"FREEDOM OF EXPRESSION: RELEVANT INTERNATIONAL PRINCIPLES"

by

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GENERAL APPROACH TO INTERPRETATION OF FUNDAMENTAL RIGHTS AND FREEDOMS

The difficult task of interpreting constitutional guarantees of fundamental rights and freedoms, of giving life to them and of determining whether a statute or other state action breaches those rights, is entrusted in most democratic countries (in the Commonwealth and elsewhere) to an independent judiciary.

In approaching this task, the Privy Council and other Commonwealth Courts have often applied the generous approach to constitutional interpretation articulated by Lord Wilberforce in Minister of Home Affairs v Fisher [1980] A C 319, 329 (PC). In that case, Lord Wilberforce, for the Judicial Committee, stated that the way to construe a constitution on the Westminster model is to treat it not as if it were an Act of Parliament but:

> "as sui generis, calling for principles of interpretation of its own, suitable to its character ... without necessary acceptance of all the presumptions that are relevant to legislation of private law".

Construing the fundamental rights and freedoms guaranteed by the Bermuda Constitution, Lord Wilberforce observed that -

> "This constitutional instrument has certain special characteristics. (1) It is, particularly in Chapter I, drafted in a broad and ample style which lays down principles of width and generality. (2) Chapter I is headed 'Protection of Fundamental Rights and Freedoms of the Individual'. It is known that this 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. That convention was ... in turn influenced by the Universal Declaration of Human Rights 1948. These antecedents, and the form of Chapter I 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."

This statement was repeated and approved by the Privy Council, in Ong Ah Chuan v Public Prosecutor [1981] A C 648, as the relevant principle of construction of the fundamental rights provisions in the Constitution of the Republic of Singapore.

Most recently, this principle was again reaffirmed by the Privy Council in construing the Constitutions of The Gambia, and of Mauritius. In Attorney-General of The Gambia v Momodou Jobe [1984] A C 689, 700, Lord Diplock said:

"A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction."

In Société United Docks and Others v Government of Mauritius [1985] A C 585, 605, Lord Templeman, delivering the judgment of the Privy Council, said that the same broad interpretation should be given to the Constitution of Mauritius.

This approach to the interpretation of constitutional guarantees of fundamental rights and freedoms has also been adopted elsewhere in the Commonwealth. For example, in Dato Menterii Othman bin Baginda v Dato Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29, at page 32B, Raja Azlan Shah Ag LP of the Federal Court of Malaysia, cited Lord Wilberforce's statement with approval as the correct approach in construing the Malaysian Constitution. He also observed (at page 32B) that:

"a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way."

It is also widely recognised that the judgments of constitutional courts in common law jurisdictions, such as the United States Supreme Court, the Indian Supreme Court, the Privy Council, and other constitutional courts are of strong persuasive authority in cases involving the interpretation of constitutional guarantees of fundamental rights. The Supreme Court of India, in particular, has drawn freely on the rulings of the British Courts, and on those of the United States and Canada as precedents of high persuasive authority in such cases. In Ong Ah Chuan's case, the Privy Council indicated that it was not appropriate to have regard to U.S. decisions to construe fundamental rights in Constitutions on the Westminster model. However, the Privy Council has not subsequently followed that restrictive approach; nor is it a correct approach in view of the universality of the underlying concepts and values.

The legal principles developed by the United States Supreme Court have been of particular influence as regards free speech. (See, for example, Indian Express Newspapers (Bombay) v Union of India [1985] 1 S C R 287 at p.324F-G; Attorney-General of Antigua v Antigua Times [1976] A C 16 (PC); Olivier v Buttigieg [1967] A C 115 at pp.134 and 136 (PC); Maulvi Farid Ahmad v Government of West Pakistan P L D 1965 (W P) Lahore 135). This is so even though the constitutional free speech guarantees under consideration in those cases were not drafted in the absolute language of the First Amendment to the U.S. Constitution.

THE RELEVANCE OF INTERNATIONAL AND COMPARATIVE HUMAN RIGHTS LAW

There has been one notable omission in the source material treated as persuasive by Commonwealth judges in construing constitutional guarantees of free speech: international human rights law. (There have been exceptions: e.g. in Minister of Home Affairs v Fisher, the Privy Council referred to the European Convention on Human Rights as well as to the International Covenant, when construing the Constitution of Bermuda. Although the Indian Supreme Court has cited international material in constitutional cases, there does not seem to be any case in which that material has had the same persuasive force and effect as the Privy Council

approach in Minister of Home Affairs v Fisher). In particular, the European Court of Human Rights and the European Commission of Human Rights, at Strasbourg, have over the years built an important body of case law concerning (inter-alia) the meaning and effect of the right to freedom of expression guaranteed in Article 10 of the European Convention on Human Rights.

As Annexes 1 and 2 to this paper make clear, not only is the definition of freedom of expression in Article 10 strikingly similar to that embodied in Commonwealth and other Constitutions, but the conditions on which this right can legitimately be restricted because of other competing public interests, are also remarkably alike.

Article 10 of the European Convention on Human Rights guarantees the right to freedom of expression in the following terms:

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

The analogous provisions under the International Covenant on Civil and Political Rights (Article 19) and the American Convention on Human Rights (Article 13), are set out in Annex 1 to this paper. The relevant constitutional provisions are contained in Annex 2.

Although the United Kingdom has neither a written constitution nor legislation incorporating the European Convention on Human Rights into domestic law, the Convention has been treated as relevant for the purpose of resolving uncertainties in statute law: see e.g., Waddington v Miah [1974] 1 WLR 683 (HL) at pp.693H-94E. The Convention has also been referred to as a source of public policy for declaring the common law where fundamental human rights and freedoms are at stake. The most notable example[1] of this is in the litigation surrounding the recent publication in the United States of 'Spycatcher', the memoirs of Mr Peter Wright, a former member of the British Security Services, and the U.K. Government's attempts to prevent further publication in the U.K., Australia, New Zealand, and Hong Kong, because he owes a lifelong duty of confidence and public disclosure would harm national security.

The central issue in the pending English proceedings is whether British newspapers should be prevented by injunction from publishing information contained in 'Spycatcher' even though the book is a bestseller

in North America and can be freely brought into the United Kingdom. Lord Templeman, with whom Lord Ackner agreed, accepted (in the interlocutory proceedings) that the House of Lords should have regard to the standards contained in Article 10 for the purpose of determining whether to continue the interlocutory injunctions against publication (Attorney-General v Guardian, Observer and Times Newspapers, [1987] 1 WLR 1248, at pp.1296E-97E and 1307E). (Whether the majority of the Law Lords did in fact comply with Article 10 in ordering interlocutory injunctions may eventually be decided by the European Court of Human Rights). The significance of Article 10 in these proceedings lies in its impact on the burden and standard of proof, and the characterisation of the interests to be balanced.

The Hong Kong Court of Appeal, in its decision of 8th September 1987, in Attorney-General v South China Morning Post Limited, granting an interlocutory injunction, also accepted that the equivalent provision (Article 19) of the International Covenant on Civil and Political Rights governed the proper approach for determining whether to restrain the newspaper's freedom of expression. This followed from the fact that the United Kingdom has adhered to the International Covenant on behalf of Hong Kong.

In the trial of the English action, the trial judge, Mr Justice Scott, accepted that Article 10 as interpreted by the English Court provided the relevant legal test. He held that no injunction should be granted on the basis of that test (Attorney-General v The Observer Ltd. and Others. The Times, December 22, 1987). The Court of Appeal confirmed this decision in its judgment of 10th February 1988 (The Times, February 11, 1988). All three members of the Court of Appeal regarded the free speech guarantee, contained in Article 10 of the European Convention, as relevant for the purpose of interpreting the common law on confidential information, balancing the competing public interests in free speech and in official secrecy. An appeal to the House of Lords against this decision is pending at the date of completing this paper (April 30, 1988).

The judgments of the European Court of Human Rights interpreting Article 10 are also relevant in domestic cases involving the interpretation of enforceable constitutional guarantees of free speech. This is so particularly in the many Commonwealth countries - such as Mauritius and Zimbabwe - whose codes of fundamental rights are modelled on the international norms reflected in the European Convention on Human Rights. Judges in those countries review the constitutionality of legislation and administrative action against standards derived from the European Convention. It is therefore at least as appropriate in such countries to treat the European Court's case law as of highly persuasive value in construing similar language in written constitutions, as it is for international human rights obligations to be taken into account in interpreting ambiguous ordinary legislation or developing the common law.

In other countries such as India, Malaysia, and Singapore, the European Court's judgments are also of great potential relevance. Their constitutions are of an earlier vintage but the underlying values and concepts are similar. Both the right to freedom of expression and the grounds on which restrictions may be imposed are set out in similar terms. The primary difference lies in the formulation of the permissible extent of restrictions. Whereas Article 19 of the Indian Constitution, for example, permits the state to impose only "reasonable restrictions" on the citizen's

freedom of speech, the European Convention prescribes the more specific test that any restriction must be "necessary in a democratic society". However, the difference in the extent of permissible restrictions under the international and constitutional norms, is more apparent than real. At a very early stage in its history, the Supreme Court of India made it clear that the "reasonableness" test imports the concept of proportionality which the European Court of Human Rights has since held lies at the heart of the notion of "necessity". In State of Madras v V G Row [1952] SCR 597, 607, Patanjali Sastri C J stated (in the context of the fundamental right to form associations or trade unions guaranteed by Article 19(1)(c) of the Indian Constitution) that:

> "The test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the rights alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict".

The European Court's interpretation of the test of necessity is potentially relevant in judging the reasonableness of a restriction on the right to freedom of expression under the Indian Constitution.

The Inter-American Court of Human Rights has looked to the European case law as providing the clearest source of guidance in this area, despite the fact that the analogous provision of the American Convention on Human Rights is not in identical language. Article 13 of the American Convention does not refer to the need for any restriction to be necessary "in a democratic society"; it stipulates only that a restriction must be "necessary" for one of the stated purposes. Nevertheless, in a powerful Advisory Opinion on the legality of the compulsory licensing of journalists, the Inter-American Court has held that for a restriction on free speech to be "necessary" under Article 13(2), the government must satisfy the test articulated by the European Court of Human Rights; it must show that the restriction is required by a compelling social need, and that it is so framed as not to limit freedom of expression more than is necessary or proportionate to achieve a legitimate objective (Compulsory Membership of Journalists' Association, Advisory Opinion OC-5/85 of 13th November 1985; 8 EHRR 165 at paragraph 46). One may expect the U.N. Human Rights Committee to take a similar approach to the interpretation of Article 19 of the International Covenant in an appropriate case.

Strasbourg too has been broadminded about comparative sources of interpretation, evidencing a willingness to look at relevant principles developed in national jurisdictions. In construing Article 10 of the Convention, the European Court and Commission pay considerable regard to the case law of the U.S. Supreme Court interpreting the First Amendment to the U.S. Constitution. Thus, for example, the Commission has referred to the settled case law of the U.S. Supreme Court on the "chilling effect" of State practices on the practical enjoyment of the right to freedom of expression (Glasenapp v Federal Republic of Germany, Commission decision on admissibility, decision of 16 December 1982, 5 EHRR 471 at 474). And, as will be seen below, the European Court has ruled, in terms similar to those employed by the U.S. Supreme Court in Procunier v Martinez 416 U.S. 396

(1974), that an interference with expression will only be upheld if there is a "pressing social need" for it in the particular circumstances.

THE SCOPE OF FREEDOM OF EXPRESSION

(a) Right to impart information

The right to freedom of expression guaranteed by Article 10 extends to all types of expression which impart or convey opinions, ideas, or information, irrespective of content or mode of communication. The breadth and importance of this right were recognised by the European Court in the Handyside Case. There, the Court observed that:

> "Freedom of expression constitutes one of the essential foundations of ... a [democratic society], one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, 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'" (judgment of 7th December 1976, Series A No 24; 1 EHRR 737, at paragraph 49; see also the Sunday Times Case, judgment of 26th April 1979, Series A No 30; 2 EHRR 245, at paragraph 65; and the Lingens Case, judgment of 8 July 1986, Series A No 103; 8 EHRR 407, at paragraph 41).

The Handyside Case concerned a successful prosecution under the English Obscene Publications Act against the publishers of The Little Red Schoolbook, a book which urged the young people at which it was aimed to take a liberal attitude to sexual matters. The book was published elsewhere in Europe and in some parts of the United Kingdom without prosecution. Although the challenge under Article 10 of the Convention to this interference with free speech failed (upon the basis that Contracting States have a wide margin of appreciation in deciding whether a given interference with free speech is necessary in a democratic society for the protection of morals), the case is important for the general statement of principle.

The importance of freedom of artistic expression has recently been stressed by the Commission. In Müller v Switzerland (report of the Commission adopted on 8 October 1986), it observed that:

> "... freedom of artistic expression is of fundamental importance in [a] democratic society. Typically it is in undemocratic societies that artistic freedom and the freedom to circulate works of art are severely restricted. 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" (paragraph 70).

Article 10 may not be relied upon, however, to secure protection of racist speech. In Glimmerveen and Hagenbeek v The Netherlands [1982] 4 EHRR 260, the Commission held inadmissible a complaint by extremist right-wing Dutch politicians that their conviction for distributing leaflets advocating racial discrimination and the repatriation of non-whites from the Netherlands violated Article 10. It did so invoking Article 17 which precludes anyone from relying on the Convention for a right to engage in activities that are "aimed at the destruction of any of the rights or freedoms set forth in the Convention." The Commission found that the expression of these ideas clearly constituted an activity within the meaning of Article 17 in that they would encourage racial discrimination which is prohibited under the Convention and other international instruments.

In other cases, the Commission has upheld race relations and defamation laws imposing civil or criminal sanctions for racist statements as being justified interferences with expression under Article 10(2), on the ground that they are necessary for the "prevention of disorder or crime", or for the "protection of the reputation or rights of others" (see e.g. X v Federal Republic of Germany 29 Decisions and Reports 194 (1982)). (The International Covenant on Civil and Political Rights and the American Convention on Human Rights go further in this regard; Article 20 and Article 13(5), respectively, prescribe that advocacy of racial or religious hatred that constitutes incitement to discrimination or violence shall be prohibited by law.)

This is an area in which U.S. First Amendment doctrine has not been followed by the European Court. In 1979, a planned march by a group of neo-Nazis through the streets of Skokie, Illinois,

> "raised in a most painful form the question of whether the First Amendment's protection is truly universal." (Lawrence H Tribe, Constitutional Choices (1985) p.219).

The town passed various ordinances designed to bar the proposed march with its display of swastikas and military uniforms. In its view, the march would have inflicted direct psychic trauma on those residents who were survivors of the Holocaust. The U.S. Court of Appeals for the Seventh Circuit rejected Skokie's justification for the ordinances, holding that speech which inflicts such "psychic trauma" is indistinguishable in principle from speech that invites dispute, or induces a condition of unrest, or even stirs people to anger (National Socialist Party v Skokie 578 F.2d 1197 (7th Cir.) cert. denied, 439 US 916 (1978)).

On the important question of access to radio and television, the European Commission has held that the freedom to impart information and ideas does not include a general right of access to broadcasting time to put them forward. However, it has acknowledged the possibility that denial of access to political parties at election time could raise issues under the Convention. In X and the Association of Z v United Kingdom ((1971) 38 Collected Decisions 86), the applicants sought to challenge the BBC's policy of limiting access to broadcasting time to political parties with representation in Parliament or with parliamentary candidates. The Association wanted to broadcast its own political programmes on television, although it had never fought an election and did not intend to do so. The BBC refused to permit such broadcasts. The Commission held the complaint alleging breach of Article 10 to be inadmissible, stating:

"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 and 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 [prohibition of discrimination]. 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" (at p.89).

The issue of political broadcasting came before the High Court of Trinidad and Tobago in Rambachan v Trinidad and Tobago Television Company Limited and Attorney-General of Trinidad and Tobago (decision of 17 July 1985, unreported). In the constitutional motion alleging breach of his right to freedom of expression, Mr Rambachan, an Opposition MP, complained about the state-owned Trinidad and Tobago Television's (TTT) refusal to transmit his political broadcast on the basis of opinions expressed in it, and the constraints imposed by TTT on the Opposition's access to the State's lone television station. Mr Justice Deyalsingh upheld both complaints, citing Indian and U.S. authorities in support of his conclusion that the fundamental right of free speech demanded opening up the television media to political broadcasts subject only to reasonable limitations. On the importance of access to television in present-day society, Mr Justice Deyalsingh had this to say:

"... Government is duty bound to uphold the fundamental rights and with 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, so are the days of political pamphleteering ...".

Although both the Trinidad and Tobago Television Company and the Attorney-General appealed against the decision, the appeal was settled in October 1987 on the basis of a consent order declaring that:

"the first named Appellant (TTT) in the operation of its policy dated the 10th February, 1982 infringed the fundamental rights of the Respondent (Mr Rambachan) to express his political views and his right of freedom of expression by refusing to broadcast the Respondent's pre-recorded script on the 21st February, 1982".

The same issue, of whether the right to broadcast on television forms part of the right to freedom of expression, was considered virtually contemporaneously by the courts in Belize in Courtenay and Hoare v Belize Broadcasting Authority. The applicants in this constitutional motion - a Senator and member of the Opposition Party, and the managing director and operator of a television station in the City of Belize - had sought and been refused permission to broadcast a television programme intended to provide the Belize public with the view of the Opposition Party on matters of public interest and public policy. The Belize Broadcasting Authority

refused to allow the airing of this half hour programme on the ground that it was a party political broadcast. The Chief Justice of Belize, Mr Justice Moe, held that:

> "Today 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" (judgment of 30th July 1985, Supreme Court of Belize).

The Chief Justice found the refusal to broadcast to be arbitrary and discriminatory and therefore violative of the applicants' constitutional rights both to freedom of expression and to protection from non-discrimination. He also found that the Broadcasting Regulation requiring prior consent to broadcast was ultra vires the Constitution; it constituted, in his view, an unjustified interference with the right to freedom of expression since it gave the Broadcasting Authority an unfettered discretion to allow or refuse permission to broadcast.

On appeal, the Belize Court of Appeal (judgment of 20th June 1986) upheld the first two conclusions, expressly endorsing Mr Justice Moe's finding that to broadcast on television is today an integral part of the freedom of expression. However, it held that the Regulation itself was not unconstitutional since there were "guidelines" elsewhere in the regulations indicating how the power or discretion of the Authority was to be exercised.

"Political speech", including information and opinions about the workings of government, is especially important and is strongly protected under Article 10. However, it is not only political speech that is protected. Article 10 also protects commercial speech (i.e. advertising or other means of communicating information to consumers). The Commission expressly recognised this in its admissibility decision in X and Church of Scientology v Sweden (16 Decisions and Reports 68 at 73 (1979)) where it stated that it was "not of the opinion that commercial 'speech' as such is outside the protection conferred by Article 10(1)...".

Neither the Commission nor the Court has yet taken this further and addressed the important issue of principle in this area: namely, the extent to which it is permissible under Article 10 to place restrictions on the content of advertising. In Barthold v Federal Republic of Germany (judgment of 25th March 1985, Series A No 90; (1985) 7 EHRR 383), both the Commission and the Court held that an interview given by a veterinary surgeon to a Hamburg newspaper, in which he called for a more comprehensive veterinary night service, was a type of expression fully protected under Article 10, since it communicated information on a matter of general interest. Restrictions imposed on the applicant by his Professional Rules, which prohibited him from repeating his remarks in the press, were thus held to violate his right of free speech. Although the interview had an advertisement-like effect, the Commission and Court both took the view that the case was not concerned with commercial advertising. They did not consider it necessary, therefore, to consider the scope of protection afforded to such speech.

The important underlying issues of principle were emphasised by Judge Pettiti in his Concurring Opinion in the Barthold Case:

"Freedom of expression in its true dimension is the right to receive and to impart information and ideas. Commercial speech is directly connected with that freedom.

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. Regulation in this sphere is of course legitimate - an uncontrolled broadcasting system is inconceivable - but in order to maintain the free flow of information any restriction imposed should answer a 'pressing social need' and not mere expediency."

The Constitutional Court of Austria, on the other hand, has considered the extent of the protection to be afforded to commercial advertising under Article 10 of the European Convention (whose provisions are incorporated into Austrian law). In its judgment of 27 June 1986 in B 658/85 ([1987] HRLJ 361), the Constitutional Court held that commercial advertising is protected by Article 10 of the European Convention although the protection afforded to such speech may be more restricted than that extended to the expression of political ideas. The Court further held that the Austrian Broadcasting Corporation (the 'ORF') had violated this guarantee in rejecting, without giving reasons, an application by an Austrian weekly to broadcast radio commercials. The Broadcasting Corporation had interpreted a permissive provision in the Broadcasting Act allowing it to carry commercial advertising on its radio and television programmes, as giving it an unfettered discretion to accept or reject commercials. Rejecting this interpretation, the Court stated:

"... It is clear that the allocation of commercial advertising according to [the] Broadcasting Act should primarily follow commercial objectives. This cannot be objectionable under the Constitution because a right to free broadcasting cannot be seriously deduced from Article 10 of the Convention. The Act is comparatively unspecific in this respect. However, it must not be understood that the ORF is free to give available time to the applicants arbitrarily, partially, with preference for certain views or with exclusion of particular entrepreneurs .... On the contrary, in the light of Article 10 of the Convention and the Broadcasting Act, the ORF is required to be available to everybody for lawful commercial advertising under equal, unbiased and neutral conditions that consider the diversity of interests of the applicants and of the public. A preference for and a discrimination between certain enterprises must be avoided ...".

A related issue which has not yet been judicially decided by the European Commission or Court is the meaning of the third sentence of Article 10(1) which permits State licensing of broadcasting, television and cinema enterprises. It is clear that licensing as such is not a breach of Article 10. It is also clear that such licensing must not violate the prohibition on discrimination in Article 14. It is strongly arguable that the power of "licensing" does not entail the power to regulate the content of the material which is broadcast by those persons to whom licences are granted. The third sentence enables public authorities to obtain a licence

but not to regulate the use of such a licence in a manner which would otherwise infringe Article 10(2). These issues are important at a time when new technology has created the possibility of free markets in broadcasting and telecommunications, irrespective of frontiers. Article 10 has the potentiality to eliminate unnecessary national restrictions upon the use of this new technology which hamper broadcasting and telecommunications.

(b) Right to receive information

The right to receive information and ideas is also protected under Article 10 - not simply as the converse of the right to impart information, but in its own right. The European Court has emphasised that the broad public interest in receiving information and in the quality of political and social debate lies at the heart of freedom of expression.

Apart from the express qualifications in Article 10(2), however, there is another important qualification on the right to receive information. This right is dependent upon there being a willing speaker. The Court made this clear in its recent judgment in Leander v Sweden (26 March 1987, Series A No 116; 9 EHRR 433). The applicant in that case had sought and been refused access to information held on a police register, on the basis of which he had been denied security clearance for employment. The Court held, unanimously, that there was no violation of Article 10 in the circumstances, stating that:

> "... the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him .... Article 10 does not .... confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual" (paragraph 74, emphasis added).

In other words, Article 10 does not confer a right to receive official information from a government department or agency.

In a case decided contemporaneously by the Constitutional Court of Austria (judgment of 16 March 1987 - B154/85 [1987] HRLJ 365), the latter attributed the same meaning to Article 10, stating that it does not oblige the state to guarantee access to information or to provide information. However, the Constitutional Court emphasised that the situation is entirely different where government officials hinder the procurement or the investigation of information accessible to the public. Such an interference is only permissible, the Court stated, if it satisfies the requirements of Article 10(2) of the Convention. The Constitutional Court held that these requirements were not met in the case before it where police seized and destroyed film taken by a journalist at a demonstration. Accordingly, the action was held to constitute a violation of the journalist's rights under Article 10.

Freedom of the press

Article 10 of the European Convention does not expressly mention freedom of the press. However, in several landmark judgments, the European Court of Human Rights has held that the principles of freedom of expression are of particular importance as far as the press and other media are concerned. The Court has stressed the importance of freedom of the press in a democratic society to ensure proper discussion of matters of public interest.

The Court first affirmed the importance of freedom of the press in the Sunday Times Case, which concerned the wish of the Sunday Times to publish an article about the drug, thalidomide. The newspaper was restrained, by an injunction ordered by the House of Lords, from publishing on the ground that publication would interfere with the administration of justice in pending proceedings concerning alleged negligence in the manufacture and distribution of the drug. For the European Court, the injunction violated Article 10 because it was not "necessary" in that it did not satisfy a "pressing social need". The Court emphasised that it was incumbent on the mass media to keep the public informed on judicial proceedings just as on other matters of public interest, and that it was the public's right to receive such information (paragraph 65).

In the Barthold Case, the Court characterised the role of the press as "purveyor of information and public watchdog". It held that the press was hampered in the performance of this task where the applicant was prevented by his professional association from repeating in the press statements which the Court construed as contributing to public debate on a topic affecting the life of the community.

Most recently, in Lingens v Austria, a political defamation case, the Court emphasised the vital role of the press in fostering political debate:

> "Whilst the press must not overstep the bounds set, inter alia, for the 'protection of the reputation of others', it is nevertheless incumbent on it to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has the right to receive them.
>
> Freedom of the press furthermore 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 which prevails throughout the Convention" (judgment of 8 July 1986, Series A No 103; 8 EHRR 407, paragraphs 41 and 42).

The Lingens Case concerned a successful criminal prosecution brought against a journalist for articles he wrote impugning the political morality and integrity of an Austrian politician. In its judgment holding Austrian criminal libel law to be in violation of Article 10, the European Court stressed the chilling effect of the fine imposed on Mr Lingens. Although the disputed articles had already been widely circulated so the penalty did not, strictly speaking, prevent him from expressing himself, it would be likely to discourage him from making criticisms of that kind in

the future. Moreover, it would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community.

This conclusion is similar to that reached by the Privy Council in Olivier v Buttigieg [1967] A C 115, which concerned compliance with the free speech guarantee of the Constitution of Malta of a government circular prohibiting government employees from taking the "Voice of Malta", a weekly newspaper published by the Malta Labour Party, into government hospitals. The Privy Council held this prohibition to be an unconstitutional hindrance of the newspaper editor's enjoyment of his freedom to impart ideas and information without interference, even though the editor was not debarred by the prohibition from expressing and circulating his views to the general public. In so holding, the Privy Council rejected the Government's argument that any hindrance was slight and could be ignored as being de minimis; there was always, Lord Morris of Borth-Y-Guest observed, the likelihood of the violation being vastly widened and extended with impunity. The Privy Council cited with approval the view expressed by the Indian Supreme Court in Romesh Thappar v The State of Madras [1950] SCR 594, 597:

> "There can be no doubt that freedom of speech and expression includes freedom of propagation of ideas and that freedom is secured by freedom of circulation. 'Liberty of circulation is as essential to that freedom as the liberty of publication. Indeed without circulation the publication would be of little value.'"

Special taxes and licence fees imposed on newspaper publishers may require special scrutiny. Thus in Indian Express Newspapers v Union of India [1985] 2 SCR 287, the Indian Supreme Court directed the Indian Government to reconsider the imposition of an import duty of 15% on newsprint imported from abroad by newspapers with a circulation of over 50,000. The Court held that while tax may be levied on the newspaper industry, such a tax becomes unconstitutional if it is unduly burdensome:

> "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. In the case of ordinary taxing statutes, the laws may be questioned only if they are either openly confiscatory or a colourable device to confiscate. On the other hand, in the case of a tax on newsprint, it may be sufficient to show a distinct and noticeable burdensomeness, clearly and directly attributable to the tax" (at pp. 342G-343A).

In the Indian Express case, the Supreme Court found that the Government had not made any assessment of the impact of the levy on the newspaper industry. Nor did the Supreme Court have before it sufficient evidence upon which to make a determination as to whether the impact was so burdensome as to affect the freedom of the press. "On such a vital issue," concluded the Court:

> "we cannot merely say that the petitioners have not placed sufficient material to establish the drop in circulation is directly linked to increase of the levy when, on the side of the

Government the entire exercise is thought to be irrelevant. Hence there appears to be good ground to direct the Central Government to reconsider the matter afresh ..." (at p.367C-D).

(The Supreme Court of India was much more tentative in its treatment of this issue than either the European Court of Human Rights in the Lingens Case, or the U.S. Supreme Court in Grosjean v American Press Company 297 U.S. 233 (1936) where it struck down, as violative of the First Amendment, a Louisiana statute which levied a licence tax on the advertising receipts of newspapers enjoying a large circulation; the measure was clearly designed, in the Court's view, to restrict press freedom rather than to raise revenue).

The Supreme Court of India took a stronger stance in two earlier cases. In Sakal Papers Ltd v Union of India A I R 1962 SC 305, the Supreme Court struck down as contrary to freedom of expression various restraints fixing the maximum number of pages that might 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 and to circulate it to any number of persons was an integral part of the freedom of speech and expression.

In Bennett Coleman and Co. Ltd. v Union of India A I R 1973 SC 107, the Supreme Court held that the Newsprint Policy for 1972-73 violated Article 19(1)(a) of the Indian Constitution since it contained restrictions which singled out the press and imposed prohibitive burdens on it that would restrict circulation, penalise freedom of choice as to personnel, prevent newspapers from being started, and compel the press to have recourse to Government aid. The Court was of the opinion that in fixing the page limit of newspapers, the Newsprint Policy not only deprived the petitioners of their economic vitality but also affected their capacity to disseminate news. If, as a result of the reduction of pages the newspapers were compelled to depend on advertising as a main source of income, their capacity to disseminate news would be affected. If, on the other hand, they were compelled to reduce their space for advertising to devote more space to news, their financial strength would crumble. Either way, concluded the Court, the Policy was unconstitutional in several respects. The Court further held that the impugned Newsprint Policy was in effect a "newspaper control policy" in the guise of framing an Import Control Policy for newsprint, and as such ultra vires.

In marked contrast, the Privy Council took a less critical approach to Antiguan legislation requiring, as a condition of the freedom to publish, a deposit of $10,000 to satisfy possible libel judgments (Attorney-General for Antigua v Antigua Times [1976] A C 16). This was regarded as "reasonably required for the purpose of the protection of the rights and freedoms of others" in the language of the free speech guarantee modelled on the European Convention. It is to be hoped that the Antigua Times case would not be followed today.

RESTRICTIONS ON FREEDOM OF EXPRESSION

Obviously, freedom of speech is not absolute. But a State may only validly interfere with freedom of expression if the conditions stated in Article 10(2) are satisfied. To justify an interference with freedom of expression, a State must show - and the burden is on it to do so - that the

interference is "prescribed by law", that it is in pursuance of one of the stated purposes, and that it is "necessary in a democratic society" to achieve that purpose (Sunday Times Case, paragraph 45). Each interference with freedom of expression has to be justified by the State under these criteria.

The Supreme Court of India, too, has imposed on the State the burden of proving the constitutionality of legislation which, prima facie, interferes with fundamental rights. In Saghir Ahmad v The State of U P [1955] SCR 707, Mukherjea, J stated on behalf of the Court (at page 726) that:

> "There is undoubtedly a presumption in favour of the constitutionality of a legislation. But when the enactment on the face of it is found to violate a fundamental right guaranteed under Article 19(1)(g) of the Constitution it must be held to be invalid unless those who support the legislation can bring it within the purview of the exception laid down in clause (6) of the Article".

The European Court has made it clear that, in applying Article 10, it is faced not with a choice between conflicting principles (one of which is freedom of expression), but with "a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted" (Sunday Times Case, paragraph 65). Here, too, there is a notable confluence in the approach taken by the international and national courts. In Romesh Thappar v The State of Madras [1950] SCR 594, a decision of the Supreme Court of India, Patanjali Sastri, J stated (at page 602) that:

> "... very narrow and stringent limits have been set to permissible legislative abridgement of the right of free speech and expression, and this was doubtless due to the realisation that freedom of speech and of the press lay at the foundation of all democratic organisations, for without free political discussion no public education, so essential for the proper functioning of the processes of popular government, is possible".

(a) "Prescribed by law" and Legal Certainty

To be "prescribed by law", an interference with freedom of expression must be authorised by domestic law - whether by statute, common law, or delegated legislation. However, this in itself is not enough. The law must also satisfy the requirements of legal certainty. Those requirements were explained by the European Court in the Sunday Times Case as follows:

> "First, the law must be adequately accessible; the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail" (paragraph 49).

In the Silver Case, a speech case about restrictions upon prisoners' correspondence, the European Court held that the requirements of legal certainty were not met where prisoners' mail was interfered with by the prison authorities on the basis of unpublished orders and instructions (judgment of 25 March 1983, Series A No 61, 5 EHRR 347). Although the case was argued and decided under Article 8 of the European Convention (right to respect for correspondence), which requires that interferences be "in accordance with the law", it was also argued under Article 10, and the decision applies equally to free speech as to correspondence.

The phrase "prescribed by law" also implies compatibility with the rule of law. This requirement entails that there must be adequate safeguards and effective control in domestic law against arbitrary interferences by public authorities with the rights safeguarded. As the Court observed in the Silver Case,

> "One of the principles underlying the Convention is the rule of law, which implies that an interference by the authorities with an individual's rights should be subject to effective control. This is especially so where, as in the present case, the law bestows on the executive wide discretionary powers, the application whereof is a matter of practice which is susceptible to modification but not to any Parliamentary scrutiny" (paragraph 90).

The European Court found this requirement too to have been violated in the Silver Case in that the authorities' powers to control prisoners' correspondence were not subject to adequate safeguards against abuse. The Court held that the safeguards need not be contained in the very text which authorises the imposition of restrictions. However, it stressed that there must be an effective remedy to challenge and secure redress of an alleged violation of one's rights under the Convention. This requirement was not met where, as in that case, the jurisdiction of the English Courts was limited to examining whether the measures in question were taken arbitrarily, in bad faith, for improper motives or were ultra vires. (See also the Malone Case, judgment of 2nd August 1984, Series A No 82, paragraph 67, inadequate legal controls on telephone tapping in the U K held violative of the right to respect for private life under Article 8).

The Indian Supreme Court has imported the concept of procedural due process into similar language in the Indian Constitution (Maneka Gandhi v Union of India A I R 1978 S C 597 at paragraph 54). So has the Privy Council, in construing similar language in the Constitution of Singapore (Ong Ah Chuan v Public Prosecutor [1981] A C 648 (PC) at pp.669D-71B). The U N Human Rights Committee has yet to give a normative meaning to the various references to "law" contained in the International Covenant on Civil and Political Rights. However, it may well be influenced by this body of international and comparative human rights law. (The Human Rights Committee's General Comment on Article 17 of the Covenant, (adopted on 23rd March 1988 (CCPR/C/21/Add.6), 31 March 1988) states, somewhat delphically, that the term "unlawful" (in Article 17) "means that no interference can take place except in cases envisaged by law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant").

(b) Legitimate aim

The State also has to establish that the interference is in pursuance of one of the legitimate purposes listed in Article 10(2). In practice, this does not cause much difficulty. Normally, the only real issue here is whether the interference complained of is genuinely aimed at one of these purposes (the Sunday Times Case, paragraph 57).

(c) Test of necessity

The most difficult condition for the State to satisfy, and the one on which most of the cases under Article 10 turn, is that the restriction is "necessary in a democratic society" for the legitimate purpose sought to be achieved. The mere fact that the State acts in good faith, or has had the restriction complained of for a long time, does not make the interference valid under Article 10.

The initial responsibility for securing the rights and freedoms enshrined in Article 10 (as in other provisions of the Convention) lies with the Contracting States. Accordingly, the Court has recognised that States enjoy a "margin of appreciation" in conforming their law and practice with the Convention. But States do not enjoy an unlimited margin of appreciation. Ultimately, it is for the European Commission and Court to assess whether the reasons given to justify an interference with freedom of expression are relevant and sufficient. Hence, "the domestic margin of appreciation ... goes hand in hand with a European supervision" (Handyside Case, paragraph 48; The Sunday Times Case, paragraph 59).

The European Court has enunciated a number of important principles relevant to interpreting the test of necessity. It has concluded that the adjective "necessary" is synonymous neither with "indispensable" nor with the looser test of "reasonable" or "desirable". What the test of necessity connotes is a requirement that the State establish a "pressing social need" for the restraint (The Sunday Times Case, paragraph 59).

Implicit in this standard is the notion that the restriction, even if justified to achieve one of the stated purposes, must be framed so as not to limit the right protected by Article 10 more than is necessary. That is, the restriction must be proportionate and closely tailored to the aim sought to be achieved. It was this requirement that the Court held had not been satisfied in the Sunday Times case, since the injunction restraining publication was overbroad in its scope. (Cf., State of Madras v V G Row [1952] SCR 597 at p.607.)

Nor was the test of necessity satisfied in the Silver Case where overbroad controls were imposed on the content of prisoners' correspondence with the outside world. The Court recognised that some measure of control over prisoners' correspondence was called for and was not in itself incompatible with the European Convention. However, it held that regulations which, inter alia, permitted the stopping of letters that contained "complaints calculated to hold the authorities up to contempt", "complaints about prison treatment", "allegations against prison officers", and "grossly improper language", did not correspond to a pressing social need, and were not proportionate to the aim sought to be achieved. In so holding, the European Court applied a very similar test and reached the same conclusions as had the U.S. Supreme Court in Procunier v Martinez [1974] 416 U.S. 396 at 413, a case relied upon by the applicants.

Finally, the interference or restriction must be necessary "in a democratic society". The Court has identified "pluralism, tolerance and broadmindedness" as the hallmarks of a democratic society (Handyside Case). It elaborated on this in Young, James and Webster v the United Kingdom, a case concerning the conformity of a "closed shop" agreement with the freedom of association guarantee in Article 11 of the Convention:

> "Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position" (judgment of 26 June 1981 at paragraph 63).

In the context of freedom of expression, the Court has made it clear that the proper functioning of democracy requires freedom not merely for restrained criticism but also for that which may "offend, shock or disturb" (Handyside Case, The Sunday Times Case, and Lingens Case).

The manner in which the European Court has applied the test of necessity in practice may be illustrated by examples from two areas of fundamental importance and considerable topicality: first, where free speech comes into conflict with the right to a fair trial; and secondly, where free speech comes into conflict with the right of public figures to protection of their reputation.

FREEDOM OF EXPRESSION AND THE RIGHT TO A FAIR TRIAL

It is well-recognised in the common law tradition that justice is not a "cloistered virtue" (Ambard v Attorney-General for Trinidad and Tobago [1936] A C 322, 335 (PC)) and that the workings of the legal process should normally be open to public scrutiny. This is an area, however, where restrictions imposed by English law have contrasted sharply with the approach required under the European Convention - particularly as regards the scope of the English doctrine of contempt of court.

In The Sunday Times case, the House of Lords unanimously held that it was a contempt of court for the newspaper to publish any material which prejudged the issue in pending (though dormant) negligence proceedings against the distributors of the Thalidomide drug for the deformities caused to the children of women who had taken the drug during pregnancy, or was likely to cause prejudgment of that issue. The Sunday Times complained that the decision of the House of Lords unjustifiably interfered with the right to free expression guaranteed by Article 10 of the Convention. The case came before the full European Court, which decided (by 11 votes to 9) that the Law Lords had indeed breached the applicants' rights under Article 10. As a result, the Government was obliged to introduce legislation (The Contempt of Court Act 1981) in effect over-ruling the Lords' decision.

The European Court's judgment is a strong and courageous affirmation of the importance of free speech and freedom of the press even where the right to a fair trial is held by a national supreme court to be threatened by public information and discussion. The Court held that the common law of England was sufficiently well established to satisfy the first condition in Article 10 of being "prescribed by law ". Further, it concluded that the ruling had the legitimate aim of maintaining judicial

authority for the reasons given by the Lords. However, the majority went on to hold that the injunction restraining publication of the article was not necessary to preserve the authority of the judges. In view of the legitimate public interest in the thalidomide compensation controversy and the public debate it had occasioned, the injunction which restrained in broad terms any public prejudgment of the legal issues was disproportionate to the aim. It did not satisfy a "pressing social need".

The Court emphasised both the media's responsibility to keep the public informed on judicial proceedings, and the public's right to receive information. On the media's role, it observed:

> "These principles [of freedom of expression] are of particular importance as far as the press is concerned. They are equally applicable to the field of the administration of justice, which serves the interests of the community at large and requires the co-operation of an enlightened public. There is a 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. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them" (paragraph 65).

As regards the right of the public to be properly informed, the Court said this:

> "In the present case, the families of numerous victims of the tragedy ... had a vital interest in knowing all the underlying facts and the various possible solutions. They could be deprived of this information, which was crucially important for them, only if it appeared absolutely certain that its diffusion would have presented a threat to the 'authority of the judiciary'" (paragraph 66).

In Harman v Home Office [1983] A C 280, the House of Lords decided, by three votes to two, that a solicitor had been guilty of a contempt of court in passing documents to a journalist which had been obtained from her client's adversary in the course of discovery procedures, even though the documents had been read out in open court at the hearing of the action. Lord Diplock, who was in the majority, stated that the case was:

> "not about freedom of speech, freedom of the press, openness of justice or documents coming into 'the public domain'".

A vigorous dissenting judgment by Lord Scarman and Lord Simon of Glaisdale relied upon U.S. First Amendment as well as European Convention doctrine. A subsequent complaint by Ms Harman to the European Commission of Human Rights was held admissible and settled upon the basis that the Government would pay the applicant's legal costs and make necessary amendments to English law.[2]

At issue in two cases currently pending before the European Commission is whether the inability of the media to challenge court orders forbidding publication of the name of a witness in a criminal trial, or banning television reporting of court proceedings until after the jury has given its verdict, is compatible with the European Convention.

The first case, Crook v the United Kingdom, was brought by a journalist over an order made by a trial judge forbidding the press from publishing the name of a chief prosecution witness because it would cause distress both to her and to her family. Her name was nonetheless mentioned in open court. Mr Crook tried to challenge the ban in the High Court but was unsuccessful. The Court held that they had no jurisdiction to review the decision.

The Crook case has been adjourned by the European Commission pending the outcome of Hodgson, D Woolf Production Ltd and the NUJ v the United Kingdom, which concerns the attempt by Channel 4 television to broadcast, nightly, studio readings from a transcript of the proceedings in the trial of Mr Clive Ponting, the civil servant eventually acquitted of violating Section 2 of the Official Secrets Act. The trial judge made an order banning the Channel 4 telecasts until after the jury's verdict in the Ponting case. The order was not opposed by counsel for the prosecution or for the defence, and the judge refused to hear counsel on behalf of the television station and producer on the ground that they had no standing. A complaint by the producer and editor of the programme to the European Commission has been held admissible under Article 13, which guarantees the right to an effective remedy in respect of alleged violations of the Convention (admissibility decision of March 1987, as yet unreported).

In the wake of this decision, the U.K. Government has tabled a new clause to the Criminal Justice Bill which would enable the press and other interested parties to obtain judicial review of banning orders made by Crown Court judges under the Contempt of Court Act.

FREEDOM OF EXPRESSION AND PUBLIC OFFICERS

The Sunday Times Case was decided by a narrow margin of eleven votes to nine. However, in the recent Lingens Case, the European Court unanimously affirmed the principles enunciated in the Sunday Times Case, and unanimously held that the Austrian courts had violated Mr Lingens' right to free expression guaranteed by Article 10.

Mr Lingens, a journalist, had published two articles in the Austrian newsmagazine "Profil" which were strongly critical of Mr Bruno Kreisky, the retiring Chancellor of Austria, for protecting former members of the S.S. for political reasons, and for his accommodating attitude towards former Nazis who had recently taken part in Austrian politics. Mr Lingens described Mr Kreisky's conduct as 'immoral', 'undignified', and amounting to 'the basest opportunism'. Mr Kreisky brought a private prosecution against him for criminal libel. Mr Lingens was found guilty and fined. The Vienna Court of Appeal reduced the fine but confirmed the lower court's judgment in all other respects.

When the case came before the European Court of Human Rights, the International Press Institute obtained leave, through Interights, to submit written comments - similar to an amicus curiae brief - summarising the law

and practice in ten other member States of the Council of Europe and in the United States on how far it is necessary in a democratic society to restrict the expression of opinion in the press in order to protect the reputation of the individual concerned, where the individual is a politician or holds public office. Its conclusion was that in all these countries Mr Lingens would either not have been prosecuted or would almost certainly have been acquitted.

The European Court did not go so far as the U.S. Supreme Court in New York Times v Sullivan and hold that a public official or figure must establish that the allegation was false and that the publisher knew it was. However, the Court's judgment was sympathetic to the principles which explain Sullivan. It stated that:

> "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 which prevails throughout the Convention.
>
> 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 by both journalists and the public at large, and he must consequently display a greater degree of tolerance" (paragraph 42).

In its judgment, the Court also made the important point that a careful distinction must be made between statements of fact and expressions of opinion. The first are susceptible of proof, the second are not. In this case, the applicant had been convicted and punished for expressing his own value judgments on a matter of political controversy. The requirement of Austrian law that he prove the truth of these in order to escape conviction was, the Court held, impossible of fulfilment. It infringed freedom of opinion itself, which is a fundamental part of the right secured by Article 10 of the Convention.

Two much earlier, strongly worded judgments of the High Courts of Peshawar and Lahore in Pakistan, are to like effect. In Hussain Bakhsh Kasuar v The State P L D 1958 (W P) Peshawar 15 Mahannad Shafi, J struck down the conviction of the accused for incitement to disaffection on the ground that his criticism of the Government in a speech as being a Government of thieves whose Ministers were men of straw, did not fall within the mischief of the section; it fell short of encouraging the use of force or violence required by the offence. The Judge held that the criminal offence of incitement to disaffection had to be read in the light of the free speech guarantee in Article 8 of the Constitution of Pakistan. It followed, in his view, that:

> "... it is permissible for a citizen to hold up the men who are charged or have been charged with the executive Government of our country and the care of her destinies to ridicule and contempt if they are guilty of mal-administration .... It is not the criticism of the Government, in whatever venomous and enraging words it is cloaked which constitutes an offence under section 124-A of the Pakistan Penal Code [incitement to disaffection], but

the adoption of the methods for the attainment of a certain purpose and that too only when they encourage force and violence which may lead to conflict with the authorities with the certainty that there will be grievous loss of life. Short of that, every criticism of the Government is permissible ..." (p.19).

On the importance in a democracy of being able to criticise government ministers, the Judge stated:

> "To criticise a Minister is no offence. If the Ministers are held above criticism then it would amount to this that if a person by fair or foul means attains to that height then the people cannot make any effort to remove him nor can his own errors even if he repeats them twenty times or his corruption, undemocratic action or mal-administration dislodge him from that position. Public platform is the only place from where the misdeeds of those who hold the reins of the Government can be exposed. If that is shut out, the democracy will see its end in no time" (ibid.).

In Maulvi Farid Ahmad v Government of West Pakistan, P L D 1965 (W P) Lahore 135, the High Court granted the accused's petition for habeas corpus on the ground that his preventive detention for delivering speeches during an election campaign in which he criticised the police force, the powers of the President and nepotism in administration - was not justified for the purpose of maintaining public order. The Court expressly adopted the clear and present danger test articulated by the U.S. Supreme Court. Holding that this test had not been met, the Court stated:

> "He [the accused] has indeed criticised the Government and its policies, but the criticism of the administration cannot always be interpreted to mean that it was intended to undermine respect from the Government with a view to bringing about disorder" (p.144).

FREEDOM OF EXPRESSION AND INVASION OF PRIVACY

In Winer v the United Kingdom (Application No.10871/84, admissibility decision of 10 July 1986), the applicant contended that there is a considerable difference between speech which is "in the public interest" and that which is merely of public interest. Expression which falls into the former category should, and does - on the principles which have been articulated by the European Court and Commission - receive strong protection under Article 10. By contrast, newspaper articles or books which purport to describe the private lives of ordinary individuals, particularly those which constitute gross intrusions into an individual's private life and family life, ought not to receive such protection because they do not contribute to the formation of public opinion. At the very least, the fact that the right to respect for one's private and family life is expressly guaranteed in Article 8 of the European Convention requires that a careful balance be struck between the interests of expression and an individual's privacy rights where such speech is at issue.

This is not, however, the approach which the Commission has taken. The Winer case concerned a complaint that English law did not provide an adequate remedy, including a right of reply, for gross invasions of the applicant's privacy arising from statements published in a book which were not alleged to be either defamatory or untrue. The Commission held the

complaint to be inadmissible. There was no reasoned consideration of the interaction between Articles 10 and 8 in such a case. On the contrary, the Commission observed simply that "... it is true that this state of the law gives greater protection to other individuals' freedom of expression, [but] the applicant's right to privacy was not wholly unprotected, as shown by his defamation action and settlement, and his own liberty to publish". The Winer case suggests that the Commission does not wish personal privacy to be respected at the expense of free speech except in gross instances of unwarranted invasions of one's private life.

FREEDOM OF EXPRESSION AND PUBLIC MORALS

Where an interference with freedom of expression is aimed at protecting morals (a goal which is shifting and subjective), the European Commission and Court have held that State authorities have a wide margin of appreciation in determining whether the interference is necessary. This follows, in their view, from the fact that:

> "... it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject" (Handyside Case, paragraph 48).

Even here, however, European supervision is effective to ensure that the measures taken are no more restrictive than necessary. This is well exemplified by the Commission's analysis in Müller v Switzerland (report of the Commission adopted on 8 October 1986), which raised the issue of the balance to be drawn between freedom of artistic expression and the protection of public morals.

The Müller case arose from the conviction of the applicants - an artist and the organisers of an art exhibition - for showing, in an exhibition open to the general public, paintings which the Swiss courts held to be obscene. The applicants were fined, and the offending paintings were confiscated for an indefinite period. In considering whether these measures were in conformity with Article 10, the Commission emphasised that freedom of artistic expression consists not only in freedom to create works of art but also in freedom to disseminate them, particularly through exhibitions. Both the fines and the confiscation amounted to clear interferences with this freedom. The confiscation was a particularly serious interference with Mr Müller's freedom of expression in that it precluded him from exhibiting his work either abroad or in Switzerland in the future. The fines were upheld under Article 10(2) as being necessary "for the protection of morals". However, the indefinite confiscation of the paintings was held not to be necessary. The Commission stated that in a case such as this, where the items judged obscene were unique works of artistic value, Article 10 required a weighing of the opposing interests, namely the moral interest and the cultural interest. This had not been done. Since other measures less restrictive of Mr Müller's freedom of expression could have achieved the desired goal of preventing public exhibition of items which the authorities considered morally harmful, the interference was held to be unnecessary in a democratic society.

By contrast, the UN Human Rights Committee has not so far exercised particularly effective supervision where a State has invoked the protection of public morals to justify restrictions on speech. In Hertzberg and others v Finland ((Communication No 61/1979), adoption of views 2 April 1982; Selected Decisions under the Optional Protocol, volume 1 p.124), the applicants complained that the State-controlled Finnish Broadcasting Company (FBC) had unjustifiably interfered with their right to freedom of expression, contrary to Article 19 of the International Covenant, by censoring radio and television programmes which they had produced dealing with homosexuality. The censorship was carried out by the responsible programme directors who indicated that transmission of the programmes in full would entail legal action against the FBC under the Finnish Penal Code (which makes it a criminal offence to encourage homosexuality). The State justified the measures under Article 19(3) of the Covenant as being necessary for the protection of public morals.

Like the Strasbourg organs, the Human Rights Committee expressed the opinion that where public morals are concerned, States must be accorded a certain margin of discretion since there is no universally accepted common standard. However, the Committee went further than this. It held that it could not question the decision made by the Broadcasting Company, and does not appear to have applied the test of necessity. Accordingly, it found that there had been no violation of the applicants' rights. In failing to carry out any examination of whether the restrictions were in fact necessary, the Committee in effect gave the State not merely a margin of discretion but an unlimited discretion.

In an Individual Opinion (concurred in by Mr Rajsoomer Lallah, and Mr Walter Tarnopolsky), Mr Torkel Opsahl emphasised the particular importance of the test of "necessity" in this context:

> "... in my view the conception and contents of "public morals" referred to in article 19(3) are relative and changing. State-imposed restrictions on freedom of expression must allow for this fact and should not be applied so as to perpetuate prejudice or promote intolerance. It is of special importance to protect freedom of expression as regards minority views, including those that offend, shock or disturb the majority. Therefore, even if such laws as paragraph 9(2) of chapter 20 of the Finnish Penal Code may reflect prevailing moral conceptions, this is in itself not sufficient to justify it under article 19(3). It must also be shown that the application of the restriction is "necessary"."

However, the minority too found no violation of the Covenant in the circumstances. What was at issue, in their view, was not official censorship but self-imposed restrictions to which the criteria of Article 19(3) of the Covenant did not apply.

FREEDOM OF EXPRESSION OF CIVIL SERVANTS

The European Court has thus far failed to address the important and difficult issue of the scope of freedom of expression within the Civil Service. This issue was raised, but not dealt with by the court, in the two recent cases of Glasenapp and Kosiek v the Federal Republic of Germany (judgments of 28 August 1986, 9 EHRR 25 and 328). These cases concerned the dismissal of a teacher and a university lecturer - both civil servants

on probation - for alleged violation of their oath of allegiance to the German Constitution.

Mrs Glasenapp was dismissed from her job as a school teacher for refusing to dissociate herself completely from the German Communist Party (of which she was not a member). She had written a letter to a Communist newspaper supporting an "international people's kindergarten", a policy also supported by the Communist Party. Mr Kosiek, a physics lecturer, was not only a member of the National Democratic Party of Germany, an extreme right-wing party, but had represented that Party in the Land parliament for four years and had stood for election to the federal parliament. He had written two books expressing his political views. His appointment was terminated (after eight years) on the ground that his activities and opinions evidenced a lack of allegiance to the Constitution.

The Commission held, by a majority of nine to eight, that there had been a violation of Article 10 in Mrs Glasenapp's case. The requirement to take the loyalty oath was a disproportionate means of pursuing the legitimate aim of safeguarding the democratic order, since there was no evidence to suggest that the applicant's political views interfered with the discharge of her work. On the other hand, the Commission found, by ten votes to seven, that there had been no violation of Mr Kosiek's rights under Article 10. In the light of his extreme opinions, which showed little sympathy for the principles of pluralism and basic equality contained in the Convention, his dismissal was held to be justified under Article 10(2), for the protection of the rights of others or in the interest of national security.

By contrast with the Commission, the Court summarily dismissed both applications as not raising any issue under Article 10. What was being claimed, in the Court's view, was a right of access to the Civil Service, a right that was not protected by the Convention. In a puzzling non sequitur, the majority of the Court held that the authorities had taken account of the applicants' opinions and activities only in order to determine whether they were qualified for the post in question and that, accordingly, there had been no interference with their freedom of expression. A minority of six judges, however, expressed some reservation about the potentially broad implications of such a holding. In a Joint Concurring Opinion, they stated that the non-applicability of Article 10 in these cases "does not preclude the possibility that Article 10 might apply even to the Civil Service where all freedom of expression was de jure or de facto non-existent under domestic law".

Only Judge Spielmann grappled with the difficult question of how to reconcile the State's interest in securing the loyalty of its civil servants with the applicants' right to freedom of expression. In a Dissenting Opinion in each case, he applied the Court's consistent jurisprudence on Article 10; there had been a prima facie interference with the applicants' freedom of expression, the pressing social need for which had to be demonstrated by the State under Article 10(2). In his view, this exacting test had not been met in the circumstances since the measures taken were disproportionate to the aim pursued.

It is submitted that Judge Spielmann's analysis is correct. If civil servants are to enjoy an effective protection of their rights under the Convention, it is essential that a government be required to

demonstrate the necessity for any restriction of those rights. It is vitally important - particularly in the light of the large number of persons employed in the Civil Service, their public functions, and the public interest in being informed about the workings of government - that the Court clarify this issue at the earliest opportunity.

The question as to the circumstances in which the public interest in protecting official secrets is outweighed by the public interest in free speech is, of course, a central issue in the pending litigation in Australia, New Zealand, Hong Kong, and the United Kingdom concerning 'Spycatcher'.

CONCLUSION

The European Court and Commission of Human Rights have articulated important principles protecting free speech against unjustifiable interference by public authorities, often redressing the balance so as to give greater importance to free speech than has been given by some national courts (including English courts). The Strasbourg case law is of strong persuasive value in interpreting and applying constitutional guarantees of free expression, in the context of restrictions imposed by statute law, common law, or administrative action.

30th April 1988

ANNEX 1

INTERNATIONAL GUARANTEES OF FREE EXPRESSION

International Covenant on Civil and Political Rights

"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."

European Convention on Human Rights

"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 or public safety, for the prevention of disorder or crime, for the protection of health and 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."

American Convention on Human Rights

"Article 13

1. Everyone shall have the right to freedom of thought and expression. This right shall include 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 in order 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, colour, religion, language, or national origin shall be considered as offences punishable by law."

ANNEX 2

RELEVANT CONSTITUTIONAL FREE SPEECH GUARANTEES

India

Article 19 of the Constitution of India 1950 provides in relevant part:

"19.(1) All citizens shall have the right -

(a) to freedom of speech and expression;

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the

interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence."

Malaysia

Article 10 of the Federal Constitution of Malaysia (as amended to 15th May 1981) provides in relevant part:

"10.(1) Subject to Clauses (2) (3) and (4) -

(a) every citizen has the right to freedom of speech and expression;

(2) Parliament may by law impose -

(a) on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence;

(4) In imposing restrictions in the interest of the security of the Federation or any part thereof or public order under Clause (2)(a), Parliament may pass law prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III, Article 152, 153 or 181 otherwise than in relation to the implementation thereof as may be specified in such law."

Mauritius

Article 12 of the Constitution of Mauritius provides:

"12. Protection of freedom of expression.

(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -

(a) in the interests of defence, public safety, public order, public morality or public health;

(b) for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the

authority and independence of the courts, or regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting, television, public exhibitions or public entertainments; or

(c) for the imposition of restrictions upon public officers,

except so far as that provision or, as the case may be, the thing done under its authority is shown not to be reasonably justifiable in a democratic society."

Islamic Republic of Pakistan

Article 19 of the Constitution of the Islamic Republic of Pakistan (adopted in April 1973) provides:

"19. Every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press, subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, commission of or incitement to an offence."

Independent State of Papua New Guinea

Section 46 of the Constitution of the Independent State of Papua New Guinea (1982) provides:

"46. - Freedom of expression.

(1) Every person has the right to freedom of expression and publication, except to the extent that the exercise of that right is regulated or restricted by a law -

(a) that imposes reasonable restrictions on public office-holders; or

(b) that imposes restrictions on non-citizens; or

(c) that complies with Section 38 (general qualifications on qualified rights).

(2) In Subsection (1), "freedom of expression and publication" includes -

(a) freedom to hold opinions, to receive ideas and information and to communicate ideas and information, whether to the public generally or to a person or class of persons; and

(b) freedom of the press and other mass communications media.

(3) Notwithstanding anything in this section, an Act of the Parliament may make reasonable provision for securing reasonable access to mass communications media for interested persons and associations -

(a) for the communication of ideas and information; and

(b) to allow rebuttal of false or misleading statements concerning their acts, ideas or beliefs,

and generally for enabling and encouraging freedom of expression."

Section 38 provides:

"38. - General Qualifications on Qualified Rights.

(1) For the purposes of this Subdivision, a law that complies with the requirements of this section is a law that is made and certified in accordance with Subsection (2), and that -

(a) regulates or restricts the exercise of a right or freedom referred to in this Subdivision to the extent that the regulation or restriction is necessary -

(i) taking account of the National Goals and Directive Principles and the Basic Social Obligations, for the purpose of giving effect to the public interest in -

(A) defence; or

(B) public safety; or

(C) public order; or

(D) public welfare; or

(E) public health (including animal and plant health); or

(F) the protection of children and persons under disability (whether legal or practical); or

(G) the development of underprivileged or less advanced groups or areas; or

(ii) in order to protect the exercise of the rights and freedoms of others; or

(b) makes reasonable provision for cases where the exercise of one such right may conflict with the exercise of another,

to the extent that the law is reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind.

(2) For the purposes Subsection (1), a law must -

(a) be expressed to be a law that is made for that purpose; and

(b) specify the right or freedom that it regulates or restricts; and

(c) be made, and certified by the Speaker in his certificate under Section 110 (certification as to making of laws) to have been made, by an absolute majority.

(3) The burden of showing that a law is a law that complies with the requirements of Subsection (1) is on the party relying on its validity."

Democratic Socialist Republic of Sri Lanka

Articles 14 and 15 of the Constitution of the Democratic Socialist Republic of Sri Lanka provide in relevant part:

"14.(1) Every citizen is entitled to -

(a) the freedom of speech and expression including publication;"

"15.(2) The exercise and operation of the fundamental right declared and recognized by Article 14(1)(a) shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence."

"15.(7) The exercise and operation of all the fundamental rights declared and recognised by Articles 12, 13(1), 13(2) and 14 shall be subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society. For the purposes of this paragraph "law" includes regulations made under the law for the time being relating to public security."

"15.(8) The exercise and operation of the fundamental rights declared and recognized by Articles 12(1), 13 and 14 shall, in their application to the members of the Armed Forces, Police Force and other Forces charged with the maintenance of public order, be subject to such restrictions as may be prescribed by law in the interests of the proper discharge of their duties and the maintenance of discipline among them."

United States of America

The First Amendment to the U.S. Constitution provides in relevant part:

"Congress shall make no law ... abridging the freedom of speech, or of the press."

Zimbabwe

Article 20 of the Constitution of Zimbabwe (1980) provides in relevant part:

"20.(1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference and freedom from interference with his correspondence.

(2) Nothing contained in or done under the authority of any law shall be held in contravention of subsection (1) to the extent that the law in question makes provision -

(a) in the interests of defence, public safety, public order, the economic interests of the State, public morality or public health;

(b) for the purpose of -

(i) protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings;

(ii) preventing the disclosure of information received in confidence;

(iii) maintaining the authority and independence of the courts or tribunals of the Senate or the House of Assembly;

(iv) regulating the technical administration, technical operation or general efficiency of telephony, telegraphy, posts, wireless broadcasting or television or creating or regulating any monopoly in these fields;

(v) in the case of correspondence, preventing the unlawful dispatch therewith of other matters; or

(c) that imposes restrictions upon public officers,

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

(6) The provisions of subsection (1) shall not be held to confer on any person a right to exercise his freedom of expression in or on any road, street, lane, path, pavement, side-walk, thoroughfare or similar place which exists for the free passage of persons or vehicles."

REFERENCES

[1] Barrister and Bencher of Lincoln's Inn, Honorary Professor of Public Law at University College London, and Chairman of INTERIGHTS (the International Centre for the Legal Protection of Human Rights). The author wishes to acknowledge the important contribution made by Susan Hulton, LL.M., Legal Director of INTERIGHTS, in the preparation of this paper.

[2] See also Re K D [1988] 1 All ER 577 at 587-591 (HL) where Lord Oliver, giving the speech for the House, analyses at length whether English law governing parental access to a child in care is in conformity with Article 8 of the European Convention on Human Rights (which guarantees the right to family life); and Hone v Maze Prison Board of Visitors [1988] 1 All ER 321 at 327-29 (HL) where Lord Goff, with whom Lords Mackay, Bridge, Ackner and Oliver agree, considers that the European Convention is relevant to determining whether a prisoner is entitled to legal representation in disciplinary proceedings, and concludes that English law is in conformity with Article 6 of the Convention.

[3] The Rules of the Supreme Court (Amendment) 1987, published on 19 August as SI 87/1423 (L8) give effect to this settlement. A new rule provides that once a case is read or referred to in open court, the undertaking that the parties and their lawyers will not use it for purposes other than those of that case will come to an end. As envisaged by the settlement, it will be open to a party or the owner of the document to apply to the court for an order that the undertaking should continue, but such an order is only to be granted if there are special reasons.