Judicial Colloquium

THE DOMESTIC APPLICATION OF INTERNATIONAL HUMAN RIGHTS NORMS

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FREEDOM OF EXPRESSION

by

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interights

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Freedom of Expression

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I. Language and Context

The right to freedom of expression is defined by Article 10 of the European Convention in detailed and specific terms 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 or 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 sometimes competing values of, on the one hand, 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.

Article 10 has to be read in the light of the Convention as a whole. For example, Article 14 extends the scope of Article 10 by guaranteeing the enjoyment of its rights and freedoms, without discrimination on any ground. The right to respect for correspondence[1] and to respect for personal privacy,[2] contained in Article 8, is closely linked to freedom of expression; as is the right to freedom of peaceful assembly and freedom of association, contained in Article 11;[3] and the right to manifest one's religion or belief, contained in Article 9.

Other provisions restrict the scope of Article 10. For example, Article 16 provides that nothing in Article 10 shall be regarded as preventing the High

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1 See *Silver and others* judgment of 25 March 1983, Series A no. 61.
2 See, for example, the Commissions's admissibility decision of 10 July 1986, in *Winer v. United Kingdom* 48 DR 154.
3 See *Ezelin* judgment of 26 April 1991, Series A no. 202, paragraphs 35 and 37.

Contracting Parties from imposing restrictions on the political activity of aliens. On its face, Article 16 is an entirely unlimited exception. If interpreted loosely, it would enable public authorities arbitrarily and unnecessarily to censor or suppress the expression of political views by aliens. Article 17 provides that nothing in the Convention (that is, including Article 10) may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth in the Convention or at their limitation to a greater degree than is provided for in the Convention. Again, a loose interpretation of Article 17 would destroy the substance of the right to freedom of expression for people with unpopular and extreme political views. Article 15 permits derogations to be made to Article 10 in time of war or other public emergency threatening the life of the nation. Once more, a loose interpretation could seriously endanger freedom of speech in troubled times.

The rights and freedoms positively guaranteed by other provisions of the Convention, and reflected in Article 10(2) itself, also limit the scope of the right to free expression. For example, the right to a fair judicial hearing, guaranteed by Article 6, justifies some restrictions upon freedom of speech.[4] The right to respect for private life, including personal privacy, guaranteed by Article 8, protects a person's honour and reputation against unnecessary attack.[5]

The right to freedom of expression is expressed in Article 10 in weaker language than in Article 19 of the UN International Covenant on Civil and Political Rights[6] in several respects. In particular, Article 10 does not, in its terms, create an independent right to hold opinions without interference;[7] nor does it expressly refer to the right to seek information;[8] nor does it specifically refer to information and ideas 'of all kinds.' However, the European Court and Commission generally

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4 See *The Sunday Times* judgment of 26 April 1979, Series A no. 30, paragraph 55.

5 See *Lingens v. Austria* judgment of 8 July 1986, Series A no. 103, paragraph 38.

6 Article 19 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 reputation 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.

7 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.

8 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.

seek to interpret Article 10 of the Convention in a manner which is consistent with Article 19 of the Covenant.[9]

Article 10 contains more detailed and specific exceptions to the right to free expression than does any other international human rights instrument. By contrast, and unlike, for example, Article 20 of the International Covenant,[10] the Convention does not require war propaganda or incitement to racial or religious hatred or discrimination to be prohibited.

Compared with the well-known constitutional guarantees of free speech in the United States,[11] France[12] and Germany,[13] the right to free expression in Article 10 is more heavily qualified by its exceptions. Unlike Article 13(2) of the Inter-American Convention on Human Rights, there is no statement in Article 10 that the exercise of the right to freedom of expression shall not be subject to prior censorship.[14] Unlike Article 14 of the Inter-American Convention,[15] the European

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9 In the *Müller v. Switzerland* judgment of 14 May 1988, Series A no. 133, paragraph 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 *Groppera Radio and others* judgment of 28 March 1990, Series A no. 173, paragraph 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.

10 Article 20 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, *The Human Rights Committee* (Oxford, Clarendon Press 1991), pp. 480–97. See also Article 13(5) of the Inter-American Convention on Human Rights, and Article 4 of the UN International Covenant on the Elimination of All Forms of Racial Discrimination.

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

12 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.'

13 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.

14 Except for the prior censorship of public entertainments for the sole purpose of regulating access to them for the moral protection of childhood and adolescence: ibid., Article 13(4).

15 Article 14 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

Convention does not expressly guarantee a right of reply for injury resulting from inaccurate or offensive statements or ideas transmitted to the public.

II. Relevance to Other Legal Systems

The principles stated in Article 10 and its case-law are relevant in interpreting other international human rights treaties[16] and national constitutions[17] and laws, as well as treaties such as the European Convention on Transfrontier Television.[18]

Since all the Member States of the European Community are Contracting Parties to the Convention, the European Court of Justice also derives guidance from the fundamental rights and freedoms stated in the Convention when interpreting and applying Community law[19] or national implementing measures. In its Memorandum on the Accession of the European Communities to the Convention,[20] the EEC Commission recognized that Article 10 has a potential role in connection with EEC competition law and with rules on the free movement of goods.[21]

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a correction using the same communication 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 honour 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.

16 The Inter-American Court of Human Rights held, in its powerful Advisory Opinion of 13 November 1985 on *Compulsory Membership of Journalists' Association*, 8 EHRR 165, paragraph 46, that for a restriction on free speech to be 'necessary,' under Article 13(2) of the Inter-American Convention, it must satisfy the test articulated by the European Court in relation to Article 10(2) of the Convention.

17 For example, in *Indian Express Newspapers v. Union of India* [1985] 2 SCR 287, and in *S. Rangarajan v. P. Jagivan Ram* (1989) 1 SCJ 128, the Supreme Court of India had regard to Article 10 of the Convention and its case-law for the purpose of construing the Indian constitutional guarantee of freedom of expression.

18 The Preamble to the Television Convention recalls that freedom of expression, as embodied in Article 10 of the European Convention on Human Rights, 'constitutes one of the essential principles of a democratic society and one of the basic conditions for its progress and for the development of every human being.' It also reaffirms the commitment of the member States of the Council of Europe to 'the principles of the free flow of information and ideas and the independence of broadcasters, which constitutes an indispensable basis for broadcasting policy.'

19 See, for example, joined cases 60 and 61/84, *Cinéthèque v. Féd. nat. des cinémas* [1985] ECR 2605, 2607; case 12/88, *Demirel v. Stadt Schwäb, Gmünd* [1987] ECR 3747, 3754; case 260/89, *Elliniki Radiophonia Tiléorassi–Antonini Etairia*, judgment of 18 June 1991.

20 Adopted on 4 April 1979, Bulletin Supplement 2/79, paragraph 18. See also Article 5 of the European Parliament's Declaration of Fundamental Rights and Freedoms, Official Journal 1989 no. C 120, p. 51.

21 The same is true of the Community rules on the provision of services: cf. case 352/85, *Bond van Adverteerders v. Netherlands State* [1988] ECR 2085. See generally the opinion of Mr Advocate General Van Gerven of 11 June 1991 in case 159/90, *The Society for the Protection of Unborn Children Ireland Ltd v. S. Grogan and others* (not yet reported).

In addition, in its legislative capacity, the Council of the European Communities has referred to Article 10 of the Convention as a relevant norm for Community legislation. The preamble to the Council Directive on television broadcasting activities[22] describes the Community freedom to provide television broadcasting services as a 'specific manifestation in Community law of a more general principle, namely the freedom of expression as enshrined in Article 10(1) of the Convention.' For this reason the Council there recognized that the issuing of directives on the broadcasting and distribution of television programmes must ensure their free movement in the light of Article 10(1) and subject only to the limits set by Article 10(2) of the Convention and by Article 56(1) of the EEC Treaty.[23]

III. The Right to Impart Information and Ideas

The right to freedom of speech extends 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.[24] The right to free speech applies to 'everyone,' whether natural or legal persons (including profit-making corporate bodies).[25]

The breadth and importance of the right to free speech were recognized by the European Court in the *Handyside* case[26] as being inherent in the concept of a democratic and plural society. In a celebrated statement, the Court observed that

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

23 See generally '*Television without Frontiers*' – Green Paper on the Establishment of the Common Market for Broadcasting, especially by Satellite and Cable (June 1984), pp. 37–38, 48–49, 127–36 and 254–57; case 260/89, note 19 above.

24 *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* 425 US 748, 756 (1976); *The Sunday Times* judgment of 26 April 1979, Series A no. 30, paragraphs 65–66. In its opinion in *De Geillustreerde Pers NV v. The Netherlands*, 8 DR 5 (1976), the Commission suggested that the freedom to impart information under Article 10 'is only granted to the person or body who produces, provides or organises 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. In its admissibility decision of 12 April 1991, *P–Institut v. Austria*, Application no. 13470/87, the Commission stated their opinion that the scope of Article 10 is not limited to the expression of one's own views. It protects, for example, the operator of a cinema.

25 *Autronic AG* judgment of 22 May 1990, Series A no. 178, paragraph 47.

26 Judgment of 7 December 1976, Series A no. 24, paragraph 49. See also *The Sunday Times* judgment of 26 April 1979, Series A no. 30, paragraph 64.

> 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.'

The *Handyside* case concerned a successful prosecution under the English Obscene Publications Act against the publishers of *The Little Red Schoolbook*, a book that 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 that has often been applied by the Court in a manner which – as will become evident in what follows – seriously dilutes the strong principles of freedom of expression proclaimed by the Court.

The 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* case, where it stated[27] that it is incumbent on the mass media 'to impart information and ideas 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.' The Court also held[28] that its supervision is not limited to ascertaining whether a respondent State exercised its discretion reasonably, carefully and in good faith.' In addition, it decided[29] 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.'

In its unanimous judgment in the *Lingens* case,[30] the Court stated that it is incumbent on the press '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 a right to receive them.' Freedom of the press, the Court observed,

> 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

27 Judgment of 26 April 1979, Series A no. 30, paragraph 65.
28 Ibid., paragraph 59.
29 Ibid., paragraph 65.
30 *Lingens v. Austria* judgment of 8 July 1986, Series A no. 103, paragraphs 41–42.

> 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.[31]

The importance of freedom of *artistic* expression was emphasized by the European Commission of Human Rights in the *Müller* case.[32] 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.

Freedom of artistic expression, in the Commission's opinion,[33] consists not only in freedom to create works of art but also in freedom to disseminate them, in particular through exhibitions.

The Commission regarded the confiscation of Mr Müller's paintings because they were judged to be obscene as a particularly serious interference with freedom of expression because of the effect upon his freedom to exhibit the paintings in future. It held that the confiscation was in breach of Article 10.

The Court accepted that freedom of artistic expression is included in Article 10, and 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.'[34] However, the Court was markedly weaker than was the Commission in giving practical content to artistic expression. Instead the Court emphasized the 'duties and responsibilities' of artists,[35] and the wide margin of appreciation in relation to the public morals exception. In one of several judgments overruling the Commission's findings of breaches of the right to free expression, the Court decided that the confiscation of the paintings did not infringe Article 10. If an

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31 See also *Oberschlick v. Austria* judgment of 23 May 1991, Series A no. 204, paragraphs 57–61; *Castells v. Spain* judgment of 23 April 1992, Series A no. 236, paragraph 42. The approach exemplified in these cases is close to the reasoning in the landmark decision of the US Supreme Court in *New York Times v. Sullivan* 376 US 710 (1964). In *Wachtmeester v. The Netherlands*, Application no. 16617/90, admissibility decision of 12 April 1991, the Commission regarded a conviction for simple insult as justified, given that the behaviour criticized did not concern public or political personalities.

32 Report adopted on 8 October 1986, Series A no. 133, p. 37, paragraph 70. The Court's judgments in the pending cases of *Schwabe v. Austria* and *Thorgeirson v. Iceland* seem likely to develop this approach further.

33 Ibid., paragraph 95. In *P–Institut v. Austria*, Application no. 13470/87, the Commission declared admissible (on 12 April 1991) a complaint by a cinema operator of the seizure, forfeiture and prohibition of a film for disparaging religious precepts.

34 Judgment of 24 May 1988, Series A no. 133, paragraph 27.

35 The notion that artists owe duties and responsibilities in their capacity as artists seems strange, in the light of the inherently subversive nature of the artistic impulse. It may be, however, that the Court meant to say no more than that artists, like everyone else, have to obey the law.

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.

In spite of the Court's strong and oft-repeated statement of principle, in the *Handyside* case,[36] 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*,[37] 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 constitute 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.

In *Purcell v. Ireland*, 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.

The Commission did not on this occasion regard the complaint as falling outside Article 10, because of Article 17 of the Convention. However, even though the broadcasting ban covered politically innocuous speech, the Commission rejected the application at the admissibility stage,[38] referring 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 statement 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 has thereby seriously weakened European protection of freedom of political speech in exactly the kind of difficult context in which European protection is most needed, so as to enable ideas to be communicated to

36 See note 26 above.
37 Report adopted on 11 October 1979, 4 *EHRR* 260.
38 Admissibility decision of 16 April 1991 (as yet unreported).

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.

In other cases, and with more justification, 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.'[39]

This is an area of expression in which US First Amendment doctrine has not been followed in Europe. 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.'[40] The town passed various ordinances designed to ban 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 US Court of Appeals 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.[41]

The European approach – reflected in Convention case law – treats racist expression as akin to using offensive weapons, not deserving of being a protected form of expression. This approach gives much greater importance to 'respect for the dignity of the individual and concern for the rights of minorities'[42] than to the commitment in American constitutional doctrine to market place trading freely in competing ideas.[43]

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39 See, for example, Application no. 9235/81 *X v. Federal Republic of Germany* 29 DR 194 (1982).

40 Lawrence H. Tribe, *Constitutional Choices* (Harvard University Press 1985), p. 219.

41 *National Socialist Party v. Skokie* 578 F.2d 1197 (7th Cir.) cert. denied, 439 US 916 (1978). But see *Beauharnais v. Illinois* 343 US 250 (1952).

42 Roger Errera, 'The Freedom of the Press: The United States, France, and Other European Countries,' in Louis Henkin and Albert Rosenthal (ed.) *Constitutionalism and Rights – The Influence of the United States Constitution Abroad* (New York, Columbia University Press 1990), p. 63 at p. 85.

43 See, for example, *Abrams v. United States* 250 US 616, at 630 (1919), per Holmes J (dissenting); *Whitney v. California* 274 US 357, at 375–78 (1927), per Brandeis J concurring). For a detailed analysis of the contrast between US and European approaches, see David Kretzmer, 'Freedom of Speech and Racism,' 8 *Cardozo Law Review* (1987), p. 445. See also the decision of the Supreme Court of Canada, in *R. v. Keegstra* 61 CCC (3d) 1, upholding a criminal provision prohibiting wilful promotion of hatred as being proportionate, in relation to the guarantee of free speech in the Charter of Rights. For a survey of the position in 30 countries see Article 19 in Sandra Coliver (ed.), *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* (1992).

In the light of the tragic European experience of genocide and totalitarianism in this century, it is not surprising that many European jurists adopt a more pessimistic view than American jurists of the ability of democratic societies to resist racist propaganda without the need for censorship or punishment. There is, however, a danger that unnecessary interferences with free speech might be permitted in the name of racial or religious harmony.[44]

Regrettably, the European Court has permitted State interference with the freedom of expression of civil servants, without even requiring proof of a pressing social need for the interference. In *Glasenapp v. Germany*,[45] the applicant was dismissed from her job as a school teacher for refusing 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. As a civil servant, she had undertaken, as required by law, to uphold the free democratic constitutional system within the meaning of the Basic Law.

By a narrow majority, the Commission found a violation of Article 10.[46] The Commission pointed out that Mrs Glasenapp's appointment had been revoked because of specific incidents relating to expression or withholding of her political opinions. The expression of opinion at issue was a letter to the editor of a newspaper after a news conference, following which she declined to clarify her position when this was required of her by the School Board to confirm her loyalty to the Basic Law. The Commission held that the conditions and restrictions which arose from the obligation of loyalty constituted an interference with the right to freedom of expression and opinion. It recalled the vital role played by the protection of freedom of expression in the democratic structure of Member States. It concluded that the requirement that she should dissociate herself completely from a political party with which she had had only a limited connection could not be considered a 'necessary' condition and restriction on her freedom of opinion and its expression. The operation of loyalty control in the particular case did not correspond to a 'pressing social need' and the response of the control mechanism 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 had interfered with the discharge of her work.

Although the Commission was divided in its opinions as to the merits of the case, all members of the Commission were agreed that there had been an interference with freedom of opinion and expression, which required to be justified under Article 10(2). As a matter of causation, it is difficult to see how they could

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44 For example, in Singapore, the Maintenance of Religious Harmony Act 1990 (no. 26 of 1990) confers sweepingly broad Ministerial powers to make restraining orders, free from any judicial review, against officials or members of religious groups or institutions, or any person.

45 Judgment of 28 August 1986, Series A no. 104.

46 Report adopted on 11 May 1984. The Commission's opinion is contained in Series A no. 104, p. 38, as an Annex to the Court's judgment.

have reached any other conclusion. But for Mrs Glasenapp's political opinions and her expression of them at a press conference and in a letter, her appointment would not have been revoked. Like every civil servant, she owed an obligation of loyalty and allegiance to the Basic Law. This obligation was a condition of her appointment and continuing employment in the civil service. As the Commission found,[47]

> It resulted in the introduction for her of a condition on her freedom of opinion and expression, since she could only avoid the consequences of the loyalty appraisal system if she expressed such opinions as were compatible with the obligation of loyalty which she had assumed. Her job as a civil servant was therefore conditional on the opinions she held or expressed.

The Court, however, came to the opposite conclusion (by sixteen votes to one) that there had been no interference with the exercise of the right protected under Article 10(1), and therefore found it unnecessary to consider the complaint under Article 10(2).[48] 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.

A minority of six judges expressed some reservation about the potentially broad implications of such a holding. They stated that the non-applicability of Article 10 in this case did 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.'[49]

Only Judge Spielman grappled with the difficult question of how to reconcile the State's interest in securing the loyalty of its civil servants with the applicant's right to freedom of expression. In his dissenting opinion, he applied the Court's jurisprudence on Article 10. There had been a *prima facie* interference with the applicant's 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.

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47 Ibid., p. 39, paragraph 69.

48 Ibid., p. 27, paragraph 53.

49 In its judgment of 6 June 1991, in *Public Service Commission v. Millar* (as yet unreported), the Supreme Court of Canada was much stronger in its protection of the freedom of expression of civil servants. It held that a statutory prohibition on partisan political expression and activity by public servants, under threat of disciplinary action including dismissal from employment, infringed the right to freedom of expression in section 2(b) of the Charter of Rights, was over-inclusive, and, in many of its applications, went beyond what was necessary to achieve the objective of an impartial and loyal civil service.

It is respectfully submitted that Judge Spielman's analysis was preferable. If civil servants are to enjoy an effective protection of their rights under the Convention, it is essential that the State should be required to demonstrate the necessity for any restrictions on those rights. It is questionable whether the Court's judgment in the *Glasenapp* case interpreted Article 10 so as to make its safeguards 'practical and effective' and in accordance with the general spirit of the Convention as 'an instrument designed to maintain and promote the ideals and values of a democratic society.'[50] Instead of adopting a generous and purposive interpretation, the Court's approach was restrictive and formal. It failed to avoid what has been called[51] 'the austerity of tabulated legalism.'[52]

The Court's judgment in the first *Sunday Times* case[53] was a landmark judgment. The House of Lords – the supreme judicial authority of the United Kingdom – was there held, by a majority of the Court, to have 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. The Court rejected the contention that it was necessary to restrain publication so as to maintain the authority of the judiciary until the proceedings had been determined. It emphasized the fact 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, in the view of the majority of the Court, merely because they formed the background to pending litigation.

The Court's majority decision was wafer-thin: eleven votes to nine. Its subsequent restrictive case law on Article 10 may be partly explained by the fact that, as it happened, many more of the dissenting minority were to remain members of the Court after *The Sunday Times* case than were those who formed the majority in that case.

The clear differences between the contrasting views are vividly illustrated by what happened in another and more recent free speech case concerning the authority of the judiciary. In the *Barfod* case,[54] a Danish citizen wrote an article,

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50 *Soering* judgment of 7 July 1989, Series A no. 161, paragraph 87.

51 *Minister of Home Affairs v. Fisher* [1980] AC 319 (PC), at 328, per Lord Wilberforce.

52 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 his 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.

53 Judgment of 26 April 1979, Series A no. 30.

54 Judgment of 22 February 1989, Series A no. 149.

which was published in a magazine, expressing his opinion that two lay judges were disqualified under the Danish Constitution, and questioning their ability and power to decide impartially in a case brought against their employer.[55] The case in question concerned the legality of a tax imposed by the Greenland Local Government, of which the two lay judges were employees. They had sat in the case, together with a High Court judge, who subsequently required the Greenland Chief of Police to investigate the matter. The applicant was charged and convicted of defamation of character, and was fined 2,000 Danish crowns.

The Commission decided,[56] 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 weigh more heavily than the interest of the two judges in being protected against criticism of the kind expressed in the applicant's article.

The Commission also observed that 'in the eyes of the respondent Government, employees of a party to a dispute ought not to sit as judges on that very dispute. This fundamental element of fair justice is also anchored in Article 6 ... and it does not lose any of its importance in a system with lay judges.' The Commission therefore found, without apparent difficulty, that there had been a breach of Article 10.

However, a Chamber of the Court was as decisive in finding to the contrary (by six votes to one) that there had been no breach of Article 10. The Court held that the impugned 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 ... In view of these considerations, the political context in which the tax case was fought cannot be regarded as relevant for the question of proportionality.' It is respectfully submitted that the Commission's opinion is greatly to be preferred to the Court's decision in the *Barfod* case, which retreats from the Court's strong judgment of principle in *The Sunday Times* case. It is to be hoped that, in future cases, the Court will ensure, in practice as well as in theory, that justice is not a 'cloistered virtue.'[57]

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55 The article stated: 'Most of the Local Government's members could ... afford the time to watch the two Greenland lay judges – who are by the way both employed directly by the Local Government, as director of a museum and as consultant in urban housing affairs – did their duty, and this they did. The vote was two to one in favour of the Local Government and with such a bench of judges it does not require much imagination to guess who voted how.'

56 Report of the Commission of 16 July 1987, paragraph 71.

57 The phrase comes from the decision of the Privy Council in *Ambard v. Attorney-General for Trinidad and Tobago* [1936] AC 322, at 335, and in turn from Milton's *Areopagitica* (1644) ('I cannot praise a fugitive and cloistered virtue ...').

The Court has been reluctant to decide whether and to what extent Article 10 protects 'commercial speech'; that is, advertising or other means of communicating commercial information to consumers. In the *Barthold* case,[58] 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 his professional rules, 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 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.

In the *Markt Intern* case,[59] the Court decided that information of a commercial nature 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.' However, the Commission reaffirmed[60] 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.[61]

Markt Intern publishes weekly news sheets aimed at specialized commercial sectors, such as chemists and beauty product retailers. It published an article

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58 *Barthold v. Germany* judgment of 25 March 1985, Series A no. 90.

59 *Markt Intern Verlag GmbH and Klaus Beermann* judgment of 30 March 1989, Series A no. 165, paragraph 26.

60 Report of 18 December 1987, paragraph 231.

61 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 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).

describing the experience of a chemist, dissatisfied with an order from a mail-order firm, who sough 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 done acts contrary to honest practices in breach of the Unfair Competition Act.

The Commission concluded, by twelve votes to one, that there had been a violation of Article 10. It noted that *Markt Intern* was not in any competitive relationship with the criticized firm, that the statements were factually accurate, and that the German judicial decision was based on reasoning which removed the protection of freedom of expression, irrespective of the particular circumstances of the case, from any publication which the civil courts had found to be acts of competition within the meaning of the Unfair Competition Act.

However, what seemed to the Commission to have been a clear breach of Article 10 caused the Court to be deeply divided. 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[62] 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.

The majority also stated[63] that 'it is primarily for the national courts to decide which statements are permissible and which are not.' They concluded[64] that

> It 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.

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 interest does not deprive him of the benefit of

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62 Judgment, paragraph 33.
63 Ibid., paragraph 35.
64 Ibid., paragraph 37.

freedom of expression. In order to ensure the openness of business activities, it must be possible to disseminate freely information and ideas concerning the products and services proposed to consumers. They found the reasoning with regard to the margin of appreciation a cause for serious concern, because it meant that the Court was effectively eschewing European supervision as to the conformity of the contested measures with Article 10.

The divided judicial opinions in the *Markt Intern* case leave uncertainty about the extent to which commercial speech is covered by Article 10. The application of the margin of appreciation to the particular facts raises the question whether those members of the Court who found no violation established really regard commercial speech as effectively protected by Article 10.

The Court's case-law is less well developed in this area than is the case-law of several European national courts.[65] It is respectfully submitted 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.

In addison to these factors, the extent to which Article 10 protects commercial speech is of great practical importance to the creation of a common market

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65 See generally Anthony Lester and David Pannick, *Advertising and Freedom of Expression in Europe* (Paris, International Chamber of Commerce 1984), pp. 12–13. See also the important judgment of 27 June 1986 of the Constitutional Court of Austria, in B 658/85 [1987] HRLJ 361, holding that commercial advertising is protected by Article 10 of the Convention, and that the Austrian Broadcasting Corporation (the ORF) had violated Article 10 in rejecting, without giving reasons, an application by an Austrian weekly to broadcast radio commercials. The Court held that, in the light of Article 10, the ORF was 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 ...'

66 These principles have been largely culled from the decision of the Supreme Court of the United States in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* 425 US 748 (1976). In *Hempfing v. Germany*, Application no. 14622/89, admissibility decision of 7 March 1991 (unreported), the Commission rejected the Government's submission that a professional reprimand against a lawyer for advertising fell outside Article 10. The Commission observed that restrictions on the freedom of expression of members of liberal professions should not discourage them from contributing to a public debate on topics affecting the life of the community. It held that, taking into account the applicant's interest in advertising his services and the proper functioning of the legal profession, together with the very light nature of the sanction, the interference was necessary under Article 10(2).

for broadcasting. Without advertising, broadcasting cannot be developed and expanded.

IV. 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.

The Court has been very 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).[67] In *Leander v. Sweden*, the Court held[68] 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.' 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* case.[69]

The Court was, however, 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[70] 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 is 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.' This 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.

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67 However, in its report of 12 October 1983, in Application no. 8231/78, *X v. United Kingdom*, 28 DR 5, the Commission held that the denial of access to writing paper and the restrictions imposed upon access to newspapers and periodicals during the applicant's imprisonment were in breach of Article 10.

68 Judgment of 26 March 1987, Series A no. 116, paragraph 74. In *Z v. Austria*, Application no. 10392/83, 56 DR 13, admissibility decision of 13 April 1988, the Commission held that freedom to receive information, guaranteed by Article 10(1), is 'primarily a freedom of access to general sources of information which may not be restricted by positive action of the authorities.'

69 Judgment of 7 July 1989, Series A no. 160, paragraph 52.

70 Ibid., paragraph 49.

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.[71] It is to be hoped that the Court will answer this very important question affirmatively.

V. 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.'[72] 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[73] 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. 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).

Any doubt about this important matter was removed by the Court in its judgment in the *Radio Groppera* case,[74] 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 organised 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.

In *Radio Groppera*, 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

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71 See Recommendation no. R (81) 19, on access to information held by public authorities, adopted by the Committee of Ministers of the Council of Europe on 25 November 1981; and the Declaration on the freedom of expression and information, adopted by the Committee of Ministers on 29 April 1982. See also, for example, Stefan Weber, 'Environmental Information and the European Convention on Human Rights,' 12 *HRLJ* (1991), pp. 177–85.

72 *Autronic AG* judgment of 22 May 1990, Series A no. 178, paragraph 47.

73 *X and the Association of Y v. United Kingdom* (Application no. 4515/70) 14 *Yearbook* 539 (1971), 38 Coll. Dec. 86.

74 Judgment of 28 March 1990, Series A no. 173, paragraph 62. Cf. *National Broadcasting Co. Inc. v. United States* 319 US 190 (1943), at 226.

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* case,[75] 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.' It stated[76] that

> Where, 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.

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 stricter scrutiny to restrictions upon the licensing of broadcasting.[77]

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75 Judgment of 22 May 1990, Series A no. 178.

76 Ibid., paragraph 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 *Radio Groppera* case.

77 It would be curious if it were the latter. The US Supreme Court has consistently held that 'of all the forms of communication, it is broadcasting that has received the most limited First Amendment protection': *FCC v. Pacifica Foundation* 438 US 726, at 748–50 (1978). 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) (cf. *Miami Herald Publishing Co. v. Tornillo* 418 US 241 (1974) on the press). 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

The Commission has left open[78] the question whether the third sentence of Article 10(1) excludes or permits a public television monopoly. It is submitted that the existence of such a monopoly would be contrary to the object and purpose of Article 10 taken as a whole, as would the imposition of unnecessary restrictions upon transmitting and receiving advertisements across national frontiers.

VI. Exceptions to the Right to Freedom of Expression

Apart from the exceptions in Articles 15, 16 and 17, noted earlier, the only 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[79] complained of satisfies the following three tests: (a) it is 'prescribed by law'; (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.'

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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: cf. Eric Barendt, 'The Influence of the German and Italian Constitutional Courts on their National Broadcasting Systems,' Public Law, 1991, pp. 93–115. 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. Netherlands State* [1988] ECR 2085; case 260/89, note 19 above. It is difficult to understand why the revenue of newspapers should be favoured in this way in preference to broadcasters.

78 *Sacchi v. Italy*, 5 DR 43, 50 (1976); *X Association v. Sweden*, 28 DR 204, 205 (1982). The pending complaints by *Informationsverein Lentia and others v. Austria*, Applications nos 13914/88, 15041/89, 15717/89, 15779/89, and 17207/90, declared admissible on 15 January 1992, challenge a State monopoly on radio and cable television broadcasting, and seem likely to result in a strengthening of the protection of Article 10 in this very important area.

79 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* (1986) A.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, 5 *EHRR* 471, at 474. An official reprimand by a professional association is an interference: *Hempfing v. Germany*, Application no. 14622/89, admissibility decision of 7 March 1991; a fine is an interference: *Sonnemann v. Germany*, Application no. 16315/90, admissibility decision of 11 July 1991; the limiting of the radio and television coverage of football matches by the private organizer of the matches is not an interference: *Nederlandse Omroepprogramma Stichting v. The Netherlands*, Application no. 13920/88, admissibility decision of 11 July 1991.

These criteria are interpreted by the Court in the context of the 'duties and responsibilities' which Article 10(2) declares are inherent in the exercise of the right to freedom of expression. The scope of these duties and responsibilities depends upon the context.[80] For example, a senior official in the Ministry of Foreign Affairs cannot complain that there has been a breach of Article 10 when he has been transferred to another department as the result of articles in the press inspired by him concerning the alleged surveillance to which he is subjected by reason of the nature of his job.[81] The duties and responsibilities 'incumbent on members of the armed forces' are relevant to an assessment of whether their right to freedom of expression has been infringed.[82]

The Court has stated[83] that, in applying Article 10(2), 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.'

However, although the principle that exception clauses should be strictly interpreted is a general principle of international human rights law (and of comparative public law), the Court has not consistently adopted this approach in free speech cases. More frequently, it has tended to give the public authorities the benefit of any doubt, balancing free speech against competing rights and freedoms, and interpreting its doctrine of the margin of appreciation loosely.[84] 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 Sunday Times* case, the Court held[85] 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.'

In practice it is rare for a State's legislative or common law interferences with

80 *Handyside*, paragraph 49.
81 *X v. Norway*, 27 DR 228 (1981).
82 *Engel v. The Netherlands* judgment of 8 June 1976, Series A no. 22, paragraph 100.
83 *The Sunday Times* judgment, paragraph 65.
84 For a recent example, pending before both European Courts, see note 86 below.
85 Ibid., paragraph 49.

fundamental rights and freedoms to fail to satisfy these requirements of the principle of legal certainty. However, in the *Open Door Counselling Ltd* case, the Commission held[86] that there had been a breach of Article 10 because the applicants could not reasonably have foreseen that their activities, in providing information to pregnant women in Ireland about abortion clinics in Britain, were unlawful, and that their freedom of expression could lawfully be restricted under domestic law. The Commission observed that a law which restricts freedom of expression 'in such a vital area requires particular precision to enable individuals to regulate their conduct accordingly.'

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86 *Open Door Counselling Ltd and Dublin Well Women Centre Ltd*, Report of the Commission of 7 March 1991, paragraphs 45–53. The case is pending before the Court. Unfortunately, the Commission did not go on to decide whether, even if the restrictions were prescribed by law, they were necessary in a democratic society. As a result, in the companion proceedings under Community law (Case C–159/90, *The Society for the Protection of Unborn Children Ireland Ltd v. S. Grogan*, there was no Commission decision on the merits to guide the European Court of Justice when construing Community law and Irish law in the light of Arrticle 10 of the Convention. The Opinion of 11 June 1991 of Mr Advocate General Van Gerven [1991] 3 CMLR 84 9 regarded the Irish ban on the provision of information in Ireland to pregnant women about medical abortion services, lawfully available in the United Kingdom, as being 'useful and indispensable and not disproportionate to the aim sought.' The aim was intended to give effect to a value-judgment, enshrined in the Irish Constitution, attaching high priority to the protection of unborn life. The Advocate General's Opinion described the question as 'delicate,' because of the 'sensitive' nature of the competing rights to freedom of expression and to the protection of unborn life. He described it as a question of '*balancing* two fundamental rights, on the one hand the right to life as ... applicable to unborn life ... and on the other hand the freedom of expression.' He relied heavily upon the 'fairly considerable margin of appreciation' which must be allowed to individual States. The Court of Justice adopted a similarly restrictive approach in its judgment of 4 October 1991 as regards the relevance of Article 10 of the Convention. However, it is difficult to understand how the principle of proportionality could be regarded as satisfied in the circumstances. As the Court of Human Rights held, in paragraph 65 of its Judgment in *The Sunday Times* case, the question was not one of balancing two rights, but of a right to freedom of expression, subject to exceptions which must be narrowly interpreted. Pregnant women surely have a right, under Community law and under Article 10 of the Convention, to obtain information about the nature of medical services lawfully provided in another State. Ireland may lawfully forbid abortions, and, in that way, protect the rights of the unborn (subject to Article 8 of the Convention). However, by going further, and forbidding the provision of information about the availability of medical services, lawfully provided in another State, it is respectfully submitted that the national restriction goes beyond what is necessary to meet the legitimate aims of the State. Furthermore, Article 10 guarantees the right to receive information 'regardless of frontiers.' Pregnant women in Ireland, with the necessary knowledge and means, are able to obtain information from the United Kingdom (by telephone, facsimile transmission, or letter) about the nature and availability of abortion medical services. It is difficult to understand the pressing social need to prevent them from obtaining such information from an advisory service in Ireland itself. See, for example, the Commission's report of 12 July 1990 in the *Spycatcher* case (*Times Newspapers Ltd and Andrew Neil v. United Kingdom*) where the Commission stated (paragraph 75) that it failed to see a pressing social need to prevent the British public reading about something which the rest of the world was free to read and which concerned a matter of major interest to them. See also the Court's judgment of 26 November 1991, Series A no. 217, paragraph 54. It remains to be seen whether the European Court of Human Rights will give a strong interpretation of free expression in this important case.

B. The purposes for which a restriction may be imposed

If the respondent 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 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.[87] 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.[88]

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;[89] or the possibility that the public disclosure of confidential information about the security service by its former members might damage its efficacy.[90]

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;[91] or upon those who advertise or otherwise promote 'pirate' radio stations.[92] '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.'[93] Similarly, restrictions upon freedom of expression may be imposed to avoid the risk of disturbances to public order after the end of a war.[94]

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87 *The Sunday Times* judgment, paragraph 55.

88 Ibid., paragraph 57.

89 *Arrowsmith v. United Kingdom*, 19 DR 22 (1978). 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.

90 *The Sunday Times v. The United Kingdom* (no. 2) judgment of 26 November 1991, Series A no. 217, paragraph 49; *The Observer and Guardian v. The United Kingdom*, judgment of 26 November 1991, Series A no. 216, paragraph 56.

91 *Castells v. Spain*, report of the Commission of 8 January 1991, paragraph 54, now pending before the Court. See also, in the particular context of Article 11, *Ezelin* judgment of 26 April 1991, Series A no. 202, paragraph 47 (professional advocate's failure to dissociate himself from unruly incidents during a demonstration).

92 *X v. United Kingdom*, 16 DR 190 (1978).

93 *Engel v. The Netherlands* judgment of 8 June 1976, Series A no. 22, paragraph 98.

94 *De Becker*, report of the Commission of 8 January 1960, paragraph 263.

The prevention of disorder also includes protecting the international telecommunications order.[95]

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.[96] The word 'morals' covers obscene publications.[97] There is a natural link between the protection of morals and the protection of the rights of others.[98]

The 'protection of the reputation or rights of others' covers the imposition of civil or criminal sanctions for defamation.[99] The reference to 'the rights of others' justifies the concept of the offence of blasphemous libel as laid down in English law.[100] It entitles the State to prohibit the display of pamphlets alleging that it is a 'lie' and a 'swindle' that millions of Jews were killed by Nazi Germany.[101] It empowers the State to take disciplinary measures against a lawyer who has broken his professional duty not to use aggressive or insulting language.[102] It entitles a school to prohibit a teacher from subjecting pupils to his personal moral or religious views.[103] The protection of 'the rights of others' applies to protect consumers.[104] It also applies to promoting pluralism in information by allowing the fair allocation of radio frequencies.[105]

Preventing 'the disclosure of information received in confidence' includes forbidding a civil servant to disclose official secrets imparted to him in confidence.[106] It also includes preventing a newspaper from publishing confidential information about the working of the security service.[107]

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95 *Radio Groppera* judgment, paragraph 69.
96 *Liljenberg v. Sweden*, Application no. 9664/82, admissibility decision of 1 March 1983, p. 17 (unreported).
97 *Handyside* judgment, paragraph 46.
98 *Muller* judgment, paragraph 30.
99 *Lingens* judgment, paragraph 36.
100 *X Ltd and Y v. United Kingdom*, 28 DR 77 (1982).
101 *K v. Federal Republic of Germany*, 29 DR 194 (1982).
102 *X v. Federal Republic of Germany*, 39 Coll. Dec. 58 (1971).
103 *X v. United Kingdom*, 16 DR 101 (1979).
104 *Liljenberg v. Sweden*, Application no. 9664/82, admissibility decision of 1 March 1983 (unreported); *Hempfing v. Germany*, Application no. 14622/89, admissibility decision of March 1991 (unreported).
105 *Autronic AG* judgment, paragraph 59.
106 *X v. Federal Republic of Germany*, 13 *Yearbook* 888 (1970).
107 See the Commission's reports of 12 July 1990 in the 'Spycatcher' case, now pending before the Court: note 90 above. However, as the Commission there made clear, 'the need for a temporary injunction must be established with particular clarity where it is the Governments which rely on a private law concept of a breach of confidence to restrict the dissemination of information which is of considerable interest to the public.' Moreover, information which is no longer confidential cannot be prevented from being made public to prevent the disclosure of information received in confidence: *Weber* judgment of 22 May 1990, Series A no. 177, paragraph 51.

Maintaining 'the authority and impartiality of the judiciary' covers the English common law forbidding contempt of court;[108] and preserving the confidentiality of a judicial investigation.[109]

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

1) 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 interference.[110]
2) The initial responsibility for securing the rights and freedoms enshrined in Article 10 lies with the Contracting States. Accordingly, Article 10(2) gives those States a 'margin of appreciation.'[111]
3) Nevertheless, States do not have an unlimited margin of appreciation. It is for the Commission and the Court to assess whether an interference with freedom of expression exceeds the limit. Hence, the domestic margin of appreciation goes hand in hand with a European supervision.[112]
4) 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).[113] Supervision must be strict, because of the importance of the rights in question; the necessity for restricting them must be 'convincingly established.'[114]
5) The test to be satisfied by the respondent State is whether the interference complained of corresponded to a pressing social need, whether 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).[115] To assess whether the interference was based upon 'sufficient'

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108 *The Sunday Times* judgment, paragraph 56. See also *Barfod* judgment of 22 February 1989, paragraph 26; Commission's admissibility decision of 9 March 1987, in *G. Hodgson and D. Woolf Productions v. United Kingdom*, 51 DR 136, at 145–46.
109 *Weber* judgment of 22 May 1990, Series A no. 177, paragraph 45.
110 *Handyside* judgment, paragraph 48; *The Sunday Times* judgment, paragraph 59.
111 Ibid.
112 *Handyside* judgment, paragraph 49; *The Sunday Times* judgment, paragraph 59.
113 *The Sunday Times* judgment, paragraph 59.
114 *Autronic AG* judgment, paragraph 61.
115 *Handyside* judgment, paragraphs 48–50; *The Sunday Times* judgment, paragraph 62.

reasons, which rendered it 'necessary in a democratic society,' account must be taken of any public interest aspect of the case.[116]

6) 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 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.[117] Therefore, the test of 'necessity' requires consideration of the nature of the aim pursued.

7) 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;[118] (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;[119] (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.[120]

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,

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116 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: *The Sunday Times* judgment, paragraphs 65–66.

117 *Handyside* judgment, paragraph 48; *The Sunday Times* judgment, paragraph 59.

118 *The Sunday Times* judgment, paragraph 63; *Barthold* judgment, paragraphs 79–81. The dangers inherent in prior restraints are such that they call for the most careful scrutiny. This is especially so as far as the press is concerned, because of the perishable nature of news: *The Observer and Guardian v. The United Kingdom* judgment, paragraph 60; *The Sunday Times v. The United Kingdom* (no. 2) judgment, paragraph 51.

119 Commission's report of 8 January 1960, paragraph 263.

120 *The Sunday Times* judgment, paragraph 60.

and expansive interpretations of the phrase 'duties and responsibilities,' have seriously 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,[121] 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.[122]

121 See note 26 above.

122 The Court remains closely divided between those favouring stronger or weaker interpretations of Article 10 and the margin of appreciation. Compare, for example, the majority and dissenting judgments in *The Observer and Guardian v. The United Kingdom*, Series A no. 216.