10

Freedom of Expression under the European Convention on Human Rights

Lord Lester of Herne Hill, QC and Natalia Schiffrin

The relevance of Strasbourg case law

The right to freedom of expression is defined by Article 10 of the European Convention as follows:

> "(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 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 language and structure of Article 10 reflect the different and competing values of, on the one hand, the basic right to individual self-expression and the free flow of information, and, on the other hand, other important rights, freedoms and social needs, and the "duties and responsibilities" of those communicating or receiving information and ideas.

The case law under the European Convention, in this and other areas, is relevant beyond Europe for a number of reasons. Judgments of the European Court can be used as a helpful aid to the interpretation of domestic law provisions in countries with constitutional guarantees similar to the guarantees of the European Convention,[1] - including the Commonwealth Caribbean. Reference to the decisions of the European Court may also be persuasive before other international and regional human rights tribunals. This may be of particular relevance to litigants in the Caribbean who have recourse to bodies such as the

---

1 For cases referring to Article 10 *see*, for instance, *Director of Public Prosecutions v Mootoocarpen and Others*, [1989] LRC (Const) 768, at 773 (a Mauritian case addressing whether publication of an article critical of the judiciary constituted contempt of court, containing extensive discussion of the *Sunday Times* case, *infra*, n 13, and, in *obiter dicta*, concluding that Mauritian law should be interpreted consistently with Article 10 of the European Convention). *See also* the Indian case, *Rangarajan v Jagjivan Ram and Others*, [1990] LRC (Const) 412.

UN Human Rights Committee and the Inter-American Commission on Human Rights and the Inter-American Court.[2] Reference to the case law under Article 10 may be of particular value because it is far more developed than the case law established under the parallel guarantees of other international and regional human rights treaties.

The right to free expression is technically drafted in Article 10 in weaker language than in Article 19 of the UN International Covenant on Civil and Political Rights[3] in several respects. In particular, Article 10 does not in terms create an independent right to hold opinions without interference;[4] nor does it expressly refer to the right to seek information;[5] nor does it specifically refer to information and ideas "of all kinds". However, the European Court and Commission generally seek to interpret Article 10 of the Convention in a manner which is consistent with Article 19 of the Covenant.[6]

Article 10 also contains more detailed and specific exceptions to the right of free expression than does any other international human rights instrument influenced by British legislative drafting style. On the other hand, unlike Article 20 of the International Covenant,[7] the European Convention does not require the prohibition of war propaganda, or of incitement to racial or religious hatred or discrimination.

Compared with the well-known constitutional guarantees of free speech in the United States,[8] France[9] and Germany,[10] the right to free expression in Article 10 is heavily qualified

---

2 Also referring to Article 10, *see*, for instance, the decision of the Inter-American Court of Human Rights in *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A No 5; 7 HRLJ 74 (1986).

3 Article 19 of the Covenant provides as follows :
"(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 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."
See generally, McGoldrick, *The Human Rights Committee* (Oxford: Clarendon Press, 1991), pp 459-79.

4 Unlike Article 19(1) of the Covenant. It is difficult to see why there should ever be a legitimate interference by public authorities with the possession, as distinct from the expression, of opinions.

5 Unlike Article 19(2) of the Covenant. However, it seems likely that Article 10, read with Article 8 of the Convention, will gradually be interpreted as containing a public right and a personal right of access to information in some circumstances. *See* section of this paper on "The right to receive information and ideas", p 155 *infra*.

6 In *Müller v Switzerland*, Judgment of 24 May 1988, Series A No 133, para 27, the Court referred to Article 19(2) of the Covenant for confirmation that the concept of freedom of expression includes artistic expression. In the case of *Groppera Radio AG and Others v Switzerland*, Judgment of 28 March 1990, Series A No 173, para 61, the Court referred to the text and history of Article 19 of the Covenant for confirmation that the third sentence of Article 10(1) was included only to make it clear that states are permitted to control by a licensing system the technical aspects of the way in which broadcasting is organized, but that licensing measures are otherwise subject to the requirements of Article 10(2) of the Convention.

7 Article 20 of the Covenant provides as follows:
"(1) Any propaganda for war shall be prohibited by law.
(2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."
See generally, McGoldrick, *supra*, n 3, pp 480-97. See also Article 13(5) of the American Convention on Human Rights, and Article 4 of the UN International Covenant on the Elimination of All Forms of Racial Discrimination.

8 First Amendment to the US Constitution: "Congress shall make no law ... abridging the freedom of speech, or of the press".

9 Article 11 of the French Declaration of the Rights of Man and of the Citizen: "The unrestrained communication of thoughts or opinions being one of the most precious rights of man, every citizen may speak, write and publish freely, provided he is responsible for the abuse of this liberty, in the cases determined by law."

10 Article 5 of the Basic Law provides as follows :
"(1) Everyone has the right freely to express and disseminate his opinion orally, in writing, and in pictures, and to inform himself without hindrance from all generally accessible sources. The freedom of the press and the freedom of reporting through radio and film are guaranteed. There is to be no censorship.
(2) These rights find their limits in the rules of the general laws, the statutory provisions for the protection of youth, and in the right to personal honour.
(3) Art and learning, research and teaching are free. The freedom of teaching does not release one from the Constitution."

by its detailed exceptions. Unlike Article 13(2) of the American Convention on Human Rights,[11] there is no statement in Article 10 that the exercise of the right to freedom of expression shall not be subject to prior censorship. Similarly, unlike Article 14 of the American Convention,[12] the European Convention does not expressly guarantee a right of reply for injury resulting from inaccurate or offensive statements or ideas transmitted to the public.

The scope of freedom of expression

Basic principles: freedom of political speech and freedom of the press

However, Article 10 confers wide-ranging and important protections. It has been interpreted to extend to all types of expression which impart or convey opinions, ideas, or information, irrespective of content or the mode of communication. Freedom of speech presupposes a willing speaker; but where a speaker exists, the protection afforded is to the communication, to its source, and to the recipient.[13] The right to free speech applies to "everyone", whether natural or legal persons (including profit-making corporate bodies).[14]

The breadth and importance of the right to free speech were recognized by the European Court in the *Handyside*[15] case as being inherent in the concept of a democratic and plural society. In a celebrated statement, the Court observed that

> "[f]reedom 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'."[16]

The *Handyside* case concerned a successful prosecution under the English Obscene

---

11 Article 13(2) of the American Convention states: "The exercise of the right [to freedom of expression] 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."
Article 13(4), however, does permit prior censorship of public entertainments for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

12 Article 14 of the American Convention provides that :
"(1) Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or make a correction using the same communications outlet, under such conditions as the law may establish.
(2) The correction or reply shall not in any case remit other legal liabilities that may have been incurred.
(3) For the effective protection of honor and reputation, every publisher, and every newspaper, motion picture, radio, and television company, shall have a person responsible, who is not protected by immunities or special privileges."

13 *Sunday Times v UK*, Judgment of 26 April 1979, Series A, No 30, paras 65-6. In its opinion in *De Geillustreerde Pers NV v the Netherlands* (Application No 5178/71), Report of 6 July 1976, (1977) 8 DR 5, the Commission suggested that the freedom to impart information under Article 10 "is only granted to the person or body who produces, provides or organizes it". If the public has other ready means of access to the information, Article 10 does not apply. That case concerned the bar on publication in unauthorized magazines of complete lists of television and radio programme details. The Commission was dealing with information protected by Dutch copyright law, which was already readily available to the public. The Commission's restrictive interpretation of Article 10 has been forcefully criticized by academic writers: *see*, for example, Roger Pinto, *La Liberté d'Information et d'Opinion en Droit International* (Paris: Economica Press, 1984), pp 216-17.

14 *Autronic AG v Switzerland*, Judgment of 22 May 1990, Series A No 178, para 47.

15 *Handyside v UK*, Judgment of 7 December 1976, Series A No 24. *See also Sunday Times v UK, supra*, n 13.

16 *Handyside v UK, supra*, n 15, para 49. *See also* the *Sunday Times Case, supra*, n 13, para 65.

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. 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 decision is important for the general statement of principle, treating free speech as indispensable to a plural and tolerant democratic society. It is also important for the recognition of the "margin of appreciation", an elastic and elusive concept which has often been applied by the Court in a manner which seriously dilutes the strong principles of freedom of expression proclaimed by the Court.

The European Court gave further emphasis to the high priority to be given to the protection of political expression, and to freedom of the press, in its landmark majority judgment in the first *Sunday Times*[17] case, where it stated that it is incumbent on the mass media

> "to impart information and idea concerning matters ... 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."[18]

The Court also held that its supervision is not limited

> "to ascertaining whether a respondent State exercised its discretion reasonably, carefully and in good faith."[19]

In addition, it decided that it

> "is faced not with a choice between two conflicting principles, but with a principle of freedom of expression that is subject to a number of exceptions that must be narrowly interpreted."[20]

In its unanimous judgment in the *Lingens*[21] case, the Court observed 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."[22,23]

Defamation

One of the most important exceptions to the right to free political speech is where it is necessary to protect personal reputation. Because the relevant cases concern crucial issues relating to criticism of government and politicians as well as the right to debate matters of

17 *Sunday Times v UK, supra*, n 13.

18 Ibid, para 65.

19 Ibid, para 59.

20 Ibid, para 65.

21 *Lingens v Austria*, Judgment of 8 July 1986, Series A No 103.

22 Ibid, para 42.

23 Recognition of the *importance* of freedom of the press was most recently expressed in *Goodwin v UK*, Application 17488/90, Judgment of 27 March 1996, Reports of Judgments and Decisions 1996-II, where the Court held that Article 10 protected a journalist from being obliged to reveal his sources.

public concern, the balance between the conflicting public interests has given rise to some of the European Convention's key human rights decisions.[24]

The *Lingens*[25] case, for example, concerned a journalist in Austria who had been criminally convicted for publishing two articles strongly critical of then Chancellor Kreisky's support for a politician who had been an SS officer. Though Mr Lingens was not alleged to have made any false statements, the Austrian courts found that he had not proved that his opinions were "true", as required under Austrian law. It was this requirement that the Court did not allow. The Court held that

> "[a] careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof.... As regards value-judgments this requirement is impossible of fulfilment and it infringes freedom of opinion itself."[26]

In striking down the conviction of Mr Lingens, the Court also held that "the limits of acceptable criticism are ... wider as regards a politician as such than as regards a private individual".[27]

In *Castells v Spain*,[28] an opposition member of parliament challenged before the European Court his conviction for criticizing the Spanish Government in accusing it of inactivity in investigating certain murders in the Basque country. In *Castells*, the *Lingens* decision was extended in two ways, first, by holding that elected representatives enjoy greater protection in their speech than do ordinary people, and second, in providing even greater protections for those alleged to have "defamed" a government rather than an individual politician in his or her private life.

In *Thorgeirson v Iceland*,[29] these principles were further extended, this time to afford protection to those addressing not only political matters but matters of other public interest. In that case, a writer had been found to have criminally defamed members of the police force in an article in which he made allegations of police brutality. In striking down the conviction, the Court held,

> "there is no warrant in [the] case-law for distinguishing ... between political discussion and discussion of other matters of public concern."[30]

In *Tolstoy v UK*,[31] the Court struck down as excessive a jury award of libel damages. The Court held that

> "under the Convention, an award of damages for defamation must bear a

---

24 *See also Schwabe v Austria*, Judgment of 28 August 1992, Series A No 242-B (conviction for defamation of a politician violates Article 10 where facts were reasonably accurate and told in good faith, and value-judgment not intended to imply a falsehood). *See also Oberschlick v Austria*, Judgment of 23 May 1991, Series A No 204.

25 *Lingens v Austria*, *supra*, n 21.

26 Ibid, para 46.

27 Ibid, para 42.

28 Judgment of 23 April 1992, Series A No 236.

29 Judgment of 25 June 1992, Series A No 239.

30 Ibid, para 64.

31 *Tolstoy Miloslavsky v UK*, Judgment of 13 July 1995, Series A No 316-B.

> reasonable relationship of proportionality to the injury to reputation suffered."[32]

The applicant challenged a libel damages award against him of £1.5 million, the highest ever awarded in English history. The Court held that the lack of judicial control over damages awards did not provide adequate safeguards to satisfy the requirements of Article 10. Unfortunately, in *Tolstoy* the Court failed to articulate principles or guidelines for future cases concerning damages awards for defamation. Nonetheless, the Court's recognition of the potential "chilling effect" of large damages awards is important.

Authority of the judiciary

In these defamation cases the Court has established important protection for the principle of free and robust debate on matters of political and public interest. An exception to this liberal trend concerns criticism of the judiciary. In two cases in this area, the Court has upheld convictions of individuals charged with defaming judges, placing great emphasis upon the protection of the reputation of the judiciary.

In *Barfod v Denmark*,[33] a journalist was convicted of criminal libel for criticizing a court judgment and suggesting improper motives on the part of some of the judges. The European Commission decided, by fourteen votes to one, that in matters of public interest involving the functioning of the public administration, including the judiciary, the test of necessity in Article 10(2) must be a particularly strict one:

> "It follows that even if the article in question could be interpreted as an attack on the integrity or reputation of the two lay judges, the general interest in allowing a public debate about the functioning of the judiciary weighs more heavily than the interest of the two judges in being protected against criticism of the kind expressed in the applicant's article."[34]

However, in refusing Mr Barfod's claim, the European Court rejected the view that the defamation was part of "political debate" and held that the statement was a

> "... defamatory accusation against the lay judges personally, which was likely to lower them in public esteem and was put forward without any supporting evidence ...."[35]

Similarly, by a narrow vote of five to four, the Court found no violation of Article 10 in *Prager and Oberschlick v Austria*,[36] also a case concerning defamation of the judiciary. While noting that the press is one of the means for allowing public scrutiny of the judiciary, the Court said that

> "[r]egard must, however, be had to the special role of the judiciary in society. As the guarantor of justice, a fundamental value in a law-governed

32 Ibid, para 49.

33 Judgment of 22 February 1989, Series A No 149.

34 Report of the Commission, 16 July 1987, appended to the Court's judgment of 22 February 1989, *supra*, n 33, para 71.

35 *Supra*, n 33, para 35.

36 Judgment of 26 April 1995, Series A No 313.

> State, it must enjoy public confidence if it is to be successful in carrying out its duties. It may therefore prove necessary to protect such confidence against destructive attacks that are essentially unfounded, especially in view of the fact that judges who have been criticized are subject to a duty of discretion that precludes them from replying."[37]

The Court's judgment in the earlier *Sunday Times*[38] case also concerned the judiciary. However, on that occasion, a closely divided Court had decided that the House of Lords in the UK had breached Article 10 by restraining *The Sunday Times* from publishing articles about the history of the testing, manufacture, and marketing of the drug "thalidomide", which had caused severe deformities in the children of women who had taken the drug as a sedative during pregnancy. Civil proceedings were pending against the manufacturers and distributors of the drug, and the English courts accepted the Attorney-General's contention that it was necessary to restrain publication so as to maintain the authority of the judiciary until the proceedings had finally been determined.

In rejecting this claim, the Court emphasized that the thalidomide disaster was a matter of undisputed public concern. The question of where responsibility lay was a matter of public interest. The facts did not cease to be a matter of public interest merely because they formed the background to pending litigation.[39] The Court held by a vote of eleven to nine that there had been a breach of Article 10. The Court stated that

> "[t]here is general recognition of the fact that the courts cannot operate in a vacuum. Whilst they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialized 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."[40]

Freedom of expression of civil servants

In comparison with its views in political speech cases, the Court has been more reluctant to afford protection under Article 10 to civil servants, even in cases that concern mere membership in political organizations. However, recent cases indicate recognition that civil servants are entitled to freedom of expression.

In *Vogt v Germany*,[41] the Court ruled in favour of a civil servant, a school teacher, dismissed because of her political activities on behalf of the German Communist Party. It was alleged that she had violated the duty of "political loyalty" which she owed as a civil servant. The Court noted that the "duties and responsibilities" referred to in Article 10(2) "assume a

---

37 Ibid, para 34.

38 *Supra*, n 13.

39 *See* also *Weber v Switzerland*, Judgment of 22 May 1990, Series A No 177, where the Court struck down a conviction under a Swiss law making it an offence to make public "any documents or information about a judicial investigation" until it had been fully completed.

40 *Sunday Times, supra*, n 13, para 65.

41 Judgment of 26 September 1995, Series A No 323.

special significance" when relating to the freedom of expression of civil servants, and considering Germany's particular history. It said,

> "The Court proceeds on the basis that a democratic State is entitled to require civil servants to be loyal to the constitutional principles on which it is founded. In this connection it takes into account Germany's experience under the Weimar Republic and during the bitter period that followed the collapse of that regime up to the adoption of the Basic Law in 1949 ...."[42]

Nonetheless, in considering that Mrs Vogt's position did not involve any security risks and that she had had only wholly satisfactory reports on her professional conduct and abilities, there was no evidence she had actually made anti-constitutional statements, and her activities were entirely lawful, the Court held, by ten votes to nine, that even allowing for the margin of appreciation, the dismissal was disproportionate.[43]

Though the ultimate decision was a narrow one, the Court in *Vogt* had agreed by seventeen to two that Article 10 was applicable, a finding it had declined to make in an earlier similar case, *Glasenapp v Germany*.[44] In *Glasenapp*, the applicant's appointment as a school teacher was annulled because of her refusal to dissociate herself 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. By sixteen votes to one, the Court came to the conclusion here that there had been no interference with the exercise of a right protected under Article 10(1), and therefore found it unnecessary to consider the complaint under Article 10(2). 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 Court held that the authorities had taken account of her opinions and attitude merely in order to satisfy themselves as to whether she possessed one of the necessary personal qualifications for the post in question, and that, accordingly, there had been no interference with her freedom of expression.

Artistic expression

The protection attached to political speech is by far the strongest under the Convention. However, freedom of artistic expression also comes within the ambit of Article 10. The major cases in this area balance freedom of artistic expression against issues of morality such as the use of criminal law to punish obscenity and blasphemy, areas in which the Court has not been minded to give strong free expression rights.

In *Müller and Others v Switzerland*,[45] the Commission emphasized the importance of artistic expression, observing that it is

---

42 Ibid, para 59.

43 For the same reasons, the Court held that there was also a violation of the Article 11 guarantee of freedom of assembly and association.

44 Judgment of 28 August 1986, Series A No 104. In the companion case of *Kosiek v Germany*, Judgment of 28 August 1988, Series A No 105, both the Commission and the Court rejected the applicant's complaint of a breach of Article 10. The facts of Mr Kosiek's case were strikingly different from those of Mrs Glasenapp's case. Mr Kosiek, a physics lecturer and civil servant, 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.

45 Report of the Commission, 8 October 1986, appended to the Court's judgment of 24 May 1988, *infra*, n 47, para 70.

> "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."

Freedom of artistic expression, in the Commission's opinion,[46] consists not only in freedom to create works of art but also in freedom to disseminate them, in particular through exhibitions. In *Müller*, an artist had been convicted on an obscenity charge because of sexually explicit paintings on public exhibition (which were confiscated).

While the Court accepted that freedom of expression affords the opportunity to take part in the public exchange of "cultural, political and social information and ideas of all kinds" it was markedly weaker than was the Commission in giving practical content to artistic expression. In one of several judgments overruling the Commission's findings of breaches of the right to free expression, the Court emphasized the "duties and responsibilities" of artists,[47] and the margin of appreciation in relation to the public morals exception, and decided that the confiscation of the paintings did not infringe Article 10.[48]

If an interference as extreme as the confiscation of an artist's works is regarded as within the wide margin of appreciation, it is difficult to imagine a case in which European supervision is likely to be real and effective where a work is regarded by the national authorities as obscene or otherwise injurious to public morals. Indeed, in *Otto-Preminger-Institut v Austria*,[49] the Court (again overruling the Commission) found that there had been no violation of Article 10 where an allegedly blasphemous film that was to be shown in an art cinema was seized and permanently forfeited. Here the Court had to balance the right to freedom of artistic expression against the protection of respect for religious feelings. The Court said that

> "in seizing the film, the Austrian authorities acted to ensure religious peace in [the] region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner."[50]

A similar case is now pending before the Court, also concerning an allegedly blasphemous video, this one containing sexual imagery. *Wingrove v UK*[51] arose out of the refusal of the British film classification board to classify a short film for video distribution. Here again, the Commission held in a near-unanimous decision that there had been a violation of the Convention, this time emphasizing that the video was unlikely to be on public display.

---

46 Ibid, para 95.

47 *Müller and Others v Switzerland*, Judgment of 24 May 1988, Series A No 133, para 34. The notion that artists owe duties and responsibilities in their capacity as artists seems strange, in light of the inherently subversive nature of the artistic impulse. However, it may be that the Court meant to say no more than that artists, like everyone else, have to obey the law.

48 Ibid, para 43.

49 Judgment of 20 September 1994, Series A No 295-A.

50 Ibid, para 56.

51 Case No 19/1995/525/611. Report of the Commission, 10 January 1995, appended to the Court's judgment of 25 November 1996, Reports of Judgments and Decisions 1996-V.

Significantly, the Commission held that "particularly compelling reasons" are required to justify prior censorship.[52]

It is hoped that the Court will take this opportunity to draw the line at *Wingrove*, and extend protection under Article 10 to this short video film. Offensive though the video may be to some, the censorious and meddling prohibition of this short, unimportant and, as the director himself concedes, not very good, film is surely not necessary to protect public morals.

Commercial speech

Another area where the Court has been reluctant to extend strong protection concerns "commercial speech". The Court has been hesitant in deciding whether and to what extent Article 10 protects advertising or other means of communicating commercial information to consumers.

In *Barthold*,[53] 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 upon the applicant by the rules of his profession, which prohibited him from repeating his remarks in the press, were thus held to violate his right to free speech. Although the interview had an advertisement-like effect, the Commission and the Court took the view that the case was not concerned with commercial advertising. They did not therefore consider it necessary to consider the scope of protection afforded to advertising.

The important underlying issues of principle were described 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."[54]

In the *markt intern*[55] case, the Court decided that information of a commercial nature

52 Ibid, para 65.

53 *Barthold v Germany*, Judgment of 25 March 1985, Series A No 90.

54 Ibid.

55 *Markt intern Verlag GmbH and Klaus Beermann v Germany*, Judgment of 20 November 1989, Series A No 165.

cannot be excluded from the scope of Article 10(1), which "does not apply solely to certain types of information or ideas or forms of expression".[56] In that case the Commission nevertheless reaffirmed its previous opinion that the test of necessity can be less strict when applied to commercial advertising, while the thrust of the Court's majority judgment shows an unwillingness to give full Article 10 protection to commercial communications.[57]

Markt intern published weekly news sheets aimed at specialized commercial sectors, such as chemists and beauty product retailers. It published an article describing the experience of a chemist, dissatisfied with an order from a mail-order firm, who sought a refund. The article also reported the firm's reply to *markt intern*'s own inquiry about the matter. It sought information from trade readers as to whether they had had similar experiences with the firm. The statements in the article were true.

The German courts restrained *markt intern* from repeating these statements in the form in which they had been published. They did so on the ground that they had performed acts contrary to honest practices in breach of the Unfair Competition Act.

The Court decided, by nine votes to nine, with the casting vote of the President, that there had been no breach. The majority based their decision upon the margin of appreciation, which they described as

> "essential in commercial matters and, in particular, in an area as complex and fluctuating as that of unfair competition. Otherwise, the European Court of Human Rights would have to undertake a re-examination of the facts and all the circumstances of each case. The Court must confine its review to the question whether the measures taken on the national level are justifiable in principle and proportionate."[58]

The majority also stated that

> "it is primarily for the national courts to decide which statements are permissible and which are not."[59]

They concluded that

> "[i]t is obvious that opinions may differ as to whether the Federal Court's reaction was appropriate or whether the statements made in the specific case by *markt intern* should be permitted or tolerated. However, the European Court of Human Rights should not substitute its own evaluation for that of the national courts in the instant case, where those courts, on reasonable grounds, had considered the restrictions to be necessary."[60]

---

56 Ibid, para 26.

57 The Supreme Court of the United States has decided that commercial speech, including advertising, is within First Amendment protection. Even though it gives less protection to such speech than to political speech, the Supreme Court has thus far been much stronger than the European Court of Human Rights in protecting advertising and other forms of commercial communication: *see*, for example, *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council*, 425 US 748 (1976); *Bates v Bar of Arizona*, 433 US 350 (1977); *Central Hudson Gas & Electric Corp v Public Service Commission*, 447 US 557 (1980).

58 *Supra*, n 55, para 33.

59 Ibid.

60 Ibid, para 37.

The opinions given by the dissenting half of the Court criticized the decision for failing to follow the Court's established criteria. In their view, it is just as important to guarantee freedom of expression in relation to the practices of a commercial undertaking as in relation to the conduct of a head of government. The fact that a person defends a given commercial interest does not deprive him of the benefit of freedom of expression. In order to ensure the openness of business activities, it must be possible to freely disseminate information and ideas about the products and services proposed to consumers. They found the reasoning based upon the margin of appreciation a cause for serious concern, because it meant that the Court was effectively abdicating European supervision as to the conformity of the contested measures with Article 10.

In *Casado Coca v Spain*[61] the Court again deferred to the state's margin of appreciation and upheld curbs on professional advertising, by a vote of seven to two. In that case the applicant, Mr Casado Coca, challenged the penalty imposed upon him by the Barcelona Bar Council, and upheld by the Spanish courts, for advertising his services as a lawyer. The advertisements supplied Mr Casado Coca's name, his legal title, his office address, and his office phone number.

In its decision, the Court stated that, although advertising is for citizens "a means of discovering the characteristics of goods and services"[62] offered, it may be restricted to prevent unfair competition, and untruthful and misleading advertising. The Court further said that

> "[i]n some contexts, the publication of even objective, truthful advertisements might be restricted in order to ensure respect for the rights of others or owing to the special circumstances of particular business activities and professions."[63]

Such restrictions, however, must be "closely scrutinized" by the Court.

In holding the restrictions to be reasonable and proportionate, the Court noted that the ban was not absolute, but did allow information such as notices announcing a change of address. The Court concluded that the legal profession could not be compared to commercial ventures, such as insurance companies that are not subject to restriction on advertising their own legal services, because the Bar's special status gives it a "... central position in the administration of justice as intermediaries between the public and the courts".[64] The Court stated that the wide range of regulations and the different rates of change throughout the Council of Europe indicates the complexity of the issue and underscores that the national authorities are in the best position to determine how the balance should be struck between the various interests involved.[65] Considering that only accurate and useful information was sought to be advertised in *Casado Coca*, the case makes

---

61 Judgment of 24 February 1994, Series A No 285.

62 Ibid, para 51.

63 Ibid.

64 Ibid, para 54.

65 *See* also *Colman v UK*, Report of the Commission, 19 October 1992, where the Commission found no breach of Article 10 in a case concerning a challenge of the applicant, a doctor, to the General Medical Council's policy against paid advertising of medical services in the press. In finding no violation, the Commission noted that there was not a blanket restriction on doctors' advertising at the material time, and that the applicant was only affected by the prohibition on newspaper advertising. The Commission also was satisfied that the measures complained of were not disproportionate to the legitimate aim of protecting patients' health, as well as the rights of others, namely other doctors.

it clear that the Court continues to offer only scant supervision of states' practices restricting commercial speech.

It is strongly arguable that[66] expression should not lose its Article 10 protection because money is spent to communicate it, or because it is carried in a form that is sold for profit, or because it does no more than propose a commercial transaction, or because it is critical of a competitor. The fact that the communicator has a purely economic motive cannot disqualify him from protection; the fate of his business may well depend upon his ability adequately to advertise his product. In addition, the consumer's interest in the free flow of commercial information may be at least as keen as his interest in political controversy. Advertising that is honest, truthful and decent is a means of informing consumers, so that they can make choices about goods and services. Society may well have an interest in the free flow of such information since much of it may relate to matters of public interest.

The right to receive information and ideas

Article 10(1) guarantees not only the right to impart but also the right to receive information and ideas without interference by public authority. Unlike Article 19(2) of the International Covenant, it does not expressly mention the right to seek information, nor does it expressly impose a duty upon the state to provide information.

In *Open Door and Dublin Well Woman v Ireland*,[67] the Court struck down an injunction preventing family planning counsellors from providing information to women about where to obtain abortions outside Ireland, where the procedure is illegal. In striking down the injunction, the Court concluded that it was excessive and beyond the scope of the state's margin of appreciation, because it "imposed a 'perpetual' restraint on the provision of information to pregnant women concerning abortion facilities abroad, regardless of age, state of health or their reason for seeking counselling on the termination of pregnancy".[68] Since the injunction prohibited the provision of information regarding medical procedures which were lawful in other Council of Europe states, and since travel to other states for the purposes of obtaining an abortion was not illegal under Irish law, Article 10's freedom of information provision would have little content if the Court had ruled otherwise.

In other cases, the Court has been cautious in developing its case law on the subject of a right of access to information, preferring to view this as an aspect of the right to respect for private life and personal privacy, under Article 8(1).[69] In *Leander v Sweden*,[70] the Court held that the right to receive information under Article 10

> "basically prohibits a Government from restricting a person from receiving information that others may wish or may be willing to impart to him."[71]

---

66 These principles have been largely culled from the decision of the Supreme Court of the United States in *Virginia State Board of Pharmacy, supra*, n 57.

67 Judgment of 29 October 1992, Series A No 246.

68 Ibid, para 73.

69 However, in its Report of 12 October 1983, in Application No 8231/78, *X v United Kingdom*, (1986) 49 DR 1, the Commission held that the denial of access to writing paper, and restrictions imposed upon access to newspapers and periodicals, during the applicant's imprisonment, were in breach of Article 10.

70 Judgment of 26 March 1987, Series A No 116.

71 Ibid, para 74.

Accordingly, the applicant had no right of access to a government register containing information on his personal position, nor did Article 10 impose an obligation on the government to impart such information to him. The Court affirmed this restrictive approach in the *Gaskin*[72] case. However, the Court was careful to confine its ruling to the particular circumstances of each case. In both cases, the information sought was personal to the applicant. In the *Gaskin* case, the Court held that Article 8 imposes a positive obligation upon the state to ensure that the interests of an individual seeking access to confidential records relating to his private and family life are secured when a contributor to the records either is not available or improperly refuses consent to access to the records.

> "Such a system is only in conformity with the principle of proportionality if it provides that an independent authority finally decides whether access has to be granted in cases where a contributor fails to answer or withholds consent."[73]

In *Gaskin*, the Court found a breach of Article 8 because no such authority existed in the UK enabling the applicant to obtain records relating to his childhood in public care. The holding in *Gaskin* thus comes close to deciding that Article 8 confers an enforceable duty upon the state to provide effective access for an individual to personal information which is of vital concern to his private life or family life.

What has still to be clarified is whether Article 10 confers a public right of access to official information about matters of legitimate public interest and concern. It is to be hoped that the Court will answer this very important question affirmatively.

The licensing of broadcasting

Article 10 applies not only to the content of information but also to the means of transmission or reception, since any interference with the means necessarily interferes with the right to receive and impart information.

The third sentence of Article 10(1) states that Article 10

> "shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."

This provision empowers the state to regulate the number and type of broadcasting services, and the identity of those who provide such services. In its early case law, the Commission went further and decided that the third sentence of Article 10(1) empowers the state to regulate the content of the material broadcast by those persons to whom licences are granted.[74] Such an interpretation would seriously weaken the right to free speech in the context of broadcasting, because it would enable public authorities to censor the public communication of information and ideas without having to demonstrate a pressing social need under Article 10(2).

---

72 *Gaskin v UK*, Judgment of 7 July 1989, Series A No 160.

73 Ibid, para 49.

74 *X and the Association of Y v UK* (Application No 4515/70), 14 Yb 539 (1971), 38 Coll Dec 86.

Any doubt about this important matter was removed by the Court in its judgment in the *Groppera Radio*[75] case, where it stated that the purpose of the third sentence is

> "to make it clear that States are permitted to control by a licensing system the way in which broadcasting is organized in their territories, particularly in its technical aspects. It does not, however, provide that licensing measures shall not otherwise be subject to the requirements of paragraph 2, for that would lead to a result contrary to the object and purpose of Article 10 taken as a whole."[76]

In *Groppera Radio*, the Court again overruled the Commission's finding of a violation of Article 10. The Swiss Government had prohibited the retransmission by cable of radio signals from an unlicensed station in Italy, consisting mainly of popular music programmes. The Court weighed the requirements of protecting the international communications order and the rights of others against the rights of the applicants, concluding that the national authorities had not overstepped their margin of appreciation. The Court noted that there had been no censorship directed against the content or tendencies of the programmes concerned, but a measure taken against a station which the Swiss authorities could reasonably hold to be in reality a Swiss station operating from the other side of the border in order to circumvent the statutory telecommunications system in force in Switzerland.

In its judgment in the *Autronic AG*[77] case, the Court agreed with the Commission's opinion that there had been a breach of Article 10. The Swiss Government had prohibited the retransmission of television signals from a Soviet satellite. The Swiss Government argued that the Soviet satellite signal was telecommunications rather than broadcasting, and that they were required to prohibit the retransmission of such signals because the Soviet Government's permission had not been obtained. The Court refused to distinguish between signals communicated to the general public in the "footprint" of a direct broadcasting satellite and similar signals transmitted by a telecommunications satellite. The Court referred to its case law on the margin of appreciation, going hand in hand with European supervision "whose extent will vary according to the case". However, it stated that

> "[w]here, as in the instant case, there has been an interference with the exercise of the rights and freedoms guaranteed in paragraph 1 of Article 10, the supervision must be strict, because of the importance of the rights in question; the importance of these rights has been stressed by the Court many times. The necessity for restricting them must be convincingly established."[78]

It is not clear from this statement whether the Court was intending to hold that, in view of the importance of the right to free speech, scrutiny of state interference will be more strict than in other cases under the Convention, or whether the Court meant to confine this

---

75 *Supra*, n 6. *See also National Broadcasting Co Inc v United States*, 319 US 190, at 226 (1943).

76 Ibid, para 61.

77 *Supra*, n 14.

78 Ibid, para 61. This strict approach was not, however, stated in the judgment of virtually the same plenary Court, delivered less than two months earlier in the *Groppera* case, *supra*, n 6.

stricter scrutiny to restrictions upon the licensing of broadcasting.[79]

In *Informationsverein Lentia and Others v Austria*,[80] the Court unanimously ruled that Austria's public broadcasting monopoly was incompatible with Article 10. The question here was whether the public monopoly was necessary in order for the appropriate authorities to ensure compliance with its aim of maintaining plurality of opinion on the airwaves. The applicants suggested that the government was in reality seeking to retain political control, and that true diversity would only be achieved by allowing a variety of stations and programmes.

In reaching its decision, the Court emphasized the importance, particularly in the audio-visual media, of the principle of pluralism, of which, the Court said, the state is the "ultimate guarantor". It said,

> "[t]he Court has frequently stressed the fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive. ... Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor. This observation is especially valid in relation to audio-visual media, whose programmes are often broadcast very widely."[81]

The Court noted that of all the means of ensuring pluralism, a public monopoly is

> "the one which imposes the greatest restrictions on freedom of expression, namely the total impossibility of broadcasting otherwise than through a national station and, in some cases, to a very limited extent through a local cable station."[82]

The Court also said that as a result of technical progress made over the last few decades, the limited restrictions were no longer justified by the number of frequencies available. Above all, the Court said,

> "... it cannot be argued that there are no equivalent less restrictive solutions;

---

79 It would be curious if it were the latter. The US Supreme Court has consistently held that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection": *FCC v Pacifica Foundation*, 438 US 726 (1978), at 748-50. So, for example, broadcasters must allow a right of reply to those they have criticized: *Red Lion Broadcasting Co v FCC*, 395 US 367 (1969). (*See also*, on the press, *Miami Herald Publishing Co v Tornillo*, 418 US 241 (1974).) Broadcasters are not required to accept editorial advertisements: *Columbia Broadcasting System v Democratic National Committee*, 412 US 94 (1973). The main reasons for this lesser degree of protection for free speech in the broadcasting media have been the scarcity of broadcasting frequencies or channels, and the fact that broadcasting confronts the individual not only in public but also in the privacy of the home. However, it is questionable whether these factors should now distinguish broadcasting from other means of expression. Technological developments in satellite and cable mean that there are no longer such finite resources in broadcasting. People reading newspapers are not warned against, or protected from, unexpected content. Questions of this kind have not yet been fully explored under the Convention. Nor has the Court had to consider questions about the organization of the broadcasting media, including the role of public service broadcasting, the prevention of undue influence by the owners of private oligopolies, the preservation of impartiality, rights of reply, and so on: *see* Eric Barendt, "The Influence of the German and Italian Constitutional Courts on their National Broadcasting Systems", [1991] PL 93. In its narrowly restrictive judgment in Case 52/79, *Procureur du Roi v Debauve* [1980] ECR 833, the European Court of Justice held that a national ban on cable television advertising, applied on grounds of general interest, and without discrimination, was justified, apparently because the ban was intended to ensure the survival of a pluralistic written press. *See also* Case 352/85, *Bond van Adverteerders v the Netherlands State* [1988] ECR 2085. It is difficult to understand why the revenue of newspapers should be favoured in this way in preference to broadcasters.

80 Judgment of 24 November 1993, Series A No 276.

81 Ibid, para 38 (citations omitted).

82 Ibid, para 39.

it is sufficient by way of example to cite the practice of certain countries which either issue licences subject to specified conditions of variable content or make provision for forms of private participation in the activities of the national corporation."[83]

Race hate speech

In spite of the Court's strong and oft-repeated statement of principle, in the *Handyside*[84] case, that, subject to paragraph 2, Article 10 applies to ideas that "offend, shock, or disturb the State or any sector of the population", politically extreme speech has been treated as falling outside the protection of Article 10. In *Glimmerveen and Hagenbeek v the Netherlands*,[85] 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. The Commission invoked Article 17, which precludes anyone from relying on the Convention for a right to engage in activities "aimed at the destruction of any of the rights or freedoms set forth in the Convention". The Commission stated that the purpose of Article 17 was "to prevent totalitarian groups from exploiting in their own interests the principles enunciated in the Convention". It found that the expression of these ideas 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. Accordingly, such expression fell outside the scope of Article 10 altogether.

While the Court and Commission have been consistent in their refusal to extend protection to politically extreme speech, in *Jersild v Denmark*[86] the Court held that a journalist could report such speech where it is clear that the journalist is not personally attempting to propagate those ideas. In *Jersild*, a journalist was found guilty of disseminating racist language on account of a radio interview he had broadcast with several self-avowed racist youths. In striking down the conviction, the Court was satisfied that Mr Jersild had dissociated himself from the offending speech, and emphasized "the journalist's discretion as to the form of expression used". The Court said that

> "[n]ews reporting based on interviews, whether edited or not, constitutes one of the most important means whereby the press is able to play its vital role of 'public watchdog'. ... The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so."[87]

---

83 Ibid.

84 *Supra*, n 15.

85 Applications Nos 8348/78 and 8406/78, Admissibility Decision of 11 October 1979, (1980) 18 DR 187.

86 Judgment of 23 September 1994, Series A No 298.

87 Ibid, para 35 (citation omitted).

National security[88]

In two companion cases concerning the book "Spycatcher", *The Observer and Guardian v UK*[89] and *Sunday Times v UK (No 2)*,[90] the Court considered whether or not various injunctions preventing publication in the press of excerpts of "Spycatcher" were necessary in the interests of "national security". Publication of details of the contents of the book, the memoirs of a former intelligence officer, was enjoined even after the book had been published across the world. Before the European Court, the UK Government argued that the injunctions were necessary for security reasons, to preserve the confidence of other governments in the secrecy of information held by the intelligence services, to enforce the duty of confidentiality owed by crown servants, and to safeguard the rights of the Attorney-General pending final determination of the lawfulness of the injunctions by the House of Lords.

In its decision, the Court ruled that, prior to publication elsewhere, the injunctions fell within the state's margin of appreciation. The Court in particular emphasized the nature and possible contents of the book, and the potential prejudice to the Attorney-General. However, the Court held that, once "Spycatcher" had been published elsewhere, the interest of the press and the public in imparting and receiving the information outweighed the government's interests. The Court stressed in particular that "[a]bove all, the continuation of the restrictions after [the publication of 'Spycatcher' and the continuance of the original interlocutory injunctions] prevented newspapers from exercising their right and duty to purvey information, already available, on a matter of legitimate public concern."[91]

In *Purcell v Ireland*,[92] journalists and producers of Irish radio and television programmes challenged restrictions imposed upon the broadcasting of interviews with spokesmen and members of various proscribed organizations, including the Provisional IRA and Sinn Fein (a registered political party). The restrictions applied irrespective of the contents of the programmes, and covered broadcasts by Sinn Fein speakers during Irish general elections and elections to the European Parliament.

Even though the broadcasting ban covered politically innocuous speech, the Commission noted that Article 10 allows restrictions based on Article 17[93] and rejected the application at the admissibility stage.[94] The Commission referred to the power and influence of radio and television, the limited possibilities for the broadcaster to correct, qualify, interpret or comment on any broadcast statement, the risk that live statements could involve coded messages, and the "limited scope of the restrictions imposed on the applicants and the overriding interests they were designed to protect".

The Commission in this case seriously weakened European protection of freedom of political speech in exactly the kind of difficult context in which European protection is

---

88 *See also Vereinigung Demokratischer Soldaten Österreichs and Gubi v Austria*, Judgment of 19 December 1994, Series A No 302 (right to distribute journal within a military barracks upheld), and *Vereniging Weekblad 'Bluf!' v the Netherlands*, Judgment of 9 February 1995, Series A No 306-A (disallowing seizure of publication that included "confidential" material obtained from the Dutch Internal Security Service).

89 Judgment of 26 November 1991, Series A No 216.

90 Judgment of 26 November 1991, Series A No 217.

91 *Supra*, n 89, para 69.

92 Application 15404/89, Admissibility Decision of 16 April 1991, 70 DR 262.

93 *See* section of this paper on "Race hate speech", p 159 *supra*.

94 *Supra*, n 92.

most needed, namely in situations where ideas are sought to be communicated to the public even though they shock, disturb or offend the state or many of its citizens, and even though they are expressed by those who support terrorism. Indeed, on this occasion it was not the content of the ideas, but the nature of the speakers and of the medium of expression which caused the Commission to uphold the compatibility of the broadcasting ban with Article 10.[95]

Exceptions to the right of freedom of expression

The primary exceptions to the principles stated in Article 10(1) are those listed in Article 10(2). To justify an interference with freedom of expression under Article 10(2), a respondent state has to establish that the interference[96] complained of satisfies the following three tests:

(a) it is "prescribed by law"; and

(b) it is in pursuance of one of the legitimate aims listed in Article 10(2); and

(c) it is "necessary in a democratic society", having regard to the "duties and responsibilities".

Each of the three tests in Article 10(2) needs separate scrutiny.

(a) Prescribed by law

The requirement that an interference be "prescribed by law" is contained in several other provisions of the Convention and its Protocols, sometimes expressed in different language. In the first *Sunday Times*[97] case, the Court held that two of the requirements that flow from the expression "prescribed by law" are:

(1) "the law must be adequately accessible: the citizen must be given an indication that is adequate in the circumstances of the legal rules applicable to a given case"; and

(2) the relevant norm must be "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."[98]

---

95 *See also Brind and Others v United Kingdom*, Application No 18714/91, Admissibility Decision of 9 May 1994, 77-A DR 42, where the Commission ruled inadmissible a challenge to a similar UK broadcasting ban.

96 Article 10(2) refers to "formalities, conditions, restrictions or penalties". It is submitted that this phrase should be interpreted broadly to cover any interference by a public authority which hinders, limits or chills freedom of speech, such as an import quota on newsprint: cf, *Minneapolis Star v Minnesota Commissioner of Revenue*, 460 US 575 (1983); *Indian Express Newspapers (Bombay) Ltd v Union of India*, AIR 1986 SC 515. *See also Sakal Papers (P) Ltd v Union of India*, [1962] 3 SCR 842 (law seeking to regulate the prices of newspapers in relation to the numbers of their pages and their size, and to regulate the allocation of advertising space). The Commission has referred to the settled case law of the US 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*, Admissibility Decision of 16 December 1982, (1983) 5 EHRR 471, at p 474.

97 *Supra*, n 13.

98 Ibid, para 49.

In practice it is rare for a state's interferences with fundamental rights and freedoms to fail to satisfy these requirements of the principle of legal certainty.

(b) The purposes for which a restriction may be imposed

If the state establishes that the interference with freedom of expression is "prescribed by law", it then has to establish that the interference is in pursuance of one of the legitimate purposes listed in Article 10(2). The interference must be

> "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."

These phrases must be interpreted within the meaning of the Convention, and not simply as a matter of domestic law.[99] The issue under this test is whether the interference complained of is genuinely aimed at one of the factors listed in Article 10(2). If so, the aim of the interference under Article 10(2) is legitimate.[100] It is rare for a state to be unable to show that an interference with free speech pursues a legitimate aim.

The phrase "in the interests of national security, territorial integrity or public safety" includes a threat of the desertion of soldiers, even in peacetime, in that it tends to weaken the role of the army as an instrument to protect society from internal or external threats;[101] or the possibility that the public disclosure of confidential information about the security service by its former members might damage its efficacy.[102]

The phrase "the prevention of disorder or crime" covers criminal penalties imposed upon an elected public officer for having published an article imputing responsibility for acts of violence to the government;[103] or upon those who advertise or otherwise promote "pirate" radio stations.[104] "Disorder" is a broad term. It covers not only "public order", but also

> "the order which must prevail within the confines of a specific social group. This is so, for example, when, as in the case of the armed forces, disorder in that group can have repercussions on order in society as a whole".[105]

Similarly, restrictions upon freedom of expression may be imposed to avoid the risk of disturbances to public order after the end of a war.[106] The prevention of disorder also

---

99 Ibid, para 55.

100 Ibid, para 57.

101 *Arrowsmith v UK*, Report of the Commission of 12 October 1978, 19 DR 5, at 22. It was there held that Article 10 was not breached by prosecuting someone under the Incitement to Disaffection Act 1934 for encouraging soldiers to desert the army.

102 The "Spycatcher" cases: *The Observer and Guardian v UK*, *supra*, n 89, para 56, and, generally, *Sunday Times v UK (No 2)*, *supra*, n 90.

103 *Castells v Spain*, *supra*, n 28, para 39. *See also* in the particular context of Article 11, *Ezelin v France*, Judgment of 26 April 1991, Series A No 202, para 47 (professional advocate's failure to dissociate himself from unruly incidents during a demonstration).

104 *X v UK*, Admissibility Decision of 4 December 1978, 16 DR 190.

105 *Engel v the Netherlands*, Judgment of 8 June 1976, Series A No 22, para 98.

106 *De Becker v Belgium*, Report of the Commission January 1960, Series B No 2, para 263.

includes protecting the international telecommunications order.[107]

The "protection of health or morals" is a purpose which may be relied upon to impose restrictions upon those who claim that an unlicensed product has pharmaceutical qualities.[108] The word "morals" covers obscene publications.[109] There is a natural link between the protection of morals and the protection of the rights of others.[110]

The "protection of the reputation or rights of others" includes the imposition of civil or criminal sanctions for defamation.[111] The reference to "the rights of others" includes the concept of the offence of blasphemous libel as laid down in English law.[112] Subject to the test of necessity it entitles the state to prohibit the display of pamphlets alleging that it is a "lie" and a "swindle" to state that millions of Jews were killed by Nazi Germany.[113] It empowers the state to take disciplinary measures against a lawyer who has broken his professional duty not to use aggressive or insulting language.[114] It also empowers a school to prohibit a teacher from subjecting pupils to his personal moral or religious views.[115] The protection of "the rights of others" applies to protect consumers.[116] It also applies to promoting pluralism in information by allowing the fair allocation of radio frequencies.[117]

Preventing "the disclosure of information received in confidence" includes forbidding a civil servant to disclose official secrets imparted to him in confidence.[118] It also includes in some circumstances preventing a newspaper from publishing confidential information about the security service.[119]

Maintaining "the authority and impartiality of the judiciary" covers the English common law forbidding contempt of court;[120] and preserving the confidentiality of a judicial investigation.[121]

(c) Necessary in a democratic society

The state must establish not only that the interference with freedom of expression was "prescribed by law" for one of the purposes listed in Article 10(2); it must also establish that

---

107 *Groppera Radio*, *supra*, n 6, at para 70.

108 *Liljenberg v Sweden*, Application No 9664/82, Admissibility Decision of 1 March 1983 (unreported).

109 *Handyside* case, *supra*, n 15, para 46.

110 *Müller* case, *supra*, n 47, para 36. *See also Otto-Preminger-Institut v Austria*, *supra*, n 49, para 50.

111 *Lingens* case, *supra*, n 21, para 36.

112 *X Ltd and Y v UK*, Admissibility Decision of 8 May 1982, 28 DR 77.

113 *K v Federal Republic of Germany*, Admissibility Decision of 16 July 1982, 29 DR 194.

114 *X v Federal Republic of Germany*, 39 Coll Dec 58 (1971).

115 *X v UK*, Admissibility Decision of 1 March 1979, 16 DR 101.

116 *Liljenberg v Sweden*, *supra*, n 108.

117 *Autronic AG v Switzerland*, *supra*, n 14, para 59. It is perhaps questionable how far this will remain a legitimate aim, given the absence of spectrum scarcity with digital broadcasting.

118 *X v Federal Republic of Germany*, 13 Yb 888 (1970).

119 See the Court's judgment in the "Spycatcher" case, *The Observer and Guardian v UK*, *supra*, n 89, para 69. Moreover, information which is no longer confidential cannot be prevented from being made public to prevent the disclosure of information received in confidence: *Weber* case, *supra*, n 39, para 51.

120 *Sunday Times v UK*, *supra*, n 13, para 56. *See also Barfod* case, *supra*, n 33, para 26; *G. Hodgson and D. Woolf Productions v UK*, Commission's Admissibility Decision of 9 March 1987, 51 DR 136, at 145-6.

121 *Weber* case, *supra*, n 39, para 45.

the interference was "necessary in a democratic society". In applying this key test, the Court has developed the following principles, some of which have been noted already:

(1) The adjective "necessary" implies the existence of a "pressing social need".[122] It is synonymous neither with "indispensable" nor with the looser test of "reasonable" or "desirable".[123]

(2) The initial responsibility for securing the rights and freedoms enshrined in Article 10 lies with the Contracting States. The Contracting States have a certain "margin of appreciation" in assessing whether a need exists, but it goes hand in hand with a European supervision.[124] It is for the Commission and the Court to assess whether an interference with freedom of expression exceeds the limit. The Court is empowered to give a final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10.[125]

(3) European supervision is not limited to ascertaining whether the state has exercised its discretion reasonably, carefully and in good faith. Such conduct is not necessarily in compliance with the criteria of Article 10(2).[126] Supervision must be strict, because of the importance of the rights in question; the necessity for restricting them must be "convincingly established".[127]

(4) The test to be satisfied by the respondent state is whether the interference complained of corresponded to a pressing social need, whether, in light of the case as a whole, it was proportionate to the legitimate aim pursued, and whether the reasons given by the national authorities to justify it are relevant and sufficient under Article 10(2).[128] To assess whether the interference was based upon "sufficient" reasons, which rendered it "necessary in a democratic society", account must be taken of any public interest aspect of the case.[129]

(5) The scope of the margin of appreciation is not identical as regards each of the aims listed in Article 10(2). With regard to an interference with free speech aimed at protecting morals (a goal which is subjective and shifting), for example, state authorities are in principle in a better position than the Commission and the Court to assess whether the interference is necessary. With regard to an interference with

122 *Sunday Times v UK (No 2), supra*, n 90, para 50.

123 *Handyside* case, *supra*, n 15, para 48; *The Observer and Guardian v UK, supra*, n 89, para 59.

124 *Handyside* case, *supra*, n 15, para 49; *The Observer and Guardian v UK, supra*, n 89, para 59.

125 *Sunday Times v UK (No 2), supra*, n 90, para 50.

126 *Sunday Times v UK, supra*, n 13, para 59.

127 *Autronic AG v Switzerland, supra*, n 14, para 61.

128 *Handyside* case, *supra*, n 15, paras 48-50; *Sunday Times v UK, supra*, n 13, para 62; *Sunday Times v UK (No 2), supra*, n 90, para 50.

129 So where the issue upon which freedom of speech is restricted is "a matter of undisputed public concern" upon which people have "a vital interest in knowing" relevant information, then it is permissible to deprive them of that information "only if it appeared absolutely certain that its diffusion would" have the adverse consequences legitimately feared by the state: *Sunday Times v UK, supra*, n 13, paras 65-6.

free speech aimed at a goal which is more objective in nature (such as maintaining the authority of the judiciary) state authorities are not necessarily in a more informed position.[130] Therefore, the test of "necessity" requires consideration of the nature of the aim pursued.

(6) In applying the test of necessity, it is also relevant to consider (a) the breadth of the restriction - the greater the breadth, the greater the scrutiny called for;[131] (b) the practice of other Contracting States - where the sanctions or preventive measures are of an unusual kind, their justification has to be considered with particular care;[132] (c) the type of media through which the communication is expressed; (d) the type of information, idea or opinion which would be communicated but for the restriction imposed by the state - with political, philosophical or religious information, ideas and opinions receiving the most protection, and with commercial speech receiving less protection; and (e) whether informed opinion in the respondent state has suggested that the impugned interference with free speech could be removed without serious adverse consequences.[133]

Conclusion

It is relatively easy to articulate the relevant legal principles for the interpretation and application of Article 10. It is much harder to apply those principles faithfully and consistently in controversial cases involving tensions between freedom of speech, state power, and pressing social needs.

Despite the promises of the early case law, the Court and, to a lesser extent, the Commission, have weakened European supervision of interferences by public authorities with the right to free expression. Excessive use of the elusive concept of the "margin of appreciation", restrictive interpretations of the scope of Article 10, and expansive interpretations of the phrase "duties and responsibilities", have eroded the protection given to freedom of expression by the Convention.

This is particularly unfortunate because of the special importance of free speech to the effective enjoyment of the other fundamental rights and freedoms guaranteed by the Convention, and because, as the Court has recognized,[134] freedom of expression is an essential foundation of a democratic society, a basic condition for its progress and for the development of every human being. It is greatly to be hoped that the European Court and Commission of Human Rights (and, where relevant, the European Court of Justice) will strengthen the practical application of Article 10, and interpret the exceptions and the margin of appreciation with a strong presumption in favour of freedom of speech. However, the Convention remains a potent source of jurisprudence especially where governments seek to censor or punish political speech.

---

130 *Handyside* case, *supra*, n 15, para 48; *Sunday Times v UK*, *supra*, n 13, para 59.

131 *Sunday Times v UK*, *supra*, n 13, para 63; *Barthold*, *supra*, n 53, paras 79-81.

132 *De Becker v Belgium*, *supra*, n 106, para 263.

133 *Sunday Times v UK*, *supra*, n 13, para 60.

134 *See* n 16, *supra*.