
.....Chapter 12
**SOME OTHER KEY RIGHTS:
FREEDOM OF THOUGHT,
CONSCIENCE, RELIGION,
OPINION, EXPRESSION,
ASSOCIATION AND
ASSEMBLY.....**

Learning Objectives

- *To familiarize the participants with some other key rights, namely freedom of thought, conscience, religion, opinion, expression, association and assembly, and their importance in a society that is respectful of human rights in general*
- *To illustrate how these freedoms, as well as the limitations attached to the exercise of most of them, are interpreted by the international monitoring bodies*
- *To explain the role of judges, prosecutors and lawyers in safeguarding the freedoms dealt with in this chapter*

Questions

- *How are the following freedoms protected in the country in which you work:*
 - *freedom of thought, conscience, and religion,*
 - *freedom of opinion and expression, and*
 - *freedom of association and assembly?*
- *Are there any particular concerns with regard to the effective implementation of these freedoms in the country in which you work?*
- *Are there any groups in the country in which you work that might be particularly vulnerable to violations of one or more of these freedoms?*
- *If so, who are they and how may their freedoms be violated?*

Questions (cont.d)

- *What judicial or administrative remedies exist in the country in which you work for persons who consider themselves to be victims of violations of these freedoms?*
- *What role is played by the following freedoms in building, preserving and/or strengthening a democratic society/ a society respectful of human rights:*
 - *freedom of thought, conscience, and religion,*
 - *freedom of opinion and expression, and*
 - *freedom of association and assembly?*
- *With regard to freedoms whose exercise may be limited: in your view, how can a balance be struck between an individual's right to exercise those freedoms and a society's general interest in protecting, for instance, national security, public order, safety, health, morals or the rights and freedoms of others?*
- *What can you as judges, prosecutors or lawyers do to protect every person's right to freedom of thought, conscience, religion, opinion, expression, association and assembly?*

Relevant Legal Instruments

Universal Instruments

- International Covenant on Civil and Political Rights, 1966
- International Covenant on Economic, Social and Cultural Rights, 1966
- International Convention on the Elimination of All Forms of Racial Discrimination, 1965
- Convention on the Elimination of All Forms of Discrimination against Women, 1979
- Convention on the Rights of the Child, 1989
- ILO Freedom of Association and Protection of the Right to Organise Convention, 1948
- ILO Right to Organise and Collective Bargaining Convention, 1949

- Universal Declaration of Human Rights, 1948
- United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, 1999

Relevant Legal Instruments (cont.d)

Regional instruments

- African Charter on Human and Peoples' Rights, 1981
 - African Charter on the Rights and Welfare of the Child, 1990
 - American Convention on Human Rights, 1969
 - Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, 1994
 - European Convention on Human Rights, 1950
 - European Social Charter, 1961, and European Social Charter, 1996 (revised)
-

1. Introduction

This chapter will deal with a number of fundamental freedoms which constitute some of the pillars of a democratic society that is respectful of human rights. Owing to space constraints, however, only the most important aspects of these freedoms will be highlighted.

The Manual has hitherto emphasized the importance of a number of rights such as the right not to be subjected to arbitrary detention, the right to a fair trial and the right to freedom from torture and other forms of ill-treatment. As a result, many of the chapters have also focused on protection of the human person in the course of law enforcement procedures.

This chapter, on the other hand, is concerned with rights or freedoms that are exercised at all levels of society and in a wide variety of settings and situations, for example in a person's religious or philosophical activities, educational undertakings or in the spoken or written word. However, in many situations where there are problems with the effective protection of human rights during law enforcement procedures, there is often a corresponding lack of tolerance for a person's religious beliefs or his or her political or other convictions expressed at public gatherings, in books or in the mass media. To move towards full and comprehensive protection of the rights and freedoms of the individual, States should therefore take appropriate action to advance the cause of human rights in all relevant dimensions of society.

The chapter will deal first with freedom of thought, conscience and religion, secondly with freedom of opinion and expression, and thirdly with freedom of association and assembly.

Lastly, the role of the legal professions in protecting freedom of thought, conscience, religion, opinion, expression, association and assembly will be emphasized, and the chapter will close with some concluding remarks.

2. The Right to Freedom of Thought, Conscience and Religion

2.1 Relevant legal provisions

This sub-section contains the text of the most important legal provisions pertaining to freedom of thought, conscience and religion:

Article 18 of the Universal Declaration of Human Rights:

“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”

Article 18 of the International Covenant on Civil and Political Rights:

“1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.”

Article 8 of the African Charter on Human and Peoples’ Rights:

“Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.”

Article 12 of the American Convention on Human Rights:

“1. Everyone has the right to freedom of conscience and of religion. This includes freedom to maintain or to change one’s religion or beliefs, and freedom to profess or disseminate one’s religion or beliefs either individually or together with others, in public or in private.

2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.
3. Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.
4. Parents or guardians, as the case may be, have the right to provide for the religious or moral education of their children or wards that is in accord with their own convictions."

Article 9 of the European Convention on Human Rights:

"1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

The right to freedom of religion is further guaranteed by:

- ❖ Article 5(d)(vii) of the International Convention on the Elimination of All Forms of Racial Discrimination;
- ❖ Article 14 of the Convention on the Rights of the Child;
- ❖ Article 9 of the African Charter on the Rights and Welfare of the Child; and
- ❖ Article 4(i) of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women.

Moreover, as will be further shown in Chapter 13, international human rights law prohibits discrimination on the ground of religion (see, inter alia, articles 1(3), 13 and 55(c) of the Charter of the United Nations, article 2 of the Universal Declaration, articles 2(1), 4(1), 24(1) and 26 of the International Covenant on Civil and Political Rights; article 2 of the African Charter on Human and Peoples' Rights, articles 1(1) and 27(1) of the American Convention on Human Rights and article 14 of the European Convention on Human Rights).

2.2 General meaning of the right to freedom of thought, conscience and religion

2.2.1 Article 18 of the International Covenant on Civil and Political Rights

As pointed out by the Human Rights Committee, the right to freedom of thought, conscience and religion guaranteed by article 18(1) of the International Covenant "is far-reaching and profound; it encompasses freedom of thought on all

matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others.” Furthermore, “the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief.”¹ The Committee points out that “the fundamental character of these freedoms is also reflected in the fact that this provision cannot be derogated from, even in time of public emergency,”² an issue that will be further dealt with in Chapter 16.

It is noteworthy that article 18 “*does not permit any limitations whatsoever* on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one’s choice. These freedoms are protected unconditionally...”³ On the other hand, as regards *the right to freedom of conscience*, the Human Rights Committee held in the case of *Westerman*, that it does not as such imply the right to refuse all obligations imposed by law, nor does it provide immunity from criminal liability in respect of every such refusal.⁴

The Committee also importantly underlines that, on the basis of articles 18(2) and 17 of the Covenant, “no one can be compelled to reveal his thoughts or adherence to a religion or belief.”⁵ In other words, every man or woman has the right to keep his or her religion or belief an exclusively private matter in all situations.

The Human Rights Committee further states that “article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms ‘belief’ and ‘religion’ are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices or practices analogous to those of traditional religions. The Committee therefore views with concern

any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community.”⁶

The Human Rights Committee further observes

“that the freedom to ‘have or to adopt’ a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one’s current religion or belief with another or to adopt atheistic views, as well as the right to retain one’s religion or belief. Article 18.2 bars coercion that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert.”⁷

¹See General Comment No. 22 (Article 18) in UN doc. HRI/GEN/1/Rev.5, *Compilation of General Comments and General Recommendations adopted by Human Rights Bodies*, p. 144, para. 1 (hereinafter referred to as *United Nations Compilation of General Comments*).

²*Ibid.*, loc. cit.

³*Ibid.*, p. 144, para. 3; emphasis added.

⁴Communication No. 682/1996, *P. Westerman v. the Netherlands* (Views adopted on 3 November 1999), in UN doc. GAOR, A/55/40 (vol. II), p. 46, para. 9.3.

⁵*United Nations Compilation of General Comments*, p. 144, para. 3.

⁶*Ibid.*, p. 144, para. 2.

⁷*Ibid.*, p. 145, para. 5.

The Committee adds that “policies or practices having the same intention or effect, such as, for example, those restricting access to education, medical care, employment or the rights guaranteed by article 25 [i.e. the right to participate in government] and other provisions of the Covenant, are similarly inconsistent with article 18(2). The same protection is enjoyed by holders of all beliefs of a non-religious nature.”⁸

2.2.2 Article 8 of the African Charter on Human and Peoples’ Rights

Article 8 of the African Charter on Human and Peoples’ Rights is brief. It merely stipulates that “freedom of conscience, the profession and free practice of religion shall be guaranteed” and that “no one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.” It is noteworthy that this provision is silent on the question of freedom of thought and also on the freedom to adopt or change a religion or belief according to one’s own convictions.

In a case against Zaire, the African Commission on Human and Peoples’ Rights held that “the harassment of the Jehovah’s Witnesses and religious leaders, including assassinations, destruction of religious structures and death threats” constituted a violation of article 8 of the Charter, since the Government had “presented no evidence that the practice of their religion in any way [threatened] law and order”.⁹

2.2.3 Article 12 of the American Convention on Human Rights

The right to freedom of conscience and religion as protected by article 12 of the American Convention on Human Rights is in many ways similar to the freedoms guaranteed by article 18 of the International Covenant. However, in the Convention freedom of thought is not linked to these freedoms but to the right to freedom of expression set forth in article 13.

The right to freedom of conscience and religion under article 12 of the American Convention also includes “freedom to maintain or to change one’s religion or beliefs”, a freedom that is strengthened by article 12(2) of the Convention, according to which “no one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.” It follows, *a fortiori*, that no one may be subject to “coercion” – the term used in article 18(2) of the Covenant – for purposes of either preventing a person from, or obliging a person to, maintain or change his or her religion or beliefs. In other words, a person’s religion or beliefs must at all times be fully voluntary.

Freedom of conscience and religion as protected by article 12 of the American Convention is included in the list of non-derogable rights in article 27(2) and must therefore be guaranteed also “in time of war, public danger, or other emergency that threatens the independence or security” of the State party concerned (art. 27(1) of the Convention).

⁸Ibid., loc. cit.

⁹ACHPR *World Organisation against Torture and Others v. Zaire*, Communications Nos. 25/89, 47/90, 56/91, 100/93, decision adopted during the 19th session, March 1996, para. 71 of the text as published at: http://www.up.ac.za/cht/ahrdb/acomm_decisions.html

Article 12 of the American Convention was considered in the case of *Olmedo Bustos et Al. v. Chile* – also called *The Last Temptation of Christ* case – concerning the annulment by the Chilean courts of an administrative decision taken by the Cinematographic Classification Council approving the exhibition of the film *The Last Temptation of Christ* for an audience of a minimum of 18 years of age. The applicants submitted, inter alia, that their **freedom of conscience** had been violated because of the censorship of the film, which implied that a group of people with a specific religion decided what other people could see.¹⁰ In its judgment the Inter-American Court of Human Rights pointed out that “the right to freedom of conscience and religion allows everyone to maintain, change, profess and disseminate his religion or beliefs,” adding that this right is one of the foundations of democratic society, which, in its religious dimension, “constitutes a far-reaching element in the protection of the convictions of those who profess a religion and in their way of life”.¹¹ However, in this case there was no evidence, according to the Court, to prove that any of the freedoms embodied in this article had been violated; “the prohibition of the exhibition of the film ‘The Last Temptation of Christ’ did not impair or deprive anyone of their right to maintain, change, profess or disseminate their religion or beliefs with total freedom.”¹² As will be seen below, however, the prohibition did violate the right to freedom of thought and expression set forth in article 13 of the Convention.

2.2.4 Article 9 of the European Convention on Human Rights

Article 9(1) of the European Convention on Human Rights guarantees “the right to freedom of thought, conscience and religion; this right includes the freedom to change [one’s] religion or belief.” In terms very similar to those used in article 18(1) of the Covenant, article 9(1) of the European Convention also protects the freedom of every person, “either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance”.

In the case of *Kokkinakis v. Greece*, the European Court of Human Rights held that “freedom of thought, conscience and religion” as enshrined in article 9

“is one of the foundations of a ‘democratic society’ within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.”¹³

Yet, as made clear by the same Court in the case of *Kalaç v. Turkey*, article 9

“does not protect every act motivated or inspired by a religion or belief. Moreover, in exercising his freedom to manifest his religion, an individual may need to take his specific situation into account.”¹⁴

¹⁰I-A Court HR, *The Case of Olmedo Bustos et Al. v. Chile*, judgment of 5 February 2001, Series C, No. 73. The version used in this context is the unedited text found on the Court’s web site: www.corteidh.or.cr/seriecing/C, para. 45.

¹¹Ibid., para. 79.

¹²Ibid., loc. cit.

¹³Eur. Court HR, *Case of Kokkinakis v. Greece*, judgment of 25 May 1993, Series A, No. 260-A, p. 17, para. 31.

¹⁴Eur. Court HR, *Case of Kalaç v. Turkey*, judgment of 1 July 1997, Reports 1997-IV, p. 1199 at p. 1209, para.27.

This case arose out of a complaint brought by Mr. Kalaç, a judge advocate in the Turkish army, who was compelled to retire for having “adopted unlawful fundamentalist opinions”; he was considered to be at least a de facto member of the Muslim Süleyman sect.¹⁵ According to the Government, his compulsory retirement “was intended to remove from the military legal service a person who had manifested his lack of loyalty to the foundation of the Turkish nation, namely secularism, which it was the task of the armed forces to guarantee”.¹⁶ The applicant argued, on the other hand, that he had been unaware of the existence of the Süleyman sect and that domestic law gave no indication as to the meaning of the expression “unlawful fundamental opinions”, given as grounds for his compulsory retirement.¹⁷

The European Court concluded, however, that there had been no violation of article 9 in this case. It held, in particular, that

“In choosing to pursue a military career Mr Kalaç was accepting of his own accord a system of military discipline that by its very nature implied the possibility of placing on certain of the rights and freedoms of members of the armed forces limitations incapable of being imposed on civilians ... States adopt for their armies disciplinary regulations forbidding this or that type of conduct, in particular an attitude inimical to an established order reflecting the requirements of military service.”¹⁸

The Court noted that it was not contested “that the applicant, within the limits imposed by the requirements of military life, was able to fulfil the obligations which constitute the normal forms through which a Muslim practises his religion”. He was, in particular, permitted to pray five times a day and to perform his other religious duties, such as keeping the fast of Ramadan and attending Friday prayers at the mosque.¹⁹ Lastly, the Supreme Military Council’s order was not based on the applicant’s “religious opinions and beliefs or the way he performed his religious duties but on his conduct and attitude”, which, according to the Turkish authorities, “breached military discipline and infringed the principle of secularism”.²⁰ There had not therefore been any breach of article 9 in this case. It should be pointed out that, since the Court concluded that the applicant’s compulsory retirement did not constitute an interference with his right to freedom of religion, it was not necessary to deal with the case under article 9(2) of the Convention.

The right to freedom of thought, conscience and religion is far-reaching and covers all matters relating to one’s personal convictions. It protects not only religious people but also, for instance, atheists, agnostics, sceptics and the indifferent.

¹⁵Ibid., p. 1203, para. 8, and p. 1208, para. 25.

¹⁶Ibid., p. 1208, para. 25.

¹⁷Ibid., p. 1208, para. 24.

¹⁸Ibid., p. 1209, para. 28.

¹⁹Ibid., p. 1209, para. 29.

²⁰Ibid., p. 1209, para. 30.

The right to freedom of thought, conscience and religion also implies that every person has the unconditional right to have and adopt a religion of his or her choice. This freedom includes the right to change one's religion. Every person has the right not to be coerced or otherwise compelled to maintain, adopt or change a religion.

The right to freedom of thought, conscience and religion, including the freedom to have, adopt or change religion according to one's choice, are protected unconditionally, although freedom of conscience does not imply a right to refuse all obligations imposed by law.

No limitations may be imposed on the freedom to adopt or change a religion of one's choice.

Under the International Covenant on Civil and Political Rights and the American Convention on Human Rights, freedom of thought, conscience and religion cannot be derogated from in any circumstances.

Freedom of thought, conscience and religion is a cornerstone of a democratic society/ a society respectful of human rights.

2.3 The right to manifest one's religion or belief

Article 18(1) of the International Covenant guarantees the freedom to manifest one's religion or belief "either individually or in community with others and in public or private" and the freedom to do so "in worship, observance, practice and teaching". As noted by the Human Rights Committee, it is thus a freedom that "encompasses a broad range of acts. The concept of *worship* extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest. The *observance and practice* of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head coverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group. In addition, the *practice and teaching* of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications."²¹

The Committee expressed concern, for instance, regarding provisions in the Freedom of Conscience and Religion Organizations Act in Uzbekistan "that require religious organizations and associations to be registered to be entitled to manifest their religion and beliefs" and article 240 of the Uzbek Penal Code, "which penalizes the failure of leaders of religious organizations to register their statutes". The Committee strongly recommended that these provisions be abolished since they were not in conformity with article 18(1) and (3) of the Covenant. It further recommended that

²¹ *United Nations Compilation of General Comments*, p. 144, para. 4; emphasis added.

criminal procedures initiated on the basis of these provisions should be discontinued and convicted persons pardoned and compensated.²²

As noted above, article 8 of the African Charter on Human and Peoples' Rights is the most laconic of the provisions considered in this chapter since it merely guarantees "the profession and free practice of religion", adding that "no one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms."

According to article 12(1) of the American Convention on Human Rights, the right to freedom of conscience and religion includes "freedom to profess or disseminate one's religion or beliefs either individually or together with others, in public or in private".

Under article 9(1) of the European Convention on Human Rights, the right to freedom of religion includes "freedom, either alone or in community with others and in public or private, to manifest [one's] religion or belief, in worship, teaching, practice and observance". In the case of *Kokkinakis v. Greece*, the European Court held that, "while religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to 'manifest (one's) religion'. Bearing witness in words and deeds is bound up with the existence of religious convictions".²³ It added that, according to article 9 of the European Convention,

"freedom to manifest one's religion is not only exercisable in community with others, 'in public' and within the circle of those whose faith one shares, but can also be asserted 'alone' and 'in private'; furthermore, it includes in principle the right to try to convince one's neighbour, for example through 'teaching', failing which, moreover, 'freedom to change (one's) religion or belief, enshrined in Article 9, would be likely to remain a dead letter.'"²⁴

The case of *Cha'are Shalom ve Tsedek v. France* raised the issue of permits to perform ritual slaughters in France. The applicant association complained that articles 9 and 14 of the European Convention had been violated by the refusal of the French authorities to grant it "the approval necessary for it to authorise its own ritual slaughterers to perform ritual slaughter, in accordance with religious prescriptions of its members," and by their granting such approval to the Joint Rabbinical Committee (ACIP) alone.²⁵ The applicant association submitted that the conditions for ritual

²²UN doc. GAOR, A/56/40 (vol. I), pp. 63-64, para. 24.

²³*Eur. Court HR, Case of Kokkinakis v. Greece, judgment of 25 May 1993, Series A, No. 260-A, p. 17, para. 31.*

²⁴*Ibid.*, loc. cit.

²⁵*Eur. Court HR, Case of Cha'are Shalom Ve Tsedek v. France, judgment of 27 June 2000; the text used is the unedited text found on the Court's website: <http://hudoc.echr.coe.int>, para. 58.*

slaughter as performed by the slaughterers authorized by ACIP “no longer satisfied the very strict requirements of the Jewish religion” so that ultra-orthodox Jews could not obtain perfectly pure or *glatt* meat.²⁶ In their view, the refusal to approve it for purposes of slaughter could not be justified under article 9(2) of the Convention and was a disproportionate and discriminatory measure contrary to article 14 thereof.²⁷

Referring to the text of article 9(1), the Court noted that it was not contested “that ritual slaughter, as indeed its name indicates, constitutes a rite or ‘rite’ (the word in the French text of the Convention corresponding to ‘observance’ in the English), whose purpose is to provide Jews with meat from animals slaughtered in accordance with religious prescriptions, which is an essential aspect of practice of the Jewish religion”.²⁸

The question next arose whether the refusal to authorize the applicant association to approve its own ritual slaughterers constituted an interference with their freedoms under article 9(1) of the Convention. In the opinion of the Court, “there would be interference with the freedom to manifest one’s religion only if the illegality of performing ritual slaughter made it impossible for ultra-orthodox Jews to eat meat from animals slaughtered in accordance with the religious prescriptions they considered applicable.” However, this was not the case, since it was not contested that the applicant association could easily obtain supplies of *glatt* meat from Belgium. It was further apparent from the material before the Court that a number of butchers’ shops operating under the control of ACIP made meat certified *glatt*.²⁹ Although the applicant association did not trust the ritual slaughters authorized by ACIP, the Court took the view that

“the right to freedom of religion guaranteed by Article 9 of the Convention cannot extend to the right to take part in person in the performance of ritual slaughter and the subsequent certification process, given that ... the applicant association and its members are not in practice deprived of the possibility of obtaining and eating meat considered by them to be more compatible with religious prescriptions.”³⁰

As it had not been established that Jews belonging to the applicant association could not obtain *glatt* meat, or that the applicant could not supply them with it by reaching an agreement with the ACIP, in order to be able to engage in ritual slaughter under cover of the approval granted to the ACIP, the Court concluded “that the refusal of approval complained of did not constitute an interference with the applicant association’s right to freedom to manifest its religion”.³¹ It was not necessary therefore for the Court to rule on the compatibility of the restriction challenged by the applicant under article 9(2) of the Convention. The Court observed, nevertheless, that, even on the assumption that the impugned measure “could be considered an interference with the right to freedom to manifest one’s religion,” it was prescribed by law and pursued a

²⁶Ibid., para. 60.

²⁷Ibid., para. 61.

²⁸Ibid., para. 73.

²⁹Ibid., paras. 80-81.

³⁰Ibid., para. 82.

³¹Ibid., para. 83.

legitimate aim, namely, “the protection of public health and public order, in so far as organisation by the State of the exercise of worship is conducive to religious harmony and tolerance”. Having regard to the margin of appreciation left to the Contracting States, particularly with regard to establishment of the delicate relations between the State and religions, it could not be considered excessive or disproportionate and the measure was not, therefore, in breach of article 9(2).³²

As to the question of alleged discrimination, the Court concluded that there had been no violation of article 9 in conjunction with article 14 of the Convention. It noted in particular that the difference of treatment which resulted from the measure complained of “was limited in scope”. In so far as there was a difference of treatment, it pursued a legitimate aim, and there was a reasonable relationship of proportionality between the means employed and the aim sought to be realized. The difference of treatment therefore “had an objective and reasonable justification within the meaning of the Court’s consistent case-law”.³³

2.3.1 Limitations on the right to manifest one’s religion or belief

Among the freedoms guaranteed by article 18 of the International Covenant, only the freedom to manifest one’s religion or beliefs may be restricted. According to article 18(3), this freedom “may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others”. The Human Rights Committee emphasizes that this provision “is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated.”³⁴ The Committee importantly adds that limitations on the right to manifest one’s religion or beliefs “must not be applied in a manner that would vitiate the rights guaranteed in article 18”.³⁵ Lastly, the limitations must not, of course, “be imposed for discriminatory purposes or applied in a discriminatory manner”.³⁶

In resorting to limitations on the right to manifest one’s religion or beliefs, States parties must therefore ensure that they

- ❖ comply with the principle of legality (“prescribed by law”);
- ❖ are imposed exclusively for one or more of the objectives enumerated in article 18(3);
- ❖ are necessary to achieve the objective concerned (principle of proportionality); and, lastly,
- ❖ are not discriminatory but applied in an objective and reasonable manner.

³²Ibid., para. 84.

³³Ibid., paras. 87-88. The Court, sitting as a Grand Chamber, was not unanimous in this case. By 12 votes to 5 it concluded that there was no violation of article 9 of the Convention, while the vote on article 9 in conjunction with article 14 was 12 to 7.

³⁴*United Nations Compilation of General Comments*, p. 145, para. 8.

³⁵Ibid., loc. cit.

³⁶Ibid.

With regard to the concept of *morals* as a possible justification for limitations on the freedom to manifest one's religion or beliefs, the Committee states that it derives from many social, philosophical and religious traditions and that, consequently, "limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition."³⁷

It further states that "persons already subject to certain legitimate restraints, such as prisoners, continue to enjoy their rights to manifest their religion or belief to the fullest extent compatible with the specific nature of the constraint."³⁸

In the *Sing Bhinder v. Canada* case, the author, who was a Sikh, complained of a violation of article 18 of the Covenant as a consequence of the termination of his labour contract following his refusal to wear safety headgear during his work. The Committee examined this issue under both article 18 and article 26 of the Covenant and concluded that, if the requirement to wear a hard hat were regarded as raising an issue under article 18, it was a limitation justified by reference to the grounds laid down in article 18(3). On the other hand, if it was considered as a de facto discrimination against persons of the Sikh religion under article 26, "the legislation requiring that workers in the federal employment be protected from injury and electric shock by the wearing of hard hats is to be regarded as reasonable and directed towards objective purposes that are compatible with the Covenant."³⁹

The grounds for allowing limitations on the freedom to manifest one's religion or beliefs contained in article 12(3) of the American Convention on Human Rights are similar to those found in article 18(3) of the International Covenant. Limitations may thus be imposed provided that they are "prescribed by law" and "are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others". The measures resorted to must, in other words, be proportionate to the legitimate aim pursued.

According to article 9(2) of the European Convention on Human Rights, "freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others." The grounds enumerated cover in substance those found in the other two treaties. There is thus an important convergence on the major issue of limitations on the freedom to manifest one's religion or beliefs. However, article 9(2) of the European Convention adds the condition that limitations for the reasons invoked must be necessary "in a democratic society". The necessity test must therefore be made in the light of the needs of a society based on a democratic constitutional order.

³⁷Ibid.

³⁸Ibid., pp. 145-146, para. 8.

³⁹Communication No. 208/1986, *K. Sing Bhinder v. Canada* (Views adopted on 9 November 1989), in UN doc. G.AOR, A/45/40 (vol. II), p. 54, para. 6.2.

Article 9 was examined by the European Court of Human Rights in the case of *Kokkinakis v. Greece* concerning a Jehovah's Witness convicted of proselytism in Greece, where, by virtue of Law No, 1363/1938, as amended by Law No. 1672/1939, proselytism was made a crime during the dictatorship of Metaxas (1936-1940).⁴⁰ The applicant was sentenced by the Lasithi Criminal Court to four months' imprisonment, convertible into a pecuniary penalty, and to a fine of 10,000 drachmas. On appeal, the Crete Court of Appeal reduced the prison sentence to three months' imprisonment converted into a pecuniary penalty.⁴¹ The applicant and his wife had been arrested at the home of a woman who was married to the cantor at a local Orthodox church. The applicant mainly complained that this conviction was an unlawful restriction of the exercise of his right to freedom of religion.⁴²

The European Court considered that Mr. Kokkinakis' conviction amounted to an interference with his right to manifest his religion or belief, which would be contrary to article 9 unless it was: (1) "prescribed by law"; (2) directed at one or more of the legitimate aims in paragraph 2; and (3) "necessary in a democratic society" for achieving them.⁴³ These various questions were dealt with as follows by the Court:

Was the interference "prescribed by law"? In reply to the applicant's argument that the Greek legislation did not describe the "objective substance" of the offence of proselytism,⁴⁴ the Court noted that

"the wording of many statutes is not absolutely precise. The need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague ... Criminal-law provisions on proselytism fall within this category. The interpretation and application of such enactments depends on practice."⁴⁵

In the case before it there was, however, "a body of settled national case-law ... which had been published and was accessible", thereby supplementing the terms of the 1936 Law and enabling the applicant "to regulate his conduct in the matter"; it followed that the measure complained of was "prescribed by law" within the meaning of article 9(2) of the European Convention.⁴⁶

Was the measure imposed for a legitimate aim? The Court concluded that, having regard to the circumstances of the case and the actual terms of the relevant court decisions, "the impugned measure was in pursuit of a legitimate aim under Article 9 § 2, namely the protection of the rights and freedoms of others, relied on by the Government"; the Government had in fact submitted "that a democratic State had to ensure the peaceful enjoyment of the personal freedoms of all those living on its territory" and that article 9(2) "would in practice be rendered wholly nugatory" unless

⁴⁰ Eur. Court HR, *Case of Kokkinakis v. Greece*, judgment of 25 May 1993, Series A, No. 260-A, p. 12, para. 16.

⁴¹ Ibid., pp. 8-10, paras. 9-10.

⁴² Ibid., p. 16, para. 28.

⁴³ Ibid., p. 18, para. 36.

⁴⁴ Ibid., p. 19, para. 38.

⁴⁵ Ibid., p. 19, para. 40.

⁴⁶ Ibid., pp. 19-20, paras. 40-41.

the State were “vigilant to protect a person’s religious beliefs and dignity from attempts to influence them by immoral and deceitful means”.⁴⁷

Was the prohibition “necessary in a democratic society”? This is the crucial test that numerous cases have failed to pass under various articles of the European Convention on Human Rights. The test of what is “necessary in a democratic society” is the ultimate safeguard against interference with the enjoyment of a person’s fundamental freedoms that cannot possibly be considered necessary in a society that is pluralistic and tolerant.

Although the Contracting States have “a certain margin of appreciation ... in assessing the existence and extent of the necessity of an interference, ... this margin is subject to European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court.” The task of the European Court in the *Kokkinakis v. Greece* case was therefore “to determine whether the measures taken at national level were justified in principle and proportionate”.⁴⁸

As to the meaning of proselytism, the Court held that, first of all:

“a distinction has to be made between bearing Christian witness and improper proselytism. The former corresponds to true evangelism, which a report drawn up in 1956 under the auspices of the World Council of Churches describes as an essential mission and responsibility of every Christian and every Church. The latter represents a corruption or deformation of it. It may, according to the same report, take the form of activities offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need; it may even entail the use of violence or brainwashing; more generally, it is not compatible with respect for the freedom of thought, conscience and religion of others.”⁴⁹

An examination of section 4 of Law No. 1363/1938 showed, however, that the criteria adopted by the Greek legislature were reconcilable with the foregoing if and insofar as they were “designed only to punish improper proselytism, which the Court [did] not have to define in the abstract in the present case”.⁵⁰ The Court noted, on the other hand, “that in their reasoning the Greek courts established the applicant’s liability by merely reproducing the wording of article 4 and did not sufficiently specify in what way the accused had attempted to convince his neighbour by improper means”. Indeed, “none of the facts they set out warranted that finding”.⁵¹ It followed that it had not been shown “that the applicant’s conviction was justified in the circumstances of the case by a pressing social need” and the contested measure did not therefore appear “to have been proportionate to the legitimate aim pursued or, consequently, ‘necessary in a

⁴⁷Ibid., p. 20, paras. 44 and 42.

⁴⁸Ibid., p. 21, para. 47.

⁴⁹Ibid., p. 21, para. 48.

⁵⁰Ibid., loc. cit. According to article 4(2) of Law No. 1363/1938 as amended, “proselytism” meant, “in particular, any direct or indirect attempt to intrude on the religious beliefs of a person of a different religious persuasion (*eterodoxos*), with the aim of undermining those beliefs, either by any kind of inducement or promise of an inducement or moral support or material assistance, or by fraudulent means or by taking advantage of his inexperience, trust, need, low intellect or naivety”, p. 12, para. 16.

⁵¹Ibid., p. 21, para. 49.

democratic society ... for the protection of the rights and freedoms of others”. There had, in other words, been a violation of article 9 in the case.⁵²

A violation of article 9 of the European Convention was also found in the case of *Serif v. Greece*, which – against a complex historical background – concerned the right of Muslims to organize elections for the post of Mufti in Rodopi. That right was overturned on 24 December 1990 by the Government through a legislative decree that was retroactively validated when the Greek Parliament passed Law No. 1920 on 4 February 1991. Requests had been made to the Government for the organization of elections to fill the post of Mufti in Rodopi following the death of the previous Mufti. In the absence of a reply, elections were held at the mosques after prayers on 28 December 1990. The applicant was elected Mufti and, together with other Muslims, challenged before the Supreme Court the Government’s decision to appoint another person to that position.⁵³ On 12 December 1994, the Salonika Criminal Court found the applicant guilty under articles 175 and 176 of the Criminal Code “for having usurped the functions of a minister of a ‘known religion’ and for having publicly worn the dress of such a minister without having the right to do so”.⁵⁴ The applicant was given a commutable sentence of eight months’ imprisonment, which was reduced to six months on appeal, the Court of Appeal having upheld the conviction. The sentence was commuted to a fine.⁵⁵

Before the European Court, the applicant complained that his conviction amounted to unjustified interference with his right to be free to exercise his religion together with all those who turned to him for spiritual guidance.⁵⁶

The Court concluded in the first place that the applicant’s conviction amounted to “an *interference* with his right under Article 9 § 1 of the Convention, ‘in community with others and in public ... to manifest his religion ... in worship [and] teaching’”; this followed from the facts on which the conviction was based, according to which the applicant had issued a message about the religious significance of a feast, delivered a speech at a religious gathering, worn the dress of a religious leader and so forth.⁵⁷ The Court did not, however, consider it necessary to deal with the question whether the interference was “*prescribed by law*”, since it was in any event contrary to article 9 on other grounds.

The Court next accepted that the interference *pursued a legitimate aim* under article 9(2) of the Convention, namely protection of “public order”, since “the applicant was not the only person claiming to be the religious leader of the local Muslim community”, the authorities having appointed another person. The Government had argued that the interference served a legitimate purpose because by protecting the authority of the lawful mufti “the domestic courts sought to preserve order in the particular religious community and in society at large.”⁵⁸

⁵²Ibid., pp. 21-22, paras. 49-50.

⁵³*Eur. Court HR, Case of Serif v. Greece, judgment of 14 December 1999, Reports 1999-IX*, p. 79, paras. 9-12.

⁵⁴Ibid., pp. 79-80, paras. 13, 15 and 16; the quote is from para. 13.

⁵⁵Ibid., p. 80, paras. 16-17.

⁵⁶Ibid., p. 84, para. 36.

⁵⁷Ibid., p. 85, para. 39; emphasis added.

⁵⁸Ibid., p. 86, paras. 43 and 45.

Lastly, in considering whether *the interference was necessary in a democratic society*, the Court recalled its ruling in the *Kokkinakis* case, according to which “freedom of thought, conscience and religion is one of the foundations of a ‘democratic society’”, pluralism being “indissociable” from such a society.⁵⁹ It was true, nevertheless, that

“in a democratic society it may be necessary to place restrictions on freedom of religion to reconcile the interests of the various religious groups ... However, any such restriction must correspond to a ‘pressing social need’ and must be ‘proportionate to the legitimate aim pursued’.”⁶⁰

Yet in the Court’s view, “punishing a person for merely acting as the religious leader of a group that willingly followed him can hardly be considered compatible with the demands of religious pluralism in a democratic society.”⁶¹ The Court was “not oblivious of the fact that in Rodopi there existed, in addition to the applicant, an officially appointed mufti” and that the Government had argued “that the applicant’s conviction was necessary in a democratic society because his actions undermined the system put in place by the State for the organisation of the religious life of the Muslim community in the region”. The Court recalled, however, that there was “no indication that the applicant attempted at any time to exercise the judicial and administrative functions for which the legislation on the muftis and other ministers of ‘known religions’ makes provisions”. It did not consider that “in democratic societies, the State needs to take measures to ensure that religious communities remain or are brought under a unified leadership”.⁶²

It only remained for the Court to consider the Government’s argument “that, in the particular circumstances of the case, the authorities had to intervene in order to avoid the creation of tension among the Muslims in Rodopi and between the Muslims and the Christians of the area as well as Greece and Turkey”. To this the Court gave the following important reply:

“Although the Court recognises that it is possible that tension is created in situations where a religious or any other community becomes divided, it considers that this is one of the unavoidable consequences of pluralism. The role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.”⁶³

The Court noted that, “apart from a general reference to the creation of tension, the Government did not make any allusion to disturbances among the Muslims in Rodopi that had actually been or could have been caused by the existence of two religious leaders.” It considered, moreover, that nothing had been adduced “that could warrant qualifying the risk of tension between the Muslims and Christians or between Greece and Turkey as anything more than a very remote possibility”.⁶⁴

⁵⁹Ibid., p. 87, para. 49.

⁶⁰Ibid., loc. cit.

⁶¹Ibid., p. 88, para. 51.

⁶²Ibid., p. 88, para. 52.

⁶³Ibid., p. 88, para. 53.

⁶⁴Ibid., loc. cit.

In the light of all these considerations, the Court concluded that it had not been shown that the applicant's conviction "was justified in the circumstances of the case by 'a pressing social need'". As a result, the interference with his right, in community with others and in public, to manifest his religion in worship and teaching was not "necessary in a democratic society ... for the protection of public order" under Article 9 § 2 of the Convention.⁶⁵ It followed that article 9 had been violated.

The third case relating to article 9 of the European Convention on Human Rights is that of *Buscarini and Others v. San Marino* concerning the obligation imposed on the applicants to take an oath containing a reference to the Holy Gospels on pain of forfeiting their parliamentary seats in the Republic of San Marino. In their view, it had been shown that in the Republic "at the material time the exercise of a fundamental political right, such as holding parliamentary office, was subject to publicly professing a particular faith" in breach of article 9 of the Convention.⁶⁶ For its part the Government maintained "that the wording of the oath in question was not religious but, rather, historical and social in significance and based on tradition". It did not, therefore, amount to a limitation of the applicants' freedom of religion.⁶⁷

Reiterating its fundamental ruling in the *Kokkinakis* case on freedom of thought, conscience and religion, the Court added that this freedom "entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practice or not to practice a religion". The obligation for the applicants to take the oath on the Gospels "did indeed constitute a limitation" within the meaning of article 9(2) of the Convention, "since it required them to swear allegiance to a particular religion on pain of forfeiting their parliamentary seats".⁶⁸ The question thus arose whether such interference could be justified as being prescribed by law and necessary in a democratic society for one or more of the legitimate aims set out in article 9(2).

The Court concluded that the measure was "*prescribed by law*", since it was based on section 55 of the Elections Act of 1958, which referred to the Decree of 27 June 1909 laying down the wording of the oath to be sworn by members of the Parliament.⁶⁹ Without determining in this case whether there were any *legitimate aims* justifying the interference within the meaning of article 9(2) of the Convention, the Court concluded that it was not in doubt that, in general, the law of San Marino guarantees freedom of conscience and religion. In the instant case, however, "requiring the applicants to take oath on the Gospels was tantamount to requiring two elected representatives of the people to swear allegiance to a particular religion," a requirement that was not compatible with article 9 of the Convention, which had therefore been violated.⁷⁰ In other words, the interference was not necessary in a democratic society.

⁶⁵Ibid., p. 88, para. 54.

⁶⁶*Eur. Court HR, Case of Buscarini and Others v. San Marino, judgment of 18 February 1999, Reports 1999-I, p. 612, paras. 12-13, and p. 615, para. 30 (quotation).*

⁶⁷Ibid., p. 616, para. 32.

⁶⁸Ibid., p. 616, para. 34.

⁶⁹Ibid., p. 616, para. 35.

⁷⁰Ibid., p. 617, para. 39.

2.3.2 Prohibitions on the freedom to manifest one's religion or belief

Article 18 of the International Covenant must be read in conjunction with article 20, according to which the following acts “shall be prohibited by law”:

- ❖ any “propaganda for war” (art. 20(1)), and
- ❖ any “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence” (art. 20(2)).⁷¹

It follows that the manifestation of religion or beliefs must *not at any time* be used as a tool for the encouragement of war or for advocacy of hatred. The Human Rights Committee confirms that no derogation made pursuant to article 4(1) of the Covenant “may be invoked as justification for a State party to engage itself, contrary to article 20, in propaganda for war, or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence”.⁷² The fact that States parties are legally bound to outlaw war propaganda and religious incitement to discrimination, hostility and violence implies that they also have a legal duty to ensure that this prohibition is respected in practice.

Every person has the right to manifest his or her religion either in private or in public and either individually or in community with others.

The manifestation of one's religion or beliefs may cover such activities as worship, observance, practice, teaching, evangelization and rites.

The right to manifest one's religion may be subjected to limitations, provided that such limitations are

- *prescribed by law*
- *imposed in order to protect a legitimate aim, namely public safety, (public) order, health, morals or the rights and freedoms of others, and*
- *necessary in order to protect the legitimate objective.*

At the European level, the notion of a democratic society plays a pivotal role in determining the necessity of measures limiting a person's right to manifest his or her religion or beliefs.

2.4 Freedom of religion and public school instruction

According to the Human Rights Committee, “the liberty of parents or legal guardians to ensure that their children receive a religious and moral education in conformity with their own convictions” under article 18(4) of the Covenant “is related to the guarantees of the freedom to teach a religion or belief stated in article 18.1”. This means, inter alia, that article 18(4) of the Covenant “permits public school instruction in subjects such as the general history of religions and ethics if it is given in a neutral and

⁷¹United Nations Compilation of General Comments, p. 145, para. 7.

⁷²General Comment No. 29 (72) (Derogations from provisions of the Covenant during a state of emergency), in UN doc. GAOR, A/56/40 (vol. I), p. 206, para. 13(e).

objective way”, but that “public education that includes instruction in a particular religion or belief is inconsistent with article 18.4 unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians.”⁷³

In the case of *Hartikainen v. Finland*, the author complained of a violation of article 18(4) of the Covenant as a consequence of the requirement in Finnish legislation that instruction in the history of religions and ethics should be given instead of religious instruction to students whose parents or legal guardians objected to religious instruction. The author, who was a teacher and also a member of the Union of Free Thinkers in Finland, wanted such alternative classes to be neutral and non-compulsory. Disagreeing with the author, the Committee concluded that such alternative instruction in the history of religions and ethics was not in itself incompatible with article 18(4) of the Covenant if “given in a neutral and objective way”, respecting “the convictions of parents and guardians who do not believe in any religion”. In any event, the impugned legislation expressly permitted parents and guardians who did not wish their children to be given either religious instruction or instruction in the history of religions and ethics to obtain exemption therefrom by arranging for them to receive comparable instruction outside school.⁷⁴

Article 12(4) of the American Convention guarantees the right of parents and guardians, as the case may be, to provide for the religious and moral education of their children or wards that is in accord with their own convictions.

Although article 9 of the European Convention contains no similar guarantee, the second sentence of article 2 of Protocol No. 1 to the Convention states that:

“In the exercise of any functions which is assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”

According to the European Court of Human Rights, this sentence, which is an adjunct to the fundamental right to education guaranteed by the first sentence of the article,⁷⁵

“is binding upon the Contracting States in the exercise of each and every function – it speaks of ‘any functions’ – that they undertake in the sphere of education and teaching, including that consisting of the organisation and financing of public education”.⁷⁶

⁷³United Nations *Compilation of General Comments*, p. 145, para. 6.

⁷⁴Communication No. R.9/40, *E. Hartikainen v. Finland* (Views adopted on 9 April 1981), in UN doc. *GAOR*, A/36/40, p. 152, para. 10.4.

⁷⁵*Eur. Court HR, Case of Kjeldsen, Busk Madsen and Pedersen, judgment of 7 December 1976, Series A, No. 23*, p. 26, para. 52.

⁷⁶*Ibid.*, p. 24, para. 50.

The provision “aims in short at safeguarding the possibility of pluralism in education, which possibility is essential for the preservation of the ‘democratic society’ as conceived by the Convention. In view of the power of the modern State, it is above all through State teaching that this aim must be realised.”⁷⁷ Article 2 of Protocol No. 1 thus “enjoins the State to respect parents’ convictions, be they religious or philosophical, throughout the entire State education programme” and it does not therefore “permit a distinction to be drawn between religious instruction and other subjects”.⁷⁸

However, the second sentence of article 2 of the Protocol

“does not prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. It does not even permit parents to object to the integration of such teaching or education in the school curriculum, for otherwise all institutionalised teaching would run the risk of proving impracticable.”⁷⁹

The same provision

“implies on the other hand that the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents’ religious or philosophical convictions. That is the limit that must not be exceeded.”⁸⁰

In the case of *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, the applicants objected to the integrated and compulsory sex education in Danish primary schools and alleged that this violated their rights under, inter alia, article 2 of Protocol No. 1 to the Convention. However, after examining the Danish legislation, the Court concluded that the provision had not been violated. In its opinion, the legislation did not entail “overstepping the bounds of what a democratic State may regard as the public interest” and it “in no way [amounted] to an attempt at indoctrination aimed at advocating a specific kind of sexual behaviour”.⁸¹ The Court added, however, that, in order to avoid abuses in its application by a given school or teacher “the competent authorities have a duty to take the utmost care to see to it that parents’ religious and philosophical convictions are not disregarded at this level by carelessness, lack of judgment or misplaced proselytism.”⁸²

⁷⁷Ibid., p. 25, para. 50.

⁷⁸Ibid., p. 25, para. 51.

⁷⁹Ibid., p. 26, para. 53.

⁸⁰Ibid., loc. cit.

⁸¹Ibid., p. 27, para. 54.

⁸²Ibid., p. 28, para. 54.

In the case of *Campbell and Cosans*, on the other hand, the Court concluded that there had been a violation of the second sentence of article 2 of Protocol No. 1 as a consequence of the existence of corporal punishment as a disciplinary measure in the schools attended by the applicants' children, such punishment being contrary to their philosophical convictions.⁸³

Under the International Covenant on Civil and Political Rights and the American Convention on Human Rights, parents or legal guardians have the right to ensure that the religious and moral education of their children is conveyed in accordance with their own convictions.

It is, however, compatible with the International Covenant to impart public school instruction in subjects such as the general history of religions and ethics provided that this is done in a neutral and objective manner.

Under the European Convention on Human Rights, the Contracting States are legally bound to ensure that in each and every function that they undertake in the field of education and teaching, the religious or philosophical convictions of parents or legal guardians are respected.

This means that States have to take care to impart information or knowledge in an objective, critical and pluralistic way and that they are forbidden to pursue an aim of indoctrination.

2.5 State religion and religious minorities

The recognition of a religion as a so-called State religion or a religion that is simply an official or traditional religion or a religion professed by a majority of the State's population can easily imply that other religions are discriminated against. However, as noted by the Human Rights Committee, this situation "shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers".⁸⁴ It would, for instance, be contrary to the non-discrimination provision in article 26 of the Covenant to adopt "measures restricting eligibility for government service to members of the predominant religion or giving economic privileges to them or imposing special restrictions on the practice of other faiths".⁸⁵

The Committee points out in this connection that article 20(2) of the Covenant provides "important safeguards against infringements of the rights of religious minorities and of other religious groups to exercise the rights guaranteed by articles 18 and 27, and against acts of violence or persecution directed towards those groups".⁸⁶

⁸³ Eur. Court HR, *Case of Campbell and Cosans*, judgment of 25 February 1982, Series A, No. 48, pp. 14-18, paras. 32-38.

⁸⁴ United Nations *Compilation of General Comments*, p. 146, para. 9.

⁸⁵ *Ibid.*, loc. cit.

⁸⁶ *Ibid.*

Lastly, the Committee stresses that “if a set of beliefs is treated as official ideology in constitutions, statutes, proclamations of ruling parties, etc., or in actual practice, this shall not result in any impairment of the freedoms under article 18 or any other rights recognized under the Covenant nor in any discrimination against persons who do not accept the official ideology or who oppose it.”⁸⁷

The Human Rights Committee has emphasized that States parties to the International Covenant on Civil and Political Rights have a legal duty to ensure that there is no discrimination against adherents of different religions or non-believers.

2.6 Conscientious objection on religious grounds

Although the right to conscientious objection is not expressly guaranteed by the International Covenant, the Human Rights Committee “believes that such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one’s religion or belief. When this right is recognized by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs; likewise, there shall be no discrimination against conscientious objectors because they have failed to perform military service.”⁸⁸

These views have been confirmed in several cases brought under the Optional Protocol to the Covenant, such as that of *Westerman v. the Netherlands*, in which the author complained, inter alia, of a violation of article 18 as a consequence of his being sentenced to nine months’ imprisonment for refusing to wear a military uniform as ordered by a military officer. Prior to entering military service, the author had in vain tried to be recognized as a conscientious objector on the basis that the army was “contrary to the destination of (wo)man”.⁸⁹

The issue to be decided by the Committee was whether the imposition of sanctions on the author “to enforce the performance of military duty was ... an infringement of his right to freedom of conscience”. The Committee pointed out that the responsible authorities “evaluated the facts and arguments advanced by the author in support of his claim for exemption as a conscientious objector in the light of its legal provisions in regard to conscientious objection and that these legal provisions [were] compatible with the provisions of article 18”. It further observed that the author had “failed to satisfy” the State authorities “that he had an ‘insurmountable objection of conscience to military service ... because of the use of violent means’”. On this basis, the Committee concluded that there was “nothing in the circumstances of the case which [required it] to substitute its own evaluation of this issue for that of the national authorities”.⁹⁰ It followed that article 18 had not been violated.

⁸⁷Ibid., para. 10.

⁸⁸Ibid., para. 11.

⁸⁹Communication No. 682/1996, *Westerman v. the Netherlands* (Views adopted on 3 November 1999), in UN doc. GAOR, A/55/40 (vol. II), pp. 41-43, paras. 2.1-2.7 and p. 46, para. 9.4.

⁹⁰Ibid., p. 47, para. 9.5.

The question of conscientious objection may, however, also be examined under articles 8 and 26 of the Covenant. Under article 8(3)(c)(ii), the term “forced and compulsory labour” shall not include “any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors”. The Committee has, however, consistently found a violation of article 26 of the Covenant where the national alternative service is *disproportionately longer* than the military service. This was the situation, for instance, in the case of *R. Maille v. France*. French law required conscientious objectors to complete 24 months of alternative service instead of 12 months of military service. In this case the Committee concluded that article 26 of the Covenant had been violated “since the author was discriminated against on the basis of his conviction of conscience”, the Government having failed to submit any reasons to show that the differentiation was based on “reasonable and objective criteria” that would justify the longer period of service.⁹¹

With regard to conscientious objection, the Committee further considers that the exemption of only one group of conscientious objectors, such as the Jehovah’s Witnesses, and the inapplicability of exemption for all others cannot be considered reasonable, since “no differentiation shall be made among conscientious objectors on the basis of the nature of their particular beliefs.”⁹² Yet where the author had not shown “that his convictions as a pacifist [were] incompatible with the system of substitute service ... or that the privileged treatment accorded to Jehovah’s Witnesses adversely affected his rights as a conscientious objector against military service”, the Committee found that he had not been a victim of a violation of article 26 of the Covenant.⁹³

The Human Rights Committee has accepted that the right to conscientious objection can be derived from article 18 of the International Covenant on Civil and Political Rights. This right is not unconditional and the Committee may be reluctant to re-examine decisions taken by the national authorities in this regard. However, when the right to conscientious objection is recognized in national law, there must be no discrimination between the persons concerned on the basis of their particular beliefs.

Alternative/ substitute service must not be disproportionately longer than ordinary military service. Any distinction in this regard must be based on reasonable and objective criteria.

⁹¹Ibid., Communication No. 689/1996, *R. Maille v. France* (Views adopted on 10 July 2000), p. 72, para. 10.4.

⁹²Communication No. 402/1990, *H. Brinkhof v. the Netherlands* (Views adopted on 27 July 1993) in UN doc. GAOR, A/48/40 (vol. II), p. 129, para. 9.3.

⁹³Ibid., loc. cit.

3. The Right to Freedom of Opinion and Expression

3.1 Relevant legal provisions

The main legal provisions dealt with in this subsection are:

Article 19 of the Universal Declaration of Human Rights:

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

Article 19 of the International Covenant on Civil and Political Rights:

- “1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights and reputation of others;
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.”

Article 9 of the African Charter on Human and Peoples’ Rights:

- “1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.”

Article 13 of the American Convention on Human Rights:

- “1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

- a. respect for the rights or reputations of others; or
 - b. the protection of national security, public order, or public health or morals.
3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinion.
4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offences punishable by law.”

Article 10 of the European Convention on Human Rights:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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

The right to freedom of expression is also guaranteed by article 5(d)(viii) of the International Convention on the Elimination of All Forms of Racial Discrimination and article 13 of the Convention on the Rights of the Child.

As the substance of freedom of expression is intrinsically linked to limitations on its exercise, these two issues will be dealt with jointly in the light of the extensive jurisprudence and legal comments of the international monitoring bodies.

3.2. Article 19 of the International Covenant on Civil and Political Rights

The right “to hold opinions without interference” guaranteed by article 19(1) “is a right to which the Covenant permits no exception or restriction”.⁹⁴ This is logical since it is impossible to control what goes on in a person’s mind.

The right to freedom of expression, as guaranteed by article 19(2), is multi-dimensional and wide-ranging, and includes “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of [one’s] choice”. In its 1983 General Comment on this article, the Human Rights Committee notes that it is not sufficient for States parties to claim in their periodic reports that freedom of expression is guaranteed by the Constitution; “in order to know the precise regime of freedom of expression in law and in practice, the Committee needs in addition pertinent information about the rules which either define the scope of freedom of expression or which set forth certain restrictions, as well as any other conditions which in practice affect the exercise of this right.”⁹⁵

The restrictions permitted by article 19(3) of the Covenant “shall only be such as are provided by law and are necessary ... for respect of the rights or reputations of others” or “for the protection of national security or of public order (*ordre public*), or of public health or morals”. *In other words, to be lawful, restrictions on freedom of expression must comply with the principles of legality and proportionality and be imposed for one or more of the legitimate purposes enumerated in article 19(3).* The Committee has further emphasized that the right to freedom of expression “is of paramount importance in any democratic society, and any restrictions to the exercise thereof must meet a strict test of justification”.⁹⁶

Freedom of expression may, however, also be limited on the basis of article 20 of the Covenant, according to which “propaganda for war” and “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

The scope of article 19 in various contexts will be further illustrated by a selection of communications brought under the Optional Protocol and of recommendations made by the Committee in connection with the consideration of the periodic reports of States parties.

Article 19(1) of the International Covenant on Civil and Political Rights guarantees the right to hold opinions without interference. This right may not be subjected to any exception or restriction.

⁹⁴General Comment No. 10 (Article 19) of the Human Rights Committee, in UN doc. *United Nations Compilation of General Comments*, p. 119, para. 1.

⁹⁵*Ibid.*, p. 120, para. 3.

⁹⁶Communication No. 628/1995, *T. Hoon Park v. the Republic of Korea* (Views adopted on 20 October 1998) in UN doc. *G.AOR*, A/54/40 (vol. II), p. 91, para. 10.3.

As a point of departure, the right to freedom of expression in article 19(2) of the Covenant may be described as all-encompassing in that it includes the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers, whether in oral, written or printed form or through any other media of one's choice. Art is a form of expression protected by article 19(2).

Freedom of expression may be limited only on the basis of articles 19(3) and 20 of the Covenant.

3.2.1 Choice of language in court

In the case of *Cadoret and Le Biban v. France*, the authors claimed that their freedom of expression had been violated since they were not allowed to use the Breton language in French courts; the Committee observed that the fact that the authors had not been able to speak the language of their choice raised no issues under article 19(2). The complaint was therefore declared inadmissible.⁹⁷ In Australia, the same finding was made with regard to the provision of sign language in court for deaf people.⁹⁸ It should be recalled, however, that a person who does not understand the language used in court has the right to free assistance of an interpreter (see Chapter 7, subsection 3.9).

Freedom of information, as guaranteed by article 19 of the International Covenant on Civil and Political Rights, does not include a right to speak the language of one's choice in court proceedings.

3.2.2 Advertising

In the case of *Ballantyne, Davidson and McIntyre v. Canada*, the authors, who were living in Quebec, complained of a violation of, inter alia, article 19 of the Covenant because they were “forbidden to use English for purposes of advertising, e.g. on commercial signs outside the business premises, or in the name of the firm”.⁹⁹ The Human Rights Committee did not share the Canadian Government’s view that commercial activities are not covered by article 19. It held that article 19(2)

“must be interpreted as encompassing every form of subjective ideas and opinions capable of transmission to others, which are compatible with article 20 of the Covenant, of news and information, of commercial expression and advertising, or works of art, etc.; it should not be confined to means of political, cultural or artistic expression. In the Committee’s opinion, the commercial element in an expression taking the form of outdoor advertising cannot have the effect of removing this expression

⁹⁷ Communications Nos. 221/1987 and 323/1988, *Y. Cadoret and H. Le Biban v. France* (Views adopted on 11 April 1991) in UN doc. GAOR, A/46/40, p. 224, para. 5.2.

⁹⁸ See *Gradiage v. Grace Bros. Pty. Ltd.* (1988), *Federal Law Reports*, vol. 92, p. 414.

⁹⁹ Communications Nos. 359/1989 and 385/1989, *J. Ballantyne and E. Davidson, and G. McIntyre v. Canada* (Views adopted on 31 March 1993), in UN doc. GAOR, A/48/40 (vol. II), p. 91, para. 1.

from the scope of protected freedom. The Committee does not agree either that any of the above forms of expression can be subjected to varying degrees of limitation, with the result that some forms of expression may suffer broader restrictions than others.”¹⁰⁰

As the right to freedom of expression set forth in article 19(2) had thus been limited, the Committee had to decide whether the restrictions could be justified under article 19(3) of the Covenant. While the relevant measures were “indeed provided for by law”, namely section 58 of the Charter of the French Language as amended by section 1 of Bill No. 178, the question arose whether they were necessary to ensure respect for the rights of others, namely “the rights of the francophone minority within Canada”. The Committee believed that it was “not necessary, in order to protect the vulnerable position in Canada of the francophone group, to prohibit commercial advertising in English”, since such protection could be achieved in other ways not precluding “the freedom of expression, in a language of their choice, of those engaged in such fields as trade”. The law could, for instance, have required that advertising be in both French and English. The Committee added that “a State may choose one or more official languages, but it may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one’s choice.”¹⁰¹ It followed that article 19(2) had been violated.¹⁰²

Freedom of expression, as guaranteed by article 19(2) of the International Covenant on Civil and Political Rights, is not limited to means of political, cultural and artistic expression but covers every form of subjective idea and opinion that is capable of transmission to others, such as commercial advertising.

Outside the public sphere, individuals have the right to choose the language in which they wish to express themselves. In public life, however, a State may choose one or more official languages.

3.2.3 Defamation and dissemination of false information

The Human Rights Committee observed that a provision in the Croatian Penal Code allowing proceedings for slander could, in certain circumstances, lead to restrictions that go beyond those permissible under article 19(3). However, given the absence of specific information by the author in the case of *D. Paraga v. Croatia* and the dismissal of the charges against him, the Committee was unable to conclude that the institution of proceedings against the author, by itself, amounted to a violation of article 19. The proceedings had been instituted because he had referred to the Croatian President as a “dictator”.¹⁰³

¹⁰⁰Ibid., pp. 102-103, para. 11.3.

¹⁰¹Ibid., p. 103, para. 11.4.

¹⁰²Ibid., loc. cit.

¹⁰³Communication No. 727/1996, *D. Paraga v. Croatia* (Views adopted on 4 April 2001), in UN doc. GAOR, A/56/40 (vol. II), p. 66, para. 9.6.

When considering the initial report of Croatia, the Committee also pointed out that, although the right to freedom of expression was constitutionally guaranteed, “the variety of provisions in the Criminal Code dealing with offences against honour and reputation, covering areas of defamation, slander, insult and so forth [were] uncertain in their scope, particularly with respect to speech and expression directed against the authorities.” It therefore urged the State party to work towards developing “a comprehensive and balanced code in this area” setting out clearly and precisely the restrictions on freedom of speech and expression and ensuring that such restrictions did not exceed those permissible under article 19(3) of the Covenant.¹⁰⁴ The Committee also took note of the existence of the crime of disrespect of authority (*desacato*), in the Dominican Republic, which it deemed contrary to article 19 of the Covenant. The State party was asked to take steps to abolish that crime.¹⁰⁵

The Committee expressed concern in the case of Iraq about “severe restrictions on the right to express opposition to or criticism of the Government or its policies” and about the fact that “the law imposes life imprisonment for insulting the President of the Republic, and in certain cases death.” The Committee also noted that the law “imposes severe punishments for vaguely defined crimes which are open to wide interpretations by the authorities, such as writings detrimental to the President”. In its view, “such restrictions on freedom of expression, which effectively prevent the discussion of ideas or the operation of political parties in opposition to the ruling Ba’ath party, constitute a violation of articles 6 and 19 of the Covenant and impede the implementation of articles 21 and 22 of the Covenant, which protect the rights to freedom of peaceful assembly and association.”. It observed that the penal laws and decrees imposing restrictions on the freedoms of expression, peaceful assembly and association should be amended so as to comply with the relevant provisions of the Covenant.¹⁰⁶

The Committee expressed concern about a number of aspects of freedom of expression in Slovakia such as article 98 of the Penal Code which makes it an offence to disseminate false information abroad which harms the interest of the State. In the Committee’s view, “this terminology ... is so broadly phrased as to lack any certainty and carries the risk of restricting freedom of expression beyond the limits allowable under [article 19(3)]”. The Committee also expressed concern about “lawsuits for defamation resulting from expressing criticism of the Government” which posed a problem under article 19.¹⁰⁷

States parties to the International Covenant on Civil and Political Rights must ensure that laws on defamation and dissemination of false information comply with the principle of legal certainty; in other words, such laws must be sufficiently detailed to allow persons to adopt a form of conduct that does not violate them.

¹⁰⁴UN doc. GAOR, A/56/40 (vol. I), p. 68, para. 17.

¹⁰⁵Ibid., p. 58, para. 22.

¹⁰⁶UN doc. GAOR, A/53/40 (vol. I), p. 21, para. 105.

¹⁰⁷UN doc. GAOR, A/52/40 (vol. I), p. 61, para. 383.

Legislative provisions which limit freedom of expression by, for instance, generally penalizing “disrespect for authority” and criticism of governing bodies and ruling parties, are not consistent with article 19 of the Covenant.

The effective protection of freedom of expression is also indispensable for implementation of the rights of freedom of peaceful assembly and association set forth in articles 21 and 22 of the Covenant.

3.2.4 Denial of crimes against humanity and advocacy of hatred

The permissibility of denying crimes against humanity was raised in the case of *Faurisson v. France*, which concerned the author’s conviction by French courts on the basis of the so-called “Gayssot Act”, which amended the 1881 Freedom of the Press Act to make it an offence “to contest the existence of the category of crimes against humanity as defined in the London Charter of 8 August 1945”. In an interview the author had “reiterated his personal conviction that there were no homicidal gas chambers for the extermination of Jews in Nazi concentration camps”.¹⁰⁸

This restriction on the author’s freedom of expression, as guaranteed by article 19(2), had to be examined in the light of article 19(3), according to which, as seen above, any restriction must cumulatively meet the following three conditions: (1) be prescribed by law, (2) be imposed for one of the legitimate purposes enumerated therein and (3) be necessary for one or more of those purposes. The Committee accepted in the first place that *the principle of legality* had been respected in that the restriction was prescribed by the Gayssot Act, on the basis of which the author was convicted for “having violated the rights and reputation of others”.¹⁰⁹ It next agreed that the restriction was imposed for a *legitimate purpose*, namely to ensure respect for the rights or reputation of others under article 19(3)(a) of the Covenant. It pointed out in this regard that “the rights for the protection of which restrictions on the freedom of expression are permitted [by article 19(3)] may relate to the interests of other persons or to those of the community as a whole.” As the statements made by the author, “read in their full context, were of a nature as to raise or strengthen anti-Semitic feelings, the restriction served the respect of the Jewish community to live free from fear of an atmosphere of anti-Semitism”.¹¹⁰

The final question to be decided was, however, *whether the restriction was necessary for this legitimate purpose*. In the absence of any argument undermining the validity of the Government’s submission that “the Gayssot Act was intended to serve the struggle against racism and anti-Semitism” and the statement by a former Minister of Justice characterizing “the denial of the existence of the Holocaust as the principle vehicle for anti-Semitism”, the Committee was satisfied that the restriction of

¹⁰⁸Communication No. 550/1993, *R. Faurisson v. France* (Views adopted on 8 November 1996), in UN doc. GAOR, A/52/40 (vol. II), p. 85, paras. 2.3 and 2.5.

¹⁰⁹*Ibid.*, pp. 95-96, para. 9.5.

¹¹⁰*Ibid.*, p. 96, para. 9.6.

Mr. Faurisson's freedom of expression was necessary within the meaning of article 19(3) of the Covenant.¹¹¹

In a case concerning the freedom of expression of teachers, the *Ross v. Canada* case, the Committee likewise concluded that article 19 had not been violated. The question that had to be decided was whether the author's right to freedom of expression had been restricted contrary to article 19 of the Covenant by virtue of the decision of the Human Rights Board of Inquiry, upheld by the Supreme Court of Canada, as a result of which the author was placed on leave without pay for a week and subsequently transferred to a non-teaching position.¹¹² It appears from the assessment of the Board of Inquiry that statements made by the author in his various books and pamphlets, which were published outside the framework of his teaching activities, denigrated the faith and beliefs of Jews.¹¹³

Disagreeing with the State party, the Committee was of the view that "the loss of a teaching position was a significant detriment, even if no or only insignificant pecuniary damage was suffered" and the removal of the author from his teaching position was therefore a restriction of his freedom of expression that needed to be justified under article 19(3).¹¹⁴ The Committee then accepted that the measure was *provided for by law*, namely the New Brunswick Human Rights Act as subsequently interpreted by the Supreme Court. On the question whether it also pursued a *legitimate purpose*, the Committee confirmed its *Faurisson* ruling that the terms "rights or reputation of others [in article 19(3)] may relate to other persons or to a community as a whole". It added that:

"restrictions may be permitted on statements which are of a nature as to raise or strengthen anti-Semitic feeling, in order to uphold the Jewish communities' right to be protected from religious hatred. Such restrictions also derive support from the principles reflected in article 20(2) of the Covenant. The Committee notes that both the Board of Inquiry and the Supreme Court found that the author's statements were discriminatory against persons of the Jewish faith and ancestry and that they denigrated the faith and beliefs of Jews and called upon true Christians to not merely question the validity of Jewish beliefs and teachings but to hold those of the Jewish faith and ancestry in contempt as undermining freedom, democracy and Christian beliefs and values. In view of the findings as to the nature and effect of the author's public statements, the Committee concludes that the restrictions imposed on him were for the purpose of protecting the 'rights and reputations' of persons of Jewish faith, including the right to have an education in the public school system free from bias, prejudice and intolerance."¹¹⁵

¹¹¹Ibid., p. 96, para. 9.7.

¹¹²Communication No. 736/1997, *M. Ross v. Canada* (Views adopted on 18 October 2000), in UN doc. *GAOR*, A/56/40 (vol. II), pp. 72-75, paras. 4.1-4.6, and p. 83, para. 11.1.

¹¹³Ibid., p. 73, para. 4.2.

¹¹⁴Ibid., p. 83, para. 11.1.

¹¹⁵Ibid., p. 84, paras. 11.3-11.5.

Lastly, with regard to the question of the *necessity* of the restriction, the Committee stated that “the exercise of the right to freedom of expression carries with it special duties and responsibilities. These special duties and responsibilities are of particular relevance within the school system, especially with regard to the teaching of young students.” The influence exerted by schoolteachers may thus “justify restraints in order to ensure that legitimacy is not given by the school system to the expression of views which are discriminatory”.¹¹⁶ The Committee took note of the fact

“that the Supreme Court found that it was reasonable to anticipate that there was a casual link between the expressions of the author and the ‘poisoned school environment’ experienced by Jewish children in the School district. In that context, the removal of the author from a teaching position can be considered a restriction necessary to protect the right and freedom of Jewish children to have a school system free from bias, prejudice and intolerance.”¹¹⁷

The Committee noted, furthermore, that “the author was appointed to a non-teaching position after only minimal period on leave without pay and that the restriction thus did not go any further than that which was necessary to achieve its protective functions.” It followed that there had been no violation of article 19.¹¹⁸

The exercise of freedom of expression carries with it special duties and responsibilities.

The denial of crimes against humanity and incitement to discrimination may in certain circumstances justify restrictions on the exercise of freedom of expression for the protection of the rights and freedoms of others. The terms “rights or reputation of others” in article 19(3)(a) of the International Covenant may in this regard relate either to other persons or to a community as a whole.

It is particularly important for States parties to ensure that the public education of young children is free from bias, prejudice and intolerance.

3.2.5 Threats to national security and public order

As will be shown by the cases cited in this subsection, it is not sufficient for a State party simply to invoke one of the legitimate purposes enumerated in article 19(3) in order to justify restrictions on the exercise of freedom of expression. ***It must also show, by providing specific and reliable details, that in the case in point the restriction was indeed “prescribed by law” and necessary for a specific legitimate purpose.***

¹¹⁶Ibid., p. 84, para. 11.6.

¹¹⁷Ibid., pp. 84-85, para. 11.6.

¹¹⁸Ibid., p. 85, para. 11.6.

The notion of national security was at the core of the *K-T Kim v. the Republic of Korea* case, which concerned the author's conviction under article 7(1) and (5) of the National Security Law of the Republic of Korea. The Criminal District Court of Seoul sentenced the author to three years' imprisonment and one year of suspension of eligibility, a sentence that was reduced to two years' imprisonment on appeal. His crime was that he had, together with other members of the National Coalition for Democratic Movement, prepared documents criticizing the Government and its foreign allies and appealing for national reunification.¹¹⁹ Article 7(1) and (5) of the National Security Law stipulate that "any person who assists an anti-State organization by praising or encouraging the activities of this organization, shall be punished" and that "any person who produces or distributes documents, drawings or any other material(s) to the benefit of an anti-State organization, shall be punished."¹²⁰

The Committee had thus to determine whether the author's conviction, which constituted a restriction of his freedom of expression, was justified under article 19(3) of the Covenant. As it was *prescribed by law*, namely the National Security Law, it had to be decided whether it was *necessary* for one of the *legitimate purposes* specified in article 19(3). The Committee observed in this regard that there was a need for "careful scrutiny" because of "the broad and unspecific terms in which the offence under the National Security Law [was] formulated".¹²¹

The Committee noted that the author had been convicted "for having read out and distributed printed materials which were seen as coinciding with the policy statements of the DPRK (North Korea), with which country the State party was in a state of war". The Supreme Court had held "that the mere knowledge that the activity could be of benefit to North Korea was sufficient to establish guilt". Even so, the Committee had to consider "whether the author's political speech and his distribution of political documents were of a nature to attract the restriction allowed by article 19(3) namely the protection of national security". It stated in this regard that:

"It is plain that North Korean policies were well known within the territory of the State party and it is not clear how the (undefined) 'benefit' that might arise for the DPRK from the publication of views similar to their own created a risk to national security, nor is it clear what was the nature and extent of any such risk. There is no indication that the courts, at any level, addressed those questions or considered whether the contents of the speech or the documents had any additional effect upon the audience or readers such as to threaten public security, the protection of which would justify restriction within the terms of the Covenant as being *necessary*."¹²²

As the State party had failed both to specify the precise nature of the threat allegedly posed by the author's exercise of freedom of expression and to provide "specific justifications" as to why it was necessary for national security to prosecute him for the exercise of this freedom, the Committee concluded that the restriction was not

¹¹⁹Communication No. 574/1994, *K-T Kim v. the Republic of Korea* (Views adopted on 3 November 1998), in UN doc. *GAOR*, A/54/40 (vol. II), p. 2, paras. 2.1-2.2.

¹²⁰*Ibid.*, p. 2, para. 2.3.

¹²¹*Ibid.*, p. 9, para. 12.3.

¹²²*Ibid.*, p. 10, para. 12.4.

compatible with the requirements of article 19(3) of the Covenant. Article 19 had therefore been violated.¹²³

In the case of *T. Hoon Park v. the Republic of Korea*, the author complained of his conviction under article 7(1) and (3) of the National Security Law, which was “based on his membership and participation in the activities of the Young Koreans United (YKU), during his study at the University of Illinois” in the United States during the years 1983-1989. According to the author, this organization was American and composed of young Koreans with the aim of discussing “issues of peace and unification between North and South Korea”.¹²⁴ It appeared from the court judgments “that the conviction and sentence were based on the fact that the author had, by participating in certain peaceful demonstrations and other gatherings in the United States, expressed his support or sympathy to certain political slogans and positions”.¹²⁵

In examining this case under article 19(3) of the Covenant, the Committee emphasized that

“the right to freedom of expression is of paramount importance in any democratic society, and any restrictions to the exercise of this right must meet a strict test of justification.”¹²⁶

To justify the restriction on the exercise of the author’s freedom of expression, the Government had maintained that it was necessary in order to protect “national security” but had in this regard only referred to “the general situation in the country and the threat posed by ‘North Korean communists’”. Again, the Committee considered that the State party had “failed to specify the precise nature of the threat” and it concluded that none of the arguments advanced by the State party sufficed to justify the restriction of the author’s freedom of expression under article 19(3) of the Covenant. Lastly, there was nothing in either the judicial decisions or the submissions of the State party to show that the author’s conviction was necessary for the protection of one of the legitimate purposes set forth in article 19. His conviction “for acts of expression” had therefore to be regarded as a violation of the article.¹²⁷

In the case of *V. Laptsevich v. Belarus*, the author complained that his right to freedom of expression and opinion had been violated by the sanctions imposed on him following the confiscation of a leaflet concerning the anniversary of the proclamation of independence of Belarus. He was fined 390,000 roubles under the Code of Administrative Offences “for disseminating leaflets not bearing the required publication data”. The author insisted, however, that the leaflets did contain the data concerned “precisely in order to make it clear that the Press Act did not apply to his publication”.¹²⁸ Although it was “implied” in the submissions of the State party “that the sanctions were necessary to protect national security”, there was nothing in the

¹²³Ibid., p. 10, paras. 12.5.

¹²⁴Communication No. 628/1995, *T. Hoon Park v. the Republic of Korea* (Views adopted on 20 October 1998, in UN doc. GAOR, A/54/40 (vol. II), p. 86, para. 2.2.

¹²⁵Ibid., p. 87, para. 2.4.

¹²⁶Ibid., p. 91, para. 10.3.

¹²⁷Ibid., loc. cit.

¹²⁸Communication No. 780/1997, *V. Laptsevich v. Belarus* (Views adopted on 20 March 2000), in UN doc. GAOR, A/55/40 (vol. II), pp. 178-180, paras. 2 and 4.

material before the Committee to suggest “that either the reactions of the police or the findings of the courts were based on anything other than the absence of necessary publication data”. Hence the sole issue to be decided by the Committee was “whether or not the sanctions imposed on the author for not including the details required by the Press Act [could] be deemed necessary for the protection of public order (*ordre public*) or for respect of the rights or reputation of others”.¹²⁹

The Committee noted that the State party had made no attempt “to address the author’s specific case and explain the reasons for the requirement that, prior to publishing and disseminating a leaflet with a print run of 200, he was to register his publication with the administrative authorities to obtain index and registration numbers”. Furthermore, the State party had “failed to explain why this requirement was necessary for one of the legitimate purposes set out in [article 19(3)] and why the breach of the requirements necessitated not only pecuniary sanctions, but also the confiscation of the leaflets still in the author’s possession”.¹³⁰ In the absence of any explanation justifying the registration requirement and the measures taken, the Committee concluded that these could not be deemed necessary “for the protection of public order (*ordre public*) or for respect of the rights or reputations [*sic*] of others”. There had consequently been a violation of article 19(2) of the Covenant.¹³¹

According to the Human Rights Committee, freedom of expression is of paramount importance in any democratic society and restrictions on the exercise of this freedom must therefore meet a strict test of justification.

*When invoking one or more of the legitimate purposes listed in article 19(3) of the International Covenant on Civil and Political Rights in order to justify restrictions on the exercise of freedom of expression, States parties must consequently provide sufficient specific and reliable details to substantiate their arguments. General references to notions such as national security and public order (*ordre public*) are insufficient and will not be accepted by the Human Rights Committee as a justification for restrictions on the exercise of freedom of expression.*

3.2.6 Freedom of the press

The case of *R. Gauthier v. Canada* concerned the publisher of *National Capital News* in Canada, who, when applying for membership in the Parliamentary Press Gallery, was only provided with a temporary pass which granted him limited privileges, a fact that he considered to be a violation of article 19 of the Covenant.¹³² The State party had actually “restricted the right to enjoy the publicly funded media facilities of Parliament, including the right to take notes when observing meetings of Parliament, to those media representatives who [were] members of a private organization, the

¹²⁹Ibid., p. 181, para. 8.4.

¹³⁰Ibid., pp. 181-182, para. 8.

¹³¹Ibid., p. 182, para. 8.

¹³²Communication No. 633/1995, *R. Gauthier v. Canada* (Views adopted on 7 April 1999), in UN doc, *GAOR*, A/54/40 (vol. II), pp. 93-94, paras. 1-2.2.

Canadian Press Gallery”. The author had been denied full membership of the Press Gallery and had only occasionally held temporary membership which gave him access to some but not all facilities of the organisation. When he did not have temporary membership, he was denied access to the media facilities and could not take notes of Parliamentary proceedings.¹³³ The Committee thus had to decide whether the author’s restricted access to the parliamentary press facilities amounted to a violation of his right under article 19 “to seek, receive and impart information”. In this connection it referred in the first place

“to the right to take part in the conduct of public affairs, as laid down in article 25 of the Covenant, and in particular to General Comment No. 25 (57) which reads in part: ‘In order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.’ ... Read together with article 19, this implies that citizens, in particular through the media, should have wide access to information and the opportunity to disseminate information and opinions about the activities of elected bodies and their members. The Committee recognizes, however, that such access should not interfere with or obstruct the carrying out of the functions of elected bodies, and that a State party is thus entitled to limit access. However, any restrictions imposed by the State party must be compatible with the provisions of the Covenant.”¹³⁴

The Committee next accepted that the author’s exclusion constituted a restriction of his right under article 19(2) to have *access to information*, and it thereby also rejected the State party’s argument that “the author [did] not suffer any significant disadvantage because of technological advances which make information about Parliamentary proceedings readily available to the public”.¹³⁵

After accepting that the restriction was “arguably, imposed by law” in that it followed from the law of parliamentary privilege, the Committee also agreed “that the protection of Parliamentary procedure can be seen as a legitimate goal of public order” and that “an accreditation system can thus be a justified means of achieving this goal”. On the other hand, the Committee did not agree with the Government’s suggestion that this was “a matter exclusively for the State to determine” and it adopted the following Views on the issue:

“The relevant criteria for the accreditation scheme should be specific, fair and reasonable, and their application should be transparent. In the instant case, the State party has allowed a private organization to control access to the Parliamentary press facilities, without intervention. The scheme does not ensure that there will be no arbitrary exclusion from access to the Parliamentary media facilities. In the circumstances, the Committee is of the opinion that the accreditation system has not been shown to be a necessary and proportionate restriction of rights within the meaning of

¹³³Ibid., p. 104, para. 13.5.

¹³⁴Ibid., p. 104, paras. 13.3-13.4; footnote omitted.

¹³⁵Ibid., pp. 104-105, para. 13.5.

article 19, paragraph 3, of the Covenant, in order to ensure the effective operation of Parliament and the safety of its members. The denial of access to the author to the press facilities of Parliament for not being a member of the Canadian Press Gallery Association constitutes therefore a violation of Article 19(2) of the Covenant.”¹³⁶

The Committee noted “with regret” with regard to Gabon “that the powers vested in the National Council of Communication to monitor programmes and impose penalties on organs of the press are an obstacle to the exercise of freedom of the press”. The Committee also deplored “the harassment of journalists” and invited the State party “to bring its legislation into line with article 19 by doing away with censorship and penalties against organs of the press and ensuring that journalists may safely exercise their functions”.¹³⁷ The Committee also expressed concern at the “growing number of complaints of systematic harassment and death threats against journalists intended to undermine freedom of expression” in Peru and requested the State party “to take the necessary measures to put an end to direct and indirect restrictions on freedom of expression, to investigate all complaints which have been filed and to bring the persons responsible to justice”.¹³⁸ It also deplored “the methods used by Peru to take control of communications media away from persons critical of the Government, including stripping one of them of his nationality” and requested the State party “to eliminate these situations, which affect freedom of expression ... and to make effective remedies available to those concerned”.¹³⁹

The Committee expressed concern about various provisions of the Press Law in the Democratic People’s Republic of Korea and their frequent invocation, which was difficult to reconcile with the provisions of article 19 of the Covenant. It was in particular concerned “that the notion of ‘threat to the State security’ may be used in such ways as to restrict freedom of expression”, that the permanent presence in the country of foreign media representatives was confined to journalists from three countries, and that foreign newspapers and publications were “not readily available to the public at large”. Lastly, the Committee observed that “DPRK journalists may not travel abroad freely”. It followed that the State party “should specify the reasons that have led to the prohibition of certain publications, and to refrain from measures that restrict the availability of foreign newspapers to the public”. The State party was further requested “to relax restrictions on the travel abroad by DPRK journalists, and to avoid any use of the notion of ‘threat to the State security’ that would repress freedom of expression contrary to article 19”.¹⁴⁰

The Committee emphasized “its deep concern about the numerous and serious infringements of the right to freedom of expression” in Belarus. “In particular, the fact that most publishing, distribution and broadcasting facilities are State owned, and that editors-in-chief of State-supported newspapers are State employees,

¹³⁶Ibid., p. 104, para. 13.5 at p. 105 and p. 105, para. 13.6.

¹³⁷UN doc. GAOR, A/56/40 (vol. I), p. 44, para. 19.

¹³⁸Ibid., pp. 47-48, para. 16.

¹³⁹Ibid., p. 48, para. 17.

¹⁴⁰Ibid., p. 103, para. 23.

effectively exposes the media to strong political pressure and undermines its independence.” The many restrictions imposed on the media, in particular the vaguely defined offences, were incompatible with article 19(3). Furthermore, the Committee expressed concern “about reports of harassment and intimidation of local and foreign journalists by authorities and the denial of access to public broadcasting facilities by political opponents to the Government”. It urged the State party “to take all necessary measures, legislative as well as administrative, in order to remove these restrictions on freedom of expression, which are incompatible with its obligations under article 19 ... as a matter of priority”.¹⁴¹

The Committee expressed concern that the mass media in Zimbabwe, “as well as many other forms of expression, including artistic expression, are subject to censorship and are largely controlled by the Government”. It recommended that the relevant law “be brought into strict compliance with article 19(3) of the Covenant”.¹⁴² Lastly, it was concerned about interference by the Government of Slovakia “in the direction of its State-owned television”, which “carries a danger of violating article 19”.¹⁴³

The right to freedom of expression, including freedom of the press, as guaranteed by article 19 of the International Covenant on Civil and Political Rights, may have to be interpreted also in the light of other provisions of the Covenant, such as article 25 concerning the right to take part in the conduct of public affairs. The effective exercise of that right presupposes the free flow of information and ideas between citizens on public and political issues, including a free press and other media which are able to comment on public issues without censorship or restraint.

*The right of journalists to have **access to information** in accordance with article 19(2) of the Covenant implies, inter alia, that criteria for accreditation schemes must be specific, fair and reasonable, and that, for instance, there must be no arbitrary exclusion from access to parliamentary debates.*

The right to freedom of the press means that harassment of journalists is strictly prohibited under article 19 of the Covenant. Freedom of the press presupposes that journalists must be able to exercise their functions safely and to travel freely.

Censorship and penalties against organs of the press constitute obstacles to the effective exercise of freedom of the press. Article 19(3) does not allow the use of vaguely defined offences for the imposition of restrictions on the mass media in order to silence criticism of the government.

¹⁴¹UN doc. GAOR, A/53/40 (vol. I), pp. 28-29, para. 153.

¹⁴²Ibid., p. 37, para. 224.

¹⁴³UN doc. GAOR, A/52/40 (vol. I), p. 61, para. 383.

3.2.7 Human rights defenders

The right to freedom of expression of human rights defenders is essential because if they are not allowed to express themselves freely, both orally and in written or printed form, the very notion of effective human rights protection becomes illusory. When considering the second periodic report of the Syrian Arab Republic, the Committee stated that it remained concerned “that the activities of human rights defenders and of journalists who speak out for human rights remain subject to severe restrictions”. Referring to a specific case where a person was sentenced to 10 years’ imprisonment “for his non-violent expression of opinions critical of the authorities”, the Committee observed that “such restrictions are incompatible with freedom of expression and opinion” as guaranteed by article 19. The State party should therefore “protect human rights defenders and journalists against any restriction on their activities and ensure that journalists can exercise their profession without fear of being brought before the courts and prosecuted for having criticized government policy”.¹⁴⁴

It is noteworthy in this context that the United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, adopted by General Assembly resolution 53/144 of 9 December 1998, is specially designed to protect human rights defenders and guarantees to every person the right, among others (1) “to communicate with non-governmental or intergovernmental organizations”; (2) “to know, seek, obtain, receive and hold information about all human rights and fundamental freedoms”; and (3) “as provided for in human rights and other applicable international instruments, [the right] freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms” (arts. 5 and 6).

The right to freedom of expression must be effectively guaranteed to all those who defend human rights and fundamental freedoms although their activities may imply criticism of government policies. The exercise of their freedom of expression must be restricted on no grounds other than those contained in the applicable international treaties.

3.3 Article 9 of the African Charter on Human and Peoples’ Rights

Article 9 of the African Charter on Human and Peoples’ Rights guarantees to every individual “the right to receive information” as well as “the right to express and disseminate his opinions within the law”. It is noteworthy that the terms “within the law” are not conditioned by any other criteria such as an enumeration of legitimate purposes or the concept of necessity.

¹⁴⁴UN doc. GAOR A/56/40 (vol. I), p. 75, para. 23.

3.3.1 Freedom of the press

The case of *Media Rights Agenda v. Nigeria* concerned the trial and conviction of Mr. Malaolu, the editor of an independent Nigerian newspaper; Mr. Maloulu was found guilty by a Special Military Tribunal of the charge of concealment of treason and sentenced to life imprisonment. It was alleged before the African Commission on Human and Peoples' Rights that article 9 of the Charter had been violated, since Mr. Malaolu had simply been punished for news stories published in his newspaper relating to an alleged coup d'état involving certain people. The Government argued, on the other hand, that Mr. Malaolu had been tried with a number of other people, including journalists, accused of involvement in the coup and that it was not, therefore, a case of victimization of the profession of journalist.¹⁴⁵ The Commission took the view, however, that it was only Mr. Malaolu's publication that had led to his arrest, trial and conviction and concluded that article 9 had been violated.¹⁴⁶

Freedom of the press was again at issue in the case of the *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria* which concerned, inter alia, the seizure of thousands of copies of magazines following protests by journalists and others against the annulment of elections. *The News* magazine was closed by a military Decree in June 1993. Prior to the closure, copies of the magazine had been seized by security agents and some of its editors were sought by the police. Thousands of copies of the weekly news magazine *Tempo* had likewise allegedly been confiscated. The Government justified these actions by referring to the "chaotic" situation reigning in the country after the elections were annulled.¹⁴⁷ The Commission disagreed, and recalled the general principle according to which States should not limit the exercise of rights by overriding constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards. In its view, Governments "should avoid restricting rights, and take special care with regard to those rights protected by constitutional or international human rights law. No situation justifies the wholesale violation of human rights. In fact, general restrictions on rights diminish public confidence in the rule of law and are often counterproductive."¹⁴⁸ The Commission concluded that, given that Nigeria had all the traditional provisions for libel suits available to deal with violations of domestic law, the Government proscription of a specific publication was of particular concern; "laws made to apply to specifically one individual or legal entity [raised] the acute danger of discrimination and lack of equal treatment before the law as guaranteed by Article 2" of the Charter. The proscription of *The News* and the seizure of 50,000 copies of *Tempo* and *The News* therefore violated article 9 of the Charter.¹⁴⁹

¹⁴⁵ACHPR, *Media Rights Agenda (on behalf of Mr. N. Malaolu) v. Nigeria*, No. 224/98, decision adopted during the 28th session, 23 October – 6 November 2000, paras. 67-68 of the text as published at: <http://www1.umn.edu/humanrts/africa/comcases/224-98.html>

¹⁴⁶Ibid., para. 69.

¹⁴⁷AHCP, *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, Communication No. 102/93, decision adopted on 31 October 1998, paras. 6, 7 and 57 of the text as published at the following web site: <http://www1.umn.edu/humanrts/africa/comcases/102-93.html>

¹⁴⁸Ibid., paras. 57-58.

¹⁴⁹Ibid., para. 59.

The African Commission considers, however, that “payment of a registration fee and a pre-registration deposit for payment of penalty or damages is not in itself contrary to the right to the freedom of expression.” “However, the amount of the registration fee should not be more than necessary to ensure administrative expenses of the registration, and the pre-registration fee should not exceed the amount necessary to secure against penalties or damages against the owner, printer or publisher of the newspaper. Excessively high fees are essentially a restriction on the publication of news media.” In the case before the Commission, on the other hand, the fees concerned were high but “not so clearly excessive” as to constitute a “serious restriction”.¹⁵⁰

The Commission was, however, more concerned about “the total discretion and finality of the decision of the registration board, which effectively gives the government the power to prohibit publication of any newspapers or magazines they choose. This invites censorship and seriously endangers the rights of the public to receive information” protected by article 9(1) of the Charter. There had thus been a breach of that article.¹⁵¹

With regard to the proscription of a newspaper in the same case, the Commission recalled that, according to article 9(2) of the African Charter, “every individual shall have the right to ... disseminate his opinions within the law”. In its view, “this does not mean that national law can set aside the right to express and disseminate one’s opinions; this would make the protection of the right to express one’s opinions ineffective.” Moreover, “international human rights standards must always prevail over contradictory national law. Any limitation on the rights of the Charter must be in conformity with the provisions of the Charter.”¹⁵² Furthermore, as the Charter does not contain a derogation clause, “limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances.”¹⁵³

Indeed, “the only legitimate reasons for limitations to the rights and freedoms of the African Charter are found in Article 27.2”, according to which “the rights and freedoms shall be exercised with due regard to the rights of others, collective security, morality and common interest.” “The reasons for possible limitations must be founded in a legitimate state interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained.” In particular, “a limitation may never have as a consequence that the right itself becomes illusory.”¹⁵⁴

Considering that, in this case, the Government had provided no evidence that the proscription of the newspaper *The News* could be justified on the grounds enumerated in article 27(2), and given the availability of libel laws in Nigeria, the

¹⁵⁰ACHPR, *Media Rights Agenda and Others v. Nigeria*, Communications Nos. 105/93, 128/94, 130/94 and 152/96, decision adopted on 31 October 1998, paras. 55-56 of the text of the decision as published at: <http://www1.umn.edu/humanrts/africa/comcases/>. The registration fee was N100,000 and the deposit for any penalty or damages awarded against the newspaper etc. amounted to N250,000, para. 6.

¹⁵¹Ibid., para. 57.

¹⁵²Ibid., paras. 63 and 66.

¹⁵³Ibid., para. 67.

¹⁵⁴Ibid., paras. 68-70.

proscription of a particular publication was “disproportionate and uncalled for” and constituted a violation of article 9(2) of the Charter.¹⁵⁵

3.3.2 Freedom to express opinions

Where persons have been detained simply for belonging to opposition parties or trade unions, the African Commission has concluded that such “blanket restrictions” on the right to freedom of expression violate article 9(2) of the Charter. In this connection, the Commission recalled the principle that, if necessary to restrict human rights, such restrictions “should be as minimal as possible” and should not “undermine fundamental rights guaranteed under international law”.¹⁵⁶ Similarly, where an alleged leader of a student union in Kenya was arrested and detained for several months because of his views and ultimately had to leave his country, the Commission considered the treatment to be a violation of article 9 of the Charter. If a person’s views are contrary to domestic law, the affected individual or Government should rather seek redress in a court of law.¹⁵⁷ Lastly, in the case brought on behalf of the writer Ken Saro-Wiwa Jr. and the Civil Liberties Organisation, the Commission emphasized the close relationship between the freedoms of expression, association and assembly guaranteed by articles 9 to 11 of the Charter and concluded that the Government had implicitly violated article 9(2) when violating articles 10(1) and 11. It had been alleged that the reason for the trial of the victims and ultimate death sentences against them was the peaceful expression of their views. During a rally, the victims had in fact been disseminating, through the organization Movement for the Survival of the Ogoni Peoples, information and opinions on the rights of the people living in an oil-producing part of the country. The Commission noted that the allegations had not been contradicted by the Government.¹⁵⁸

3.3.3 Human rights defenders

The case of *Huri-Laws v. Nigeria* concerned the harassment and persecution of members of a human rights organization in Nigeria. According to the complainant, the Civil Liberties Organisation was a human rights organization whose employees worked together to secure respect for human rights through organized programmes aimed at informing people of their rights. The Commission concluded that “the persecution of its employees and raids of its offices in an attempt to undermine its ability to function in this regard” amounted to a violation of both the right to freedom of expression and the right to freedom of association as guaranteed by articles 9 and 10 of the Charter.¹⁵⁹

¹⁵⁵Ibid., para. 71. It is unclear how this communication relates to Communication No.102/92 (see foot note 155 *et seq.*), since they both deal partly with the proscription of the same newspaper.

¹⁵⁶*Amnesty International and Others v. Sudan*, Communications Nos. 48/90, 50/91, 52/91 and 89/93, decision adopted on unknown date, para. 77-80 of the text of the decision as published at the following web site: <http://www1.umn.edu/humanrts/africa/comcases/>

¹⁵⁷*John D. Ouko v. Kenya*, Communication No. 232/99, decision adopted during the 28th Ordinary session, 23 October – 6 November 2000, paras. 27-28 of the text of the decision as published at: <http://www1.umn.edu/humanrts/africa/comcases/232-99.html>

¹⁵⁸*International Pen and Others (on behalf of Ken Saro-Wiwa Jr and Civil Liberties Organisation) v. Nigeria*, Communications Nos. 137/94, 139/94, 154/96 and 161/97, decision adopted on 31 October 1998, para. 110 of the text of the decision as published at the following web site: <http://www1.umn.edu/humanrts/africa/comcases/>

¹⁵⁹*Huri-Laws (on behalf of Civil Liberties Organisation) v. Nigeria*, Communication No. 225/98, decision adopted during the 28th Ordinary session, 23 October – 6 November 2000, para. 47 of the text of the decision as published at: <http://www1.umn.edu/humanrts/africa/comcases/225-98.html>

The right to freedom of expression, as guaranteed by article 9 of the African Charter on Human and Peoples' Rights, also protects freedom of the press.

The payment of a reasonable fee for the registration of a newspaper is not, however, contrary to article 9, unless excessive. On the other hand, the registration of newspapers may not be used as a way of endangering the right of the public to receive information, as guaranteed by article 9(1) of the Charter. It is for Governments to prove that the limitations imposed on the exercise of a right can be justified under article 27(2) of the Charter.

Domestic law cannot nullify the right to freedom of expression and the right to disseminate one's opinions because international human rights standards prevail over national law.

Under the African Charter, limitations on the exercise of rights must never drain the rights of their substance and can only be imposed for the legitimate reasons described in article 27(2) of the Charter. Limitations must also be strictly proportionate to the legitimate advantage that they are aimed at securing.

The freedom to express one's opinion implies the right to do so peacefully in public, without fear of arrest, prosecution and harassment.

Under the African Charter, human rights defenders have a right to freedom of expression in working for an improved understanding of peoples' rights and freedoms.

3.4 Article 13 of the American Convention on Human Rights

The definition of the right to freedom of expression in article 13(1) of the American Convention on Human Rights is very similar to that in article 19(2) of the International Covenant although it also includes a reference to “freedom of thought”. The right thus includes “freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice”.

The limitation provision in article 13(2) of the American Convention is particularly important in that it states, *expressis verbis*, that the exercise of the right provided for in article 13(1), “shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: (a) respect for the rights and reputation of others; or (b) the protection of national security, public order, or public health or morals”. The grounds that may justify limitations on the exercise of freedom of expression are thus identical to those found in article 19(3) of the International Covenant. An exception to the prohibition on prior censorship is contained in article 13(4) inasmuch as “public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence”.

According to the Inter-American Court, apart from the said exception provided for in article 13(4), “*prior censorship is always incompatible with the full enjoyment of the rights listed in Article 13 ... even if the alleged purpose of such prior censorship is to prevent abuses of freedom of expression*”. It follows that, “in this area any preventive measure inevitably amounts to an infringement of the freedom guaranteed by the Convention.”¹⁶⁰ A case in point is that of *Olmedo Bustos et Al. v. Chile* concerning the prohibition by Chilean courts of the exhibition of the film *The Last Temptation of Christ*. The Inter-American Court concluded that this case of prior censorship constituted a violation of the right to freedom of thought and expression as embodied in article 13 of the American Convention on Human Rights.¹⁶¹

While abuses of the right to freedom of expression can thus be controlled only “through the subsequent imposition of sanctions on those who are guilty of the abuses”, the imposition of such liability must, according to the Court, comply with all of the following requirements in order to be valid:

- ❖ “the existence of previously established grounds for liability”;
- ❖ “the express and precise definition of these grounds by law”;
- ❖ “the legitimacy of the ends sought to be achieved”; and
- ❖ “a showing that these grounds of liability are ‘necessary to ensure’ the aforementioned ends”.¹⁶²

Article 13(3) further specifically outlaws restrictions on freedom of expression “by indirect methods or means, such as the abuse of government or private controls over newsprint” or various kinds of mass media “tending to impede the communication and circulation of ideas and opinions”. This provision thus prohibits not only indirect governmental restrictions but also “private controls” over the mass media which produce the same result. This means that not only can a violation of the Convention occur when the State itself imposes restrictions of an indirect character which tend to impede “the communication and circulation of ideas and opinions” but that “the State also has an obligation to ensure that the violation does not result from the ‘private controls’” referred to in article 13(3).¹⁶³

Article 13(5) of the American Convention allows restrictions similar to those in article 20 of the International Covenant in that propaganda for war and advocacy of hatred “shall be considered as offenses punishable by law”.

Lastly, a distinctive characteristic of the American Convention on Human Rights is that the right of reply is guaranteed by article 14, the first paragraph of which states that:

¹⁶⁰I-A Court HR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (arts. 13 and 29 American Convention on Human Rights)*, Advisory Opinion OC-5/85 of November 13, 1985, Series A, No. 5, pp. 103-104, para. 38; emphasis added.

¹⁶¹See I-A Court HR, *The Case of Olmedo Bustos et Al. v. Chile*, judgment of 5 February 2001, Series C, No. 73, paras. 71-73

¹⁶²I-A Court HR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (arts. 13 and 29 American Convention on Human Rights)*, Advisory Opinion OC-5/85 of November 13, 1985, Series A, No. 5, p. 104, para. 39.

¹⁶³*Ibid.*, pp. 110-111, para. 48.

“Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.”

Furthermore, “the correction or reply shall not in any case remit other legal liabilities that may have been incurred” (article 14(2)). Lastly, “for the effective protection of honor and reputation, every publisher, and every newspaper, motion picture, radio, and television company, shall have a person responsible who is not protected by immunities or special privileges” (article 14(3)). For an interpretation of article 14 in relation to articles 1 and 2 of the Convention, see the advisory opinion of the Inter-American Court of Human Rights on the “Enforceability of the Right to Reply or Correction”.¹⁶⁴

The exercise of freedom of expression under article 13 of the American Convention on Human Rights must not be subjected to prior censorship. Abuses of the exercise of freedom of expression can only be lawfully controlled through the a posteriori imposition of sanctions on those who are guilty of abuses.

In order to be lawful, however, the imposition of such subsequent liability must comply with the following requirements:

- *the existence of previously established grounds for liability;*
- *the express and precise definition of these grounds by law;*
- *the legitimacy of the ends sought to be achieved; and*
- *a showing that these grounds of liability are necessary to ensure the legitimate ends.*

Article 14 of the American Convention on Human Rights guarantees the right of reply to anyone injured by inaccurate or offensive statements or ideas disseminated to the public.

3.4.1 The individual and collective dimensions of freedom of expression, including the role of the mass media

Basing itself on its advisory opinion in the case concerning *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (hereinafter referred to as the “*Compulsory Membership*” case), the Inter-American Court of Human Rights confirmed in the case of *Ivcher Bronstein v. Peru* that persons protected by article 13 of the American Convention on Human Rights “have not only the right and freedom to express their own thoughts, but also the right and freedom to seek, receive and disseminate information and ideas of all types. Consequently, freedom of expression has both an *individual* and a *social dimension*”, which requires that

¹⁶⁴I-A Court HR, *Enforceability of the Right to Reply or Correction* (arts. 14(1), 1(1) and 2 American Convention on Human Rights), Advisory Opinion OC-7/86 of August 29, 1986, Series A, No. 7; for the text see the Court’s web site: www.corteidh.or.cr/seriecing/A_7_ING.html.

“on the one hand, no one may be arbitrarily harmed or impeded from expressing his own thought and therefore represents a right of each individual; but it also implies, on the other hand, a collective right to receive any information and to know the expression of the thought of others.”¹⁶⁵

With regard to the first dimension of the right contained in article 13, namely the *individual right*, the Court stated that

“freedom of expression is not exhausted in the theoretical recognition of the right to speak or write, but also includes, inseparably, the right to use any appropriate method to disseminate thought and allow it to reach the greatest number of persons. In this respect, the expression and dissemination of thought and information are indivisible, so that the restriction of the possibilities of dissemination represents directly, and to the same extent, a limit to the right to free expression.”¹⁶⁶

With regard to the second element of the right embodied in article 13, namely the *social element*, the Court stated that

“freedom of expression is a medium for the exchange of ideas and information between persons; it includes the right to try and communicate one’s points of view to others, but it implies also everyone’s right to know opinions, reports and news. For the ordinary citizen, the right to know about other opinions and the information that others have is as important as the right to impart their own.”¹⁶⁷

In the Court’s opinion, these two dimensions “are of equal importance and should be guaranteed simultaneously in order to give total effect to the right to freedom of expression in the terms of Article 13 of the Convention”. The importance of this right is further underlined if one examines

“the role that the media plays in a democratic society, when it is a true instrument of freedom of expression and not a way of restricting it; consequently, it is vital that it can gather the most diverse information and opinions.”¹⁶⁸

Furthermore, “it is essential that the journalists who work in the media should enjoy the necessary protection and independence to exercise their functions comprehensively, because it is they who keep society informed, and this is an indispensable requirement to enable society to enjoy full freedom.”¹⁶⁹

¹⁶⁵I-A Court HR, *Ivcher Bronstein Case v. Peru*, judgment of February 6, 2001, Series C, No. 74; the text used is that found on the Court’s web site: www.corteidh.or.cr/seriecing/C_74_ENG.html, para. 146; emphasis added. The *Compulsory Membership* case will be further reviewed *infra* in subsection 3.4.5.

¹⁶⁶Ibid., para. 147.

¹⁶⁷Ibid., para. 148.

¹⁶⁸Ibid., para. 149.

¹⁶⁹Ibid., para. 150.

In its advisory opinion in the *Compulsory Membership* case, the Court stated moreover that the fact that the individual and collective dimensions of freedom of expression must be guaranteed simultaneously means, on the one hand, that “one cannot legitimately rely on the right of a society to be honestly informed in order to put in place a regime of prior censorship for the alleged purpose of eliminating information deemed to be untrue in the eyes of the censor” and, on the other hand, “that the right to impart information and ideas cannot be invoked to justify the establishment of private or public monopolies of the communications media designed to mold public opinion by giving expression to only one point of view”.¹⁷⁰

It followed that, since “it is the mass media that make the exercise of freedom of expression a reality ... the conditions of its use must conform to the requirements of this freedom, with the result that there must be, **inter alia**, a plurality of means of communication, the barring of all monopolies thereof, in whatever form, and guarantees for the protection of the freedom and independence of journalists.”¹⁷¹

The right to freedom of expression in article 13 of the American Convention on Human Rights includes not only the right to express one’s own thoughts but also the right and freedom to seek, receive and disseminate information and ideas of all types and by whatever method one considers appropriate.

*This also means that freedom of expression has both an **individual** and a **social dimension** that must be guaranteed simultaneously: on the one hand, no individual may be arbitrarily prevented from expressing his or her own thoughts; on the other hand, there is a collective right to receive information from others and thoughts and opinions expressed by them.*

The interrelationship between the individual and social dimensions of freedom of expression implies, furthermore, that limitations on the possibility to disseminate information will restrict freedom of expression to the same extent.

In a democratic society the media are a true instrument of freedom of expression and, for a society to be free, journalists must be able to exercise their professional responsibilities independently and in safe conditions.

The right to impart information cannot be invoked to justify prior censorship and the establishment of monopolies within the media.

¹⁷⁰I-A Court HR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85 of November 13, 1985, Series A, No. 5, pp. 101-102, para. 33.

¹⁷¹Ibid., p. 102, para. 34.

3.4.2 Freedom of expression and the concept of public order in a democratic society

According to the understanding of the Inter-American Court, which follows logically from its reasoning as set forth in the preceding subsection,

“The concept of public order in a democratic society requires the guarantee of the widest possible circulation of news, ideas and opinions, as well as the widest access to information by society as a whole. Freedom of expression constitutes the primary and basic element of the public order of a democratic society, which is not conceivable without free debate and the possibility that dissenting voices be fully heard.”¹⁷²

In support of this opinion the Court referred to the jurisprudence of the European Court of Human Rights, according to which freedom of expression is “one of the essential pillars” of a democratic society and “a fundamental condition for its progress and the personal development of each individual”. As noted by the Inter-American Court, its European counterpart has also ruled that “this freedom should not only be guaranteed with regard to the dissemination of information and ideas that are received favourably or considered inoffensive or indifferent, but also with regard to those that offend, are unwelcome or shock the State or any sector of the population.” The European Court has further held that these principles are “of particular importance when applied to the press”.¹⁷³

In the *Compulsory Membership* case, the Court expressed the role of freedom of expression in the following terms:

“[It] is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a *conditio sine qua non* for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.”¹⁷⁴

*Freedom of expression is the basic element of the **public order of a democratic society**; it presupposes both the widest possible circulation of news, ideas and opinions and the widest possible access to information by society as a whole.*

¹⁷²I-A Court HR, *Incher Bronstein Case v. Peru*, judgment of February 6, 2001, Series C, No. 74, para. 151.

¹⁷³Ibid., paras. 152-153.

¹⁷⁴I-A Court HR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (arts. 13 and 29 American Convention on Human Rights)*, Advisory Opinion OC-5/85 of November 13, 1985, Series A, No. 5, p. 123, para. 70.

The hallmark of the concept of public order in a democratic society is free debate, that is to say a debate in which dissenting opinions can be fully heard and views can therefore be disseminated although they may shock, offend or disturb.

A society that is not well informed is not truly free.

3.4.3 Restrictions on freedom of expression: Meaning of the term “necessary to ensure”

It is recalled that, according to article 13(2) of the American Convention, one of the conditions that States must comply with in order to impose valid restrictions on the exercise of freedom of expression is that the restrictions must be “necessary to ensure” one or more of the legitimate aims mentioned in the article. The question therefore arises: What is meant by the term “necessary to ensure” in this context?

The Inter-American Court on Human Rights stated in the *Compulsory Membership* case that article 29 of the American Convention, which concerns restrictions on interpretation, article 32, which deals with relationships between duties and rights, and the Preamble to the Convention define the context within which the restrictions permitted under Article 13(2) must be interpreted:

“It follows from the repeated reference to ‘democratic institutions,’ ‘representative democracy’ and ‘democratic society’ that the question whether a restriction on freedom of expression imposed by a state is ‘necessary to ensure’ one of the objectives listed in subparagraphs (a) or (b) must be judged by reference to the legitimate needs of democratic societies and institutions.”¹⁷⁵

In its view, the “just demands of democracy” must, in particular, guide the interpretation of those provisions of the Convention “that bear a critical relationship to the preservation and functioning of democratic institutions”.¹⁷⁶

Having thus established the interpretative role played by the notion of a democratic society in the interpretation of article 13(2) of the Convention, the Court went on to analyse the term “necessary”. In doing so, it referred to the case law of the European Court of Human Rights, according to which the term “necessary” in article 10 of the European Convention, while not being synonymous with “indispensable”, implies the existence of a “pressing social need” and that for a restriction to be “necessary” it is not enough to show that it is “useful”, “reasonable” or “desirable”. In the opinion of the American Court,

¹⁷⁵I-A Court HR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (arts. 13 and 29 American Convention on Human Rights)*, Advisory Opinion OC-5/85 of November 13, 1985, Series A, No. 5, p. 106, para. 42. Article 29(c) states that “No provision of this Convention shall be interpreted as: ... precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government.” According to article 32(2), “The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.”

¹⁷⁶Ibid., p. 108, para. 44.

“This conclusion, which is equally applicable to the American Convention, suggests that the ‘necessity’ and, hence, the legality of restrictions imposed under Article 13(2) on freedom of expression, depend upon a showing that the restrictions are required by a compelling governmental interest. Hence if there are various options to achieve this objective, that which least restricts the right protected must be selected. Given this standard, it is not enough to demonstrate, for example, that a law performs a useful or desirable purpose; to be compatible with the Convention, the restrictions must be justified by reference to governmental objectives which, because of their importance, clearly outweigh the social need for the full enjoyment of the right Article 13 guarantees. Implicit in this standard, furthermore, is the notion that the restriction, even if justified by compelling interests, must be so framed as not to limit the right protected by Article 13 more than is necessary. That is, the restriction must be proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it.”¹⁷⁷

The term “necessary to ensure” means that a restriction imposed on the exercise of freedom of expression must be interpreted in the light of the just or legitimate demands of a democratic society. The restrictions must be justified by a compelling governmental interest, which clearly outweighs society’s interest in full enjoyment of freedom of expression. Restrictions are not “necessary” if only shown to be useful or desirable.

The term “necessary” therefore also means that a restriction must be proportionate to the legitimate compelling objective that necessitates it and that States must select the least invasive restriction needed to achieve that objective.

3.4.4 Indirect control of the mass media: The case of Ivcher Bronstein v. Peru

Issues relating to freedom of expression have seldom been raised before the Inter-American Court. However, article 13(1) and (3) was found to have been violated by Peru in the *Ivcher Bronstein* case.

Mr. Ivcher was the majority shareholder in the company that operated Peru’s television Channel 2 and was moreover authorized, as director and chairman of the Board of the company, to take editorial decisions on programming. In April 1997, in its programme called *Contrapunto*, Channel 2 aired investigative reports of national interest, such as reports on possible torture committed by members of the Army Intelligence Service, the alleged assassination of a named agent and the extremely large income allegedly obtained by an advisor to the Peruvian Intelligence Service.¹⁷⁸ Evidence showed that Channel 2 had an extensive audience throughout the country in 1997 and that, as a consequence of its editorial line, Mr. Ivcher was the object of threatening action of various kinds. A Peruvian national of Israeli origin, he was eventually deprived

¹⁷⁷ *Ibid.*, p. 109, para. 46.

¹⁷⁸ I-A Court HR, *Ivcher Bronstein Case v. Peru*, judgment of February 6, 2001, Series C, No. 74, para. 156.

of his Peruvian citizenship, following which a judge ordered the suspension of the exercise of his rights as majority shareholder and president of the company. His appointment as director was also revoked and a new Board was appointed.¹⁷⁹ The Court also established that, after the minority shareholders took over the administration of the company, “the journalists who had been working for *Contrapunto* were prohibited from entering the Channel and the program’s editorial line was modified.”¹⁸⁰

The Inter-American Court concluded that the annulment of Mr. Ivcher’s nationality “constituted an *indirect* means of restricting his freedom of expression, as well as that of the journalists who worked and conducted investigations for *Contrapunto*. ... By separating Mr. Ivcher from the control of Channel 2 and excluding the *Contrapunto* journalists, the State not only restricted their right to circulate news, ideas and opinions, but also affected the right of all Peruvians to receive information, thus limiting their freedom to exercise political options and develop fully in a democratic society.” Peru had therefore violated article 13 (1) and (3) of the Convention.¹⁸¹

Indirect measures to control the mass media for the purpose of impeding the communication and circulation of ideas and opinions of public interest are contrary to article 13(1) and (3) of the American Convention. Prohibited measures may thus involve indirect governmental or private controls over the mass media and a variety of other actions including harassment of journalists and owners of newspapers and radio and television stations.

3.4.5 Article 13(2) and the Compulsory Licensing of Journalists case

In its advisory opinion in the *Compulsory Licensing of Journalists* case, the Court examined the compatibility with article 13(2) of the American Convention of a scheme of compulsory licensing of journalists in Costa Rica. It was clear that this scheme could result in non-members of the Colegio de Periodistas incurring liability, including criminal liability, if they engaged in the professional practice of journalism. The requirement therefore constituted a restriction on freedom of expression for those who were not members of the Colegio.¹⁸² The Court had to examine whether this restriction could be justified on any of the grounds enumerated in article 13(2) of the Convention.

It observed “that the organization of professions in general, by means of professional ‘colegios,’ is not *per se* contrary to the Convention, but that it is a method for regulation and control to ensure that they act in good faith and in accordance with the ethical demands of the profession”. If the notion of public order contained in article

¹⁷⁹Ibid., paras. 158-160.

¹⁸⁰Ibid., para. 161.

¹⁸¹Ibid., paras. 162-164; emphasis added.

¹⁸²I-A Court HR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (arts. 13 and 29 American Convention on Human Rights)*, Advisory Opinion OC-5/85 of November 13, 1985, Series A, No. 5, pp. 114-115, para. 58.

13(2)(b) “is thought of ... as the conditions that ensure the normal and harmonious functioning of the institutions on the basis of a coherent system of values and principles, it is possible to conclude that the organization of the practice of professions is included in that order”.¹⁸³

However, the Court also noted, in particular, that the same concept of public order in a democratic society requires “the guarantee of the widest possible circulation of news, ideas and opinions as well as the widest access to information by society as a whole”, and that “freedom of expression is a cornerstone upon which the very existence of a democratic society rests.”¹⁸⁴ In the Court’s view, “journalism is the primary and principal manifestation of freedom of expression of thought. For that reason, because it is linked with freedom of expression, which is an inherent right of each individual, journalism cannot be equated to a profession that is merely granting a service to the public through the application of some knowledge or training acquired in a university or through those who are enrolled in a certain professional ‘colegio’”, such as those created for lawyers and medical doctors.¹⁸⁵ The Court therefore concluded

“that reasons of public order that may be valid to justify compulsory licensing of other professions cannot be invoked in the case of journalism because they would have the effect of permanently depriving those who are not members of the right to make full use of the rights that Article 13 of the Convention grants to each individual. Hence, it would violate the basic principles of a democratic public order on which the Convention itself is based.”¹⁸⁶

The Court nonetheless recognized the need “for the establishment of a code that would assure the professional responsibility and ethics of journalists and impose penalties for infringements of such a code” and it also believed “that it may be entirely proper for a State to delegate, by law, authority to impose sanctions for infringements of the code of professional responsibility and ethics”. However, when dealing with journalists the restrictions contained in article 13(2) “must be taken into account”.¹⁸⁷ It followed “that a law licensing journalists, which does not allow those who are not members of the ‘colegio’ to practice journalism and limits access to the ‘colegio’ to university graduates who have specialized in certain fields, is not compatible with the Convention.” Such a law would contain restrictions to freedom of expression that are not authorized by article 13(2) and would thus violate “not only the right of each individual to seek and impart information and ideas through any means of his choice, but also the right of the public at large to receive information without any interference”.¹⁸⁸ The Court consequently decided by unanimity that “the compulsory licensing of journalists is incompatible with Article 13 of the American Convention ... if it denies any person access to the full use of the news media as a means of expressing opinions or imparting information”, and that the Organic Law of the Association of Journalists of Costa Rica, was “incompatible” with article 13 “in that it [prevented]

¹⁸³Ibid., p. 122, para. 68.

¹⁸⁴Ibid., pp. 122-123, paras. 69-70.

¹⁸⁵Ibid., pp. 123-124, paras. 71-73.

¹⁸⁶Ibid., pp. 125-126, para. 76.

¹⁸⁷Ibid., pp. 127-128, para. 80.

¹⁸⁸Ibid., p. 128, para. 81.

certain persons from joining the Association of Journalists and, consequently [denied] them the full use of the mass media as a means of expressing themselves or imparting information”.¹⁸⁹

The organization of professions, such as those of lawyers and medical doctors, is not per se contrary to article 19 of the American Convention on Human Rights, given that such associations provide a means of ensuring that their members act in good faith and in accordance with the ethical demands of the profession.

On the other hand, as journalism is the primary and principle manifestation of freedom of expression in a democratic society, it would violate the principles of a democratic public order on which the American Convention is based to require them to belong to a specific organization if such compulsory membership denied them full access to the news media in order to express their views and transmit information.

3.5 Article 10 of the European Convention on Human Rights

Article 10 of the European Convention on Human Rights has been interpreted in numerous cases. Only a few will be examined in this section in order to illustrate some key aspects of the substantive content of freedom of expression at the European level.

According to article 10, “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.” However, the article does not prevent States “from requiring the licensing of broadcasting, television or cinema enterprises”.

As the exercise of these freedoms “carries with it duties and responsibilities”, article 10(2) provides a list of legitimate grounds for imposing “such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society”. These grounds are:

- ❖ “the interests of national security, territorial integrity or public safety”;
- ❖ “the prevention of disorder or crime”;
- ❖ “the protection of health or morals”;
- ❖ “the protection of the reputation or rights of others”;
- ❖ “for preventing the disclosure of information received in confidence”; and
- ❖ “for maintaining the authority and impartiality of the judiciary”.

¹⁸⁹Ibid., pp. 131-132, para. 85.

To be valid under article 10(2), the “formalities, conditions, restrictions or penalties” must *cumulatively* comply with *the principle of legality, the condition of legitimate purpose and the principle of necessity in a democratic society*.

It is noteworthy that, contrary to article 13 of the American Convention on Human Rights, article 10 of the European Convention “does not in terms prohibit the imposition of prior restraints on publication, as such”. As noted by the European Court of Human Rights, this is evidenced “not only by the words ‘conditions’, ‘restrictions’, ‘preventing’ and ‘prevention’ which appear in that provision” but also by its own case law. However,

“the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.”¹⁹⁰

Contrary to article 13 of the American Convention on Human Rights, article 10 of the European Convention on Human Rights does not expressly prohibit prior restraints on publication. However, in view of the inherent danger of such restraints, they must be subjected to the most careful scrutiny by the European Court of Human Rights.

To be lawful, any formalities, conditions, restrictions or penalties imposed by the Contracting States on freedom of expression under article 10 of the European Convention must cumulatively comply with the principle of legality, the condition of legitimate purpose and the principle of necessity in a democratic society.

3.5.1 Basic interpretative approach to freedom of expression

Before analysing the case law relating to article 10 of the Convention, it may be useful to highlight the basic interpretative approach adopted by the European Court of Human Rights when considering issues relating to freedom of expression. Its approach is conditioned by the role of freedom of expression in a democratic society, the Contracting States’ margin of appreciation and the Court’s own supervisory role. This basic interpretative approach has been consistently applied by the Court in its voluminous jurisprudence.¹⁹¹

The role of freedom of expression in a democratic society: The European Court has emphasized from the outset the important role played by freedom of expression in a democratic society. Thus, in the early *Handyside* case it ruled:

¹⁹⁰*Eur. Court HR, Case of the Observer and Guardian v. the United Kingdom, judgment of 26 November 1991, Series A, No. 216, p. 30, para. 60.*

¹⁹¹Further examples of cases involving article 10 of the European Convention on Human Rights may be found by using the search engine on the Court’s web site (<http://hudoc.coe.int>).

“The Court’s supervisory functions oblige it to pay the utmost attention to the principles characterising a ‘democratic society’. Freedom of expression constitutes one of the essential foundations of such a 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’. This means, amongst other things, that every ‘formality’, ‘condition’, ‘restriction’ or ‘penalty’ imposed in this sphere must be proportionate to the legitimate aim pursued.”¹⁹²

In the *Sunday Times* case the Court affirmed that:

“These principles are of particular importance as far as the press is concerned. They are equally applicable to the field of the administration of justice, which serves the interests of the community at large and requires the co-operation of an enlightened public. There is general recognition of the fact that the courts cannot operate in a vacuum. Whilst they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialised journals, in the general press or amongst the public at large. Furthermore, whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them.”¹⁹³

In the later *Observer and Guardian* case, the Court added that “were it otherwise, the press would be unable to play its vital role of ‘public watchdog’.”¹⁹⁴

States’ margin of appreciation v. European supervision: With regard to the interpretation of the limitation provision in article 10(2) of the Convention, the Court has stated that the exceptions contained therein:

“must be narrowly interpreted and the necessity of any restrictions must be convincingly established.”¹⁹⁵

¹⁹²*Eur. Court HR, Handyside Case v. the United Kingdom, judgment of 7 December 1976, Series A, No. 24, p. 23, para. 49.* This case concerned the applicant’s criminal conviction and the seizure and subsequent forfeiture and destruction of the matrix and of hundreds of copies of the Little Red Schoolbook for the purpose of protecting morals in a democratic society. This book was primarily aimed at children in the 12-18 age group and included a section on sex. The Court concluded that article 10 had not been violated by the measures taken in this case. See p. 28, para. 59.

¹⁹³*Eur. Court HR, the Sunday Times Case v. the United Kingdom, judgment of 26 April 1979, Series A, No. 30, p. 40, para. 65.*

¹⁹⁴*Eur. Court HR, Case of the Observer and Guardian v. the United Kingdom, judgment of 26 November 1991, Series A, No. 216, p. 30, para. 59(b).*

¹⁹⁵*Ibid.*, p. 30, para. 59(a).

While “the adjective ‘necessary’ within the meaning of Article 10 § 2, implies the existence of a ‘pressing social need’,”¹⁹⁶

“[it] is not synonymous with ‘indispensable’ (cf., in Articles 2 § 2 and 6 § 1, the words ‘absolutely necessary’ and ‘strictly necessary’ and, in Article 15 § 1, the phrase ‘to the extent strictly required by the exigencies of the situation’), neither has it the flexibility of such expressions as ‘admissible’, ‘ordinary’ (cf. Article 4 § 3), ‘useful’ (cf. the French text of the first paragraph of Article 1 of Protocol No. 1), ‘reasonable’ (cf. Articles 5 § 3 and 6 § 1) or ‘desirable’. Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of ‘necessity’ in this context.

Consequently, Article 10 § 2 leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator (‘prescribed by law’) and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force.”¹⁹⁷

Yet article 10(2) “does not give the Contracting States an unlimited power of appreciation. The Court ... is empowered to give the final ruling on whether a ‘restriction’ or ‘penalty’ is reconcilable with freedom of expression as protected by Article 10. The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its ‘necessity’; it covers not only the basic legislation but also the decision applying it, even one given by an independent court.”¹⁹⁸

Moreover, the Court’s supervision is not limited to “ascertaining whether a respondent State exercised its discretion reasonably, carefully and in good faith. Even a Contracting State so acting remains subject to the Court’s control as regards the compatibility of its conduct with the engagements undertaken under the Convention.”¹⁹⁹

In short, for the limitation on the exercise of freedom of expression to be “convincingly established”, the European Court must be satisfied that the impugned measures were “proportionate to the legitimate aim pursued” and that the reasons adduced by the national authorities to justify them were “relevant and sufficient”.²⁰⁰

Lastly, it should be observed in this context that the Contracting States’ margin of appreciation is not identical with respect to each of the aims listed in article 10(2). As will be seen in the next subsection, the more objective the legitimate aim, the less power of appreciation is granted to States.²⁰¹

¹⁹⁶Ibid., p. 30, para. 59(c).

¹⁹⁷*Eur. Court HR, Handyside Case v. the United Kingdom, judgment of 7 December 1976, Series A, No. 24, p. 22, para. 48.*

¹⁹⁸Ibid., p. 23, para. 49.

¹⁹⁹*Eur. Court HR, the Sunday Times Case v. the United Kingdom, judgment of 26 April 1979, Series A, No. 30, p. 36, para. 59.*

²⁰⁰*Eur. Court HR, Case of the Observer and Guardian v. the United Kingdom, judgment of 26 November 1991, Series A, No. 216, p. 30, paras. 59(a) and (b).*

²⁰¹*Eur. Court HR, the Sunday Times Case v. the United Kingdom, judgment of 26 April 1979, Series A, No. 30, pp. 36-37, para. 59.*

Freedom of expression as guaranteed by article 10 of the European Convention on Human Rights constitutes one of the essential foundations of a democratic society.

Freedom of expression is also one of the basic conditions for the progress of a democratic society and for the development of every individual.

The hallmarks of a democratic society include pluralism, tolerance and broadmindedness, which means that, subject to the restrictions defined in article 10(2) of the European Convention, the right to freedom of expression covers not only information and ideas that are considered acceptable or otherwise inoffensive but also information and ideas that offend, shock or disturb the State or any part of its population.

These principles are of particular importance to the press, which plays the role of a public watchdog by imparting information and ideas. They are also important to the general public, which has the right to receive such information and ideas.

The term “necessary in a democratic society” in article 10(2) of the European Convention means that there must be “a pressing social need” for limitations imposed on the exercise of freedom of expression. It must, in other words, be “convincingly established” that the measures concerned are proportionate to the legitimate aim pursued. To this end, the Contracting States have to show that the reasons adduced in support of the measures are both “relevant” and “sufficient”. It is not enough in order to fulfil this requirement that the Contracting States show that they have acted carefully or in good faith.

Although domestic authorities have a certain margin of appreciation in deciding the necessity of a measure, this power is coupled with supervision by the European Court of Human Rights.

States’ power of appreciation is not identical in each situation but changes with the legitimate aim to be pursued. The more objective the legitimate purpose, the less power of appreciation is granted to States in deciding on the necessity of the restrictive measures.

3.5.2 Freedom of the press

Freedom of the press has been the subject of many cases under article 10, cases that prove not only the frailty but also the fundamental importance of a free and critical press in Europe. In this subsection examples will be given of cases involving restrictions on freedom of the press in order to maintain the authority of the judiciary and to protect the reputation or rights of others.

Maintenance of the authority of the judiciary: The *Sunday Times* case concerned a court injunction preventing the newspaper from publishing an article on the thalidomide tragedy on the ground that it would constitute contempt of court. The article concerned thalidomide children and the settlement of their compensation claims

in the United Kingdom. Thalidomide was a drug prescribed, in particular, for expectant mothers, some of whom subsequently gave birth to children suffering from severe deformities. Distillers Company (Biochemicals) Limited, which manufactured and marketed the drug in the United Kingdom, eventually entered into settlements with a great majority of the victims of the drug. The applicants alleged, inter alia, that the injunction issued by the High Court and upheld by the House of Lords constituted a breach of article 10 of the Convention.²⁰²

The European Court had no difficulty deciding that there had been in this case “interference by public authority” in the exercise of the applicants’ freedom of expression as guaranteed by article 10(1) of the Convention. To be justified, such interference had to meet the conditions laid down in article 10(2).²⁰³

With regard to the condition that the interference must be “*prescribed by law*”, the Court first noted that the term “law” in article 10(2) “covers not only statute but also unwritten law”.²⁰⁴ Furthermore, the expression “prescribed by law” requires that “the law must be adequately accessible” and “formulated with sufficient precision to enable the citizen to regulate his conduct”.²⁰⁵ After carefully examining whether the law of contempt of court in English law satisfied these criteria of “*accessibility*” and “*foreseeability*”, the European Court concluded that it did and that the interference complained of was “prescribed by law” as required by article 10(2).²⁰⁶

The *foreseeability criterion* means that a person “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. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable.”²⁰⁷ As applied in the *Sunday Times* case, the foreseeability principle rather means that a person must be able to foresee, to a degree that is “reasonable in the circumstances”, the risk that a certain conduct entails.²⁰⁸

The next question to be decided was whether the interference had *a legitimate aim* in conformity with article 10(2). Both the applicants and the Government agreed that the law of contempt of court served the purpose of “safeguarding not only the impartiality and authority of the judiciary but also the rights and interests of litigants”.²⁰⁹ Explaining the term “judiciary” (French: “*pouvoir judiciaire*”), the Court stated that it comprises

“the machinery of justice or the judicial branch of government as well as the judges in their official capacity. The phrase ‘authority of the judiciary’ includes, in particular, the notion that the courts are, and are accepted by the public at large as being, the proper forum for the ascertainment of legal rights and obligations and the settlement of disputes relative thereto;

²⁰²*Eur. Court HR, the Sunday Times Case v. the United Kingdom, judgment of 26 April 1979, Series A, No. 30, p. 27, para. 38.*

²⁰³*Ibid.*, p. 29, para. 45.

²⁰⁴*Ibid.*, p. 30, para. 47.

²⁰⁵*Ibid.*, p. 31, para. 49.

²⁰⁶*Ibid.*, pp. 31-33, paras. 50-53.

²⁰⁷*Ibid.*, p. 31, para. 49.

²⁰⁸*Ibid.*, p. 33, para. 52.

²⁰⁹*Ibid.*, p. 33, para. 54.

further, that the public at large have respect for and confidence in the courts' capacity to fulfil that function."²¹⁰

Having examined the domestic law at issue, the Court took the view that “the majority of the categories of conduct covered by the law of contempt relate either to the position of the judges or to the functioning of the courts and of the machinery of justice: ‘maintaining the authority and impartiality of the judiciary’ is therefore one purpose of that law ... [I]nsofar as the law of contempt may serve to protect the rights of litigants, this purpose is already included in the phrase ‘maintaining the authority and impartiality of the judiciary’”. It was therefore not necessary to consider as a separate issue whether the law of contempt had the further purpose of safeguarding the rights of others.²¹¹ As the question of “impartiality” had not been pleaded before the European Court, the Court only had to consider whether the reasons invoked by the House of Lords for concluding that the draft article was objectionable fell “within the aim of maintaining the ‘authority ... of the judiciary’ as interpreted by the Court”. The Court concluded that they did and accepted, *inter alia*, the following reasons given by the House of Lords:

- ❖ “by ‘prejudging’ the issue of negligence [the article] would have led to disrespect for the processes of the law or interfered with the administration of justice;”
- ❖ “prejudgment by the press would have led inevitably in this case to replies by the parties, thereby creating the danger of a ‘trial by newspaper’ incompatible with the proper administration of justice;” and
- ❖ “the courts owe it to the parties to protect them from the prejudices of prejudgment which involves their having to participate in the flurries of pre-trial publicity.”²¹²

As the interference in this case complied both with *the principle of legality* and *the condition of a legitimate purpose*, the crucial question that remained to be answered was whether it could be considered to be “*necessary in a democratic society*”. In other words,

- ❖ Did the interference correspond to a “pressing social need”?
- ❖ Was it “proportionate to the legitimate aim pursued”?
- ❖ Were the reasons given by the domestic authorities to justify it “relevant” and “sufficient”?²¹³

The Court noted in this regard that a Contracting State’s “power of appreciation is not identical as regards each of the aims listed in Article 10 (2)”. In contrast to the “protection of morals”, for instance, the “authority” of the judiciary is a “far more objective notion” concerning which “the domestic law and practice of the Contracting States reveal a fairly substantial measure of common ground ... Accordingly, here a more extensive European supervision corresponds to a less discretionary power of appreciation” at the domestic level.²¹⁴

²¹⁰Ibid., p. 34, para. 55.

²¹¹Ibid., p. 34, paras. 55-56.

²¹²Ibid., pp. 34-35, paras. 56-57.

²¹³Ibid., p. 38, para. 62.

²¹⁴Ibid., pp. 36-37, para. 59.

In its detailed reasoning, the Court recalled, inter alia, the principles relating to the importance of freedom of expression in a democratic society, which are “equally applicable to the field of the administration of justice”. The exceptions to this freedom contained in article 10(2) “must be narrowly interpreted”.²¹⁵ The Court then pointed out that article 10 “guarantees not only the freedom of the press to inform the public but also the right of the public to be properly informed ... In the present case, the families of numerous victims of the tragedy, who were unaware of the legal difficulties involved, had a vital interest in knowing all the underlying facts and the various possible solutions. They could be deprived of this information which was crucially important for them, only if it appeared absolutely certain that its diffusion would have presented a threat to the ‘authority of the judiciary’”.²¹⁶ The Court therefore had to “weigh the interests involved and assess their respective force”. In so doing, it observed, inter alia, that the facts of the case “did not cease to be a matter of public interest merely because they formed the background to pending litigation. By bringing to light certain facts, the article might have served as a break on speculative and unenlightened discussion.”²¹⁷ It concluded that “the interference complained of did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression within the meaning of the Convention”. The Court therefore found the reasons for the restraint imposed on the applicants not to be sufficient under Article 10 (2). That restraint proved not to be proportionate to the legitimate aim pursued; it was not necessary in a democratic society for maintaining the authority of the judiciary.²¹⁸ There had, consequently, been a violation of article 10.

Protection of the reputation or rights of others: The case of *Lingens v. Austria* concerned the applicant’s conviction for having defamed Mr. Kreisky, the then Chancellor of Austria. In a couple of articles the applicant had, inter alia, criticized Mr. Kreisky’s accommodating attitude towards former Nazis taking part in Austrian politics, using terms such as “the basest opportunism”, “immoral” and “undignified” on the basis of which he was sentenced to a fine and his articles were ordered confiscated.²¹⁹

The European Court of Human Rights accepted that there had been “interference by public authority” with the exercise of Mr. Lingens’s freedom of expression that needed to be justified under article 10(2) in order not to constitute a violation of the Convention, that the conviction was “prescribed by law” since it was based on article 111 of the Austrian Criminal Law, and that the measure pursued a legitimate aim in that it was designed to protect “the reputation or rights of others”.²²⁰ The question that remained to be decided was therefore whether the conviction could be justified as being “***necessary in a democratic society***” in pursuance of the legitimate aim.

²¹⁵Ibid., pp. 40-41, para. 65.

²¹⁶Ibid., pp. 41-42, para. 66.

²¹⁷Ibid., p. 42, para. 66.

²¹⁸Ibid., p. 42, para. 67.

²¹⁹*Eur. Court HR, Case of Lingens v. Austria, judgment of 8 July 1986, Seris A, No. 103*, pp. 21-23, paras. 26-30.

²²⁰Ibid., p. 24, paras. 35-36.

Recalling its *Handyside* and *Sunday Times* rulings, the Court emphasized that it could not accept the opinion, expressed in the judgment of the Vienna Court of Appeal, “to the effect that the task of the press was to impart information, the interpretation of which had to be left primarily to the reader”.²²¹ It added that:

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

The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt Article 10 § 2 enables the reputation of others – that is to say, of all individuals – to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.”²²²

As to the particular facts of Mr. Lingens’s case, the European Court observed that his articles “dealt with political issues of public interest in Austria which had given rise to many heated discussions concerning the attitude of Austrians in general – and the Chancellor in particular – to National Socialism and to the participation of former Nazis in the governance of the country. The content and tone of the articles were on the whole fairly balanced but the use of the aforementioned expressions in particular appeared likely to harm Mr. Kreisky’s reputation. However, since the case concerned Mr. Kreisky in his capacity as a politician, regard must be had to the background against which these articles were written.” They had appeared after the general election in 1975, when Mr. Kreisky had accused Mr. Wiesenthal, the President of the Jewish Documentation Centre, of using “mafia methods” after he had made a number of revelations concerning the past of the President of the Austrian Liberal Party, Mr. Kreisky’s likely coalition partner. “The impugned expressions [were] therefore to be seen against the background of a post-election political controversy; ... in this struggle each used the weapons at his disposal.” Furthermore, these were circumstances that “must not be overlooked” when assessing, under article 10(2) of the European Convention, “the penalty imposed on the applicant and the reasons for which the domestic courts imposed it”.²²³

The European Court noted in this regard that, although the disputed articles had been “widely disseminated” so that the confiscation order imposed on the applicant “did not strictly speaking prevent him from expressing himself, it nonetheless amounted to a kind of censure, which would be likely to discourage him from making criticisms of that kind again in future.” It added that:

²²¹Ibid., p. 26, para. 41.

²²²Ibid., p. 26, para. 42.

²²³Ibid., pp. 26-27, para. 43.

“In the context of political debate such a sentence would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, a sanction such as this is liable to hamper the press in performing its task as purveyor of information and public watchdog.”²²⁴

The Court then observed “that the facts on which Mr. Lingens founded his value judgment were undisputed, as was also his good faith”. It was impossible, in the Court’s view, to prove the truth of value-judgments as required by article 111 of the Austrian Criminal Code in order to escape conviction. Moreover, such a requirement “infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 of the Convention”.²²⁵ The Court therefore concluded that the interference with Mr. Lingens’s freedom of expression was not “necessary in a democratic society” in that it was “disproportionate to the legitimate aim pursued”.²²⁶

In the case of *Jersild v. Denmark*, the applicant was convicted of aiding and abetting three youths – members of a group called the “Greenjackets” – who were themselves convicted of making insulting or degrading remarks against persons of foreign origin. The remarks had been made in a television programme produced by the applicant for the stated purpose of providing “a realistic picture of a social problem”. He was sentenced to pay day-fines of 1,000 Danish kroner or, alternatively, to five days’ imprisonment.²²⁷

It was common ground in this case that the conviction constituted an interference with Mr. Jersild’s freedom of expression, that it was “prescribed by law”, namely, articles 266(b) and 23(1) of the Danish Penal Code, and that it pursued the legitimate aim of protecting “the reputation or rights of others”.²²⁸

The only point in dispute was whether the measures complained of were “*necessary in a democratic society*”. The Court emphasized at the outset that it was “particularly conscious of the vital importance of combating racial discrimination in all its forms and manifestations” and that, consequently, “the object and purpose” of the United Nations International Convention on the Elimination of All Forms of Racial Discrimination were

“of great weight in determining whether the applicant’s conviction, which – as the Government ... stressed – was based on a provision enacted in order to ensure Denmark’s compliance with the UN Convention, was ‘necessary’ within the meaning of Article 10 § 2”.²²⁹

Denmark’s obligations under article 10 of the European Convention must therefore “be interpreted, to the extent possible, so as to be reconcilable with its obligations under the UN Convention”.²³⁰

²²⁴Ibid., p. 27, para. 44.

²²⁵Ibid., p. 28, para. 46.

²²⁶Ibid., p. 28, para. 47.

²²⁷*Eur. Court HR, Case of Jersild v. Denmark, judgment of 23 September 1994, Series A, No. 298, p. 14-15, paras. 13-14.*

²²⁸Ibid., p. 20, para. 27.

²²⁹Ibid., p. 22, para. 30.

²³⁰Ibid., pp. 22-23, para. 30.

Reiterating the importance of freedom of expression and the role of the press in a democratic society, the Court emphasized that these principles “doubtless apply also to the audiovisual media”. It added that:

“In considering the ‘duties and responsibilities’ of a journalist, the potential impact of the medium concerned is an important factor and it is commonly acknowledged that the audiovisual media have often a much more immediate and powerful effect than the print media ... The audiovisual media have means of conveying through images meanings which the print media are not able to impart.

At the same time, the methods of objective and balanced reporting may vary considerably, depending among other things on the media in question. It is not for the Court, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists. *In this context, the Court recalls that Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed.*”²³¹.

The Court thus had to decide whether the reasons adduced by the Danish authorities to justify the conviction of Mr. Jersild were “relevant and sufficient and whether the means employed were proportionate to the legitimate aim pursued”. In so doing, “the Court [had] to satisfy itself that the national authorities did apply standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts.”²³²

The Court’s assessment had regard to “the manner in which the Greenjackets feature was prepared, its contents, the context in which it was broadcast and the purpose of the programme”. It also bore in mind “the obligations on States under the UN Convention and other international instruments to take effective measures to eliminate all forms of racial discrimination and to prevent and combat racist doctrines and practices”.²³³

In so doing, the Court found, in the first place, that the reasons advanced by the national authorities were “relevant”. In its view, “the national courts laid considerable emphasis on the fact that the applicant had himself taken the initiative of preparing the Greenjackets feature and that he not only knew in advance that racist statements were likely to be made during the interview but also had encouraged such statements. He had edited the programme in such a way as to include the offensive assertions. Without his involvement, the remarks would not have been disseminated to a wide circle of people and would thus not have been punishable.”²³⁴

On the other hand, considering the programme in its context, including the presenter’s introduction, there was “no reason to doubt” that the interviews fulfilled the stated aim of addressing aspects of the problem of racism in Denmark. “Taken as a whole, the feature could not objectively have appeared to have as its purpose the propagation of racist views and ideas” because

²³¹Ibid., p. 23, para. 31; emphasis added.

²³²Ibid., pp. 23-24, para. 31.

²³³Ibid., p. 24, para. 31.

²³⁴Ibid., p. 24, para. 32.

“it clearly sought – by means of an interview – to expose, analyse and explain this particular group of youths, limited and frustrated by their social situation, with criminal records and violent attitudes, thus dealing with specific aspects of a matter that already then was of great public concern.”²³⁵

Furthermore, the European Court was “not convinced by the argument, also stressed by the national courts ... that the Greenjackets item was presented without any attempt to counterbalance the extremist views expressed. Both the TV presenter’s introduction and the applicant’s conduct during the interviews clearly dissociated him from the persons interviewed.”²³⁶ The Court added that:

“News 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. *In this regard the Court does not accept the Government’s argument that the limited nature of the fine is relevant; what matters is that the journalist was convicted.*”²³⁷

There could be no doubt “that the remarks in respect of which the Greenjackets were convicted ... were more than insulting to members of the targeted groups and did not enjoy the protection of Article 10”. However, “it [had] not been shown, that, considered as a whole, the feature was such as to justify also [the applicant’s] conviction of, and punishment for, a criminal offence under the Penal Code.”²³⁸ It followed that “the reasons adduced in support of the applicant’s conviction and sentence were not sufficient to establish convincingly that the interference thereby occasioned with the enjoyment of his right to freedom of expression was ‘necessary in a democratic society’; in particular the means employed were disproportionate to the aim of protecting ‘the reputation or rights of others.’” The measures therefore violated article 10 of the Convention.²³⁹

The protection of the reputation or rights of others was also at issue in the case of *Bergens Tidende and Others v. Norway* concerning a Norwegian newspaper, its editor-in-chief and one of its journalists. The complaint originated in an article published in the newspaper concerning women who were dissatisfied with the work of a cosmetic surgeon. The article followed a previous article in which the newspaper had described the surgeon’s work and the advantages of cosmetic surgery, following which a number of women had contacted the newspaper with their complaints.²⁴⁰ The second article, which was critical of the surgery performed, was published on the newspaper’s front page with the title “Beautification resulted in disfigurement”. In it the women

²³⁵Ibid., p. 24, para. 33.

²³⁶Ibid., p. 25, para. 34.

²³⁷Ibid., p. 25, para. 35; emphasis added.

²³⁸Ibid., pp. 25-26, para. 35.

²³⁹Ibid., p. 26, para. 37.

²⁴⁰*Eur. Court HR, Case of Bergens Tidende and Others v. Norway, judgment of 2 May 2000*; the text used in this context is the unedited version of the judgment found on the Court’s web site: <http://hudoc.echr.coe.int/>, paras. 9-11.

stated, inter alia, that they had been “disfigured and ruined for life”.²⁴¹ As a consequence of the negative publicity, the surgeon lost patients and had to close his business. Following complaints about him to the health authorities by dissatisfied patients, the authorities concluded that he had not performed any improper surgery and therefore took no action.²⁴² The surgeon instituted defamation proceedings against the applicants and, although the court of second instance found in their favour, the Supreme Court eventually found in favour of the surgeon, awarding him damages and costs totalling 4,709,861 Norwegian kroner.²⁴³

There was agreement between the parties before the European Court that this measure constituted an interference with the applicants’ right to freedom of expression that needed to be justified under article 10(2), that it was “prescribed by law”, namely Section 3(6) of the Damage Compensation Act 1969, and that it pursued the legitimate aim of protecting “the reputation or rights of others”. As in so many other cases brought under article 10 of the European Convention, the only question that remained to be decided was whether the interference could be considered to be “*necessary in a democratic society*”.²⁴⁴

Recalling its well-established case law on freedom of expression and the essential role played by the press in a democratic society, including its obligations and responsibilities, the Court stated that it was

“mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation ... In such cases as the present one, the national margin of appreciation is circumscribed by the interests of a democratic society in enabling the press to exercise its vital role of ‘public watchdog’ by imparting information of serious public concern.”²⁴⁵

In the Court’s view, “the impugned articles ... concerned an important aspect of human health and as such raised serious issues affecting the public interest.” Where, as in this case, “measures taken by the national authorities are capable of discouraging the press from disseminating information on matters of legitimate public concern, careful scrutiny of the proportionality of the measures on the part of the Court is called for.”²⁴⁶

However, the exercise of freedom of expression “carries with it ‘duties and responsibilities’ which also apply to the press ... [T]hese ‘duties and responsibilities’ assume significance when, as in the present case, there is question of attacking the reputation of private individuals and undermining the ‘rights of others’.” Consequently,

“by reason of the ‘duties and responsibilities’ inherent in the exercise of freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.”²⁴⁷

²⁴¹Ibid., para. 12.

²⁴²Ibid., paras. 17-19.

²⁴³Ibid., paras. 20-24.

²⁴⁴Ibid., para. 33.

²⁴⁵Ibid., para. 49.

²⁴⁶Ibid., paras. 51-52.

²⁴⁷Ibid., para. 53.

The Court attached considerable weight to the fact “that in the present case the women’s accounts of their treatment by Dr R. were found not only to have been essentially correct but also to have been accurately recorded by the newspaper.” Reading the articles as a whole, the Court could not find that the statements were excessive or misleading.²⁴⁸ “The Court [was] further unable to accept that the reporting of the accounts of the women showed a lack of any proper balance.” It pointed out that “news reporting based on interviews constitutes one of the most important means whereby the press is able to play its vital role of ‘public watchdog’.”²⁴⁹ Invoking its judgment in the *Jersild* case, the Court stated that “the methods of objective and balanced reporting may vary considerably, depending among other things on the medium in question”; it was not for the Court, any more than it was for the national courts, “to substitute its own views for those of the press as to what techniques of reporting should be adopted by journalists.” Lastly, the Court noted that on the same page as the first impugned article, there was an interview with another cosmetic surgeon referring to the “small margins between success and failure” in this field as well as an interview with the accused cosmetic surgeon who drew attention to the fact that complications occurred in 15-20 per cent of all operations. Moreover, another two articles defending Dr. R. had been published by the newspaper.²⁵⁰

While accepting that the publication of the relevant articles “had serious consequences for the professional practice of Dr R.”, the European Court was of the opinion that, “given the justified criticisms relating to his post-surgical care and follow-up treatment, it was inevitable that substantial damage would in any event be done to his professional reputation.”²⁵¹ In the light of all these considerations, the Court could not find “that the undoubted interest of Dr R. in protecting his professional reputation was sufficient to outweigh the important public interest in the freedom of the press to impart information on matters of legitimate public concern. In short, the reasons relied on by the respondent State, although relevant, [were] not sufficient to show that the interference complained of was ‘necessary in a democratic society’.” It followed that “there was no reasonable relationship of proportionality between the restrictions placed by the measures applied by the Supreme Court on the applicants’ right to freedom of expression and the legitimate aim pursued.”²⁵² Article 10 of the European Convention had therefore been violated.

Subject to the restrictions specified in article 10(2) of the European Convention on Human Rights, freedom of expression has to be guaranteed to allow the press to perform its task as purveyor of information and as public watchdog.

Freedom of political debate is at the very core of the concept of a democratic society which permeates the European Convention.

²⁴⁸Ibid., para. 56.

²⁴⁹Ibid., para. 57.

²⁵⁰Ibid., para. 57.

²⁵¹Ibid., para. 59.

²⁵²Ibid., para. 60.

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.

*Freedom of the press protects not only the substance of ideas and information but also the **form** in which they are conveyed and journalists therefore have the right to decide what technique of reporting to adopt.*

The exercise of freedom of expression carries with it “duties and responsibilities”. To benefit from the protection of article 10 of the European Convention when reporting on issues of general interest, journalists are required to act in good faith in order to provide accurate and reliable information in accordance with the ethics of their profession.

News 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. Punishment of journalists for assisting in the dissemination of statements by other persons should not therefore be envisaged unless there are particularly strong reasons for doing so.

Convictions or other sanctions on reporting are likely to hamper the press in performing its task as a public watchdog.

It may be necessary in a democratic society to restrict the exercise of freedom of expression, for instance to maintain “the authority and impartiality of the judiciary” and to protect “the reputation or rights of others”.

However, a matter does not cease to be of public interest just because it is part of pending litigation. Interference with freedom of expression in such a matter is therefore justified only if it corresponds to a social need that is sufficiently pressing to outweigh the public interest in the free flow of information. The Contracting States must provide relevant and sufficient reasons to establish convincingly that such a need exists to justify the interference.

Although political leaders also enjoy protection for their “reputation or rights” under article 10(2) of the Convention, the limits of acceptable criticism are wider in their case than in the case of private individuals. When politicians act in their official capacity, the requirement that they be protected under article 10(2) must be weighed against the interest of an open discussion of political issues.

3.5.3 Freedom of expression of elected members of professional organizations

The case of *Nilsen and Johnsen v. Norway* raised the question of freedom of expression for members of professional organizations, in this case policemen. The first applicant was a police inspector and Chairman of the Norwegian Police Association and the second a police constable and Chairman of the Bergen Police Association. Their complaint under article 10 originated in their conviction by the Oslo City Court

for defamation under the Norwegian Penal Code. The defamatory statements were published in three newspapers and concerned critical remarks regarding a professor's reports on police brutality. One applicant was ordered to pay non-pecuniary damages to the professor and both applicants were ordered to pay him substantial sums for legal costs.²⁵³

It was agreed among the parties that the impugned measures interfered with the applicants' freedom of expression, that the interference was "prescribed by law" and pursued a legitimate aim, namely "the protection of the reputation or rights of others". It therefore only remained for the European Court of Human Rights to decide whether the measure was "*necessary in a democratic society*".²⁵⁴ This question was of particular importance in the case, given that the applicants had tried to counter serious allegations of misconduct by the police in the Norwegian city of Bergen. The Court held in this regard that:

"A particular feature of the present case is that the applicants were sanctioned in respect of statements they had made as representatives of police associations in response to certain reports publicising allegations of police misconduct. While there can be no doubt that any restrictions placed on the right to impart and receive information on arguable allegations of police misconduct call for a strict scrutiny on the part of the Court ... the same must apply to speech aimed at countering such allegations since it forms part of the same debate. This is especially the case where, as here, the statements in question have been made by elected representatives of professional associations in response to allegations calling into question the practices and integrity of the profession. Indeed, it should be recalled that the right to freedom of expression under Article 10 is one of the principal means of securing effective enjoyment of the right to freedom of assembly and association as enshrined in Article 11."²⁵⁵

The European Court considered that the reasons relied upon by the Norwegian courts were "*clearly relevant*" in that they aimed at protecting the professor's reputation. The Norwegian Supreme Court, for instance, had found that the defamatory statements amounted to accusations of "falsehood", "deliberate lies", "unworthy and malicious motives" and "dishonest motives".²⁵⁶ But were these reasons "*sufficient*" for the purposes of article 10(2)? The Court observed in this regard that the case had its background "in a long and heated public debate in Norway on investigations into allegations of police violence, notably in the city of Bergen" and that "the impugned statements clearly bore on a matter of serious public concern." Importantly, however, it noted in this regard

"that, according to the Strasbourg Court's case law, there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest."²⁵⁷

²⁵³ *Eur. Court HR, Case of Nilsen and Johnsen v. Norway, judgment of 25 November 1999, Reports 1999-VIII, pp. 72-75, para. 25, and p. 76, para. 27.*

²⁵⁴ *Ibid.*, p. 82, para. 39.

²⁵⁵ *Ibid.*, pp. 85-86, para. 44.

²⁵⁶ *Ibid.*, p. 86, para. 45; emphasis added.

²⁵⁷ *Ibid.*, pp. 86-87, para. 46.

However, “even in debate on matters of serious public concern, there must be limits to the right to freedom of expression.” The issue was therefore “whether the applicants [had] exceeded the limits of permissible criticism”.²⁵⁸

The European Court accepted that the Norwegian courts were justified in declaring null and void the statement accusing the professor of deliberate lies, since this statement “exceeded the limits of permissible criticism”. However the same was not true of the remaining statements, which were “rather akin to value judgments”.²⁵⁹

In assessing the necessity for the interference, the Court also had regard to “the role played by the injured party in the present case”. It noted that “he had used a number of derogatory expressions, such as ‘misinformation’, ‘despotism’” and had alleged that there was “a ‘criminal sub-culture’ in the Bergen police”.²⁶⁰ However,

“bearing in mind that the applicants were, in their capacity as elected representatives of professional associations, responding to criticism of the working methods and ethics within the profession, the Court considers that, in weighing the interests of free speech against those of protection of reputation under the necessity test in Article 10 § 2 of the Convention, greater weight should be attached to the plaintiff’s own active involvement in a lively public discussion than was done by the national courts when applying national law... The statements at issue were directly concerned with the plaintiff’s contribution to that discussion. In the Court’s view, a degree of exaggeration should be tolerated in the context of such a heated and continuing public debate of affairs of general concern, where on both sides professional reputations were at stake.”²⁶¹

In the light of the foregoing, the Court was “not satisfied” that the remaining statements “exceeded the limits of permissible criticism for the purposes of” article 10 of the Convention. At the heart of the long and heated public discussion was the question of the truth of allegations of police violence and there was factual support for the assumption that false allegations had been made by informers. The statements in question essentially addressed this issue and the admittedly harsh language in which they were expressed was not incommensurate with that used by the injured party who, since an early stage, had participated as a leading figure in the debate. The Court concluded that there had been a violation of article 10, since there were not “sufficient reasons” to support the interference with the applicant’s freedom of expression, which was therefore not “necessary in a democratic society”.²⁶²

There is little scope under article 10(2) of the European Convention for restrictions on political speech or on debate on questions of public interest. However, when persons criticize others, there is a limit that may not be exceeded.

²⁵⁸Ibid., p. 87, para. 47.

²⁵⁹Ibid., p. 87, paras. 49-50.

²⁶⁰Ibid., pp. 88-89, para. 52.

²⁶¹Ibid., p. 89, para. 52.

²⁶²Ibid., p. 89, para. 53.

Restrictions placed on the right to impart and receive information on arguable allegations of, for instance, police misconduct call for strict European supervision. The same applies to restrictions on speech aimed at countering such allegations, since they form part of the same debate. This approach is particularly valid where the impugned statements have been made by elected representatives of professional organizations in response to alleged violations of their professional integrity and ethics. Moreover, freedom of expression as guaranteed by article 10 of the European Convention on Human Rights is one of the principal means of securing the effective enjoyment of freedom of assembly and association guaranteed by article 11.

3.5.4 Freedom of expression of elected politicians

The European Court has stated that:

“while freedom of expression is important for everybody, it is especially so for an elected representative of the people. He or she represents the electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition Member of Parliament ... call for the closest scrutiny on the part of the Court.”²⁶³

In the case in question, *Jerusalem v. Austria*, the applicant, who was a member of the Vienna Municipal Council which also acted as the Regional Parliament, had been prohibited by the Austrian courts, on the basis of article 1330 of the Austrian Civil Code, from repeating statements to the effect that two named associations, IPM and its Swiss counterpart VPM, “were sects of a totalitarian character”.²⁶⁴ During a debate in the Vienna Municipal Council concerning the granting of subsidies to an association assisting parents whose children had become involved in sects, the applicant had stated that sects that were “psycho-sects” existed in Vienna and had common features such as “their totalitarian character” and “fascist tendencies”. The applicant had also stated that IPM had “gained influence on the drug policy of the Austrian People’s Party”.²⁶⁵ The Austrian association, as well as its Swiss counterpart VPM, requested the Vienna Regional Court to issue an injunction against the applicant, prohibiting her from repeating that IPM was a sect. The request was granted.

The Court endorsed the parties’ assessment in this case that the injunction constituted an interference with the applicant’s freedom of expression as guaranteed by article 10(1) of the Convention, and that the interference was both “prescribed by law” and pursued a legitimate aim, namely “the protection of the reputation or rights of others” within the meaning of article 10(2). It therefore remained to be determined

²⁶³ Eur. Court HR, *Case of Jerusalem v. Austria*, judgment of 27 February 2001; the text used is the unedited version found on the Court’s web site: <http://hudoc.echr.coe.int/>, para. 36.

²⁶⁴ Ibid., para. 18.

²⁶⁵ Ibid., para. 10.

whether the injunction was also “necessary in a democratic society” for that particular purpose.²⁶⁶

After emphasizing the importance of freedom of expression also for elected representatives of the people, the European Court recalled

“that the limits of acceptable criticism are wider with regard to politicians acting in their public capacity than in relation to private individuals, as the former inevitably and knowingly lay themselves open to close scrutiny of word and deed by both journalists and the public at large. Politicians must display a greater degree of tolerance, especially when they themselves make public statements that are susceptible to criticism.”²⁶⁷

Referring to its abovementioned judgment in the *Nilsen and Johnsen* case, the Court observed, however, that “private individuals or associations lay themselves open to scrutiny when they enter the arena of public debate.” In the case before the Court, the two associations were “active in a field of public concern, namely drug policy. They participated in public discussions on this matter and, as the Government conceded, co-operated with a political party. Since the associations were active in this manner in the public domain, they ought to have shown a higher degree of tolerance to criticism when opponents consider their aims and the means employed in that debate.”²⁶⁸

The Court then noted that the statements in question, which were made in the course of a political debate in the Vienna Municipal Council, were thus also “made in a forum which was at least comparable to a Parliament as concerns the public interest in protecting the participants’ freedom of public expression”. It added that:

“In a democracy, Parliament or such comparable bodies are the essential fora for political debate. Very weighty reasons must be advanced to justify interfering with the freedom of expression exercised therein.”²⁶⁹

Contrary to the Austrian courts, the European Court accepted that the applicant’s statements, which reflected “fair comments on matters of public interest by an elected member of the Municipal Council [were] to be regarded as value judgments rather than statements of fact”. The question that had to be decided was therefore “whether there existed a sufficient factual basis for such value judgments”.²⁷⁰

The Court noted that, in order to prove her value judgments, the applicant had offered documentary evidence on the internal structure and activities of the plaintiffs, including a judgment handed down by a German court on the matter. While the Austrian Regional Court had accepted this evidence, it had rejected the applicant’s proposed witnesses as well as a suggested expert opinion.²⁷¹ The European Court stated that it was “struck by the inconsistent approach of the domestic courts” which, on the hand, required proof of a statement and, on the other, refused to consider all available evidence. It concluded that

²⁶⁶Ibid., para. 30.

²⁶⁷Ibid., para. 38.

²⁶⁸Ibid., paras. 38-39.

²⁶⁹Ibid., para. 40.

²⁷⁰Ibid., paras. 44-45.

²⁷¹Ibid., para. 45.

“in requiring the applicant to prove the truth of her statements, while at the same time depriving her of an effective opportunity to adduce evidence to support her statements and thereby show that they constituted a fair comment, the Austrian Courts overstepped their margin of appreciation and that the injunction granted against the applicant amounted to a disproportionate interference with her freedom of expression.”²⁷²

There had consequently been a breach of article 10.

Freedom of expression as guaranteed by article 10 of the European Convention is of particular importance for elected representatives of the people such as members of local, regional and national parliaments who represent and defend the interests of their electorate.

When entering the arena of public debate, politicians lay themselves open to close scrutiny of what they do and what they say. They must therefore accept wider limits of criticism as well as a correspondingly greater degree of tolerance. The same is true of private persons and associations who participate in political debates on matters of public concern.

In a democratic society, where parliament and other elected bodies are the primary forums for political debate, very weighty reasons must be advanced to justify restrictions on the exercise of freedom of expression in those forums.

3.5.5 Freedom of artistic expression

Article 10 of the European Convention

“includes freedom of artistic expression – notably within freedom to receive and impart information and ideas – which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds ... Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence the obligation on the State not to encroach unduly on their freedom of expression.”²⁷³

In the case of *Karatas v. Turkey*, the applicant had been convicted by the Istanbul National Security Court of violating Section 8 of the Prevention of Terrorism Act (Law No. 3713) by publishing an anthology of poems entitled *The song of a rebellion – Dersim*. Following an amendment to the law, the sentence was reduced to one year, one month and ten days, but the fine imposed was increased to 111,111,110 Turkish liras.²⁷⁴ Section 8 of the Prevention of Terrorism Act outlawed written and spoken propaganda, meetings, assemblies and demonstrations aimed at undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation.

²⁷²Ibid., para. 46.

²⁷³Enr. Court HR, *Case of Karatas v. Turkey*, judgment of 8 July 1999, Reports 1999-IV, p. 108, para. 49.

²⁷⁴Ibid., pp. 90-95, paras. 9-15.

The Court accepted that the conviction constituted an “interference” with the applicant’s exercise of his right to freedom of expression, that the conviction was “prescribed by law”, namely by article 8 of the Prevention of Terrorism Act, and that the measure pursued a legitimate aim. With regard to the latter point, the Court considered that

“having regard to the sensitivity of the security situation in south-east Turkey ... and to the need for the authorities to be alert to acts capable of fuelling additional violence, the measures taken against the applicant can be said to have been in furtherance of certain of the aims mentioned by the Government, namely the protection of national security and territorial integrity and the prevention of disorder and crime. This is certainly true where, as with the situation in south-east Turkey at the time of the circumstances of this case, the separatist movement had recourse to methods which rely on the use of violence.”²⁷⁵

It thus remained for the European Court to decide whether the conviction of the applicant was proportionate to this legitimate aim and thus necessary in a democratic society. It observed that the applicant was “a private individual who expressed his views through poetry – which by definition is addressed to a very small audience – rather than through the mass media, a fact which limited their potential impact on ‘national security’, [public] ‘order’ and ‘territorial integrity’ to a substantial degree”. Even though some passages seemed “very aggressive in tone and to call for the use of violence, the Court [considered] that the fact that they were artistic in nature and of limited impact made them less a call to an uprising than an expression of deep distress in the face of a difficult political situation.”²⁷⁶ Furthermore, the Court noted that the applicant had been convicted “not so much for having incited to violence, but rather for having disseminated separatist propaganda by referring to a particular region of Turkey as ‘Kurdistan’ and for having glorified the insurrectionary movements in that region”²⁷⁷. The Court was “above all ... struck by the severity of the penalty imposed on the applicant”.²⁷⁸ For all these reasons, it concluded that the applicant’s conviction “was disproportionate to the aims pursued and, accordingly, not ‘necessary in a democratic society’. There [had] therefore been a violation of Article 10 of the Convention.”²⁷⁹

Freedom of *artistic* expression was also at issue in the case of *Müller and Others v. Switzerland*, in which the applicants had been convicted under article 204(1) of the Swiss Criminal Code for having published “obscene” items at an exhibition. The Court accepted that this conviction, as well as the order – although subsequently lifted – to confiscate the paintings, constituted an interference with the applicants’ right to freedom of expression which had to be justified under article 10(1) in order to be lawful.²⁸⁰

²⁷⁵Ibid., pp. 105-106, paras. 36, 40 and 44.

²⁷⁶Ibid., p. 109, para. 52.

²⁷⁷Ibid., pp. 109-110, para. 52.

²⁷⁸Ibid., p. 110, para. 53.

²⁷⁹Ibid., p. 110, para. 54.

²⁸⁰*Eur. Court. HR, Case of Müller and Others v. Switzerland, judgment of 24 May 1988, Series A, No. 133, p. 19, para. 28.*

The Court accepted that the measure was prescribed by law and that the conviction pursued a legitimate aim in that it was designed to protect public morals.²⁸¹ Recalling the fundamental role played by freedom of expression in a democratic society, the Court admitted that “artists and those who promote their work are certainly not immune from the possibility of limitations as provided for in [article 10(2) of the Convention]. Whoever exercises his freedom of expression undertakes, in accordance with the express terms of that paragraph, ‘duties and responsibilities’: their scope will depend on his situation and the means he uses.”²⁸² As to the term *morals*,

“ it is not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals. The view taken of the requirements of morals varies from time to time and from place to place, especially in our era, characterised as it is by a far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the ‘necessity’ of a ‘restriction’ or ‘penalty’ intended to meet them.”²⁸³

The Court recognized, “as did the Swiss courts, that conceptions of sexual morality [had] changed in recent years. Nevertheless, having inspected the original paintings, the Court [did]not find unreasonable the view taken by the Swiss courts that those paintings, with their emphasis on sexuality in some of its crudest forms, were ‘liable grossly to offend the sense of sexual propriety of persons of ordinary sensitivity’.” Having regard to the margin of appreciation granted to the Swiss courts in the matter, the European Court concluded that the disputed measures did not infringe article 10 of the Convention.²⁸⁴

Freedom of artistic expression is protected by article 10 of the European Convention on Human Rights and is an essential component of a democratic society.

Freedom of artistic expression includes, in particular, the freedom to receive and impart information and ideas which enable people to take part in the public exchange of cultural, political and social information and ideas of all kinds.

The exercise of freedom of artistic expression cannot be lawfully interfered with on any grounds other than those specified in article 10(2) of the European Convention.

²⁸¹Ibid., pp. 20-21, paras. 29-30.

²⁸²Ibid., p. 22, para. 34.

²⁸³Ibid., p. 22, para. 35.

²⁸⁴Ibid., pp. 22-23, paras. 36-37. On the notion of “morals”, see also the *Eur. Court HR, Handyside Case, judgment of 7 December 1976, Series A, No. 24*, pp. 23-28, paras. 49-59. For more information on freedom of expression, see also the web site of the organization “Article 19” (www.article19.org) on which it is possible to consult *The Virtual Freedom of Expression Handbook*.

To determine what is necessary in a democratic society in order to protect public morals, the Contracting States have a wider margin of appreciation than when they impose restrictions on the exercise of freedom of expression for legitimate aims that are of a more objective nature.

4. The Rights to Freedom of Association and Assembly

The rights to freedom of association and assembly are closely related and will therefore be considered jointly in this chapter. As these two freedoms are not dealt with in the same order in the treaties considered, for the sake of consistency freedom of association will generally be dealt with prior to freedom of assembly.

4.1 Relevant legal provisions

Article 20 of the Universal Declaration of Human Rights provides that:

- “1. Everyone has the right to freedom of peaceful assembly and association.
2. No one may be compelled to belong to an association.”

Article 22 of the International Covenant on Civil and Political Rights concerning the right to freedom of association reads as follows:

- “1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
3. Nothing in this article shall authorize States Parties to the International Labour Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.”

Article 21 of the International Covenant on Civil and Political Rights guarantees the right to peaceful assembly in the following terms:

“The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.”

Article 10 of the African Charter on Human and Peoples’ Rights guarantees the right to free association:

- “1. Every individual shall have the right to free association provided that he abides by the law.
2. Subject to the obligation of solidarity provided for in Article 29 no one may be compelled to join an association.”

The right to freedom of assembly is contained in article 11 of the African Charter:

“Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.”

Article 16 of the American Convention on Human Rights guarantees freedom of association:

- “1. Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.
2. The exercise of this rights shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.
3. The provisions of this article do not bar the imposition of legal restrictions, including even deprivation of the exercise of the right of association on members of the armed forces and the police.”

Article 15 of the American Convention on Human Rights safeguards the right of peaceful assembly:

“The right of peaceful assembly, without arms, is recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a democratic society in the interest of national security, public safety or public order, or to protect public health or morals or the rights or freedoms of others.”

Both freedoms are included in article 11 of the European Convention on Human Rights, which reads:

- “1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

The right to freedom of peaceful assembly and association is also guaranteed by article 5(d)(ix) of the International Convention on the Elimination of All Forms of Racial Discrimination, article 15 of the Convention on the Rights of the Child and article 8 of the African Charter on the Rights and Welfare of the Child, while freedom of association is expressly guaranteed also by article 4 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women. The right to form trade unions and to join a trade union of one’s choice is recognized by article 8 of the International Covenant on Civil and Political Rights, article 8 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, article 5 of the European Social Charter, 1961, and article 5 of the European Social Charter, 1996 (revised).

Freedom of association is, of course, also protected by the ILO Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). The ILO is working extensively in the area of freedom of association, particularly within the framework of the Freedom of Association Committee of its Governing Body. In the present context, however, freedom of assembly and freedom of association will be considered only to the extent that they have been dealt with by the monitoring bodies under the major international human rights treaties.

4.2 Articles 21 and 22 of the International Covenant on Civil and Political Rights

4.2.1 Origin and meaning of the “in a democratic society” concept

The drafting of article 21 and article 22 of the International Covenant on Civil and Political Rights followed each other very closely and, contrary to article 19(3) relating to freedom of expression, the limitation provisions of both articles contain a reference to “a democratic society”. These terms were inserted in article 21 at the eighth session of the United Nations Commission on Human Rights in 1952 at the suggestion of France,²⁸⁵ which had already tried in vain, at the Commission’s fifth session in 1949, to have the concept inserted in the text. At the time, France argued that the insertion of the concept was “essential”, since it was already contained in the general limitation provision of article 29 of the Universal Declaration of Human Rights.²⁸⁶ The proposal was renewed at the Commission’s sixth session in 1950, when Australia opposed it

²⁸⁵For the amendment see UN doc. E/CN.4/L.201. For the vote see UN doc. E/CN.4/SR.325, p. 20.

²⁸⁶UN doc. E/CN.4/SR.120, p. 9. For the vote rejecting the proposal, see UN doc. E/CN.4/SR.121, p. 5.

since, at the time, the notion of “democracy” embraced two diametrically opposed concepts. However, Chile was in favour since “it was possible to classify States as democratic or anti-democratic by taking into consideration how each State complied with the principles laid down in the Charter, the Universal Declaration of Human Rights and the Covenant.”²⁸⁷ The French representative stated that

“63. ... he defined a democratic society as a society based upon respect for human rights. Public order in such a society was based on the recognition by the authorities of the dignity of the individual and the protection of his rights. Undemocratic societies were characterized by a disdain for human rights.

64. ... It was important to adhere to the spirit of the Universal Declaration of Human Rights and to declare forthrightly that even public order was subordinate to human rights. The reference to a democratic society should therefore be included.”²⁸⁸

The Lebanese representative, however, considered that the French definition “was subject to abuse, since often the greatest tyrannies claimed to respect human rights as they conceived those rights.” On the other hand, if the French amendment meant the total doctrine of human rights as promulgated in the Universal Declaration, he would accept it, although he felt “that the statement should be made explicit”.²⁸⁹

In 1952 the term “in a democratic society” was also inserted in the text of the article on the right to freedom of association over objections by the United States because of its “ambiguity”.²⁹⁰ In the subsequent discussions in the Third Committee of the General Assembly, Sweden pointed out that “the right to form and join associations of one’s choice was an important one in a democratic society.”²⁹¹ Italy observed that “freedom of political association completed the freedoms of opinion, expression and assembly, respect for which was the essential characteristic of a truly democratic State.”²⁹² As shown in this chapter, the intrinsic relationship between the freedoms of expression, association and peaceful assembly has subsequently been consistently emphasized by the international monitoring bodies.

The drafters of the International Covenant on Civil and Political Rights considered that freedom of association and freedom of peaceful assembly are fundamental elements of a democratic society, which they described as a society respectful of human rights.

²⁸⁷UN doc. E/CN.4/SR.169, p. 10, para. 41 (Australia), and p. 13, para. 54 (Chile).

²⁸⁸Ibid., p. 14, paras. 63-64.

²⁸⁹Ibid., p. 14, para. 65.

²⁹⁰UN doc. E/CN.4/SR.325, para. 15 (United States). For the text of the French amendment, see UN doc. E/CN.4/L.202. On the vote, see UN doc. E/CN.4/SR.326, p. 5.

²⁹¹UN doc. GAOR, 16th session, 1961-1962, v. 1, Third Committee, doc. A/C.3/SR.1087, p. 134, para. 16.

²⁹²Ibid., UN doc. A/C.3/SR.1088, p. 139, para. 8.

4.2.2 Freedom of association

The Human Rights Committee expressed concern “at the absence of specific legislation on political parties” in the Syrian Arab Republic “and at the fact that only political parties wishing to participate in the political activities of the National Progressive Front, led by the Baath Party, are allowed. The Committee [was] also concerned at the restrictions that can be placed on the establishment of private associations and institutions ... including independent non-governmental organizations and human rights organizations.” Hence, “the State party should ensure that the proposed law on political parties is compatible with the provisions of the Covenant. It should also ensure that the implementation of the Private Associations and Institutions Act No. 93 of 1958 is in full conformity with articles 22 and 25 of the Covenant.”²⁹³

The Committee observed that the restrictions on freedom of expression in force in Iraq not only violated article 19 of the Covenant but also impeded the implementation of articles 21 and 22 which protect the rights to freedom of peaceful assembly and association. “Therefore: penal laws and decrees which impose restrictions on the rights to freedom of expression, peaceful assembly and association should be amended so as to comply with articles 19, 21 and 22 of the Covenant.”²⁹⁴

The Human Rights Committee expressed concern at difficulties in Belarus arising from “the registration procedures to which non-governmental organizations and trade unions are subjected. The Committee also [expressed] concern about reports of cases of intimidation and harassment of human rights activists by the authorities, including their arrest and the closure of the offices of certain non-governmental organizations. In this regard: The Committee, reiterating that the free functioning of non-governmental organizations is essential for the protection of human rights and dissemination of information in regard to human rights among the people, [recommended] that laws, regulations and administrative practices relating to their registration and activities be reviewed without delay in order that their establishment and free operation may be facilitated in accordance with article 22 of the Covenant.”²⁹⁵

The Committee was “very concerned about interference by the [Venezuelan] authorities in trade union activities including the free election of union leaders [and recommended that the] State party should, pursuant to article 22 of the Covenant, guarantee that unions are free to conduct their business and choose their business without official interference.”²⁹⁶ The Committee was also concerned that in Germany “there is an absolute ban on strikes by public servants who are not exercising authority in the name of the State and are not engaged in essential services, which may violate article 22 of the Covenant.”²⁹⁷ The Committee also regretted that civil servants in Lebanon “continue to be denied the right to form associations and to bargain collectively” in violation of article 22 of the Convention.²⁹⁸

²⁹³UN doc. GAOR, A/56/40 (vol. I), pp. 75-76, para. 26.

²⁹⁴UN doc. GAOR, A/53/40 (vol. I), p. 21, para. 105.

²⁹⁵Ibid., p. 29, para. 155.

²⁹⁶UN doc. GAOR, A/56/40 (vol. I), p. 53, para. 27.

²⁹⁷UN doc. GAOR, A/52/40 (vol. I), p. 34, para. 188.

²⁹⁸Ibid., p. 57, para. 357.

4.2.3 Freedom of assembly

While noting the statements by the State party to the effect that freedom of assembly was “fully respected” in the Syrian Arab Republic, the Human Rights Committee remained concerned at the restrictions in the Penal Code on the holding of public meetings and demonstrations, since they exceeded those authorized by article 21.²⁹⁹ The Committee also expressed concern at the fact that the legal rules in the Netherlands Antilles on the right of peaceful assembly “contain a general requirement of prior permission from the local police chief. [It recommended that the] State party should ensure that the right of peaceful assembly may be exercised by all in strict conformity with the guarantees of article 21 of the Covenant.”³⁰⁰

The Committee further expressed concern in the case of the Democratic People’s Republic of Korea “about the restrictions on public meetings and demonstrations, including possible abuse of the requirements of the laws governing assembly. The Committee [requested] the State party to provide additional information on the conditions for public assemblies and, in particular, to indicate whether and under what conditions the holding of a public assembly can be prevented, and whether such a measure can be appealed.”³⁰¹ The Committee was also concerned that the 1958 Cypriot law “regulating lawful assembly and requiring permits for public assemblies [was] not in compliance with article 21 of the Covenant. In this regard, the Committee [emphasized] that restrictions on freedom of assembly must be limited to those which are deemed necessary in conformity with the Covenant.”³⁰² A few years later the Committee noted the enactment of a new law in Cyprus regulating public assemblies and processions and expressed concern about the conditions that the appropriate authorities could impose “regarding the conduct of assemblies and processions upon receiving the required advance notification. The Committee also [noted] that the advance notice required to be given is too early and may unduly curtail the freedom of assembly. The Committee [reiterated] that restrictions on freedom of assembly must be limited only to those which are in conformity with article 21 of the Covenant.”³⁰³

With regard to Mongolia, the Committee observed that the limitations permitted under Mongolian law on the exercise of certain rights guaranteed by the Covenant were “so broad and numerous as to restrict severely the effective exercise of such rights”. This was, for instance, the case with “the requirement of prior permission for the holding of public meetings and the criteria for refusing such meetings”. Furthermore, the absence of adequate mechanisms to appeal against administrative decisions created an uncertainty as to whether such fundamental rights as the freedoms of association, assembly and movement were fully enjoyed in practice.³⁰⁴

The Committee expressed concern “about severe restrictions imposed on the right to freedom of assembly” in Belarus, which were not in compliance with the Covenant. It noted in particular that “applications for permits to hold demonstrations

²⁹⁹UN doc. *GAOR*, A/56/40 (vol. I), p. 75, para. 25.

³⁰⁰*Ibid.*, p. 82, para. 20.

³⁰¹*Ibid.*, p. 103, para. 24.

³⁰²UN doc. *GAOR*, A/49/40 (vol. I), p. 54, para. 323.

³⁰³UN doc. *GAOR*, A/53/40 (vol. I), p. 34, para. 194.

³⁰⁴UN doc. *GAOR*, A/47/40, p. 151, para. 601.

are required to be submitted 15 days prior to the demonstrations and are often denied by the authorities, and that Decree No. 5 of 5 March 1997 imposes strict limits on the organization and preparation of demonstrations, lays down rules to be observed by demonstrators and bans the use of posters, banners or flags that ‘insult the honour and dignity of officials of State organs’ or which ‘are aimed at damaging the State and public order and the rights and legal interests of citizens’. These restrictions cannot be regarded as necessary in a democratic society to protect the values mentioned in article 21 of the Covenant. Therefore: The Committee [recommended] that the right of peaceful assembly be fully protected and guaranteed in Belarus in law and in practice and that limitations thereon be strictly in compliance with article 21 of the Covenant, and that Decree No. 5 of 5 March 1997 be repealed or modified so as to be in compliance with that article.”³⁰⁵

Lastly, the Committee held that the “wholesale ban on demonstrations” on grounds of “public safety and national security” in Lebanon was not compatible with the right to freedom of assembly under article 21 of the Covenant and should be lifted as soon as possible.³⁰⁶

Restrictions on the exercise of freedom of expression under article 19(3) of the International Covenant on Civil and Political Rights may not impede the full and effective enjoyment of freedom of association and freedom of peaceful assembly guaranteed by articles 22 and 21 of the Covenant.

The right to freedom of association in article 22 of the International Covenant protects, inter alia, the right to form political parties, trade unions and private associations such as non-governmental organizations, including human rights organizations.

Article 22 of the Covenant does not authorize States parties to ban civil servants from forming associations and engaging in collective bargaining. Restrictions on the right to freedom of association must strictly respect the conditions laid down in article 22(2) of the Covenant.

States parties must also ensure that the right to peaceful assembly is guaranteed on the strict conditions laid down in article 21 of the Covenant and that limitations on its exercise do not exceed those expressly permitted thereby.

This means, in particular, that rules requiring prior permission for the holding of assemblies or demonstrations or any other rules or requirements governing the holding or conduct of public assemblies must be limited to those necessary in a democratic society for the legitimate purposes enumerated in article 21.

³⁰⁵UN doc. GAOR, A/53/40 (vol. I), p. 29, para. 154.

³⁰⁶UN doc. GAOR, A/52/40 (vol. I), pp. 56-57, para. 356.

A wholesale ban on demonstrations for reasons such as public safety and national security is not compatible with freedom of peaceful assembly as guaranteed by article 21 of the International Covenant.

States parties have a legal duty to provide effective remedies to persons who consider that their freedom of association or freedom of peaceful assembly has been violated.

4.3 Articles 10 and 11 of the African Charter on Human and Peoples' Rights

Article 10(1) of the African Charter on Human and Peoples' Rights guarantees to every individual "the right to free association provided that he abides by the law". Furthermore, article 10(2) stipulates that "subject to the obligation of solidarity provided for in Article 29 no one may be compelled to join an association." The words "provided that he abides by the law" are admittedly vague and, contrary to the limitation provisions in the corresponding articles of the International Covenant and the American and European Conventions, the reference to "law" is not conditioned by a reference to the terms "necessary", "a democratic society" or any specified purposes which alone can justify restrictions on the exercise of the right to freedom of association.

It is not clear in what circumstances the individual's duties towards his or her family, community and the State as specified in article 29 could justify an obligation to join an association.

The exercise of the "right to assemble freely with others" in article 11 of the Charter can, however, "be subject only to necessary restrictions provided for by law, in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others". The Charter thus adds to the principle of legality ("provided for by law") the principle of proportionality ("necessary"), which provides some safeguards against excessive limitations. It is noteworthy, on the other hand, that, as indicated by the words "in particular", the legitimate objectives enumerated in article 11 are not exhaustive and the provision therefore opens up an area of legal uncertainty.

It should be pointed out, however, that, in accordance with article 60 of the African Charter, the African Commission on Human and Peoples' Rights "shall draw inspiration" from other international legal standards in the human rights field when interpreting the terms of the Charter. As indicated in some of the previous chapters, the Commission has frequently done so, also to some extent, as will be seen below, with regard to restrictions on the exercise of freedom of association.

4.3.1 Freedom of association

Freedom of association as protected by article 10 of the African Charter on Human and Peoples' Rights has been violated on a number of occasions. The African Commission on Human and Peoples' Rights has held, for instance, that article 10(1) was violated in the case of the *World Organization against Torture et Al. v. Zaire*. The

Government of Zaire had imposed restrictions on the number of political parties, allowing only those supportive of the regime in power to operate. “These opposition parties were not permitted to meet in public or private and there was evidence that the government attempted to destabilise these groups by harassment. In addition, human rights groups [had] been prevented from forming and established bodies in certain areas [had] been unable to hold education courses on human rights issues.” In the Commission’s view, these actions by the Government constituted “clear violations” of article 10(1) of the African Charter.³⁰⁷ The Commission likewise found a violation of article 10 in the case of *John D. Ouko v. Kenya*. Mr. Ouko was a student union leader in Kenya, a country he had to leave because of his political opinions after being arrested and detained for ten months without trial. The facts of the case were not refuted by the Government and the Commission therefore concluded that the persecution of Mr. Ouko and his flight abroad “greatly jeopardised his chances of enjoying his right to freedom of association” as guaranteed by article 10 of the Charter.³⁰⁸

Article 10 was further violated in a case concerning the Nigerian Bar Association. This communication concerned the Body of Benchers, the then new governing body of the Nigerian Bar Association, which was dominated by government representatives. The Body of Benchers had “wide discretionary powers”, including “the disciplining of lawyers”.³⁰⁹ The African Commission held that the Nigerian Bar Association, which was “legally independent of the government ... should be able to choose its own governing body. Interference with the self-governance of the Bar Association may limit or negate the reasons for which lawyers desire in the first place to form an association.”³¹⁰ It then recalled its well-established principle that:

“where regulation of the right of freedom of association is necessary, the competent authorities should not enact provisions which limit the exercise of this freedom or are against obligations under the Charter. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards.”³¹¹

The Commission concluded that the Government intervention in the governing of the Nigerian Bar Association was “inconsistent with the preamble of the African Charter, where states reaffirm adherence to the principles of human and peoples’ rights contained in declarations such as the UN Basic Principles on the Independence of the Judiciary”. It therefore constituted a violation of article 10 of the Charter.³¹²

³⁰⁷ ACHPR, *World Organization against Torture et Al. v. Zaire*, Communications Nos. 25/89, 47/90, 56/91, 100/93, decision adopted during the 19th session, March 1996, para. 75 of the text as published at: www.up.ac.za/chr/ahrdb/acomm_decisions.html. On the violation of article 10 of the African Charter as a consequence of the persecution of employees of a human rights organization, see also ACHPR, *Huri-Laws (on behalf of Civil Liberties Organization) v. Nigeria*, Communication No. 225/98, decision adopted during the 28th Ordinary session, 23 October – 6 November 2000, paras. 48-49 of the text of the decision as published at: <http://www1.umn.edu/humanrts/africa/comcases/225-98.html>

³⁰⁸ ACHPR, *John D. Ouko v. Kenya*, Communication No. 232/99, decision adopted during the 28th Ordinary session, 23 October – 6 November 2000, para. 30 of the text of the decision as published at: <http://www1.umn.edu/humanrts/africa/comcases/232-99.html>

³⁰⁹ ACHPR, *Civil Liberties Organisation (on behalf of the Nigerian Bar Association) v. Nigeria*, Communication No. 101/93, decision adopted during the 17th Ordinary session, March 1995, para. 24 of the text of the decision as published at: www.up.ac.za/chr/ahrdb/acomm_decisions.html

³¹⁰ *Ibid.*, loc. cit.

³¹¹ *Ibid.*, para. 25.

³¹² *Ibid.*, para. 26.

Lastly, the African Commission found a violation of article 10 in a case where a Nigerian Court had concluded that the accused persons were guilty of murder for the simple reason that they were members of the Movement for the Survival of the Ogoni People (MOSOP). According to the Commission, “it would seem furthermore that government officials at different times during the trial declared MOSOP and the accused guilty of the charges, without waiting for the official judgment”. This demonstrated a clear prejudice against the organisation MOSOP, which the government had done nothing to defend or justify.³¹³ There had therefore been a violation of article 10(1).³¹⁴

Under article 10 of the African Charter on Human and Peoples’ Rights, freedom of association implies that permission must be given for the creation and functioning of political parties even when they do not support the party in power. Harassment of political parties constitutes a violation of freedom of association.

Freedom of association under article 10 of the African Charter also means that human rights organizations must be able to function effectively, inter alia for the purpose of teaching human rights.

Freedom of association under article 10 further implies that Bar Associations must be able to function freely and that there should be no governmental interference with their self-governance.

Limitations on the exercise of the right to freedom of association recognized in article 10 of the African Charter must not undermine the fundamental human rights and freedoms guaranteed by national constitutions or international legal standards.

It is a violation of the right to freedom of association recognized in article 10 of the African Charter to find a person guilty of a criminal offence such as murder solely on the ground of that person’s membership of an association.

4.4 Articles 15 and 16 of the American Convention on Human Rights

Article 15 of the American Convention guarantees “the right to peaceful assembly, without arms”. The words “without arms” seem redundant in that the term “peaceful” necessarily implies that there must be an absence of violence and threats of violence, including the carrying of weapons, which may, in themselves, be considered to constitute a threat of violence.

³¹³*International Pen and Others (on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organization) v. Nigeria, Communications Nos. 137/94, 139/94, 154/96 and 161/97, decision adopted on 31 October 1998, para. 108 of the text of the decision as published at the following web site: http://www1.umn.edu/humanrts/africa/comcases/137-94_139/94_154-96_161-97.html*

³¹⁴*Ibid.*, loc. cit.

The “right to associate freely” as guaranteed by article 16 covers all dimensions of society such as the freedom to associate “for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes”. As made clear by the words “or other purposes”, this enumeration is simply indicative of the purposes for which a person must be allowed to associate freely with others.

The exercise of both the right to peaceful assembly and the right to associate freely may be subjected to restrictions provided that they are “imposed in conformity with the law” (right of assembly) or “established by law” (freedom of association) and are “necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others”.³¹⁵ Article 16(3) also allows “legal restrictions, including even *deprivation* of the exercise of the right of association, on members of the armed forces and the police” (emphasis added).

Articles 15 and 16 of the American Convention were at the centre of the case of *Baena Ricardo and Others v. Panama* concerning Panamanian Law No. 25 of 14 December 1990, on the basis of which 270 workers were dismissed from their work after participating in a national work stoppage on 5 December 1990. The impugned law granted the Executive and directors of autonomous and semi-autonomous institutions and State and municipal enterprises, among others, wide powers to dismiss civil servants who took part in the organization of actions against democracy and the constitutional order. Dismissal was to ensue regardless of whether the persons concerned were members of, for instance, the boards of management of labour unions and associations of civil servants. It was for the Executive to decide which acts were contrary to democracy and the constitutional order for purposes of the administrative sanction of dismissal. The workers had also taken part in a demonstration for labour claims on 4 December 1990.³¹⁶ The victims alleged violations of several articles of the American Convention, including articles 15 and 16.

With regard to *the right to peaceful assembly*, the Inter-American Court accepted that Panama had not violated article 15 in the case of the 270 workers submitting the complaint. The measures complained of had been due to the work stoppage of 5 December 1990 which was considered to have violated democracy and the constitutional order, while the march of 4 December had taken place “without any interruption or restriction”. According to the Court, the letters of dismissal to the workers concerned did not mention the march of 4 December 1990 but most of them declared the appointments invalid because the workers participated in the organization or execution of the work stoppage of 5 December.³¹⁷

With regard to *freedom of association* as guaranteed by article 16 of the American Convention, the Inter-American Court observed, inter alia, that Law No. 25 not only permitted the dismissal of labour union leaders but also abrogated rights granted to them under the Labour Code regarding the procedure to be followed in the event of dismissal of workers enjoying trade union privileges. Law No. 25 had also

³¹⁵The list of legitimate purposes is quoted from article 16; article 15 refers to “rights *or* freedoms of others” rather than “rights *and* freedoms of others”; emphasis added.

³¹⁶*I-A Court HR, Caso Baena Ricardo y Otros (270 trabajadores v. Panamá, sentencia de 2 de febrero de 2001, Serie C, No. 72*; the Spanish text used here can be found at the Court’s web site: www.corteidh.or.cr/serie_c/C_72_ESP.html, paras. 1 and 104.

³¹⁷*Ibid.*, paras. 148-150.

entered into force retroactively, thereby permitting the authorities to ignore procedures that should have been followed under the legislation in force when the events occurred. The resultant dismissal of a considerable number of trade union leaders “seriously affected” the organization and activities of the trade unions concerned and thereby also interfered with freedom of association for labour purposes.³¹⁸ The Court therefore had to examine whether this interference could be justified on the basis of article 16(2) of the Convention.

The Court first recalled its views on the notion of “laws”, by virtue of which the existence of laws is not sufficient under the American Convention to render restrictions on the enjoyment and exercise of rights and freedoms lawful; the laws must also be based on reasons of general interest.³¹⁹ The Court then considered in particular the facts contained in the report and recommendations adopted by the ILO Freedom of Association Committee in Case 1569 (which had not been contradicted by the Panamanian Government), according to which: (1) Law No. 25 was passed 15 days after the occurrence of the facts at the origin of this case; (2) the authorities did not apply the existing norms regarding dismissal of workers; (3) the trade union premises and bank accounts were interfered with; and (4) numerous dismissed workers were trade union leaders.³²⁰ The Court concluded from the foregoing that it had not been shown either that the measures taken by the State were necessary to protect “public order” in the context of the relevant events or that the principle of proportionality had been respected. The measures taken were therefore not “necessary in a democratic society” as required by article 16(2) of the Convention so that article 16 had been violated in the case of the 270 named workers.³²¹

4.5 Article 11 of the European Convention on Human Rights

The right of every person “to freedom of peaceful assembly and to freedom of association” is contained in article 11 of the European Convention, as is “the right to form and to join trade unions for the protection of his interests”. The restrictions allowed on the exercise of these rights are exhaustively enumerated in article 11(2), and must be “prescribed by law” and be “necessary in a democratic society” for one or more of the purposes specified therein. Moreover, the article “shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State”. In contrast to article 16(2) of the American Convention, article 11(2) of the European Convention uses the word “restrictions” and not “deprivation”, which indicates that the substance of the right as such cannot be compromised. On the other hand, article 11(2) of the European Convention goes further in that it also refers to “the administration of the State” in this connection. A few examples from the jurisprudence of the European Court of Human

³¹⁸Ibid., para. 166.

³¹⁹Ibid., para. 170.

³²⁰Ibid., para. 171.

³²¹Ibid., paras. 172-173. The Court also concluded that Panama had violated the principles of legality and prohibition of ex post facto laws laid down in article 9 as well as articles 8(1), 8(2), 25 and 1(1) and 2 of the American Convention, para. 214.

Rights will illustrate the meaning of the terms of article 11 of the European Convention.

4.5.1 Freedom of association, trade unions and the closed shop system

The case of *Young, James and Webster v. the United Kingdom* concerned three former employees of the British Railways Board (“British Rail”) who were dismissed from their jobs for not being members of one of the three trade unions with which British Rail had concluded a “closed shop” agreement, which meant that, as from the conclusion of that accord, membership of one of the three unions became a condition of employment. The applicants alleged that this system violated article 11 of the Convention. The question was thus whether article 11 “guarantees not only freedom of association, including the right to form and to join trade unions, in the positive sense, but also, by implication, a ‘negative right’ not to be compelled to join an association or a union”.³²²

However, the Court did not consider it necessary to answer this question in the case before it, noting that “the right to form and to join trade unions is a special aspect of freedom of association [and] that the notion of a freedom implies some measure of freedom of choice as to its exercise.”³²³ While thus refraining from any review of the closed shop system per se, the Court limited its examination “to the effects of that system on the applicants”.³²⁴ It noted that after the conclusion of the agreement between British Rail and the three trade unions, the applicants had the choice of losing their work or joining one of the unions, something they refused to do. “As a result of their refusal to yield to what they considered to be unjustified pressure, they received notices terminating their employment. Under the legislation in force at the time ... their dismissal was ‘fair’ and, hence, could not found a claim for compensation, let alone reinstatement.”³²⁵

The Court observed that, on the assumption that article 11 does not guarantee the negative aspect of freedom of association on the same footing as the positive aspect, compulsion to join a particular trade union may not always be contrary to the Convention.

“However, a threat of dismissal involving loss of livelihood is a most serious form of compulsion and, in the present case, it was directed against persons engaged by British Rail before the introduction of any obligation to join a particular trade union.

In the Court’s opinion, such a form of compulsion, in the circumstances of the case, strikes at the very substance of the freedom guaranteed by Article 11. For this reason alone, there has been an interference with that freedom as regards each of the three applicants.”³²⁶

³²²*Eur. Court HR, Case of Young, James and Webster, judgment of 13 August 1981, Series A, No. 44, p. 21, para. 51.*

³²³*Ibid.*, p. 21, para. 52.

³²⁴*Ibid.*, p. 22, para. 53.

³²⁵*Ibid.*, p. 22, para. 54.

³²⁶*Ibid.*, pp. 22-23, para. 55.

Another facet of the case related to “the restriction of the applicants’ choice as regards the trade unions which they could join of their own free volition” because, as observed by the Court, an individual does not enjoy the right to freedom of association if in reality the freedom of action or choice which remains available to him is either non-existent or so reduced as to be of no practical value.³²⁷ This issue was linked to the fact that Mr. Young and Mr. Webster objected to trade union policies and activities and that Mr. Young also objected to the political affiliations of two of the unions. This meant that, in spite of its autonomous role, article 11 also had to be considered in the present case in the light of Articles 9 and 10 of the Convention:

“The protection of personal opinion afforded by Articles 9 and 10 in the shape of freedom of thought, conscience and religion and of freedom of expression is also one of the purposes of freedom of association as guaranteed by Article 11. Accordingly, it strikes at the very substance of this Article to exert pressure, of the kind applied to the applicants, in order to compel someone to join an association contrary to his convictions.”³²⁸

The Court therefore had to examine whether the interference with the applicants’ right to freedom of association could be justified as being “*necessary in a democratic society*” for any of the reasons set out in article 11(2) of the Convention. In this connection it observed:

“Firstly ‘necessary’ in this context does not have the flexibility of such expressions as ‘useful’ or ‘desirable’... The fact that British Rail’s closed shop agreement may in a general way have produced certain advantages is therefore not of itself conclusive as to the necessity of the interference complained of.

Secondly, pluralism, tolerance and broadmindedness are hallmarks of a ‘democratic society’ ... Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position. Accordingly, the mere fact that the applicants’ standpoint was adopted by very few of their colleagues is again not conclusive of the issue ... before the Court.

Thirdly, any restriction imposed on a Convention right must be proportionate to the legitimate aim pursued.”³²⁹

The Court concluded that “even making due allowance for a State’s ‘margin of appreciation’ ... the restrictions complained of were not ‘necessary in a democratic society’ as required by paragraph 2 of Article 11.” It referred in particular to the fact that it had not been informed of any special reasons justifying the imposition of the closed shop system. Many similar systems did not require existing non-union employees to join a specific union and “a substantial majority even of union members themselves disagreed with the proposition that persons refusing to join a union for strong reasons should be dismissed from employment.”³³⁰

³²⁷Ibid., p. 23, para. 56.

³²⁸Ibid., pp. 23-24, para. 57.

³²⁹Ibid., p. 25, para. 63; emphasis added.

³³⁰Ibid., pp. 25-26, paras. 64-65.

A similar issue arose in the case of *Sigurjónsson v. Iceland*, in which the applicant, a taxi driver, was compelled by law to join an organization called “Frami”, failing which he would lose his licence as a cab driver. The Court observed that “such a form of compulsion, in the circumstances of the case, strikes at the very substance of the right guaranteed by Article 11 and itself amounts to an interference with that right.” Moreover, the case had to be considered in the light of articles 9 and 10 of the Convention, since the applicant “objected to being a member of the association in question partly because he disagreed with its policy in favour of limiting the number of taxicabs and, thus, access to the occupation”.³³¹

As in the *Young, James and Webster* case, the Court concluded that there had been a violation of article 11. It accepted that the membership obligation was “prescribed by law” (a law passed in 1989) and that this law pursued a legitimate aim, namely the protection of the “rights and freedoms of others”.³³² **However, was it “necessary in a democratic society”?** The Government considered that it was, arguing that “membership constituted a crucial link between them and Frami in that the latter would not be able to ensure the kind of supervisory functions which it performed unless all the licence-holders within its area were members.”³³³

In the first place, the Court recalled “that the impugned membership obligation was one imposed by law, the breach of which was likely to bring about the revocation of the applicant’s licence. He was thus subjected to a form of compulsion which ... is rare within the community of Contracting States and which, on the face of it, must be considered incompatible with Article 11.” While accepting that Frami served both the occupational interests of its members and the public interest, the Court was not convinced “that compulsory membership of Frami was required in order to perform those functions”. In support of its view, it noted in particular that “membership was by no means the only conceivable way of compelling the license-holders to carry out such duties and responsibilities as might be necessary” and that it had not been established “that there was any other reason that would have prevented Frami from protecting its members’ occupational interests in the absence of the compulsory membership imposed on the applicant despite his opinions”.³³⁴

It followed that the reasons adduced by the Government, **although they could be considered relevant**, were **not sufficient** to show that it was “necessary” to compel the applicant to be a member of Frami, on pain of losing his licence and contrary to his own opinions. The measures complained of were consequently “disproportionate to the legitimate aim pursued” and violated article 11.³³⁵

The right to form and to join trade unions recognized under article 11 of the European Convention on Human Rights is a special aspect of freedom of association.

³³¹ Eur. Court HR, *Case of Sigurdur A. Sigurjónsson v. Iceland*, judgment of 30 June 1993, Series A, vol. 264, pp. 16-17, paras. 36-37.

³³² Ibid., p. 17, para. 39.

³³³ Ibid., p. 18, para. 40.

³³⁴ Ibid., p. 18, para. 41.

³³⁵ Ibid., pp. 18-19, para. 41.

The term “freedom” implies some measure of choice as to its exercise but does not necessarily mean that compulsion to join a specific trade union is always contrary to the European Convention on Human Rights.

An obligation to join a specific trade union on pain of dismissal involving loss of livelihood is a form of compulsion that has been considered to strike at the very substance of freedom of association as guaranteed by article 11 of the European Convention. To be lawful, such interference with the exercise of a person’s freedom of association must comply with the restrictions laid down in article 11(2) of the Convention.

Although it is autonomous, article 11 must be considered in the light of articles 9 and 10 of the Convention guaranteeing freedom of thought, conscience, religion and expression. This means that, in ensuring respect for the exercise of freedom of association and assembly, it is also relevant to ensure respect for a person’s other fundamental freedoms.

4.5.2 Trade unions and collective agreements

In the *Swedish Engine Drivers’ Union v. Sweden* case, the applicant trade union complained of the refusal by the Swedish Collective Bargaining Office to enter into collective agreements with it notwithstanding the fact that it did so with large trade union federations and, occasionally, with independent unions; according to the applicant union, this refusal entailed a series of disadvantages and was also a violation of article 11 of the European Convention.³³⁶

It is noteworthy that the Convention “nowhere makes an express distinction between the functions of a Contracting State as holder of public power and its responsibilities as employer”. Article 11 is accordingly “binding upon the ‘State as employer’, whether the latter’s relations with its employees are governed by public or private law”.³³⁷ The *Swedish Engine Drivers’ Union* case neither concerned the right for trade unions to engage in collective bargaining nor the legal capacity of such unions to conclude collective agreements in the interest of its members, since these rights were granted under Swedish law; the case was instead limited to ascertaining whether article 11(1) “requires the ‘State as employer’ to enter into any given collective agreement with a trade union representing certain of its employees whenever the parties are in accord on the substantive issues negotiated upon”.³³⁸

The Court then pointed out that article 11(1) “presents trade union freedom as one form or a special aspect of freedom of association” but “does not secure any particular treatment of trade unions, or their members, by the State, such as the right that the State should conclude any given collective agreement with them”. Moreover, trade union freedoms are dealt with in article 6(2) of the European Social Charter, which “affirms the voluntary nature of collective bargaining and collective agreements. The prudence of the wording of Article 6 § 2 demonstrates that the Charter does not

³³⁶*Eur. Court HR, Swedish Engine Drivers’ Union Case v. Sweden, judgment of 6 February 1976, Series A, No. 20, p. 13, para. 32.*

³³⁷*Ibid.*, p. 14, para 37.

³³⁸*Ibid.*, pp. 14-15, paras. 38-39.

provide for a real right to have any such agreement concluded, even assuming that the negotiations disclose no disagreement on the issue to be settled.”³³⁹

As to the phrase “for the protection of his interest” contained in article 11(1) of the European Convention, the Court stated that:

“These words, clearly denoting purpose, show that the Convention safeguards freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible. In the opinion of the Court, it follows that the members of a trade union have a right, in order to protect their interests, that the trade union should be heard. Article 11 § 1 certainly leaves each State a free choice of the means to be used towards this end. While the concluding of collective agreements is one of these means, there are others. What the Convention requires is that under national law trade unions should be enabled, in conditions not at variance with Article 11, to strive for the protection of their members’ interests .”³⁴⁰

No one disputed the fact that the Swedish Engine Drivers’ Union could “engage in various kinds of activity vis-à-vis the Government”. The Court concluded that the fact alone that the Collective Bargaining Office had in principle refused during the past few years to enter into collective agreements with the applicant union did not constitute a breach of article 11(1). Lastly, the Office’s policy of restricting the number of organizations with which collective agreements were to be concluded was “not on its own incompatible with trade union freedom.”³⁴¹

The Contracting States to the European Convention on Human Rights must also respect freedom of association as laid down in article 11(1) when they act as employer, regardless of whether their relations with employees are governed by public or private law.

The Convention requires that, under national law, trade unions should be able, in conditions not at variance with the terms of article 11, to strive for the protection of their members’ interests. This means that trade unions should be heard, although the Contracting States are free to choose the means whereby this end is obtained.

The conclusion of collective agreements is one of several means of allowing trade unions to be heard. It is not incompatible with the trade union freedoms guaranteed by article 11 of the European Convention for a State as employer to limit the conclusion of collective agreements to a certain number of trade unions provided that all unions are able to strive for the protection of their members’ interests in accordance with article 11.

³³⁹Ibid., p. 15, para. 39.

³⁴⁰Ibid., pp. 15-16, para. 40.

³⁴¹Ibid., p. 16, paras. 41-42. For a similar case see *Eur. Court HR, National Union of Belgian Police Case, judgment of 27 October 1975, Series A, No. 19.*

4.5.3 Freedom of association and political parties

In recent years a number of important cases involving the dissolution of political parties have been considered by the European Court of Human Rights under article 11 of the European Convention. Selected examples will illustrate the extent and limits of the right to form political parties at the European level.

The leading case in this regard is that of the *United Communist Party of Turkey and Others v. Turkey*, which concerned the dissolution by the Turkish Constitutional Court of the United Communist Party (TBKP) entailing, *ipso jure*, the liquidation of the party and the transfer of its assets to the Treasury.

The Constitutional Court of Turkey held, *inter alia*, that “the mere fact that a political party included in its name a word prohibited by section 96(3) of Law No. 2820” on the regulation of the political parties, i.e. the term “communist”, was sufficient to justify its dissolution. Furthermore, the party’s constitution and programme referred to two nations, the Kurdish nation and the Turkish nation. “But it could not be accepted that there were two nations within the Republic of Turkey, whose citizens, whatever their ethnic origin, had Turkish nationality. In reality, the proposals in the party constitution covering support for non-Turkish languages and cultures were intended to create minorities, to the detriment of the unity of the Turkish nation.” Such objectives “which encouraged separatism and the division of the Turkish nation were unacceptable and justified dissolving the party concerned”.³⁴²

In reply to the submission of the Turkish Government that the reference to trade unions in article 11 is not applicable to political parties, the European Court of Human Rights emphasized that it was and that “the conjunction ‘including’ clearly shows that trade unions are but one example among others of the form in which the right to freedom of association may be exercised.” Even more persuasive than the wording of article 11 was, in the Court’s view,

“the fact that political parties are a form of association essential to the proper functioning of democracy. In view of the importance of democracy in the Convention system ... there can be no doubt that political parties come within the scope of Article 11.”³⁴³

In response to further arguments by the Government, the Court stated in particular that “an association, including a political party, is not excluded from the protection afforded by the Convention simply because its activities are regarded by the national authorities as undermining the constitutional structures of the State and calling for the imposition of restrictions.”³⁴⁴ “However, it does not follow [from article 11] that the authorities of a State in which an association, through its activities, jeopardises that State’s institutions are deprived of the right to protect those institutions.” According to the Court, “some compromise between the requirements of defending democratic society and individual rights is inherent in the system of the Convention”.

³⁴²*Enr. Court HR, Case of the United Communist Party of Turkey and Others v. Turkey, judgment of 30 January 1998, Reports 1998-I, pp. 9-10, para.10.*

³⁴³*Ibid.*, pp. 16-17, paras. 24-25.

³⁴⁴*Ibid.*, p. 17, para. 27.

However, for there to be a compromise of that sort any intervention by the authorities must be in accordance with paragraph 2 of Article 11.³⁴⁵

The Court then accepted that the dissolution of TBKP constituted an *interference with the right to freedom of association* within the meaning of article 11(1) of the European Convention in respect of all three applicants, i.e. the party itself and two of its founders and leaders who were banned from discharging similar responsibilities in any other political grouping.³⁴⁶ In examining whether this interference could be justified under article 11(2) of the Convention, the Court accepted that *the interference was “prescribed by law”*, namely by various provisions of the Turkish Constitution and the aforementioned Law No. 2820. It also considered that the dissolution of TBKP *“pursued at least one of the ‘legitimate aims’ set out in Article 11: the protection of ‘national security’”*.³⁴⁷ In considering the final question, whether the interference was also *“necessary in a democratic society”*, the Court synthesized and expanded its general principles relating to the concept of “a democratic society”. In view of its importance at the European level, these principles will be quoted *in extenso*:

“42. The Court reiterates that notwithstanding its autonomous role and particular sphere of application, Article 11 must also be considered in the light of Article 10. The protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association as enshrined in Article 11 ...

43. That applies all the more in relation to political parties in view of their essential role in ensuring pluralism and the proper functioning of democracy ...

As the Court has said many times, there can be no democracy without pluralism. It is for that reason that freedom of expression as enshrined in Article 10 is applicable, subject to paragraph 2, 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 fact that their activities form part of a collective exercise of freedom of expression in itself entitles political parties to seek the protection of Articles 10 and 11 of the Convention.

44. In the Informationsverein Lentia and Others v. Austria judgment the Court described the State as the ultimate guarantor of the principle of pluralism ... In the political sphere that responsibility means that the State is under the obligation, among others, to hold, in accordance with Article 3 of Protocol No. 1, free elections at reasonable intervals by secret ballot under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature. Such expression is inconceivable without the participation of a plurality of political parties representing the different shades of opinion to be found within a country’s population. By relaying this range of opinion, not only within political institutions but also – with the help of the media – at all levels of social life, political parties

³⁴⁵Ibid., p. 18, para. 32.

³⁴⁶Ibid., p. 19, para. 36.

³⁴⁷Ibid., pp. 19-20, paras. 38-41; emphasis added.

make an irreplaceable contribution to political debate, which is at the very core of the concept of a democratic society ...

45. Democracy is without doubt a fundamental feature of the European public order ...

That is apparent, firstly, from the preamble to the Convention, which establishes a very clear connection between the Convention and democracy by stating that the maintenance and further realisation of human rights and fundamental freedoms are best ensured on the one hand by an effective political democracy and on the other by a common understanding and observance of human rights ... The Preamble goes on to affirm that European countries have a common heritage of political tradition, ideals, freedom and the rule of law. The Court has observed that in that common heritage are to be found the underlying values of the Convention ...; it has pointed out several times that the Convention was designed to maintain and promote the ideals and values of a democratic society...

In addition, Articles 8, 9, 10 and 11 of the Convention require that interference with the exercise of the rights they enshrine must be assessed by the yardstick of what is 'necessary in a democratic society'. The only type of necessity capable of justifying an interference with any of those rights is, therefore, one which may claim to spring from 'democratic society'. Democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it.

The Court has identified certain provisions of the Convention as being characteristic of democratic society. Thus in its very first judgment it held that in a 'democratic society within the meaning of the Preamble and the other clauses of the Convention', proceedings before the judiciary should be conducted in the presence of the parties and in public and that that fundamental principle was upheld in Article 6 of the Convention ... In a field closer to the one concerned in the instant case, the Court has on many occasions stated, for example, that freedom of expression constituted one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment ... whereas in the *Mathieu-Mohin and Clerfayt* judgment ... it noted the prime importance of Article 3 of Protocol No. 1, which enshrines a characteristic principle of an effective political democracy ...

46. Consequently, the exceptions set out in Article 11 are, where political parties are concerned, to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties' freedom of association. In determining whether a necessity within the meaning of Article 11 § 2 exists, the Contracting States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying it, including those given by independent courts. The Court has already held that such scrutiny was necessary in a case concerning a Member of parliament who had been convicted of proffering insults; ... such scrutiny is all the more necessary where an entire political party is dissolved and its leaders banned from carrying on any similar activity in the future.

47. When the Court carries out its scrutiny, its task is not to substitute its own view for that of the relevant national authorities but rather to review under Article 11 the decisions they delivered in the exercise of their discretion. This does not mean that it has to confine itself to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; it must look at the interference complained of in the light of the case as a whole and determine whether it was ‘proportionate to the legitimate aim pursued’ and whether the reasons adduced by the national authorities to justify it are ‘relevant and sufficient’. In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity the principles embodied in Article 11, and, moreover, that they based their decisions on an acceptable assessment of the relevant facts.”³⁴⁸

The Court then applied these principles to the *United Communist Party of Turkey and Others* case. It noted that, since the dissolution of the party had been ordered before it even had been able to start its activities, ***it was exclusively based on its constitution and programme***, which contained “nothing to suggest that they did not reflect the party’s true objectives and its leaders’ true intentions”. Like the Constitutional Court, the European Court therefore took those documents “as a basis for assessing whether the interference in question was necessary”.³⁴⁹

With regard to ***the first ground invoked by the Constitutional Court in favour of the dissolution***, namely that the TBKP included the word “communist” in its name, the European Court considered “that a political party’s choice of name cannot in principle justify a measure as drastic as dissolution, in the absence of other relevant and sufficient circumstances. In this connection, it must be noted, firstly, that ... the provisions of the Criminal Code making it a criminal offence to carry on political activities inspired, in particular, by communist ideology were repealed by Law no. 3713 on the prevention of terrorism. The Court also [attached] much weight to the Constitutional Court’s finding that the *TBKP* was not seeking, in spite of its name, to establish the domination of one class over the others, and that, on the contrary, it satisfied the requirements of democracy, including political pluralism, universal suffrage and freedom to take part in politics.” Accordingly, “in the absence of any concrete evidence to show that in choosing to call itself ‘communist’, the *TBKP* had opted for a policy that represented a real threat to Turkish society or the Turkish State, the Court [could not] accept that the submission based on the party’s name, by itself, entail the party’s dissolution.”³⁵⁰

As to the ***second submission accepted by the Constitutional Court in support of the dissolution of the TBKP***, namely that it “sought to promote separatism and the division of the Turkish nation”, the European Court observed that, although the party referred in its programme “to the Kurdish ‘people’ and ‘nation’ and Kurdish ‘citizens’”, it neither described them as a “minority”, nor made any claim “other than for recognition of their existence – for them to enjoy special treatment or rights, still less a right to secede from the rest of the Turkish population. On the contrary its

³⁴⁸Ibid., pp. 20-22, paras. 42-47.

³⁴⁹Ibid., p. 25, para. 51.

³⁵⁰Ibid., p. 26, para. 54.

programme [stated]: “The TBKP will strive for a peaceful, democratic and fair solution of the Kurdish problem, so that the Kurdish and Turkish peoples may live together of their free will within the borders of the Turkish Republic, on the basis of equal rights and with a view to democratic restructuring founded on their common interests.” “The *TBPK* also said in its programme: ‘A solution to the Kurdish problem will only be found if the parties concerned are able to express their opinions freely, if they agree not to resort to violence in any form in order to resolve the problem and if they are able to take part in politics with their own national identity’.”³⁵¹

The European Court went on to state that it considered one of the principal characteristics of democracy to be

“the possibility it offers of resolving a country’s problems through dialogue, without recourse to violence, even when they are irksome. Democracy thrives on freedom of expression. From that point of view, there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State’s population and to take part in the nation’s political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned. To judge by its programme, that was indeed the *TBKP*’s objective in this area.”³⁵²

Although it could not be ruled out “that a party’s political programme may conceal objectives and intentions different from the ones it proclaims”, this was an issue that could not be verified in the case before the Court, since the party had not been active but dissolved immediately after its creation. “It was thus penalised for conduct relating solely to the exercise of freedom of expression.”³⁵³

Although the Court was finally also “prepared to take into account the background of cases before it, in particular the difficulties associated with the fight against terrorism ... it [found] no evidence to enable it to conclude, in the absence of any activity by the *TBKP*, that the party bore any responsibility for the problems which terrorism poses in Turkey.”³⁵⁴

It followed that “a measure as drastic as the immediate and permanent dissolution of the *TBKP*, ordered before its activities had even started and coupled with a ban barring its leaders from discharging any other political responsibility, [was] disproportionate to the aim pursued and consequently unnecessary in a democratic society.”³⁵⁵ The Court, sitting as a Grand Chamber, thus *unanimously* decided that article 11 of the European Convention had been violated.³⁵⁶

³⁵¹Ibid., pp. 26-27, paras. 55-56.

³⁵²Ibid., p. 27, para. 57.

³⁵³Ibid., p. 27, para. 58.

³⁵⁴Ibid., p. 27, para. 59.

³⁵⁵Ibid., pp. 27-28, para. 61.

³⁵⁶Ibid., p. 31 as read in conjunction with p. 5.

The general principles applied in the *United Communist Party of Turkey* case have subsequently been confirmed in other similar cases such as that of the *Socialist Party and Others v. Turkey*. This party, the SP, had also been dissolved by decision of the Constitutional Court and its leaders banned from holding similar office in any other political party. Its assets had also been liquidated and transferred to the Treasury.³⁵⁷ Unlike in the abovementioned case, however, ***the decision of the Constitutional Court was based only on the political activities of the SP and not on its constitution or programme.*** The Constitutional Court had noted, inter alia, that, by distinguishing two nations, i.e. the Kurdish and Turkish nations, and advocating a federation to the detriment of the unity of the Turkish nation and the territorial integrity of the State, the aim of the SP was “similar to that of terrorist organisations”. As it “promoted separatism and revolt its dissolution was justified”.³⁵⁸

The European Court therefore had to examine the statements of the SP to decide whether its dissolution was justified. In other words, it had to satisfy itself “that the national authorities based their decisions on an acceptable assessment of the relevant facts”.³⁵⁹

The Court analysed the relevant statements and found nothing in them that could be considered “a call for the use of violence, an uprising or any other form of rejection of democratic principles” – on the contrary. As for the distinction made between the Kurdish and the Turkish nations, the Court noted that “the statements put forward a political programme with the essential aim being the establishment, in accordance with democratic rules, of a federal system in which Turks and Kurds would be represented on an equal footing and on a voluntary basis.” With regard to the references to “self-determination” and the right to “secede” of the Kurdish nation, the Court observed in particular that “read in their context, the statements using these words [did] not encourage secession from Turkey but [sought] rather to stress that the proposed federal system could not come about without the Kurds’ freely given consent, which should be expressed through a referendum.”³⁶⁰ Moreover,

“the fact that such a political programme is considered incompatible with the current principles and structures of the Turkish State does not make it incompatible with the rules of democracy. It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself.”³⁶¹

Furthermore, in the absence of concrete actions belying the sincerity of the statements, that sincerity should not be doubted. In the view of the European Court, “the SP was thus penalised for conduct relating solely to the exercise of freedom of expression.”³⁶²

³⁵⁷ *Eur. Court HR, Case of the Socialist Party and Others v. Turkey, judgment of 25 May 1998, Reports 1998-III, p. 1250, para. 24, and p. 1258, para. 51.*

³⁵⁸ *Ibid.*, p. 1256, para. 43.

³⁵⁹ *Ibid.*, p. 1256, para. 44.

³⁶⁰ *Ibid.*, pp. 1256-1257, paras. 46-47.

³⁶¹ *Ibid.*, p. 1257, para. 47.

³⁶² *Ibid.*, pp. 1257-1258, para. 48.

Emphasizing “the essential role of political parties in the proper functioning of democracy”, the Court stated that the exceptions set out in article 11 were to be “construed strictly” where political parties are concerned. Applying correspondingly “rigorous European supervision”, the Court held that radical measures such as those taken in the case before it “**may only be applied in the most serious cases**”.³⁶³ But the impugned statements by the party leader “did not appear to it to call into question the need for compliance with democratic principles and rules” nor had it been established “how, in spite of the fact that in making them their author declared attachment to democracy and expressed rejection of violence, the statements in issue could be considered to have been in any way responsible for the problems which terrorism poses in Turkey”.³⁶⁴ It followed that article 11 of the Convention had been violated, since “the dissolution of the SP was disproportionate to the aim pursued and consequently unnecessary in a democratic society.”³⁶⁵ This finding was reached by a **unanimous** Court sitting as a **Grand Chamber**.³⁶⁶

It is noteworthy that in both of the preceding cases the Court also considered that there was no need to bring article 17 of the Convention into play as suggested by the Government. This was so because there was no evidence warranting the conclusion that the Convention had been relied on to engage in activities or perform acts aimed at the destruction of any of the rights and freedoms set forth in it.³⁶⁷

The outcome was different, however, in the case of *Refah Partisi (Prosperity Party) and Others v. Turkey*, which concerned Refah’s dissolution and the prohibition of its leaders from holding office in any other political party. ***This case is important in that it was made clear that a political party that wants to introduce a plurality of legal systems, that does not take prompt action against party members who call for the use of force as a political weapon and that shows disrespect for political opponents cannot count on the protection of the Convention system.***

In examining whether this measure could be justified under article 11(2) of the Convention, the European Court accepted that it was “**prescribed by law**” (the Constitution and Law No. 2820 on the regulation of political parties). In view of “the importance of the principle of secularism for the democratic system in Turkey”, the

³⁶³Ibid., p. 1258, paras. 50-51; emphasis added.

³⁶⁴Ibid., pp. 1258-1259, para. 52.

³⁶⁵Ibid., p. 1259, para. 54.

³⁶⁶Ibid., p. 1262 as read in conjunction with p. 1236.

³⁶⁷Ibid., p. 1259, para. 53, and *Eur. Court HR, Case of the United Communist Party of Turkey and Others v. Turkey, judgment of 30 January 1998, Reports 1998-I, p. 27; para. 60*. For other cases raising similar issues against Turkey, see *Eur. Court HR, Case of Freedom and Democracy Party (ÖZDEP) v. Turkey, judgment of 8 December 1999, Reports 1999-VIII, p. 293* and *Eur. Court HR, Case of Yazar, Karatas, Aksoy and the People’s Labour Party (HEP) v. Turkey, judgment of 9 April 2002*; for the text see the Court’s web site: <http://hudoc.echr.coe.int/hudoc>. Article 11 was violated in these two cases as well.

Article 17 of the Convention reads: “Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”

Similar provisions are contained in article 5(1) of the International Covenant on Civil and Political Rights and article 29(a) of the American Convention on Human Rights.

Court also considered “that *Refab’s dissolution pursued a number of the legitimate aims listed in Article 11, namely protection of national security and public safety, prevention of disorder or crime and protection of the rights and freedoms of others.*”³⁶⁸

With regard to the notion of being “*necessary in a democratic society*”, the Court drew attention to the following general principles, in which it further elaborated its views on the role of democracy and the rule of law in a system for the protection of human rights:

“43. The European Convention on Human Rights must be understood and interpreted as a whole. Human rights form an integrated system for the protection of human dignity; in that connection, democracy and the rule of law have a key role to play.

Democracy requires that people should be given a role. Only institutions created by and for the people may be vested with the powers and authority of the State; statute law must be interpreted and applied by an independent judicial power. There can be no democracy where the people of a State, even by a majority decision, waive their legislative and judicial powers in favour of an entity which is not responsible to the people it governs, whether it is secular or religious.

The rule of law means that all human beings are equal before the law, in their rights as in their duties. However, legislation must take account of differences, provided that distinctions between people and situations have an objective and reasonable justification, pursue a legitimate aim and are proportionate and consistent with the principles normally upheld by democratic societies. But the rule of law cannot be said to govern a secular society when groups of persons are discriminated against solely on the ground that they are of a different sex or have different political or religious beliefs. Nor is the rule of law upheld where entirely different legal systems are created for such groups.”³⁶⁹

Referring to its judgment in the *United Communist Party of Turkey* case, the Court reaffirmed its view that “democracy is without doubt a fundamental feature of the ‘European public order’” and that “one of the principal characteristics of democracy [is] the possibility it offers of resolving a country’s problems through dialogue, without recourse to violence, even when they are irksome.”³⁷⁰ It therefore took the view that

“a political party may campaign for a change in the law or the legal and constitutional basis of the State on two conditions: (1) the means used to that end must in every respect be legal and democratic; (2) the change proposed must itself be compatible with fundamental democratic principles. It necessarily follows that a political party whose leaders incite recourse to violence, or propose a policy which does not comply with one

³⁶⁸ *Eur. Court HR, Case of Refab Partisi (Prosperity Party) and Others v. Turkey, judgment of 31 July 2001*; the text used is the unedited text found at the Court’s web site, <http://hudoc.echr.coe.int/>, paras. 39 and 42; emphasis added.

³⁶⁹ *Ibid.*, para. 43.

³⁷⁰ *Ibid.*, paras. 45-46.

or more of the rules of democracy or is aimed at the destruction of democracy and infringements of the rights and freedoms afforded under democracy cannot lay claim to the protection of the Convention against penalties imposed for those reasons.”³⁷¹

The Court also reiterated that the right to freedom of thought, conscience and religion in article 9 of the Convention is “one of the foundations of a ‘democratic society’ within the meaning of the Convention”. It added that “in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected ... The State’s role as the neutral and impartial organiser of the practising of the various religions, denominations and beliefs is conducive to religious harmony and tolerance in a democratic society.”³⁷² To illustrate this view, the Court recalled its jurisprudence, according to which

“in a democratic society, the freedom to manifest a religion may be restricted in order to ensure the neutrality of the public education service, an objective contributing to protection of the rights of others, order and public safety ... Similarly, measures taken in secular universities to ensure that certain fundamentalist religious movements do not disturb public order or undermine the beliefs of others do not constitute violations of Article 9 ... The Court has likewise held that preventing a Muslim opponent of the Algerian Government from spreading propaganda within Swiss territory was necessary in a democratic society for the protection of national security and public safety.”³⁷³

With regard to the situation in Turkey, the Court confirmed that “the principle of secularism ... is undoubtedly one of the fundamental principles of the State, which are in harmony with the rule of law and respect for human rights. Any conduct which fails to respect that principle cannot be accepted as being part of the freedom to manifest one’s religion and is not protected by Article 9 of the Convention.”³⁷⁴

With regard to the specific case of *Refah*, the Government submitted that the dissolution of the party “had been a preventive measure to protect democracy” since the party “had ‘an actively aggressive and belligerent attitude to the established order’ and was making ‘a concerted attempt to prevent it from functioning properly’ so that it could then destroy it”.³⁷⁵ The applicants, for their part, denied that they had challenged the “vital importance of the principle of secularism” for Turkey. The party “had been in power perfectly legally ... from June 1996 to July 1997. The second applicant ... had been Prime Minister during the same period.”³⁷⁶

In assessing the *necessity* of the dissolution of *Refah*, the European Court noted that the parties before it agreed “that preserving secularism is necessary for protection of the democratic system in Turkey. However, they did *not* agree about the

³⁷¹Ibid., para. 47.

³⁷²Ibid., paras. 49-51.

³⁷³Ibid., para. 51.

³⁷⁴Ibid., para. 52.

³⁷⁵Ibid., para. 63.

³⁷⁶Ibid., paras. 54-55.

content, interpretation and application of the principle of secularism.”³⁷⁷ As in the *Socialist Party and Others* case, the Court based its assessment on the declarations and policy statements of Refah’s chairman and leaders and not on the constitution and programme of the party. These statements, which were considered by the Constitutional Court to infringe the principle of secularism, fell into the following three categories:

- ❖ “those which tended to show that Refah intended to set up a plurality of legal systems, introducing discrimination on the grounds of belief”;
- ❖ “those which tended to show that Refah wanted to apply sharia to the Muslim community”; and
- ❖ “those based on references made by Refah members to jihad (holy war) as a political method”.³⁷⁸

With regard to the *first* category, the Court agreed with the Government that “Refah’s proposal that there should be a plurality of legal systems would introduce into all legal relationships a distinction between individuals grounded on religion, would categorise everyone according to his religious beliefs and would allow him rights and freedoms not as an individual but according to his allegiance to a religious movement. The Court [took] the view that such a societal model cannot be considered compatible with the Convention system, for two reasons.”

“Firstly, it would do away with the State’s role as the guarantor of individual rights and freedoms and the impartial organiser of the practice of the various beliefs and religions in a democratic society, since it would oblige individuals to obey, not rules laid down by the State in the exercise of its above-mentioned functions, but static rules of law imposed by the religion concerned. But the State has a positive obligation to ensure that everyone within its jurisdiction enjoys in full, *and without being able to waive them*, the rights and freedoms guaranteed by the Convention...

Secondly, such a system would undeniably infringe the principle of non-discrimination between individuals as regards their enjoyment of public freedoms, which is one of the fundamental principles of democracy. A difference in treatment between individuals in all fields of public and private law according to their religion or beliefs manifestly cannot be justified under the Convention, and more particularly Article 14 thereof, which prohibits discrimination. Such a difference in treatment cannot maintain a fair balance between, on the one hand, the claims of certain religious groups who wish to be governed by their own rules and on the other the interest of society as a whole, which must be based on peace and on tolerance between the various religions and beliefs.”³⁷⁹

With regard to the *second* category of statements, namely those relating to the introduction of sharia, Islamic law, as the ordinary law and the law applicable to the Muslim community, the Court considered that:

³⁷⁷ Ibid., para. 65; emphasis added.

³⁷⁸ Ibid., para. 68.

³⁷⁹ Ibid., para. 70; emphasis added.

“sharia, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it. The Court notes that, when read together, the offending statements, which contain explicit references to the introduction of sharia, are difficult to reconcile with the fundamental principles of democracy, as conceived in the Convention taken as a whole. It is difficult to declare one’s respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts. In addition, the statements concerning the desire to found a ‘just order’ or the ‘order of justice’ or ‘God’s order’, when read in their context, and even though they lend themselves to various interpretations, have as their common denominator the fact that they refer to religious or divine rules in order to define the political regime advocated by the speakers. They reveal ambiguity about those speakers’ attachment to any order not based on religious rules. In the Court’s view, a political party whose actions seem to be aimed at introducing sharia in a State party to the Convention can hardly be regarded as an association complying with the democratic ideal that underlies the whole of the Convention.”³⁸⁰

The Court considered, furthermore, that “taken separately, the policy statements made by Refah’s leaders particularly on the question of Islamic headscarves or organising working hours in the public sector to accommodate prayers, and some of their acts, such as the visit of Mr Kazan, then Minister of Justice, to a member of his party charged with inciting hatred on the ground of religious discrimination, or the reception given by Mr Erbakan to the leaders of the various Islamic movements, did not constitute an imminent threat to the secular regime in Turkey. However, the Court [found] persuasive the Government’s argument that these acts and policy statements were consistent with Refah’s unavowed aim of setting up a political regime based on sharia.”³⁸¹

With regard to the *third* category of statements, namely those concerning the concept of jihad, the Court stated that, while it was true “that Refah’s leaders did not, in government documents, call for the use of force and violence as a political weapon, they did not take prompt practical steps to distance themselves from those members of Refah who had publicly referred with approval to the possibility of using force against politicians who opposed them. Consequently, Refah’s leaders did not dispel the ambiguity of these statements about the possibility of having recourse to violent methods in order to gain power and retain it.”³⁸²

With regard to specific remarks made by a Member of Parliament for the province of Ankara, which “revealed deep hatred for those he considered to be opponents of an Islamist regime”, the Court held that:

³⁸⁰Ibid., para. 72.

³⁸¹Ibid., para. 73.

³⁸²Ibid., para. 74.

“where the offending conduct reaches a high level of insult and comes close to a negation of the freedom of religion of others it loses the right to society’s tolerance.”³⁸³

The Court concluded, accordingly, that “the offending remarks and policy statements made by Refah’s leaders [formed] a whole and [gave] a fairly clear picture of a model of State and society organised according to religious rules, which was conceived and proposed by Refah.” Moreover, “Refah’s political aims were neither theoretical nor illusory, but achievable” in the light of the large number of Members of Parliament they had at the time of the party’s dissolution (almost one third of the seats in the Turkish Grand National Assembly) and past experience which had shown that political movements based on religious fundamentalism had been able to seize power.³⁸⁴

Given all these considerations, the Court concluded that

“the penalty imposed on the applicants may reasonably be considered to have met a ‘pressing social need’, in so far as Refah’s leaders, under the pretext that they were redefining the principle of secularism, had declared their intention of setting up a plurality of legal systems and introducing Islamic law (sharia), and had adopted an ambiguous stance with regard to the use of force to gain power and retain it. It takes the view that, even though the margin of appreciation left to States must be a narrow one where the dissolution of political parties is concerned, since the pluralism of ideas and parties is itself an inherent part of democracy, a State may reasonably forestall the execution of such a policy, which is incompatible with the Convention’s provisions, before an attempt is made to implement it through concrete steps that might prejudice civil peace and the country’s democratic regime.”³⁸⁵

Lastly, in deciding whether the dissolution of Refah was proportionate to the legitimate aim pursued, the Court stated

“that the dissolution of a political party accompanied by a temporary ban prohibiting its leaders from exercising political responsibilities was a drastic measure and that measures of such severity might be applied only in the most serious cases ... In the present case, it has just found that the interference in question met a ‘pressing social need’. It should also be noted that after Refah’s dissolution, only five of its MPs (including the applicants) temporarily forfeited their parliamentary office and their role as leaders of a political party. The 152 remaining MPs continued to sit in parliament and pursued their political careers normally. Moreover, the applicants did not allege that Refah or its members had sustained considerable pecuniary damage on account of the transfer of their assets to the Treasury. The Court considers in that connection that the nature and severity of the interference are also factors to be taken into account when assessing its proportionality.”³⁸⁶

³⁸³Ibid., para. 75.

³⁸⁴Ibid., paras. 76-77.

³⁸⁵Ibid., para. 81.

³⁸⁶Ibid., para. 82.

The Court was thus satisfied that the interference complained of “was not disproportionate to the legitimate aims pursued”. It followed that article 11 had not been violated.³⁸⁷ This decision was taken by a Chamber of the Court with a majority of four votes to three.

Democracy is a fundamental feature of the European public order and the only political model compatible with the European Convention on Human Rights.

There is no democracy where the people of a State, even by majority decision, may waive their legislative and judicial powers in favour of an entity, be it secular or religious, that is not responsible to the people it governs.

In a democratic society, the State is the ultimate guarantor of the principle of pluralism. It is also the guarantor of individual rights and freedoms and the impartial organizer of the practice of the various beliefs and religions in society. This means that the State must ensure that every person within its jurisdiction enjoys fully the rights and freedoms guaranteed by the Convention. These rights and freedoms cannot be waived by anybody.

The rule of law has a key role to play in a democratic society. This means, for instance, that all human beings are equal before the law, in their rights and in their duties, and that there must therefore be no discrimination between them.

Political parties are a form of association essential to a democratic society and are protected by article 11 of the European Convention on Human Rights.

The right to freedom of association of political parties must also be considered in the light of the right to freedom of religion, thought, opinion and expression as guaranteed by articles 9 and 10 of the European Convention. This is because of the essential role played by political parties in ensuring pluralism and a functioning democracy.

In view of the important role played by political parties in a democratic society, only convincing and compelling reasons can justify restrictions on their freedom of association. This means that the Contracting States have only a narrow margin of appreciation in deciding on the necessity of a restriction on the exercise of this right and that the corresponding European supervision is rigorous. Any restrictions on the exercise of the rights contained, inter alia, in articles 9 to 11 of the Convention must, in other words, spring from the pressing social needs of a democratic constitutional order.

³⁸⁷Ibid., paras. 83-84.

One of the principal characteristics of a democracy is also the possibility it offers of resolving a country's problems through dialogue and without recourse to violence. Democracy thrives on a generously understood and applied freedom of expression. There cannot therefore be any justification for not allowing political parties to seek public debate on issues of general interest as long as they do so in accordance with democratic rules.

The fact that a political party's constitution and programme may be considered incompatible with the principles and structures of a Contracting State does not make it incompatible with the rules of democracy as understood by the European Convention on Human Rights.

Political parties which, in their constitutions, programmes or activities, seek to introduce a plurality of legal systems, profess or fail to disavow violence for political aims, and show disrespect and hatred for political opponents will not enjoy protection of freedom of association as guaranteed by article 11 of the European Convention on Human Rights.

4.5.4 A lawyer's right to freedom of assembly

The right to freedom of assembly was at issue in the case of *Ezelin v. France*, in which a disciplinary sanction in the form of a reprimand was imposed on the applicant, who was a lawyer (“*avocat*”), for having participated in a demonstration against two court decisions in response to a call by the Trade Union of the Guadeloupe Bar, of which the applicant was Vice-Chairman at the time. The demonstration turned unruly, although the applicant himself was not involved in any violent incident. The sanction was imposed on him “because he had not dissociated himself from the unruly incidents which occurred during the demonstration”. He argued before the European Court that his rights under articles 10 and 11 of the Convention had been violated.³⁸⁸

The Court noted at the outset that, “notwithstanding its autonomous role and particular sphere of application, Article 11 must, in the present case, also be considered in the light of Article 10 [since the] protection of personal opinions, secured by Article 10, is one of the objectives of freedom of peaceful assembly as enshrined in Article 11.”³⁸⁹

The Court then accepted that the measure complained of was “*prescribed by law*”, namely the Decree of 9 June 1972 regulating the profession of *avocat*, implementing the Act of 31 December 1971 reforming certain court and legal professions, and that it was imposed in pursuit of a *legitimate aim*, i.e. the “prevention of disorder”.³⁹⁰ But was it *necessary in a democratic society* for this legitimate purpose? The Government submitted that it was, “having regard in particular to Mr Ezelin’s position as an *avocat* and to the local background”. By not disavowing the unruly incidents that had occurred during the demonstration, the applicant had, in its

³⁸⁸ Eur. Court HR, *Case of Ezelin v. France*, judgment of 26 April 1991, Series A, vol. 202, p. 8, paras. 9-10, and p. 22, para. 47.

³⁸⁹ Ibid., p. 20, para. 37.

³⁹⁰ Ibid., p. 21-22, paras. 43-47.

view, approved them ipso facto. The Government also claimed that “it was essential for judicial institutions to react to behaviour which, on the part of an ‘officer of the court’ ... seriously impaired the authority of the judiciary and respect for court decisions.”³⁹¹

The European Court of Human Rights disagreed. It examined the disciplinary sanction imposed on Mr. Ezelin “in the light of the case as a whole in order to determine in particular whether it was proportionate to the legitimate aim pursued, having regard to the special importance of freedom of peaceful assembly and freedom of expression, which [were] closely linked in this instance”. It added that

“The proportionality principle demands that a balance be struck between the requirements of the purposes listed in Article 11 § 2 and those of the free expression of opinions by word, gesture or even silence by persons assembled on the streets or in other public places. The pursuit of a just balance must not result in *avocats* being discouraged, for fear of disciplinary sanctions, from making clear their beliefs on such occasions.”³⁹²

The Court observed that in this case the penalty imposed on the applicant was, admittedly, “at the lower end of the scale of disciplinary penalties” foreseen in the relevant law and that “it had mainly moral force, since it did not entail any ban, even a temporary one, on practising the profession or on sitting as a member of the Bar Council.” The Court considered, however,

“that the freedom to take part in a peaceful assembly – in this case a demonstration that had not been prohibited – is of such importance that it cannot be restricted in any way, even for an *avocat*, so long as the person concerned does not himself commit any reprehensible act on such an occasion.”³⁹³

As the sanction complained of, however minimal, did not appear to have been “necessary in a democratic society”, it violated article 11 of the Convention.³⁹⁴

The right to freedom of assembly guaranteed by article 11 of the European Convention on Human Rights must also be guaranteed to lawyers provided that they have not committed a reprehensible act.

There are situations which require that article 11 be considered also in the light of the protection of personal opinions as secured by article 10 of the Convention, since such protection is one of the objectives of freedom of peaceful assembly.

³⁹¹Ibid., p. 22, para. 49.

³⁹²Ibid., p. 23, para. 51-52.

³⁹³Ibid., p. 23, para. 53.

³⁹⁴Ibid., loc. cit.

The principle of proportionality, which is one of the conditions laid down in article 11(2) for imposing restrictions on the exercise of freedom of assembly, requires that a balance be struck between, on the one hand, the requirements of the legitimate purposes cited therein and, on the other, the requirements of freedom of expression of opinion by word, gesture or even silence by persons assembled in public places.

5. The Role of Judges, Prosecutors and Lawyers in Ensuring the Protection of Freedom of Thought, Conscience, Religion, Opinion, Expression, Association and Assembly

This chapter has highlighted some of the main aspects of the fundamental freedoms of thought, conscience, religion, opinion, expression, association and assembly. These freedoms constitute cornerstones of the life of every human being and of society as a whole, which depends on them for its proper and efficient functioning. They are also not only relevant but even essential to the legal professions themselves, since they depend on them to be able to exercise their daily work independently, impartially and effectively.

As this chapter has also shown, however, enjoyment of freedom of conscience, religion, opinion, expression, association, assembly and other freedoms is in many instances fragile even in countries with an otherwise largely acceptable human rights record. It is therefore essential that judges, prosecutors and lawyers in every society be made aware of the importance of their efficient protection. Although the exercise of some freedoms may be subject to limitations when necessary for certain legitimate purposes, the legal professions are well placed to strike an indispensable – but fair – balance between, on the one hand, the individual’s interest in maximizing the enjoyment of his or her freedoms and, on the other, society’s general interest in enabling all human beings to enjoy respect for the same freedoms. The large body of international jurisprudence in this area, some of which has been analysed in this chapter, offers the legal professions valuable guidance in this regard.

6. Concluding Remarks

The freedoms of thought, conscience, religion, opinion, expression, association and assembly cover all or virtually all aspects of the life both of individuals and of society. To ensure the full and effective protection of these freedoms for all without discrimination means allowing for divergences of views, opinions and ideas that may enrich not only our personal lives but also the life of society. Furthermore, it helps to nurture increased understanding between, and respect for, persons with different opinions, beliefs and religious convictions. People may not always share each others' views, religious beliefs or opinions on various matters and may even find them repulsive and unacceptable. But by allowing a free flow of information and exchanges of views, ideas and information, a society allows people of all shades of opinions to take an active part in issues of general interest. The effective implementation of these freedoms is thus also a precondition for a society in which people can live in tolerance, peace and security.

The effective protection of freedom of opinion, expression, association and assembly is, moreover, indispensable to enable people to vindicate their human rights before national and international tribunals or other competent authorities, and also to enable others to play a role in contributing to the promotion and protection of human rights and fundamental freedoms. It is noteworthy in this regard that human rights violations involving torture, arbitrary detention, unfair trial proceedings and extrajudicial executions more often than not have their root in a lack of tolerance for the views and beliefs of others. It would thus be an important step towards an improved human rights record for all States to ensure the full and effective exercise of the fundamental freedoms dealt with in this chapter.