because the applicant had been "arrested, detained and tried for his political and trade union activities". The Committee explained:

Bare information from the State party that [the applicant] was charged with subversive association and conspiracy to violate the Constitution, followed by preparatory acts thereto, is not in itself sufficient, without details of the alleged charges and copies of the court proceedings.²⁸

In a case against Zaïre, eight former Zaïrean Members of Parliament (MPs) and one businessman challenged their arrest and internal exile in December 1980 for having published an "open letter" to President Mobutu. The eight MPs were stripped of their membership of parliament and forbidden to hold office for a period of five years. In June 1982 they were tried and convicted in a State Security Court of plotting to overthrow the government and planning the creation of a political party. The former MPs received sentences of 15 years each, and the businessman received a five-year sentence. They were released pursuant to an amnesty in May 1983 but were sent into internal exile. The Committee concluded that the applicants' rights had been violated "because they suffered persecution because of their opinions". The government was ordered to grant them compensation and to take "other effective measures to remedy the violations."²⁹

A second case against Zaïre challenged the 18-month detention and indefinite internal exile of a man who had submitted his candidacy for the presidency in 1979 (which was rejected). The Committee found a violation and ordered compensation.³⁰

Report, 1981, Annex IX, paras. 16-17.

²⁷ *L Buffo Carballal v. Uruguay*, Communication No. 33/1978, views adopted 27 March 1981, 12th Session, Committee Report, 1981, Annex XI, para. 12.

²⁸ *A Pietroroia v. Uruguay*, Communication No. 44/1979, views adopted 27 March 1981, 12th Session, Committee Report, 1981, Annex XVI, para. 17.

²⁹ *N Mpandanjila, et al v. Zaïre*, Communication No. 138/1983, decision of 26 March 1986, 27th Session, Committee Report, 1986, Annex VIII.A., paras. 10 and 11.

³⁰ *André Alphonse Mpaka-Nsusu v. Zaïre*, Communication No. 157/1983, views adopted 26 March 1986, 27th Session, Committee Report, 1986, Annex VIII.D.

Thus, imprisonment for seditious libel or any other offence against the authority of the state violates Article 19 of the International Covenant in the absence of specific allegations of the way in which his or her statements threatened public order or national security.

6.2.1.b European Court of Human Rights

The European Court has not gone so far as to prohibit punishment of all verbal attacks on or criticism of the government. However, in the *Castells* case, a chamber of the Court, by 6 votes to 1, made clear that governments are required to tolerate an even greater degree of scrutiny and criticism than politicians.³¹

In 1979, Mr Castells, a senator who represented *Herri Batasuna*, a Basque separatist coalition, published in a weekly magazine an article condemning murders and attacks committed by armed groups against Basque citizens. In particular, he accused the government of failing to investigate any of the crimes and of actually supporting and instigating the attacks. He was convicted for insulting the government and sentenced to imprisonment and disqualification from public office for one year. (The penalties were suspended by the Constitutional Court and never actually imposed.) The government contended that Mr Castells had insulted a democratic government in order to destabilize it during a particularly critical time - shortly after the adoption of the Constitution when groups of various political persuasions were resorting to violence. In addition to establishing precedents concerning defamation generally,³² the Court stated:

The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion. Furthermore, the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.³³

The Court suggested that a government may prohibit criticism of itself only in extraordinary circumstances, when necessary to protect public order and when the accusations are "devoid of foundation or formulated in bad faith".³⁴ The Court ruled that the government had violated Article 10 of the European Convention on the narrow ground that the government had prevented Mr Castells from offering evidence as to the truth of his allegations.

In a case against Iceland, the Court suggested that a person should not be held liable for publishing allegations, especially regarding matters of serious public concern, that are based on public opinion, "rumours", "stories" or the statements of others, so long as the nature of factual support for the allegations is clearly stated. In this case, a journalist alleged that police brutality was on the increase

³¹ *Castells v. Spain*. Compare the *Lingens* case, concerning the heightened degree of criticism politicians are required to tolerate, discussed in Section 7.1.1 infra.

³² See Section 7.1.1 infra.

³³ *Castells v. Spain*, para. 46.

³⁴ *Id.* at para. 46.

and called for measures to ensure better police oversight. He made various factual allegations but was excused from having to prove their truth because he had made clear that they were based in part on public opinion, rumours and stories.³⁵

6.2.2 United States Jurisprudence: Advocacy v. Incitement

In 1969, in a unanimous opinion in *Brandenburg v. Ohio*, the US Supreme Court reversed the conviction of a Ku Klux Klan leader under an Ohio statute which forbade the advocacy of crime or violence as a means of accomplishing industrial or political reform. The Court ruled that the statute was unconstitutional. In doing so, the Court held that speech advocating the use of force or crime may only be proscribed where two conditions are satisfied: (1) the advocacy must be "directed to inciting or producing imminent lawless action"; and (2) the advocacy must also be "likely to incite or produce such action."³⁶

The first prong of the test incorporates the "clear and present danger" test first articulated by Justice Holmes (for the full Court).³⁷ It further incorporates Justice Hand's distinction between advocacy of unlawful action and advocacy of abstract doctrine.³⁸

The Court has applied the test (and earlier variants of it) in numerous cases. In a 1966 case, the Court ruled that the Georgia House of Representatives' exclusion from membership of Julian Bond violated his constitutional rights. Mr Bond, an opponent of the Vietnam war, had joined a statement of "sympathy with, and support [for] the men in this country who are unwilling to respond to a military draft." The Court held that Bond could not be penalized for that statement since it did not constitute a call for unlawful draft resistance but was merely a general, abstract declaration of opposition to the war. The Court also relied on other statements by Bond in which he explicitly denied advocating the breaking of the draft laws.³⁹ The Court emphasized:

[S]tatements criticizing public policy and the implementation of it must be ... protected [in order to] ... give freedom of expression the breathing space it needs to survive.⁴⁰

A black anti-war activist declared in a public speech: "If they ever make me carry a rifle, the first man I want to get in my sights is LBJ [then-President Lyndon B Johnson]. They are not going to make me kill my black brothers." He was convicted of threatening to kill the President. The Supreme Court reversed the conviction on the ground that the circumstances showed that the speaker did not intend to make a "true threat" but rather to state his political opposition to the

³⁵ *Thorgeirson v. Iceland*. For further discussion of the case see Section 7.1.1 infra.

³⁶ *Brandenburg v. Ohio*, 395 US 444 (1969).

³⁷ *Schenck v. United States*, 249 US 47 (1919).

³⁸ L Tribe, *American Constitutional Law*, 2nd edn, (Foundation Press, 1988), 847-49.

³⁹ *Bond v. Floyd*, 385 US 116 (1966).

⁴⁰ *Id.* at 135.

President, albeit in a "very crude, offensive" manner. The Court relied, in particular, on the fact that the threat was conditional, and that the audience responded with laughter.⁴¹

In a 1982 decision, the Supreme Court unanimously reversed a civil judgment against the National Association for the Advancement of Colored People (NAACP) and several of its members for damages arising out a boycott of a white-owned business. The Court conceded that the boycott leader's speeches referred to the possibility that "necks would be broken" and "might have been understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence".⁴² Indeed, violence did erupt, but sufficiently removed in time from the speeches for the Court to conclude that the speeches were not a proximate cause. The Court rejected any imposition of liability on the boycott leader or the NAACP, holding that the speeches did not exceed the bounds of protected expression set forth in *Brandenburg*. The Court stated: "Strong and effective extemporaneous rhetoric cannot be nicely channelled in purely dulcet phrases."⁴³

The Supreme Court developed the "fighting words" doctrine to address the issue of offensive speech. "Fighting words", which are excluded from constitutional protection, include those which "tend to incite an immediate breach of the peace" or which "by their very utterance inflict injury".⁴⁴ The Court articulated the "fighting words" test in 1942; since 1952, it has not upheld a single "fighting words" conviction. Although it has not expressly rejected the doctrine, in practice it has declined to proscribe words which "by their very utterance inflict injury", and has interpreted the first prong of the definition, the tendency to incite "an immediate breach of the peace" to be co-extensive with the "clear and present danger" test. The Supreme Court effected this transformation of the "fighting words" doctrine in several decisions.

First, the Court made clear that it is not enough that the speaker's words make the listeners angry; incitement to violence (whether or not violence actually ensues) is required. Thus, the Supreme Court reversed the conviction of a speaker who made a race-baiting speech which attracted an angry crowd and then denounced the crowd as "snakes" and "slimy scum". He was convicted under a statute which the trial court had interpreted to include speech which "stirs the public to anger or invites dispute", as well as speech which creates a public disturbance. The Court reasoned that speech which "stirs ... to anger" or "invites dispute" is protected and that, in fact:

A function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.⁴⁵ Accordingly, the Court ruled that the statute as interpreted was over-broad and that the race-baiter's conviction had to be reversed regardless of whether his actual words could have been criminal under a more narrowly-drawn statute.

⁴¹ *Watts v. United States*, 394 US 705 (1969).

⁴² *NAACP v. Claiborne Hardware Co.*, 458 US 886, 927 (1982).

⁴³ *Id.* at 928.

⁴⁴ *Chaplinsky v. New Hampshire*, 315 US 568 (1942).

⁴⁵ *Terminiello v. Chicago*, 337 US 1, 4 (1949) (per Douglas J).

Second, whenever the police have the physical capacity to control an angry crowd through reasonable crowd control techniques, they must do so in preference to arresting the speaker for using "fighting words". In a 1965 case, 2,000 civil rights protesters picketed a courthouse; about 75 policemen separated them from 100-300 counter-protesters gathered on the other side of the street. The Supreme Court, in reversing the conviction of the leader of the civil rights demonstration for breach of the peace, rejected the claim that the conviction was justified because "violence was about to erupt". The Court relied in part on the fact that the police could have "handled the crowd" and noted that upholding the conviction would in effect permit a "heckler's veto" of any views with which an angry crowd disagreed.⁴⁶

Third, the doctrine will not apply where the feared violence of the crowd is a wholly unjustified response to lawful activity. Thus, the Court reversed convictions for breach of the peace in several civil rights cases where the state's fear of imminent violence arose solely from the fact that use by blacks of segregated facilities was likely to stir whites to attack them.⁴⁷

Fourth, protection of "public order" does not justify exclusion from public areas of offensive speech (short of obscenity). Thus, in 1971 the Supreme Court ruled unconstitutional the conviction of a man who wore a jacket bearing the words "Fuck the Draft" in the Los Angeles County Courthouse where women and children were present. First, the Court concluded that the jacket was not obscene since it was not erotic in any significant way. Second, the conviction could not be justified as necessary to protect "unwilling or unsuspecting viewers", pursuant to the "captive audience" theory. Those in the courthouse could avoid further offence simply by averting their eyes. Third, the state was not entitled to ban certain expletives in order to maintain what officials regarded as "a suitable level of discourse within the body politic". There was no principled way to distinguish "fuck" from other words.

Justice Harlan, writing for the majority, rejected the proposition that "the States, acting as guardians of public morality, may properly remove [an] offensive word from the public vocabulary."⁴⁸ He observed, "one man's vulgarity is another man's lyric."⁴⁹ The jacket-wearer could not express his message equally well with polite language; the language chosen conveyed not only an intellectual idea but also "otherwise inexpressible emotions". The Constitution protects this "emotive function" of speech just as much as its cognitive content. Moreover, permitting the banning of "offensive" words poses an unacceptable risk of allowing the suppression of unpopular ideas. The government may not punish expression because of its offensiveness except where it is foisted on a "captive audience" or intrudes into the privacy of the home.⁵⁰

6.2.3 Seditious Libel: Common Law Jurisdictions

⁴⁶ *Cox v. Louisiana (Cox I)*, 379 US 536, 550 (1965). See also *Edwards v. South Carolina*, 372 US 229 (1963).

⁴⁷ *E.g., Garner v. Louisiana*, 368 US 157 (1961).

⁴⁸ *Cohen v. California*, 403 US 15, 22-23 (1971).

⁴⁹ *Id.* at 25.

⁵⁰ *Id.* at 25-26.

While the British courts have considerably narrowed the common law crime of seditious libel over the years so that the prevailing view now is that it is limited to speech which is both likely and intended to incite violence, there has not been a similar development in many countries of the Commonwealth. Thus while the courts of some countries have followed, and indeed preceded the courts of Britain, others interpret seditious libel to require the somewhat lesser showing of a likelihood only that the libel will lead to a breach of the peace, and yet others require a showing only that the libel is likely to excite ill-will or contempt of the government. The following decisions overturning seditious libel convictions are grouped into three categories: decisions which require an intent to incite violence (from Canada and UK); decisions (from India, Namibia, Nigeria and Uganda) which apply the breach of the peace standard; and decisions (from Kenya, Malaysia and Sierra Leone) which interpret seditious libel to encompass expression that incites ill-will, but which have imposed a requirement of a high evidentiary showing.

6.2.3.a Intent to incite violence

Canada

The Supreme Court of Canada, in a 1951 case, stated a two-part test for the common law crime of seditious libel. First, the seditious intention upon which a prosecution for seditious libel must be founded is an intention to incite to violence or resistance. An intent, for example, to "promote feelings of ill will and hostility between different classes of subjects" will not suffice. Second, the intention of the violence must be to disturb "constituted authority". As stated by Justice Kellock, in summarizing the authorities:

It cannot be that words which, for example, are intended to create ill-will even to the extent of violence between any two of the innumerable groups into which society is divided, can, without more, be seditious. In my opinion to render the intention seditious, there must be an intention *to incite to violence or resistance or defiance for the purpose of disturbing constituted authority*. I do not think there is any basis in the authorities for defining the crime on any lower plane.⁵¹

United Kingdom

In 1991, the Queen's Bench Divisional Court (England) expressly endorsed the above stated two-part definition in what is the most recent and arguably the most authoritative statement of the English common law of seditious libel.⁵² The Court, finding that the book, *The Satanic Verses*, was neither blasphemous nor seditious, declined to grant judicial review of a magistrate's refusal to issue a summons against Salman Rushdie. The Court stated:

"It is the absence in the present case of the vital element of public mischief ... that is to say, the element of attacking, obstructing or undermining public authority, which the magistrate relied on. ... In our judgment, he was absolutely right to do so."⁵³

Some earlier English cases have suggested that an intention to publish words which have a tendency to incite violence suffices to establish the mental element of the crime.⁵⁴ However, the more likely

⁵¹ *Boucher v. the King* [1951] 2 DLR 369, 389.

⁵² *R v. Chief Metropolitan Stipendiary Magistrate ex parte Choudhury* [1991] 1 QB 429.

⁵³ *Id.* at 453.

view is that the tendency of the words is, at best, evidence of an intention to incite violence which may be rebutted by other evidence. This view is supported by Judge Cave's statement in 1886:

In order to make out the offence of speaking seditious words there must be a criminal intent upon the part of the accused, they must be words spoken with seditious intent; and, although it is a good working rule to say that a man must be taken to intend the natural consequences of his acts, yet, if it is shown from other circumstances that he did not actually intend them, I do not see how you can ask a jury to act upon what has become a legal fiction.⁵⁵

In several Commonwealth countries, the law of sedition has been codified based upon Sir James Stephens' analysis in his *Digest of Criminal Law*. Consequently, several Commonwealth countries now have a statutory offence which is stated in broadly the same terms. A recurring question is whether this common formulation allows a conviction for sedition if the words in question are not calculated to incite violence. Decades old decisions of the Privy Council on appeal from the Gold Coast⁵⁶ and from India⁵⁷ held that incitement to violence was not an essential prerequisite. However, that view has not prevailed (as illustrated by several of the following cases).

6.2.3.b Incitement to violence or breach of the peace

India

The Supreme Court of India, in expressly declining to follow the Privy Council cases, ruled that the statutory offence (Section 124A of the Indian Penal Code), like the common law, had incitement to violence as its gist. This interpretation was necessary because otherwise the offence would have contravened the guarantee of freedom of expression set forth in Article 19 of India's Constitution.⁵⁸

Namibia (South West Africa)

The Supreme Court of South West Africa set aside an order directing *The Namibian* newspaper to pay a high registration fee before it could lawfully engage in publishing. The Cabinet had based its order on its finding that *The Namibian's* editor had written articles critical of various Cabinet members which tended to lower the esteem in which its members were held by the public, and had the likely effect of endangering the security of the state. The Court (per Levy J.) observed that:

Because people (or a section thereof) may hold their government in contempt does not mean that a situation exists which constitutes a danger to the security of the State or to the maintenance of public order. In fact, to stifle just criticism could as likely lead to these undesirable situations.⁵⁹

⁵⁴ See, e.g., *R v. Aldred* [1909] 22 Cox 1.

⁵⁵ *R v. Burns* [1886] 16 Cox CC 355, 364.

⁵⁶ *Wallace-Johnson v. the King* [1940] AC 231.

⁵⁷ *King-Emperor v. Sadashiv Narayan Bhalerao* [1947] LR 74 IA 89.

⁵⁸ *Kedar Nath Singh v. State of Bihar* [1962] Supp. SCR 769.

⁵⁹ *Free Press of Namibia Pty Ltd v. Cabinet for the Interim Government of South West Africa*, 1987 (1) SA 614, 624E.

The Court criticized the Cabinet for confusing individual members of the Cabinet with the state by contending that attacks upon Cabinet members could endanger State security. It ruled that this confusion resulted in the Cabinet taking into account irrelevant matters and, accordingly, set aside the decision.

Nigeria

The Court of Appeal (Enugu Division) invalidated the provisions of the Criminal Code concerning seditious publications. The appellants had been convicted of publishing and distributing "seditious publications" for having published and distributed a book accusing the Governor and government of Anambra State of attempting to import arms into the State.

The Court of Appeal unanimously held that relevant sections of the Criminal Code were invalid because they violated the right to freedom of expression guaranteed by the Constitution and were not saved by the constitutional provision which permits derogation from the right to freedom of expression in the interest of public order and safety. The Court of Appeal found the sections particularly unsatisfactory because they did not provide for a defence of truth and could lead to conviction even in the absence of any evidence that publication was likely to lead to a breakdown in public order. The Court emphasized the availability of other remedies for intemperate speech, such as the offence of spreading false news and the crime and tort of defamation. Stated Olatawura JCA:

We are no longer the illiterates or the mob society our colonial masters had in mind when the law was promulgated. ... To retain S. 51 of the Criminal Code, in its present form, that is even if inconsistent with the freedom of expression guaranteed by our Constitution, will be a deadly weapon to be used at will by a corrupt government or a tyrant Let us not diminish from the freedom gained from our colonial masters by resorting to laws enacted by them to suit their purpose.⁶⁰

The Enugu High Court had earlier reached a similar conclusion, stating its reasons at greater length, in a case involving another article accusing the Governor of Anambra State of corruption. The Court held that the law of sedition allows restrictions on the right to free speech similar to those stated in Article 19(2) of the Indian Constitution. Citing judgments of the Supreme Court of India, the Court stated that in order to determine whether a law is reasonably justifiable in a democratic society the context surrounding that law must be examined and, in particular, the circumstances surrounding the passage of the legislation, the object of the law and the mischief which the law was aimed at preventing. Taking into account the history of the Nigerian sedition law and the nature of the Constitution now being applied, the Court found that the law was not reasonably justifiable in a democratic society in the interests of public order or safety.⁶¹

Uganda

Rajat Neogy, the editor of the magazine *Transition*, published several articles concerning the operation and independence of the judiciary. One of the articles, by Abu Mayanja, asserted that the failure to appoint indigenous African Ugandans to the High Court Bench was essentially based on tribal prejudice. Rajat Neogy and Abu Mayanja were charged with sedition on the ground that the accusation implied that the President had breached the Constitution, and were detained under

⁶⁰ *Chief Arthur Nwanko v. the State*, FCA/E/111/83 (Fed. CA: Enugu), [1985] 6 NCLR 228.

⁶¹ *The State v. The Ivory Trumpet Publishing Co.*, [1984] 5 NCLR 736, High Court, Enugu, 31 Jan. 1983.

emergency regulations. Their highly politicized trial, in which President Obote became personally involved, began in January 1968.

Mohammed Saied, the Chief Magistrate, noted the four grounds of defence to the charge of seditious publication:

- a) to show that the government has been misled or mistaken in any of its measures;
- b) to point out errors or defects in the Government or Constitution or in the legislation or in the administration of justice with a view to the remedying of such errors or defects;
- c) to persuade any person to attempt to procure by lawful means the alteration of any matter as by law established; or
- d) to point out, with a view to their removal, any matters which are producing or have a tendency to produce feelings of ill-will and enmity among any body or group of persons.

He further stated:

The essence of the crime of sedition consists in the intention with which the language is used. ... Such intention must be gathered from a fair and generous reading of the whole of the article and not from isolated or stray passages here and there. In other words, it must be read as a whole in a fair, free and liberal spirit.⁶²

The Chief Magistrate observed that the right to freedom of expression is entrenched in the Constitution, and that the defences stated in the Penal Code act as further safeguards, such that the law of sedition does not "encourage the creation of a servile press, but a press which possesses perfect freedom of speech so long as it does not deliberately deteriorate into a malignant abuse ..."⁶³

He pointed out that all of the judges, other than the Chief Judge, were non-Africans drawn from different parts of the Commonwealth, and that, since the policy of Africanization was "a matter of public concern and the delay in its implementation [gave] rise to a reasonable grievance", it was "open to the community and to the press to voice their comments on it so long as they stayed within the proper bounds":

It must not be forgotten that the mere assertion of a grievance tends to create a discontent which may be seditious, but if redress is sought *bona fide* - although the language used may be objected to - it would not be seditious. Indeed, such articles, if written in a fair spirit and *bona fide* might be productive of a great public good.⁶⁴

⁶² *Uganda v. Rajat Neogy & Abu Mayanja (The Transition Case)*, 1 Feb. 1968, reported in *Transition*, No. 38 (1972), 47, 48.

⁶³ *Id.*

⁶⁴ *Id.*

For the above reasons, Chief Magistrate Saied found that both of the offending passages "when viewed in a free, bold, manly, and generous spirit and dealt with in a fair, free and liberal spirit are saved by exceptions, viz. (b), (a) and (d) and are not seditious." The Magistrate accordingly acquitted the defendants on all counts.⁶⁵

6.2.3.c Likely to excite ill-will

Kenya

The Chairman of a local branch of President Moi's ruling party accused the defendant, a candidate who was running against him in an upcoming election, of injurious falsehood and seditious libel for saying that President Moi had failed to perform his duties and consequently that the local party Chairman should step down rather than seek re-election. The High Court (Nairobi) held that the Chairman had established the claim of injurious falsehood but not seditious libel:

I can see no traces of sedition in the defendant's alleged remarks nor can I see an expression of his disloyalty in the alleged remarks. They are merely expressive of a dissatisfaction with the way certain persons performed the duties they perform on behalf of and for the people. A right thinking person respects freedom of speech and the right to express one's ideas freely. He may dislike vehemently what a person says but he should be prepared to die to protect that person's right to say it.⁶⁶

Salim Ahmed Balala, a Kenyan Muslim cleric, was arrested in late 1992 and charged with treason for allegedly having stated in the course of a prayer "God kill Moi" and also that President Moi had only a few days to live because he persecuted Muslims. At the time of his arrest, Mr Balala was an outspoken critic of the government's refusal to register the Islamic Party of Kenya. The Mombasa Senior Resident Magistrate acquitted Mr Balala and refused to refer charges against him to the High Court on the ground that the challenged statements could not be construed as imagining the death of the President since they were uttered in prayer. The Court observed that Mr Balala was interested only in President Moi's removal from power. The Court further concluded that, in the context of the highly-charged campaign preceding the 1992 multi-party elections, Balala's utterances were not particularly unusual.⁶⁷

Malaysia

The High Court of Malaysia acquitted Param Cumaraswamy, then President of the Bar Council, of having uttered seditious words on the ground that, taking into consideration all the circumstances of the case, his statement did not have the tendency to promote ill will and hostility between different classes of people or against the Ruler. Mr Cumaraswamy had read and distributed a statement at a press conference called by him on behalf of the Bar Council in which he pointed out to the Pardons Board that the public should not be made to feel that the Board was discriminating between two petitioners for pardon on the basis of class or ethnic origin. He was charged under a section of the

⁶⁵ Id. at 49. Despite the courageous ruling of the Magistrate, Mr Neogy was not released for a further 13 months (having been held for four months while awaiting trial); and Mr Mayanja was not released for a further 31 months.

⁶⁶ *Patrick Mutua Nzomo v. Francis Mwea Kasoa*, High Court (Nairobi) Civil Case No. 1604 of 1984 (per Shields J).

⁶⁷ *Republic v. Khalid Salim Ahmed Balala*, Crim. Case No. 871 of 1992, Ruling of the Mombasa Senior Resident Magistrate of 7 Jan. 1993.

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Sedition Act which carries a penalty of a M\$5,000 fine and/or a term of imprisonment not exceeding three years.

In acquitting Mr Cumaraswamy of the charges, the High Court held that: (1) a person could be guilty of seditious libel even if his or her words did not incite to violence or public disorder; it was enough that the words uttered had a tendency to raise discontent or disaffection amongst the inhabitants or against the Ruler; (2) it is for judges acting independently of the Executive to decide the line between criticism and sedition; (3) the words used by Mr Cumaraswamy, far from being likely to excite hostility between the classes, actually urged the Pardons Board not to discriminate between classes of people; and (4) Mr Cumaraswamy's appeal was directed to the Pardons Board and not the Ruler and so could not be found to bring the Ruler into hatred or contempt.⁶⁸

Sierra Leone

The editor and columnist of a newspaper in Sierra Leone were accused of sedition for having published an article which called the government despotic and urged the country to get rid of it, even though the only method actually advocated was to call an early election. The High Court ruled:

[I]n dealing with articles or publications, one should not pause at an objectionable sentence here or a strong word there. It is not merely strong language, tall language, turgid language or vicious or uncouth language which should influence the court, but the court should deal with writing or publication in a free, fair and liberal spirit. The jury will be directed to recollect that great latitude is given to the publication of political articles And they will also be directed to look at the whole article and be reminded that, although they are guardians of the liberty of the press, they must check its abuse while preserving its freedom and ensure that this liberty will suffer no diminution in their hands. Liberty of the press means complete liberty to write and publish without censorship or restriction save such as is absolutely necessary for the preservation of society.

It is the duty of the press to call attention to the weakness of the government when it is done for the public good. It would also be its duty to complain of a grievance which the public good required to be removed or ameliorated, though the very assertion of a grievance creates discontent to a certain extent. ...

Reading that portion of the article which forms the charge, it comes very near the crime of sedition, but notwithstanding this offending paragraph, the article, when taken as a whole, amounts to nothing more than an attempt to force the government to call an early election; no other method is mentioned. ... I come to the conclusion that the article, as it stands without more, and notwithstanding the sarcastic language, does not have the tendency to excite ill-will, contempt or hatred or lead ignorant people to subvert the government or to incite people to insurrection and rebellion leading to public disturbance.⁶⁹

⁶⁸ *Public Prosecutor v. Cumaraswamy* [1986] 1 *Malaysian Constitutional Law Journal* 101 (High Court); 12 *Common L Bull* (1986), 663.

⁶⁹ *R v. Lamin and Taqi* (1964) 66 *African LR Sierra Leone* 346.

6.2.4 Criticism of Government

Privy Council

The Judicial Committee of the Privy Council held that a criminal law provision violated the Constitution of Antigua and Barbuda to the extent that it made the printing or distribution of any false statement which was likely to "undermine public confidence in the conduct of public affairs" a criminal offence. A majority of the Judicial Committee reasoned that it would be a grave impediment to the freedom of the press if those who printed or distributed matter reflecting critically on public authorities could do so with impunity only if they could first verify the accuracy of all statements of fact on which the criticism was based. As stated by Lord Bridge:

In a free and democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind. At the same time it is no less obvious that the very purpose of criticism levelled at those who conduct public affairs by their political opponents is to undermine public confidence in their stewardship and to persuade the electorate that the opponents would make a better job of it than those presently holding office. In the light of these considerations their Lordships cannot help viewing a statutory provision which criminalises statements likely to undermine public confidence in the conduct of public affairs with the utmost suspicion.⁷⁰

The Judicial Committee noted that a section of the law which prohibited statements likely to disturb public order was adequate to safeguard the state's legitimate interests.

India

The Indian Supreme Court, in a landmark case, held that a film for viewing by the general public could not be banned based merely on a chance that it would provoke violence. The film, about a young Brahmin woman forced to undertake illegal means to obtain admission to college because of the government's policy of reserving positions in educational institutions for scheduled castes ("untouchables"), was clearly critical of the government's policy. The Court noted that, because films have a unique capacity to disturb and arouse feelings, and because they cater to mass audiences, they must be subject to prior restraint. Nevertheless, the Constitution's guarantee of freedom of expression is premised on the notion that democracy requires the free exchange of ideas; open criticism of government policies could not be a ground for restricting expression. Given that the film was otherwise unobjectionable, it could not be suppressed merely because of threats of demonstrations or violence. The state has a duty to protect freedom of expression and a speculative assertion of its inability to handle the problem of a hostile audience could not be used to suppress expression in the absence of clear evidence of the likelihood of uncontrollable violence. In particular, the Court declared:

There does indeed have to be a compromise between the interest of freedom of expression and social interests. But we cannot simply balance the two interests as if they are of equal weight. Our commitment to freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and

⁷⁰ *Hector v. Attorney General of Antigua and Barbuda* [1990] 2 AC 312, 315 (PC).

the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have a proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interests. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a 'spark in a powder keg'.⁷¹

The Court cited with approval a statement made by the High Court of Bombay in overturning a conviction based on a published article suggesting that the toiling masses could get hold of power through the path of revolution. "But," stated the High Court, "the expression 'revolution' is used here, as is clear from the context, in contradistinction to reformism or gradual evolution. The revolution preached is not necessarily a violent revolution."⁷²

The Court also noted that the European Court's approach to the protection of freedom of expression was similar to its own.⁷³

In another case, the Indian Supreme Court ruled that an order for preventive detention must be carefully drawn and that, where it was based on several grounds which were distinct and not clearly stated to be in the alternative, the insufficiency of any one ground was sufficient to require that the detention order be set aside. Moreover, if the government intends to allege, in one of the grounds, that the person to be detained advocated violence, then that must be specifically stated in the order of detention. In the case under consideration, the petitioner, a university student leader, was detained on authority of an order which, among other grounds, alleged that he had been responsible for a decision to start a "Gujarat type of agitation". The reference was to an agitation against price rises in Gujarat which turned violent and eventually required the dissolution of the state legislature and the institution of emergency rule.

The Court noted that, while it ought to take judicial notice of well-known facts of contemporary life, it should not confuse "what happened in fact and what was intended to happen". The petitioner could well have meant to call for a peaceful agitation against price rises. As the Court stated: "If the charge be that the petitioner had preached violence, the grounds of detention must say so. Such a serious accusation ought not to be left to mere speculation. ... 'Gujarat type of agitation' being thus a phrase of vague and uncertain import, the petitioner could have had no opportunity to make an effective representation against the order of detention." Accordingly, the ground was insufficient and for that reason alone the detention order had to be set aside.

In addition, a second ground was defective because it did not allege an offence at all and so was irrelevant. This ground stated that the petitioner readily agreed to become a member of a student organizing committee for "conducting the students' agitation". The Court, noting that no evidence had been presented to show that the petitioner intended to promote violent agitation, ruled that the word "agitation" does not by itself imply violence. The Court stated:

⁷¹ *Rangarajan v. Jagjivan Ram and Others; Union of India and Ors v. Jagjivan Ram*, decided on 30 March 1989, [1990] LRC (Const.) 412, 427; [1989] (2) SCR 204, 226.

⁷² *Id.* at 427 and at 226-227.

⁷³ *Id.* at 428 and at 87, citing the paragraph from *Handyside v. United Kingdom* quoted in Section 4.1 supra.

The formation of an Association for the ventilation of grievances in a lawful manner is a part of the Constitutional right of free speech and expression, the right to assemble peaceably and without arms and the right to form associations Peaceful protests and the voicing of a contrary opinion are powerful wholesome weapons in the democratic repertoire. It is therefore unconstitutional to pick up a peaceful protestor and to put him behind prison bars."⁷⁴

The Court ruled that the detention order had to be set aside because: (a) one ground was vague and a second one irrelevant, (b) these two grounds were separate and distinct from the remaining grounds, and (c) the satisfaction of the detaining authority being subjective, it was impossible to tell whether the order would have been passed in the absence of vague or irrelevant data.

During the 1975 Emergency, the Police Commissioner of Bombay refused permission to hold a meeting in which speeches critical of the government and the emergency were likely to be made. The Bombay High Court struck down the Commissioner's order. It held that the right to dissent is the very essence of democracy and that, even during emergencies,

it is legitimate for any citizen to say that these emergencies are being kept alive for the purpose of suppressing democratic dissent and criticism and that these should be ended. ... Creation of public opinion against the emergency in a persuasive, peaceful and constructive manner is permissible and perfectly legal.⁷⁵

Japan

The Nagoya High Court, on appeal, overturned a conviction for distributing politically inflammatory printed material supportive of crimes of insurrection. The Court reasoned that the political expression at issue constituted only an abstract danger, and not a concrete danger, of inciting the crimes encouraged by the writings. The intent of the Subversive Activities Prevention Law was to require that the accused have foreknowledge of a clear and present danger to public safety, not merely "the objective of performing a crime of insurrection".

[I]t is not sufficient for the establishment of that crime merely to distribute, with knowledge of their contents, writings that emphasize the propriety and necessity of carrying out crimes of insurrection, but that ... such acts be carried out with the intent to incite to the crime of insurrection

Caution should be exercised in judging the presence or absence of the motive [to incite insurrection], since ... Article 2 of the same law ... establishes a prohibition on its broad interpretation and confines application of this law to the minimum necessary for the preservation of public safety.⁷⁶

Pakistan

⁷⁴ *Ram Bahadur v. State of Bihar*, AIR 1975 SC 223, 228.

⁷⁵ *Nathwani v. Commissioner of Police* (1976) 78 Bom. LR 1. See also *Binod Rao v. Masani* (1976) 78 Bom. LR 125, Section 4.2 supra on political expression.

⁷⁶ *Japan v. Kanemoto et al*, 396 *Hanrei Jihô* 19, SC (Second Petty Bench), 21 Dec. 1964, translated in H Itoh and L Beer, *The Constitutional Case Law of Japan* (1978), 242.

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The Lahore High Court granted the accused's request for habeas corpus on the ground that his detention for delivering speeches critical of the government and the police force during an election campaign could not be justified by the interest in maintaining public order. In so doing, the Court expressly adopted the US Supreme Court's "clear and present danger" test, and stated that criticism of the government does not always indicate an intention to bring about disorder.⁷⁷

The Peshawar High Court upheld the right to express opinions critical of the government. The court struck down the conviction of the accused for inciting disaffection by calling the government a "government of thieves". The Court held that the criticism could not be construed as encouraging the use of force or violence and, in light of the free speech guarantee in Article 8 of the Constitution, merely criticizing the government is not an offence. The Court elaborated on the importance of being able to publicly discuss the misdeeds of government officials to the workings of a democratic society.⁷⁸

Sri Lanka

The Supreme Court of Sri Lanka, in a unanimous opinion, ruled that the police had violated a protester's fundamental rights when they beat him, causing injuries, and took from him a drum that he had been beating in support of a protest against the government. The police claimed that they took these actions after a crowd of protesters shouted slogans against the government and called on the people to riot. However, in police notes written shortly after the incident there was no mention of the calls to riot. The Supreme Court thus rejected the contention, reasoning that, had there been calls for a riot, it was unthinkable that the police would not have mentioned them in their notes. The Supreme Court concluded that the police had stopped the protest based on shouting against the government and police. Justice Fernando, writing for the Supreme Court of Sri Lanka, reiterated the relevant law:

The right to support or to criticise Governments and political parties, policies and programmes is fundamental to the democratic way of life, and the freedom of speech and expression is one which cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions. ...

[T]he expression of views which may be unpopular, obnoxious, distasteful or wrong, is nevertheless within the ambit of freedom of speech and expression provided of course there is no advocacy of, or incitement to, violence or other illegal conduct. ...

Stifling the peaceful expression of legitimate dissent today can only result, inexorably, in the catastrophic explosion of violence some other day.⁷⁹

In the instant case, the actions of the police could not be justified by any extenuating circumstances; this was "not a borderline case, or a sudden emergency in which a quick decision had to be taken" given that there had been prior publicity about the planned protest. Accordingly, the Court found

⁷⁷ *Maluvi Farid Ahmad v. Government of West Pakistan*, PLD 1965 (WP) Lahore 135.

⁷⁸ *Hussain Bakhsh Kasuar v. the State*, PLD 1958 (WP) Peshawar 15.

⁷⁹ *Amaratunga v. Sirimal & Ors*, S.C. App. No. 468/92, decided on 6 March 1993, 5-6, quoting *De Jonge v. State of Oregon*, 299 US 353 (1937). See also Section 4.2.1 supra.

that there had been a "grave, deliberate and unprovoked violation of the petitioner's freedom of speech and expression" and ordered that the petitioner should be awarded compensation of SLR50,000.

In an earlier case, the accused, PV Nallanayagam, who was President of the Citizen's Committee in the Eastern Province of Sri Lanka, was charged under the emergency regulations with having uttered "rumours or false statements likely to cause public alarm or public disorder" and with having engaged in "exciting feelings of disaffection to or hatred or contempt of the Government". The charges arose out of two separate sets of events.

First, Mr Nallanayagam wrote a report about the destruction of a Tamil village by Muslims allegedly with the active participation of the Special Task Force (STF), a government anti-terrorist commando unit. The report, which contained eyewitness accounts of the commission of various crimes by Muslims with the help of STF officers, including attacks on Tamil inhabitants, was intended for the Vice-President of the Citizens Committee for National Harmony in Colombo; it was found in Mr Nallanayagam's briefcase when he was arrested in connection with the second incident.

The second incident arose from Mr Nallanayagam's inquiries concerning the arrest by the STF and subsequent disappearance of 23 youths. He called for a police inquiry on suspicion that the youths had been killed and buried in a remote spot. When questioned by foreign journalists, he stated that he had brought the allegation to the attention of the police.

After a trial which lasted 49 days, Judge Viksarajah of the High Court of Colombo acquitted Mr Nallanayagam of all charges. First, he observed that Mr Nallanayagam's report was based on direct eyewitness testimony of the victims and that "he did not put down in writing any general talk without knowing its author. If what the accused put down in writing is contended to be a rumour then the newspapers which we read daily would contain rumours and not news."⁸⁰ The judge concluded that "the allegations of the accused that the STF officers assisted the Muslims in the attack ... is not a rumour" and that, "[i]n the absence of any explanation from the STF officers, ... the allegation that some STF officers were involved in the incidents ... is more probable than not." The judge furthermore found that the report did not amount to "exciting disaffection" because Mr Nallanayagam had merely "asked for an investigation and to severely deal with the commandos responsible for the incident." The judge observed:

Irresponsible elements in the STF, by their reckless action, not only undermine the efforts of the government to combat terrorism, but also strengthen the hands of those who espouse violence. Thus, the accused had appealed to the government to weed out irresponsible elements from the STF.

Regarding Mr Nallanayagam's statements about the disappearance of the 23 youths, the judge held that, in light of the events that had been taking place in the Eastern Province at that time, it was not unreasonable for Mr Nallanayagam to believe that the youths were victims of foul play. He did not rely only on the statements of the youths' parents, but went to the camp where STF detainees were held and found that the youths were not there. The judge noted that, to establish the crime of spreading false rumours, the prosecution had to show that the allegations were unreasonable or were

⁸⁰ *The Democratic Socialist Republic of Sri Lanka v. P V Nallanayagam*, HC Colombo (per Viksarajah J), Case No. 1715/85, decided on 17 July 1986.

made in bad faith; Mr Nallanayagam did not have to show that his suspicions were true. The judge not only concluded that the allegations were reasonable and held in good faith but also commended Mr Nallanayagam for discharging his duties as a Citizen's Committee official. Moreover, the judge ruled that Mr Nallanayagam was not guilty of exciting feelings of disaffection towards the government "because it [was] to the Government of Sri Lanka that the accused has appealed for an inquiry".

A third case arose against the backdrop of the 1982 referendum campaign to extend the life of the then current Parliament for a further six-year period. The petitioner, a Buddhist priest, collected the signatures of a considerable number of Buddhist and Christian clergy who opposed the proposed extension, and included their names in a leaflet. The local police seized about 20,000 copies of the leaflet and several documents with original signatures, and told the petitioner that he was likely to be arrested. The petitioner promptly appealed to the Supreme Court. The police justified the seizure under the emergency regulations on the basis of a complaint by a Christian clergyman that he had been deceived into signing a blank piece of paper and that his name had been included in the pamphlet without his consent. The Deputy Solicitor-General contended that the seizure was justified by the Code of Criminal Procedure which permits the police to search and seize documents in the course of investigating a particular offence (here, unlawful use of the clergyman's name) when: (1) the Superintendent of Police considers the documents to be necessary to the conduct of an investigation; (2) he has reason to believe that the petitioner will not produce the documents in response to a request; and (3) the documents are not known to be in the petitioner's possession.

A five-judge bench of the Supreme Court noted that the burden lay on the police to justify the seizure and that the only document which could legitimately have been seized on the above-stated facts was the page on which the Christian priest allegedly placed his signature. Accordingly, the Court ruled unanimously that the seizure of the leaflets and of other signature pages could not be justified on the facts as alleged.⁸¹ The Court further concluded that the seizure, which prevented the petitioner from expressing his political opinions during the course of a referendum campaign, constituted a serious violation of the petitioner's fundamental right to freedom of expression and, accordingly, ordered the Superintendent of Police to pay the petitioner "substantial damages" of SLR10,000 and costs.

Three members of the Revolutionary Communist League (RCL) of Sri Lanka (a lawful political party), petitioned the Supreme Court for a ruling that their arrest and detention under emergency regulations were unconstitutional. They had organized a lecture at a college hall to air complaints about government plans to cut funding of public education. On the day of the planned lecture, the college Principal, based on newspapers, pamphlets and announcements circulated by the RCL, asked the police to stop the lecture.⁸² The Principal claimed that his concern was aggravated by the receipt three days earlier of a letter threatening to blow up the school signed by the "Eelam Tigers". (No connection between the Eelam Tigers and the petitioners was alleged, however.) The police arrived before the meeting began, dispersed the crowd and arrested the petitioners who eventually were charged under emergency regulations with intending to bring the President and government

⁸¹ *Ratanasara Thero v. Udugampola & Ors*, SC App. No. 125/82, decision of 8 Feb. 1983.

⁸² The Principal particularly objected to statements that "[t]he Government, desperately endeavouring to perpetuate its existence having enmeshed itself in a capitalist racist war, has no funds to spend on education and it has become necessary to do away with all these rights" and "[i]t is no secret that these people receive the complete cooperation of the political bosses and the head of the Catholic church in Chilaw".

into hatred or contempt and with distributing posters without the prior consent of the police. They were released on bail after 42 days in detention.

A five-judge bench of the Supreme Court (two more than usual in light of the case's constitutional significance) ruled unanimously that: (1) the materials the petitioners distributed were not unlawful; (2) accordingly, the detention of the petitioners for more than the few days necessary to examine the materials violated their rights to freedom of expression and assembly, guaranteed by Article 14 of the Constitution; (3) the regulation requiring prior police approval of all pamphlets and posters was unconstitutional; and (4) the petitioners each were entitled to substantial damages of SLR10,000 and costs.⁸³ Chief Justice Sharvananda and a second justice also considered the petitioners' arrest to have been unconstitutional. The ruling is particularly noteworthy in light of the fact that, in the words of one of the judges, "the court has to take cognizance of the fact that a state of terrorism amounting to almost civil war is raging in the northern and eastern provinces of the country and that incidents like bomb explosions of a terrorist nature occur sporadically in other parts of the country where subversion cannot be ruled out. The safety of the State and the protection of the general public have now become more than ever the paramount duty of the State and of the armed forces and the Police."⁸⁴

The Chief Justice cited several decisions of the US Supreme Court, as well as the Universal Declaration of Human Rights,⁸⁵ in supporting these conclusions.

First, he ruled that, while the President had extensive powers to issue emergency regulations, the President could not impose limits on fundamental freedoms beyond those permitted by the Constitution.⁸⁶ In particular, restrictions may be imposed in the interests of national security or public order only where the connection between the restriction and the desired goal is "intimate, real and rational" and "proximate and direct"; the Court may rule unconstitutional an emergency regulation which fails to meet those requirements.⁸⁷ Second, regulations attempting to restrict freedom of expression must be "narrowly drawn":

Precision of the regulation must be the touchstone in an area so closely touching a most precious freedom. Such a regulation must be strictly construed and the greater the restriction, the greater the need for strict scrutiny by the court.⁸⁸

⁸³ *M Joseph Perera & Ors v. Attorney-General*, SC App. Nos. 107-9/86, decision of 25 May 1987.

⁸⁴ *Id.* per Wanasundera J.

⁸⁵ He cited Art. 29(2) of the UDHR in reasoning that "Though the rights of citizens are neither absolute nor limitless, any limitation of the freedoms protected by Art. 19 should however be closely scrutinized."

⁸⁶ Art. 155(2) of the Constitution provides that the President may issue emergency regulations which "have the legal effect of overriding, ending or suspending the operation of the provisions of any law, except the provisions of the Constitution."

⁸⁷ As stated by the Chief Justice: "Though the court may give due weight to the opinion of the President that the regulation is necessary or expedient in the interests of public security and order, [the court] is competent ... to question the necessity of the emergency regulation and whether there is a proximate or rational nexus between the restriction imposed on a citizen's fundamental right by emergency regulation and the object sought to be achieved by the regulation." *M Joseph Perera & Ors v. Attorney-General*, note 83 supra at 10.

⁸⁸ The Chief Justice cited the following cases from Nigeria and India in support: *Eshugbayi Eleko v. Government of Nigeria*, [1931] AC 662, 670; and *Satchanandan v. Union of India*, AIR [1982] SC 902.

Moreover, the party which imposed the restriction bears the burden of proving its legality.

Third, the Chief Justice emphasized that "what is prohibited is advocacy of action and not advocacy of ideas".⁸⁹

One of the basic values of a free society to which we are pledged under our Constitution is founded on the conviction that there must be freedom not only for the thought that we cherish, but also for the thought that we hate. ... Hence criticism of government, however unpalatable it may be, cannot be restricted or penalised unless it is intended or has a tendency to undermine the security of the State or public order or to incite the commission of an offence. Debate on public issues should be uninhibited, robust and wide open and that may well include vehement, caustic and sometimes unpleasantly sharp attacks on government. Such debate is not calculated and does not bring the government into hatred and contempt.⁹⁰

The Chief Justice concluded that the petitioners' literature did not advocate or incite persons to action and thus was not unlawful.

United States

The Supreme Court has observed:

Criticism of public measures or comment on government action, however strongly worded, is within reasonable limits and is consistent with the fundamental right of freedom of speech and expression. This right is not confined to informed and responsible criticism but includes the freedom to speak foolishly and without moderation. So long as the means are peaceful, the communication need not meet standards of common acceptability.⁹¹

6.2.5 Peaceful Assembly or Other Lawful Expression Met by Hostile Crowd

Council of Europe

The European Commission concluded (by 7 votes to 7 with the casting vote of the President being decisive) that the Austrian government had violated the freedom of expression of a peaceful protester by arresting and detaining him. Mr Chorherr and a friend had attended a national celebration that included a military display at which they handed out leaflets and carried signs in support of a referendum to oppose the Austrian army's planned acquisition of interceptor fighter aeroplanes. They were arrested after they refused to obey a police officer's instruction to stop displaying the signs and distributing the pamphlets. Austria's Constitutional Court upheld the arrest and detention as necessary to preserve public order on the grounds that the signs interfered with

⁸⁹ *M Joseph Perera & Ors v. Attorney-General*, note 83 supra at 15.

⁹⁰ *Id.* at 17.

⁹¹ *Organization for a Better Austin v. Keefe*, 402 US 415, 419 (1971).

people's view of the ceremony and that the crowd was becoming agitated. The Commission disagreed. The Commission noted that it was relevant that "the ceremony and parade were manifestations of a military character, that they were held on a public square on the Austrian national holiday and that the proceedings were open to the public."⁹² To the Attorney-General's complaint that Mr Chorherr's intent was "to take a hostile stand to the army", the Commission responded that such a stand fell "within the range of behaviour which must be tolerated by the authorities in a democratic society."⁹³

As to the way in which Mr Chorherr expressed his opinion, the European Commission concluded that the spectators were primarily disquieted because their view was blocked, that it appeared that the signs had obstructed people's view no more than children on other people's shoulders, and that the policeman's intervention was what led to "a gradually more heated" exchange concerning the substance of the protest. The Commission concluded that, because it would have sufficed to have removed the signs from Mr Chorherr, and because he was detained for an hour and a half past the time of the conclusion of the ceremony, the arrest and detention were disproportionate to the legitimate aim pursued.

Germany

The German Federal Administrative Court ruled that a protester who distributed leaflets and held up posters should not have been refused access to the Lübeck City Hall square where a military ceremony was taking place. The Court considered that if the army uses a public place to obtain maximum publicity for itself it must tolerate the criticism of protesters who take advantage of the occasion to publicize their views.⁹⁴

Ghana

During a contested chieftaincy instalment in a district of Ghana, supporters of the rival candidate expressed their intention to assemble and install their candidate. A magistrate ordered the rival supporters to appear before the court to show cause why they should not be ordered to refrain from installing a new chief, since their efforts were likely to lead to a breach of the peace. The supporters successfully applied to the High Court for a writ of prohibition. Referring to the case of *Beatty v. Gillbanks*,⁹⁵ and other UK cases, the High Court held that the intention of the rival supporters was perfectly lawful (and was at most a breach of custom) and that no one could be convicted for a lawful act even if he knew that such an act might provoke another person to commit an unlawful act. Where persons assembled for a lawful purpose and with no intention to act unlawfully, they could not be guilty of unlawful assembly even if they knew that their assembly would be opposed and that a breach of the peace was likely to result.⁹⁶

India

⁹² *Chorherr v. Austria*, Commission Report, 21 May 1992, App. No. 13308/87, para. 45.

⁹³ In so concluding, the Commission referred to a judgment of the German Administrative Court, discussed below.

⁹⁴ Judgment of the German Federal Administrative Court, Vol. 84, 297, 12 Jan. 1990.

⁹⁵ *Beatty v. Gillbanks* [1882] 15 Cox CC 138, discussed in the United Kingdom section infra.

⁹⁶ *Republic v. Tema District Magistrate Grade I, ex parte Akotiah*, High Court (1979) Ghana LR 315.

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A serial broadcast on Indian television portrayed the communal tension and violence between Muslims and Hindus and Muslims and Sikhs in Lahore just before the partition of India. The Central Board of Film Censors considered that the programme was suitable for unrestricted exhibition under the Cinematograph Act 1952. The petitioner applied to the Supreme Court for an order preventing its broadcast on the grounds, *inter alia*, that it was against public order, was likely to incite people to violence and was contrary to the principle embodied in Article 25 of the Constitution (guaranteeing equal entitlement to the right freely to profess, practise and propagate religion).⁹⁷

The Supreme Court rejected the petition and affirmed the principle set out in an earlier case that the standards by which the likelihood of violence should be assessed are those of "reasonable, strong-minded, firm and courageous men, and not those of weak and vacillating minds, nor of those who smell danger in every hostile point of view."⁹⁸

Israel

The Supreme Court of Israel, sitting as the High Court of Justice, ruled that the right of the Committee Against the War in Lebanon to demonstrate outweighed other conflicting human rights and interests.

The petitioners, members of Peace Now, applied for a police permit to hold a demonstration and procession in Jerusalem to mark the death of a peaceful protester killed by a grenade in the course of a demonstration held by Peace Now one month earlier. The request was refused on the apprehension that similar violence was likely to recur and "the inability of the police to provide the demonstrators complete protection from a hostile audience". The Court emphasized that

the right of demonstration and procession is a basic human right in Israel ... recognized alongside the freedom of expression and derives therefrom, as belonging to the freedoms that shape our democratic regime.⁹⁹

The right, while fundamental, is, however, not absolute but relative, restricted both by other human rights and by the necessity of maintaining public peace and security. Hence, the Court noted the need to "strike a balance" between the right to demonstrate and other conflicting rights and interests. The Supreme Court adopted the "imminent probability test" first articulated in the *Kol Ha'am* case.¹⁰⁰ Similar to, though less protective than, the "clear and present danger" test applied by US courts, this test requires that "substantial evidence must exist".

⁹⁷ *Ramesh Dalal v. Union of India*, AIR [1988] SC, [1989] LRC (Const.) 618. See also Section 7.4 *infra*.

⁹⁸ *Bhagwati Charan Shukla v. Provincial Government*, AIR [1947] Nagpur 1 (per Vivian Bose J). For a detailed discussion of Indian case-law on this subject, see V Eswaran, "Advocacy of National, Racial and Religious Hatred: The Indian Experience" in *Striking A Balance: Hate Speech, Freedom of Expression and Non-discrimination* (London: ARTICLE 19/University of Essex, 1992), 159-170..

⁹⁹ *Alan Levi and Yaheli Amit v. Southern District Police Commander*, SC sitting as the High Court of Justice (per Barak J), 13 May 1984, 38(2) PD 393; discussed in *Selected Judgments of the Supreme Court of Israel*, Vol. VII (1983-87), and 17 *Israel Yearbook on Human Rights* (1985), 286.

¹⁰⁰ See Section 8.2 *infra*.

The Court concluded that the police commander's "general fear" of a breach of public peace based primarily on his experience with previous demonstrations by the petitioners was insufficient to justify refusal of a permit. Accordingly, the Court ordered the respondent to permit the demonstration and march.

United Kingdom

Members of the Salvation Army were arrested for "unlawful and tumultuous assembly" after their peaceful march through an English town was met with violence by a group which opposed their views. The Queen's Bench Divisional Court quashed their convictions on the ground that persons acting lawfully are not to be held "responsible and punished merely because other persons are thereby induced to act unlawfully and create a disturbance" even if the unlawful reaction was reasonably foreseeable.¹⁰¹

A protester was convicted under Section 5 of the Public Order Act 1965 (which prohibited "threatening, abusive or insulting" speech or behaviour) after he stepped onto a tennis court during a match, blew a whistle, threw around leaflets and generally insulted the people who were watching the match. The House of Lords, vacating the conviction, stated:

Parliament had to solve the difficult question of how far freedom of speech or behaviour must be limited in the general public interest. It would have been going much too far to prohibit all speech or conduct likely to occasion a breach of the peace because determined opponents may not shrink from organising or at least threatening a breach of the peace in order to silence a speaker whose views they detest. Therefore vigorous and it may be distasteful or unmannerly speech or behaviour is permitted so long as it does not go beyond any one of three limits. It must not be threatening[,] ... abusive [or] insulting Free speech is not impaired by ruling [these categories] out.¹⁰²

¹⁰¹ *Beatty v. Gillbanks*, note 95 supra at 146.

¹⁰² *Brutus v. Cozens* [1973] AC 854.

CHAPTER 7

CONTENT-RELATED RESTRICTIONS

This chapter brings together summaries of cases in which national courts rejected claims to restrict the right to freedom of expression (or a related right) based upon the expression's content, as well as summaries of any relevant international case law (whether protective or restrictive of a freedom). Separate sections address defamation (Section 7.1), invasion of privacy (Section 7.2), right of reply (Section 7.3), advocacy of national, racial or religious hatred (Section 7.4), insult to national institutions (Section 7.5), authority of the judiciary (Section 7.6, including contempt of court and threats to a fair trial), compelled disclosure of journalists' sources (Section 7.7), duty of confidentiality (Section 7.8), protection of public morals (Section 7.9, including claims of obscenity and blasphemy), and property rights of others (Section 7.10, including the right to pursue a profession and to conduct business free from calls for product boycotts).

7.1 DEFAMATION

7.1.1 Decisions of the European Court of Human Rights

The European Court, in the last half dozen years, has issued a number of judgments establishing principles that limit the discretion of governments to punish allegedly defamatory speech.

In the landmark *Lingens* case, the European Court established the rule that politicians must tolerate a more intense level of criticism than private individuals:

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society The limits of acceptable criticism are, accordingly, wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed ... and he must consequently display a greater degree of tolerance.¹

The applicant, an Austrian journalist, had been convicted under Article 111 of the Criminal Code for publishing two articles strongly criticizing then Chancellor Kreisky for supporting a politician who had served as an SS officer. The Austrian court conceded that the article did not contain any false statements but found that Mr Lingens could not prove that his opinions were "true", a necessary step in establishing his innocence of criminal libel. Mr Lingens was fined and the relevant issues of the publication were confiscated.

The European Court ruled unanimously that: (1) "the limits of acceptable criticism are ... wider as regards a politician as such than as regards private individuals,"² and (2) the requirement that an

¹ *Lingens v. Austria*, para. 42.

² *Id.*

accused must prove the truth of an allegedly defamatory opinion infringes his or her right to impart ideas, within the meaning of Article 10, as well as the public's right to receive ideas. As stated by the Court:

[A] careful distinction needs to be made between facts and value-judgements. The existence of facts can be demonstrated, whereas the truth of value-judgements is not susceptible of proof. ... As regards value judgements this requirement [to prove their truth] is impossible of fulfilment and it infringes freedom of opinion itself ...³

The Court elaborated on its *Lingens* ruling in *Oberschlick v. Austria*. Mr. Oberschlick, an Austrian journalist, had been convicted and fined for publishing a criminal complaint he and others had filed against the leader of the Austrian Liberal Party in which they accused him of incitement to national hatred and also of activities on behalf of the aims of the National Socialist Party (NSDAP). The complaint referred to statements made by the politician in which he urged that family allowances of Austrian women should be increased by 50 per cent in order to discourage them from seeking abortions for financial reasons, while allowances paid to immigrant mothers should be reduced by 50 per cent. The complaint alleged that this proposal was "entirely consistent with and corresponded to the philosophy and aims of the NSDAP", a criminal offence under Austria's Prohibition Act.⁴ The trial court convicted Mr Oberschlick of defamation, ordered him to pay a fine and damages to the politician, and ordered the seizure of all issues of the offending publication. According to the court, the politician's statements "did not yet amount to a National Socialist attitude or to a criminal offence" and thus Mr Oberschlick had not established the truth of his allegations. The court further concluded that Mr Oberschlick had "disregarded the standards of fair journalism by ... insinuating motives which [the politician] had not himself expressed".⁵

The European Court reiterated its *Lingens* holding that a libel defendant must not be required to prove the truth of his or her opinions. The Court considered that the published complaint stated facts followed by a value judgement, and that the requirement that a journalist prove the truth of a value judgement is impossible and "itself an infringement on freedom of expression".⁶

In reiterating the second prong of the *Lingens* holding that politicians must tolerate a higher level of criticism concerning their public actions than private citizens, the Court added an additional reason for the different level of scrutiny:

The [politician] inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance, especially when he himself makes public statements that are susceptible of criticism.⁷

³ Id. at para. 46.

⁴ *Oberschlick v. Austria*, para. 13.

⁵ Id. at para. 16.

⁶ Id. at para. 63.

⁷ Id. at para. 59.

What is particularly interesting about the decision is the Court's willingness to treat the allegation that the politician's views "corresponded to the philosophy and aims of the NSDAP" as a statement of opinion. Only one dissenting judge viewed the allegation as an erroneous statement of fact.⁸ The majority recognized that the allegation was provocative, but reasoned that "[a] politician who expresses himself in such terms exposes himself to a strong reaction on the part of journalists and the public."⁹ In other words, an inflammatory statement may justify a more provocative response than the same ideas expressed in more measured terms.

In a third case against Austria, *Schwabe v. Austria*, the Court again criticized the Austrian courts for requiring a person accused of defamation to prove the truth of a value judgement. Mr Schwabe had issued a press release, thereafter published in a newspaper, in which he called attention to the conviction 18 years previously of the Vice-President of a state government for causing an accident, while under the influence of alcohol, in which one person was killed. Mr Schwabe made the statement in the context of arguing that the head of the state government applied a double standard in calling for the resignation of a mayor recently convicted of drunk driving and yet remaining silent about the Vice-President's conviction. Mr Schwabe suggested that both politicians were unfit for office.

Mr Schwabe was convicted of defamation on the ground that his comparison of the culpability of the two politicians suggested a falsehood; namely, that the Vice-President had been convicted of drunk driving when in fact he had been convicted only of negligent homicide (although his blood alcohol content had been sufficiently high to justify a drunk-driving conviction). Mr Schwabe was also convicted of the crime of reproach, for having mentioned a conviction for which the sentence had already been served.

The European Court ruled that Mr Schwabe's convictions violated Article 10 because it was evident from his press release that he had not meant to imply a falsehood but rather had made a value judgement in good faith that the two convictions were morally comparable. In other words, as in *Oberschlick*, where a value judgement is based on facts (here, a comparison between two driving convictions; in *Oberschlick*, a comparison between a politician's statement and the aims of the NSDAP), it should not be considered defamatory so long as the facts are reasonably accurate and told in good faith, and the value judgement is not intended to imply a falsehood, even if a false implication is possible.¹⁰

In addition, the Court ruled that Mr Schwabe's conviction for reproach was inappropriate because certain criminal convictions (including negligent homicide) could be relevant factors in assessing a politician's fitness to exercise political functions.¹¹

In the *Castells* case, the European Court articulated two additional protections of political speech. First, criticisms of government are to be accorded even greater protection than criticisms of

⁸ Two judges dissented on the ground that publication in the form of a criminal complaint could create the impression that a criminal action had actually been initiated by a public prosecutor.

⁹ *Oberschlick v. Austria*, para. 61.

¹⁰ *Schwabe v. Austria*, para 34.

¹¹ *Id.* at para. 32.

politicians.¹² Second, elected representatives, especially opposition members, are entitled to enhanced protection when they voice criticisms concerning political matters. Thus, in ruling that a conviction for defamation of an opposition Member of Parliament violated Article 10, the Court concluded that:

While freedom of expression is important for everybody, it is especially so for an elected representative of the people. ... Accordingly, interferences with the freedom of expression of an opposition Member of Parliament, like the applicant, call for the closest scrutiny on the part of the Court.¹³

The decision is important for the further reason that it establishes the principle that when a defamation is based in part on an allegation of fact, the defendant must be permitted to try to prove its truth. The Spanish court had refused to permit Mr Castells to try to establish the truth of his claim that the government had intentionally failed to investigate the murders of people accused of belonging to the Basque separatist movement. While the Court recognized that Mr Castells' article included statements of opinion as well as fact, and that some of his accusations were serious, it attached decisive importance to the fact that the courts had precluded him from offering any evidence as to the truth of his assertions. The Court ruled that the article had to be considered as a whole, and that Mr Castells was entitled to try to establish the truth of his factual assertions as well as his good faith.¹⁴

The question of whether matters of public interest other than political matters are entitled to a greater degree of protection was decided in the affirmative by the European Court in the case of *Thorgeirson v. Iceland*. The Court rejected the government's contention that political discussion should be treated differently than discussion of other matters of legitimate public concern.¹⁵

Mr Thorgeirson had published two articles about police brutality in which he called for a new and more effective system of investigating accusations against the police. He was convicted and fined for defaming police officers on the grounds that some of his statements constituted "insults" and "vituperation" (*e.g.*, calling police officers "brutes in uniform") and that other allegations were untrue (*e.g.*, that police officers had committed numerous serious acts of physical assault on people who had become disabled as a result and, in particular, that a paralyzed man he had seen in a hospital had been the victim of police brutality).

Other relevant factors were that no police officers were expressly named, the articles bore on a matter of serious public concern and, in the Court's opinion, Mr Thorgeirson's primary purpose in publishing the article had been to promote reform and not to disparage the police.

In addition to clearly extending the *Lingens* holdings to all matters of public concern, the judgment is noteworthy for its finding that the articles had an adequate factual basis. The Court noted that many of the statements reflected public opinion or were based on "rumours", "stories" or the

¹² *Castells v. Spain*. For further discussion of this case, see Section 6.2.1 *supra*.

¹³ *Id.* at para. 42.

¹⁴ *Id.* at para. 47.

¹⁵ *Thorgeirson v. Iceland*, para. 64.

statements of others, and concluded that it would therefore be unreasonable to require Mr Thorgeirson to establish the factual basis for those statements. In fact, the government had provided substantial evidence at trial of the falsity of one of Mr Thorgeirson's most sensational claims by producing as a witness a man who appeared to be the paralyzed man (mentioned in his article) who testified that he had been beaten by someone he knew and not by the police. Mr Thorgeirson's only response was that, although he did not remember faces very well, he did not think that the witness was the same man.

In light of these facts, the *Thorgeirson* judgment appears to stand for the principle that a speaker or publisher is protected so long as his claims are based upon public opinion, do not disparage specific named individuals and are primarily intended to promote a positive aim such as institutional reform. The publisher must provide some evidence to support his good faith in believing public opinion (in this case, a police officer recently had been convicted for brutality), but the burden appears to be light.

The one defamation case in which the Court did not find a violation of Article 10 is *Barfod v. Denmark*. Mr Barfod, a journalist, was convicted of criminal libel for writing an article in which he criticized a judgment of a three-person high court in favour of a local civil service agency on the ground that the two lay judges were both employed by the agency and thus should have been disqualified. In particular, he wrote that the lay judges "did their duty", clearly suggesting that they had been influenced by improper factors in reaching their decision. The European Commission ruled, by 14 votes to 1, that even that claim was protected on the ground that "the functioning of the judiciary weighed more heavily than the interest of the two lay judges in being protected against criticism of the kind expressed in the applicant's article."¹⁶ The Court disagreed, ruling that, while criticism of the composition of the Court was protected, Mr Barfod's claim "was a serious accusation which [was] likely to lower [the judges] in public esteem".

The *Barfod* case was decided in 1989 and might well be decided differently today in light of *Castells* and *Thorgeirson*. To the extent that a distinction based on substance may be discerned, *Barfod* may stand for the proposition that the scope of acceptable criticism concerning judicial officers is narrower than concerning politicians, executive officials or law enforcement personnel, and also is narrower when directed at named individuals rather than at an institution generally.

The above cases establish a number of principles: (1) the pre-eminent role of the press in informing public opinion on matters of public interest and in acting as a public watchdog requires that the press be accorded particular latitude when commenting on matters of political or other public interest; (2) elected representatives, especially opposition members, are also entitled to special latitude; (3) the limits of acceptable criticism are wider concerning governmental bodies and political figures than concerning private individuals, and in general are wider when no named individuals are specifically criticized; (4) judicial officers do not seem to have to tolerate the same degree of scrutiny as other government agents; (5) a defendant must not be required to prove the truth of value judgements, statements reflecting public opinion or allegations based on rumours or the statements of others; (6) in assessing whether a person has unlawfully reproached another for having committed a crime for which he or she has already served a sentence, courts must consider the public interest in being reminded about the conviction; an automatic penalty for reproach

¹⁶ *Barfod v. Denmark*, para. 31.

violates Article 10; and (7) a claim for defamation is weaker if the allegedly defamatory statement was made in response to a statement that itself was provocative or inflammatory.

7.1.2 National Courts: Balancing of Interests

The Netherlands

The Supreme Court has ruled that, in defamation cases, courts should weigh the interest of individuals in not being subjected to frivolous accusations against the interest in encouraging exposure of socially undesirable situations. Which interest should be given preference depends on various factors, including:

- (1) the nature of the published criticisms and the seriousness of the impact they may be expected to have on the person to whom they refer;
- (2) the public interest in the situation which the publication purported to expose;
- (3) the extent to which the criticisms were supported by facts available at the time the criticisms were published;
- (4) the phrasing of the criticisms;
- (5) the availability of other means, less damaging to the person against whom the criticisms were made, to expose the information;
- (6) the likelihood that the published information would have been disclosed by another source;
- (7) the credibility in the public's perception of the person who made the criticisms; and
- (8) the position in society of the person against whom the criticisms were made (the "public figure" concept).¹⁷

United States

A New York state trial court refused to enforce a UK£40,000 libel judgment rendered by a British jury against a New York-based publisher, *India Abroad Publications, Inc.*¹⁸ This marks the first time that a US court has refused to enforce a British libel judgment, although it must be noted that the decision is being appealed and may well be overturned. The news story at issue reported that a leading Swedish newspaper had linked Mr Bachchan, a well-known Indian businessman and friend of the late Rajiv Gandhi, to the Bofors arms scandal. Although only about 10 per cent of *India Abroad's* circulation was in the UK, Mr Bachchan chose to bring suit there because UK law requires a media defendant to prove the truth of all facts in any story and provides no defence for errors made negligently or in good faith. In dismissing the action, the New York judge stated that British libel law is antithetical to the protections afforded to the press by the US Constitution.

7.1.3 Public Officials and Other Public Figures¹⁹

Australia

¹⁷ HR 27 Jan. 1984, NJ 1984, 802; HR 8 March 1985, NJ 1986, 437.

¹⁸ *Bachchan v. India Abroad Publications, Inc.*, New York Supreme Court Index No. 28692/91, 14 April 1992.

¹⁹ For relevant decisions of the European Court, see Section 7.1.1 supra. For a relevant decision of the Privy Council, see Section 6.2.4 supra.

The High Court of Australia (the highest court) ruled unconstitutional a statutory provision that prohibited persons from using words, spoken or written, "calculated to bring a member of the Arbitration Commission or the Australian Industrial Relations Committee into disrepute". Nationwide News, the publisher of the daily newspaper, *The Australian*, published an article containing a virulent attack on the integrity and independence of the Arbitration Commission and its members. In particular, the article called the Commission's members "corrupt labour judges". In ruling the statutory provision unconstitutional, the Court stated:

Inherent in the Constitution's doctrine of "representative government" is an implication of the freedom of the people of the Commonwealth to communicate information, opinions and ideas about all aspects of the government of the Commonwealth, including qualifications, conduct and performance of those entrusted (or who seek to be entrusted) with the exercise of any part of the legislative, executive or judicial powers of government which are ultimately derived from the people themselves.²⁰

Chile

On 10 December 1992, the Second Chamber of Santiago's Court of Appeals confirmed the dismissal of a defamation action against *El Mercurio*, an important paper in Chile and the oldest Spanish-language newspaper in the world.²¹ The President of the Supreme Court had sued the paper for "offensive words against the judiciary" based on an editorial, written by Fernando Silva, the paper's Secretary, which condemned judicial corruption. The editorial commented on a previously published document revealing instances of corruption written by a judge of one of the higher courts. Named as defendants were the paper's Editor-in-Chief and Publisher, Augustin Edwards, its General Manager, Johnny Kulka and Fernando Silva. The charges carried a maximum sentence of three years' imprisonment.

The lower court judge who initially examined the case dismissed the charges on grounds that the underlying factual information had already been published and that the editorial comments were written in a polite tone. The Court of Appeals affirmed the decision.

Germany

The Constitutional Court reversed a criminal conviction for defamation resulting from the publication of a story about the involvement of two politicians in the 1939 invasion of Poland. The Court based its ruling on considerations that the article contributed to a political debate and that public figures must accept a greater degree of criticism about their public actions than private persons.²²

Hungary

The High Court of Hungary (the highest court) may soon consider its first case involving defamation of a public official since Hungary's transition to a democratic state. In 1992, Eorsi

²⁰ *Nationwide News Pty Ltd v. Wills* (1992) 66 ALJR 658, 681. See *Australian Capital Television Pty Ltd v. The Commonwealth; New South Wales v. The Commonwealth (No.2)* [1992] 66 ALJR 695 in Sections 4.2.1 and 4.2.3 supra.

²¹ Court of Appeals of Santiago, Second Chamber, Judgment of 10 Dec. 1992, Case No. 13398-92.

²² 43 FCC 130 (1976) (*Politisches Flugblatt* case).

Matyas, a Member of Parliament, stated on television that two years previously Balazs Horvath, then Minister of Domestic Affairs (and also acting Prime Minister) had considered ordering police to fire on crowds of protesters during a taxi drivers' strike over petrol prices. Mr Horvath initiated a criminal prosecution against Mr Matyas for defamation of a public official.

The trial judge concluded that Mr Matyas had committed a criminal act, but issued only a warning. In so doing, the judge referred to Article 10 of the European Convention and noted that the European Court has held that politicians are required to sustain a greater degree of criticism regarding the discharge of their public functions than are private individuals. Nevertheless, the court reasoned that the moral and legal context had to be considered in applying that standard and that the context in Hungary differed from that of Western Europe. Moreover, the judge concluded that Mr Matyas's statement was a value judgement not based on objective circumstances since he did not claim that Mr Horvath had ever expressly stated his intention to order the police to fire on the crowds. Mr Matyas filed an extraordinary appeal for violation of a fundamental right with the High Court, but the High Court has not yet decided whether to hear the case.²³

Malawi

False accusations made by one political party leader against another often can be redressed adequately by public retraction of the false accusations or by public denunciation of the accusations by other prominent figures. However, during a transitional period to democracy, and especially in the run-up to elections, false accusations concerning matters of fact (and not merely involving value judgements) may have the potential to affect the democratic process and accordingly may warrant harsher measures. Such a situation is illustrated by the case of *Aleke K Banda v. Robert Dangwe*, concerning an accusation made during the period preceding the June 1993 referendum on whether to introduce a multi-party system. Aleke Banda, a former minister and executive of Press Holdings (of which ruling President Banda was Chairman and principal trustee), was released in early 1993 after 12 years in detention without charge or explanation. It is widely believed that he was detained because of his efforts to expose corruption in Press Holdings. Robert Dangwe, Chairman of the ruling Malawi Congress Party (MCP) in Thyolo district, publicly accused Aleke Banda, now the Campaign Chairman of the United Democratic Front, of having stolen money from Press Holdings. Aleke Banda sued Mr Dangwe and the MCP for defamation. The High Court ruled that Mr Dangwe had made the accusation in bad faith and accordingly awarded Aleke Banda K300,000.

Spain

A Spanish journalist published an article in a local newspaper that humorously criticized the Mayor of Soria. The journalist was convicted of the minor crime of slander of public authorities and fined 7,500 pesetas. The Constitutional Court instructed the lower court to re-weigh the competing interests. While both the right to freedom of expression and the right to honour are rights of a fundamental character, the right to freedom of expression has "a dimension of institutional guarantee, protecting the freedom of public opinion, which is not present in the right to one's honour".²⁴

The Constitutional Court has adopted a "public figure" doctrine:

²³ *Eorsi Matyas v. Balazs Horvath*, Metropolitan Court Budapest, No. 20.Bf.V.8460/1992/3, decision of 29 Jan. 1993.

²⁴ STC 105/86 (*Soria Semanal case*), *Boletín de Jurisprudencia Constitucional* 64/65, 1048.

[T]he right to honour ... is proportionately weakened as an external limit [to freedom of expression] to the extent to which those who seek to exercise the right are public figures, exercise public functions or are involved in matters of public interest. ... [T]his is required by the political pluralism, tolerance and spirit of liberalization without which a democratic society cannot exist.²⁵

United States

The US Supreme Court held, in the landmark case of *New York Times v. Sullivan*, that public officials, in order to sustain an action for defamation, must prove the falsity of the allegedly defamatory statement as well as "actual malice", *i.e.*, that the defendant published a falsehood with knowledge that it was false or with reckless disregard of its truth or falsity.²⁶

The Supreme Court extended the *Sullivan* rule to apply to all "public figures", reasoning that public figures have access to the media to counteract false statements and, at least to some degree, invite the comment to which they are exposed.²⁷ The Supreme Court explained:

We have no difficulty in distinguishing among defamation plaintiffs. The first remedy of any victim of defamation is self-help - using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury and the state interest in protecting them is correspondingly greater.

More important[ly] ... , [a]n individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer scrutiny than might otherwise be the case. [Those] classified as public figures stand in a similar position.

Even if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehoods concerning them.²⁸

²⁵ STC 107/88 (*Navazo* case), para. 2.

²⁶ *New York Times v. Sullivan* 376 U.S. 254 (1964). Justice Brennan, writing for the majority, criticized those statutes which required defendants to prove the truth of their statements about public officials on the grounds that: "Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which steer far wider of the unlawful zone. The rule thus dampens the vigour and limits the variety of public debate ..."

²⁷ *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker* 388 U.S. 130 (1967).

²⁸ *Gertz v. Robert Welch Inc.*, 418 US 323 (1974).

A person may be a public figure: (1) for all purposes and contexts if he or she achieves "general fame or notoriety in the community and pervasive involvement in the affairs of society", or (2) for a limited range of issues if he or she "voluntarily injects" him- or herself into a particular controversy.²⁹ Public figures have been held to include a former football coach³⁰ and a political commentator who was also a retired army general.³¹

Zambia

In 1991 and 1992, a number of public officials and public figures in Zambia sought injunctions to stop publication of further allegedly defamatory articles in *The Weekly Post*. The Clerk of the National Assembly complained about articles that accused him, while acting in his official capacity, of having used the National Assembly's funds for his personal use. Other plaintiffs included the then-current and longest serving Speaker of the National Assembly; the then-Managing Director of the company solely responsible for shipping and marketing Zambia's copper (the country's major hard currency earner); and the then-Chairman and Chief Executive of the copper mining company. The paper contended that all of the published statements were true. In all of the cases, which were heard by different judges, the judges refused to grant injunctions on the ground that "the right of the public to be informed was much more important than the individual's right to his reputation."³²

7.1.4 Local Government Bodies

South Africa

The Supreme Court of South Africa held that South African Railways and Harbours, a governmental department, was not entitled to maintain an action for defamation in respect of a publication that allegedly injured its reputation. While recognizing that the department engaged in trade and thus could suffer monetary damage from injury to its reputation, Judge Schreiner observed:

The normal means by which the Crown protects itself against attacks upon its management of the country's affairs is political action, not litigation, and it would, I think, be unfortunate if that practice were altered. ... I have no doubt that it would involve a serious interference with the free expression of opinion hitherto enjoyed in this country if the wealth of the State, derived from the State's subjects, could be used to launch against those subjects actions for defamation because they have, falsely and unfairly it may be, criticised or condemned the management of the country.³³

United Kingdom

The Court of Appeal, Civil Division (England and Wales) cited Article 10 of the European Convention and Article 19 of the International Covenant in ruling that a local government body

²⁹ *Id.*

³⁰ *Curtis Publishing Co. v. Butts*, note 27 *supra*.

³¹ *Associated Press v. Walker*, note 27 *supra*.

³² *Mwelwa Chibesakunda v. The Post Newspapers Ltd.* (1992) HP/563; *Robinson Nabulyato v. The Post* (1992) HP/611; *Lawrence Mutakasha v. The Post* (1992) HP/194; *Francis Kaunda v. The Post* (1991) HP/1295.

³³ *Die Spoorbond v. South African Railways* 1946 SA 999.

may not sue for libel (which requires the defendant to prove the truth of his or her statements) for non-financial damage to its reputation. Where an allegedly libellous statement causes no actual financial damage, a governing body may obtain relief only if it can establish that the statement amounted to malicious falsehood, *i.e.*, that the publisher either knew it was false or else published it for some improper motive.³⁴

In affirming the judgment, Lord Keith, writing for the Appellate Committee of the House of Lords, noted that there are important features of a local authority that distinguish it from a corporation (which is entitled to sue for damage to its "trading reputation"); mainly, "that it is a governmental body. Further, it is a democratically elected body."³⁵ Lord Keith observed:

It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech.³⁶

After quoting extensively from two US decisions,³⁷ Lord Keith stated:

While these decisions were related most directly to the provisions of the American Constitution concerned with securing freedom of speech, the public interest considerations which underlaid them are no less valid in this country. What has been described as 'the chilling effect' induced by the threat of civil actions for libel is very important. Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available. This may prevent the publication of matters which it is very desirable to make public.³⁸

Following reasoning set forth in *Die Spoorbond v. South African Railways* (summarized above), Lord Keith suggested that the principle precluding local authorities from suing for libel applied to organs of central government as well:

I regard it as right for this House to lay down that not only is there no public interest favouring the right of organs of government, whether central or local, to sue for libel, but that it is contrary to the public interest that they should have it ... because to admit such actions would place an undesirable fetter on freedom of speech.³⁹

³⁴ *Derbyshire County Council v. Times Newspapers Ltd* [1992] 3 All ER 65 (CA).

³⁵ *Derbyshire County Council v. Times Newspapers Ltd*, House of Lords, Judgment of 18 Feb 1993, [1993] 2 WLR 449, 456.

³⁶ *Id.*

³⁷ *New York Times v. Sullivan*, note 26 *supra*, and *City of Chicago v. Tribune Co.*, note 40 *infra*.

³⁸ *Derbyshire County Council v. Times Newspapers Ltd*, note 35 *supra* at 457.

³⁹ *Id.* at 458.

Despite Lord Keith's invocation of US law, it should be noted that English and US law on this issue still differ substantially in that, under English law, an individual member of a governmental authority may prevail in an action for defamation without having to prove either falsity or malice (except in response to a defence such as fair comment or qualified privilege).

United States

The Supreme Court of Illinois, noting that the threat of a civil action for defamation may have as great an inhibiting effect on freedom of speech as the possibility of criminal prosecution, held that a city government may not maintain an action even for civil libel. The Court stated:

The fundamental right of freedom of speech is involved in this litigation, and not merely the right of liberty of the press. If this action can be maintained against a newspaper it can be maintained against every private citizen who ventures to criticize the ministers who are temporarily conducting the affairs of his government. ... While in the early history of the struggle for freedom of speech, the restrictions were enforced by criminal prosecutions, it is clear that a civil action is as great, if not a greater, restriction than a criminal prosecution. ... A despotic or corrupt government can more easily stifle opposition by a series of civil actions than by criminal prosecutions.⁴⁰

7.1.5 Defences: Good Faith, Truth, Fair Comment and Public Interest

Barbados

The High Court of Barbados held that published statements made in good faith about a matter of public interest were protected by the defence of fair comment. The plaintiffs, the owners of a poultry production plant, sued a newspaper for having published articles claiming that the plant engaged in unsanitary procedures and unfair labour practices. The High Court ruled that the defence of fair comment protected statements of fact as well as opinion when the statements were made in good faith and concerned a matter of public interest, even though possibly false.⁴¹

Canada

The Minister of Human Resources of British Columbia claimed that a political cartoon published on the editorial page of the *Victoria Times* portrayed him as "a person of cruel and sadistic nature". The trial court awarded him \$3,500 in damages. The Court of Appeal (British Columbia's highest court), noting that the Minister had made provocative statements likely to provoke a public response, concluded that the press defendants had established the defence of fair comment and accordingly dismissed the action against them.⁴²

France

In France, a journalist (or other defendant) may establish a defence if he or she can prove good faith, for example, that he or she proceeded with care, checked the facts, or tried to contact the interested person. Some court decisions mention the "presumption of bad faith" but this may be

⁴⁰ *City of Chicago v. Tribune Co.* 139 N.E. 86 (Ill. Sup. Ct. 1923), 90.

⁴¹ *McDonald Farms Ltd v. Advocate Company Ltd*, High Court of Barbados, 31 July 1990, Suit No. 344 of 1989, in 18 *Commonwealth Law Bulletin* 504 (1992).

⁴² *Vander Zalm v. Times Publishers* [1980] 18 BCLR 210 (BCCA).

balanced against the right and duty of the press to inform the public. For example, a Paris civil court rejected a libel action brought by a Swiss lawyer against two newspapers and a journalist for publishing statements that he belonged to the board of a company accused of laundering narcotics money. Although truth could not be proven, the court accepted evidence of the defendants' good faith. The Court stated:

Although belief in the reality of the alleged facts and an absence of animosity or personal interest are not enough to set aside the presumption of bad faith, the legitimate motivation arising from *the right and duty to inform* allows the journalist to invoke his good faith as long as he establishes not only the seriousness of his inquiry, but also his prudence and objectivity.⁴³

A recent case involved *Le Monde's* publication of a mock letter allegedly sent by a former collaborator to a friend, and signed by the paper's literary columnist. The publication followed the decision of the Paris court of appeal not to commit for trial Mr Touvier, a former member of the most infamous Vichy police unit, for crimes against humanity. Among other things, the letter stated: "Now Touvier is innocent and Gaucher, a former member of the SS, is a candidate in the next election, and the public is not concerned." The next day, the newspaper published a statement that Mr Gaucher had been a member of one of the collaborationist parties during the occupation and had written anti-Semitic articles but had never been a member of the SS. Mr Gaucher sued for libel. The Paris court of first instance acquitted the newspaper and the journalist. It ruled that: (a) they had committed defamation, notwithstanding the publication of a correction, because Mr Gaucher had never been a member of the SS; (b) however, the article was a literary imitation, written in a polemical style, against the backdrop of widespread public indignation over a judicial decision that was viewed as vindicating the Vichy regime (the *Cour de cassation* subsequently reversed and ordered Mr Touvier to appear before a court); and (c) accordingly, the newspaper and journalist had acted in good faith.⁴⁴

In January 1992 a French local newspaper, *Le Journal*, published an article warning its readers against voting for the National Front at the forthcoming regional elections. The readers would, it stated, risk putting in power "Le Pen - Petain" and, behind him, "the neo-Nazis, those who are nostalgic for the gas chambers, the Jews and Arab-baiters, those who denounced people to the Gestapo and contributed to the Nazi genocide". Both Le Pen and the National Front sued for libel. The court rejected Le Pen's claim on the ground that he had not been personally libelled. Regarding the National Front, the court, after examining the Front's literature, noted its strong resemblance to some Vichy themes, its advocacy of segregation and exclusion, and its anti-Semitic public pronouncements. The court thus concluded that truth had been sufficiently established.⁴⁵

Germany

The Constitutional Court (FCC) overturned an injunction that directed two journals to refrain from publishing any further articles accusing credit houses in general of lending at usurious rates. The journals had printed articles which, after acknowledging that some credit houses are trustworthy, criticized credit houses in broad terms. A credit house obtained an injunction to prohibit further

⁴³ *Paris Tribunal de grande instance*, decision of 19 Dec. 1990, reported in *Le Monde*, 23-24 Dec. 1990.

⁴⁴ *Paris Tribunal de grande instance*, decision of 22 Jan. 1993, reported in *Le Monde*, 24-25 Jan. 1993.

⁴⁵ *Annecy Tribunal de grande instance*, decision of 26 June 1992, reported in *Le Monde*, 9 July 1992.

similar articles on the ground that an assertion that credit houses are usurious money-lenders was a statement of opinion based upon a false statement of fact, because not all credit houses overcharge. The FCC concluded that, since the articles were intended to warn consumers about some unethical credit houses and did not purport to provide a market analysis, their reference only to striking examples of abuse was not unlawful.⁴⁶

Japan

The Supreme Court held that criminal intent to defame is not present where the defendant reasonably, though mistakenly, believed the truth of his allegations. Punishment is furthermore inappropriate where a defamatory statement concerns a matter of public interest.⁴⁷ In 1963, a journalist named Mr Kochi published articles attacking another journalist, Mr Sakaguchi, for corrupting public officials. Mr Sakaguchi sued for defamation, and the lower court found Mr Kochi guilty. The Supreme Court, in a unanimous decision, overturned the conviction and reversed its previous doctrine. The Court, noting that Mr Sakaguchi had made statements within the hearing of others that apparently and improperly invited officials to engage in corruption, concluded that Mr Kochi reasonably could have believed his accusations to be true. The Court stated:

Article 230-2 of the Criminal Code [on defamation] should be construed as harmonizing the protection of the individual's good name as a right of the person with guarantees of Article 21 [of the Constitution] concerning legitimate speech. In the interests of achieving balance and harmony regarding both these elements, even if statements are not proved to be true, as specified in Article 230-2(1), criminal intent and a crime of defamation should not be deemed present in this case, where the party mistakenly believed his statements were true and where there was sufficient reason for this mistaken belief in light of the concrete evidence presented. We hold that the above-mentioned doctrine of the First Petty Bench should be changed ... ; the decision ... erred in applying the laws.

The Court also recognized that Mr Kochi's acts were undertaken for the public interest and that accordingly, even if he had been guilty of defamation, he should not have been punished. Paragraph 1 of Article 230-2 states that when a person is found to have defamed another by making a statement that

is found to relate to matters of public interest and to have been done solely for the benefit of the public and, upon inquiry into the truth or falsity of the alleged facts, the truth is proved, punishment shall not be imposed.

Paragraph 2 of Article 230-2 states that "matters concerning the criminal act of a person for which prosecution has not yet been instituted shall be deemed to be matters of public interest."

Kenya

The High Court (Nairobi) ruled that the *Sunday Nation* paper and its editor, Joe Kadhi, were guilty of libel for publishing a story stating that the plaintiff had been dismissed by the Nairobi City Council as part of its efforts to eliminate "deadwood" from its staff. The judge reasoned that the

⁴⁶ 60 FCC 234 (1982).

⁴⁷ *Kochi v. Japan*, 23 *Keishû* 259, SC (Grand Bench), 25 June 1969, translated in H Itoh & L Beer, *The Constitutional Case Law of Japan: Selected Supreme Court Decisions (1961-1970)*, 175.

privilege of fair comment is lost when defamatory material is included. The Court of Appeal reversed and, in a landmark decision, ruled that, under Kenya's defamation law, where no malice is proved, a fair report or comment on a matter of public interest is entitled to a qualified privilege. Justice Platt stated:

There was no malice proved, in my judgement. The defendants gave fair information as to what was happening in the City Council. The language was not violent or out of proportion. The rationale of this privilege is that the benefit to the public outweighs the harm to the individual.⁴⁸

In a more recent case, the High Court (Nairobi) observed that the public at large has a legitimate interest in knowing how public funds are being spent by a statutory corporation that administers public funds.⁴⁹ This interest becomes all the stronger if there is an allegation that public funds are being wasted. The Court made these comments in refusing to restrain Nation Newspapers Ltd from publishing information about the sale of property owned by the Chairman of "Youth for KANU '92", a powerful pro-government pressure group, to the National Social Security Fund for what appeared to be an excessively high price. In declining to grant the injunction, the Court ruled that, because Nation Newspapers Ltd stood by the story and was prepared to establish its truth, its freedom of expression should not be compromised at that interlocutory stage.

South Africa

A South African trial court ruled that public interest may be a defence to a defamation action even where certain factual statements are shown to be untrue. Lieutenant-General Neethling had brought a R1.5 million defamation suit against *Vrye Weekblad* and the *Weekly Mail* for their publication of allegations that he had supplied poison for the sedation and killing of political activists. The court held that, although the *Weekly Mail* had printed allegations about poisoned alcohol which had not been proven to be true, in the particular circumstances of the case, Lieutenant-General Neethling's reputation was less important than the public's right to know.⁵⁰

The Cape Provincial Division of the Supreme Court affirmed the right to freedom of expression in denying the Church of Scientology's request for an injunction against publication by *Reader's Digest* of an article critical of the Church's philosophies. The Court rejected the Church's argument that its right to freedom of expression was violated by the criticism. The Court also refused the injunction on the ground that a corporation does not have standing to sue for defamation in the absence of actual financial injury.⁵¹

The Witwatersrand Local Division of the Supreme Court ruled that public interest is a defence to defamation if the matter is of substantial public interest, even if the publisher did not have a *bona fide* belief in its truth. A controversial statement by a Cabinet Minister regarding the plight of

⁴⁸ *Joe Kadhi and Sunday Nation v. Isaac J. Arimi*, Civil Appeal No. 93 (1984), reported in the *Nairobi Law Monthly* No. 27, Nov. 1990, pp. 45-46 and the *Daily Nation*, 2 April 1990.

⁴⁹ *Cyrus S. Jirongo v. Nation Newspapers Ltd*, Civil Case No. 5276 of 1992; and *Sololo Outlets Ltd v. Nation Newspapers Ltd*, Civil Case No. 5196 of 1992.

⁵⁰ *General Lothar Paul Neethling v. Max du Preez*, WLD 18 Jan. 1991, Case Nos. 34650/89 and 34969/89).

⁵¹ *Church of Scientology v. Reader's Digest Association*, Cape Provincial Division 1980 (4) SA 313, 1 Aug. 1980.

pensioners triggered a lively debate in the press. During the course of this debate, the Minister strongly criticized a particular story as constituting "a flagrant and total distortion of the facts". The article's author sued the newspaper that had published the Minister's accusation. In holding that the newspaper was entitled to publish the Minister's comments, the Court stated that the government's pension policy, the Minister's statements at the press conference and his attitude to comments by the press were all matters of significant public interest. In particular, his attitude concerning the press "was by itself an important component of the reasoning of a member of the public in his or her judgment of the Minister's performance *qua* Minister".⁵² The Court ruled that the fact that the paper which published the Minister's accusation knew or reasonably should have known that it was false and that the story he criticized was not "a flagrant and total distortion of the facts" did not deprive the paper of the defence of public interest.

United Kingdom

The House of Lords ruled that members of local authorities may not be subjected to liability for statements, even if otherwise defamatory, made during meetings of the authority or any of its committees, so long as they are made in the public interest and in good faith. As stated by Lord Diplock:

The public interest that the law should provide an effective means whereby a man can vindicate his reputation against calumny has nevertheless to be accommodated to the competing public interest in permitting men to communicate frankly and freely with one another about matters in respect of which the law recognises that they have a duty to perform or an interest to protect in doing so. What is published in good faith on matters of these kinds is published on a privileged occasion. It is not actionable even though it be defamatory and turns out to be untrue [T]he privilege is lost if the occasion which gives rise to it is misused."⁵³

7.1.6 Extreme Statements of Opinion

Germany

The Constitutional Court (FCC) ruled that a statement made in response to a possibly defamatory statement is entitled to greater latitude than if made in a neutral context, the so-called *gegenschlag* (counter-attack) principle. After Judge Schmid was publicly attacked for being a Communist and thus not qualified to be a judge, the magazine *Der Spiegel* published a highly critical story about his past political activities that disregarded documents Schmid had given to the magazine in his defence. In response, Schmid stated that *Der Spiegel* was, in the field of politics, what pornography was in the field of morals. *Der Spiegel* called for criminal prosecution, and Schmid was convicted of defamation. The FCC reversed, noting that the article in *Der Spiegel* gave a false picture of Schmid's political activities since it failed to mention certain facts known to the editor. It is a defence to a defamatory opinion (although not to a statement of false facts) that the remarks were made to protect a legitimate interest. Here, Schmid's statement was a statement of opinion and was justified.⁵⁴

⁵² *Zillie v. Johnson*, 1984(2) SA 186, 196A-C (W).

⁵³ *Horrocks v. Lowe* [1975] AC 135, 149.

⁵⁴ 12 FCC 113 (1961) (*Schmid-Spiegel* case).

7.2 INVASION OF PRIVACY

Council of Europe

Article 8(1) of the European Convention guarantees to everyone the "right to respect for his private and family life, his home and his correspondence." Article 8(2) permits the right to be subject to restriction by public authority when necessary to protect various private and public interests. The list differs from the list of interests in Article 10(2) in that it includes "the economic well-being of the country" and does not include "territorial integrity", "preventing the disclosure of information received in confidence", or "maintaining the authority and impartiality of the judiciary". None of the cases decided under Article 8 have concerned the extent to which the press may intrude into private life.

Decisions of the European Commission have established that disclosure to, or improper discovery by, third persons of facts relating to an individual's physical condition, health or personality violate the right to privacy, but may be justified in the interest of preventing crime.⁵⁵ Similarly, the placing of intimate photographs in evidence at trial, and the keeping of records, including documents, photographs and fingerprints relating to past criminal activity, may violate Article 8 but may also be justifiable in the interests of preventing crime and protecting public order.⁵⁶

Chile

The Supreme Court affirmed the dismissal by the Court of Appeals of a penalty of US\$6,150 against Megavision, a privately owned television network.⁵⁷ The National Television Council (an independent government agency empowered to penalize channels for transmitting information that violates moral standards or the dignity of citizens) had ordered the sanction on 28 September 1992 as a penalty for broadcasting a surreptitiously-recorded conversation between a Senator, who used a cellular telephone, and an opposition presidential candidate, Sebastian Pinera. The two discussed the agreement by a journalist to harass a rival candidate within Mr Pinera's party, Congresswoman Evelyn Matthei, and, in particular, to capitalize on certain inconsistent and contradictory statements she had made. Ms Matthei, the daughter of one of the members of General Pinochet's former military junta, obtained the recording from an army telecommunications officer and indirectly handed it over to Megavision's President, Ricardo Claro. Mr Claro played the recording without pre-clearance from Megavision during a live, televised political debate in which he had been invited to participate as a private citizen. The broadcast caused such a scandal that both Mr Pinera and Ms Matthei withdrew from the race.

There was public outrage against Megavision for having broadcast the conversation. The Media Ethical Council, a private entity composed of media representatives, issued a public reprimand and the National Television Council imposed the fine mentioned above. An investigation by the prosecutor, however, concluded that no crime had been committed since the Telecommunications Law did not penalize interception of conversations over cellular phones. Megavision and Mr Claro

⁵⁵ *Van Oosterwijck v. Belgium*, App. No. 7654/77, Report of 1 March 1979.

⁵⁶ *X v. Federal Republic of Germany*, App. No. 5339/72, CD 43, 156; *X v. Federal Republic of Germany*, App. No. 1307/61, CD 9, 53.

⁵⁷ *Red Televisio Megavision SA v. Consejo Nacional de Televisión*, S. Ct, 18 March 1993, affirming the decision of the Court of Appeals of Santiago, Second Chamber, issued on 18 Nov. 1992.

justified the broadcast on grounds that the content of the conversation was of substantial public importance and that they had not participated in or in any way encouraged the interception.

The Court of Appeals dismissed the reprimand on grounds that the broadcast was not imputable to Megavision since Mr Claro had played the recording on a live programme without giving prior notice. The Supreme Court affirmed.

The Netherlands

The Supreme Court has ruled that "persons with some public renown" must accept greater infringements on their privacy than private persons, and that the more important a public figure and the information to be exposed, the greater is the degree of acceptable scrutiny.⁵⁸ The extent to which a person voluntarily cooperates with a journalist is considered when a court examines an alleged infringement, but lack of consent to publish does not automatically lead to a finding of illegal behaviour. While there remains much uncertainty on how properly to balance press freedom and the public's right to know on the one hand and the right to privacy on the other, the courts have tended to accord greater weight to the press' role as public watchdog.⁵⁹

New Zealand

The applicant sought an interim injunction to prevent a film company from distributing a film which contained a sequence filmed at the applicant's family tombstone. The High Court held that to grant the injunction would be "to extend the boundaries of an emerging tort [breach of privacy] far beyond what is safe and would impose unjustified restrictions on the freedom of expression."⁶⁰

Spain

The Constitutional Court ruled that the privacy rights of the widow of a famous artist had not been violated by the playing of a video of the artist's death on a TV news programme. In contrast, it also ruled that the makers of a commercial videotape about the artist's life had invaded the widow's privacy by including the same footage in their commercial tape. The Court made a distinction between a lawful invasion of privacy when there is a legitimate public interest in the information, and an unlawful violation of privacy motivated primarily by an economic interest in selling the information. Where the public interest is involved greater weight is accorded to freedom of expression than where primarily private interests are at stake. Moreover, the fact that the video-tape had been broadcast on the news programme did not place it in the public domain for all purposes and thus did not destroy the widow's privacy interests in the tape.⁶¹

United States

The US Supreme Court has acknowledged the government's power to limit the collection or dissemination of information about an individual. The Court has recognized four aspects of this type of privacy: (1) the right not to be put in a "false light" by the publication of true facts; (2) the right not to have one's name or likeness "appropriated" for commercial value; (3) the "right of publicity"

⁵⁸ SC, 4 March 1988, *Netherlands Jurisprudence* 1989, 361.

⁵⁹ See F Van Lenthe and I Boerefijn, "Press Law in The Netherlands", in *Press Law and Practice: A Comparative Study of Press Freedom in European and Other Democracies*, (London: ARTICLE 19, 1993), 107.

⁶⁰ *Bradley v. Wingnut Films* (1992), TCL, Vol. 15, No. 36.

⁶¹ *Pantoja case*, STC 231/88, *Boletín de Jurisprudencia Constitucional* 92, 1577.

on the part of a person whose name has a commercial value; and (4) the right to avoid the publicizing of "private details".⁶² The Court has ruled that public officials and public figures must meet *Sullivan's* "actual malice" standard in invasion of privacy cases.⁶³

7.3RIGHT OF REPLY

In some countries, especially those with civil law systems, recognition in law of a right of reply is considered a means of promoting freedom of expression. Other legal systems, especially common law jurisdictions, tend to view the right of reply as a restriction on freedom of expression which cannot be justified as necessary in a democratic society.

European Community

The EC Council Directive on Broadcasting of 3 October 1989, which was implemented in all countries in October 1991, allows for "a right to reply at European level for any natural or legal person whose legitimate interests have been damaged by an assertion of incorrect facts in a television programme."⁶⁴

Organization of American States

The Inter-American Court, in response to a request from the government of Costa Rica, issued an advisory opinion concerning the nature of the obligations imposed by Article 14(1) of the American Convention, which states:

Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.

The Court first recalled two general rules of interpretation: (1) Article 14 "must be interpreted in good faith in accordance with its ordinary meaning"; and (2) "the purpose of the Convention is to recognize individual rights and freedoms and not simply to empower the States to do so".⁶⁵ Accordingly, states parties are obliged to ensure the right of reply "by law", although this may be accomplished through adoption of legislation or through other "effective measures".⁶⁶ However, any measure that would restrict the exercise of any of the rights set forth in the Convention, including the right to freedom of expression, would have to be adopted in the form of legislation.⁶⁷

⁶² *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

⁶³ *Time, Inc. v. Hill*, 385 U.S. 374 (1967) referring to *New York Times v. Sullivan* discussed in Section 7.1.3 supra.

⁶⁴ Reported in General Affairs Council Press Release, 3 Oct. 1989 meeting, 8774/89 (Presse 166).

⁶⁵ *Enforceability of the Right of Reply or Correction*, paras. 22 and 24.

⁶⁶ *Id.* at para. 27.

⁶⁷ *Id.* at para. 33.

The Court made clear that while states parties must respect the right to freedom of expression in regulating the application of the right of reply or correction, they "may not ... interpret the right of freedom of expression so broadly as to negate the right of reply".⁶⁸

Argentina

The Supreme Court ruled that everyone in Argentina is entitled to the right of reply, not by virtue of any constitutional provisions but rather as a result of Argentina's ratification of the American Convention.⁶⁹ The Court noted that Article 14(1) of the Convention was sufficiently specific, clear and mandatory to be self-executing and, accordingly, that the Court was obliged to apply it. The Court commented on the importance of the right of reply:

In the analysis of the 'right of reply', what is at issue is not only the protection of freedom of expression, or the right to print without prior censorship, but also the adequate protection of dignity, honour, feelings and privacy of human beings; consequently, there must be a jurisdictional guarantee that these values can be supported by an appropriate means of exercise through rectification, reply or other similar proceedings. The reply is meant to guarantee the natural, primary and elemental right to the legitimate defence of dignity, honour and privacy."

Because the right of reply is a right of exceptional character, the following requirements must be met before the right may become operative:

- 1) There must be a "substantial serious offence".
- 2) The offence must arise from a statement unsupported by reasonable argument.
- 3) In the case of "ideological interests", the person who replies assumes a "collective representation"; only one person, the first to reply, will have the right to reply in the name of all those who may have been offended by the same statement.
- 4) The rectification or reply must be published in the same medium of communication, in the same place and with the same prominence as the offending statement.
- 5) The space given to the reply must be adequate to its goal.⁷⁰

The Court ruled that, in the instant case, the petitioner was entitled to have his letter read on Channel 2 TV in reply to allegedly offensive comments made about the Virgin Mary and Jesus Christ.

Japan

The Supreme Court held that a newspaper is not obliged to provide free space to respond to a negative political advertisement paid for by a political party. In late 1973, the ruling Liberal Democratic Party (LDP) took newspaper space for an advertisement that juxtaposed the militant 1961 programme of the Japan Communist Party (JCP) with its mild and democratic policies of 1973, and asked: "Dear Mr JCP, Please clarify [the contradictions]". The JCP sued the *Sankei Newspaper* for equal and free space, claiming defamation and a right to respond. The Tokyo

⁶⁸ Id. at para. 25.

⁶⁹ *Ekmekdjian v. Sofovich*. See Section 4.5.1 supra for the Court's discussion of the importance of freedom of expression, and Section 3.2.4 supra for its discussion of the role of international law in Argentine national law.

⁷⁰ Id. at 25, 29 and 32.

District Court held: (1) the JCP's policies were not misrepresented; (2) the LDP advertisement sought a response, but not necessarily in the same medium; and (3) political parties must be willing to tolerate sharp criticisms:

In a democratic society, political parties seek to win political power by competing for popular support with debate as their principal weapon, based on the freedoms of speech and expression. Consequently, it is unavoidable that debate between political parties be harsh and acrimonious. Anyone appealing for popular support by means of speech (writing, etc.) must be willing to accept sharp criticisms and attacks.⁷¹

The judgment of the District Court was affirmed by the Tokyo High Court as well as by Japan's Supreme Court.⁷²

United States

The Supreme Court has ruled that statutes which attempt to grant a right of reply violate the First Amendment to the Constitution. The Court struck down a Florida statute that required newspapers to print, free of cost, the reply of any political candidate who had been criticized in the newspaper's editorial pages. The Court held that under the First Amendment, government may no more mandate publication of certain material than it may prohibit publication of other material. The Court also observed that imposing a right of reply would be an unwarranted interference with editorial independence and would "inescapably dampen" the vigour of public debate:

Compelling editors to publish that which reason tells them should not be published is what is at issue in this case. The Florida statute operates as a command in the same sense as a statute or regulation forbidding [the newspaper] to publish specified matter. [It] exacts a penalty on the basis of the content of a newspaper. The first phase of the penalty [is] exacted in terms of the cost in printing [and] in taking up space that could be devoted to other material. ... [E]ditors might well conclude that the safe course is to avoid controversy. ... [Thus, a government enforced] right of access inescapably dampens the vigour and limits the variety of public debate.⁷³

The Court also noted that the law might not serve its intended purpose of increasing the range of views but instead might deter editors from including controversial stories.

7.4 ADVOCACY OF NATIONAL, RACIAL OR RELIGIOUS HATRED

What to do about advocacy of national, racial, religious or other hatred (hereafter referred to as "hate speech") is one of the most vexed questions in the jurisprudence of freedom of expression. There are several reasons for this complexity. First, speech that a government views as advocating hatred may be regarded by many individuals as the legitimate expression of political belief (such as calling for the expulsion of foreign workers). The great difficulty of drafting a statute that proscribes

⁷¹ *Japan Communist Party v. Sankei Newspaper, Inc.*, 857 *Hanrei Jihô* 30, Tokyo District Court, 13 July 1977.

⁷² *Japan Communist Party v. Sankei Newspaper, Inc.*, *Asahi Shimbun*, S. Ct. (Second Petty Bench), 24 April 1987.

⁷³ *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256-57 (1974).

only the most worthless forms of hate speech has resulted in the use of such statutes around the world to suppress dissent and punish speech, especially by members of minority groups. Second, the rights that anti-hate speech statutes seek to protect often are as fundamental as the right to freedom of expression. Thus, attempting to strike a balance between the two rights risks impairing core aspects of one or the other.

ARTICLE 19 has addressed the subject in a book that includes more than 30 essays examining anti-hate speech laws and their application in 15 countries.⁷⁴ Here we confine ourselves to presenting the international standards and a few judgments protective of freedom of expression from national courts.

International Standards

All four major human rights treaties discussed in this handbook authorize governments to punish the advocacy of hatred on national, racial or religious grounds. The American Convention expressly requires states parties to declare such advocacy a criminal offence, and the International Covenant expressly requires that hate speech be prohibited by law. The European Convention and the African Charter permit, although they do not expressly require, a proscription in law.

The strongest prohibition is found in a fifth human rights treaty, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Article 4 requires states parties to declare a criminal offence "all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, ... the provision of any assistance to racist activities" and participation in "organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination".

The UN Committee that monitors compliance with ICERD has decided only one case alleging a violation of Article 4. A Turkish national brought an application against The Netherlands for failing to prosecute her employer for allegedly having made a racist remark. The Netherlands government argued that its obligation under Article 4 was fully met by incorporation into the penal code of measures criminalizing racist speech and that it was not required to prosecute every case. The Committee agreed that the government was entitled to exercise prosecutorial discretion and thus found no violation, but added that Article 4 "should be applied in each case of alleged racial discrimination."⁷⁵

The European Convention does not contain an express prohibition of hate speech, but the European Commission has stated in a number of decisions that, pursuant to Articles 17 and/or 14 of the European Convention, governments may prohibit, and criminally prosecute, people who exercise their rights to freedom of expression, assembly or association with the aim of destroying or unlawfully limiting the Convention rights and freedoms of others. The European Commission has ruled inadmissible several applications which challenged convictions for a range of racist, fascist or revisionist statements or activities. These include a case against Sweden filed by a man convicted and sentenced to 10 months' imprisonment for publishing extremely contemptuous anti-Semitic statements and for mailing hateful letters (including to Jews) accompanied by bars of soap, locks of

⁷⁴ *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination*, (London: ARTICLE 19/University of Essex, 1992).

⁷⁵ Committee on the Elimination of Racial Discrimination, *Yilmaz-Dogan v. The Netherlands*, 43 GAOR Supp. No. 18, Annex IV, UN Doc. 1/43/18 (1988).

hair and condoms,⁷⁶ and a challenge to an Italian law that made it a criminal offence to "engage in intrigue aimed at reconstituting a fascist party".⁷⁷

In *Glimmerveen and Others v. The Netherlands*,⁷⁸ the European Commission declared inadmissible an application from an extremist, right-wing political party leader who had been sentenced to two weeks' imprisonment and had had his name removed from the electoral lists for publicly advocating the repatriation of non-white guest workers. The Commission found that such advocacy encouraged racial discrimination prohibited by the European Convention and other international treaties and, accordingly, could be punished.⁷⁹

In the *Jersild* case, a journalist in Denmark was convicted and fined for broadcasting a television interview with members of a white supremacist youth gang, even though the Danish court accepted that he had not endorsed the racist views expressed and was motivated by an interest in informing the public about the existence of violent racism. After the journalist filed an application with the European Commission, the Danish law was amended so as to exclude liability for journalists unless, by publishing racist ideas, they intended to "threaten, insult or degrade" people. The Commission ruled the application admissible, but has yet to rule on the merits.⁸⁰

Article 20 of the International Covenant provides that "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." The American Convention's prohibition of hate speech, though similar, differs from Article 20 in three important respects. First, Article 13(5) of the American Convention prohibits advocacy of hatred only if it constitutes an "incitement[] to lawless violence or to any other similar illegal action". Second, whereas Article 20 by its terms is limited to hatred on national, racial or religious grounds, Article 13(5) prohibits unlawful advocacy "on any grounds, including those of race, colour, religion, language, or national origin". Third, Article 13(5) requires that such unlawful advocacy be considered a criminal offence, whereas Article 20 requires that it be "prescribed by law", thus leaving open the possibility of civil liability only.

The UN Human Rights Committee has ruled inadmissible several applications challenging convictions for racist or fascist speech, on the ground that the convictions were consistent with the International Covenant's Article 19, Article 20 and Article 5 (denying "any right to engage in any activity ... aimed at the destruction of any of the rights and freedoms" set forth in the Covenant).⁸¹

The African Charter does not expressly prohibit hate speech, but authority to do so arguably may be found in Articles 27 and 28. Article 27(2) states that "[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others". Article 28 provides: "Every individual

⁷⁶ *Felderer v. Sweden*, App. No. 11001/84.

⁷⁷ *X v. Italy*, App. No. 6741/74.

⁷⁸ App. Nos. D 8348/78 and 8406/78, 4 EHRR 260 (1982).

⁷⁹ See also *X v. Federal Republic of Germany*, App. No. 92351/81, 29 D & R 194 (1982); *T v. Belgium*, App. No. 9777/82.

⁸⁰ App. No. 15890/89, decision on admissibility issued 8 Sept. 1992.

⁸¹ *MA v. Italy*, App. No. 117/81; *JRT and The WG Party v. Canada*, App. No. 104/1981.

shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance."

Hungary

The Constitutional Court, which may decide constitutional questions referred to it by other courts, recently ruled unconstitutional a provision of the law on incitement to hatred. The law made it a crime for anyone, in a statement which is widely publicized: (1) to incite hatred against the Hungarian nation or nationality, or against certain groups of the population based on religion, race or similar features; and (2) to insult or humiliate the Hungarian nation, or a group of the population based on religion, race or similar features. The Court affirmed the constitutionality of the first clause but invalidated the second clause as a violation of freedom of expression, including the right to receive and impart information and ideas. The Court reasoned:

Freedom of expression has a distinguished role among the fundamental human rights since it is the "mother right" of various other freedoms known as the basic rights of communication. From these basic rights of communication can be derived the special rights of free speech, freedom of the press, which includes freedom of all mass communication media, the public's right to be informed, and the right of access to information. ...

This collection of rights is necessary to enable the individual's full participation in political and public life. ...

Freedom to express ideas and opinions, including freedom to express unpopular or unconventional ideas, is the fundamental condition for the existence of a truly vital society which is capable of self-improvement.⁸²

Freedom of expression protects statements of opinion regardless of their implicit value or truth. This is the only way to comply with the requirement of ideological neutrality [stated in the Constitution].⁸³

India

Section 295A of the Indian Penal Code makes it an offence for anyone "with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India" to insult or attempt to insult the religion or religious beliefs of that community. The Supreme Court ruled that this section does not prohibit each and every act of insult to religion but only those aggravated forms of insult which tend to disrupt public order.⁸⁴

A serial broadcast on Indian television, titled *Tamas*, portrayed the communal tension and violence between Muslims and Hindus and Muslims and Sikhs in Lahore just before the partition of India. The Central Board of Film Censors considered the programme suitable for unrestricted exhibition under the Cinematograph Act 1952. The petitioner, a private citizen, applied to the Supreme Court

⁸² Constitutional Court, *AB Hatarozat*, No. 30/1992 (26 May), para. III.2.1.

⁸³ *Id.* at para. V.3.

⁸⁴ *Ramji Lal Modi v. State of Uttar Pradesh*, AIR [1957] SC 620.

for an order preventing its broadcast on the grounds, *inter alia*, that it was likely to incite people to violence and to stir up feelings of hatred between people of different religions.

The Supreme Court noted that the appropriate test for assessing the effect of a film is its impact on "the ordinary, reasonable man" and the "average person for whom the film is intended" and not on "those of weak and vacillating minds".⁸⁵ In the instant case, the Court denied the petition on two grounds. First, the film censorship board had unanimously approved the film for general viewing, and "a court should be slow to interfere with the conclusion of a body specially constituted for this purpose."⁸⁶ Second, the film, viewed in its entirety and from the standpoint of an average person, was "capable of creating a lasting impression of this message of peace and co-existence" and was more likely to "prevent incitement to [public order] offences in the future" than to stir up violence.⁸⁷ The Court noted that

the potency of the motion picture is as much for good as for evil. If some scenes of violence, some nuances of expression or some events in the film can stir up certain feelings in the spectator, an equally deep, strong, lasting and beneficial impression can be conveyed by scenes revealing the machinations of selfish interests, scenes depicting mutual respect and tolerance, scenes showing comradeship, help and kindness which transcend the barriers of religion.⁸⁸

Israel

The Israeli Supreme Court, observing that freedom of expression may be infringed only where there is an imminent probability that the statement will cause real and severe damage to the public order, ruled that the Broadcasting Authority had violated the rights of Meir Kahane, the leader of an anti-Arab legal political party, by reviewing his statements before broadcasting them.⁸⁹

Sweden

The Freedom of the Press Act, one of Sweden's constitutional documents, prohibits the expression of threats against, or contempt for, a population group "with allusion to its race, skin, colour, national or ethnic origin, or religious faith."⁹⁰ The provision is rarely used against the mainstream press. In 1991, the Chancellor of Justice prosecuted the editor of a mainstream paper who had published a letter to the editor expressing racist opinions. His defence was that views held by the readers must be allowed to surface, or otherwise they could not be debated and refuted. The Chancellor's decision was widely criticized, and the editor was acquitted by the jury.⁹¹

⁸⁵ *Ramesh Dalal v. Union of India*, AIR [1988] SC, [1989] LRC (Const.) 618, 623 (per Sabyasachi Mukharji J), citing *K A Abbas v. Union of India* (1971) 2 SCR 446, AIR [1971] SC 481 discussed in Section 7.9 *infra*.

⁸⁶ *Id.* [1989] LRC (Const.) at 625.

⁸⁷ *Id.* at 626.

⁸⁸ *Id.*

⁸⁹ *Meir Kahane and Others v. Board of Directors of the Broadcasting Authority*, Israeli Supreme Ct, 41(3) P D 255 (1987).

⁹⁰ FPA, Chap. 7, Art. 4, para. 11.

⁹¹ H-G Axberger, "Freedom of the Press in Sweden", in ARTICLE 19, *Press Law and Practice*, 165.

United States

US law diverges from the international standards and indeed from the law and practice of many countries. The US Supreme Court has ruled that speech may not be prohibited, regardless of how offensive it may be, unless there is a clear and present danger that it will incite imminent, unlawful action.⁹²

A US federal intermediate appellate court (the Seventh Circuit Court of Appeals) ruled that speech which causes psychic pain is protected, even if it is directed at survivors of racial violence, so long as the pain is caused by the speech's cognitive or emotive content. A Nazi group announced plans to demonstrate in front of the Village Hall of Skokie, Illinois, a predominantly Jewish community that included some 5,000 survivors of the Nazi Holocaust. In response, the village enacted several ordinances designed to prevent or neutralize the demonstration, including one forbidding the dissemination of any materials that promoted or incited racial or religious hatred. Such materials were defined to include the "public display of markings and clothing of symbolic significance" such as Nazi uniforms and swastikas. The appellate court, in ruling the ordinance unconstitutional, rejected for several reasons the village's argument that it had the right to prevent the "infliction of psychic trauma on resident Holocaust survivors". First, the court reasoned that there was no principled way to distinguish between the symbolic speech sought to be prohibited here and other offensive or provocative speech that the Supreme Court had ruled was constitutional. "Public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."⁹³ Second, the village's residents were not a "captive audience" since they could avoid the village hall area during the demonstration.

In a recent decision, the Supreme Court ruled unconstitutional an ordinance passed by the city of St Paul, Minnesota that made it a misdemeanour to place on public or private property a symbol, object, appellation, characterization, or graffiti with knowledge or reasonable grounds to know that the object would arouse anger, alarm, or resentment in others on the basis of race, colour, creed, religion or gender.⁹⁴ A teenager who burned a cross on the property of a black family and was charged with violating the ordinance challenged its constitutionality.

The US Supreme Court held that the ordinance, even as narrowly construed by the Minnesota Supreme Court to apply only to "fighting words",⁹⁵ violated the First Amendment. The Court reasoned that the ordinance was a content-based restriction, applying only to "fighting words" or symbols that insult or arouse alarm on certain, specific grounds (race, colour, creed, religion or gender) and not on others (such as sexual orientation or social status). In this sense the ordinance was under-inclusive and imposed viewpoint discrimination.⁹⁶ The Court noted that the cross-burning at issue could be prosecuted under content-neutral laws, such as those prohibiting trespass or intimidation.

⁹² See also Section 6.2.1 supra on advocacy versus incitement in US jurisprudence.

⁹³ *Collin v. Smith*, 578 F.2d. 1197 (7th Cir. 1978).

⁹⁴ *R A V v. St Paul*, 505 U.S. ___, 112 SC 2538 (1992).

⁹⁵ The "fighting words" doctrine is discussed in Section 6.2.2 supra.

⁹⁶ *R A V v. St Paul*, supra note 94 at 2547-48.

7.5 INSULT TO NATIONAL INSTITUTIONS

7.5.1 Head of State

Many countries have laws making it a crime to insult the head of state or other high ranking officials. In Europe, while many countries retain such laws on their statute books, the courts in most of those countries have declared that they do not impose restraints any greater than the normal defamation laws.⁹⁷ The case from Spain summarized below is illustrative of this trend. The cases following show how courts in countries that retain such laws may nevertheless interpret them narrowly.

Spain

A Spanish journalist published an article in which he called the King a fascist in the course of criticizing the government's policies relating to the World Cup football championship. The journalist was convicted and his sentence of six years' imprisonment was upheld by the Supreme Court (though suspended pending resolution by the Constitutional Court). The Constitutional Court, vacating the conviction, observed:

The maximum scope that freedom of ideology has in our Constitution must be pointed out, since it is the basis, together with the dignity of the person and his inviolable, inherent rights, of all other fundamental rights and freedoms⁹⁸

Factors to be considered in the balancing process include the necessity and proportionality of the restriction, the public interest in the information, and whether any of the words used were highly insulting. In this case, although the words used were highly insulting and the public interest in the information was slim (in that the journalist merely gave his opinion about known facts), the Court nevertheless concluded that the restriction was disproportionate since it was clear that the insulting words were an opinion only.

Uganda

Two Ugandan journalists were charged with the offence of defaming a foreign ruler for having asked allegedly embarrassing questions of the then-Zambian President, Kenneth Kaunda, at a State House press conference in January 1990. Chief Magistrate Hensley Okalebo dismissed the charges because the journalists had not "published anything intended to be read", nor had they made "any sign or visible representation intended to revile" the visiting President. However, the case dragged on because the government disregarded the ruling and detained the journalists for several weeks following the dismissal of the case. They were eventually released on orders of the High Court.⁹⁹

7.5.2 National Symbols

⁹⁷ See S Coliver, "Comparative Analysis of Press Laws" in *Press Law and Practice*, supra note 59, 288. See also Sections 4.2 and 6.2 supra.

⁹⁸ *Punto y Hora*, STC 20/90.

⁹⁹ *Uganda v. Alfred Okwaare and Hussein Abdi Hassan*, High Court, Feb. 1990 (unreported).

Many countries have laws making it a crime to defile or show disrespect for the national flag or other national symbols.

Germany

Although Germany retains several criminal laws intended to safeguard the honour of national institutions and symbols, these provisions are of scant importance in practice. In recent decisions, the Constitutional Court has held that attacks against national symbols, such as against the flag and anthem, even if harsh and satirical, must be tolerated in view of the constitutional protections of freedom of speech, the press and the arts.¹⁰⁰

United States

The Supreme Court has made clear in two recent cases that, while the federal and state governments may make it a crime to mutilate or otherwise desecrate the US flag, they may not pass laws which prohibit certain flag-related conduct based on the message sought to be communicated.

Thus, in one case, the Supreme Court invalidated a Texas statute which made it a crime to "intentionally or knowingly desecrate ... a state or national flag." "Desecrate" was defined to mean "deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action." As stated by the Court:

If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.¹⁰¹

A majority of the Court reasoned that: (1) the country's belief in the cherished significance of the flag would not be undermined by acts of mutilation, and (2) such acts could be countered by acts respectful of the flag, such as giving the remains of the flag a burial (as one witness did in the instant case).

After the Court's decision in this case, Congress passed an act which criminalized the conduct of anyone who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon" a US flag, except in the context of disposing of a "worn or soiled" flag. Several people were arrested under the Act for burning flags while protesting government policies. The Court declared the law unconstitutional:

Although the ... Act contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the government's asserted interest is 'related to the suppression of free expression' and concerned with the content of such expression.¹⁰²

¹⁰⁰ 81 FCC 278, 294 (1990) (*Bundesflagge* case); 81 FCC 298, 306 (1990) (*Bundeshymne* case). See U Karpen, "Freedom of the Press in Germany", in *Press Law and Practice*, note 59 supra at 88.

¹⁰¹ *Texas v. Johnson*, 491 US 397, 414 (1989).

¹⁰² *United States v. Eichman*, 496 US 310, 315 (1990), quoting *Texas v. Johnson*, id. at 410.

Punishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering.¹⁰³

7.6 AUTHORITY OF THE JUDICIARY, CONTEMPT OF COURT AND RIGHT TO A FAIR TRIAL

7.6.1 Decisions of the European Court of Human Rights

Access to court documents and proceedings may legitimately be regulated under Article 10(2) of the European Convention in the interest of maintaining "the authority and impartiality of the judiciary". The European Court has ruled that, in deciding the requirements of "the authority and impartiality of the judiciary", account must be taken of Article 6 of the European Convention.¹⁰⁴ Article 6 guarantees to any person charged with a criminal offence or involved in proceedings to determine his or her civil rights and obligations, the right "to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." While all judgments are to be made public, Article 6 further provides:

[T]he press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

The European Court has stressed that, in assessing claims based on the interest in maintaining the authority and impartiality of the judiciary, national courts must accord due weight to the countervailing interest of the public in receiving information about matters of public concern, and that decisions of national courts are entitled to only a narrow margin of appreciation.¹⁰⁵

In the *Weber* case, the European Court considered a challenge to a conviction and fine under a Swiss criminal law that made it an offence to make public "any documents or information about a judicial investigation" until the investigation had been "finally completed".¹⁰⁶ Franz Weber, a journalist and well-known ecologist, sued the author of a letter to the editor for defamation. Dissatisfied with the judge's conduct of the investigation, Mr Weber held a press conference in which he announced that he had filed the action, that the judge had ordered him to produce certain documents, and that he had partially complied. One year later, he held a second press conference in which he reiterated the information previously disclosed and further announced that he had lodged a complaint against the investigating judge. Mr Weber was convicted of disclosing confidential information and his conviction was affirmed. The Swiss courts conceded that he had previously disclosed the information but ruled that he nevertheless continued to have a duty not to republish the information.

¹⁰³ *Id.* at 319.

¹⁰⁴ *The Sunday Times v. United Kingdom*, para. 55.

¹⁰⁵ *Id.* at para. 59. See Chapter 5 *supra* for a discussion of the "margin of appreciation".

¹⁰⁶ *Weber v. Switzerland*.

The European Court noted three relevant factors in ruling that the conviction was not necessary to safeguard a legitimate interest and thus violated Article 10. First, though not of decisive importance, the public had an interest in the case because of Mr Weber's notoriety and his claim that the investigation had been unfair.¹⁰⁷ Second, the Swiss government had no legitimate interest in maintaining the confidentiality of information which had been previously disclosed.¹⁰⁸ Third, Mr Weber could not have used the press conference to place pressure on the investigating judge, as the government claimed, because, by the time the press conference took place, the judge had already decided to commit the letter-writer to trial and thus had virtually completed the investigation.¹⁰⁹

In *The Sunday Times* case, Times Newspapers was enjoined from publishing an article critical of the testing and marketing practices of the UK manufacturer and marketer of thalidomide, a drug that had caused severe deformities in children born to women who had taken the drug during pregnancy. The UK House of Lords held that the injunction was necessary to safeguard the rights of the litigants and the integrity of the judicial process because, although trial proceedings had been suspended, the parties were engaged in protracted settlement negotiations which could be affected by the article's publication. The European Court concluded that the injunction violated Article 10 on the grounds that the thalidomide disaster was a matter of undisputed public interest, publication would not substantially distort the settlement process, and legal proceedings might not recommence. In so ruling, the Court pronounced as follows:

There is general recognition of the fact that the courts cannot operate in a vacuum. Whilst they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialised journals, in the general press or amongst the public at large. Furthermore, whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest.¹¹⁰

In addition, the Court disapproved of the adoption by some members of the House of Lords of an absolute rule (similar to that applied by the Swiss courts in *Weber*) that no information concerning a pending case could ever lawfully be disclosed.¹¹¹ The Court reiterated the importance of evaluating the necessity of a restriction based upon the particular facts of the case.¹¹²

7.6.2 Comments on Matters Pending Before a Court

¹⁰⁷ Id. at para. 49.

¹⁰⁸ Id. at para. 51.

¹⁰⁹ Id. at para. 52.

¹¹⁰ *The Sunday Times v. United Kingdom*, para. 64.

¹¹¹ Id. at para. 65.

¹¹² See also Section 7.1.1 supra for discussion of *Barfod v. Denmark*, in which the European Court upheld the libel conviction of a Danish journalist for having accused two lay judges of bias in rendering a judgment favourable to the civil service agency which employed them.

Canada

The Supreme Court held that a provincial law that prohibited the publication of any details relating to matrimonial proceedings other than names, a concise statement of the charges, the summing up, and the findings of the court, violated Section 2(b) of the Canadian Charter protecting freedom of expression. The Court noted that the press must be free to comment and report upon court proceedings to ensure that the courts are in fact seen to operate openly; the public, as readers or listeners, have a right to receive information pertaining to public institutions and, in particular, the courts. Moreover, while the objective of protecting the privacy of individuals is a pressing and substantial concern, the law prohibited the release of much information that would not unduly intrude upon privacy and thus was not proportionate to a legitimate objective.¹¹³

Cyprus

The Supreme Court overturned the convictions of two journalists for interfering with judicial proceedings. The journalists had published a news item in the *Kypros* paper about a pending criminal trial, and the district court concluded that they were guilty of having calculated to obstruct or influence the proceedings. In overturning the convictions, the Supreme Court reasoned:

In light of the modern trend in interpreting and applying provisions relating to human rights, such as Article 19 of our Constitution and the corresponding Article 10 of the European Convention on Human Rights, which forms part of our own law as well, and in the light also of weighty dicta such as those of the European Court of Human Rights in the judgment of *The Sunday Times case*, ... [the criminal provision applied against the journalists], which is a restriction of the right of expression, must be applied in each particular case in a manner as favourable as possible for the freedom of the press.¹¹⁴

Moreover, the Court concluded that it could not be held beyond a reasonable doubt that the news item at issue was calculated or likely to obstruct or to influence the proceedings.

Germany

The Constitutional Court (FCC) stressed that a total ban on reporting on criminal proceedings, even while they are in progress, would violate freedom of the press. Thus, while upholding a statute that prohibited references to court documents and testimony that had not been made public, the FCC reaffirmed that journalistic reports of trial proceedings must be protected. The distinction was rational because the legislature reasonably could find that reference to official court documents or testimony would have a greater impact on public opinion than mere reports unsupported by such evidence.¹¹⁵

Ireland

The Supreme Court vacated an injunction against publication of an article by an accomplice-witness in a murder case, after the defendant had been convicted but while his appeal was pending. The Court reasoned that publication could not possibly prejudice the determination of the appeal

¹¹³ *Edmonton Journal, A Division of Southam Inc. v. Attorney-General for Alberta et al.*, Canada Supreme Court, 21 Dec. 1989 (No. 20608), *Commonwealth Law Reports*.

¹¹⁴ *Cosmos Press Ltd v. Police*, (1985) 2 CLR 73, 81 (SC) (per Triantafyllides J); 13 *Common L Bull* 37 (1987).

¹¹⁵ 71 FCC 206 (1985).

given that the only issues pending before the Court of Criminal Appeal were pure issues of law. Chief Justice O'Higgins stated:

It cannot be suggested that in considering such questions [of pure law], publication of this or any number of articles in any number of periodicals would have the slightest effect on the objective consideration of legal arguments. It seems to me that such an argument is unsustainable. ... Freedom of the press and of communication ... can only be curtailed or restricted by the courts ... where such action is necessary for the administration of justice.¹¹⁶

Justice McCarthy noted:

From a public point of view it would be far worse that the public should think that the judiciary would lose its objectivity in determining a pure issue of law because of some article in a news magazine.¹¹⁷

Similarly, the Irish High Court refused to issue an injunction to prevent further broadcasts of a programme criticizing a court judgment which was the subject of a pending appeal. The Court stated:

The public take a great interest in court cases and it is only natural that discussion should concentrate on the result of cases. So criticism which does not subvert justice should be allowed.¹¹⁸

Because the plaintiff could not show that the broadcast would prejudice his appeal, the Court denied his request for an injunction.

New Zealand

In ruling on an application for an injunction to prohibit publication of comments made by a "secret" witness during a criminal trial, the High Court held that the mere risk of undermining a fair trial was an insufficient basis to make the order sought. A clearly contemplated contempt needed to be shown before a court would consider an injunction that restricted freedom of the press.¹¹⁹

Nigeria

The Federal Court of Appeal warned courts to avoid over-reacting when considering whether press comment on matters *sub judice* amounted to contempt of court. A court should consider whether the case would be "grossly affected" by the comments before finding contempt. Serious prejudice would be unlikely in a civil case being heard by a judge alone since he could be expected to avoid being influenced by any discussion of the case.¹²⁰

¹¹⁶ *Cullen v. Toibin* [1984] ILRM 577 SC (per O'Higgins, CJ), 581-2.

¹¹⁷ *Id.* at 582.

¹¹⁸ *Weeland v. RTE* [1987] IR 662 (High Court, per Carroll, J), 666.

¹¹⁹ *Chignell and Walker* (1990) 6 CRNZ 476.

¹²⁰ *In Re. Onagoruwa*, Federal Court of Appeal of Nigeria [1980] 1 NCR 254, 5 Feb. 1980.

The High Court of Kaduna State ruled that a comment accusing a state governor of wrongdoing was not a contempt of court, even though the courts were already looking into the wrongdoing.¹²¹

Panama

The Supreme Court of Panama ruled unconstitutional a law that prohibited disclosure of the name of any person accused of a crime and other information that could link the accused with the crime until a final judgment. The Court reasoned that the presumption of innocence requires only that the identity of the accused be kept confidential during the investigation stage, and that the right of the public to information demands that the identity be subject to publication once the trial begins. An exception that permitted disclosure of the name and identifying information about "common criminals of high dangerousness, whose search and location by the media has been authorized by the Attorney General" was appropriate but did not save the law's constitutionality. The Court stated:

Well-accepted modern doctrine considers the presumption of innocence principle and the freedom of expression and the right to information principle [both protected by the Constitution] ... as two fundamental and natural rights that have been legally recognized: dignity of human beings, and the right to express one's thoughts and to be informed. Both rights work together and are exercised within the society. ... [I]n addition to being recognized by the Constitution, there have been significant debates in the international arena, such that they have been recognized in the international treaties ratified by our Republic. ...

The society has every right to be informed. This, as a legal correlation, implies the right of the media to obtain true and adequate information in order to transmit it to the public. Nevertheless, it is fair and justifiable that human dignity is also preserved ...¹²²

Senegal

The Court of Appeal in Dakar ruled that the confidentiality of a document which has been disclosed in one court proceeding may again be breached in another court proceeding where disclosure is the only way of assuring the dispensation of justice by an equitable process.¹²³

United Kingdom

The House of Lords vacated a contempt order directed at an article about a parliamentary candidate with birth deformities which noted that the chances of a baby with such deformities surviving today would be small indeed. The article was published on the third day of a trial of a paediatrician for the murder of a baby suffering from Down's syndrome. The House of Lords held that any risk of prejudice to a fair trial was "merely incidental" to the article's discussion of a matter of substantial public interest.¹²⁴

¹²¹ *Alaji Dalhatu v. A-G of Kaduna*, High Court of Kaduna, 19 March 1981.

¹²² Supreme Court, decision of 30 April 1991, 8.

¹²³ Court of Appeal (Dakar), Judgment No. 1 of 11 Jan. 1964.

¹²⁴ *Attorney-General v. English* [1983] 1 AC 116.

The Queen's Bench Divisional Court (England and Wales) reversed a lower court order prohibiting any reporting on a major fraud trial. To sustain such an order the court would have had to have found that, in the particular circumstances, publication would have been likely to have prejudiced a fair trial. The Court stated:

[T]he crucial question peculiar to each case ... is whether, in that case, the publication created at the time of its publication, a substantial risk that the course of justice would be seriously impeded or prejudiced. The risk must be a practical risk and not a theoretical risk. ... [T]he publication of the fact that one unidentified defendant was to be involved in a separate trial in the Isle of Man does not seem to me to give rise to any serious risk of prejudice.¹²⁵

The Queen's Bench Divisional Court refused to hold a newspaper in contempt for publishing a story about a suspect's prior convictions, in violation of a court order, where at the time of publication the possibility of the suspect being prosecuted was speculative. On such facts, the judge stated that he could not be satisfied that the editor "intended to prejudice the fair conduct of proceedings".¹²⁶

United States

The Supreme Court has ruled that the press and public have a right to attend criminal trials unless in a particular situation there is a compelling interest that can be served only by limiting such attendance,¹²⁷ such as protecting certain crime victims from further trauma or encouraging witnesses to come forward and testify truthfully.¹²⁸

The Court has also invalidated a court order prohibiting the press from publishing confessions by a murder defendant and other inculpatory evidence prior to trial. The Court found that other measures, such as extensive jury questioning and even jury sequestration, were adequate to ensure a fair trial.¹²⁹ In ruling that a trial could not be closed to the public where fairness could be preserved by sequestration of the jury for the period of the trial, the Court observed:

All of the alternatives admittedly present difficulties for trial courts, but none of the factors relied on here was beyond the realm of the manageable. Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public.¹³⁰

7.6.3 Criticism of the Courts

Germany

¹²⁵ *Attorney-General v. Guardian Newspapers Ltd* [1992] 3 All ER 38.

¹²⁶ *Attorney-General v. Sport Newspapers Ltd* [1992] 1 All ER 503

¹²⁷ *Richmond Newspapers, Inc. v. Virginia*, 448 US 555 (1980).

¹²⁸ *Globe Newspapers Co. v. Superior Court*, 457 US 596 (1982).

¹²⁹ *Nebraska Press Assoc. v. Stuart*, 427 US 539 (1976).

¹³⁰ *Richmond Newspapers, Inc. v. Virginia*, note 127 supra at 581.

The Constitutional Court (FCC) ruled that a newspaper may not be excluded from a public trial merely on the ground that it is likely to publish a defamatory article about the hearing. The publisher of the *Koeler Volksblatt* newspaper was tried for defamation for having published an anonymous, insulting article criticizing the way in which a judge conducted trials. Thereafter, the judge excluded an editor of the paper from a subsequent trial on the ground that he clearly was not interested in informing the public but only in continuing to defame the courts. The FCC ruled that freedom of the press entitles representatives of the press to attend trials; press representatives may be excluded from public trials only if they disturb the trial's proper conduct; and the editor in this case would not have disturbed the conduct of the trial even if he had published a defamatory article.¹³¹

Kenya

A judge sought to commit Pheroze Nowrojee, an Advocate of the High Court of Kenya, to prison for having written a letter to the Registrar of the High Court. In the letter, Mr Nowrojee had complained of the judge's delay in deciding a motion to stay proceedings in a traffic case in which Bishop Alexander Muge, a prominent government critic, had been killed. Mr Nowrojee wrote:

It is unusual that in the meantime the same learned judge has dealt with several hundred matters as duty judge and left this one matter as yet uncompleted. Such delay amounts in law to a refusal to adjudicate. ... These departures from the usual, the indefinite delay, despite reminders and the willingness to specify a fixed date, may create the impression that the ruling is being tailored [improperly] I convey my anxiety at the unusual treatment of this or any applicant to our courts, and the belief that trust in our judges is a major contributor to the security of that trust. The events taking place in this case tend to the erosion of that trust. To few proceedings more than the instant case is the trite but true and old maxim applicable - Justice delayed is justice denied.¹³²

The High Court, reiterating the reasoning of an earlier case,¹³³ ruled that courts could not use their contempt power to suppress mere criticism of a judge or to vindicate the judge in his personal capacity, but rather could use it only to punish scurrilous abuse of a judge when necessary in the interests of justice.¹³⁴ The Court stressed that a judge must scrupulously balance the need to maintain his or her authority with the right to freedom of speech. Accordingly, the High Court declined to hold Mr Nowrojee in contempt.

Mauritius

The Supreme Court of Mauritius recognized, in *dicta*, that Section 12 of its 1968 Constitution should be construed to be consistent with Article 10 of the European Convention. Section 12 enjoins the court from taking any action, even under the authority of law, which is not "reasonably

¹³¹ 50 FCC 234 (1979).

¹³² *Republic v. Nowrojee*, High Court, Misc. Crim. App. No. 461 of 1990.

¹³³ *Republic v. Wangari Muta Maathai and Two Ors*, Crim. App. No. 53 of 1981.

¹³⁴ *Republic v. Nowrojee*, note 132 supra.

justifiable in a democratic society". The Court instructed the lower court to consider, in determining whether publication of an article critical of the judiciary constituted a contempt of court, the decision of the European Court in *The Sunday Times* case that the injunction there at issue was "not necessary in a democratic society for maintaining the authority of the judiciary".¹³⁵

United Kingdom

The Queen's Bench, Appellate Division (England and Wales) refused to hold a Member of Parliament in contempt for having written an article in which he vigorously criticized a judgment of the Court of Appeal. The Court stated:

[N]o criticism of a judgment, however vigorous, can amount to contempt of court, providing it keeps within the limits of reasonable courtesy and good faith.¹³⁶

Zambia

A man convicted of overcharging money was charged with contempt on the ground that he had implied, following his conviction and outside the presence of the court, that he had been treated unfairly because another man who faced a similar charge had not been convicted. The High Court of Zambia ruled that mere criticism of a judicial decision does not of itself amount to contempt. Rather what was required to prove contempt was an express or implied allegation of bias on the part of a judicial officer.¹³⁷

Zimbabwe

Two lawyers were convicted of contempt of court for alleging that their clients were ill-treated in custody. They had sought to get access to their clients who had been arrested on suspicion of having been involved in an act of sabotage on an air base, but were denied access for two and three weeks respectively. By the time they were allowed to talk with their clients, the clients had already made statements to the police. After the lawyers had seen their clients, they told the press that their clients had been interrogated under conditions of extreme duress including the use of torture, and that there was medical evidence to corroborate this allegation. The lawyers emphasized that they were not alleging that torture was a common practice and that they would challenge the confessions in due course. As a result, both lawyers were convicted of contempt and fined.

The Supreme Court, by unanimous decision, vacated the contempt order. The Court noted that Zimbabwe's constitutional protection of freedom of expression permits inroads on that freedom in order to maintain the authority and independence of the courts, but added that any inroad must not be any wider or deeper than required for the declared objective. The Court was asked to apply the test for contempt of court used in South Africa¹³⁸ that contempt requires a showing that a statement would tend to prejudice or interfere with the administration of justice. The Court concluded that this standard would infringe too greatly on the right to freedom of expression and instead adopted the test incorporated in Section 2(1) of the United Kingdom's Contempt of Court Act 1981; namely,

¹³⁵ *DPP v. Mootoocarpn* [1989] LRC (Const.) 768, 773 (Judgment of 21 Dec. 1988, per Glover CJ). See Section 3.2.1 supra.

¹³⁶ *R. v. Metropolitan Police Commissioner, ex parte Blackburn* [1968] 2 QB 150, 155.

¹³⁷ *The People v. David Masupa*, High Court (1977) Zambia L R 226.

¹³⁸ *S. v. van Niekerk* 1972 (3) SA 711 (AD).

whether there was a real risk that the statement was intended, and was likely, to interfere with the administration of justice.¹³⁹

7.6.4 Procedural Matters

Malta

The Constitutional Court of Malta held that a trial court had acted improperly in ruling on the question of whether a litigant had committed a contempt of court against it.¹⁴⁰

Sierra Leone

The Court of Appeal quashed the contempt conviction of the editor of the *New Shaft* newspaper for allegedly having broken the Sheriff's seal affixed to his office in Freetown. Despite the absence of credible evidence, he had been sentenced to five years' imprisonment. The Court of Appeal concluded that the trial judge had "misguidedly sacrificed 'proof beyond reasonable doubt' on the altar of an ill-conceived and wrongly applied doctrine of 'judicial notice'."¹⁴¹

7.7 COMPELLED DISCLOSURE OF JOURNALISTS' SOURCES

France

The French law on protection of sources and confidential information was substantially revised by the Act of 4 January 1993 on criminal procedure reform. The Act added Article 109(2) which now provides:

Any journalist who appears as a witness concerning information gathered by him in the course of his journalistic activity is free not to disclose its source.

Concerning searches of media offices, newly added Article 56(2) provides:

Searches of the premises of a press or broadcasting company may be conducted only by a judge or a State prosecutor, who must ensure that the investigations do not endanger the free exercise of the profession of journalism and do not obstruct or cause an unjustified delay to the distribution of information.

Germany

The Constitutional Court (FCC) noted that there are two grounds upon which a journalist may refuse to divulge confidential information. First, Article 53 of the Code of Criminal Procedure

¹³⁹ *S. v. Hartmann*, Supreme Court, (1983) Zimbabwe L R 186, 16 Sept. 1983.

¹⁴⁰ *The Court v. Pace*, Malta Constitutional Court, 7 Dec. 1990, 17 *Common L Bull* (April 1991).

¹⁴¹ Court of Appeal (Sierra Leone), Judgment of 22 May 1986.

provides that journalists may refuse to give evidence in court in certain circumstances. In addition, the Basic Law's constitutional guarantee of press freedom permits journalists to protect confidential sources if the interest in promoting press freedom is found to outweigh the interest in the enforcement of justice. The constitutional right to protect confidential sources is intended primarily to protect the role of a free press in controlling government abuse. In this case, the FCC rejected the journalist's effort to protect the confidentiality of the source of an advertisement because the matter did not touch on public affairs at all.¹⁴²

Japan

The Sapporo District Court, sustained by the appellate courts, held that Article 281 of the Code of Civil Procedure protects the journalist's privilege as a witness to refuse to divulge information about a source as "an occupational secret" unless the information is necessary for a fair trial.¹⁴³ In an article, a journalist alleged that parents were complaining about child abuse in a local nursery school. The owner of the school sued the journalist for erroneous and defamatory reporting. Under questioning, the journalist refused to identify his sources. The courts upheld his privilege on the ground that, when a fair trial is not at issue, compelling disclosure of confidential sources would improperly impair the reporter's pursuit of his profession.

Nigeria

The High Court of Lagos State ruled that the Senate of the National Assembly had exceeded its authority in summoning a journalist to disclose the confidential sources of an article he had written. In concluding that the summons had interfered with the journalist's right to freedom of expression as guaranteed by Article 36(1) of the Constitution, the Court stated:

It is a matter of common knowledge that those who express their opinions, or impart ideas and information through the medium of a newspaper or any other medium for the dissemination of information enjoy by customary law and convention a degree of confidentiality. How else is a disseminator of information to operate if those who supply him with such information are not assured of protection from identification and/or disclosure?¹⁴⁴

In another case, after the editor of *Sunday Punch* published an article accusing the Nigerian National Assembly of monumental fraud, a committee appointed by the National Assembly to investigate the allegations demanded that the editor reveal the confidential source of his information. He refused. The High Court of Ikeja declined to compel him to reveal his source. It reasoned that the powers granted to the investigatory committee did not include the power to require a journalist to disclose a confidential source except in grave and exceptional circumstances such as when state security was threatened. It concluded that no such exceptional circumstances existed in the instant case. The Court further observed that if journalists were compelled to disclose their sources of information, their sources would dry up. Wrongdoers would not be discovered; misdeeds and serious misconduct in the corridors of power would no longer be exposed. A

¹⁴² 64 FCC 108 (1983).

¹⁴³ *Sasaki v. The Hokkaido News, Inc.*, 930 *Hanrei Jihô* 44, Sapporo District Court, 30 May 1979; affirmed 937 *Hanrei Jihô* 16, Sapporo High Court, 31 Aug. 1979; affirmed 30 *Minshû* 403, S. Ct (Third Petty Bench), 8 March 1980. This case is discussed in L Beer, "Freedom of Expression: The Continuing Revolution," 53 *Law & Contemporary Problems* (1990), 39, 59.

¹⁴⁴ *Tony Momoh v. Senate of the National Assembly*, [1981] 1 NCLR 105 (High Court: Lagos).

legislative investigation must comply with the Constitution and it would be wrong for a court simply to assume that every legislative investigation is justified by a public need that outweighs the rights of the press.¹⁴⁵

The High Court of Lagos State ruled that an editor and journalist of the *Daily Sketch* based in Ibadan could not be forced to disclose the confidential source of an article about a daylight killing and robbery in Lagos. Judge Balogun stated:

It seems to me to be beyond doubt that by and under the provisions of the 1979 Constitution ... , no person or authority (not even a Court of Law) in Nigeria may require any individual, editor, reporter or other publisher of a newspaper to disclose his source of information of any matter published by that individual or other person or publisher, and the individual or editor, reporter or publisher of a newspaper cannot be guilty of contempt of court for refusing to disclose the source of information contained in the newspaper publication for which he is responsible, unless it is established to the satisfaction of the court that disclosure is necessary in the interest of justice, national security, public safety, public order, public morality, welfare of persons or for the purpose of prevention of disorder or crime.¹⁴⁶

Justice Balogun continued that protection of the journalistic privilege must be all the stronger where the published information concerns a matter of general public interest:

[W]hen a newspaper has investigated a matter of general public interest or concern (such as it ought to make known to the public) the publication of an article upon the matter is so much in the public interest that the newspaper ought not to be restrained or 'interfered' with by any person or authority, solely on the ground that the information in the article originated in confidence Nor should a newspaper be compelled (except in grave and exceptional circumstances, justifiable under the constitutional limitations on freedom of expression) to disclose the source of the information. The editor and the reporter can rely on the constitutional shield of constitutionality.¹⁴⁷

The court found that the report of the daylight murder was of general public interest and that no exceptional circumstances existed, and accordingly held that the editor and journalist could not be compelled to reveal their source.

Norway

In January 1992, the Supreme Court issued a decision upholding the right of journalists to protect their sources, especially concerning matters of public interest and even if they published their information in a book rather than a newspaper or other periodical publication.¹⁴⁸

¹⁴⁵ *Innocent Adikwu and Others v. Federal House of Representatives of the National Assembly* [1982] 3 NCLR 394 (High Court: Ikeja).

¹⁴⁶ *Oyegbemi v. Attorney-General of the Federation & Ors*, [1982] FNLR (Fed. of Nigeria LR) 192, 208.

¹⁴⁷ *Id.* at 209.

¹⁴⁸ *Edderkopp* case, Supreme Court Judgment of 15 Jan. 1992, in the Interlocutory Appeal of LNR 10/1992, JNR 34/1991.

The case involved two journalists who had written a book, titled *Edderkopp* (Spider), about the activities of a Norwegian furniture manufacturer who had secretly taped his telephone conversations with noted politicians. Various passages in the book discussed connections between the Labour party and the Norwegian intelligence agency. A Parliamentary oversight body sought the source of this information in order to determine whether the information had been disclosed illegally by an agency employee. The authors refused to reveal their sources, and the Parliamentary body applied for a court order to compel them to do so. The court refused the application. The Supreme Court, in upholding the lower court's decision, ruled that the authors had a right to protect their sources and that this right is all the stronger where the information revealed is of public importance:

In some cases ... the more important the interest violated, the more important it will be to protect the sources. ... It must be assumed that a broad protection of sources will lead to more revelations of hidden matters than if the protection is limited or not given at all. ... The protection of sources must extend even to questions that are not intended to help track down the source but which could have that result.¹⁴⁹

Moreover, while Section 209a of the Civil Procedure Code upon which the journalists relied does not expressly extend to information published in books (but only to newspapers, other periodic publications and broadcasts), the Court ruled that the section applied in the present case:

Information contained in the book comes within the purpose of Section 209a, which is to promote debate about matters of public importance. The book is the result of the "watch dog" and investigatory journalism which we today look upon as a positive and important aspect of the media's work. ... Information disclosed to journalists is expected to be protected under Section 209a.

The Court emphasized that "protection of sources is the rule, and the question then is whether there are strong enough reasons to override the rule".

United Kingdom

The Court of Appeal (England and Wales) declined to order disclosure of the source of a libellous article in *Private Eye* which alleged that the publishing magnate Robert Maxwell had financed trips abroad by the leader of the Labour Party in order to be recommended for a peerage. Mr Maxwell argued that the media defendants should be compelled to reveal their sources because only then could the jury determine whether the defendants acted in good faith or instead with knowledge of the allegation's falsity or reckless disregard for its truth which would entitle Mr Maxwell to claim increased damages. The defendants relied on the protection provided by Section 10 of the Contempt of Court Act 1981, which prohibits courts from ordering media personnel to disclose confidential sources except when disclosure is "necessary in the interests of justice or national security or for the prevention of disorder or crime." The Court ruled that compelled disclosure was not necessary in the interests of justice since the jury could decide on damages without the additional information and the consequences of such an order would outweigh its benefits. The Court stated:

I can see many difficulties about the consequence that a draconian order to reveal their sources of information should be made against journalists merely because of an

¹⁴⁹ Id. at 39.

apparently plausible claim for aggravated, or even exemplary, damages. ... It would then follow that, merely because the plaintiff has also claimed aggravated, and in particular exemplary, damages, they could be forced to reveal their source. ... [O]ne has to consider the consequence for other cases and the importance of the public interest which is enshrined in Section 10.¹⁵⁰

In a later case, the House of Lords noted that, in order to establish the necessity for an order compelling disclosure in the interest of justice, it does not suffice for a party to show merely that he or she will be unable without disclosure of the source's identity to exercise his or her legal right or avert the threatened legal wrong on which the claim is based. Rather, many factors must be weighed on both sides of the scale. One important factor is the nature of the information. "The greater the legitimate public interest in the information which the source has given to the publisher or intended publisher, the greater will be the importance of protecting the source."¹⁵¹ Another, and perhaps more significant factor is:

the manner in which the information was itself obtained by the source. If it appears to the court that the information was obtained legitimately, this will enhance the importance of protecting the source. Conversely, if it appears that the information was obtained illegally, this will diminish the importance of protecting the source, unless, of course, this factor is counterbalanced by a clear public interest in publication of the information, as in the classic case where the source has acted for the purpose of exposing iniquity.¹⁵²

A factor of particular importance in the instant case was the extent of economic damage likely to be caused by the threatened legal wrong. The House of Lords stated:

If the party seeking disclosure shows ... that his very livelihood depends upon it, this will put the case near one end of the spectrum. If he shows no more than that what he seeks to protect is a minor interest in property, this will put the case at or near the other end.¹⁵³

The appropriate standard to be applied in weighing the competing factors was that of "preponderating importance":

[I]t is only if the judge is satisfied that disclosure in the interests of justice is of such preponderating importance as to override the statutory privilege against disclosure that the threshold of necessity will be reached.¹⁵⁴

¹⁵⁰ *Maxwell v. Pressdrum Ltd* [1987] 1 All ER 656, 665-66.

¹⁵¹ *X Ltd v. Morgan Grampian Publishers and Ors* [1991] 1 AC 1, 44.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

The case concerns Bill Goodwin, a journalist who was planning to write an article about a company's financial situation revealing information supplied by a confidential source. The company, alerted to the leak by the journalist's questions, obtained orders prohibiting publication of the article and sought disclosure of the identity of his source. The Court of Appeal ordered Mr Goodwin to submit to the court the name of the source in a sealed envelope pending the outcome of an interlocutory appeal to the House of Lords. Mr Goodwin refused and was charged with contempt of court. The House of Lords ruled that on the balance of probabilities disclosure of the source's identity was necessary in the given case in light of the fact that the economic damage caused by publication would be severe, the source had either committed or was complicit in a gross breach of confidentiality, and the public interest in the information was not great. Mr Goodwin was fined £5,000 for contempt of court (even though there was no finding that he had known that his source might have obtained the information through wrongdoing, let alone that he had encouraged any such wrongdoing). His application challenging the conviction and fine is pending before the European Commission.¹⁵⁵

United States

The Supreme Court has held that, while reporters may be called to testify before a grand jury, they may not be called unless the grand jury has specific grounds to believe that the reporter has evidence which is relevant and necessary to its investigation.¹⁵⁶

7.8 DUTY OF CONFIDENTIALITY

Australia

Australia's highest court denied a government request for a permanent injunction to prohibit two newspapers from publishing extracts from a book based on documents illegally given to the book's author by a government agent.¹⁵⁷

Germany

The Constitutional Court (FCC) ruled that publication by the media of information obtained in breach of a duty of confidentiality (or by other unlawful means) is generally protected by the Basic Law's safeguard of press freedom. This interpretation is necessary to enable the press to report on activities of public interest. The FCC stated: "If publication of information obtained by unlawful means was exempt from press freedom the role of the press as a public watchdog would cease." However, in the instant case, the FCC enjoined publication of information about the editorial practices of a publishing house, obtained through deceit, because the information did not disclose unlawful activity and, accordingly, the public interest in the information did not outweigh the freedom of editorial confidentiality.¹⁵⁸

¹⁵⁵ *Goodwin v. United Kingdom*, App. No. 17488/90.

¹⁵⁶ *Branzburg v. Hayes*, 408 US 665 (1972).

¹⁵⁷ *Commonwealth of Australia v. John Fairfax & Sons Ltd* (1980) 147 CLR 39 (High Court).

¹⁵⁸ 66 FCC 116 (1984).

Ireland

The High Court declined to issue an interlocutory injunction to restrain publication of a book written by a former member of the British Secret Service.¹⁵⁹ The Attorney-General for England and Wales claimed that publication would breach the duty of confidentiality owed by the author to the British Crown. Judge Carroll, rejecting that claim, ruled that the defendant had a constitutional right to publish information and that a private individual does not owe a duty of absolute confidentiality to a government employer. Moreover, publication would not harm the UK's public interest.

Spain

A Spanish journalist employed by the press office of the Ministry of Justice published an article denouncing his superior on the ground that he regularly disclosed information about public events to only one newspaper, thus discriminating against the other papers and media. Moreover, his superior was a former employee of the one newspaper that received information. The journalist was dismissed on the ground that he had violated his superior's right to honour. The Supreme Court upheld the dismissal.

The Constitutional Court reversed the Supreme Court's decision. It noted that, while the article might well be defamatory, the journalist was entitled to publish it because of its general public interest. The existence of labour relations implies some reciprocal rights and duties which can negatively affect the exercise of freedom of expression. However, in this case, the right to freedom of expression prevailed over the rights and duties of a contractual labour relationship because the journalist used his freedom of expression to denounce wrongdoing by a public officer.¹⁶⁰

United Kingdom

In 1984, Peter Wright, a former intelligence agent at MI5, a branch of the UK Security Services, wrote a book, *Spycatcher*, which revealed unlawful acts and other wrongdoings by MI5 agents, although his employment contract with the Crown and provisions of the Official Secrets Act 1911 prohibited its publication. Two UK newspapers, *The Observer* and *Guardian*, published short articles on Peter Wright's allegations. The Attorney-General filed a civil suit against them for breach of confidence, and obtained an injunction to prevent the papers from publishing further information derived from Mr Wright that had not already been published or disclosed in open court. (The Attorney-General did not file any criminal charges against Mr Wright who, although residing in Australia, could have been made subject to extradition.)

Mr Wright entered into a publishing agreement with an Australian publisher. The Australian lower court refused to grant an injunction against publication sought by Britain's Attorney-General, and the Court of Appeal affirmed. The book *Spycatcher* was published in the US in July 1987, and thereafter in Canada, Australia, Ireland, Hong Kong and several other countries. By the end of 1987, more than one million copies had been sold around the world. The UK did not prevent the importation of *Spycatcher*.

The House of Lords dissolved the injunctions against *The Observer* and *Guardian* in October 1988 on the ground that, because the book had been published in other countries, the injunctions no

¹⁵⁹ *Attorney-General for England and Wales v. Brandon Book Publishers Ltd* [1987] ILRM 135 (Carroll, J). See Section 8.1 infra for further discussion of this case.

¹⁶⁰ STC 06/88 (Crespo case), *Boletín de Jurisprudencia Constitucional* 82, 174.

longer served a purpose. Moreover, the House of Lords stated that the courts have always refused to uphold the right to confidence when to do so would be to cover up wrongdoing.¹⁶¹

The newspapers challenged the interim injunction which had prevented publication prior to October 1988 before the European Commission, and the case was referred to the European Court. It ruled that failure to dissolve the injunction once *Spycatcher* had been published elsewhere violated Article 10 because, at that point, the public's interest in the information outweighed the government's interests in confidentiality and national security.¹⁶²

In 1985, the Court of Appeal (England and Wales) overturned an injunction against publication of confidential and copyrighted documents that disclosed doubts about the accuracy of the machine the Home Office used to measure blood-alcohol levels. The Court stated:

There is confidential information which the public may have a right to receive and others, in particular the press, may have a right and even a duty to publish, even if the information has been unlawfully obtained in flagrant breach of confidence and irrespective of the motive of the informer.¹⁶³

Several pop singers were refused an injunction to prevent a former employee from publishing embarrassing details of their private lives. The Court of Appeal of England, Civil Division, ruled:

If a group of this kind seeks publicity ... , they cannot complain if a servant or employee of theirs afterwards discloses the truth about them. If the image which they fostered was not a true image, it is in the public interest that it should be corrected. In these cases of confidential information, it is a question of balancing the public interest in maintaining the confidence against the public interest in knowing the truth.¹⁶⁴

The Court found in addition that the information was in the public domain because many of the events commented on by the former employee had taken place in public.

The High Court refused to enjoin publication of the first volume of a diary of a Cabinet Minister ten years after the last events described in the volume. To obtain an injunction the Attorney-General would have had to have shown: (a) that such publication would be a breach of confidence; (b) that the public interest required that the publication be restrained; and (c) that no other public interest

¹⁶¹ *Attorney General v. Guardian Newspapers Ltd* (No. 2) [1990] 1 AC 109. Two related cases, which resulted in decisions restricting press freedom, concerned *The Sunday Times'* publication, the day before the book's publication in the United States, of the first instalment of an intended serialization of *Spycatcher*. In 1990, the House of Lords ruled that that publication, displaying as it did an intent to publish the entire book, constituted a third party breach of the duty of confidentiality which Mr Wright owed to the Crown. (*Attorney-General v. Times Newspapers Ltd* [1990] 1 AC 233). In April 1991, the House of Lords further ruled that *The Sunday Times'* publication constituted a contempt of court because it violated the injunction issued against *The Observer* and *Guardian*. (See Section 8.1 infra for discussion of this case at the European Court.)

¹⁶² See further discussion of the case in Section 6.1 supra.

¹⁶³ *Lion Laboratories Ltd v. Evans* [1985] QB 526, 536.

¹⁶⁴ *Woodward v. Hutchings* [1977] 2 All ER 751, 754.

considerations outweighed the interest in confidentiality. Passage of time was a significant factor arguing against an injunction. The Court observed:

The fact that the Crown can claim privilege in litigation has nothing to do with giving parties a cause of action in cases like the present. Discovery amounts to a shield, not a sword. ... It is questionable whether there is a law of confidentiality. ... Our law is based on rights and duties and infringements.¹⁶⁵

The Court of Appeal, Civil Division (England and Wales), vacated an injunction restraining publication of information that allegedly was defamatory and obtained in breach of a contractual duty of confidentiality. The information was contained in a report by a UK public relations company to the Greek military government. The information had been leaked by a source in the Greek government, and it was the public relations consultants who had obtained the injunction. In vacating the injunction, the Court made clear that a publication should not be restrained where disclosure is in the public interest and/or the defendant indicates, as the defendant here did, that he intends to justify his statements or that they constituted fair comment on a matter of public interest. The Court stated:

[T]he defences of justification and fair comment are for the jury ... but a better reason is the importance in the public interest that the truth should out.¹⁶⁶ ...

There are some things which are of such public concern that the newspapers, the press, and indeed, everyone is entitled to make known the truth and to make fair comment on it. This is an integral part of the right of free speech and expression. It must not be whittled away. ... *The Sunday Times* should be allowed to publish the article at their risk. ... [W]e should not grant an interim injunction in advance of [publication of] an article when we do not know in the least what it will contain.¹⁶⁷

An additional reason for vacating the injunction was that it was the Greek government and not the consultancy firm who were entitled to the confidence: "[T]he party complaining must be the person who is entitled to the confidence and to have it respected."¹⁶⁸

7.9 BLASPHEMY AND PROTECTION OF PUBLIC MORALS

Council of Europe

In the *Handyside* case, the European Court reviewed the conviction, under the Obscene Publications Act, of the publishers of *The Little Red Schoolbook*, which encouraged its adolescent

¹⁶⁵ *Attorney-General v. Jonathan Cape; Attorney-General v. Times Newspapers Ltd* [1976] QB 752, 757.

¹⁶⁶ *Fraser v. Evans* [1969] 1 All ER 8, 10.

¹⁶⁷ *Id.* at 12.

¹⁶⁸ *Id.*

readers to take a liberal attitude towards sexual activity and drug use.¹⁶⁹ The Court, while articulating strong endorsements of the importance of the right to freedom of expression, nevertheless found that the prohibition on sales fell within the UK's margin of appreciation. The Court accorded considerable weight to the fact that *The Schoolbook* was aimed at children, and noted that the failure of authorities in other European countries to ban the book did not limit the UK's discretion to do so.

In the *Müller* case, the European Court made clear that governments may prohibit the sale of obscene material to youths under 18, or their display in such manner that youths could have access to them.¹⁷⁰ In that case, the Court upheld an obscenity conviction and fine for painting and displaying sexually explicit paintings at an exhibition open to the public including children.

Although the European Court has not ruled on the legitimacy of blasphemy laws, the Commission has ruled inadmissible applications challenging the UK's common law crime of blasphemous libel which prohibits publication of material that produces shock or resentment among Christians even in the absence of any intent to shock. In the *Gay News* case,¹⁷¹ the applicant, a respected writer, had been convicted for publishing a poem which depicted Christ as a homosexual, even though he published the poem in a magazine with a predominantly gay readership and thus could not be shown to have had any intention to shock. In the *Choudhury* case,¹⁷² the applicants were Muslims who had sought to have Salman Rushdie prosecuted for writing *The Satanic Verses*. The UK courts refused to prosecute him on the ground that the blasphemy statute protects only the Christian religion; the Commission, in ruling the application inadmissible, stated that the UK's failure to provide a cause of action for Muslims did not violate the UK's obligation not to discriminate in the protection of rights recognized under the European Convention.

While most of the decisions of the Court or Commission which have considered restrictions on expression based on public morals have upheld the restrictions, the Court has made clear that a state's discretion in this field is not unfettered. A restriction is particularly likely to be found disproportionate where it seems to have a negative impact on health and where it does not admit exceptions in the interest of protecting health. Thus, in *Open Door Counselling, Well Woman Centre and Others v. Ireland*, the Court rejected Ireland's claim that the prohibition on information about where to obtain legal abortions outside of Ireland was necessary to protect public morals.¹⁷³

Canada

The Supreme Court upheld the constitutionality of a law which prohibits the distribution or exhibition of any obscene publication, defined to be "any publication a dominant characteristic of which is undue exploitation of sex or of sex and ... crime, horror, cruelty [or] violence".¹⁷⁴

¹⁶⁹ *Handyside v. United Kingdom*.

¹⁷⁰ *Müller & Ors. v. Switzerland*.

¹⁷¹ 5 EHRR 123 (1983).

¹⁷² App. No. 17439/90.

¹⁷³ *Open Door Counselling and Dublin Well Woman Centre v. Ireland*, para. 68. See Section 4.12 supra for a more detailed discussion of this case.

¹⁷⁴ *Butler v. Her Majesty the Queen*, Judgment of 27 Feb. 1992.

The Court noted that, in deciding whether exploitation had been undue, juries must apply "the community standard of tolerance test" by which they must consider the kind of publication to which they would not tolerate other Canadians being exposed. What the community will tolerate depends on the degree of harm that may flow from exposure; harm here refers to the likelihood that exposure will lead a person to act in an anti-social manner.

Juries may not find a publication obscene if the portrayal of sex is essential to a wider artistic, literary, scientific or other similar purpose, and they must resolve any doubts in favour of freedom of expression.

The Court ruled that pictures and movies of sexual activity come within the realm of expression entitled to protection since this form of expression is not inherently violent. However, the Court ruled that the law at issue was a permissible limitation on expression because: (1) the overriding objective of the provision is not moral disapprobation but the avoidance of harm to society; (2) while a direct link between obscenity and harm to society may be difficult to establish, it nevertheless is reasonable to presume that exposure to images can bear a causal relationship to changes in attitudes and beliefs; and (3) the law constitutes a minimal impairment of freedom of expression in that it criminalizes only the public distribution and display of material that creates a risk of harm to society.

India

The Supreme Court ruled that directions to the film review board for determining when a film should be banned as offensive to public morals were flawed in that they did not direct the board to consider artistic or social merit. In so ruling, the Court stated:

Our standards must be so framed that we are not reduced to a level where the protection of the least capable and the most depraved amongst us determines what the morally healthy cannot view or read. ... In our scheme of things, ideas having redeeming social or artistic value must also have importance and protection for their growth. Sex and obscenity are not always synonymous and it is wrong to classify sex as essentially obscene or even indecent or immoral.¹⁷⁵

Accordingly, Chief Justice Hidayatullah, writing for the Court, ruled that a film was entitled to a certificate for unrestricted viewing, even though it included a brief scanning shot of Bombay's red light district showing prostitutes wearing short skirts.

7.10 PROPERTY RIGHTS OF OTHERS

Council of Europe

Because freedom to impart information may extend "only to the person or body who produces, provides or organizes it", the European Commission has ruled that a publication has no right to reproduce information protected by copyright.¹⁷⁶

¹⁷⁵ *K A Abbas v. Union of India* note 85 supra at 498.

¹⁷⁶ *De Geillustreerde Pers NV v. The Netherlands*, Commission Report, 8 D & R 5 (1976).

Germany

Three decisions of Germany's Constitutional Court (FCC) establish where it draws the line between permissible advocacy of economic sanctions and the application of impermissible economic pressure.

In the *Lüth* case, the Director of the Hamburg Press Club, who was also a member of the Hamburg Senate, publicly urged owners of movie theatres not to show the film *Unsterbliche Geliebte* by Veit Harlan on the ground that Mr Harlan had directed several strongly anti-Semitic films and had been Germany's most celebrated film director during the Nazi period. Mr Harlan applied for an injunction to stop Mr Lüth from calling for a boycott, which the High Court granted on the ground that the boycott call interfered with Mr Harlan's right under the Civil Code to pursue a profession. In reversing the decision, the FCC observed:

Even though freedom of expression is primarily a right of the individual against the government, government is also compelled to provide the space and climate for the freedoms actually to be used.¹⁷⁷

Thus, when deciding an action between private individuals, the courts must ensure compliance with the Constitution's guarantee of freedom of expression. The interests of the speaker must be balanced against the freedom of the film director to produce and perform artistic work and to pursue his profession. Whether or not encouragement of the boycott violated Mr Harlan's right to pursue his profession depended on the dominant motive, target and purpose, and truth of the statement. The FCC found that all were lawful: the motive was not to pursue personal economic interests; the target and purpose were to counter the worldwide impression that Mr Harlan's ideas represented prevailing public opinion in Germany; and the statement that Mr Harlan had not been completely cleared of genocide by the Allied court was sufficiently true in that the court had found him guilty of the requisite objective and subjective elements of the crime (but had accepted his defence that he could not have stopped the showing of his film without endangering his life).

The case, decided in 1958, remains one of the leading cases in the freedom of expression field; it is frequently cited for the proposition that expression designed to contribute to public debate on a matter of legitimate public interest is entitled to a greater degree of protection than expression aimed at a private, in particular a commercial, interest.

In a 1969 case, the FCC ruled illegal a boycott called by the Axel Springer publishing house against *Blinkfür*, a weekly paper distributed in the Hamburg area which published the schedule of East German TV programmes.¹⁷⁸ Springer urged news agents not to sell *Blinkfür*, and stopped doing business with newsagents that continued to do so, on the ground that the East German government interrupted programmes to make propaganda statements. The FCC ruled that advocacy of a boycott is legal only if the means to enforce the boycott are legal, such as by publicizing facts and making convincing arguments. Means are unlawful if they leave no real room for individual choice. The FCC concluded that the means were unlawful because the economic pressure Springer exerted left no room for effective choice.

¹⁷⁷ 7 FCC 198, (1958), 205 (*Lüth* case).

¹⁷⁸ 25 FCC 256 (1969) (*Blinkfür* case).

In a 1982 case, the FCC decided a similar case. The publisher of *X*, an information service for distributive trades, urged traders to boycott producers who offered higher discounts to wholesale traders.¹⁷⁹ A chain of supermarkets which was a target of the boycott obtained an injunction and an award of damages from the lower court. The FCC, in ruling the boycott illegal, concluded that the publisher was motivated by economic interests and not by an interest in informing the public about a possible misuse of power by supermarket chains, in part because *X* was sent only to traders and not to the general public.

United Kingdom

In the case of *Middlebrook Mushrooms Ltd*, the plaintiff had succeeded in getting an interlocutory injunction enjoining members of the Transport and General Workers Union from distributing leaflets outside a supermarket. The leaflets stated that Middlebrook had dismissed 89 employees for refusing to accept a pay cut and urged the public to support the employees by not buying the plaintiff's mushrooms.

Middlebrook sought a permanent injunction relying on a theory of tortious interference with supply contracts between it and the supermarket. The Court of Appeal, Civil Division (England and Wales), ruled that, to be unlawful, the actions had to be directed at one of the parties to the contract and that, accordingly, the union members were entitled to distribute the leaflets since they were directed at the public and not at the supermarket.

As stated by the Court:

In the present case it is an important fact that the suggested influence was exerted, if at all, through the actions or the anticipated actions of third parties who were free to make up their own minds. Though counsel for the appellants did not place any specific reliance on Article 10 of the European Convention it is relevant to

bear in mind that in all cases which involve a proposed restriction on the right of free speech the court is concerned, when exercising its discretion, to consider whether the suggested restraint is necessary. In the present case, however, one does not reach the question of the exercise of discretion. In my judgment the distribution of these leaflets in the way proposed does not fall within the principle [concerning tortious interference] at all.¹⁸⁰

¹⁷⁹ 62 FCC 230 (1982).

¹⁸⁰ *Middlebrook Mushrooms Ltd. v. Transport and General Workers Union and Others*, Court of Appeal, Judgment of 16 Dec. 1992, *The Times Law Report* 18 Jan. 1993, ____.

CHAPTER 8

PRIOR CENSORSHIP

This chapter summarizes cases in which courts were asked to enjoin or in other ways restrict expression in advance of publication. Included here are licensing requirements which may have the effect of keeping a newspaper from publishing or a journalist from working, orders suspending publication of newspapers, and customs and other trans-border controls which seek to exclude information or ideas from entering the country. In some circumstances and jurisdictions, these restraints may be imposed pursuant to summary procedures requiring a lower showing of the need for a restriction; in other jurisdictions a higher showing is required to restrain expression in advance of publication than to punish it subsequently.

8.1 INJUNCTIONS AGAINST PUBLICATION

Council of Europe

Article 10 of the European Convention does not prohibit the imposition of all prior restraints on publication. Nevertheless, the European Court, in the *Spycatcher* case, emphasized that "the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court". The Court noted that this is especially so as regards the press, since "news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest."¹

In the *Spycatcher* case, the UK courts had issued and upheld various injunctions which prohibited newspapers from publishing excerpts of the book *Spycatcher*, the memoirs of a former intelligence officer, even after it had been published in the United States and other countries. (The banning of the book itself was not challenged.) The UK government claimed that the injunctions were necessary for national security reasons to preserve the confidence of other governments in the secrecy of information held by the intelligence services, to enforce the duty of confidentiality owed by Crown servants, and to safeguard the rights of the Attorney-General pending final determination of the injunction's lawfulness by the House of Lords. The Court ruled that, once the information had been published elsewhere, the interest of the press and public in imparting and receiving information outweighed the government's interests.² However, the Court also ruled that, prior to publication elsewhere, the injunctions came within the government's margin of appreciation.

Organization of American States

The American Convention on Human Rights, in Article 13(2), expressly prohibits all "prior censorship".

Austria

¹ *The Observer and Guardian v. United Kingdom*, para. 60. See also Section 6.1 supra for further discussion of this case.

² *Id.* at para. 65.

The Austrian Constitutional Court has ruled that a law which required permission to advertise job openings in other countries violated the Constitution's prohibition of censorship.³

Belgium

Belgian law does not permit any prior restraints in the interest of protecting reputation, only penalties *a posteriori*.⁴

France

A Paris court refused to order the seizure of an issue of a weekly paper, even though it concluded that the issue probably violated a convicted person's privacy rights, his right to fair judicial proceedings, and the attorney-client privilege. A Paris weekly, *L'évènement du jeudi*, published excerpts of a telephone conversation between a reporter from *Le Monde* and the lawyer of Dr Garretta, a French physician who had recently been sentenced to four years' imprisonment for his involvement in France's blood transfusion scandal. The conversation had been intercepted by a Cable News Network reporter using a scanner. Dr Garretta asked the court to order the publication's seizure. The court refused. It ruled that, while his right to privacy, fair judicial process and attorney-client confidentiality had been invaded, entitling him to damages, there had been no invasion of the core of his privacy which could justify seizure. The violation thus did not have the "intolerable" aspect necessary to justify such an extreme step.⁵

The Paris court subsequently ordered *L'évènement du jeudi* to pay damages (F50,000) to Dr Garretta and one of his lawyers, and to pay the costs of publishing the judgment in two newspapers.⁶

Ireland

The High Court rejected a claim that publication of a book written by a former member of the British Secret Service, allegedly in violation of the duty of confidentiality, should be enjoined pending a final decision on the merits. The Court stated:

The exercise of a constitutional right cannot be measured in terms of money; what is at stake is the very important constitutional right to communicate *now* and not in a year or more when the case has worked its way through the courts.⁷

United States

The ban on judicially-imposed prior restraints on publication of information by newspapers is, under United States law, all but absolute. A prior restraint is presumptively unconstitutional, with

³ VFslg 12394/1990.

⁴ Rechtbank Brussel (Kort Ged.), Case of 22 Aug. 1991.

⁵ Paris civil court, decision of 4 Nov. 1992, reported in *Le Monde*, 6 Nov. 1992.

⁶ Id.

⁷ *Attorney-General for England and Wales v. Brandon Book Publishers Ltd* [1987] ILRM 135 (Carroll, J), 138. See also Section 7.8 *supra*.

the petitioner bearing the "heavy burden of showing justification for the imposition of such a restraint."⁸

While US jurisprudence on prior restraints takes the First Amendment to the Constitution as its starting point, the reasoning of US courts is equally applicable to any system which recognizes the special importance of freedom of expression and of the press in sustaining an informed citizenry and safeguarding democracy. As stated by Blackstone in 1765:

The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publication and not in freedom from censure for criminal matters when published.⁹

Under US law a party seeking a prior restraint against the press or other mass media must satisfy a three-pronged showing: (1) publication must pose a clear threat of immediate and irreparable damage to a near sacred right; (2) the prior restraint must be effective; and (3) no less extreme measures may be available.¹⁰

The Supreme Court has indicated that exceptions to the prohibition of prior restraints should be tolerated only concerning a very narrow range of publications: "when a nation is at war", information that amounts to "actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops"; "incitements to acts of violence and the overthrow by force of orderly government"; obscene publications;¹¹ and statements that pose a clear and imminent threat to a defendant's fair trial rights where those rights cannot be safeguarded by less onerous means.¹² Other rights, although they may merit great protection, simply are not of the same magnitude. For instance, an individual's right to privacy and even his constitutional right to be free of unlawful searches and seizures may never justify a prior restraint against a newspaper; the sole remedy is a subsequent action for damages.¹³

In the *Pentagon Papers* case, the Supreme Court observed that "any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."¹⁴ Thus it ruled unconstitutional a prior restraint sought by the government on publication during the Vietnam War of 47 volumes of "top secret" documents on grounds of national security and maintaining good relations with other countries. The documents described in detail the internal decision-making procedures of the US government leading to its involvement in the war and also

⁸ *Organization for a Better Austin v. Keefe*, 402 US 415, 419 (1971).

⁹ W Blackstone, *Commentaries on the Law of England*, (1765).

¹⁰ *Nebraska Press Association v. Stuart*, 427 US 539, 565-66 (1976); *New York Times Co. v. United States*, 403 US 713, 730 (1971) (*per curiam*) (the *Pentagon Papers* case).

¹¹ *Near v. Minnesota*, 283 US 697, 716 (1931).

¹² *E.g.*, *Cable News Network v. Noriega and United States*, 111 S.Ct. 451 (1990).

¹³ *In Re. Providence Journal Co.*, 820 F.2d 1342, 1350 (1st Cir. 1986).

¹⁴ The *Pentagon Papers* case, note 10 *supra*, 403 US 713 (1971).

highly sensitive information regarding the efforts by other governments to assist in arranging an end to the war. The Supreme Court refused to uphold the restraint, even though the source who provided the papers may well have obtained them in breach of the criminal law and even though, in the view of a majority of the Court, publication would cause "substantial damage to public interests".¹⁵

Only once in the 200-year history of the First Amendment has the Supreme Court upheld a prior restraint on publication, and then only for a matter of three weeks and only in the extraordinary circumstances where publication could have constituted an immediate and *per se* violation of a "near sacred right", namely, a criminal defendant's right to a fair trial. In *Cable News Network v. Noriega and United States*, CNN was enjoined temporarily from broadcasting tapes of conversations between Manuel Noriega and his lawyers.¹⁶ The trial judge issued the injunction after CNN refused to disclose the tapes to the trial judge *in camera* or even to a magistrate not involved in the trial,¹⁷ thus utterly preventing the judge from evaluating whether any of the tapes contained material either protected by the attorney-client privilege or whose disclosure would pose a clear threat of irreparable prejudice to Noriega's constitutional right to a fair trial. If the tapes contained such information, then their disclosure would require dismissal of all charges. Under such extraordinary circumstances, the district court found that no post-publication remedy would be able to restore the litigants' rights.

In upholding the interlocutory injunction, the Eleventh Circuit Court of Appeals stressed the rigorous showing necessary to establish a "clear" threat of "immediate and irreparable damage" before a prior restraint may be imposed by a judge, even in the interest of assuring such a "sacred" right as the criminal defendant's right to a fair trial: "there must be an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil."¹⁸

After the Supreme Court upheld the injunction in a two-paragraph memorandum decision, CNN made the contested tapes available *in camera* first to a magistrate and thereafter to the trial judge. The judge concluded that any prejudice that might arise from the tapes could be cured by carefully screening the jury and expanding sequestration orders already directed to the prosecution team and, accordingly, lifted the injunction. The entire judicial procedure from entry to lifting of the injunction lasted less than three weeks.

¹⁵ Id. at 731; see also id. at 758 and 762-63. In *United States v. The Progressive, Inc.* 486 F. Supp. 5 (W D Wisc. 1979), the main case since the *Pentagon Papers* case in which a court has considered a government request for a prior restraint based on national security interests, the government itself moved to vacate a preliminary injunction after the challenged material was published by a magazine not party to the litigation.

¹⁶ 111 S.Ct. 451 (1990).

¹⁷ CNN argued that the court should get the tapes from the prison where Noriega was held but refused to declare that the recordings it had in its possession were prison recordings. CNN thus failed to show that the court could get all relevant tapes from any source other than CNN.

¹⁸ *United States v. Noriega*, 917 F.2d 1543, 1549 (11th Cir. 1990) (quoting *Craig v. Harney*, 331 US 367, 376 (1947)).

The trial judge, recognizing the considerable attention paid to the case, went to great lengths to make clear the narrowness and minimal precedential value of his ruling.¹⁹ The only reason for the entry of the preliminary injunction, he stressed, was CNN's refusal to make the tapes available to him or a magistrate; that refusal prevented the careful balancing of constitutional interests and tailoring of remedies required by Supreme Court precedent.

Several courts which have refused to issue or uphold an injunction against the press have done so on grounds that the court did not have territorial jurisdiction over all media that were apt to have access to the information, and in any event that it would be unable to serve notice of any restraining order on all potentially interested media.²⁰ In addition, and of particular relevance to the UK *Spycatcher* cases, courts have refused to find that a prior restraint would be effective where significant portions of information sought to be restrained had already been disseminated by the media.

US courts have reasoned that interlocutory injunctions against the media, especially daily newspapers, do not preserve the *status quo*:

The *status quo* of daily newspapers is to publish news promptly that editors decide to publish. A restraining order disturbs the *status quo* and impinges on the exercise of editorial discretion. News is a constantly changing and dynamic quantity. Today's news will often be tomorrow's history.²¹

As recognized by the Supreme Court, the heavy presumption of unconstitutionality against a prior restraint "is not reduced by the temporary nature of [the] restraint".²²

8.2 NEWSPAPERS: LICENSING REQUIREMENTS, SUSPENSIONS AND SPECIAL TAXES

Council of Europe

Licensing requirements, mandating government approval before a new entity may begin publishing, although not expressly prohibited by the European Convention are widely held to be prohibited implicitly. Neither the European Court nor the Commission have ruled on an application challenging a licensing requirement, reflecting the virtual demise of the requirement throughout the member states of the Council of Europe. (In contrast, *registration requirements*, which require registration of the names and addresses of those legally responsible for a publication, are permitted under the European Convention and are present in several European countries.)

Israel

The Supreme Court, sitting as the High Court of Justice, held in Israel's landmark case on freedom of expression that the Minister of the Interior had exceeded his jurisdiction in ordering the

¹⁹ See *United States v. Noriega*, 752 F.Supp. 1045 (S.D.Fla., 6 Dec. 1990) (slip opn., 10).

²⁰ See, e.g., *Re. Providence Journal Co.*, note 13 supra.

²¹ Id.; see also *United States v. Dickinson*, 465 F.2d 496, 512 (5th Cir. 1982).

²² *Nebraska Press Association v. Stuart*, note 10 supra at 559.

suspension of two Communist newspapers, *Kol Ha'am* and *Al-Ittihad*, for 10 and 15 days respectively. The Minister had acted under powers in the Press Ordinance which allowed for the suspension of publications considered "likely to endanger the public peace".

After consulting a number of authorities, Judge Agranat, writing for the Court, ruled that a publication may be suspended, or other form of expression restrained, only if

it is probable that as a consequence of the publication, a danger to the public peace has been disclosed; the bare tendency in that direction in the matter published will not suffice to fill that requirement. Moreover, the Minister of Interior is bound to estimate the effect of the matter published on the public peace only according to the standard of what is reasonable in the light of the surrounding circumstances; and in such estimation, the length of time likely to pass between the publication and the consequential event which constitutes the harm to the public peace is liable to be an important factor, though not necessarily a decisive one. Finally, even if the Minister is satisfied that the danger caused by the publication is "probable", he ought carefully to consider whether it is so grave as to justify the use of the drastic power of suspending the newspaper or whether effective action is not available for the purpose of cancelling out the undesirable effect consequent upon the publication, by less stringent means, such as discussion, denial and counter-explanation.²³

South Korea

The National Coalition for Democracy (*Chonminnyon*), a Korean private association, was charged in 1989 with violating the Act on Registration of Periodicals for having published a bi-monthly newspaper for three months without having registered with the Ministry of Information. The Act requires registration of basic information about a planned periodical as well as evidence of "provision" of a high-speed duplicating machine.

Chonminnyon argued that the requirement of registration violated Article 21(2) of the Constitution which provides that "[l]icensing or censorship of speech and the press ... shall not be recognized." The government argued that the requirement was valid under Article 21(3) which provides that "[t]he standards of news service and broadcast facilities and matters necessary to ensure the functions of newspapers shall be determined by law." The Seoul Criminal District Court referred the question to the Constitutional Court which (by a vote of 8 to 1) held that the requirement concerning a high-speed duplicating machine was constitutional only if interpreted as requiring some form of access to such a machine (by lease or contract) and not necessarily ownership. Accordingly, to the extent that *Chonminnyon's* failure to register was due to the fact that it did not own a duplicating machine of the kind specified in the statute, the criminal charges were predicated on an unconstitutional interpretation of the statute and thus had to be dismissed.²⁴ The decision thus represents a qualified victory. It is to be noted, however, that the Court majority did not rely on Article 21(1) of the Constitution which guarantees to all citizens "freedom of speech and of the press".

²³ *Kol Ha'am Company Ltd. & Al-Ittihad Newspaper v. Minister of the Interior*, High Court 73/53 (per Agranat J), discussed in *Selected Judgments of the Israeli Supreme Court*, Vol. I (1948-53), 90. See also Section 4.1 supra for further discussion of this case.

²⁴ *Case 90-Honka-23*, Constitutional Court of the Republic of Korea, Judgment of 26 June 1992. Justice Jeong Soo Byun, dissenting, would have accepted *Chonminnyon's* argument that the equipment and other registration requirements were unconstitutional as a form of prior licensing.

Namibia (South West Africa)

The Supreme Court of South West Africa set aside the ruling of the Cabinet that *The Namibian* should pay R20,000 as a deposit for registration as a newspaper. The Court found that in reaching its decision the Cabinet had taken irrelevant matters into account, in particular the fact that the newspaper's editor had previously written articles critical of Cabinet members. The Chairman of the Cabinet had admitted in an affidavit that the editor's past activities had "naturally" been taken into account since the Cabinet believed that attacks upon it would lower the status of the Cabinet and its members, and possibly endanger State security.²⁵

The Netherlands

The Supreme Court in 1892 declared unconstitutional all forms of administrative licensing requirements affecting the dissemination of printed matter.²⁶

Senegal

The Supreme Court annulled a joint order of the Ministry of the Interior and the Ministry of Communication which prohibited the circulation, distribution and sale of the newspaper, *Closed Letter*. The Ministries had issued the order in the mistaken belief that *Closed Letter* was a foreign publication (when in fact the owner was Senegalese). In annulling the order, the Supreme Court stated:

Each person has the right to express and circulate freely his opinions by the spoken word, the pen and the image This right is limited by the prescriptions of the laws and rules, as well as by respect for the honour of others. No provision of the law of 29/7/1881 [from the French press law] foresees the possibility of an administrative prohibition of a newspaper or national document. Such a prohibition can only occur within the framework of the provisions of ... the law ... relating to a state of emergency and a state of siege. But it has been established in the case in point that the order was not made on the basis of these provisions.²⁷

United States

The Supreme Court used the doctrine against prior restraints to invalidate a state tax on gross receipts of newspapers with circulations of over 20,000 copies per week. The Court reasoned that the tax was a "deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled by virtue of the constitutional guarantees".²⁸

8.3 LICENSING OF JOURNALISTS

²⁵ *Free Press of Namibia (Pty) Ltd v. Cabinet for the Interim Government of South West Africa*, 1987 (1) SA 614, Supreme Court of South West Africa, Judgment of 9 Nov. 1986. See further discussion of this case in Sections 4.5.1 and 6.2.3 supra).

²⁶ HR 7 Nov. 1892, W 625.9.

²⁷ *Abdourahmane Cisse*, Judgment No. 1 of 6 Feb. 1974, Supreme Court of Senegal.

²⁸ *Grosjean v. American Press Co.*, 297 US 233, 250 (1936).

Organization of American States

The Inter-American Court of Human Rights issued an advisory opinion that compulsory licensing of journalists violates Article 13 of the American Convention if it "denies any person access to the full use of the news media as a means of expressing themselves or imparting information." The case came before the Court when a journalist challenged his conviction and sentence of imprisonment for having violated Costa Rica's licensing law. The law prohibited individuals who were not members of a journalists' association from engaging in the remunerated practice of journalism.

It is the mass media that make the exercise of freedom of expression a reality. This means that the conditions of its use must conform to the requirements of this freedom, with the result that there must be, *inter alia*, a plurality of means of communication, the blurring of all monopolies thereof, in whatever form and guarantees for the protection of the freedom and independence of journalists.

The Court acknowledged that in virtually all democratic countries certain professionals, such as doctors and lawyers, are required to be members of a professional association. Journalists, however, reasoned the Court, are different:

The problem results from the fact that Article 13 expressly protects freedom to seek, receive and impart information and ideas of all kinds The practice of journalism consequently requires a person to engage in activities that define or embrace the freedom of expression which the Convention guarantees.

This is not true of the practice of law or medicine, for example.²⁹

The Court acknowledged that the goals the government sought to achieve by the restriction - good ethics, independence and high quality of journalism - were legitimate as means to promote the "general welfare" and "public order". However, it reasoned that compulsory membership in a journalists' association was not necessary to ensure those goals:

[T]he compulsory licensing of journalists does not comply with the requirements of Article 13(2) of the Convention because the establishment of a law that protects the freedom and independence of anyone who practices journalism is perfectly conceivable without the necessity of restricting that practice only to a limited group of the community.³⁰

8.4 CUSTOMS AND TRANS-BORDER CONTROLS

International Standards

Article 19 of the Universal Declaration, Article 19(1) of the International Covenant, Article 13(1) of the American Convention and Article 10(1) of the European Convention all expressly guarantee the free flow of information and ideas "regardless of frontiers". These words prohibit export and import

²⁹ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, para. 72. See also Section 4.5.1 for further discussion of this case.

³⁰ *Id.* at para. 79.

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controls which would place restrictions on the circulation of information and ideas beyond those applied by the general law.

France

The *Conseil d'Etat* (the highest court on issues relating to the exercise of public authority) upheld a decision of the Paris Administrative Court to quash a ban directed against a new French edition, published in Belgium, of the German military propaganda magazine *Signal* (published during World War II). The Minister had justified the ban on two grounds: (a) the magazine's circulation was such as to be likely to develop a renewal of Nazi ideology, and (b) it created a danger for *ordre public*. The *Conseil* noted that these two grounds were, in principle, lawful but found the evidence to support the public order ground manifestly wanting. Because there was no way to tell whether the Minister would have issued the ban only on the basis of the first ground, the *Conseil* ruled that the ban was unlawful.³¹

Germany

According to the law of 31 May 1961 on the importation of printed matter, newspapers and other printed materials may be seized at the border if they violate the laws protecting the free democratic order, international relations or the prohibition of pornography. The law has not been used for several years.³² In a leading case, the Constitutional Court (FCC) ruled that courts, in applying the importation law, must take into consideration the right of the public to *receive* information. Accordingly, because the lower court had not considered this public right, the FCC ruled illegal the confiscation of literature imported from the German Democratic Republic which supported the banned West German Communist Party.³³

Malaysia

A staff correspondent of the *Asian Wall Street Journal* was granted an employment pass to work in Malaysia for two years but was served with a cancellation notice before the expiry of the pass. The notice stated that he had contravened or failed to comply with the Immigration Act and Regulations, and that his presence was or would be prejudicial to the security of the country. The Supreme Court of Malaysia held that the correspondent had a legitimate expectation to stay in Malaysia until the expiry of his employment pass and that "any action to curtail that expectation would in law attract the application of the rules of natural justice" Accordingly, because he was not given an opportunity to be heard before his pass was cancelled, the Court ordered the cancellation quashed.³⁴

³¹ Decision of 17 April 1985, *Ministre de l'Intérieur et de la décentralisation c. Société des Archers*, 100 (concl. Stim), *Revue de droit public* (1985), 1363.

³² See U Karpen, "Press Freedom in Germany", in *Press Law and Practice: A Comparative Study of Press Freedom in European and Other Democracies* (London: ARTICLE 19, 1993), 83.

³³ 27 FCC 71 (1969); see also E Barendt, *Freedom of Speech* (Oxford: Clarendon Press, 1987), 111-12.

³⁴ *J P Berthelsen v. Director-General of Immigration* [1987], 1 *Malaysian Law Journal* 134 (Supreme Court, Malaysia).

CHAPTER 9

NON-CONTENT BASED REGULATION

This chapter brings together cases in which governments have attempted to justify restrictions on expression on the ground that the *manner* of expression was unduly disruptive.

Section 9.1 examines time, place and manner restrictions, most often applied to such conduct-related speech as assemblies, marches, leafleting, display of billboards and use of amplifiers in outdoor places. Although the justification for the restrictions is framed in content-neutral language, in practice these restrictions are often applied with the intention of silencing or reducing the impact of expression with which the government disagrees.

Cases concerning regulation of broadcasting are summarized in Section 9.2. Such regulations generally are aimed at protecting a society's sense of national culture or heritage, or the property rights of broadcasters.

9.1 TIME, PLACE AND MANNER RESTRICTIONS

9.1.1 General Principles

The Netherlands

In The Netherlands the time, place and manner of communication may be regulated in order to protect various public interests, including reasonable traffic flow, public order and public morals. However, the conditions placed on time, place and manner of dissemination may not frustrate the actual operation of the right guaranteed in the Constitution to receive and impart information and ideas.¹ Any manner of dissemination that, compared with other means, has a significance of its own and may serve a certain need, may be regulated only to the extent necessary and may not be prohibited altogether. The Supreme Court (*Hoge Raad*) and the Supreme Administrative Court have held that the principle applies to the following means of communication:

- (a) handing out leaflets in public;²
- (b) selling or giving away printed or written matter accompanied by an oral explanation;³
- (c) selling books as a business;⁴
- (d) placing printed pictures on a structure visible to the public;⁵

¹ Supreme Administrative Court, ARRvS 19 Jan. 1987, AB 1988, 58.

² HR 27 Feb. 1951, NJ 1951, 472.

³ HR 10 June 1952, NJ 1952, 688.

⁴ HR 22 March 1960, NJ 1960, 274.

⁵ HR 24 Jan. 1967, NJ 1967, 270.

- (e)standing, walking or driving in the street while displaying an advertisement or making propaganda;⁶
- (f)driving in a car with a loudspeaker;⁷
- (g)displaying a political statement in neon letters on a building.⁸

Only the dissemination of information in public may be regulated; private dissemination may not be regulated.⁹

According to some lower courts, a local government may prohibit dissemination on public property generally only if it designates some public locations where dissemination is lawful.¹⁰

The Supreme Court upheld local ordinances prohibiting the handing out of printed matter in the downtown area of the city between 6.00 a.m. and 11.00 p.m.¹¹ and prohibiting the sale of printed matter in the downtown area after 6.00 p.m. on weekdays and after 11.00 a.m. on Saturdays.¹² However, it ruled invalid a regulation which allowed leafleting only for two hours on two days per week.¹³

United States

The Supreme Court has developed a three-part test for evaluating the validity of a regulation which imposes time, place or manner restrictions on speech. First, the regulation must be justified without reference to the content of the regulated speech, that is, it must be content-neutral. Second, it must be "narrowly-tailored" to serve a "significant governmental interest." This does not require that a regulation must be the least restrictive possible, but it must not be "substantially broader than necessary to achieve the government's interest." Third, it must "leave open alternative channels for communication of the information."¹⁴

Speech on public property is entitled to greater protection than speech on private property; mere inconvenience to the government will not suffice to outweigh the interest in public expression. Accordingly, the second and third factors will be interpreted more stringently in public forum cases. For example, the Supreme Court has ruled unconstitutional ordinances that completely forbid distribution of leaflets in the interest of preventing litter. The Court reasoned, firstly, that the interest

⁶ HR 30 May 1967, NJ 1968, 4.

⁷ ARRvS 17 May 1983, AB 1983, 514.

⁸ HR 24 Jan. 1967, NJ 1967, 270.

⁹ HR 9 Jan. 1968, NJ 1968, 105.

¹⁰ Rechtbank Amsterdam 18 April 1984, NJCM-Bulletin 1985, 57; and Rechtbank Arnhem 8 Feb. 1985, NJCM-Bulletin 1985, 303.

¹¹ HR 20 June 1950, NJ 1950, 619.

¹² HR 22 May 1979, NJ 1979, 505.

¹³ HR 17 March 1953, NJ 1953, 389.

¹⁴ *Clark v. Community for Creative Non-Violence*, 468 US 288 (1984); *Metromedia, Inc. v. San Diego*, 453 US 490 (1981).

in keeping the streets clean is insufficiently substantial to justify preventing a person with a right to be on a public street from giving literature to people who want to receive it. Secondly, a municipality's interest in clean streets may be met by more narrowly-tailored restrictions, for instance, by prohibitions only on actual littering.¹⁵

If a regulation is found to be unconstitutional "on its face" (*i.e.*, as written rather than as applied) the courts will not enquire into whether the particular applicant's activity legitimately could have been prohibited; the applicant may not be convicted under an unconstitutional statute. Thus, a member of the organization Jews for Jesus who solicited contributions at the Los Angeles airport in an intrusive manner possibly could have been convicted under a proper statute. However, his conviction was reversed because the law used against him - which prohibited any individual or group from engaging "in First Amendment activities within the Central Terminal Area" of the airport - was unconstitutionally overbroad.¹⁶

9.1.2 Permits for Marches, Assemblies and Other Means of Expression

Germany

The Constitutional Court (FCC) ruled that a local permit which banned anti-nuclear demonstrators from an area within 10 kilometres of a nuclear power plant's construction site violated the principle of proportionality. The local authority contended that the 10 km ban was necessary to prevent damage to the site, noting that in recent demonstrations some protestors had tried to demolish the fence surrounding the plant. The FCC, acknowledging that proximity would give the protest greater impact, balanced that interest against the local authority's interest in preventing property damage. Accordingly, the Court ruled that the local authorities could ban protests within a 5 km radius but that a 10 km ban was unjustifiable. The authorities were entitled to ban an assembly only if convinced that the ability to dissolve the assembly in case of actual problems would not suffice to prevent violence. In addition, the threshold for imposing a ban is higher when the organizers show a willingness to cooperate with the police to prevent lawless conduct. In the instant case, the willingness of the organizers to cooperate with police was an additional factor rendering the 10 km ban unjustifiable.¹⁷

Japan

Japanese law affords considerable protection to freedom of assembly. The most influential precedent has been the judgment of the Grand Bench of the Supreme Court (consisting of all 15 Justices) in the *Tokyo Ordinance* case.¹⁸ In 1959 and 1960, massive, mostly non-violent but angry demonstrations took place across Japan, constituting the largest mass movement in the country's history. At issue was opposition to the government's ratification of a revised security treaty with the United States. In cases brought against demonstrators who had held marches without applying for permits, a number of district courts in Tokyo and other cities ruled local public safety ordinances unconstitutional *per se* for requiring demonstration permits.

¹⁵ *Schneider v. State*, 308 US 147 (1939).

¹⁶ *Airport Commissioners of Los Angeles v. Jews for Jesus, Inc.*, 482 US 569 (1987).

¹⁷ 69 FCC 315 (1985) (Brokdorf case). See also Section 4.13 for further discussion of this case.

¹⁸ *Ito v. Japan*, 14 Keishū 1243; Sup. Ct, Grand Bench, 20 July 1960, translated in J Maki, *Court and Constitution in Japan: Selected Supreme Court Decisions*, (1964).

On special appeal, the Supreme Court upheld the constitutionality of the Tokyo Public Safety Ordinance, but on narrow grounds. The court recognized that the guarantee of freedoms such as the freedom of assembly "is the most important feature that distinguishes democracy from totalitarianism," but, as with other fundamental rights, citizens "have a responsibility to exercise them for the public welfare." Especially with respect to large, angry demonstrations that leaders and police may find hard to control, it is "unavoidable that local authorities ... prior to the fact" will adopt by ordinance "minimum measures necessary to maintain law and order"; these ordinances, however, are always subject to judicial review. The Tokyo Ordinance required the Public Safety Commission to grant a permit upon request unless "it is clearly recognized" that the collective activity in question "will directly endanger the maintenance of the public peace", an extremely rare occurrence.

Malaysia

The Supreme Court of Malaysia held unreasonable a condition in a licence that restricted the number of speakers within the time limit granted by the licence. A licence had been issued to an opposition party, the Democratic Action Party (DAP), to hold a solidarity dinner and a lion dance in a public place for six hours. The licence was subject to several conditions, two of which the appellant challenged on the ground that they abridged the constitutional right of freedom of speech. The High Court held that a condition forbidding any speeches that touched on political issues was unreasonable since it violated the right to freedom of speech, but held that a condition restricting the number of speakers to seven was valid. On appeal, the Supreme Court held that there was no valid reason for restricting the number of speakers since the police had the means to deal with any infringement of the overall time limit and, accordingly, that the condition was unreasonable.¹⁹

Sri Lanka

Three members of a local branch of the Christian Workers Fellowship (a non-governmental organization) complained to the Supreme Court that the Sub-Inspector of Police and the Chairman of the local Urban Council had prevented them from holding a seminar on human rights at the Urban Council hall, in violation of their constitutional rights to freedom of expression, peaceful assembly and association. The petitioners had paid the stipulated fee to the Urban Council and had obtained written permission from the police inspector to use the hall on the given date to hold an "adult education seminar". The event was widely publicized as a discussion of "Decisions of the Supreme Court on Human Rights" and as "a seminar" on Supreme Court decisions on human rights which were "very important in relation to arrests, detentions, assaults, torture and unequal treatment before the law". Before the seminar was set to begin, the police inspector, at the request of the Urban Council Chairman, ordered the petitioners to stop the meeting on the ground that they planned to address "a subject contrary to the permission granted." When they proceeded to start the meeting, the inspector ordered the audience to disperse.

The question addressed by the Supreme Court was "whether it could reasonably be said that a review of the decisions of the Supreme Court in relation to Human Rights falls within the subject of Adult Education."²⁰ Justice de Silva, writing for a unanimous Court, concluded that "there is little doubt that a discussion of the Supreme Court decisions on Human Rights falls well within the area of 'adult education'". He added:

¹⁹ *Chai Choon Hon v. Ketua Police Daerah Kampar and the Government of Malaysia* [1986] 2 *Malaysia Law Journal* 203 (Supreme Court, Malaysia).

²⁰ *Wanigasuriya & Ors. v. Sub-Inspector A D S Peiris & Ors*, Supreme Court App. No. 199/87, decision of 29 Sept. 1988, 6.

Freedom of speech and expression necessarily includes the freedom to impart knowledge, to disseminate knowledge and to propagate ideas. `Knowledge' is not confined to any particular branch of learning. ... [A] meaningful discussion on Human Rights would not be complete without reference to the relevant Supreme Court decisions.²¹

Because both respondents had acted in good faith, although mistakenly, and the police inspector had merely implemented the Chairman's decision to terminate the meeting, the Chairman alone was ordered to pay a small fine of SLR1,500 and SLR250 for costs of the proceedings.

The Supreme Court of Sri Lanka ruled unconstitutional an emergency regulation which permitted the arrest of any person who, without prior authorization from the police, "affix[ed] in any place visible to the public or distribute[d] among the public any posters, handbills or leaflets".²² The Court noted that the test for assessing the legitimacy of measures of "pre-censorship" is more liberal than the test applied by the US Supreme Court. "However, any system of pre-censorship which confers unguided and unfettered discretion upon an executive authority without narrow, objective and definite standards to guide the official is unconstitutional." Moreover, as in the US, a person faced with an unconstitutional permit restriction may ignore it and engage with impunity in the exercise of freedom of expression. The Court concluded that, because the regulation at issue did not enumerate the grounds upon which a permit could be refused, it violated the constitutional prohibition of discriminatory state action.

United States

Where a time, place or manner regulation requires that a permit or other form of administrative approval be obtained, the grounds upon which approval may be denied must be set forth specifically and narrowly. A regulation is unconstitutional if it grants too much discretion to the official charged with granting or denying permission. Thus, for example, the Supreme Court struck down as overbroad a municipal ordinance which forbade the distribution anywhere within the town of "literature of any kind", unless a permit had first been obtained from the City Manager. The applicant had been convicted for distributing religious literature published by the Jehovah's Witnesses. The Court reasoned that the City Manager had been given the power of a censor, since his authority to deny a permit was not limited to content-neutral interests, such as avoidance of littering or disorderly conduct.²³

The Court similarly ruled unconstitutional an ordinance that required speakers to obtain a permit before making a public speech and allowed a permit to be denied if the speaker was likely "to ridicule or denounce any form of religious belief" or to "expound atheism or agnosticism [in] any street." The town used these provisions to deny a permit to a Baptist minister who had previously made verbal attacks on Catholics and Jews. The Court ruled that the speaker could be banned from speaking only if there was clear evidence that his words were likely to incite imminent violence or disorder. Otherwise, the only acceptable response was to permit him to speak and to take action

²¹ *Id.*

²² *M Joseph Perera & Ors v. Attorney-General*, Supreme Court App. Nos. 107-109/86, decision of 25 May 1987 (per Sharvananda, C J), 19-20. For further discussion of this case, see Sections 4.2.1 and 6.2.4 *supra*.

²³ *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

(such as by ordering him to stop and/or punishing him) if his speech in fact was likely in the particular circumstances to incite violence or disorder.²⁴

Moreover, when a permit requirement is unconstitutional on its face, a speaker may ignore the requirement and challenge it after he or she has been arrested. Thus, for instance, the Court ruled that Martin Luther King, Jr. and others could not be convicted for conducting a civil rights march without a permit. A local ordinance in Alabama required issuance of parade permits unless denial was required by "the public welfare, peace, safety, health, decency, good order, morals or convenience." The Alabama State Supreme Court gave a narrow interpretation to the ordinance. The US Supreme Court ruled that the state court's "remarkable job of plastic surgery upon the face of the ordinance" was sufficient to save it from being unconstitutional but that, nevertheless, Dr King and others could not be convicted for ignoring it since it "would have taken extraordinary clairvoyance" for anyone at the time of the march to have foreseen the state court's interpretation.²⁵

In addition, a speaker may ignore the denial of a permit when the denial is issued an unreasonably short time before the scheduled event (in light of all the circumstances) or when the speaker can show that he or she tried unsuccessfully to obtain a prompt judicial review of the denial.²⁶

9.2REGULATION OF BROADCASTING

Council of Europe

The European Court has held that states may regulate the technical aspects of broadcasting within their territories, but that any regulation of content must comply with the requirements of Article 10(2).²⁷

The European Convention on Transfrontier Television (ECTT), which recommits states parties to comply with Article 10,²⁸ also imposes certain regulations on broadcasting. In particular, states parties must restrain broadcasters from transmitting pornography or incitements to racial hatred,²⁹ afford a right of reply,³⁰ and reserve at least 50 per cent of transmission time (not including news, sports, and advertising) for programmes produced in Europe.³¹ The Convention also regulates the content of advertising.³²

²⁴ *Kunz v. New York*, 340 U.S. 290 (1951).

²⁵ *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).

²⁶ L H Tribe, *American Constitutional Law*, 2nd edn (Foundation Press, 1988), 1044-45.

²⁷ See *Groppera Radio AG and Ors v. Switzerland* and *Autronic AG v. Switzerland*, discussed in section 4.6 supra.

²⁸ See section 4.6 supra.

²⁹ Art. 7 (Responsibilities of the Transmitter).

³⁰ Art. 8 (Right of Reply).

³¹ Art. 10 (Cultural Objectives).

³² Arts. 11-18.

European Community

The principles of free movement of services and freedom of establishment, set forth in Articles 59-66 and 48-51 of the EC Treaty, are applicable to broadcasting as well as press services.³³ For instance, the European Court of Justice (ECJ) has ruled that television advertisements constitute services under the Treaty and thus are entitled to the Treaty's protections. However, Community law does not prohibit member states from operating exclusive rights within their territory for the transmission and distribution of television and radio programmes to one or several enterprises where the reasons for such grant are based on public interest grounds of a non-economic nature.³⁴

The ECJ ruled that certain provisions of The Netherlands' cable regulations violated the EC Treaty's guarantee of the freedom to provide services.³⁵ The provisions at issue prohibited cable operators from distributing programmes from abroad that carried Dutch subtitles or included commercial advertisements specifically directed at the Dutch market, unless they obtained an exemption from the Minister of Cultural Affairs. The Minister's statement that he would refuse exemptions only for commercial advertisements was not sufficient since the regulations granted him the authority to ban other programmes, thus enabling him, should he so wish, to ban programmes on the basis of content. The Supreme Court of The Netherlands previously had ruled that the provisions also violated the Constitution's guarantee of freedom of expression.³⁶

The ECJ in a separate case ruled that certain provisions of The Netherlands 1988 Media Act also violated the EC Treaty's guarantee of the freedom to provide services.³⁷ These provisions permitted the government agency responsible for broadcasting matters to prohibit Dutch cable operators from transmitting the programmes of foreign companies. Pursuant to these provisions, the highest administrative court of The Netherlands upheld an agency decision to prohibit Dutch cable operators from transmitting programmes of a London-based cable music company. The Dutch court ruled that broadcasting freedom would be undermined if an organization could avoid the rules of Dutch broadcasting law by locating itself abroad and that, accordingly, the provisions of the Media Act were justified by the interests in preventing disorder, protecting the rights of others, and maintaining a pluralist and non-commercial broadcasting system.³⁸ The ECJ rejected these arguments.

The ECJ has also decided cases concerning regulation of advertising. For instance, in the *Debauxe* case, the Court held that the EC Treaty does not preclude national governments from prohibiting

³³ *Commission v. France*, Case No. 19/84, 1984 1 CMLR 605.

³⁴ *Elliniki Radiophonia Teleorassi-Anonimi Etairia v. Dimotiki Etairia Plirioforissis*, Case No. C-260/89, Judgment of 18 June 1991 (unreported).

³⁵ *Bond van Adverteerders v. The Netherlands*, Case No. 352/85, ECCJ, 26 April 1988, 1988 ECR 2085.

³⁶ HR 11 Dec. 1987, RvdW 1987, 237.

³⁷ *EC Commission v. The Netherlands*, Case No. C-353/89, and *Stichting Collectieve Antennevoorziening Gouda et al. v. Commissariaat voor de Media*, Case No. C-288/89, ECJ 25 July 1991.

³⁸ ARRvS 5 Sept. 1990, 2 *Mediaforum (Bijlage)* 1990/10, 110.

television advertisements so long as they do not discriminate between domestic and foreign broadcasters.³⁹

The EC Council Directive on Broadcasting of 3 October 1989⁴⁰ requires the provision of a right of reply to an assertion of incorrect facts, and also requires that a specified percentage of air time or budget be reserved for European works created by independent producers.⁴¹

The Netherlands

The Supreme Administrative Court ruled that a local ordinance which prohibited the use of television antennas in a town that had a centralized system for receiving broadcast signals violated Article 10 of the European Convention and thus was invalid. The Court rejected the local government's contention that the prohibition was necessary for aesthetic reasons, and instead concluded that the measure went further than was necessary in a democratic society in the interest of public order.⁴² A lower Dutch court upheld a similar ordinance insofar as it prohibited antennas of excessive size.⁴³

³⁹ (1980) ECR 833.

⁴⁰ This Directive is also discussed in section 4.6 supra.

⁴¹ Reported in General Affairs Council Press Release, 3 Oct. 1989 meeting, 8774/89 (Presse 166).

⁴² ARRvS 10 Oct. 1978, 28 Ars Aequi 477.

⁴³ Hof Leeuwarden 23 March 1983, 1983 Bouwrecht 629.

PART III

INTERGOVERNMENTAL BODIES THAT ACCEPT FREEDOM OF EXPRESSION COMPLAINTS

INTRODUCTION TO PART III

People whose freedom of expression or related freedoms have been violated, and the lawyers and organizations that represent them, may wish to consider the possibility of presenting their cases to international bodies which receive communications from or on behalf of individuals. At the very least, filing a complaint puts the government on notice that the applicant is seeking international scrutiny, and it may generate sufficient publicity and/or international attention to prompt the government to provide individual redress or even to reform the challenged law or practice.

The chief international bodies include those charged with monitoring compliance with a human rights treaty: the UN Human Rights Committee, which monitors compliance with the International Covenant on Civil and Political Rights; the Inter-American Commission on Human Rights, which examines violations of the American Declaration as well as of the American Convention on Human Rights, and the Inter-American Court of Human Rights; the European Commission of Human Rights, which examines violations of the European Convention on Human Rights, and the European Court of Human Rights, which reviews cases referred from the Commission; and the African Commission on Human and Peoples' Rights, which considers violations of the African Charter on Human and Peoples' Rights.

Other bodies, which may offer speedier and more effective relief in certain cases than the treaty bodies, include: the UN Commission on Human Rights; the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities; the UN Working Group on Arbitrary Detention; the recently-appointed UN Rapporteur on Freedom of Expression; and the UNESCO Committee on Conventions and Recommendations (UNESCO Committee).¹

This part aims to alert the reader to the possibility of using these procedures; to provide enough information to enable those involved in freedom of expression cases to make a preliminary assessment as to the utility of filing an international complaint; and to point out the steps necessary to ensure that issues are adequately preserved in the national courts in the event that a decision is made to petition one of the international bodies.

If the reader is interested in obtaining further information about how to submit an application, he or she may consult the *Guide to International Human Rights Practice*, edited by Professor Hurst Hannum, and the *Guide to International Procedures* by Amnesty International.² Alternatively, the reader may contact the intergovernmental organization directly.³ As noted in the introduction to this handbook, ARTICLE 19 encourages readers who are considering pursuit of an international remedy to contact us.

¹ Although the International Labour Organization's (ILO) complaint procedures offer some of the most effective international mechanisms for the protection of human rights, they are not discussed here because they are available only to redress the range of violations within the ILO's mandate. These include freedom of association but only within the framework of trade union rights which are not addressed in this handbook. For a discussion of the ILO procedures, see L Swepson, "Human Rights Complaint Procedures of the ILO", in H Hannum (ed.), *Guide to International Human Rights Practice* (2nd edn), (Philadelphia: University of Pennsylvania Press, 1992), 99-117.

² See Bibliography in Appendix D.

³ Addresses of the various organizations are set forth in Appendix E.

The reasons for bringing an individual complaint to an intergovernmental body are elaborated upon in Section 10.1. Sections 10.2.1-4 summarize basic information about the four most relevant treaty-based bodies. Procedural requirements of the four bodies are discussed together (in Section 10.2.5) in order to highlight differences, and also because the bodies on occasion consult the practice of other bodies where their own procedures are unclear or underdeveloped. Section 10.3 discuss the chief non-treaty bodies which examine individual communications, all of which are under UN auspices. The substantive law applied by each of the bodies is discussed in Part I of this handbook.

Judgments of the European and Inter-American Courts of Human Rights are referred to by their case names only; full citations may be found in the table of cases.

CHAPTER 10

FILING INDIVIDUAL COMPLAINTS

10.1 REASONS FOR FILING WITH AN INTERGOVERNMENTAL BODY

The value of filing a communication with one of the intergovernmental bodies is manifold.¹ First, if the claim is reasonable, the filing of an international communication, and/or its acceptance as admissible, may prompt a government to negotiate a friendly settlement rather than be subjected to international scrutiny. Second, if the communication is accepted through the initial stages, the communication and the body's discussions about it can be publicized, and publicity itself may persuade a government to remedy the alleged violations, not simply in the individual case but in similar cases as well. Third, if the body issues a statement on the merits in favour of the applicant, at the least the applicant will have obtained a moral victory and very possibly the government will be motivated by the diplomatic pressure generated to grant the applicant some form of relief (such as release from prison, reversal of a conviction, and/or monetary damages). Fourth, a favourable ruling may lead, and in many cases has led, to law reform. Fifth, a favourable ruling contributes positively to the development of international law and may influence other countries which accept the authority of the ruling body or similar international obligations.

There are also countervailing factors which should be considered in deciding whether to file. All of the bodies accord a margin of deference to the respondent states, and all conclude that a violation has been committed in only a small fraction of cases presented to them. Moreover, all of the treaty-based procedures take several years to reach a final decision on the merits. (However, most of the bodies have a procedure by which emergency relief may be requested). Filing with an intergovernmental body will require time and money (although not a great deal in typical cases other than before the European and Inter-American Commissions²). The UNESCO Committee and all of the treaty-based bodies require that the process be kept confidential for most of the time that an application is under consideration (although the potential for eventual publicity is present in all save the UNESCO procedure). Moreover, the decisions of most of the bodies (other than the Inter-American and European Courts) are not considered legally binding. Perhaps most importantly, the applicant must assess whether filing an international communication could result in governmental retaliation; although most of the bodies are authorized to request protective measures, these are useless against a government intent on silencing its critics.

Nevertheless, the impact of international scrutiny and potential criticism should not be underestimated, particularly where the country involved is sensitive to diplomatic pressure (for instance, because it seeks, or considers that it occupies, a leadership role at the relevant intergovernmental organization, or because it relies on foreign aid which may be reduced owing to a

¹ "Communication" is the term used by the Human Rights Committee, the African Commission, the UN Working Group on Arbitrary Detention and the UNESCO Committee; "application" is the word used by the European Commission; and "petition" is the word used by the Inter-American Commission. In this handbook, the term "communications" is used to refer to petitions and applications when various mechanisms are discussed jointly.

² The European Commission awards legal aid to needy applicants after it determines an application admissible, and also awards lawyers' fees and costs to successful applicants.

poor human rights record). Although decisions cannot be enforced by measures akin to those available to enforce judgments of national courts, governments often, for various reasons, are motivated to take some measure of positive action.

10.2 TREATY-BASED BODIES

10.2.1 UN Human Rights Committee³

The Human Rights Committee, composed of 18 independent experts nominated and elected by states parties to the International Covenant on Civil and Political Rights (ICCPR), monitors the compliance of states parties with their obligations under the International Covenant. It generally meets three times a year for three-week sessions, and is serviced by the UN Human Rights Centre in Geneva.

One of the Committee's functions is to review communications submitted by individuals alleging violations of Covenant rights committed by states parties to the First Optional Protocol to the ICCPR (by which states agree to accept individual communications). As of January 1993, 71 of the 116 states parties to the ICCPR were also parties to the First Optional Protocol.⁴

If the Committee deems a communication admissible, it invites further information from the parties, examines the merits of the claims and issues its decision on whether a violation has occurred. If it concludes that a violation occurred, it generally also offers its view as to what measures the state is obliged to take in order to remedy or redress the violation. These have included release from detention, commutation of a death sentence, and payment of compensation.

The Committee's decisions are not legally binding and it is a disappointing reality that, in a majority of cases, states have failed to comply with the Committee's decisions. In 1990, the Committee adopted a series of measures to improve monitoring of compliance and to exert increased pressure on recalcitrant states, and these appear to be having some impact.

Decisions of the Human Rights Committee are important, nevertheless, as they form the most authoritative interpretations of the International Covenant. Thus the Optional Protocol procedure provides a significant opportunity for those interested in setting precedents and helping to develop international law.

10.2.2 Inter-American Commission and Court of Human Rights⁵

³ For further information about the workings of the Human Rights Committee, see S Lewis-Anthony, "Treaty-Based Procedures for Making Human Rights Complaints Within the UN System" in H Hannum (ed.), *Guide to International Human Rights Practice* (2nd edn), (Philadelphia: University of Pennsylvania Press, 1992).

⁴ See Appendix B for a list of states parties.

⁵ For further information about the procedures of the Inter-American Commission and Court, see D Shelton, "The Inter-American Human Rights System", in H Hannum (ed.), note 3 supra.

The Inter-American Commission is the principal human rights body of the Organization of American States (OAS). It consists of seven independent experts elected by the OAS General Assembly, and is based in Washington DC, USA.

One of the Commission's functions is to review petitions from individuals against OAS member states. If the state is a party to the American Convention on Human Rights, that is the law which will be applied; if not, the Commission will apply the obligations set forth in the American Declaration of the Rights and Duties of Man. Twenty-three of the 35 member states of the OAS are parties to the American Convention.

The American Declaration is not a treaty, and its protection of freedom of expression (Article 4) is stated in much simpler and less precise terms than the protection set forth in Articles 13 and 14 of the American Convention. Nevertheless, it may be argued that Article 4 of the Declaration should be construed to encompass the basic obligations encompassed by Articles 13 and 14 of the Convention.

In most respects, the procedures for filing petitions under the American Convention and the American Declaration are the same. The Commission attempts to reach a friendly settlement of disputes. If that is not possible, it publishes its report which may include the Commission's (non-binding) views as to whether the state has violated the Convention or Declaration and specific recommendations to the state about actions necessary to redress the violation.

The Commission may, on its own initiative or at the request of a party, request that provisional measures be taken to avoid irreparable damage. If the Commission is not in session, the Chairperson of the Commission can act on its behalf.

If the respondent state is a party to the American Convention and has accepted the jurisdiction of the Inter-American Court, the Commission or the state (but not the complainant) may, pursuant to Article 62 of the Convention, refer the petition to the Court. Fourteen of the 23 states parties to the American Convention have accepted the Court's jurisdiction.

The Court consists of seven judges elected for six-year terms by the parties to the American Convention. Its permanent headquarters are in San José, Costa Rica. It is a judicial body and its decisions in contentious cases are legally binding. In such cases it may recommend that damages be awarded as well as pronounce on the law and on whether a violation has been committed. Although it has no enforcement power, there has been a fair record of compliance with its rulings.

The Court also has authority to issue advisory opinions in response to requests for answers to hypothetical questions submitted either by member states or by the Inter-American Commission. These opinions are not technically binding but states parties tend to accord them substantially the same weight as decisions in contentious cases.

10.2.3 European Commission and Court of Human Rights⁶

⁶ For further information about the workings of the European Commission and Court, see K Boyle, "Europe: The Council of Europe, the CSCE, and the European Community", in H Hannum (ed.), note 3 *supra*.

The European Commission is composed of a number of jurists equal to the number of parties to the European Convention on Human Rights. They are nominated and elected by the states parties to the European Convention, and serve in their individual capacities.⁷

The European Commission receives applications from individuals (as well as from states) and decides their admissibility. It will accept applications against all member states of the European Convention which have accepted the optional obligation set forth in Article 25 to receive individual applications. All 26 member states of the Council of Europe are parties to the European Convention, and all but Poland have accepted Article 25's obligation concerning the Convention's rights, although Turkey has attached substantial reservations. If the Commission concludes that an application is inadmissible, it issues a decision to that effect. Its decision as to admissibility is final; there is no process by which to seek review of such a decision.

If the Commission concludes that an application is admissible, it proceeds to a consideration of the merits. If the applicant is indigent and in need of legal counsel, the Commission may award legal aid. After consideration of the merits, it prepares a report stating its views as to the facts, the relevant law and whether a breach appears to have been committed. If it concludes that the government has not violated the Convention, it publishes its report to that effect. If it concludes that the government did violate the Convention, it attempts to negotiate a friendly settlement, and publishes the report only if unsuccessful. The Commission's findings are not legally binding.

The Commission or the state party may refer a case to the European Court (whose decisions are legally binding on the parties). Acceptance of the Court's jurisdiction is optional, but all parties which have accepted the right of individual petition have also accepted the Court's jurisdiction. Under a new protocol to the European Convention, states may also accept reference to the Court by the applicant. The Court consists of a number of judges, who serve in their individual capacities, equal to the number of member states of the Council of Europe.

The Committee of Ministers, composed of one representative, usually the Minister for Foreign Affairs, of each of the Council of Europe's member states, is the Council's political and executive branch. If a case is not referred to the Court, the Committee decides in private, taking into consideration the Commission's report, whether there has been a breach of the Convention. If it decides that there has been, it then decides the appropriate remedies and orders the state to comply. If a case is decided by the Court, the Committee is responsible for supervising compliance with the Court's judgment. The Committee may exert a measure of diplomatic pressure; however, it has seriously considered imposing its strongest sanction, expulsion of a government from the Council, only twice (concerning Greece, for massive violations committed during the rule of the colonels⁸, and Turkey, following the military coup in that country).

The Commission usually considers cases roughly in the order in which they become ready for hearing. It is not unusual for it to issue a decision on admissibility one to two years after the

⁷ See D Gomien, *Short Guide to the European Convention on Human Rights* (Strasbourg: Council of Europe Directorate of Human Rights, 1991), 100-01.

⁸ See Decision of the Committee of Ministers, 15 April 1970, directing, *inter alia*, publication of the Report of the European Commission, App. Nos. 3321-3323 and 3344/67, *Denmark, Norway, Sweden and The Netherlands v. Greece*, "The Greek Case", (1969) *Yearbook of the European Convention on Human Rights*, 108. Greece withdrew from the Council when it became apparent that it was likely to be expelled.

application was filed (and more if the case touches on a controversial issue), and for it to issue a final report only after another year or so. If the application is referred to the Court, generally at least another 18 months elapse before the final judgment is issued. The Commission, however, can give priority to an application in circumstances of genuine emergency such as that the applicant is subject to continuing ill-treatment in prison or imminent deportation.⁹ Moreover, the Commission may request a state to adopt interim measures to preserve the *status quo* and to safeguard rights.

10.2.4 African Commission on Human and Peoples' Rights¹⁰

The African Commission was established by the Organization of African Unity's Assembly of Heads of States and Governments in 1986 to monitor compliance with the African Charter on Human and Peoples' Rights. Its 11 members are elected by the Assembly and serve in their individual capacities although to date, unlike members of the other treaty-based bodies, most have been senior government officials.

The African Commission is based in Banjul, The Gambia, and held its first session in 1987. While it is too early to predict how the individual communication procedure will develop, it is fair to say that, to date, the Commission has not been rigorous in questioning and holding governments accountable.

The Commission does not formally distinguish between the consideration of the admissibility and the merits of a communication. In practice, the Commission makes an initial decision on admissibility. If it finds that a communication is admissible, it notifies the author and the state; the state may then submit information and arguments within a four-month period, to which the author may reply. The Commission may revise its view on admissibility after receiving information from the state.

If a communication relates solely to an individual violation of human rights, the Commission appears to have no power to take any action or even to make recommendations to the state concerned. If, however, the Commission finds that one or more communications clearly reveal the existence of "a series of serious or massive violations of human and peoples' rights" the Commission will draw these "special cases" to the attention of the Assembly of Heads of States and Governments. If the Assembly so requests, the Commission may "undertake an in-depth study of these cases and make a factual report, accompanied by its findings and recommendations". In an emergency, the Chairman of the Assembly may make such a request.

10.2.5 Procedural Requirements of the Treaty-based Bodies

10.2.5.a Who may file

The Human Rights Committee will accept communications only from individuals. The Inter-American Commission, in addition, accepts petitions from groups of persons and from NGOs legally established in a member state, and the African Commission and the European Commission accept communications from individuals, groups of persons and NGOs wherever established. A

⁹ See Rules 33 and 34 of the Court's Rules of Procedure.

¹⁰ For further information about the way in which the African Commission operates, see C Flinterman and E Ankumah, "The African Charter on Human and Peoples' Rights", in H Hannum (ed.), note 3 *supra*.

petition to the Inter-American Commission may be on behalf of an individual or numerous victims of a specific incident (a collective petition), or allege the existence of widespread human rights violations (a general petition); both general and collective petitions should refer to specific victims. The African Commission also accepts communications from individuals and NGOs which allege serious or massive patterns of violations of human and peoples' rights.

The Human Rights Committee and European Commission require that the applicant be a victim (or a victim's close relative or legal guardian) of a cognizable violation and that the communication must be submitted and signed by the applicant or his or her legal representative. The African Commission and the Inter-American Commission will also accept communications from unrelated third parties, including NGOs, even without the victim's knowledge or consent. In such circumstances the African Commission and the Inter-American Commission require a showing that the victim could not be notified (for instance, when it is alleged that the state is responsible for the victim's disappearance).

None of the bodies will accept an abstract challenge to a law by way of an *actio popularis*;¹¹ there must be an individual whose rights were actually violated. However, the Human Rights Committee has made clear that "where an individual is in a category of persons whose activities are, by virtue of the relevant legislation, regarded as contrary to law, they may have a claim as 'victims' within the meaning of Article 1 of the Optional Protocol" even though they have not been subjected to any penalty.¹²

None of the bodies accept anonymous communications, although all maintain the confidentiality of the author's or victim's name if requested, and the Inter-American Commission will do so even if not requested. None of the bodies requires that the individual applicant be a citizen or resident of the state party against which it files. For example, although there are 26 states parties to the European Convention, applications have been filed by or on behalf of the nationals of more than 80 countries.¹³

Nor do any of the bodies require the applicant to have been, at the time of the alleged violation, within the state against which he or she files. For instance, the Human Rights Committee accepted a communication by a Uruguayan citizen living in Canada challenging Uruguay's failure to renew his passport¹⁴ and by a Uruguayan citizen who had been kidnapped, detained and mistreated in Argentina by Uruguayan security officers.¹⁵

¹¹ See European Commission, App. No. 867/60, [1960] *Yearbook of the European Convention on Human Rights*, 270, in which the Commission dismissed an application from an Irish parliamentarian challenging the legality of certain emergency laws.

¹² *Ballantyne et al v. Canada*, Annex, para. 10.4. See Section 4.10 for further discussion of this case.

¹³ D Gomien, note 7 supra at 3.

¹⁴ *Lichtensztein v. Uruguay*, Communication No. 77/1980, reprinted in 2 *Selected Decisions of the Human Rights Committee under the Optional Protocol*, UN Doc. CCPR/C/OP/1 (1990), 102.

¹⁵ *Lopez Burgos v. Uruguay*, Communication No. 52/1979, reprinted in 1 *Selected Decisions of the Human Rights Committee under the Optional Protocol*, UN Doc. CCPR/C/OP/1 (1985), 88.

10.2.5.b States against which communications may be filed

All the bodies require that the violation be alleged to be a direct result of the action or, where there was a duty to act, inaction of a state which comes within the body's jurisdiction.

10.2.5.c Substance of the violations

All require that the communication allege a violation of an applicable declaration or treaty provision that is not subject to a reservation or derogation by the state party concerned.

10.2.5.d Exhaustion of domestic remedies

All of the treaty-based bodies require applicants to have exhausted all available domestic remedies. The American and European Conventions expressly state that exhaustion is necessary in accordance with the generally recognized rules of international law,¹⁶ and the Human Rights Committee and the African Commission also apply the international rules. Exhaustion is required only if the remedy is effective, available and not unreasonably prolonged.¹⁷ The applicant must allege with some specificity that all domestic remedies have been exhausted or that no effective remedies exist. The burden then shifts to the respondent state to prove the existence of an available and sufficient remedy.¹⁸ In particular, if the applicant establishes "serious doubts" about the effectiveness of the remedy, the state must show that the remedy would have been effective in the applicant's case.¹⁹

The Inter-American Commission has stated that remedies will be considered ineffective where: (1) domestic legislation did not afford adequate protection of the right allegedly violated; (2) there had been an unwarranted delay in rendering a final judgment; or (3) access to the remedies had been denied or exhaustion had been prevented. The third-mentioned ground may be established, *inter alia*, by evidence of a consistent pattern of serious human rights violations or the absence of an independent judiciary. The Inter-American Court recently noted an additional justification for non-exhaustion: the petitioner's inability to obtain adequate legal representation, due either to indigence or a general fear in the legal community, where such representation was necessary.²⁰

The European Commission has repeatedly found that an applicant must exhaust all remedies provided as a right by domestic law, administrative as well as judicial, but is not required to exhaust those remedies available only as a privilege. Thus, for example, an applicant is not required to have sought a pardon from the executive, a process considered to be an "extraordinary remedy".²¹

¹⁶ See Arts. 2 and 5(2)(b) of the Optional Protocol to the International Covenant; Art. 26 of the European Convention, and Art. 46(1)(a) of the American Convention.

¹⁷ See, e.g., Art. 5(2) of the Optional Protocol to the International Covenant.

¹⁸ *Sibson v. United Kingdom*, European Commission App. No. 14327/88, Admissibility Decision of 9 April 1991, citing the European Court judgment in *Deweert v. Belgium*, para. 26.

¹⁹ European Commission App. Nos. 8805/79 and 8806/79, in D Gomien, note 7 supra at 105.

²⁰ Inter-American Court, *Exhaustion of Remedies (Articles 46(1)(a) and 46(2) of the ACHR)*.

²¹ App. No. 8395/78.

Nor is an applicant required to pursue remedies which "although theoretically of a nature to constitute remedies, do not in reality offer any chance of redressing the alleged breach ... [or] which would be a mere repetition of remedies already exercised by him."²²

The European Commission has ruled on several occasions that existing remedies were ineffective where clear precedent in the state's law established that the applicant had no chance of success.²³ Where domestic remedies are potentially effective, exhaustion requires a showing that the applicant raised the substance of his or her international claims in the national proceedings. An applicant is not required to have cited the relevant treaty explicitly so long as he or she relied on domestic legal provisions with an essentially similar content.²⁴ However, an applicant must expressly invoke a treaty provision where it provides the only legal basis for a given claim.²⁵

The European Court has observed that the exhaustion requirement must be applied "with some degree of flexibility and without excessive formalism"; it is sufficient that "the complaints intended to be made subsequently before the Convention organs" should have been raised "at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law".²⁶

Although the European Commission has shown flexibility in determining whether the substance of a claim has been raised, it has been more rigid in requiring applicants to have pursued all available and effective remedies. Thus, for instance, the Commission ruled inadmissible a challenge to a conviction by a peaceful protester who had challenged his arrest and detention to the highest court in a pre-trial proceeding, but had not challenged his conviction.²⁷

²² *Sibson v. United Kingdom*, note 18 supra. In this case, the UK Court of Appeal had reversed the decision of an industrial tribunal that the applicant truck driver was entitled to reinstatement to his job. The European Commission rejected the government's claim that the applicant should have requested an alternative remedy from the industrial tribunal; because the truck driver claimed that a transfer to another depot constituted a constructive dismissal, he was not required to request any remedy short of reinstatement.

²³ *E.g.*, App. Nos. 7367/76 and 7819/77.

²⁴ *E.g.*, European Court decision in *Castells v. Spain*, para. 27. In this case, the Court found that Mr Castells had raised in substance the violation of his right to freedom of expression even though in the domestic courts he had asserted only his constitutional right as an elected representative to formulate political criticism. The European Court noted that Mr Castells had alleged facts and made claims clearly implicating the right to freedom of expression and that the Constitutional Court had expressly considered that right. The fact that Art. 10 was not raised before any national court, either by Mr Castells or the courts directly, was not significant in assessing the question of whether domestic remedies had been exhausted. See also Sections 4.5.1 and 6.2.1 supra for further discussion of this case.

²⁵ See *e.g.*, European Court decision in *DeWeer v. Belgium*.

²⁶ *Guzzardi v. Italy*, para. 72. See also *Cardot v. France*, para. 34.

²⁷ *Chorherr v. Austria*, Decision of 1 March 1991 as to Admissibility of App. No. 13308/87, attached as Annex II to the Commission's Report on the Merits, adopted 21 May 1992. The Commission did, however, rule admissible a challenge to the arrest and detention and, on the merits, found that the arrest and detention violated Art. 10. For further discussion of this case, see Section 6.2.5 supra.

10.2.5.e Timeliness

The European Commission (pursuant to Article 26 of the European Convention) and the Inter-American Commission (pursuant to Article 46(1)(b) of the American Convention) require that at least a preliminary communication be filed within six months of the date on which the applicant was notified of the final decision in the national system, or on which he or she actually received notice if, through no fault of the applicant's, he or she actually received notice only on a later date. The time limit may be extended if the state interfered with the applicant's ability to file the communication within the six-month period.

The Inter-American Commission grants a "reasonable period of time" for filing where there is no effective domestic remedy, or where the communication is filed by a third party on behalf of a victim who is unable to file.

When there is no effective domestic remedy, the European Commission requires filing within six months of the date of the violation or of the date when the applicant discovers that no effective remedy exists.²⁸

The European Commission does not apply a time limit if the violation is of a continuing nature.²⁹

The European Commission has stated that, while it must apply the six-month deadline strictly, it need only receive within the deadline a letter stating the applicant's desire to file an application and setting forth the facts in summary form. The European Commission has accepted applications submitted prior to the complete exhaustion of domestic remedies when the domestic remedy was speculative, and indeed it may be advisable to file in such circumstances.

The Human Rights Committee does not apply a time limit, although communications are apt to be handled with greater attention if filed in a timely fashion. The African Commission requires that communications be filed within a "reasonable period" of the exhaustion of domestic remedies.

10.2.5.f Duplication and choice of forums

The Human Rights Committee (under the terms of the Optional Protocol), the European Commission (under the terms of the European Convention) and the Inter-American Commission (under its Rules of Procedure) may not consider a communication the substance of which has been submitted to another intergovernmental body. An applicant will not be barred from bringing a simultaneous application, however, unless the other communication alleges substantially the same violations. Thus, the Human Rights Committee accepted a complaint from an applicant even though the applicant's name was listed along with hundreds of others in a complaint to the Inter-American Commission.³⁰ Moreover, the European Commission may consider a communication if it alleges new relevant information not presented to another forum.

²⁸ *Sibson v. UK*, note 18 supra. In this case, the Commission ruled that the six-month period began to run when the applicant was denied legal aid to appeal to the House of Lords.

²⁹ *K Boyle*, note 6 supra.

³⁰ *Sequeira v. Uruguay*, Communication No. 6/1977, reprinted in 1 *Selected Decisions*, note 15 supra. Nor is examination precluded by consideration of the general human rights situation by the UN Human Rights Commission.

The Human Rights Committee may consider a communication the substance of which was previously *decided* by another intergovernmental body, so long as the state party has not made a declaration to the contrary. All of the states party to the European Convention, other than The Netherlands and Portugal, have made a declaration that they do not accept the Committee's jurisdiction over matters that have already been submitted to the European Commission.

The Inter-American Commission will consider a simultaneous petition if the applicant is the alleged victim or a family member and a petition to another body was filed by a third party without the applicant's consent.

The African Commission may consider communications the substance of which are *pending* before other international bodies so long as the case has not been "settled in accordance with the principles of the Charter of the UN, or the Charter of the OAU or the provisions of the present Charter".³¹

10.2.5.g Confidentiality

All of the bodies, except the Working Group on Arbitrary Detention, require the communication process to be kept confidential at least until the point where the body finds reasonable grounds to believe that a violation has been committed and the government refuses to enter a friendly settlement.

The entire consideration of individual communications by the African Commission is confidential. In the African system, only the OAU Assembly may decide to make public a Commission report (or other measure taken).

The fact that a communication has been filed with the Human Rights Committee, the Inter-American Commission or the European Commission may be announced, as may a brief description of the allegations and any finding of admissibility, but the government's reply is strictly confidential. If the government declines to accept a friendly settlement, a report on the merits may be published.

10.2.5.h Content of communications

All of the bodies have forms that they supply to applicants and which require essentially the same basic information: the full name and address of the author of the communication, although anonymity may be requested; the state against which the communication is made; a summary of the facts; a list of the rights which are claimed to be breached; a description of measures taken to exhaust domestic remedies or reasons why it would be futile to pursue domestic remedies. All except the Working Group on Arbitrary Detention also request information as to whether the substance of the communication is being examined by another intergovernmental body. If a communication fails to state all the necessary information, the applicant is requested to provide supplementary information within a given period.

In addition, most of the bodies require that the communications do not use insulting or disparaging language, that they be motivated primarily by the interest in redressing a human rights violation

³¹ Art. 56(7) of the African Charter.

(and not, for example, by a political interest), and that they do not rely solely on information published by the mass media.

10.3 UN NON-TREATY BODIES

10.3.1 Commission on Human Rights

A person who is the victim of a violation which forms part of a systematic pattern of serious violations (such as the mass expulsion of journalists of a particular ethnic or national group from the government-controlled media) may wish to consider raising the case, as illustrative of the larger pattern, before the UN Commission on Human Rights or its Sub-Commission on Prevention of Discrimination and Protection of Minorities.³²

The UN Commission, composed of representatives of 53 governments, meets annually for six weeks in Geneva during February and March. The Commission adopts resolutions on human rights situations and issues, some of which are referred for approval or endorsement to the Economic and Social Council (ECOSOC) and from there to the UN General Assembly. While only the 53 governments may vote on resolutions, many other actors participate in its sessions, including representatives of most non-member governments, several intergovernmental organizations and generally more than 100 accredited non-governmental organizations (NGOs).

The Commission's agenda always includes an item on "gross violations of human rights in any part of the world". Under this item (pursuant to ECOSOC resolution 1235), accredited NGOs may present information concerning gross violations of human rights in a given country or of a pattern of violations in several countries. Information about individual cases may be included to illustrate a pattern of abuse. There is no requirement that domestic remedies be exhausted or that the communication not be pending before any other intergovernmental body.

There are several benefits of drawing the Commission's attention to an individual case as part of a pattern of abuse. First, the Commission's meetings are public and are attended by representatives of a considerable number of governments, intergovernmental organizations and NGOs, as well as the international media. Thus, the complaint may in fact receive substantial attention. Second, the representative of the government which is the target of criticism may respond and may be motivated by the international attention to enter into discussions about the case. Even if not receptive, his or her response may heighten the case's visibility. Third, if the violation is serious, widespread and of a continuing nature, the Commission could be moved to adopt a resolution on the matter. More than two dozen countries were criticized by the Commission at its 1993 session and, while adoption of a country resolution normally requires several years to pass, any resolution so passed carries considerable weight. If the country is likely to be criticized by the Commission for other reasons, Commission members may be persuaded to add a sentence concerning any new information supplied by the individual complainant.

10.3.2 Sub-Commission on Prevention of Discrimination and Protection of Minorities

³² For further information about the Commission and Sub-Commission, see N Rodley, "UN Non-Treaty Procedures for Dealing with Human Rights Violations", in H Hannum (ed.), note 3 supra. If other violations are associated with the violation of freedom of expression, application may also be made to the Special Rapporteur on Summary or Arbitrary Executions, the Special Rapporteur on Torture, or the Working Group on Disappearances.

The Human Rights Sub-Commission is composed of 26 experts who serve in their individual capacity and meet annually during August in Geneva. The Sub-Commission submits reports and resolutions to the Commission. Because it is a smaller, expert body it often is easier to build support for a complaint at the Sub-Commission in the first instance.

10.3.3 Working Group on Arbitrary Detention

The Working Group on Arbitrary Detention was established by the UN Commission on Human Rights and approved by ECOSOC in 1991. Its mandate is:

to investigate cases of detention imposed arbitrarily or otherwise inconsistently with the relevant international standards set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments accepted by the States concerned.³³

The Working Group was established for a three-year period and is expected to have its mandate regularly renewed. It held its first session in September 1991, and meets three times annually for one-week sessions in Geneva. It is composed of five independent experts who serve in their individual capacities, and who are appointed by the Chairman of the Commission on Human Rights so as to reflect the five main regional/political UN groupings (African, Asian, Eastern European, Latin and Western).

In addition to its overarching mandate, the Working Group is directed:

- (1) to seek and receive information from Governments and intergovernmental and non-governmental organizations, and receive information from the individuals concerned, their families or their representatives; and
- (2) to present a comprehensive report to the Commission at its following session.³⁴

The Working Group applies international standards, including the Universal Declaration, the International Covenant and any regional treaty to which the respondent state is a party. In addition to being concerned about the fairness of the arrest, detention and/or trial procedures, the Working Group also inquires into whether the grounds for detention violate international standards.

Among other categories of cases, the Working Group will investigate "cases of deprivation of freedom when the facts giving rise to the prosecution or conviction concern the exercise of [one of several rights and freedoms]". These include the rights to freedom of expression, assembly and association (Articles 19 and 20 of the Universal Declaration, and Articles 19, 21 and 22 of the International Covenant), as well as the related rights to freedom of thought, conscience and religion (Article 18 of the Universal Declaration, Article 18 of the International Covenant), to participate in genuine, periodic elections (Article 25 of the International Covenant) and to use one's own language (Article 27 of the International Covenant).

³³ *Report of the Working Group on Arbitrary Detention*, UN Doc. E/CN.4/1992/20 of 21 Jan. 1992, para. 9(a).

³⁴ *Id.* at para. 9(b) and (c).

The Working Group reported, in its second annual report, that about 90 per cent of the cases received involved allegations that the applicant had been detained for the lawful exercise of the right to freedom of expression. In about 20 per cent of the cases, the reasons for detention also included exercise of the right to freedom of assembly; and in about 15 per cent of the cases, the reasons also included exercise of the right to freedom of political association.³⁵

The Working Group considers communications only from or on behalf of people who are in detention or under some other form of restraint such as house arrest (although it has not yet clarified this point). It will consider cases of pre-trial detention, whether administrative or judicial, as well as trial and post-trial detention. The Working Group will stop its inquiries once it learns that the applicant has been released from detention.

The Working Group accepts communications from individuals in detention, their families or personal representatives, as well as from governments, intergovernmental and non-governmental organizations. Most of the communications to date have been submitted by NGOs unaccompanied by any formal statement of authorization by the victim or his or her family. The Working Group has welcomed the contributions of NGOs, and has commended their co-operation with the Group as "fruitful".³⁶

The Working Group does not have either a timeliness or exhaustion requirement although it does request information about steps taken to verify the detention and to seek domestic remedies. It does not inquire whether a case has been presented to, or is under consideration by, another intergovernmental body.

In addition to information as to why the applicant believes that the detention is arbitrary, the Working Group requests all information that would assist it in confirming the applicant's detention, including the date and place of arrest, the forces believed to have carried out the arrest, whether they showed a warrant, the place of detention and the exact spelling of the applicant's official name.

There are two chief advantages of filing a communication with the Working Group. First, it can act quickly. Under normal circumstances, it decides at its thrice-yearly sessions whether or not to forward a communication to a government. After it forwards a letter of inquiry based on the communication, it sets a deadline for receipt of a reply (of up to 90 days), and, if the government fails to respond within that time, it will promptly publish the fact of its non-cooperation and its conclusions regarding the merits of the communication. The Working Group reported after its second year of operation that governments responded in about 50 per cent of the cases though not necessarily with satisfactory information.³⁷

In addition, the Working Group's "urgent action" mechanism can be triggered by the submission of (1) "sufficiently reliable allegations" that a person's arbitrary detention constitutes a "serious danger to that person's health or even life"; and (2) "where the detention may not constitute a danger to a

³⁵ *Report of the Working Group on Arbitrary Detention*, UN Doc. E/CN.4/1993/24 of 12 Jan. 1993, para. 35.

³⁶ *Id.* at para. 11.

³⁷ *Id.* at para. 37.

person's health or life, but where the particular circumstances of the situation warrant urgent action" and the Chairman secures "the agreement of two other members of the Working Group".³⁸

The second advantage of the procedure is that much of the process is public. The Working Group regularly reports on the status of inquiries, including when it received information of an allegedly arbitrary detention, when it transmitted the information to the government concerned, if and when the government responded, the substance of any government response and its conclusions about the legality of the detention.

Moreover, the procedure is flexible. The Working Group expressly states in its guidelines that failure to comply with all of the formalities of its procedure shall not "directly or indirectly" result in a communication's inadmissibility. Although the Working Group welcomes all relevant information, it has acted on communications of less than a page in length.

Despite the fact that the Working Group has been in operation for only two years, it has already shown itself to be energetic and forceful. If a person is wrongfully detained, filing a communication with the Working Group is one of the quickest, simplest and most effective ways to obtain a measure of international scrutiny.

10.3.4 Special Rapporteur on Freedom of Expression

A Special Rapporteur on "the promotion and protection of the right to freedom of opinion and expression" was appointed for a three-year period by the Chairman of the Commission on Human Rights following a consensus vote of the Commission at its 1993 session (and subject to approval by ECOSOC).³⁹ The Commission has requested the Rapporteur

to gather all relevant information, wherever it may occur, of discrimination against, threats or use of violence and harassment, including persecution and intimidation, directed at persons [including "professionals in the field of information"] seeking to exercise or to promote the exercise of the right to freedom of expression and opinion as affirmed in the Universal Declaration and, where applicable, the International Covenant.⁴⁰

The Rapporteur is further requested to gather reliable information from all sources, including NGOs, and to present a report to the Commission at its 1994 session. It is too soon to tell how the Rapporteur will conduct his assignments, but it is expected that he will accept information about individual cases - especially concerning attacks against writers, journalists and other mass media professionals - and transmit inquiries to implicated governments. One open question is whether he will address threats, intimidation and other acts committed by non-governmental entities.

10.3.5 UNESCO Committee on Conventions and Recommendations⁴¹

³⁸ Id. part II, Deliberation 03, para. D. The second, extraordinary procedure has been used only once.

³⁹ Commission Res. 1993/45.

⁴⁰ Id. at paras. 12-13.

⁴¹ For further information, see S Marks, "The Complaint Procedure of UNESCO", in H Hannum (ed.), note 3 supra.

The UNESCO Committee on Conventions and Recommendations meets at UNESCO's headquarters in Paris usually twice a year. One of the Committee's functions is to review and decide communications from persons or groups of persons who allege violations which fall within UNESCO's fields of competence, namely, education, science, culture or information. The Committee has expressly found that it may address violations, *inter alia*, of: (1) the right to freedom of expression and information; and (2) the right to freedom of assembly and association for the purposes of activities connected with education, science, culture or information. In defining these rights, the Committee tends to rely primarily on the appropriate provisions of the International Covenant concerning communications against states which are party to the treaty, and on the provisions of the Universal Declaration concerning communications against other states. The Committee may accept communications against any country, although the procedure is less effective against a country which is not a UNESCO member.

The Committee is particularly receptive to communications filed by or on behalf of a victim whose professional activity involves education, science, culture or information. It will reject communications that are motivated exclusively by political or other considerations not directly related to human rights. The fact that the applicant belongs to an organization critical of the government often suffices for that government's representative to claim that the only motivation is political, and occasionally results in rejection of the communication.

The Committee requires the applicant to "indicate whether an attempt has been made to exhaust domestic remedies". In practice, the Committee is unlikely to accept a communication where no serious effort has been made to pursue domestic redress and, accordingly, the applicant should specify what remedies he or she has exhausted or attempted. A communication must be submitted within a "reasonable time following the facts", a requirement which is applied liberally in practice.

The Committee may declare inadmissible any communication that has been settled, under domestic or international procedures, so long as the Committee is satisfied that the applicant's human rights have been adequately respected. The fact that the substance of a communication is being considered by another body, domestic or international, will not preclude the Committee's consideration.

Like the other bodies discussed in this chapter, the Committee may reject communications which are "manifestly ill-founded". In theory, this requirement should only bar allegations that clearly fall outside UNESCO's scope or lack any indication of the availability of evidentiary support. In practice, the Committee may simply dismiss a communication without giving the author a chance to reply to the Committee's concerns or the government's objections.

A major drawback of the procedure is that all documents and meetings of the Committee, as well as its final report, are confidential and there is no possibility of the communication or the Committee's findings being made public. Thus the government against which a communication is filed has little incentive to remedy any alleged breach. Nevertheless, some governments do comply with the Committee's recommendations and, even when they do not, they may provide useful information.

APPENDICES

APPENDIX A

RELEVANT PROVISIONS OF INTERNATIONAL INSTRUMENTS

UNITED NATIONS

UNIVERSAL DECLARATION OF HUMAN RIGHTS

Adopted and proclaimed by General Assembly Resolution 217 A(III) of 10 December 1948.

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20

1. Everyone has the right to freedom of peaceful assembly and association.
2. No one may be compelled to belong to an association.

Article 29

1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200 A(XXI) of 16 December 1966. Entered into force 23 March 1976.

Article 2

...

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to

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adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the Parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

...

Article 17

- 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
- 2. Everyone has the right to the protection of the law against such interference or attacks.

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

Adopted and opened for signature, ratification and accession by General Assembly Resolution 2106 A(XX) of 21 December 1965. Entered into force 4 January 1969.

Article 4

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, *inter alia*:

- (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
- (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
- (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

ORGANIZATION OF AFRICAN UNITY

AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

Adopted by the OAU on 27 June 1981. Entered into force in October 1986.

Article 1

The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.

Article 2

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Article 9

1. Every individual shall have the right to receive information.

2. Every individual shall have the right to express and disseminate his opinions within the law.

Article 10

1. Every individual shall have the right to free association provided that he abides by the law.

2. Subject to the obligation of solidarity provided for in Article 29 no one may be compelled to join an association.

Article 11

Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.

Article 25

States parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.

Article 27

1. Every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community.

2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

Article 28

Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

ORGANIZATION OF AMERICAN STATES

AMERICAN CONVENTION ON HUMAN RIGHTS

Adopted by the OAS on 22 November 1969. Entered into force 18 July 1978.

Article 1: Obligation to Respect Rights

- 1.The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

...

Article 2: Domestic Legal Effects

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

Article 8: Right to a Fair Trial

- 1.Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

...

- 5.Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

Article 11: Right to Privacy

- 1.Everyone has the right to have his honor respected and his dignity recognized.
- 2.No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
- 3.Everyone has the right to the protection of the law against such interference or attacks.

Article 13: Freedom of Thought and Expression

- 1.Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

2.The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

(a) respect for the rights or reputations of others; or

(b) the protection of national security, public order, or public health or morals.

3.The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

4.Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5.Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar illegal action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

Article 14: Right of Reply

1.Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.

2.The correction or reply shall not in any case remit other legal liabilities that may have been incurred.

3.For the effective protection of honor and reputation, every publisher, and every newspaper, motion picture, radio, and television company, shall have a person responsible who is not protected by immunities or special privileges.

Article 15: Right of Assembly

The right of peaceful assembly, without arms, is recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a democratic society in the interest of national security, public safety or public order, or to protect public health or morals or the rights or freedoms of others.

Article 16: Freedom of Association

The ARTICLE 19 Freedom of Expression Handbook

1. Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.
2. The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.

Article 29: Restrictions Regarding Interpretation

No provision of this Convention shall be interpreted as:

- (a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
- (b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
- (c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
- (d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN

Approved by the Ninth International Conference of American States on 2 May 1948.

Article 4

Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.

Article 5

Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life.

Article 21

Every person has the right to assemble peaceably with others in a formal public meeting or an informal gathering, in connection with matters of common interest of any nature.

Article 22

Every person has the right to associate with others to promote, exercise and protect his legitimate interests of a political, economic, religious, social, cultural, professional, labor union or other nature.

COUNCIL OF EUROPE

EUROPEAN CONVENTION ON HUMAN RIGHTS

(Convention for the Protection of Human Rights and Fundamental Freedoms)

Signed by Contracting States of the Council of Europe on 4 November 1950. Entered into force 3 September 1953.

Article 6

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

...

Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 10

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity of public safety, for the prevention of disorder or crime, for the

protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 16

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

Article 17

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

CONFERENCE ON SECURITY AND COOPERATION IN EUROPE

1989 VIENNA CONCLUDING DOCUMENT

- (34) The participating States will make further efforts to facilitate the freer and wider dissemination of information of all kinds, to encourage cooperation in the field of information and to improve the working conditions for journalists

In this connection and in accordance with the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights and their relevant international commitments concerning seeking, receiving and imparting information of all kinds, they will ensure that individuals can freely choose their sources of information."

DOCUMENT OF THE COPENHAGEN MEETING OF THE CONFERENCE ON THE HUMAN DIMENSION

5 to 29 June 1990

(9)The participating States reaffirm that

- (9.1) - everyone will have the right to freedom of expression including the right to communication. This right will include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The exercise of this right may be subject only to such restrictions as are prescribed by law and are consistent with international standards. In particular, no limitation will be imposed on access to, and use of, means of reproducing documents of any kind, while respecting, however, rights relating to intellectual property, including copyright. ...

(24)The participating States will ensure that the exercise of all the human rights and fundamental freedoms set out above will not be subject to any restrictions except those which are provided by law and are consistent with their obligations under international law, in particular the International Covenant on Civil and Political Rights, and with their international commitments, in particular the Universal Declaration of Human Rights. These restrictions have the character of exceptions. The participating States will ensure that these restrictions are not abused and are not applied in an arbitrary manner, but in such a way that the effective exercise of these rights is ensured.

Any restriction on rights and freedoms must, in a democratic society, relate to one of the objectives of the applicable law and be strictly proportionate to the aim of that law.

(28)The participating States recognize the important expertise of the Council of Europe in the field of human rights and fundamental freedoms and agree to consider further ways and means to enable the Council of Europe to make a contribution to the human dimension of the CSCE. They agree that the nature of this contribution could be examined further in a future CSCE forum.

DOCUMENT OF THE MOSCOW MEETING OF THE CONFERENCE ON THE HUMAN DIMENSION

10 September to 4 October 1991

(26)The participating States reaffirm the right to freedom of expression, including the right to communication and the right of the media to collect, report and disseminate information, news and opinion. Any restriction in the exercise of this right will be prescribed by law and in accordance with international standards. ...

EUROPEAN ECONOMIC COMMUNITY

TREATY OF ROME

Article 30

Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States.

Article 34

1. Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.

2. Member States shall, by the end of the first stage at the latest, abolish all quantitative restrictions on exports and any measures having equivalent effect which are in existence when this Treaty enters into force.

Article 36

The provisions of Articles 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Article 59

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

The Council may, acting by a qualified majority on a proposal from the Commission, extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Community.

APPENDIX B

STATES PARTIES TO INTERNATIONAL AND REGIONAL TREATIES

(as of February 1993)

Abbreviations:

ACHPR African Charter on Human and Peoples' Rights ACHR American Convention on Human Rights
 CSCE Conference on Security & Cooperation in Europe ECHR European Convention on Human Rights
 ICCPR International Covenant on Civil & Political Rights OAS Organization of American States
 OAU Organization of African Unity

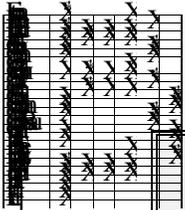
COUNTRY	ICCPR ¹	Council ² of Europe	ECHR ³	CSCE	OAU ⁴	OAS ⁵
Afghanistan	X					
Albania	X			X		
Algeria	X*				X*	
Angola	X*				X*	
Antigua & Barbuda						X
Argentina	X*					X*
Armenia				X		
Australia	X*					
Austria	X*	X	X	X		
Azerbaijan	X			X		
Bahamas						X
Barbados	X*					X*
Belgium	X	X*	X	X		
Belize						X
Benin	X*				X*	
Bolivia	X*					X*
Bosnia-Herzegovina				X		
Botswana					X*	
Brazil	X					X*

Note: 1: * = States parties to the First Optional Protocol of the ICCPR.
 2: * = Member states of the European Community.
 3: * = States not accepting ECHR Arts. 25 (right of individual petition) and 46 (compulsory jurisdiction of the European Court).
 4: * = States parties to the ACHPR.
 5: * = States parties to the ACHR.

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COUNTRY	ICCPR ¹	Council ² of Europe	ECHR ³	CSCE	OAU ⁴	OAS ⁵
Bulgaria	X*	X	X	X		
Burkina Faso					X*	
Burundi	X				X*	
Byelorussia	X*			X		
Cambodia	X					
Cameroon	X*				X*	
Canada	X*			X		X
Cape Verde					X*	
Central African Republic	X*				X*	
Chad					X*	
Chile	X*					X*
Colombia	X*					X*
Comoros					X*	
Congo	X*				X*	
Costa Rica	X*					X*
Cote d'Ivoire	X				X*	
Croatia	X			X		
Cuba						X
Cyprus	X*	X	X	X		
Czech Republic	X*			X		
Denmark	X*	X*	X	X		
Djibouti					X*	
Dominica						X
Dominican Republic	X*					X*
Ecuador	X*					X*

- Note:
- 1: * = States parties to the First Optional Protocol of the ICCPR.
 - 2: * = Member states of the European Community.
 - 3: * = States not accepting ECHR Arts. 25 (right of individual petition) and 46 (compulsory jurisdiction of the European Court).
 - 4: * = States parties to the ACHPR.
 - 5: * = States parties to the ACHR.



COUNTRY	ICCPR ¹	Council ² of Europe	ECHR ³	CSCE	OAU ⁴	OAS ⁵
Egypt	X				X*	
El Salvador	X*					X*
Equatorial Guinea	X*				X*	

- Note:
- 1: * = States parties to the First Optional Protocol of the ICCPR.
 - 2: * = Member states of the European Community.
 - 3: * = States not accepting ECHR Arts. 25 (right of individual petition) and 46 (compulsory jurisdiction of the European Court).
 - 4: * = States parties to the ACHPR.
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The ARTICLE 19 Freedom of Expression Handbook

COUNTRY	ICCPR ¹	Council ² of Europe	ECHR ³	CSCE	OAU ⁴	OAS ⁵
Ireland	X*	X*	X	X		
Israel & Occupied Territories	X					
Italy	X*	X*	X	X		
Jamaica	X*					X*
Japan	X					
Jordan	X					
Kazakhstan				X		
Kenya	X				X*	
Kyrgyzstan				X		
Latvia	X			X		
Lebanon	X					
Lesotho	X				X*	
Liberia					X*	
Libya	X*				X*	
Liechtenstein		X	X	X		
Lithuania	X*			X		
Luxembourg	X*	X*	X	X		
Madagascar	X*				X*	
Malawi					X*	
Mali	X				X*	
Malta	X*	X	X	X		
Mauritania					X*	
Mauritius	X*				X*	
Mexico	X					X*
Moldova	X			X		
Monaco				X		

- Note:
- 1: * = States parties to the First Optional Protocol of the ICCPR.
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 - 4: * = States parties to the ACHPR.
 - 5: * = States parties to the ACHR.

COUNTRY	ICCPR ¹	Council of Europe ²	ECHR ³	CSCE	OAU ⁴	OAS ⁵
Mongolia	X*					
Morocco	X					
Mozambique					X*	
Namibia					X*	
Nepal	X*					
Netherlands	X*	X*	X	X		
New Zealand	X*					
Nicaragua	X*					X*
Niger	X*				X*	
Nigeria					X*	
North Korea	X					
Norway	X*	X	X	X		
Panama	X*					X*
Paraguay	X					X*
Peru	X*					X*
Philippines	X*					
Poland	X*	X	X*	X		
Portugal	X*	X*	X	X		
Romania	X			X		
Russian Federation	X*			X		
Rwanda	X				X*	
Saharawi Arab Democratic Republic					X*	
San Marino	X*	X	X	X		
São Tome & Príncipe					X*	
Senegal	X*				X*	
Seychelles	X*				X*	

- Note:
- 1: * = States parties to the First Optional Protocol of the ICCPR.
 - 2: * = Member states of the European Community.
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COUNTRY	ICCPR ¹	Council ² of Europe	ECHR ³	CSCE	OAU ⁴	OAS ⁵
Sierra Leone					X*	
Slovakia				X		
Slovenia	X*			X		
Somalia	X*				X*	
South Korea	X*					
Spain	X*	X*	X	X		
Sri Lanka	X					
St Christopher & Nevis						X
St Lucia						X
St Vincent & The Grenadines	X*					X
Sudan	X				X*	
Suriname	X*					X*
Swaziland					X	
Sweden	X*	X	X	X		
Switzerland	X	X	X	X		
Syria	X					
Tajikistan				X		
Tanzania	X				X*	
Togo	X*				X*	
Trinidad & Tobago	X*					X*
Turkey		X	X	X		
Tunisia	X				X*	
Turkmenistan				X		
Uganda					X*	
Ukraine	X*			X		

- Note:
- 1: * = States parties to the First Optional Protocol of the ICCPR.
 - 2: * = Member states of the European Community.
 - 3: * = States not accepting ECHR Arts. 25 (right of individual petition) and 46 (compulsory jurisdiction of the European Court).
 - 4: * = States parties to the ACHPR.
 - 5: * = States parties to the ACHR.

COUNTRY	ICCPR ¹	Council ² of Europe	ECHR ³	CSCE	OAU ⁴	OAS ⁵
United Kingdom	X	X*	X	X		
United States of America	X			X		X
Uruguay	X*					X*
Uzbekistan				X		
Venezuela	X*					X*
Viet Nam	X					
Yemen (Republic of)	X					
Yugoslavia	X*			X		
Zaire	X*				X*	
Zambia	X*				X*	
Zimbabwe	X				X*	
TOTALS	116(*71)	26(*12)	26(*1)	53	51(*49)	35(*23)

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- 1: * = States parties to the First Optional Protocol of the ICCPR.
 - 2: * = Member states of the European Community.
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 - 4: * = States parties to the ACHPR.
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APPENDIX C

BANGALORE PRINCIPLES¹

CHAIRMAN'S CONCLUDING STATEMENT

Between 24 and 26 February 1988 there was convened in Bangalore, India, a high level judicial colloquium on the Domestic Application of International Human Rights Norms. The Colloquium was administered by the Commonwealth Secretariat on behalf of the Convenor, the Hon Justice P N Bhagwati (former Chief Justice of India), with the approval of the Government of India, and with assistance from the Government of the State of Karnataka, India.

The participants were:

Justice P N Bhagwati (India) (Convenor)
Chief Justice E Dumbutshena (Zimbabwe)
Judge Ruth Bader Ginsburg (USA)
Chief Justice Muhammad Haleem (Pakistan)
Deputy Chief Justice Sir Mari Kapi (Papua New Guinea)
Justice Michael D Kirby, CMG (Australia)
Justice Rajsoomer Lallah (Mauritius)
Mr Anthony Lester, QC (Britain)
Justice P Ramanathan (Sri Lanka)
Tun Mohamed Salleh Bin Abas (Malaysia)
Justice M P Chandrakantaraj Urs (India)

There was a comprehensive exchange of views and full discussion of expert papers. Justice Bhagwati summarised the discussions in the following paragraphs:

1. Fundamental human rights and freedoms are inherent in all humankind and find expression in constitutions and legal systems throughout the world and in the international human rights instruments.
2. These international human rights instruments provide important guidance in cases concerning fundamental human rights and freedoms.
3. There is an impressive body of jurisprudence, both international and national, concerning the interpretation of particular human rights and freedoms and their application. This body of jurisprudence is of practical relevance and value to judges and lawyers generally.
4. In most countries whose legal systems are based upon the common law, international conventions are not directly enforceable in national courts unless their provisions have been incorporated by legislation into domestic law. However, there is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases

¹ The Bangalore Principles were endorsed and extended at subsequent colloquia held in Harare, Zimbabwe, 19-22 April 1989 and Banjul, The Gambia, 7-9 November 1990.

where the domestic law - whether constitutional, statute or common law - is uncertain or incomplete.

5. This tendency is entirely welcome because it respects the universality of fundamental human rights and freedoms and the vital role of an independent judiciary in reconciling the competing claims of individuals and groups of persons with the general interests of the community.
6. While it is desirable for the norms contained in the international human rights instruments to be still more widely recognised and applied by national courts, this process must take fully into account local laws, traditions, circumstances and needs.
7. It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes - whether or not they have been incorporated into domestic law - for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.
8. However, where national law is clear and inconsistent with the international obligations of the State concerned, in common law countries the national court is obliged to give effect to national law. In such cases the court should draw such inconsistency to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of an international legal obligation which is undertaken by a country.
9. It is essential to redress a situation where, by reason of traditional legal training which has tended to ignore the international dimension, judges and practising lawyers are often unaware of the remarkable and comprehensive developments of statements of international human rights norms. For the practical implementation of these views it is desirable to make provision for appropriate courses in universities and colleges, and for lawyers and law enforcement officials; provision in libraries of relevant materials; promotion of expert advisory bodies knowledgeable about developments in this field; better dissemination of information to judges, lawyers and law enforcement officials; and meetings for exchanges of relevant information and experience.
10. These views are expressed in recognition of the fact that judges and lawyers have a special contribution to make in the administration of justice in fostering universal respect for fundamental human rights and freedoms.

Bangalore
Karnataka State
India

26 February 1988

APPENDIX D

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¹ This bibliography by no means purports to be comprehensive, but rather aims to provide a few sources on a range of topics. We have included only a few publications in languages other than English (where we did not have a good English-language source for the topic).

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APPENDIX E

USEFUL ADDRESSES

United Nations

Centre for Human Rights
Palais des Nations
1211 Geneva 10
Switzerland
Tel: (41 22) 9171234
Fax: (41 22) 9170118

For communications to the Human Rights Committee, the Working Group on Arbitrary Detention and the Special Rapporteur on Freedom of Expression.

UNESCO

Director-General
UNESCO
c/o Office of International Standards and Legal Affairs
7 place de Fontenoy
F-75700 Paris
France
Tel: (33 1) 45681000
Fax: (33 1) 45671690

For communications under the UNESCO procedure.

Council of Europe

European Commission of Human Rights
Council of Europe
BP 431 R6
F-67006 Strasbourg Cedex
France
Tel: (33 88) 412000
Fax: (33 88) 412792

For individual applications under Article 25 of the ECHR.

The European Court of Human Rights may be contacted, for information and documentation only, at the same address as the Commission.

Organization of American States

Inter-American Commission on Human Rights
Organization of American States
Washington DC 20006
USA
Tel: (1 202) 4586002
Fax: (1 202) 4583992

For petitions under the American Convention or Declaration.

Secretary
Inter-American Court of Human Rights
PO Box 6906-1000
San José
Costa Rica
Tel: (506) 340581
Fax: (506) 340584

For information and documentation only.

Organization of African Unity

Secretariat
African Commission on Human and Peoples' Rights
PO Box 673
Banjul
The Gambia
Tel. (220) 92962
Fax. (220) 90764

For communications under the African Charter.

Non-Governmental Organizations

ARTICLE 19
90 Borough High Street
London SE1 1LL
UK
Tel: (44 71) 4034822
Fax: (44 71) 4031943

Interights
5-15 Cromer Street

The ARTICLE 19 Freedom of Expression Handbook

London WC1H 8LS
UK
Tel: (44 71) 2783230
Fax: (44 71) 2784334

For further information about international and comparative law, advice on filing complaints with international bodies, and expert declarations and memoranda of law.

Amnesty International
1 Easton Street
London WC1X 8DJ
UK
Tel: (44 71) 4135500
Fax: (44 71) 9561157

International Service for Human Rights
1 rue de Varembé
Case Postale 16
CH-1211 Geneva 20 CIC
Switzerland
Tel: (41 22) 7335123
Fax: (41 22) 7330826

For assistance and advice about making formal or informal interventions at the UN Commission on Human Rights and its Sub-Commission, as well as in submitting information to the Rapporteur on Freedom of Expression and the Working Group on Arbitrary Detention.

International Freedom of Expression Exchange (IFEX)
490 Adelaide Street West, Suite 205
Toronto
Ontario
Canada M5V 1T2
Tel: (1 416) 8671638
Fax: (1 416) 8671034
E-mail: ifex@web.apc.org

For the dissemination of information about threats, attacks or other violations of the right to freedom of expression worldwide. IFEX operates an Action Alert Network to inform campaigning organizations and individuals in more than 20 countries whenever there is a threat to journalists, writers or media organizations.

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