



Volume IV

CIJL Yearbook

December 1995

The Media and Judiciary

Editor: Mona A. Rishmawi

Centre for the Independence of Judges and Lawyers
Geneva, Switzerland

Established in 1978 by the International Commission of Jurists in Geneva, the Centre for the Independence of Judges and Lawyers:

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- organizes support for judges and lawyers who are being harassed or persecuted.

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Note: Payment may be made in Swiss francs or in the equivalent amount in other currencies either by direct cheque valid for external payment or through a bank to Société de Banque Suisse, Geneva, account No. 142.548.0; National Westminster Bank, 1 New Bond Street, London W1A 2JH, account No. 11762837. *Pro forma* invoices will be supplied on request to persons in countries with exchange control restrictions to assist in obtaining authorization.

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ISSN 0252-0354

Cover Design and Layout by M.Reza Hariri of the ICJ/CIJL
Printed in France, Imprimerie Abrax -Chenôve, France

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Editorial

During 1995, the news of the case of O.J. Simpson, the wealthy African-American football-player and actor who was accused of killing his white former-wife and a friend of hers, dominated the media. Unusual in many countries, most aspects of the proceedings were aired on television. Technologically-advanced communication networks, such as the CNN, followed the trial closely. Audiences not only in the United States of America, but also in Asia, Africa, Europe, Australia, Canada, and Latin America, were able to follow the case on daily basis. The case, treated mainly as entertainment, became one of the best known trials in the world today. Long before the jury reached its verdict, the American and international public had reached their own conclusions on the guilt or innocence of O.J. Simpson. Emotions were so high that on the day of the verdict, the President of the United States had to call for self-restraint. The "not guilty" verdict, which was cheered largely by the African-American community, was met with *shock and dismay* by the majority of whites.

The case raised many legal and moral questions, most important of which were perhaps those related to the racial bias of the police, violence against women, and the impact of the financial and social status of the accused on the result of a criminal proceedings in a US court. The question remains; if the media coverage of the trial was not so extensive and sensational, would emotions surrounding this case have been so intense?

Many argue that the media's handling of the case contributed to turning a double-murder trial into a soap-opera. Others, applauding the role of the media, feel that it played its rightful role in informing the public about current events and advancing their knowledge of judicial proceedings.

It is not easy to reach a conclusive opinion on the role of the media in the O.J. Simpson case. The principles underlying the right of public and media access to judicial proceedings are many. There is no doubt that media coverage of judicial proceedings serves to

inform the public of the achievements and shortcomings of the justice system. Public knowledge of judicial actions could result in its improvement and in an increased public confidence in the administration of justice.

Nevertheless, certain media reports may threaten a party's right to fair trial. Reports may suppress, colour, or sensationalise facts. Evidence may be reported that is inadmissible in court. These reports may cause a certain public to reach a position as to the case that may or may not be reached by a judge or jury following a trial with all legal guarantees employed. Such public positions may affect the behaviour of the participants in the adjudication of any particular case. It was often said in the O.J. Simpson trial that the lawyers were tailoring their arguments to the cameras as much as they were to the judge and jury.

Moreover, witnesses may read media reports and alter their testimony as a result. In jury trials, jurors may be influenced in their decision-making by reports on the case. In addition, judges may be influenced by media accounts of a case and public criticism of judgements, which may affect subsequent decisions. This is why the jury's access to the media had to be restricted in the O.J. Simpson case.

But the liberal American approach concerning the media-coverage of a trial is hardly reflective of universal practice. In fact, in many parts of the world, cameras are not allowed in the court-room and media coverage of judicial matters is often restricted. This raises questions about whether the judge's power to set restrictions is absolute. Are there guidelines that a judge must follow in making a decision to restrict access or reporting? Should the media play a role in determining appropriate restrictions on reports? Should the media have standing to contest a restriction on reporting? Must the judge be compelled to hear arguments from the media? Should there be an opportunity for appeal of a restriction on media reporting in a particular case?

All these questions and others are addressed in this volume of the CIJL Yearbook. Long before the O.J. Simpson murder trial, the Centre for the Independence of Judges and Lawyers (CIJL) recognised that freedom of information and speech must be properly

balanced with the needs of the proper administration of justice. In an attempt to address this delicate balance, a group of 40 distinguished judges, lawyers, and media representatives gathered in Madrid - Spain, in January 1994 to participate in a seminar on the relationship between the media and judiciary.¹ The seminar was organised by the International Commission of Jurists (ICJ) and the CIJL. Amongst the participants was the then UN Special Rapporteur on the Independence of the Judiciary, Mr. Louis Joinet.

This volume of the CIJL Yearbook contains a selection of the papers presented during the seminar.² The papers present a wide range of issues related to media coverage of judicial proceedings. They attempt to balance between the doctrine of judicial independence and the public's right to know. Amongst the topics explored in this volume are the parameters of judicial reporting, as well as the impact of modern technology on judicial independence.

Also examined is the possibility of formal regulation of the relationship between the media and the judiciary. While some participants highlighted the need for codes and guidelines, others thought that the relationship is adequately self-regulated by the media. In an attempt to take a balanced approach to the problem, the participants adopted the Madrid Principles on the Relationship between the Media and Judiciary. The Principles, which are included in this volume, do not attempt to draw up decisive rules. Rather, as their title indicates, they point out to the various norms governing this complex relationship.

In addition to the work of the authors of the papers, this volume benefited from the efforts of several ICJ and CIJL staff members. They include Ms. Cynthia Bechler, Ms. Nana Moeljadi, Ms. Karin

1 The Seminar was organised in co-operation with the Spanish Committee of UNICEF. The ICJ Spanish Section as well as the ICJ affiliate, Asciación pro Derechos Humanos, also provided helpful assistance.

2 All the articles were presented and discussed during the seminar with the exception of Mr. Omar Wakil's article. Mr. Wakil's article was written in December 1995. It was added to this collection because of its relevance.

Stasius, and Mr. Peter Wilborn who assisted in organising the seminar. Ms. Cynthia Belcher and Mr. Peter Wilborn also undertook legal research and Ms. Karin Stasius prepared as well the manuscripts for editing. Mr. Peter Wilborn and Ms. Lynn Hastings assisted in the editing process. Ms. Anja Klug helped as well. Mr. Reza Hariri redesigned the cover and prepared the lay-out of the final publication. All these efforts are valuable.

We hopes that jurists and journalists will find this volume useful.

Mona A. Rishmawi

CIJL Director

December 1995

Part One

The General Principles Governing the Relationship between the Media and Judiciary

The Relationship between the Media and the Judiciary

Background Paper

*Mona Rishmawi, Peter Wilborn and Cynthia Belcher**

Introduction

Freedom of expression and the independence of the judiciary are both requisite parts of a just society. The relationship between the media and the judiciary is a complex one. On the one hand, media reports of judicial proceedings inform the public of matters of interest and can serve as a measure of control over the courts. On the other, certain media reports may unduly influence the judge, the jury, and witnesses, as well as the general public. The purpose of this paper is to introduce the relationship between the media and the judiciary to the participants of the Seminar on the Media and the Judiciary, organised by the International Commission of Jurists (ICJ) and its Centre for the Independence of Judges and Lawyers (CIJL).¹

To this end, Section II of this paper defines the relevant principles and issues related to the judiciary and to the media, and discusses their relationship. Section III examines how the judiciary and the media interact throughout the judicial process: before, during and after trial. Section IV concludes with examples of press self-regulation.²

* Mona Rishmawi is the Director of the CIJL; Peter Wilborn is the Assistant Legal Officer of the CIJL; and Cynthia Belcher is a CIJL legal intern.

- 1 The paper does not analyse other important issues surrounding the media and the judiciary, including defamation and compelled disclosure of sources.
- 2 The CIJL would like to acknowledge the useful work in this field being done by Article 19, an international non-governmental organisation working against censorship.

The Media and the Judiciary

A. An Independent Judiciary

1. The Meaning of the Independence of the Judiciary³

In 1959, the ICJ recognised that an independent judiciary is an indispensable part of a free society under the Rule of Law.⁴ According to the definition drawn up by the ICJ in 1981, "[i]ndependence of the judiciary means that every judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law without any improper influences, inducements or pressures, direct or indirect, from any quarter or for whatever reason"⁵

The 1985 UN Basic Principles on the Independence of the Judiciary (the Basic Principles) build upon this definition and set forth that "[t]he independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the laws of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary."⁶ Furthermore, the Basic Principles make clear that "[t]here shall not be any inappropriate or unwarranted interference with the judicial process..."⁷

3 For a more complete discussion see A. Dieng, "The Rule of Law and the Independence of the Judiciary: An Overview of Principles" (1992), 1 *CIJL Yearbook* 21 at 24-31.

4 See "The Judiciary and Legal Profession under the Rule of Law", a paper produced by the Congress of Delhi, 1959, Committee IV of the International Commission of Jurists, New Delhi, India, in *The Rule of Law and Human Rights: Principles and Definitions* 30 (ICJ, 1966).

5 (Oct. 1981), 8 *CIJL Bulletin* 34 (emphasis added).

6 UN Basic Principles on the Independence of the Judiciary at Art. 1, G.A. Res. 146, U.N. GAOR, 40th Sess. (1985), reprinted in (1990), 25-26 *CIJL Bulletin* 14 at 18 (hereinafter "Basic Principles").

7 *Id.* at Art. 4.

2. *Fair and Public Trial*

One of the most important functions of an independent judiciary is to ensure the right to a fair trial. According to the Basic Principles, the judiciary is entitled and required "to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected."⁸

Trials must not only be fair, but, as a general rule, they must be open to the public. The Universal Declaration of Human Rights states that "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."⁹ The principle was adopted, using similar language, in Article 14 of the International Covenant on Civil and Political Rights (ICCPR),¹⁰ which provides that "[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing."

This right to a public trial is not absolute. It is recognised that certain situations call for a limitation of public access to trials. Article 14 of the ICCPR provides that:

[t]he press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interests of the private lives of the Parties so requires, or to the extent necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

The Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR,¹¹ discussed below, set out parameters for this, and other limitations.

8 Id. at Art. 6.

9 Art. 10.

10 As well as Article 6 of the *European Convention on Human Rights* (ECHR).

11 Reprinted in (June 1986), 36 *ICJ Review* 47.

B. The Media

1. Freedom of Expression

Like the independence of the judiciary, freedom of expression is a fundamental part of a democratic society. This is reflected in Article 19 of the ICCPR¹² which provides that "[e]veryone 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."

Freedom of expression, as set out in international instruments, is also not an absolute right. The proviso in Article 19 is that there may be certain restrictions on the freedom of expression, "but these shall only be such as are provided by law and are necessary (a) [f]or the respect of the rights or reputations of others" The United Nations Human Rights Committee has stated, however, that "when a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself."¹³

2. The Freedom of the Press¹⁴

The freedom of expression includes the freedom of the press. Members of the press, like members of the general public, have the freedom to "impart information . . . in writing . . . or in any other media of his choice."¹⁵ Furthermore, freedom of expression "cannot be separated from the right to use whatever medium is deemed appropriate to impart ideas and to have them reach as wide an audience as possible."¹⁶

12 As well as Article 10 of the ECHR.

13 Report of the Human Rights Committee to the General Assembly, 38th Sess., Supp. No. 40, 1983 (A/38/40), Annexe VI, General Comment 10, quoted in The Article 19 Freedom of Expression Handbook 11 (August 1993) (hereinafter Handbook).

14 The word "press" is used interchangeably with "media."

15 ICCPR at art. 19.

16 Handbook at 67, quoting the Inter-American Court of Human Rights.

By its very nature, however, the press plays a “pre-eminent role.”¹⁷ Freedom of expression, to quote the Supreme Court of the United States, “rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.”¹⁸

The important role of the press is founded on the public’s right to know. Members of the public have the freedom not only to express information to others, but to receive information as well. The public must have access to information in order to monitor the functioning of its institutions, and this is where a free press is essential. The European Court of Human Rights stated that “[n]ot only does it have the task of imparting such information and ideas: the public also has the right to receive them. Were it otherwise, the press would be unable to play its vital role as ‘public watchdog’.”¹⁹ As has been noted, “[j]ournalists are important: but their special status derives from the right of the people. For the journalists hold the public’s right-to-know hat in their right-to-print hand.”²⁰

C. The Interaction between the Media and the Judiciary

1. In General

The relationship between the media and the judiciary is complex. It is the job of the judiciary to uphold the right to free expression. When members of the public, including journalists, suffer limitations to their freedom of expression, they turn to the judiciary for protection and redress. In the separation of powers, the judiciary can check the violations of human rights committed by state and other societal actors.

17 *Thorgeirson v. Iceland*, para. 63, quoted in Handbook at 65.

18 *Associated Press v. United States*, 326 U.S. 1, 20 (1944).

19 *Thorgeirson v. Iceland*, *supra.*, at n. 17 at para. 63.

20 Simons & Califano, Jr., eds., *The Media and the Law* at 4 (1976).

This task, however, is not always an easy one. Freedom of expression is not an absolute right, as is, for example, the freedom from torture. The judiciary sometimes needs to reconcile disparate principles. Freedom of expression must be balanced against certain imperatives of public interest such as national security, public order, public health or morals, and individual rights such as reputation and the right to privacy.²¹ The crux of the matter is how these considerations are defined, what limitation of freedom of expression is permissible and in what circumstances.²²

2. *Media Reporting on the Judicial Process*

The interaction between the media and the judiciary becomes more complicated when the media reports on the judicial process. The public necessarily relies on the media for information pertaining to judicial cases. In addition, the media contributes to the control of the court through its observations and enhances the process. Through information obtained from media reports, the public can monitor the justice system and identify its shortcomings. Public involvement could result in improvement of, and increased public confidence in, the judicial system.²³

Most judicial proceedings attract very little, if any, media interest. Almost by definition, media reports are prone to emphasise issues that attract public attention. The press may not fully cover judicial proceedings, or they may stress the most scandalous details. *L’Affaire Grégory* in France serves as an illustration. This convoluted tragedy centring on the unsolved murder of a child has been the subject of intense media attention. The unrestrained actions of the media have been criticised by some, including by members of the

21 These considerations are vague and can be abused. Refer below to the discussion of the Siracusa Principles.

22 S. Sorabjee, “The Importance and Use of International and Comparative Law: The Indian Experience”, in Handbook at 3.

23 “The Right to Attend Criminal Hearings” (1978), 78 Colum. L. Rev. 1308 at 1314. See also, “Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings” (1978), 91 Harv. L. Rev. 1899 at 1902-04.

media itself,²⁴ as adversely affecting the lives of Grégory's family.²⁵ Some have argued that press reports such as these may interfere with the independence of the judiciary and the right to a fair trial by unduly influencing the judge, the jurors, witnesses, and the general public.

Situations such as these can lead to a conflict between the right to information and judicial independence. As noted above, the judiciary may limit the general "openness" of judicial proceedings. This, as will be discussed below, can be because of the type of case before the court or in order to protect the parties' right to a fair trial. In limiting public, and press, access to the courtroom, the judiciary is restricting the freedom it is often called upon to protect.

Many commentators have noted that the principles of freedom of expression and the independence of the judiciary establish "the contest, not its resolution."²⁶ The challenge is the resolution of the problems posed by the interaction of the media and the judiciary. The following sections will discuss the interaction of the media and the judiciary throughout the judicial process in an attempt to better highlight the issues.

24 See Lacour, *Le Bûcher des Innocents*, Plon (1993).

25 "L'Affaire Grégory et les Medias", (Dec. 1993) *L'Evenement du Jeudi*, 52. See also: "Les Journalistes sont-ils des pourris?" (May 1985) *L'Evenement du Jeudi*.

26 In a speech delivered by Justice Stewart of the United States Supreme Court, quoted in *The Media and the Law* at 2.

The Media and the Judiciary throughout the Judicial Process

A. Pre-Trial

In the period before trial, the media and the judiciary may have different interests. The media's interest in an event begins with the event itself. For example, when a crime that attracts public attention is committed, the news value of the story rapidly decreases as weeks, days, even hours go by. Members of the press rush, competing with each other, to break the story. At times, the first priority is speed. The judicial process, on the other hand, has quite a different focus on the same set of events. The process favours thorough and deliberate preparation for the day in court, where the facts and legal arguments are presented.

As a general rule, therefore, public access to information during the pre-trial period, which includes police investigation and preliminary proceedings, is limited. Access to pre-trial information is limited to prevent "trial by the press" for three reasons: to protect the privacy of certain individuals in sensitive matters (such as in rape and juvenile cases), to maintain the integrity of the judiciary and to preserve the presumption of innocence.

The United Kingdom, for example, has created one of the most comprehensive systems for regulating the pre-trial period in the form of contempt laws. The Contempt of Court Act, 1981 provides that contempt is committed if a publication "creates a substantial risk that the course of justice in particular proceedings will be seriously impeded or prejudiced." Similarly, the Penal Code of France makes it an offence "to publish before the decision of the court, commentaries, the aim of which is to constitute pressure relating to the declaration of witnesses or to the decision of the court."²⁷

27 Kingsford-Smith and Oliver, eds., Errera, "Recent Developments in the French Law of the Press in Comparison with Britain" *Economical with the Truth: The Law and Media in a Democratic Society* 74 (1990).

Furthermore, in France, criminal procedures, acts or documents must not be published before they are introduced in open court.²⁸ This does not mean, however, that the restriction of access to this information during the pre-trial period is complete. In some countries, such as France and Spain, statutory provisions prohibiting public access to information are loosely applied. In Spain, for example, pre-trial procedures and pre-trial evidence, the *sumario*, have a secret character vis-à-vis third parties. According to one commentator, this provision specifically prohibits direct access to the acts and documents that constitute the *sumario*, not the subject matter of the documents itself. This information may be gained through different means, such as through press investigation, and it may be published.²⁹

While understanding the importance of confidentiality of investigation in the pre-trial period, it must be noted that this principle must not affect the pre-trial rights of accused persons, such as freedom from torture. Therefore, presenting an arrested person before a judge to confirm the arrest is an important guarantee against police abuse. This procedure should be public to ensure that allegations of torture, for instance, are handled properly. Adding an abusive police force or a corrupt judiciary to the balance weighs in the favour of the critical importance of a vigorous and free press during pre-trial, and throughout the judicial process, to protect an individual's pre-trial rights. Secrecy can encourage violations of human rights.

B. During Trial

1. In General

Unlike the pre-trial period, the public and press have the right to have access to trial. Freedom of expression weighs with, not against, the fair administration of justice. During trial, they weigh on the same side of the scale; fairness is guaranteed by public access.

28 Errera, "Press Law in France" (1993), *Press Law and Practice* at 70 (Article 19).

29 B. Rodriguez Ruiz, "Freedom of the Press in Spain" *Press Law and Practice* at 144.

When the trial begins, the interaction between the media and the judiciary becomes more direct. The public, the media, the parties, and other actors are all in the same room, often for the first time. They together form what has been called the "internal community of the law."³⁰ This community is particularly concerned with the fair administration of justice and the rights of the parties. The court is concerned that judgements are rendered based on admissible evidence. In the courtroom, these actors are expected to behave in a manner that does not interfere with the integrity of the judicial process, the privacy of certain individuals, and the right to a fair trial.

The so-called "external community" is the world outside of the courtroom, a world of different expectations and different interests. The external community's right to know provides public accountability. To fulfil this right, the press enters the courtroom to get the news to the outside. Generally, the press follows trials that are of interest to the public, who wants as much information as possible as soon as possible.

2. Exceptions to the Rule of Public Access

Some argue that media reports, by their very nature, may distort details, include inadmissible facts, or identify individuals in sensitive cases. The public may form an opinion as to the proper outcome of a case on the basis of these reports: an opinion which may differ from the decision reached by a judge or jury following a proceeding employing all legal guarantees.

Members of the public are not the only ones who may be affected by media reports — members of the "internal community" may be affected as well. In jury trials, for example, jurors may be exposed to inadmissible evidence or to public expectation. Judges themselves may be influenced by media reports and public opinion. The parties' right to a fair trial and the independence of the judge may suffer as a

30 L. Denniston, "The Struggle between the First and Sixth Amendments" (November 1982), *California Lawyer* 43 at 44.

result. In the most extreme cases, the court may be incapable of rendering justice.³¹

Article 14, therefore, recognises that there may be exceptions to the general rule of openness “for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interests of the private lives of the Parties so requires, or to the extent necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

As is true with all exceptions to a rule of law, however, these restrictions must not jeopardise the essence of the protected right. As the Siracusa Principles on the Limitation and Derogation Provisions of the ICCPR recognised, limitations must be interpreted strictly in favour of the protected right, and can only be applied in circumstances provided for in the law. Limitations must be strictly necessary and proportionate, and must not be applied in an arbitrary or discriminatory manner. Furthermore, there must be the possibility to challenge the limitation and to receive remedy against its abusive application.³²

Following the logic of Article 14, judges in some cases impose a total or partial ban on reporting on a public trial. In other cases, participants in the trial, including parties, lawyers and witnesses are ordered not to speak about the case.

The most severe restriction is court closure. In certain types of cases, like those involving rape or other sexual offences, family matters (divorce, paternity, adoption, guardianship), and mental patients, the judge may order the courtroom closed to preserve privacy. This restriction must be strictly necessary.

Similarly, a judge may close the court in cases concerning “national security” or “public order” in order to protect the sensitive

31 As was the case in the trial of M. Troure in Mali, which was observed by the ICJ. This is one reason why the ICJ has advocated the creation of an International Criminal Court. See *Towards Universal Justice* (ICJ, May 1993).

32 Siracusa Principles at I(A).

nature of certain information. Obviously, these considerations are vague and are open to abuse. Therefore, restrictions on public access for these reasons must be used only in the most extreme circumstances and in accordance with the Siracusa Principles referred to above. In particular, the possibility to challenge and to obtain remedy against abusive application must be available.

A judge may close a court if a party argues that a substantial risk of prejudice to the defendant or to the administration of justice exists. When both parties in the case agree, the judge can assume that court closure is fair to the parties involved, and must then weigh their wishes against the public's right to know. When the parties disagree, the balance of interests equation is more complicated.

Another issue that may be considered is the effectiveness of restrictions. Today, changes in media technology and the increasing globalisation of the media has made the interaction between the media and the judiciary more complicated. The "Barbie-Ken Murders" in Canada raise this point. In this case, a young married couple allegedly committed a series of sex-and-torture killings. An Ontario judge, who found the wife guilty of manslaughter, recently banned the publication of most of the facts of the case until after the husband's trial. The judge stated that his publication ban was intended to "balance the freedom of the press and the right of [the husband] to a fair trial."³³ Despite the judge's blackout of the Canadian media, the details of the case have seeped into Canada via foreign press (e.g., the Washington Post), computer bulletin boards, and on-line data-bases. The question is whether this national restriction, or any, can be effective in the modern world.³⁴

3. Checks on the Balance

When a judge orders a restriction on press access to trial, the question becomes whether there is the "an efficacious corrective

33 Justice Kovacs quoted in "The Barbie-Ken Murders", *Newsweek*, Dec. 6, 1993, at 21.

34 See paper prepared for this Seminar by Justice Kirby entitled "The Globalisation of Media and Judicial Independence".

machinery to challenge the restriction"³⁵ and remedy against its abusive application.

The first issue is standing. Does the press have standing to object to an order that closes the courtroom or sets restrictions on reporting of judicial proceedings? Typically, only interested parties to a particular case have standing. The issue is whether the media is an "interested party," in criminal cases where the prosecution represents the public interest. There is an argument that presentation of these interests before the court should not be left to the prosecutor, who may not expound the principle of open justice with diligence.³⁶ Ideally, the presiding judge should consider the interests of the media and the public in observing and being informed about judicial proceedings when making a decision to order closure or restrictions on reporting.

In some jurisdictions, it may be possible to assert standing by demonstrating an interest that is protected by a particular statute or constitutional provision.³⁷ In the United Kingdom, for example, even though the Contempt of Court Act, 1981 does not explicitly give standing to the media to oppose an order, a court has "inherent jurisdiction" to permit representations by the media.³⁸ The courts have been increasingly receptive to hearing such representations.³⁹

In Europe, when national jurisdiction does not grant effective remedy, recourse may be sought at the regional level. In *The Sunday Times Case*,⁴⁰ the European Court of Human Rights did not uphold orders in the United Kingdom to restrict public access to information concerning a drug that had allegedly caused severe birth defects. The

35 Sorabjee in Handbook at 3.

36 Nicol, "Reporting in Court", *The Law Society's Gazette*, 17 (November 6, 1991).

37 Ball, "Protecting Access to the Criminal Court" (1981), 13 *Arizona State Law Journal* 1049 at 1063, n. 116.

38 Beloff, "Fair Trial - Free Press? Reporting Restrictions in Law and Practice." (Spring 1992), *Public Law* 92 at 98.

39 Nicol, *supra.*, at n. 36, at 17.

40 *The Sunday Times Case*, (27 October 1978) Series A, No. 30. Handbook at 175-77 (Eur. Court H. R.).

Court stated that the restriction violated the freedom of expression on the grounds that the drug disaster was a matter of undisputed public interest, and publication would not substantially distort the settlement process.⁴¹ The court concluded that "the interference complained of did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression."⁴²

C. Post-Trial

After the trial is concluded, the only remaining interest is the integrity of the judiciary. Thus, the most significant aspect of the post-trial period is the regulation of criticism of judicial decisions. This is a controversial question. After the decision has been handed down, given that rights of the parties have been respected, the balance of interests becomes less complicated, but no less difficult. In the post-trial period, the freedom of expression must be weighed directly against the integrity of the judiciary.

According to one judge, "each attack on a judge for a decision given by him is an attack on the independence of the judiciary, because it represents an attempt on the part of those who indulge in such criticism to coerce judicial conformity with their own preconceptions and thereby influence the decision-making process."⁴³ Furthermore, "if a judge is to be in fear of personal criticism by political or pressure groups or journalists... it would most certainly undermine the independence of the judiciary."⁴⁴

As a general rule, of course, the press is free to express its opinions and to criticise judicial decisions and actions. Restricting this freedom is warranted only in the most extreme circumstances.

Under French law, for example, it is an offence "to criticise and discredit a judicial decision in such a manner as to harm the authority

41 *Id.*, at para. 66.

42 *Id.*, at para. 67.

43 Justice P.N. Bhagwati, "The Pressures on and Obstacles to the Independence of the Judiciary" (1989), 23 *CJL Bulletin* 14 at 25.

44 *Id.*

of justice or independence of the judges."⁴⁵ England's approach to this question is that "no criticism of a judgement, however vigorous, can amount to contempt of court, providing it keeps within the limits of reasonable courtesy and good faith."⁴⁶ The High Court in Kenya has ruled that "courts could not use their contempt power to suppress mere criticism of a judge or to vindicate the judge in his personal capacity, but rather could use it only to punish scurrilous abuse of a judge when necessary in the interests of justice."⁴⁷

Conclusion: Self-Regulation

Having traced a somewhat dismal picture of the relationship between the media and the judiciary, it must be noted that the relationship usually works quite well. The press often has a subtle understanding of the importance of fair trial, privacy and judicial integrity. Generally, the press takes its "public watchdog" function seriously in order to improve the functioning of the administration of justice and to protect individual rights.

In many countries,⁴⁸ members of the press have formed a national press council in response to increasing calls for moderation of press excesses. Press councils often have the authority to hear and decide cases of individual complaints against the press. Sweden also has a Press Ombudsman whose function is to mediate disputes before they are submitted to formal mechanisms.⁴⁹

Press councils often create professional guidelines for members to follow. Typically, the guidelines set up a system of voluntary self-

⁴⁵ Errera, *Economical with the Truth* at 74, quoting Article 226 of the Penal Code.

⁴⁶ *R. v. Metropolitan Police Commissioner, ex parte, Blackburn*, [1968] 2 QB 150, at 155; Handbook at 183.

⁴⁷ Handbook at 182, in reference to *Republic v. Nowrojee*, High Court, Misc. Crim, App. No. 461 of 1990.

⁴⁸ For example, Australia, Austria, Germany, Netherlands, Norway, Sweden, and the United Kingdom.

⁴⁹ Judge Groll, Vice-President of the ICJ, is the former Press Ombudsman in Sweden.

control. Based primarily on ethical concepts and “other self-disciplinary measures,” codes of ethics “strive to preserve the material and moral interests of the profession and to protect and support the good name of the profession both among its own members and among the general public. A code of ethics must also prevent any abuse by members of the profession of the rights and privileges conferred on them by it.”⁵⁰

According to *Press Law and Practice*, most press codes include the following issues:

1. honesty and fairness, duty to seek views of the subject of any critical reportage in advance of publication; duty to correct factual errors; duty not to falsify pictures or to use them in a misleading fashion;
2. duty to provide an opportunity to reply to critical opinions as well as to critical factual reportage;
3. appearance as well as reality of objectivity;
4. respect for privacy;
5. duty to distinguish between facts and opinion;
6. duty not to discriminate or to inflame hatred on such grounds as race, nationality, religion, or gender;
7. duty not to use dishonest means to obtain information;
8. duty not to endanger people;
9. general standards of decency and taste;
10. duty not to divulge confidential sources;

⁵⁰ R. von Schilling, “An Overview of Media Codes of Ethics and their Relationship to Judicial Independence”, a paper prepared for this Seminar.

11. duty not to prejudge the guilt of the accused and to publish the dismissal of charges against or acquittal of anyone about whom the paper previously had reported that charges had been filed or that a trial had commenced.⁵¹

It may be possible to widen the scope of the professional guidelines to include the bench and bar. Such voluntary bench-bar-press agreements set guidelines for judges, lawyers and journalists in regard to proper media coverage of judicial cases. These agreements, for example, help to clarify when it is proper for lawyers to comment to the media on a particular case. Also, they may lead to better communication between bench and bar and the media.

⁵¹ Press Law and Practice, An Article 19 Report, International Centre Against Censorship (1993) at 264.

*A Note on Judicial Independence, the Media and the Rights of the Child**

*Joaquín Ruiz-Giménez***

The Dilemma

When dealing with such a pertinent and suggestive problem as the relationship between the judiciary and the public media, we must not fail to consider the specific perspective of the protection of the rights of children, as either victims or perpetrators of crime and how they are affected by legal procedures. Two recent cases¹ serve as potent reminders; on the one hand the boys of Liverpool judged and convicted for the murder of a younger child, and, on the other, the young adolescents who were violated and tortured to death in a Spanish village. Both cases were thoroughly reported by the written press and radio and television.

Before dealing with the current questions posed from this perspective, reference should be made to a permanent uncertainty in doctrine and practice.²

This uncertainty is the conflict between essential goods and values; one's own life and that of others, liberty and equality, justice and piety or charity, etc. And, much more recently, the conflict

* This article was translated from Spanish.

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1 This article was written in January, 1994.

2 From the ethical and juridical reflection of the great Greek and Roman moralists and jurists and Christian theologians from antiquity, to the Middle Ages and through to the modern era since Kant and his followers.

between fundamental human rights. This includes such stinging and polemical problems as the conflict between the right of the embryo to birth and the right of the mother to survive; the right of the elderly or debilitated to life and their right to a dignified death; the right of the scientist to test nuclear materials and the right of the rest of the population not to be destroyed by his experiments; the right of the owner to his possessions and the right of the hungry to steal what he needs not to die.

With all pertinent distinctions, in this panorama we also find the potential for conflict between the fundamental right of judges to independence in the exercise of their basic functions, the fundamental right of journalists to investigate and report social events and, finally, the right of each individual to the respect of his or her privacy, honour and reputation, and all the more so when it concerns children affected by a legal procedure. In brief, the fundamental rights of each person in society borders on the rights of all the rest and they have their limitations. They are harmonised reciprocally so that there may be peace, as modern democratic thought has affirmed since Emmanuel Kant.

Under Human Rights Law

The perception through collective conscience of this conflicting, and yet reconcilable disposition of fundamental rights led the representatives of the founding members of the United Nations, after the Second World War, to proclaim in the preamble to the Universal Declaration of Human Rights of 10 December 1948, that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" and that "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."³

3 Preamble of the Universal Declaration of Human Rights

In light of these lofty principles, the well-known table of basic rights was articulated, emphasising, amongst others, "the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law".⁴ But the Universal Declaration also provides; "Everyone has duties to the community in which alone the free and full development of his personality is possible"; and that, "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".⁵ Distressingly, we are generally silent about these later provisions. The interpretation of the correct meaning and the scope of these "limitations" is obviously the function of democratic parliaments which elaborate on laws regulating the exercise of each one and, ultimately, of the judges or tribunals which apply those laws to concrete cases submitted to its jurisdiction.

Coming to the specific issue to be analysed (that is, the relationship between the independence of the judiciary and the public media, and in this framework, the protection of the rights of the child), it is helpful to recall summarily that all the international treaties drawn up in the light of the Universal Declaration of Human Rights emphasise unequivocally both the substantiality of recognised fundamental rights and their limits.

For example, Article 14(1) of the International Covenant on Civil and Political Rights⁶ (ICCPR), while recognising that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law" stresses that "the press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the Parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice

4 Article 8 of the Universal Declaration of Human Rights

5 Article 29(1) and (2) of the Universal Declaration of Human Rights

6 of 16 December 1966

the interests of justice.” Article 14 also concludes that “any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes of the guardianship of children.”

Similar principles appear with respect to the right to freedom of expression: which is amply guaranteed in all aspects, but not without re-affirming that its exercise can also be “subject to certain restrictions”...“prescribed by law and which are necessary for respect of the rights or reputations of others, or for the protection of national security or of public order, or of public health or morals” (Art. 19(3)).

The same restrictions, and similar wording, is revealed in the European Convention for the Protection of Human Rights and Fundamental Liberties⁷ (ECHR) where judicial procedures⁸ and the right to the freedom of expression⁹ are concerned. Art. 10(2), states that the exercise of the freedom of expression “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 security, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others; for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

Where children are specifically concerned – the main feature of this report - the ICCPR, with the rigour of *jus cogens*, prescribes that “Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.”¹⁰

9 4 November 1950.

8 Article 6 of the ECHR.

9 Article 10 of the ECHR.

10 Article 24 of the ECHR.

Under the United Nations Convention on the Rights of the Child

Deeming these precepts insufficient before the increasingly perturbing situation of children in the so-called developing countries and in the increase of mistreatment, rape and various types of exploitation in the countries, rich countries of the Northern Hemisphere, the United Nations promulgated the sister Declaration of the Rights of the Child¹¹ on 20 November 1959, in the effort to advance a rigorous and imperative agreement which, as we know, was obtained thirty years later in the Convention of the Rights of the Child,¹² (Children's Convention).

Concentrating on what concerns us most today, it is important to point out the following articles in the Children's Convention:

- "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."¹³
- "State Parties undertake to respect the rights of the child, to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference."¹⁴
- "The child shall have the right to the freedom of expression... The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for the respect of the rights or reputations of others; or for the protection of national security or of public order, or of public health or morals."¹⁵

11 20 November 1959.

12 20 November 1989.

13 Article 3(1) of the Children's Convention.

14 Article 8 of the Children's Convention.

15 Article 13 of the Children's Convention.

- “No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation. The child has the right to the protection of the law against such interference or attacks.”¹⁶
- “State Parties recognise the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the “promotion of his or her social, spiritual and moral well-being and physical and mental health.” To this end, State Parties are to encourage the mass media, and international co-operation in the production and dissemination of information and material having particular regard to the linguistic needs of children, and “encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being.”¹⁷
- Finally, and this is the aspect most directly related to the problem which occupies us here, - where a child accused of having infringed the penal law is concerned, the State Parties to the Children’s Convention recognise his or her right “to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth”, reinforcing the child’s respect for the human rights and fundamental freedoms of others and taking into account the child’s age, the importance of his or her reintegration and assumption of a constructive role in society.”¹⁸

To this end, the States also guarantee the child accused of infractions the principle of legality and non-retroactivity of penal norms; the presumption of innocence; prompt information of the charges against him; appropriate legal or other assistance in the

16 Article 16 of the Children’s Convention.

17 Article 17 of the Children’s Convention.

18 Article 40 of the Children’s Convention.

preparation of his defence; a hearing without delay before a competent, independent and impartial juridical authority in the presence of legal or other appropriate assistance; the non-obligation to give testimony or to confess guilt; the possibility to intervene in the interrogation of witnesses; to have recourse to a superior authority or judicial body if he is declared guilty; free assistance of an interpreter if necessary; and a very fundamental aspect, "his or her privacy fully respected at all stages of the proceedings"; as well as other ulterior means in the interest of the child and his rehabilitation, always with full respect of his human rights and with due legal guarantees. (Art. 40)

To this we must add complementary aspects contained in The Beijing Rules, or United Nations Standard Minimum Rules for the Administration of Juvenile Justice¹⁹ (Beijing Standards of Juvenile Justice). In this excellent collection of Rules, it is particularly interesting to point out that:

- a) "The juvenile justice system shall emphasise the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence."²⁰
- b) At all stages of the proceedings basic procedural guarantees, similar to those later included in Art. 40 of the Children's Convention will be respected.
- c) In order to avoid harm being done to juveniles by undue publicity or the process of labelling, their privacy shall be respected at all stages and "in principle, no information that may lead to the identification of a juvenile offender shall be published".²¹

19 Adopted by the General Assembly 10 December 1985.

20 Article 5 of the Beijing Standards of Juvenile Justice.

21 Articles 8(1) and (2) of the Beijing Standards of Juvenile Justice.

Enduring Problems and Suggestions for the Future

Thus expounded, it seems clear that the normative panorama, international and national, is substantially positive in foreseeing a reasonable harmonisation of the fundamental rights analysed in the scope of the independence of the judiciary, the freedom of expression and the protection of the rights of children.

Admittedly, there is, in practice, persistent, and sometimes even escalating friction between these rights and, consequently, the complaints of individuals and groups, and proposals for reform of legal norms, especially those which affect the rights of children as victims or accused. It requires an up-to-date and positive reflection:

- In some countries (including Spain, where such different fundamental rights are largely consecrated in the Democratic Constitution of 1978 and in later legislation), various political parties, of differing ideologies, as well as NGO's and other associations, particularly those devoted to co-operation with children and juveniles, have urged the promulgation of new norms in the juridical-penal order which would strengthen the protection of persons affected by processes of this kind.

The Ministry of Public Affairs (in Spain and equivalent bodies in other countries) has been asked to distribute instructions to its subordinates on all levels, in order to accentuate its function as the guardian of fundamental rights with respect to honour, reputation and the private lives of persons affected by a judicial process, especially in the case of minors, and always with due respect to the independence of judges and tribunals, and of the informative function of the mass media.

- Another tendency, more flexible and pragmatic, is the self-elaboration and the approbation by colleges and professional associations of journalism. In the broad sense, that is the establishment of ethical codes and deontology, without strictly punitive sanctions, but with convincing principles and norms which lead to trustworthy and

effective self-regulation. It is the establishment of the legitimate exercise of the fundamental right to the freedom of information and expression while simultaneously guaranteeing constitutional harmony with the fundamental rights of the persons affected and society in its entirety.

Nevertheless, the question remains open. We must insist on the fundamental mission which judges, lawyers and professionals in the media can, and must, accomplish for the effective harmonisation of their fundamental rights with those which pertain to children and juveniles. This is a difficult challenge, but beautiful and full of hope.

Part Two

The Parameters of Judicial Reporting

Media Criticism of Judges and Judicial Decisions

*P.N. Bhagwati**

Introduction

The judiciary and the press are institutions pedestaled in fragile loneliness in the constitutions of most democratic countries. Neither has the power to execute or legislate and neither has an army, police force or extensive bureaucracy to enforce its rulings or editorials. The judiciary gains vitality from individual jurists, and the press from individual journalists. There is also one other feature common to the judiciary and the press, and it is that both are vital for the maintenance and preservation of the democratic way of life, free from arbitrariness and authoritarianism. It may also be noted that both the judges and the journalists depend on their moral authority for effective institutional survival. It is therefore essential that a high level of co-operation exist between the judges who interpret the laws and the journalists who write about the conduct of public business. This high level of co-operation is also essential because the central foundation of support for the decision of the judiciary is the people, and that support can be most effectively achieved through the media. Likewise, the independence of the press depends to a large extent on the vibrant activism of the judiciary. It is interesting to note that both in the United States as well as in India, the judiciary and the press have been the constitutional pillars of the society. It is now a fact of history that during the *Watergate Scandal*, the judiciary and the press remained independent and strong in the face of an executive paralysed by corruption and paranoid suspicion and the legislature fragmented by special interests, frustrated by inordinate delay and

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the abuses by individual political ambitions. If anyone deserves praise for the political demise of Richard Nixon and the cleansing of a corrupt executive, they are the judiciary and the journalists.

So also in India, it was the press which exposed the *Bofors Scandal*, and it was the highest judiciary in the country which supported the steps to bring the guilty to justice. I may also point out that it was the press which through investigative journalism played a leading part in exposing violations of human rights committed by state as well as non-state actors. They could then be rectified by the judiciary through the strategy of public interest litigation devised by this author. The press became a close ally of the judiciary in bringing to an end deprivation and exploitation of the weaker sections of the Indian community. But despite this alliance between the press and the judiciary in the area of human rights violations, in many other areas an abrasive interface between the judiciary and the press exists. Thus, it is necessary to evolve the principles which govern the relationship between the judiciary and the press and eliminate abrasives from such relationship. I shall deal with a few of these areas of apparent clash between the judiciary and the press. But before doing so, let me make a few prefatory observations.

International and National Standards

It is axiomatic that in a free democratic society, the administration of justice by an independent judiciary and free speech and expression are two of the most cherished values, and it is always a difficult and a delicate task to reconcile them. Lord Diplock¹ pointed out that:

“The due administration of justice requires first that all citizens should have unhindered access to the constitutionally established courts of criminal or civil Jurisdiction for the determination of disputes as to their legal rights and liabilities; secondly, that they should be able to rely upon obtaining in the courts the arbitrament

1 Attorney General vs. Times Newspapers Ltd. (1974), A.C. 273.

of a tribunal which is free from bias against any party and whose decision will be based upon those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law; and thirdly, that once the dispute has been submitted to a court of law, they should be able to rely upon there being no usurpation by any other person of the function of that court to decide according to law."

These are the requirements of the administration of justice which constitute a cherished value of society. Freedom of speech and expression are equally cherished values since it is vital to the democratic way of life. Freedom of the press and expression is so important and valuable that it finds place in Article 19 of the Universal Declaration of Human Rights, Article 19 of the International Covenant on Civil and Political Rights and Article 10 of the European Convention on Human Rights. As far as the Indian Constitution is concerned, it is embodied in Article 19(1)(a).

The importance of the right to freedom of speech and expression was recognised by the European Court of Human Rights in the *Handyside Case* where it was observed that "[f]reedom of expression constitutes one of the essential foundations of ... a democratic society, once all the basic conditions for its progress and for the development of every man."

It is axiomatic that freedom of the press be an essential part of freedom of speech and expression. The importance of the right to freedom of the press has been emphasised over and over again by judges and jurists all over the democratic world. The Supreme Court of India pointed out in a leading decision:

"Freedom of the press lies at the foundation of old democratic organisations, for without free political discussion, no public education so essential for the proper functioning of the process of popular government is possible. A freedom of such amplitude might involve risk of abuse ... But it is better to leave a few of its noxious branches to their luxuriant growth than by pruning them away to injure the vigour of those yielding the proper fruits. It will thus be seen that there

are two interests of great public importance viz. the administration of justice and freedom of the press which sometimes appear to clash with each other and the decision of the judiciary which has to perform the task of striking a balance between the requirements of free press and fair trial."²

The first area in which there is an apparent clash between these two freedoms is the area relating to contempt of court.

Contempt of Court: Should Truth be a Defence?

It may be noticed that Article 10 of the European Convention of Human Rights provides that the exercise of right to freedom of expression may be subjected to such restrictions as are prescribed by law and are necessary in a democratic society *inter alia* for maintaining the authority and impartiality of the judiciary. Article 10(2) of the Indian Constitution also permits reasonable restrictions to be imposed on freedom of speech and expression in the interest of certain specified categories, one of which is contempt of court. It is therefore clear, and I presume that it is the law in most democratic countries, that freedom of speech and expression can be restricted if it constitutes contempt of court. No one can be permitted to exercise his right to freedom of speech and expression to commit contempt of court. This proposition, standing by itself, seems to be unexceptional. The difficulty — or, if I may say so, unreasonableness — arises by reason of the long standing view in India as to what constitutes contempt of court. It has been regarded as settled law in India that if anyone scandalises the court by imputing dishonesty, partiality or bias to a judge, he would be committing contempt of court, even if the imputation made by him is true and he is in a position to prove it.

The law says that truth is no defence in such a case. The person alleged to be in contempt cannot be permitted to establish the truth

2 Justice Black in the case of *Harry Bridge*, 86 Lawyers' Edition 252 at page 260.

of his assertion. This is indeed a serious encroachment on the right of free speech and expression. But this has been the law of contempt in India since British times, and it is part of the British heritage. The foundations of this view in regard to contempt of court are to be found in the opinion of Wilmut J. in the 18th century – an opinion which was drawn up but not delivered – where the learned Judge, who subsequently became the Chief Justice of Common Pleas, said:

“The arraignment of the justice of the judge is arraiging the King’s justice. It is an impeachment of his wisdom and goodness in the choice of his judge and excites in the minds of the people a general dissatisfaction with all judicial determination and indisposes their minds to obey them: and whenever man’s allegiance to the laws is so fundamentally shaken it is the most fatal and most dangerous obstruction of justice ...”.

The opinion given by Wilmut J. was severely criticised by Fletcher J. in the Irish case of *Taafe vs. Dawnes*, but it has found acceptance in India; presumably because it was the British system of justice which was adopted in India. It is interesting to note that in the United States there is no contempt like scandalising a court, and one would have thought that since both India and the United States have a written constitution embodying a charter of fundamental rights including the right of free speech and expression, the Indian courts would have preferred to follow the American precedents in preference to the British. But the Supreme Court of India did not adopt the American view because, in its opinion, in India “principles have become crystallised by the decisions of the High Courts and of the Supreme Court”. The High Courts in India had consistently, prior to independence, taken the view that the truth of the allegation that constitutes contempt was no defence. The defendant could not plead justification and was not permitted to substantiate his allegations by leading evidence. Indeed, the view taken was that every attempt to justify would constitute a new offence of contempt. The same view was taken by the Supreme Court of India after independence in the case of *Perspective Publications* where it held that “[i]t may be that truthfulness or factual correctness is a good defence in an action for libel but in the law of contempt there are hardly any English or Indian cases in which such defence has been recognised.”

The Supreme Court had an opportunity of overruling this view and adopting a more rational approach consistent with freedom of speech and expression in a subsequent case where the constitutional validity of the Contempt of Court Act, 1952 was challenged. The Supreme Court, however, approved the earlier decision that in a case of contempt, evidence to establish the truth of the allegations of the court's bias or dishonesty cannot be led. On that footing, it upheld the restriction on the right of freedom of speech and expression imposed by the Contempt of Court Act as reasonable. The Supreme Court, in my opinion, could have taken the view that truth is a defence and the Contempt of Court Act therefore unreasonably restricts the right of free speech and expression. But this opportunity was missed by the Supreme Court. The result is that the law continues to remain what it was, namely that truth is no defence in an action for contempt, and the restriction on free speech and expression is reasonable.

It is interesting to note that the High Court of Australia has taken a different view in *King vs. Nicholls*.³ The report of the Inter-Departmental Committee on the Law of Contempt presided over by Lord Justice Salmon referred to that view with approval by saying that "[i]n the most unlikely event, however, of there being just cause for challenging the integrity of a judge ... it could not be contempt of court to do so. Indeed, it would be a public duty to bring the relevant facts to light."

The view taken in the Australian case seems more consistent with free speech and expression which is a basic human right. I fail to see how truth can scandalise a court and why it should be stifled. Is it necessary for maintaining the dignity of the court to enforce silence and punish truth? Would it be in the public interest to suppress the truth and tolerate the subversion of the institution of the judiciary by an undeserving judge? It was aptly said by a former Chief Justice of the Bombay High Court that "... one has to recognise that in the long run, the degree of confidence reposed in the judiciary will depend on the character of judicial work and confidence cannot for long be artificially engendered by the simple process of stifling criticism."

3 (1911), 12 CLR 280.

Moreover, the judiciary must be accountable to the people. The people must have the right to know how the institutions of the state, including the judiciary, work. There is no reason why the public should be kept in the dark about the true state of the judiciary. However, this will be the inevitable consequence if a journalist or any other person is deterred by the present law of contempt. Why should the people not be entitled to know how many cases are pending in the courts and for what periods those judgements have been pending; how many letter petitions the courts entertain every year and with what results, and how many days the judges were absent although the courts were open? These are matters which the public is entitled to know in order to enforce the accountability of the judiciary. Unfortunately, the judiciary keeps such information from the public. The press is often afraid of ferreting out this information and publishing it, lest it may invite punishment for contempt of court.

The doctrine that truth is no defence clearly inhibits press freedom and journalistic activism. The press hesitates when it ought to make comments and expose the true state of affairs in the public interest which renders not only the judiciary unaccountable but also results in public harm, and impairs freedom of speech and expression. Can a freedom, as cherished as the freedom of the media be made dependent upon the precarious base of judicial sensitivity and caprice? The two constitutional values, namely the right of free speech and expression and the right to independent justice, must be suitably balanced and accommodated.

Media Prejudgment: the Test of "Present and Imminent Danger".

The second area of apparent clash between the requirements of free press and administration of justice relates to what has been popularly described as "Gag Orders". The question which arises in this area is: can the judiciary prohibit the press from publishing material which pre-judges an issue in pending litigation or is likely to cause pre-judgement of that issue? This is an area where there has been a certain amount of ambivalence in judicial decisions. Mr. Justice Black of the US Supreme Court, who was an absolutist so far as the First Amendment of the US Constitution is concerned,

observed that a public utterance or publication is not to be denied merely upon the theory that in cases where the concerned judicial proceedings is still pending in the courts it must necessarily tend to obstruct the orderly and fair administration of justice.

He held that a publication can only be prohibited when there is reason to believe that it implies a "pressing and imminent danger" of harm. The Justice concluded that the requirement of "a clear and pressing danger" would ensure that the prevention of a publication was consistent with the first amendment. Justice Frankfurter, on the other hand, took the view that free speech is not such an absolute or irrational conception as to imply paralysis of the means for effective protection of all the freedoms. He held that the administration of justice by an impartial judiciary has been basic to the conception of freedom ever since the *Magna Carta*. According to Frankfurter, society depends upon an unswerving judiciary. This is so common place in the history of freedom that it is too frequently taken for granted without paying attention to the conditions which alone make it possible. Yet again in another case viz. *John Dennekamp vs. State of Florida* ⁴ Justice Frankfurter reiterated that the judiciary cannot function properly if the press intends to influence the judiciary with its publications. Judgements must be based solely on the basis of what is before the court. He emphasised that the "[j]udiciary is not independent unless courts of justice are able to administer the law in the absence of pressure from that, whether exerted through the blandishment of reward or the menace of disbelievable."

Chief Justice Warren Burger, in his opinion in *Nebraska Press Association vs. High Stuart*,⁵ approved of the observations of Learned Hand which set forth the test whether "The gravity of the evil, disputed by its improbability justifies invasion of free speech as is necessary to avoid the danger."

So far as the law in England is concerned, the leading decision is that in the *Times Newspapers' Case*⁶ where Lord Reed referred to the

4 90 Lawyers' Edition 1295.

5 49 Lawyers' Edition 683.

6 *Supra.*, at n. 1

observation of Jordan, C.J., in *Expert Bread Manufacturers Ltd.*⁷ to the following effect:

"But the administration of justice, important though it undoubtedly is, is not the only matter in which the public is vitally interested; and if in the course of the ventilation of a question of public concern matter is published which may prejudice a party in the conduct of a law suit, it does not follow that a contempt has been committed. The case may be one in which as between competing matters of public interest the possibility of prejudice to a litigant may be required to yield to other and superior considerations. The discussion of public affairs and the denunciation of public abuses, actual or supposed, cannot be required to be suspended merely because the discussion or the denunciation may, as an incident but not intended by-product, cause some likelihood of prejudice to a person who happens at the time to be a litigant."

The learned Law Lord, however, did not seem to agree with the aforesaid observations and expressed the following view:

"I think that anything in the nature of pre-judgement of a case or of specific issues in it is objectionable, not only because of its possible effect on that particular case but also because of its side effects which may be far reaching. Responsible 'mass media' will do their best to be fair, but there will also be ill-informed, slapdash or prejudiced attempts to influence the public. If people are led to think that it is easy to find the truth, disrespect for the processes of the law could follow and, if mass media are allowed to judge, unpopular people and unpopular causes will fare very badly. Most cases of prejudging of issues fall within the existing authorities on contempt. I do not think that the freedom of the press would suffer; and I think that the law would be clearer and easier to apply in practice if it is made a

⁷ (1937), 37 S.R. 242 (NSW).

general rule that it is not permissible to prejudge issues in pending cases.”

The Supreme Court of India has in a recent judgement⁸ adopted the test of “present and imminent danger” to decide whether to grant an injunction that restrains the press from publishing any article relating to the pending litigation. The Supreme Court of India observed in that case that, as pointed out by Justice Brandeis⁹ — there must be reasonable ground to believe that the danger apprehended is real and imminent. The court adopted this test “on the basis of balance of convenience.”

It will thus be seen that a balance has to be achieved between the administration of justice and freedom of the press. In my view, the proper test for resolving the apparent clash between these two fundamental values is the test of “present and imminent danger.” The Court should restrain publication of an article relating to a pending litigation only if it ascertains that there is a present and imminent danger of harm if the article is allowed to be published.

It is also necessary to point out that there is a source of danger to the independence of the judiciary from the press. That source of danger lies in unjust and improper criticism of the judges for the judgements. There is a pernicious tendency of some people to attack judges if the decision is not as they wish it to be. Of course, there is nothing wrong with critically evaluating the judgement given by a judge. As observed by Lord Atkin, “[j]ustice is not a cloistered virtue and she must be allowed to suffer the criticism and respectful, though outspoken, comments of ordinary men.” But improper or intemperate criticism of judges stemming from dissatisfaction with their decisions constitutes a serious threat to the independence of the judiciary and, whatever may be the form of shape which such criticism takes, it has the inevitable effect of eroding the independence of the judiciary. Each attack on a judge for a decision given by him is an attack on the independence of the judiciary. It represents an attempt to coerce judicial conformity with one’s own

8 S.C.R.P. Ltd. vs. Indian Express Newspapers (1989), A.I.R. 190 (S.C.).

9 Charlotte Anita Whitney vs. People of the State of California, 71 Lawyers’ Edition 1095.

preconceptions and thereby influence the decision-making process. It is essential in a country governed by the Rule of Law that every decision must be made under the Rule of Law and not under the pressure of a group or under threat of adverse criticism by irresponsible journalists or contentious politicians. If a judge has to fear personal criticism by political or pressure groups or journalists while deciding a case, this would most certainly undermine the independence of the judiciary. Unfortunately, this is what is happening in some countries. Those who indulge in such improper or intemperate and even sometimes vitriolic criticism or attacks on a judge fail to realise what incalculable damage they are doing to the institution of the judiciary.

Disclosure of Sources

There is also one other area where the judiciary sometimes comes into conflict with the freedom of the press. That area relates to the privilege of the journalist not to disclose his source of information to a court. There have been instances in the past when the court has called upon the journalist to disclose the source of his information – and this has usually happened in libel actions or in proceedings under the *Official Secrets Act* – and the journalist has refused to do so on pain of being imprisoned.

The often unspoken but nonetheless sacred pledge of every journalist is: "I will go to jail before revealing the identity of anyone who tells me something confidentially." This moral code is in the heart, mind and blood of every good journalist. Indeed, the very fact that people have this impression of journalists – that they will go to jail to protect their sources – has brought a wealth of news tips to newspapers and television stations across this nation. It affected the course of story telling and news reporting profoundly. Unless the need of journalists to protect confidential sources is given the sacrosanct status accorded solicitor- client privilege, reporters and editors will remain convinced that the free flow of information to them will slowly diminish. Eventually, newspapers will be printing public relations handouts and press releases. As far as the journalist is concerned, without this protection, the lives and livelihoods of news sources will be jeopardised. Put bluntly, only the very dumb or the eternally secure would come forward to offer material to the

press that, by its nature, will upset those in power or those who have power over them.

It is not only the journalist that has this sense of critical importance of confidential sources in the flow of information to the public. Professor Neustadt has also pointed out that sources are critical to the flow of information from government sources to the public.

“The class of confidential communications commonly called ‘leaks’ play, in my opinion, a vital role in the functioning of our democracy. A leak is, in essence, an appeal to public opinion. Leaks generally do not occur in dictatorships where public opinion is not a force that those in power must take into account. In our country, leaks commonly occur when significant questions of public policy are being decided in secret. A leak opens the decision to public scrutiny and evaluation, and brings into play the forces that act in the public forum – congressional and other agencies of government, political party organisations, interest groups and other segments of society that have a stake in the decision. If the confidentiality of communications to newsmen could not be assured, I am convinced that the number of leaks would be greatly diminished, and that our political institutions would be less subject than they are to public monitoring and public control.”

It would, therefore, seem that a journalist should not be called upon by the judiciary to disclose the source of his information unless the question relating to the source is not only relevant to the enquiry but is also necessary for the decision according to the judge holding the inquiry.

The Proper Role of the Media in Court Reporting

*by Andrew Nicol QC**

Introduction

The title of this paper implies that the role of the media in court reporting needs to be justified or defended. This premise deserves examination. In a free society, is the media not entitled to report whatever it thinks fit? Newspapers and broadcasters are not a court-sponsored information service. They select items which they think will be attractive to readers or other consumers. Why should they be called to account in any terms other than the hard reality of the market place? That market seems to have an insatiable appetite for (mainly criminal) court reporting and has since sensational accounts of notorious trials were sold on the streets of London in the seventeenth century. We may regret or applaud this fascination with bloody or sordid deeds, but why does the role of the media in satisfying it call for some special consideration?

There are perhaps three answers to these questions. The first is that trials are generally held in public. The principle of open justice is well-established. Although not applied universally to all judicial proceedings, this principle is a Rule of Law whose justification has to be examined in the course of any debate as to its limits. Second, the law is not neutral as to whether the media reports what goes on in court; on the contrary it gives positive encouragement to do so. Reports of proceedings held in public have the benefit of absolute privilege from libel claims. Fear of libel constitutes the greatest inhibition on freedom of expression and in few other contexts can the

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media carry stories of wrongdoing (or rather alleged wrongdoing) with complete confidence that they will not have to pay heavily in damages for the privilege. Finally, the reporting of court proceedings risks collision between freedom of speech and the right of a litigant to a fair hearing. In working out the precise boundary between these principles, the value of court reporting has to be spelt out and defended.

Access to Judicial Decisions vs. Other Government Decisions

The freedom to report court proceedings is seen as an extension of the right of the public to attend court and as a means by which what goes on can be communicated beyond the few members of the public who can be accommodated in the court itself.¹⁰ But why allow the public into court in the first place? Why should this type of government activity take place in public when so much else takes place behind closed doors? Several reasons are offered.

Some might challenge the analogy with other branches of government. Does not the theory of separation of powers and judicial independence set them apart? Decisions of the executive are, nominally at least, taken in the name of ministers who may be called to publicly account in Parliament. The same is not true of judicial decisions. Similarly, administrative decisions may be taken for political expediency, but one of the distinct features of the judicial decisions is that they are supposed to be reached by reason. For that process to carry legitimacy, it ought to be open to public scrutiny. Curiously, applications for press reporting restrictions pose a particular dilemma for judicial independence. When the contest is between freedom of speech and due administration of justice many judges will find it hard not to identify automatically with the latter or to find a neutral middle ground to occupy between the two.

10 Attorney-General v. Leveller Magazine Ltd., [1979] A.C. 440.

The Role of the Media in Highlighting Judicial Bias

Bentham justified open justice in characteristic terms:

Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against impropriety. It keeps the judge himself, while trying, under trial."

Fortunately, financial impropriety appears to be rare. It is perhaps ironic that when an allegation of bribery was made in 1992, the judge responded by banning reporting of the proceedings in which it was discussed. This took place in the context of the preliminary stages of the trial of Asil Nadir (the former head of Polly Peck International). The allegation (from two informants) was that Nadir, his defence counsel, the judge and a senior police officer were engaged in a plot to prevent the course of justice. The judge imposed the ban to protect Nadir (potential jurors who read of the allegation might have thought he was more likely to have committed the serious fraud with which he was charged). However, after Nadir had absconded, news of the claim was leaked to the media. The allegation was investigated and found to be wholly unfounded. The reporting ban was later lifted, an occasion which gave the judge, the prosecution and police authorities an opportunity to explain their positions in the near certainty that their words would be reported in the media.

But if allegations of financial impropriety are uncommon, Bentham's justification is still valuable in holding up to public light judicial bias or other idiosyncrasies. This is particularly important given certain characteristics of the court room. In Britain, it is still the case that judges share with most of the advocates who appear before them a common but very narrow middle class background. Assumptions and values adopted as axiomatic amongst such a group deserve more critical scrutiny. It is easy to see this in retrospect in some even relatively modern cases where racism, quiet, genteel and unquestioning, was behind some judicial comment. Even when advocates do recognise outrageous behaviour from the bench, it may not be in their clients' interest (or, less honourably, their own) to draw attention to it. The media can do so.

Should Judges Be Sensitive to "Public Opinion"?

There is an ambivalence here in the perception of the role of the media. On the one hand, we look to them to draw attention to deficiencies in judicial behaviour or the court room process. On the other hand, we rely on the relative immunity of judges from outside influence as a reason for not imposing reporting restrictions. Do we or do we not want judges to be sensitive to public opinion as reflected in the media? In the past it used to be fashionable to deride "public policy" as an unruly horse that was best avoided. That was unsatisfactory, not least because it left full play to unarticulated and sometimes unconscious values and principles. But the traditionalists did have a point. There is no ready means for the judges to decide what public policy is best to pursue or what public opinion really desires. Precisely because the media is free to set its own agenda, the editorial line of the Murdoch or Rothermere press is an unreliable guide to public opinion. Once again, judges are drawn into decisions that involve making choices which do not seem that different from other policy makers and which call into question whether their role is special and distinct from other branches of government.

It was not only judges whom Bentham had in mind as needing the spur of publicity. Witnesses may think twice before lying in public. Press reports of public testimony may lead others to come forward with evidence in rebuttal. Wigmore has some wonderful examples of this.¹¹ Whether his stories are true or apocryphal, it is not uncommon for the publicity of a trial to elicit new witnesses. A colleague of mine represented a young woman in a civil action against her employers for false imprisonment. They claimed she was always free to come and go as she wished. His opening speech was widely reported and the next day a former neighbour of his client contacted the solicitors to offer a valuable first hand account of her being detained.

Reporting Bias

Unfortunately, too often what passes for court reporting is a short précis of the prosecution's opening speech. One can see the

¹¹ *Wigmore on Evidence*, para. 1834.

attraction for journalists. Not only is the subject often dramatic, but it comes neatly packaged and couched in terms which the prosecutor, at least, thinks is readily digestible by a lay audience. But it remains a set piece and a partial view of the expected evidence. Journalists do their readers (not to mention the defendant) a gross disservice if only the prosecution opening and then an otherwise unexplained acquittal are reported.

For the true investigative reporter, the interest in a trial is much more likely to be in the evidence itself. Occasionally, of course, cross-examination produces a coup de theatre (such as Robert Armstrong's admission to economy with the truth in the course of the Australian "*Spycatcher*" litigation). Sometimes it opens a window on otherwise closed worlds. The Matrix-Churchill trial of several years ago gave an insight into the operation of government arms sales procedures which would have been unique had the trial not collapsed so spectacularly. Alan Clark, the responsible minister, admitted that the intelligence services had keen awareness of the true purpose of the sales to Iraq and the government was forced to set up an inquiry under Lord Justice Scott, which itself took evidence in public.

A real challenge for those reporters who wish to cover such inquiries or trials is how to make the huge volume of material accessible to a casual reader. Focusing on personalities is one technique and the young Queen's Counsel, Presily Baxendale, who is counsel to the Scott Inquiry has become something of a star for her beguiling way of cross-examining senior civil servants and ministers unaccustomed to such intensive questioning. The problem is acute for broadcasters who are not allowed to televise or record English court proceedings. Channel 4 experimented with dramatic reconstructions of highlights of the day's events but the attempt floundered on judicial antipathy.

For print journalists however, the problem cannot be that different from presenting any other large body of data and some seem to be highly successful in building up a readership for a regular diet of daily reports. It is particularly gratifying to see this in the case of recent fraud trials. Some of these have assumed gargantuan proportions and to make them more manageable have often been split into several different but sequential trials. Defendants in the second or later trials have often argued that reporting of the whole series

should be postponed until the conclusion of the last so as to avoid prejudicial publicity. The media has a good record in opposing such attempts, and as a result, the public is much better informed, for instance, about techniques of bolstering share prices as well as the particular methods used by the food and drink company, Guinness, in its bid to take-over distillers.

The Media's Standing in Court

The media in Britain has had to fight for the right to be heard in court on the issue of reporting restrictions. Defendants, plaintiffs and (to a more restricted extent) the prosecution can appeal an unsatisfactory decision, but until recently, the press had no right of appeal against an order relating to publicity. The High Court has power to consider the legality of the decision of lower courts by a process called "judicial review", but statute prohibits judicial review of a trial on indictment.¹² In the past, it has not been uncommon for trial judges when faced with applications for reporting restrictions to refuse to hear a representative of the press. I remember being briefed to appear for most of Fleet Street and the BBC in connection with a notorious trial for the murder of a policeman in the course of an urban riot. Again there was to be a sequence of trials and again the defendants in the later cases wanted reporting postponed. The judge politely but firmly refused to hear me since I represented neither the Crown nor the defence since these were the only parties to the prosecution.

This judge refused to curtail publicity, but many other restriction orders were made without any serious consideration. Defendants are usually keen to minimise reporting. The prosecution is often indifferent and more concerned that the defence should not have an arguable appeal point because of publicity. In the absence of anyone with a vested interest in free reporting, the adversarial system did not work.

¹² Supreme Court Act, 1981 s. 29(3).

I am glad to say that those attitudes have now changed. The catalyst was a number of complaints to the European Commission of Human Rights under Article 6 (the right to a fair hearing of disputes about civil rights) and Article 10 (the right to freedom of expression) of the European Convention of Human Rights. The complainants included Channel 4 whose counsel had also been refused a hearing by the trial judge when seeking to overturn one of the bans on dramatic reconstruction which I mentioned earlier. The Commission declared the complaints admissible. In a "friendly settlement" (the language of the Rules of Procedure of the European Commission of Human Rights rather than a reflection of the amicability of the parties), the government agreed to introduce a right of appeal against reporting restrictions or exclusions from the court which in either case were imposed by a judge.¹³

The appeal is to the Court of Appeal and is by way of rehearing so that the media can argue the merits as well as the formal legality of the judge's order. There has been a number of successful appeals as a result. As important, trial judges have recognised the legitimacy of the media's interest in opposing such orders and the propriety of hearing representations from them as the parties most directly affected. This is a quick, relatively cheap and often effective alternative to appeal. If the order has been made before the media learns of the application, it will usually be allowed an early opportunity to ask for it to be set aside. The Court of Appeal has approved of this procedure by Crown Court judges and the High Court has said that magistrates should give the press similar opportunities.¹⁴

The Statutory Test to Postpone Reporting

The statutory power to order the postponement of reporting arises "where it appears necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any proceedings pending or imminent."¹⁵

13 Criminal Justice Act, 1988, s. 159.

14 R. v. Beck (1992), Cr. App. R. 376

15 Contempt of Court Act, 1981, s. 4(2).

There has been a number of interesting developments in the interpretation of this power. The mandatory precondition is a substantial risk of prejudice. In assessing whether this is likely, the court must assume that the reporting which would take place in the absence of a ban would be fair, accurate and in good faith. This is not because of some rosy-eyed view of the way in which the media behave in practice, but because reporting which does not meet these standards and which is prejudicial will be contempt of court even in the absence of a court order. The courts have also understood that a ban on reporting will not stop rumours and gossip. A good faith, fair and accurate report will be much less harmful than misinformed and distorted rumour. Judges vary in the influence which they attribute to the media. As I have already said, there is a phenomenon, particularly in long trials, which is well-recognised. The participants are not unlike members of an expedition who acquire shared experiences and who become as a result more inward looking and less susceptible to outside forces. The acquittal of the Kray brothers on a murder charge within three weeks of their well-publicised conviction of another murder is a famous example.¹⁶ So, too, is the acquittal of Jeremy Thorpe (the former leader of the Liberal Party) on a charge of conspiracy to murder following a committal for trial and the trial itself, both of which attracted massive publicity.

A judge who concludes that, notwithstanding these considerations, there is a substantial risk of prejudice to the administration of justice ought not to jump to the conclusion that some restriction on publicity must be imposed.¹⁷ There is still a discretion as to whether to make an order. Alternatively, the courts have reasoned, the word "necessary" implies a balancing exercise between the danger to the administration of justice on the one hand and the principle of open justice on the other. In one sense, the bigger the case and the more media attention it can expect to attract, the greater the potential prejudice to the administration of justice. Yet in a number of instances the courts have reached the opposite conclusion. The media attention has been seen as a consequence of the public interest in the prosecution and the greater that interest, the less willing the judges should be to agree to a postponement order.

16 *R. v. Kray* (1969), 53 Cr. App. R. 412.

17 *ex parte The Telegraph plc*, [1993] 1 WLR 980 (C.A.).

Defendants regularly argue that they seek only a *postponement* of publicity until the end of the trial. Rightly, this argument has carried little weight. News has a very short shelf life. Postponement is usually synonymous with abandonment of coverage. At the end of a big trial, the press will often carry long articles of background material which could not be published while the prosecution was in progress. However, the process for gathering such information is very different from the laborious business of attending court each day to compile a report of the proceedings. If the fruits of that labour cannot be used immediately, there are few organisations which can afford to pursue it for the sake of post-trial publication.

If the balance does come down in favour of some restriction, it ought to be the minimum necessary to achieve the goal of preventing substantial prejudice to the administration of justice. Restrictions should continue for no longer and be no more extensive than is necessary for that purpose.

Here the English courts, by their interpretation of the word "necessary", have developed an approach which is very similar to the principle of proportionality that has been a feature of the case-law of the European Court of Human Rights in its interpretation of Article 10 of the European Convention of Human Rights and, more recently, by the European Court of Justice in its treatment of rights fundamental to the European Union.

The Media and the Judiciary: the Constitutional and Political Context

David Rose*

Introduction

The relationship between judges and journalists in Britain is strained and vexed. It is seldom that even the better newspapers discuss the judiciary in other than in the crudest way, by attacking them for rulings which the news values of the moment suddenly deem perverse. Before sitting down to write this paper I asked my newspaper's library for the file marked "judges". A few recent examples will illustrate what I mean.

At the end of November,¹⁸ for example, there was widespread condemnation in the popular tabloid papers and the television news of a judge in Northeast England who refused to admit the confession of the accused at the trial of a man charged with killing a seven-year-old girl. As a result, the man was acquitted, to the widely reported fury of the victim's family and the police. It was only later, in stories which did not appear in the mass circulation dailies, that the true details emerged. The defendant had confessed only after the police breached the Act which governs the interrogation of suspects, the Police and Criminal Evidence Act. He also confessed to the wrong crime: he said he had raped the victim, although she had not suffered a sexual assault, and described inflicting injuries which were, in fact, fiction. But in the popular consciousness, the myth of a "soft" judiciary, out of touch with "ordinary" people, had been reinforced.

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18 This article was written in 1994. [editor's note]

Another example is the case of Roger Levitt, a former businessman accused of committing a massive fraud. After the prosecution dropped most of the charges, the aptly named Mr Justice Laws imposed a non-custodial sentence for a plea of guilty to a minor charge. He was universally attacked, his detractors ignoring the fact that the substance of the case had melted away, leaving a somewhat technical conviction for which imprisonment would have been harsh and unfair. There was an extraordinary and disgraceful footnote in, of all places, the legal page of *The Times*, in the shape of a signed article by the prosecutor, Michael Cocks QC, repeating the accusation of "softness" against the judge and adding another of incompetence. Only later did the magazine *Private Eye* disclose the extent of Cocks' hypocrisy: the non custodial sentence against Mr. Levitt had been one of the explicit terms of a plea-bargain conducted in Mr Justice Laws' chambers at Cocks' own instigation.

There are other examples. But suffice it to say, that in general, the media in Britain have characterised the judiciary along the lines of the fictional Mr Justice Cocklecarrot: as a bunch of mostly senile, hopeless inadequates. Unwise comments, often in sex crime trials, by a tiny minority of junior circuit judges are seized upon and endlessly recycled, to create an impression of a bench which is sexist and out of date.

Then, it has to be said that in a number of important cases in the 1980s, the British judiciary did not do any favours to the media, nor to the principle which, for all its faults, the media implicitly holds dear, the freedom of speech. Among several examples, the most prominent was the upholding by the House of Lords of the Government's ban on the broadcasting of interviews with members of Sinn Féin, the political wing of the IRA, in the face of argument derived from article 10 of the European Convention on Human Rights. I should also mention the long imbroglio over *Spycatcher*, the book by the ex-MI5 spy, Peter Wright.

Reporting Restrictions

At a less dramatic level, some judges seem already to have answered, in their behaviour on the bench, some of the questions posed before this conference. Reporting restrictions of various kinds

are regularly being imposed in Britain: and I would argue, to the detriment of justice and democracy. Too often, courts hear evidence of vital public interest *in camera*. One has the feeling with some judges that Government lawyers have only to utter the magic words "national security" and all suspension of disbelief comes to a swift end. Perhaps in view of the treatment the judiciary gets in the media, it isn't surprising. But occasionally one does detect a disdain for the media from the bench, a feeling that things might really proceed a great deal more easily if we weren't there.

I spent much of last week preparing a long,¹⁹ investigative article based on the trial of people accused of importing a vast quantity (905 kg) of cocaine. This case has several scandalous aspects. The ringleader of the conspiracy, one of Europe's richest and most dangerous drug barons, had all charges dropped against him after the intervention of the Attorney General. It transpired that police from a regional squad, with whom the Customs Officers who made the arrests had been working for years, betrayed their colleagues. The ringleader had, without Customs' knowledge, been working in non-drugs cases as a police informer, and now the police were threatening to give evidence in his defence. The cocaine shipment was, in a sense, a chimera: after the front company which was shipping the drugs inside lead ingots had been busted in Venezuela by the American CIA, it was decided to allow the operation to "run" in order to catch those responsible at the European end - with the CIA making the shipping arrangements and paying the bill.

That much my newspaper printed last week. We were taking a risk. The trial judge, Mr Justice May, had acceded to applications to suppress documentary material from the trial, and also made several wide-ranging orders which prevented me and my colleagues telling the full story. Both the jury and the public remain in the dark about a lot of what went on.

I tell this anecdote because at the simplest level it illustrates the danger of restricting reporting of trials: the jeopardising of the need that justice be not only done but be seen to be done. But as I shall now argue, I think there is a wider, constitutional context, too.

19 See editor's note, *supra.*, above.

The Constitutional Question

You might say: well, what is a journalist doing talking about constitutional problems; the media have no constitutional position. No one elected us. We are just working for newspapers or broadcasting stations whose main job (with the exception of the BBC) is to make money. The distinguished English jurist, Sir Francis Purchas, who retired as a Lord of Appeal last autumn, put the problem succinctly. In November, in the annual Joseph Jackson memorial lecture, he reminded his audience of the constitutional doctrine of the separation of powers and said:

The media's presence cannot be ignored ... logically, with the immense power it now wields, it must be considered as a candidate for selection to the separation of powers club. No doubt if it could harness the exercise of those powers by its constituent parts in a responsible manner, it would be an admirable and beneficial member of that club.

But he went on to point out that the media are "incapable" of self-regulation" because of their "control by the forces of the market place." His conclusion: "[t]he presence of the media, therefore, reinforces the importance of maintaining the strength of the judiciary... as the only element of power to balance the executive."

That, I suggest, is a pretty clear summary of the views held by a majority of the British judiciary: that the media have power, but not responsibility, and the role of the judiciary in dealing with them must of necessity be essentially restrictive and coercive, in the interests of preserving justice.

Consider again the prime task specified by Sir Francis: that of "maintaining the strength of the judiciary as the only element of power to balance the executive." How much easier this task might become if the media and the judiciary were to undertake it in partnership! I make no apology for sounding somewhat apocalyptic. If we don't form such a partnership and make it work, I am convinced we will both fail, leaving the field to modes of government which are democratic only in name.

In the last 15 years, for a variety of historic and contemporary reasons, the always imperfect systems of British democracy have come close to collapse. If you don't have a written constitution, or even Bill of Rights, then it is easy for governments to adapt the constitution according to political will.

We have seen whole institutions, which by and large functioned well, simply written off, abolished, principally because they were focuses of dissent. The Greater London Council was only the most prominent. Its destruction leaves London, a great capital city, without any coherent forum of local government. In health, education and the police, the trend has been and continues to be relentlessly centralising, with more and more ruthless control being exercised not in the regions to locally accountable bodies but by central government in London.

At the same time, lines of accountability have become largely meaningless. The hiving off of many state functions to "agencies" - run, I may say, almost entirely by Tory Party loyalists - means there is no longer any scrutiny over their operation in Parliament. Decisions which would once have required parliamentary debate are now presented as *faits accomplis*. Meanwhile there is privatisation: and with it, the concealing of previously public information on the grounds of "commercial confidentiality."

In a recent article in *Public Law*, Lord Lester QC coined this memorable adaptation of Acton "Power is delightful, and absolute power is absolutely delightful." It applies only too well to recent developments in Britain. In Britain, we don't, frankly, have parliamentary democracy at the moment. We have something closer to parliamentary absolutism. And as Sir Francis Purchas recognised in his lecture, it deeply affects the judicial process.

Among his concerns was the slow starvation of the official budget for justice, which has led to a grave shortage of High Court judges. Sometimes half of all High Court cases are tried on a given day by "deputies," ordinary QCs or circuit judges who have neither the training nor the experience for the job. But he recognised there was a more profound threat, too, saying:

High Court judges, protected as they are by the Act of Settlement of 1770, are in the eyes of many members of

the executive an extravagant and embarrassing inhibition to the economic and convenient dispatch of judicial business. Such persons look for the ideal solution, which would be a single-tiered cadre of judges who could be deployed and controlled by the executive.

Five years ago, the Lord Chancellors Department had considered just such a system.

Judicial independence, Sir Francis went on, meant much more than the freedom to take decisions inside the court. Judges also needed freedom in the administration of the courts: cash limits could not be applied to this “organic” art. He concluded: “The requirements of the judiciary must be scrutinised against their intrinsic needs, and not be referenced to external economic constraints. The independence of the judiciary must also be secured by removing their funding from Treasury programming and incentive performance criteria.”

I suspect that when he uttered these words, Sir Francis had two things at the front of his mind. One is a scandalous attempt by a member of the executive to influence decisions made by the Employment Appeal Tribunal on grounds of cost. The other is the Police and Magistrates Courts Bill currently before Parliament. This imposes exactly the “performance criteria” on justice which he rightly abhorred: performance related pay and fixed term contracts for magistrates clerks, the officials who run the magistrates’ courts. The danger is of the quality of justice being sacrificed to mere quantity; or perhaps, to performance targets set by a minister out to prove he was “tough on crime” by pointing to rising numbers in jail.

The Limitation on Judicial Review

However, there is plenty of other evidence of threats to judicial independence in Britain. Without a constitutional court or constitution, the only way to challenge executive decisions is through “judicial review”. The scope for reversing the government’s actions on this basis is slim: as long as the courts hold a decision was made according to the right procedures, it has to be perverse, absolutely

unreasonable, before it can be quashed. The court may feel a decision is absolutely wrong, and that it tramples over rights set out in the European Convention on Human Rights to which we are, after all, a signatory - and be unable to do anything about it.

Nevertheless, there is in government circles something amounting almost to paranoia about judicial review. Civil servants go on special courses and read special booklets to learn how to craft their work to make it immune from judicial scrutiny.

The feelings of the executive for the judiciary boiled over publicly in Britain last week, when Lord Howe, former Foreign Secretary, attacked Lord Justice Scott, presiding over "the arms to Iraq" inquiry. Howe claimed the process was unfair because ministerial witnesses had not been able to cross-examine all the other very numerous witnesses despite the fact that Scott was appointed by the Prime Minister and his working methods agreed upon. But that is what happens in a parliamentary absolutism. Last summer, the former editor of *The Times*, Lord Rees-Mogg, attempted to bring a judicial review of the Treaty of Maastricht, arguing it conflicted with other British legislation. The howls of rage were led by the Speaker of the House of Commons, appalled that a mere citizen, albeit a noble one, might dare try such a thing, and that the courts might presume to intrude in the sacrosanct arena of the foreign policy of an elected government. I think she thought she was defending democracy. I would suggest she was treating it with contempt.

I regret to say there is evidence that the British disease, secrecy and the stifling of dissent, seems to be spreading to Europe. Since *Maastricht*, with its "third pillar" on law and order, immigration and security, the European Commission has started behaving like a British Government. It wants to vet staff in Brussels. More seriously, it proposes to restrict information available to the European Parliament on a long list of topics, to suppress debate until it is in a position to present a *fait accompli*. As the European Union becomes an ever more powerful institution, this is a trend to be fought and deplored. The historic origins of the weakness of European parliamentary institutions are obviously quite different from the situation I have described in Britain. The dangers of European executive absolutism could, if anything, be greater still.

So what, to quote Lenin, is to be done? I make no apology for straying some way from the immediate subject: because if we are to suggest guidelines for the media in reporting judicial proceedings, I believe they must be fashioned with this broader constitutional perspective in mind. And as I said earlier, I think it is vital for journalists and judges to start working together.

I am delighted to report that even in Britain, the thaw is beginning. Since Lord MacKay, the Lord Chancellor, relaxed in 1988 the previous strict rules preventing serving judges from speaking to the media, and from giving lectures, more and more members of the senior judiciary have begun to use this openness in a constructive way. Lord Taylor, the recently appointed Lord Chief Justice, has been particularly outspoken in criticising aspects of government policy where he thinks it conflicts with the demands of justice. He and Sir Thomas Bingham, the Master of the Rolls (head of the civil division of the court of appeal) have explicitly recognised the weaknesses of our constitutional arrangements, and called publicly for incorporation of the European Convention into our domestic law. The effect, of course, would be to establish what amounted to a bill of fundamental rights, accessible locally without the very long delays entailed by litigation in Strasbourg.

In an interview with me, Sir Thomas said that he thought the judiciary ought to be taking a more active role precisely because of the current weakness of Parliament as a brake on the executive. Margaret Thatcher, Lord Woolf told me, had added to the powers of the executive more than any other prime minister. It was right that he and his judicial colleagues should seek to redress the balance.

The easier contact between some of this newer generation of the high judiciary and the media - Lord Taylor has even given press conferences - is, despite the bleak picture I painted at the beginning, starting to take effect. When judges become more visible, and start having contact with reporters, it becomes a lot more difficult either to ignore them, or to portray them as hopelessly out of touch.

There have been hopeful signs in the courts, as well as outside. Last year, in the case of *Derbyshire County Council v. Sunday Times*, the British courts for the first time ruled that Art. 10 of the European Convention, governing free speech, had virtual effect in Britain: its

principles also existed under Common Law. The test of proportionality as a judicial tool is beginning to creep into our domestic courts. Clearly it has some potential if widely applied to executive decisions in judicial review.

Conclusion

Briefly, then, to conclude with a descent from the panoramic vista to the highly specific. What answers does this analysis lead me to give to the questions facing our subject? First, I would say that the media must generally have the rights of access and reporting in all judicial proceedings, and to all material discussed within them, and that exceptions to this rule must be hedged with the most stringent safeguards. I think it is vital that if a judge does wish to impose any restrictions, the media must have the right to be heard, and to appeal the ruling while the trial is in progress.

It is important to distinguish between restrictions which stay in effect for all time and those which end with the end of proceedings. I am not sure that any blanket restriction, preventing reporting even after the end of a trial, can be justified in any terms other than on genuine national security grounds, or, where I do take a slightly more moderate position, where children and young people are involved. If national security is advanced by a party in a case to justify secrecy, then the claim ought to be tested. In a spy case, for example, it would be right to protect secret informants whose lives could be at risk. But in this area, it is particularly important that the judiciary is alive to the danger that governments will seek to invoke national security as a means of limiting or preventing political embarrassment.

I need hardly point out that the Scott Inquiry mentioned earlier was set up precisely because of such an attempt: the trial of executives of the Matrix Churchill Company on charges of exporting military equipment to Iraq, in which four ministers tried separately to prevent disclosure of the fact they had all along been working for the Secret Intelligence Service on grounds of "public interest immunity". In other words, to preserve their careers, ministers would have seen three innocent men jailed, despite the very considerable risks they had taken in the service of their country. Thankfully, a

judge refused to allow them to take this action, and insisted the truth be disclosed.

Turning to restrictions which remain in force only while the trial is in progress, I actually think the British system is about right. All proceedings in jury trials can be reported contemporaneously, without comment, but judges can (and usually do) order the media not to report legal discussion carried out in the jury's absence until the end of the trial. In non-jury trials, the rules are much more relaxed. Rightly, judges imagine themselves less likely to be swayed by what they read in the newspapers than the evidence before them.

However, according to statute, restrictions in criminal cases before trials start are normally severe. Again, this strikes me as about right. I cannot agree with the system found in the United States, where often the main issues in a case are picked over in the press in inordinate detail before the court ever sits.²⁰ The British test for contempt of court is that a report must have "substantial risk of serious prejudice". Again, that strikes me as sensible and right as it relates to the ordinary run of cases.

To conclude, I repeat that in setting the terms for this debate, we must set them very wide. In setting guidelines, we should do so with constitutional requirements of democracy and accountability at the forefront of our deliberations. And in making rulings in individual cases, judges must consider the same demands. There are circumstances where I can envisage the contempt test would need to be modified. If a report created a substantial risk of prejudice in a particular hearing, but perhaps, for example, exposed a greater wrong by government, the report should be immune from contempt. It would be "in the public interest". And when we come to try to define which cases such a modification is necessary, we find that what were apparently simple questions become very complicated indeed.

20 Such as the extensive media comments made during the 1995 trial of O. J. Simpson, the American football player and actor, who was accused of killing his former wife and her friend. [Editor's note]

Part Three

The Impact of Modern Communication Technology

The Globalisation of Media and Judicial Independence

*Michael Kirby**

From Smoke Signals - Through Wireless - to Cyberspace

My proposition is simple. The media of communications have changed radically in recent years. The ownership of the media has also changed. The professional ethics of the media have changed as well. These changes have an impact on the actions of the media and on the messages they present. They also affect the legal system and the judiciary.

The media's messages are no longer confined to a particular village, town, city or even to a particular country. The technology now takes them, instantaneously, across jurisdictional borders. The powerful, opinionated media can thereby play an important role in the assertion of freedom and in undermining autocratic government. It was, to some extent, the global media which brought the concerns (originally expressed by a privileged few and in tentative language) from the docks of Gdansk, Poland, remorselessly through Hungary and Czechoslovakia. It swept from there to Bulgaria, Mongolia and Romania. It consumed the Baltic States. It eventually destroyed Federal Yugoslavia. In the space of a couple of years, it brought the Berlin Wall crashing down. Ultimately, it demolished one of the two global mega-powers: the Soviet Union.

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An essential element of the movement for *Glasnost* in Russia, which stimulated these changes, was the demand for access to an open media and an accessible system of telecommunications. A largely uncontrolled media and direct access to telecommunications were themselves the bi-products of the comparatively freer societies of the West, where ideas could more readily flourish. Such societies stood in stark contrast to the economic backwardness and social dislocation of the former Soviet Union and its satellites with command economies. Broadcasts, by radio and television, crossed the Berlin Wall. Telephone communications and direct dialling leapt over even the energetic intrusions of the omnipresent censor. Satellites beamed down the messages of the extraordinary developments of other economies. The data spoke, with one voice, of the multiplier which a high measure of free expression contributed to human happiness and to economic progress. Links with the reformist movements were established by interactive computers and by telefacsimile. The growing realisation of technological backwardness provided a stimulus to the movements for change which were to become a deluge and to stop only at the borders of China.

It is important to keep these technological developments in mind as we approach their impact upon the other important values of free societies: basic human rights, the Rule of Law, the independence of judges and of lawyers.

The progress made in the last few decades has been remarkable:

Telecommunications are a fundamental component of political, economic and personal life today. Yet, until recently, human encounter was place-dependent. Communication across distance was only possible by such technologies as talking drums or smoke signals, relatively immediate but limited to messages that were terse and susceptible to error. More detail and accuracy could be conveyed by messengers travelling by foot, boat, horse or other beast of burden. Messages from distant locations could take weeks or years to arrive and were used to communicate affairs of State, nobility, Church and commerce. These communication forms were not interactive and not available to common people. The voyages of Marco Polo, conveying letters

from the Church of Rome to the Emperor of China, took decades. Transmission of messages was very slow and expensive even up to one hundred and fifty years ago. As Arthur C. Clarke noted: "When Queen Victoria came to the throne in 1837, she had no swifter means of sending messages to the far parts of her Empire than had Julius Caesar - or, for that matter, Moses... The galloping horse and the sailing ship remained the swiftest means of transport, as they had for five thousand years.¹

Then things started to change. In the 1840s the telegraph was introduced. In 1875, Alexander Graham Bell invented the telephone. Marconi's wireless spread quickly in the early decades of the twentieth century. A signal across the Atlantic notified the judicial order to arrest Dr Crippen for the murder of his wife. By the 1920s, Hollywood was in full operation. Cinemas sprang up throughout the developed and developing world. The dominance of American movies and later television and videos has lasted into our own age to become a major controversy in the recent GATT negotiations. In 1956, the first submarine telephone cable was laid successfully. The first telecommunications satellite was launched in 1960 - a balloon. It was not until 1962 that the first efficient satellite, Telstar, was launched into orbit. Thousands have followed. Fibre optic communications were introduced in 1977.

The term "global village" was coined in the 1960s by Marshall McLuhan of the University of Toronto to describe the way in which the global media were linking humanity in all parts of the world. Professor McLuhan attributed his basic idea to something which Nathaniel Hawthorne had written, in 1851, in his book *The House of Seven Gables*:

Is it a fact... that, by means of electricity, the world of matter has become a great nerve, vibrating thousands of miles in a breathless point of time? Rather, the round globe is a vast head, a brain, instinct with intelligence! Or, shall we say, it is itself a thought, nothing but

1 L.M. Harasam, *Global Networks*, MIT Press, Cambridge, Mass, 1993, 4f.

thought, and no longer the substance which we deemed it.

Aldous Huxley, in 1925, painted the picture of the vast power of this media interconnection. And of the dangers it presented of cultural consolidation and, ultimately, homogenisation:

It is comforting to think...that modern civilisation is doing its best to re-establish the tribal regime but on an enormous, national and even international scale. Cheap print, wireless telephones, train, motorcars, gramophones and all the rest are making it possible to consolidate tribes, not of a few thousands, but of millions... In a few generations it may be that the whole planet will be covered by one vast American speaking tribe, composed of innumerable individuals, all thinking and acting in exactly the same way, like the characters in a novel by Sinclair Lewis.²

The foregoing represent some only of the important media developments. Others, just as important, are happening now and will gather pace in the future. They include the phenomenon of multimedia, digitalisation compression and informatics. Cyberspace,³ a term coined in 1984 by the science-fiction writer William Gibson, connotes a future world linked by computer networks in which physical reality makes contact - mental and sensorial - with a parallel world of pure digitised information and communication: the world of modern non-physical media of communication.

It is a fault of lawyers, including judges, that they are typically uncomfortable with the complexities of technology. In the pursuit of the familiar world of well worn legal rules, they too often recoil from the complex problems presented to human rights, the Rule of Law, and the independence of judges and lawyers by advances in nuclear fission, genetic engineering and informatics. To some extent, the judges and other lawyers of today have adapted, like their fellow citizens, to a rapidly changing world. They use information

2 Huxley quoted *ibid.*, 8.

3 W. Gibson quoted *ibid.*, 9.

technology in the discharge of their duties. But if the stereotype of the lawyer with the quill pen is hard to eradicate, it is because lawyers, and lawmakers, abhor the complexities of modern technology and the daunting variety of the problems which it throws up. It is as if their minds are in a different, verbal, gear.

Changing Media Ownership - from PTT to CNN

One such problem is the subject of this paper, relevant to the seminar on the media and the judiciary. It concerns the response of the judiciary to the changes in the nature and ownership of the media. The changes in the nature of the modern media of communication, I have sufficiently outlined. The changes in the ownership can now be briefly sketched.

First, the last decade or so has seen the large scale destruction of the PTT monopolies which formerly controlled much of the electronic media and were often in a position, directly or indirectly, to influence its content and assure its compliance with local law. The movement towards privatisation and diversification of the ownership of media outlets has been common, although not universal, in Western and formerly Eastern Block countries. The movement began in the United States as a change from "the New Deal's social welfare orientation to 'Chicago School' economics."⁴ It has now spread to many Western countries. In the former Eastern Block, it accompanied the moves to liberate the broadcasting media from the stultifying control of the government and its stern discipline of the media in matters of politics, economics and public morality.⁵ In some Western countries, the Government monopoly on the audio visual media has been gradually eroded by new technology, such as cable television and direct broadcasting satellite television.⁶ Necessarily, in the case of satellite transmission, the geographic boundaries of the

4 E.G. Krasnow and M. Boteim "Deregulation of Broadcasting in the United States: Quo Vadimus? (1986), 7 Media Law and Practice 56.

5 G.L. Peiris, "Media Law" (1993), New Zealand Law Journal, 388.

6 I.C. de Baillon, "The Legal Framework of french Television" (1987), 8 J Media Law and Practice 150.

satellite's "footprint" are such that the media cannot any longer be considered local. The capacity of local laws to control such media - and to insist upon local public policy in matters such as culture, language and morality - is reduced accordingly.

Apart from Government ownership, there is also the phenomenon of private ownership of powerful new media forces. I refer not only to media barons, like the erstwhile Australian (now United States) citizen, Rupert Murdoch who controls many media outlets (print and electronic) in several continents. I refer also to the intercontinental and transnational media corporations. The very technology which has been described above has promoted their growth. It has extended their coverage, distribution and power. The implications of this development for governments and the Rule of Law were touched upon by the noted English news journalist, Mr Jon Snow at a conference of the *Fundacion BBV* in Madrid last year. He suggested that the new media of communication had begun to alter the message being communicated. According to Snow, television, in particular, is vulnerable to superficiality and inaccuracy. Over-simplistic news presentation with film has replaced, for many, the delivery of any detailed news analysis or in depth consideration of issues. Glitz has replaced information.⁷ Delay, editing and reflective expert commentary previously promoted the sharing of more thoughtful messages than tends to come with the powerful intercontinental packaging of instant information. According to Snow, we are now, on every continent, increasingly receiving simultaneous coloured pictures with banal commentary, often in the form of entertainment and quite frequently directed (at least in the case of CNN) towards its substantial American audience of origin. Even more significantly:

In the developing world... CNN is frequently unchallenged. The indigenous broadcasters simply don't have the financial or physical resources to compete with an external provider by-passing national transmissions with a global operation pumped in from outer space. Certainly it would help if a more balanced service could

7 J. Snow, "The Role of Communication and Information in Contemporary Society", unpublished paper for a preliminary meeting of the Cross-Cultural Debate, sponsored by the *Fundacion BBV*, Madrid, 1992. 6.

be made available to the developing world in competition with CNN.⁸

Snow concluded in terms relevant to this session:

There is a case for real regulation of international satellite transmissions. Whilst I want to maintain the absolute unfettered freedom of the skies, I see no difficulty in regulating ownership and broadcasting standards and asking the host government, from whenever the transmission originate, to police the regulations on behalf of, and in accordance with, the demands of a body established by the international community. But more urgently than anything, national governments must move to break up monopolistic domination of the television information market. It is potentially dangerous to allow such world-wide dominance to be vested in so few hands.⁹

It is in this last message that there lies the principal message for governments, the judiciary and the Rule of Law in every country. Judicial independence involves the capacity of the judges to enforce compliance with their own jurisdiction's applicable laws and to make orders which will be obeyed within their jurisdiction. The point of this paper is that, in domestic jurisdiction, the power of the judges, by their orders to control the complex intercontinental and constantly changing media which I have described is now significantly diminished. It is not diminished by any law that has been passed. It has simply diminished by the fact of the global nature, dynamic growth and enormous power of the modern media of communications. It has also diminished by the extremely powerful, and sometimes opinionated, interests which own or control the media and which do so in places far from the courtroom of the judge. The judge can, like King Canute in early Britain, commend the tide to retreat. But such commands will often be ignored, just as the waves ignored Canute.

8 *Ibid.*, 10.

9 *Id.*, 11.

This is not a tale of unalloyed gloom or judicial despair. Overwhelmingly, as I have demonstrated, the international media, propelled by the new technology, has been a liberation device. Often its journalists aspire to high personal standards, sometimes taking considerable risks to bring immediate news to living rooms around the world. But the international media also bring problems for the Rule of Law in particular jurisdictions. In the balance of this paper, I wish to give a number of illustrations of how this has come about.

Jurisdictional Law: Extra Jurisdictional Media

Transborder Data Flows:

A number of activities of my professional life have demonstrated to me the impact upon the law, and on judicial and legal authority, of the changing media of communications. In 1978, I was elected to chair a working group of the Organisation for Economic Cooperation and Development (OECD). It was concerned with developing guidelines on the protection of privacy in the context of transborder data flows. The guidelines were duly developed.¹⁰ They have influenced, and in some cases, precipitated, domestic legislation in a number of countries, including my own.¹¹

The reason for the interest of the OECD, an economic body, in what might otherwise be regarded as the human rights concern of privacy, was essentially twofold. The first, was a recognition that the proliferation of numerous incompatible national law operating upon a single indivisible national law, operating upon a simple indivisible data flow could only lead to inconvenience, disharmony, ineffective law and, in the end, the dominance of the laws of the most economically powerful jurisdictions. Secondly, the common feature

10 Organisation for Economic Cooperation and Development, Guidelines on the Protection of Privacy and Transborder Data Barriers, Paris, 1980.

11 Privacy Act, 1988 (Aust).

of OECD countries was an adherence to the Rule of Law and democratic government. It was realised that, with the advent of the new media of communications, a special challenge was presented to the governments of OECD countries to provide effective lawmaking by ensuring against a cacophony of disharmonious laws which would give rise to legal uncertainty and confusion in which lawlessness and anarchy would breed.

It may not be true that there emerged in the OECD group evidence of the "basic philosophical dichotomy between the United States and the rest of the world over the ownership and control of communication systems" of which some authors have written.¹² But it certainly was true that serious differences emerged between the perspectives of privacy held by European countries (with the memories of the Gestapo and of authoritarian governments fresh in mind) and the "liberation" free flow and free speech philosophy which is inculcated in United States citizens from their earlier childhood and upheld in the law by the First Amendment to the Constitution of their country. Economic advantage sometimes reinforced these respective advocates of privacy protection and free-flow of data. But the important point for present purposes is that consensus was ultimately achieved, basic rules were laid down, a common approach to assure individual control (the right of access to data) was established and the regime influenced domestic laws in a way promoting respect for the law, the authority of local judges and individual human rights.

I believe that this is a model which should be utilised in international responses to problems of the modern media which are larger than the power of domestic jurisdiction typically to control. In 1991-2, I chaired a further working party of the OECD. This time it was concerned with the related problem of the security of information systems. As the media of communications have become more complex, and as more reliance is daily placed upon them, there is a need in some instances to assure the security (confidentiality, integrity and accessibility) of data. This working group, in turn, produced Guidelines on Security of Information Systems. One of the

12 A.W. Branscom (ed.) *Towards a Law of Global Communications Networks*, (Longman) New York, ix.

major proponents of action in this area was Japan. Japan is very concerned about the vulnerability of reliance: dependent as it is upon interlinked international information systems, not always subject to the level of security and assurance felt necessary.

One of the common problems presented by transborder data flows in the difficulty of assigning to a particular jurisdiction and individual the authority and responsibility to deal with the antisocial conduct in question. Jurisdiction, particularly in criminal law, has tended by international convention and domestic practice to be confined to the jurisdiction where the criminal act occurred. But in something as ephemeral as satellite broadcasts, wireless signals, telecommunications messages and interactive data systems, it is often difficult to pinpoint with certainty the jurisdiction with legal responsibility and to determine beyond doubt the forum of the judge with the necessary legal authority to act upon a complaint.¹³ Perhaps a more practical problem is present at a level long before a judge becomes involved. At one conference which I attended in Canada, we were told of many cases where prosecutors declined to initiate proceedings in Michigan in the United States because of the difficulty of pursuing a data criminal across the lake in Toronto. The Rule of Law is challenged by such loopholes in the legal system and uncertainties about the authority of the judges.

Initiatives such as those taken within Europe by the Commission of the European Union, by the Council of Europe and the initiatives taken on an intercontinental basis by the OECD, point the way to the future. The Rule of Law, in the future, will increasingly be international in its content. This is merely a reflection in the law of the problems presented to society by international technology and the powerful interests which control or direct it.

Defamation Law Reform:

A second field of activity where I was required to confront the changing nature and ownership of the media arose in the work of the

13 See eg L.O. Smiddy, "Choosing the Law and Forum for the Litigation of Disputes", in Branscomb, *supra.*, at n. 12 at 299.

Australian Law Reform Commission in 1979. I was then the Chairman of that Commission. The Commission was investigating the perennial problem of reform of the law of defamation. Australia has basically followed the English law of defamation. Persons defamed may sue to recover money damages that are provided as a sanction against wrongful hurt to reputation. As in England, the law provides no protection to privacy in the context of publications. Recommendations were made for significant reforms of the remedies available. The Commission drew upon the remedies available in the civil law systems which permit rights of correction and rights, of reply in lieu of money damages.¹⁴

A particular problem arose in this context within the Australian Federation. Until now, defamation law has been regulated at a State level in Australia. The sources of power for Federal regulation of such activity are limited, aside from the broadcasting media which are Federally regulated. The Law Reform Commission drew attention to the problem presented by this disparate regulation of the law of defamation in different ways, with different defences in each of the different jurisdictions of the one country, Australia. It also drew attention to the concentration of media ownership in Australia.

I would only refer to these domestic concerns of my own country because, in microcosm, they present many of the same issues as are seen at work on the global level. Local laws, which worked quite well when defamation was local work less well now that the same defamation can be spread across many borders. Local jurisdictions depended upon human decency and good manners to protect and respect individual privacy. They must now consider the legal protection of privacy in the context of the media which, for entertainment, delights in prying upon the famous or notable and to reveal the tragedies and scandals of their private lives.

The concentration of media ownership in relatively few hands has produced a tendency towards centralised control resting, ultimately, in media owners (who sometimes boast that there would be no point in owning such a corporation if they could not influence

14 "Australia, the Law Reform Commission, Unfair Publication: Defamation and Privacy" Aust Govt. Publishing Service, Canberra, 1979.

editorial policy and publication standards). Since the Law Reform Commission report was written, the powerful and opinionated interests of the media have effectively delayed the implementation of the proposed reforms. The concentration of media ownership noted by the Australian Commission¹⁵ has not changed very much in the past 15 years. The major change has been the intrusion into the Australian media of the Canadian media interests controlled by Mr Conrad Black. He wishes to increase his holding in one of the major media outlets. Perhaps he is North American's answer to Mr Rupert Murdoch whose media empire began in Adelaide, South Australia and now embraces much of the world.

In dealing with the power and effectiveness of the judicial branch of government to respond to the defamation, contempt of court, invasions of privacy, misuse of personality etc., it is necessary to remember the way in which media technology has so radically changed since such laws were first fashioned in every jurisdiction. It is also essential to remember the transborder character of modern media and to reflect upon the multinational corporations which now tend to own them and to spread their messages beyond the jurisdictional power of domestic judges to provide protection to those who are harmed.

The Spycatcher Litigation:

The third context in which the foregoing *Realpolitik* was brought home to me in a dramatic way concerns the *Spycatcher* litigation. In 1988 in my capacity as a judge, I had to sit on one of the cases which concerned the attempt of the British Government to prohibit the publication of the memoirs of a former officer of the British Security Service, Mr Peter Wright. The Government succeeded in Britain in stopping the publication of a major extract from the book in British newspapers.¹⁶ Interim injunctions were also granted in Hong Kong. The book was withdrawn from circulation in Singapore. But then

¹⁵ *Ibid.*, 23.

¹⁶ Attorney General v Guardian Newspaper Limited, [1987] 1 WLR 1248 (HL), *ibid.* [Nr.2] [1988] 2 WLR 805 (HL).

seventy thousand copies of it were published in Australia. It was also proposed to publish extracts of it in the Murdoch newspaper, *The Australian*. To prevent this happening, urgent applications were made for injunctions out of the Supreme Court of New South Wales. These succeeded until Justice Powell¹⁷ concluded that the injunction should be lifted. He rested his conclusion upon the fact that much of the information in the book was already available to the public. The British Government appealed to my Court. By majority, the Court dismissed the application.¹⁸ The reasons varied. My own view was that it was not the function of Australian law to enforce the penal legislation of the United Kingdom in Australia. We would not enforce South Africa's Official Secrets Act or assist Libya to suppress the memoirs of one of its spies. We should therefore not do so in the case of any other nation. This was the view which ultimately prevailed in the High Court of Australia.¹⁹ It was held that Australian law would not vindicate the government interests of a foreign State, including the United Kingdom.

In New Zealand, the Court of Appeal came to a similar result, but upon a somewhat different basis. Relevant to its determination was the global reticulation of the information in Mr Wright's book and the undesirability of the courts offering their aid in a struggle so futile as the endeavour to contain the book in the particular jurisdiction of New Zealand. Sir Robin Cooke (now a Member of the International Commission of Jurists) said in his judgement:

The dominating factor leading us to refuse the injunctions is the extent to which the contents of *Spycatcher* have already been published in the world. The book is a best seller in the United States. Similarly, it is freely available in Canada. Since the refusals of the interim injunctions by the High Court of Australia it has also become freely available throughout Australia... We

17 Attorney General (UK) v Heinemann Australia Limited (1987) 8 NSWLR 341 (SC). See also Discussion M Blakeney, "Protecting the Secrets of a Foreign Government: *Spycatcher* in Australia" (1988), 9 *J Media Law & Practice* 13.

18 Attorney General (UK) v Heinemann Australia Limited (1968), 10 NSWLR 86 (CA).

19 Attorney General (UK) v. Heinemann Australia Limited (1988), 165 CLR 30.

were informed from the Bar that proceedings to prevent the publication in Ireland failed and that the book is available in both Northern Ireland and the Republic of Ireland. The temporary injunction upheld by the majority of the House of Lords did not extend to Scotland. In England itself there was the major publication already mentioned in the *Sunday Times*. Many copies have been brought into England by travellers or otherwise imported there being no restriction on doing so. Counsel also told us that the book is freely available in Europe and has been published beyond what were described as the Iron and Bamboo Curtains... There have been importation of the book by individual citizens who have purchased it when overseas or who have ordered it from overseas, the right to do so being in no way restricted. Copies of overseas newspapers... are regularly on sale in New Zealand.... Quite apart from the ability to order from overseas, there is no reason to suppose that a member of the public, minded to acquire or borrow a copy, would have any real difficulty. We think it can be said without exaggeration that the general nature of the main allegations in *Spycatcher* is known all over the world.... We do not overlook that there is a difference between mass and more limited circulation. Even bearing that in mind, the stage has been reached when, looking at the case from a New Zealand point of view, we have to describe the contents of *Spycatcher* as being in the international domain.²⁰

This was an eminently sensible and practical answer to the application facing the Court of Appeal of New Zealand at the time the judges had the claim for the injunction before them. But it does illustrate the limits of the power of the judiciary when faced by determined publishers, and international media having outlets in many jurisdictions, taking advantage of disparity between the laws of those differing jurisdictions and the limited effectiveness of an order made in one jurisdiction, to control what happens.

20 Attorney General for the United Kingdom v Wellington Newspapers Limited, [1988] 1 NZLR 161 (CA) at 183.

This is not a case for simply hanging up the judicial robe and abandoning the attempt to enforce the Rule of Law in the jurisdiction in which the judge has a responsibility. But it is an illustration of the practical limits which are placed upon the judiciary when seeking to discipline the modern media: motivated not unreasonably by financial gain, opinionated and sometimes even self-righteous in the espousal of free flow, with numerous outlets in many jurisdictions and backed up by instantaneous communications in the global broadcasting media with its symbiotic relationship to the global print media.

The judge in Wellington in New Zealand, Sydney in Australia, Seville in Spain or New Delhi in India will continue to issue orders. The limitations imposed by the growth of international multimedia interests cannot be ignored in any discussion of the effectiveness of such orders and thus the interaction between the judiciary and the media today.

Terrorists, Pornography, Royalty and Sheer Power

Terrorists

Every country which has a threat from terrorists faces particular challenges to the Rule of Law and the independence of its judges. In Britain, the Home Secretary issued directives to the British Broadcasting Corporation, under its licence and agreement and to the Independent Broadcasting Authority under the Broadcasting Act, 1981, forbidding them to "support or solicit or invite support for such an organisation" i.e. the Irish Republican Army. The lawfulness of the directive was unsuccessfully challenged in the courts of England.²¹ It was argued that English courts should interpret the exercise of delegated and discretionary power under statute as being subject to the implied limitation that it would always comply with the

21 R. v Secretary of State for the Home Department; Ex parte Brind, [1990] 1 All ER 469.

European Convention on Human Rights and Fundamental Freedoms. The English Court of Appeal "unhesitatingly and unreservedly" rejected the idea.

The attempts to censor (and by censoring to distort) the news broadcasts of the BBC and of other British media has produced a great deal of heart burning in Britain and much popular and academic writing.²² My present purpose is not to canvas the justifiability of the British Government's directives or the responses of the British courts to them. Terrorism, like wartime, puts very great pressures upon the courts to act with courage and neutrality in defence of the Rule of Law.²³ Sometimes the courts succumb to the urgency of their perception of the national predicament. Judges are citizens too; but citizens with great power and trust.

My purpose in mentioning this issue (which has its reflections in many other countries) is to draw attention to the obvious. If, as is increasingly the case, international news broadcasts are regularly received on multiple channels in every jurisdiction, it will be difficult, in a society of the developed world at least, to effectively enforce the kind of ban described above. The BBC may be forced to comply. It will pay a price in its hard-won and generally well deserved international reputation. The local law may have a local and national utility which will be enforced by local judges. But the directive will have limited practical effect upon international media conglomerates, such as CNN or the international print and electronic media that now flood into Britain. This is simply to point to the difficulty of the judiciary enforcing terrorism law, when the responses impinge upon a global media.

Pornography

Another illustration of this truth can be seen in the difficulties of enforcing laws which help define the peculiar cultural features of

22 "On the Edge of the Union - Censorship and Constitutional Crisis at the BBC" (1985), 6 J Media Law and Practice 277.

23 Cf *Liversidge v Anderson* (1942), AC 206 (HL) at 227; *Inland Revenue Commissioner v Rossminster Limited*, [1980] AC 952 (HL) at 1000; *George v Rockett* (1990), 170 CLR 104 at 112.

particular jurisdictions. Take the case of "*Red Hot Television*" (formerly known as "*Red Hot Dutch*"). This service, which started broadcasting in July 1992, sells a brand of hard-core electronic pornography to subscribers in possession of the necessary decoding equipment. The programmes are beamed, via a satellite linkup, from Denmark. In England, complaints were made by the Independent Television Commission (ITC) and the Broadcasting Standards Council. Nothing was done until March 1993. The responsible Minister (Mr Peter Brooke) then made an order proscribing *Red Hot Television* under section 177 of the Broadcasting Act, 1990 (UK). As a result of his order, any person who supplies decoding equipment or publishes programme details in respect of the service in Britain will be guilty of a criminal offence under section 178 of the Broadcasting Act. Such a person will be liable to a fine, or to a term of imprisonment not exceeding two years.

This government response led to an application to the English courts for judicial review. Amongst the matters raised was the operation of EEC law. The Minister urged that the programme might "seriously impair the physical, mental or moral development of minors." The courts refused to intervene. It is expected that an appeal will be taken to the European Court of Justice.²⁴

Within Europe, both inside the European Union and in the wider context of the Council of Europe countries, there has been a great deal of attention to the development of common solutions to face up to the reality that technology will not conveniently stop at jurisdictional boundaries out of respect for common cultural and linguistic features of the communities there.²⁵

For every proponent of censorship, to uphold moral standards, there will be other advocates urging the right of adults to receive explicit sexual material and media "celebrating human sexuality."²⁶ Certainly, within the print media, such materials undoubtedly help to

24 A Coulthard, "Dutch Television - Too Red Hot for UK" (1993) 14 J Media Law and Practice 117.

25 H. Olsson, "Council of Europe and Mass Media Law" (1986), 7 J Media Law and Practice.

26 R. Walsh, "Celebrating Human Sexuality in Print" (1993) 1 Free Speech 1 (Aust).

sell the media product. This is recognised by the large media houses in English-speaking countries which, in popular newspapers, regularly resort to the page 3 pinup. Furthermore, the flood of popular international magazines such as *Penthouse* and *Playboy*, to say nothing of the X rated books, videotapes and other media readily obtainable in developed countries, attest to the changing social mores. They reflect a recognition of the right of adult citizens to have access to media of their choice.

The market driven availability of this material has undoubtedly changed the milieu in which judges operate in today's world. In November 1993, it was reported from Washington in the United States that the Federal Communications Commission policy on sex on television had been overturned by the Court of Appeals²⁷ of the District of Columbia. The court decided that the US FCC policy which bans transmissions of sex and violence in television programmes between 6 a.m. and midnight was unconstitutional. The judges held that the First Amendment to the United States Constitution, which guarantees freedom of speech, extended to this material. It is beyond question that the First Amendment, and the decisions of the United States Supreme Court and other courts upon it, together with the sheer power of the American media, revolutionised the practice, if not the law, on pornography throughout the Western world (and beyond) in the past twenty years. But it should not be thought that, even in the United States, this media and market-driven change has passed without controversy. There is a sizeable movement of feminists in the United States which urges effective legal prohibitions on pornography, although not always in a coherent or persuasive manner.²⁸ The courts in Canada have also had to face similar debates.²⁹

It should not be thought that the issue of cultural values in a global media is one simple of resolution. Recently, newspapers have recorded the protests of the Government of China to the United

27 See report, *The Times*, (London) 25 November 1993, 13.

28 See eg R.A. Posner "Obsession", a book review of *Only Words* by Catharine A. MacKinnon in *The New Republic*, 18 October 1993, 31.

29 J. McLaran, "New Puritans :0 - Free Speech United :0 - The Great Canadian Pornography Shootoff" (1988), 9 *J Media Law and Practice*, 128.

Kingdom concerning a BBC documentary, broadcast on 21 December 1993, suggesting that the former Chinese leader Mao Zedong had an insatiable sexual appetite for young women. The programme *Chairman Mao, the Last Emperor* was made to mark the 100th anniversary of Mao's birth. The BBC defended the programme, which it aired, stating that it was "a modern China." China sees such a programme as an affront to its cultural, political and moral standards. Britain sees it as an attribute of an uncontrolled media, not forced into the straight jacket of political orthodoxy and hero worship. But with the programme being beamed to millions from satellite, copied onto video, summarised in news broadcasts and reticulated in newspapers and magazines, it will be as impossible for China to suppress the details as it was for Britain to suppress *Spycatcher*.

This is a salutary warning of the limits not only of the power of judges but of the power of governments, democratic and autocratic. Often those limits will be seen as salutary and even desirable. But if the end product is the destruction of cultural difference and the imposition of a single standard across the "American speaking tribe," the precious diversity of human cultures will have been mortally damaged.

Earnest endeavours of one government, with the aid of its media, to possible notions of equal opportunity, anti-discrimination and racial and religious tolerance may be undermined by extra jurisdictional media which carry quite different messages.

Presidential and Royal Privacy

Another aspect of the international media is the determined and persistent invasion of the privacy of the leaders of every nation. Mao is not alone. Nor is this phenomenon confined to the dead.

There seems now to be a concerted effort, of at least some media interests, to destroy the respect for public figures and in the process to invade mercilessly their privacy. President Clinton's alleged trysts are spoken of openly where President Kennedy's were not revealed. The private telephone conversations of Prince Charles of England are broadcast and printed around the world where decency and

respect for individuals and institutions restrained the media invasions into the life of his great grandfather. Nor is the British Royal House alone in these invasions of privacy. It would be difficult for Michael Jackson to secure a trial before a jury uninfluenced by the media circus which has surrounded the sensational accusations made against him. The trial of Mr Kennedy Smith was watched by millions, possibly billions, around the world on CNN.³⁰ I saw it in Lesotho in Southern Africa! What was so special about that trial? It was a rather ordinary case of sexual assault. All that was special was that the event happened in the Kennedy compound at Palm Beach, that Senator Kennedy was there and that the accused was related to the famous family. These are the ingredients of entertainment. The legal process in an actual trial is reduced to glitz, glamour and spectacle. The accused is offered up upon a global altar, as the star of this week's soap opera.³¹ The judiciary which becomes caught up in such entertainment, by the public televising of its process, will struggle (sometimes successfully, sometimes not) to maintain the dignity and justice that is the accused's due. But these are not the media's concerns. Jurists should be in no doubt that the media's concerns are entertainment, money-making and, ultimately, the assertion of the media's power.

Sheer Power

As a bi-product of the media's own realisation of its great power we have seen that power wielded in recent times against the Rule of Law and the independence of judges and lawyers.

An appreciation of the extreme difficulty which the law has in controlling the global media, enhances the belief in some quarters that some at least of the organs of the media are now effectively

30 This article was written well before the trial of O.J. Simpson, the American football player and actor, who was accused of killing his former wife and her friend. The argument that the author makes about how these trials are treated by the media as "entertainment" apply to this trial, which was considered by the media in the United States as the "trial of the century". (Editor's note)

31 See "Media Coverage of the Courts, Judicial Decisions and the Judiciary" (1992), 140 *Federal Rules Decisions* 512 at 517.

beyond legal control and judicial orders. This was the warning given by Jon Snow to which I referred at the outset of this paper.

If the global media can invade the privacy of Royal Families of several countries and the personal lives of presidents, if it can effectively override local laws established for local cultural, linguistic or moral objectives, if it can set the agenda of national and international concerns for its viewers and listeners, promote its own causes and turn issues on and off at will, we have on our hands an important challenge to the Rule of Law. The very instrument which is potentially such a defender of human rights, and the vehicle for one of the most important and precious of those rights, the media, can become a threat to other basic rights and interests — to reputation, to privacy, to fair trial, to effective democracy.

It is natural enough that the media should tend to favour change. Change is news. More of the same is no news and will be perceived as boring. An inclination to change is probably quite healthy. But some judicial commentators are now asserting that the media often promote particular kinds of persons for appointment to the judiciary and attack those who do not fall into their pre-conceived mould. In the United States, Federal Court of Appeals Judge Laurence Silberman of the District of Columbia told the Federalist Society in that country that the media was actually manipulating judicial appointments by campaigns of political correctness designed to diminish vigilant independence and fidelity to the law:

Who wants martyrdom for upholding the constitution's separation of powers or long-headed principle of interpretation that are denigrated as 'esoteric' or 'archaic' by reporters intoxicated with results? Who wants to risk a media beating a la Judge Bork in a Senate Confirmation Hearing? Only a diminishing number display the intellectual incorruptibility of Socrates and, thus,... unflinchingly risk media obloquy and a seat on the Supreme Court to safeguard constitutional truths. This is healthy neither for enlightened law nor the public weal. Constitutional principles, by definition, stand above media kudos or public opinion polls. To paraphrase Justice Robert Jackson, their vitality should not turn on the

vicissitudes of political controversy or journalistic passions.³²

In Australia, in the past two years, there has been unprecedented media criticism of the judiciary. Much of it is focused on alleged gender bias, conservatism and the need for change. Like any institution, the judiciary is probably improved by such criticism. The old days when such critics were suppressed by the law of contempt of court and of scandalising the court have gone. But more lately, the attacks on the judiciary in my country have turned feral. Judges, who cannot easily engage in public controversy, are attacked for their decisions. They are followed along public streets by television cameras and interviewing media harassment. A strident campaign is mounted against particular judges, with little attention to their faithful service to the community and the justifiability of the attack.³³ Informed and thoughtful criticism of the judiciary is a positive blessing in a free society. But personalised media campaigns, generalised opprobrium, inaccurate stereotyping and dismissive attacks on vital institutions all threaten judicial independence. And if public confidence in the judiciary is destroyed, what will be left? Evidence has it that politicians in all Western democracies are no longer generally trusted and respected as a group. The Church has lost most of its influence. The academics have retreated into their ivory towers. Royal families and presidents are denigrated and pulled down. The bureaucracy is derided. What, then, is left to defend our liberties? The investigative journalist! Alas, with a short attention span. Usually with a ferocious requirement for entertainment. And often with the insistent need to bring in the big bucks.

There are of course honourable exceptions to this melancholy picture of the global media. But one of the central challenges to democratic societies in the decades ahead will be to respond to the

32 B. Fein, "First Amendment - the Press Loves Activists" ABA Journal, October 1992, 48.

33 Sir Anthony Mason CJA, "The State of the Judicature" - an Address to the 28th Australian Legal Convention, Hobart, Tasmania, 30 September 1993, 18. See also R.D. Nicholson, "*Judicial Independence and the Conduct of Media Relations by the Courts*", (1993), 2 J Judicial Administration (Aust) 207 and M.D. Kirby, "Government, Media, Judiciary" (1993), 2 J Judicial Admin (Aust).

dangers presented to the Rule of Law by these features of media technology and multi-national ownership. The answer will not lie in oppressive local legislation, most of which would be ineffective, or partly so. Nor will they lie in international agreements for licensing journalists or for requiring "balanced" coverage, as UNESCO once proposed. They will lie in seizing the great potential of the modern media to provide a multitude of voices and to advance freedom, imagination and the quality of life, whilst at the same time lifting standards, respecting diversity of opinion and curbing excesses. The excesses involve the diminution of the rights of others: depriving those accused of a fair trial, destroying the reputations of those who cannot quickly and effectively answer back, invading the privacy of other human beings, high and low, manipulating public debate and reducing our diverse world to a dull custard of uniformity and homogeneity.

Some will say that the law, national and international, cannot stand up against the powerful combination of new technology and the opinionated ownership of the media. That the judges are neutered in defending basic human rights against such potent global forces. But if the Rule of Law is to survive this challenge, we must find the answers that will render the global media accountable to the government of laws, not of men. No consideration of the media and the judiciary today can overlook this basic paradox. The media technology, which is such a potential liberator, can, in the hands of a powerful few, bestride the narrow world like a Colossus. It can do irretrievable wrongs to individuals. It can diminish cultural and linguistic diversity. It can reduce large issues to froth and bubble. And it can challenge the Rule of Law itself.

Publication Bans on Court Proceedings in Canada

*Omar Wakil**

The issue of media access to the Courts has recently come under scrutiny in Canada, where Courts have imposed publication bans in a number of high-profile criminal cases. This recent flurry of judicial activity culminated in the recent decision of the Supreme Court of Canada in *Dagenais v. Canadian Broadcasting Corporation*,³⁴ which many have seen as redefining the law regarding publication bans.

Criminal Code Provisions

In Canada, the publication of matters relating to a criminal trial may be restricted in a number of circumstances and for a number of reasons. The judicial power to impose publication bans comes from both Common Law and Statute. The Common Law concept of Contempt of Court is preserved in section 9 of the *Criminal Code* of Canada. The main statutory provision is section 486(1) of the *Criminal Code*, which states that,

Any proceedings against an accused shall be held in open court, but where the presiding judge, provincial court judge or justice, as the case may be, is of the opinion that it is in the interest of public morals, the maintenance of order or the proper administration of justice to exclude any members of the public from the

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34 [1994] 1 SCR 835

court room for all or part of the proceedings, he may so order.

Most frequently, publication bans are imposed under section 486(1) to ensure that an accused has a fair trial. The fear is that "a fair trial cannot occur if news stories have prejudiced that judge or jury against the accused"³⁵ and therefore "the proper administration of justice" requires the exclusion of members of the public from the court room and a ban on the publication of the court proceedings. The imposition of such bans are not unusual when two accused individuals are to be tried separately.

Publication bans may also be ordered in relation to bail hearings under the authority of section 517 of the Criminal Code of Canada. Such bans are imposed in order to prevent prejudice to the accused at the trial or to ensure that a continuing police investigation is not hampered, particularly where there may be further arrests. Under section 517, the decision of the court may be published (i.e. whether or not the accused was released) regardless of whether a ban is imposed. However, if one is ordered, the reasons for the decision must be suppressed. When the accused requests the ban the judge must impose it; when the Crown makes the request, the Court has the discretion to impose the ban. The Court may also impose the ban on its own initiative. Should an order respecting bail be reviewed, the review hearing may also be subject to a publication ban: section 520(9) and section 521(10).³⁶

Publication bans may also be ordered with respect to the evidence given at preliminary hearings: s. 539. As with publication bans imposed over bail hearings, the ban must be ordered when requested by the accused.³⁷

35 John Pearson Allen and Thomas Allen, "Publication Restrictions and Criminal Proceedings, [1994] 36 Criminal Law Quarterly 168 at 168.

36 Section 517 is not an unconstitutional infringement on the right to freedom of expression as guaranteed by the Charter of Rights and Freedoms: *Re : Global Communications Ltd. and AG Can.* (1984), 10 C.C.C. (3d) 97 (Ont. C.A.).

37 Section 539 is not an unconstitutional infringement on the right to freedom of the press as guaranteed by the Charter of Rights and Freedoms: *R. v. Banville* (1983), 3 C.C.C. (3d) 312 (N.B. Q.B.).

Publication bans may also occur in other situations. For example, the Criminal Code provides that the identity of complainants in sexual assault cases may be subject to a publication ban.³⁸ Similarly, the Young Offenders Act prohibits the publishing of the names of young offenders, victims and witnesses and gives judges the discretion to exclude the public from proceedings under the Act.³⁹

The Publication Ban in The Queen v. Homolka

Perhaps the most notorious publication ban in recent Canadian history was that imposed on the trial of Karla Homolka, who was convicted of manslaughter in July of 1993. Homolka and her estranged husband, Paul Bernardo, had been charged with two counts of manslaughter and first-degree murder respectively in the sex-slayings of two teenage girls. The case received widespread coverage in the media and the trial judge in the Homolka case feared that this coverage might have adversely affected the trial of Bernardo, although in a rare move, Bernardo himself objected to the ban. His counsel argued that unless Homolka's role in the killings was revealed, Bernardo would be presumed guilty of the murders.⁴⁰ Despite Bernardo's objections, the judge invoked section 486(1) of the Criminal Code and placed a publication ban on the trial of Homolka pending the trial of Bernardo. The order excluded the public and US media from the trial and restricted what Canadian journalists could report. The reasons for his decision were, in part, as follows:

The task before me is to protect the integrity of the court system for both the accused and the right to a fair trial for Mr [Bernardo].

38 Sections 486(3) and (4) of the Criminal Code of Canada R.S.C. 1985, c. C-46.

39 Sections 38 and 39 of the Young Offenders Act, R.S.C., 1985, c. Y-1.

40 Hazlewood, K., "Can justice unseen be justice done?" (July 26, 1993) *Western Report* 24 at 25.

I have considered all submissions. I must keep in mind that if a person is guilty, it's essential he be tried and no fault be found in the trial process.

I am satisfied that these are exceptional circumstances which have sufficient weight that they require the court to protect the integrity of the trial process by a temporary ban...

... The publicity has been widespread, massive and repetitive, and will no doubt continue. It has come to the point where it is questionable whether an impartial jury can be selected.

... The charges against Paul Bernardo are extraordinarily serious and numerous [in addition to the charges of murder he was also facing 46 counts of sexual assault], and outweigh the freedom of the press in these extraordinary circumstances.

I conclude therefore that the freedom of the press may be curtailed to protect social values of inordinate importance: the protection of the innocent and the protection of the integrity of the court's judicial process.

I am satisfied that these are exceptional circumstances which have sufficient weight that they reassure the court to protect the integrity of the trial process with a temporary ban.⁴¹

The ban itself permitted the press to publish the contents of the indictment; whether there was a joint submission; whether a conviction was registered; the sentence; and part of the reasons for the sentence.

The publication ban in the *Homolka Case*, although not precedent-setting, was extremely controversial and received widespread media

41 "Reasons given for ruling", *The Globe and Mail*, Tuesday, July 6, 1993, pgs. A1-A2.

coverage. Several members of the Bar came forward to speak out in favour of the ban on the basis that the right of an individual to a fair trial was a more important than the right of the public and press to have immediate access to and knowledge of the proceedings at a trial.⁴² Many members of the press, on the other hand, criticised the effectiveness of the ban and emphasised the importance of open proceedings.⁴³

The Homolka case raised at least three important issues relating to the general nature of publication bans. First, are such bans effective given the inability of courts to control the press outside their jurisdiction and the pervasiveness of modern communications technology? Second, are publication bans needed to ensure fair trials? And third, how should Courts balance two conflicting civil rights: the right to a fair trial and the right to freedom of the press?

Publication Bans: The Issues

(a) The Efficacy of Publication Bans

On a general level, it must be remembered that the *Homolka Case* was an exceptional one in that it was subject to an enormous amount of Canadian and foreign media coverage. One should, therefore, be slow to draw conclusions of a general nature from this case. That being said, the case does provide insight into the Courts' ability to enforce publication bans in cases of great notoriety.

When a case is subject to international attention, much depends upon the willingness of foreign media to respect the ban given that Canadian courts lack the jurisdiction to regulate foreign media. If the ban is not respected, modern communication technology makes complete enforcement of the ban impossible as information will enter into Canada in a number of ways, such as post, facsimile, E-Mail and telephone.

42 See for example, Edward L. Greenspan, Q.C., "When muzzling the press may serve the public good", *the Globe and Mail*, Saturday July 10, 1993, D-3.

43 See for example, "A weak excuse to close a courtroom", *The Globe and Mail*, Wednesday, July 7, 1993, A-18.

In the *Homolka Case*, the American media broadcast and published information that was subject to the ban. Some of this information filtered into Canada and many citizens became familiar with details of the trial that were subject to the ban.

However, it would appear that the ban was generally effective despite the extraordinarily high amount of media coverage. Canadian media generally respected the ban as did some American television stations which broadcast into Canada and Canadian customs officials seized foreign newspapers that reported information subject to the ban. As a result, many individuals remained unaware of the details of the Homolka trial.

Publication bans are, however, usually less effective in the communities in which the trials occur. Generally, the bans are imposed without limiting public access to the court and in many cases many members of the community in which the first trial was held will eventually obtain some knowledge of the trial. This is especially true in small communities. As the Ontario Court of Appeal once stated, "[i]f the locale is a small city or town, it is said that 'everybody in town has heard about it'.⁴⁴ However, publication bans may also be accompanied by a change in venue for the trial of the second accused. In the *Homolka-Bernardo Case*, for instance, Homolka was tried where the murders occurred and Bernardo was tried in another city out of concern that it may have been difficult to select an impartial jury where Homolka was tried and the murders were committed.

(b) The Impact of Pre-Trial Publicity on Jurors

A more interesting question is not whether the bans can be enforced but whether they are necessary to ensure jury impartiality. In most instances the rationale for publication bans seems to be that jurors will pre-judge the case on the basis of news reports and that they will then close their minds to the matter. The assumption is that once jurors form an initial opinion, that opinion will remain

44 R. v. Hubbert (1975), 29 C.C.C. (2d) 281 at 291.

unchanged regardless of the persuasiveness of the evidence at trial. Some studies do suggest that pre-trial publicity can have a biasing effect on jurors. Others however, including Albert Alsuler, a professor of criminal law at the University of Chicago found that concerns about pre-trial publicity were overblown.⁴⁵ Canadian jurisprudence supports that latter position. The courts have found that widespread publicity does not necessarily result in biased juries. In *Regina v. Hubbert*, for example, the Ontario Court of Appeal stated that,

...in the era of rapid dissemination of news by the various media, it would be naive to think that in the case of a crime involving considerable notoriety, it would be possible to select 12 jurors who had not heard anything about the case. Prior information about a case, even if the holding of a tentative opinion about it, does not make partial a juror sworn to render a true verdict according to the evidence.⁴⁶

Similarly, in *Regina v. Makow*, Seaton, J.A. stated that,

Today's jurors are intelligent people, well able to put from their minds something heard elsewhere... I have not heard it suggested that a trial Judge who has heard about a case is not competent to decide it and I do not think that is capacity to reject what he heard before is unique. Jurors too, are able to decide upon the evidence.⁴⁷

Furthermore, where there has been extensive pre-trial publicity, defence counsel are entitled to determine (by way of questions) whether any potential juror is sufficiently impartial. The defence has this right even when the accused himself is responsible for a certain amount of the publicity.⁴⁸

45 Edward Greenspan, Q.C. "Trial by media means mob justice " (October, 1994) Canadian Speeches, 27.

46 (1975), 29 C.C.C. (2d) 281 at 291.

47 (1974), 20 C.C.C. (2d) 5113 at 518-19 (B.C.C.A.).

48 R. v. Zundel (1987), 31 C.C.C. (3d) 97 (Ont. C.A.).

The Supreme Court of Canada specifically approved both these decisions in *Regina v. Vernet* in 1988⁴⁹ and virtually repeated these sentiments in *Dagenais*.⁵⁰

(c) *Balancing Rights*

In *Dagenais v. Canadian Broadcasting Corporation*, (Dagenais) the Supreme Court of Canada considered the balance to be struck between publication bans and freedom of expression.

In *Dagenais*, the Court held that the traditional Common Law assumption, that the right to a fair trial outweighs the media's right to report the news, the assumption relied on in the *Homolka* decision,⁵¹ does not provide sufficient protection for freedom of expression. The Court emphasised that the Canadian Charter of Rights and Freedoms protects both the right to a fair trial and the right to freedom of expression, including freedom of the press, and that when two protected rights come into conflict, the Courts should strive to achieve a balance that fully respects the importance of both rights.⁵² The Court held that publication bans should only be ordered when (a) such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably alternative measures will not prevent the risk; and (b) the salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.⁵³ Alternatives to publication bans would "include adjourning trials, changing venues, sequestering jurors, allowing challenges for cause and *voir dire*s during jury selection, and providing strong judicial direction to the jury".⁵⁴

49 (1988), 41 C.C.C. (3d) 523.

50 *Supra.*, n.1 at 884.

51 Hazlewood, K. *supra.*, at n. 5 at p. 25.

52 Section 2 of the Canadian Charter of Rights and Freedoms provides that "Everyone has the following fundamental Freedoms ... (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media." Section 11 of the Charter provides that "Any person charged with an offence has the right ... (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."

53 *Supra.*, n. 1 at 878.

54 *Ibid.*, at 881.

Furthermore, the Court emphasised that the onus of proving that a publication ban is necessary is on the party seeking the ban.

The actual extent to which *Dagenais*, has changed the law in Canada is, however, unclear. Under the Canadian constitution, the rights protected by the Canadian bill of rights, the Charter and Rights and Freedoms, are subject to "reasonable limits". As these rights are subject to limits, a law which appears to violate a right protected by the Charter may nevertheless be valid. For example, a law which prohibits hate propaganda may appear to violate an individual's right to freedom of expression may be valid on the basis that an individual's right to freedom of expression is not absolute.

The test that Canadian courts have developed to determine whether a limit is valid is made up of two essential parts.

First, the objectives which the measure responsible for a limit on a Charter right or freedom are designed to serve must be of sufficient importance to warrant overriding a constitutionally protected right or freedom and secondly, [it must be shown] that the means chosen are reasonable and demonstrably justified.⁵⁵

The second branch of this test requires a form of proportionality test to be met in which the interests of society are balanced against the interests of the individual. Thus, prior to *Dagenais*, the courts in publication ban cases considered the proportionality between the objective of the ban (i.e., fair trials) and its effect (i.e., the infringement of the right to freedom of expression). The "new" *Dagenais* test requires courts to weigh the objective and the *salutary effects* of the ban against the deleterious effects of the ban.

Whether this new test will actually effect the number of publication bans imposed in Canada remains to be seen. To some, the change may be seen as largely semantic as judges likely considered the "salutary effects" of the ban when they considered the objective of a ban under the old test. Presumably, the objective or purpose of a publication ban would exist because of its salutary effects.

55 Edward L. Greenspan, Q.C. (ed.) *Martin's Annual Criminal Code*, 1996, p. CII/1.

It is quite likely then that the debate surrounding publication bans in Canada, such as the one imposed in the Homolka case, has not yet been put to rest. While the *Dagenais* decision may change the law in Canada with regard to publication ban it seems at least as likely that the decision is "much ado about nothing". In any event, it seems inevitable that the Courts will continue to be called upon to determine the balance between the right to a fair trial and the right to freedom of expression.

Conclusion

If conclusions of a general nature can be drawn from the Homolka-Bernardo trials, they are these: that publication bans, even in cases of great notoriety and despite numerous "leaks" can work. Although it is difficult to determine whether a publication ban actually does increase the likelihood that the accused will be tried by an impartial jury, it seems probable that they are effective in this regard. While there are other means of ensuring that juries are impartial, such as the procedure of challenging jurors for cause on the basis that they are not impartial due to pre-trial publicity, cases of great notoriety may still require publication bans.

The great controversy surrounding publication bans is not whether they increase the likelihood of impartial jurors but the fact that they infringe upon freedom of the press. Although the infringement is temporary in nature and the by-product of an objective of great importance (ensuring fair trials), Courts should not be quick to suppress the free press. There is a sound basis for the use of publication bans in some cases, but they should not be imposed lightly; only where it is clear that selecting an impartial jury may be difficult due to publicity should a publication ban be ordered.

Part Four

Are Codes of Ethics Necessary?

Are Impediments to Free Expression in the Interest of Justice?

*Fali S. Nariman**

Introduction

A responsible press¹ is the handmaiden of effective judicial administration. The press does not simply publish information about cases and trials but subjects the entire hierarchy of the administration of justice (police, prosecutors, lawyers, judges, courts), as well as the judicial processes, to public scrutiny. Free and robust reporting, criticism and debate contribute to public understanding of the rule of law, and to a better comprehension of the entire justice system. It also helps improve the quality of that system by subjecting it to the cleansing effect of exposure and public accountability. "Sunlight" as Justice Brandeis once said "is the best of disinfectants, electric light the most efficient policeman."

The most powerful "electric light" over the judicial administration of justice is the hearing of cases in open court. What transpires there is public property. And those who see and hear what goes on in the court-room must be free to report and comment with impunity. There is nothing about the judiciary that warrants that organ of government, as distinguished from other democratic institutions, to suppress, edit or censor events which take place in court.

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1 In referring to the "Press" in this paper, I use the word compendiously as a term of art, also encompassing broadcasting by electronic media.

All this is true in an ideal democracy, but regrettably, there is no ideally functioning democracy in any part of the world. The press is not always responsible, nor always innocent of the charge of misreporting or scandalising. At times, it simply doesn't care about "fair hearing" or "fair trial" so long as what it wraps up and presents as news gets read (and heard) by the largest number of persons. The need is great that courts be criticised, but there is just as great a need that courts be allowed to do their duty fearlessly.

The Strained Relations between the Courts and the Media

In most, if not all, modern democracies, relations between the press and the courts, are not very cordial. This itself is not a bad thing, because (as Burke used to say) the fire-engines that ring their bells and disturb your sleep also keep you from being burnt at night! Courts of justice and the press are public guardians, but guardians of different public interests — the public interest in every civilised society for a fair administration of justice, and the public interest of disseminating information and enforcing the inadequacies and failings of the justice system. Two different sets of rights are thus involved: the right to a fair hearing or trial, and the right of citizens to know. Ideally, they ought to converge but in practice, they often conflict. The arbiter of the conflict is the judge and that is the real problem for the media.

At a conference held in Bangalore many years ago, a prominent American journalist recalled how he had been "cited" for contempt for reporting a pending case in colours too fanciful and garish for the judge. The journalist told the federal judge (somewhat brashly): "We want no accommodation from you. The First Amendment is on our side. We will fight it out." The judge responded, "Have it your way - but remember who is the umpire in this battleground!"

The concern of the journalist is not just that Courts can (and do) issue restraining orders, but that if a gag order is disobeyed, the same court will issue a contempt citation, which is enforced even if the restraining order is eventually reversed by a higher court! Most journalists genuinely believe in the law of the land, but do not believe

that the judge -as opposed to the editor - is the one to strike a fair balance between the concepts of a "free press" and "fair trial."

All this is further compounded by judicial distrust of the press which is a relatively recent phenomenon. In the play "*Night and Day*", Tom Stoppard has one of his characters saying: "I'm with you on a free press. It's the newspapers I can't stand!" Some judges share this view but will not publicly admit it.

Others, taking their lead from the great Lord Atkin, have maintained that the press has the right to report and criticise, temperately and fairly, but freely, any episode in the administration of justice. Writing the opinion of the Privy Council in an appeal from Trinidad, he said that no wrong is committed by any member of the public who exercises the ordinary right of criticising in good faith, in private or in public, the public act done in the seat of justice. He then went on to say in purple prose, what has been forgotten by most modern judges:

The path of criticism is a public way: the wrongheaded are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men.²

With an Atkin approach, "balancing" the two public interests is not difficult; absent the Atkin approach the dice is loaded against "free speech"!

2 Andre Paul v. Attorney-General (1936), A.C. 322.

“Free Expression” and the “Rule of Law”: Absence of Sufficient Guidance in the Law

Freedom of the press is cherished in all free societies, not for the benefit of the press as an institution but for the public good. A.H. Sulzberger, President of the *New York Times*, made the point, when he said “[t]he crux is not the publisher’s freedom to print; it is rather the citizen’s right to know.”³

This new right, the right to know, has successfully shouldered itself into a position of pre-eminence under most legal systems of the world. But it is often pitted against the concept of “the rule of law” which is mentioned in the preamble to the Universal Declaration of Human Rights of 1948. The Rule of Law requires every person in society (which includes the men and women of the Fourth Estate) to accept and abide by the restraints of “law”.

The men and women of the press are content to accept constraints imposed by the “Rule of Law” as expressed in the following classic formulation by Professor Hayek:

Rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge.⁴

But the press is not prepared to accept the ad hoc rules imposed according to the whims, vagaries and idiosyncrasies of judges. It was Jeremy Bentham (the theoretical jurist) who characterised the Common Law as “Dog Law.” “When your dog does anything you want to break him of”, he wrote in 1823, “you wait till he does it, and then beat him for it. This is the way you make laws for your dog; and this is the way judges make laws for you and me.”

The law of contempt of court in Anglo-Saxon jurisprudence has been for a long time “Dog-Law”. It does not define (often, even when embodied in a statute) what precisely will be regarded as “contempt

3 William Safire's Political Dictionary p. 614.

4 *In the Road to Serfdom* (1944) p.54.

of court", and what will not. It gives little guidance to the editor and broadcaster: it serves only as a standing threat to free expression. It leaves too much to the discretion of the particular judge (or judges) investigating into "reports" by the press.

The conditions prevalent in two of the great democracies of the world, the United Kingdom and the United States of America, emphasise the necessity for laying down more definite norms and guidelines. Let me illustrate.

a. The Sunday Times Case

The leading case in England on the banning of reports and comments on pending proceedings is the *Sunday Times Case*. It is also known as the *Thalidomide Case*.⁵ A drug containing thalidomide taken by pregnant women between 1959 and 1961 resulted in over four hundred children being born in England with deformities. In 1968 and subsequent years, actions were commenced against the manufacturing company. Some were settled out of court. Negotiations continued in other pending cases. In September 1972, *The Sunday Times* published the first of a series of articles drawing attention to the plight of the children; more articles were to follow.

The Attorney-General, on a complaint by the manufacturers, moved the court to grant an injunction preventing publication of the second (and subsequent articles) on the ground that comment on pending proceedings tended to interfere with a fair administration of justice. The Divisional Court (three Judges) unanimously agreed, and granted the injunction holding there was "clear contempt"; the Court of Appeal (three Judges) reversed (also unanimously) the Divisional Court, applying the "balancing" test; the Appellate Committee of the House of Lords (five Law Lords) unanimously allowed the company's appeal, and restored the injunction granted by the Divisional Court! The House of Lords decided against *The Sunday Times* on the ground that the second article "might" be prejudicial to a subsequent trial of the pending case. In the

5 A.G. v. Times Newspapers, [1974] AC 273.

aggregate, eight judges favoured granting the injunction, three judges (of the Court of Appeal) were against it. For the judges, there was no yardstick to go by; from the judgements it appears that each judge was guided only by his own predilection of how the interests of free expression and fair administration of justice could be best accommodated.

The case was then taken to the European Court of Human Rights at Strasbourg on the ground that the injunction violated Article 10 of the European Convention of Human Rights. For the first time, the matter fell to be decided according to certain known prescribed guidelines, those contained in Article 10 of that Convention.⁶ The European Court concluded by a majority of eleven votes to nine, that the injunction did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression and therefore was not "necessary in a democratic society" for maintaining "the authority of the judiciary" and was hence in breach of Article 10.

b. The Contempt of Court Act

In response to this decision, the Contempt of Courts Act of 1981 was enacted in the UK. Section 5 of that act attempted for the first time a statutory balancing of the competing interests between "free press" and "fair trial." As a result, when in October 1980, *The Daily Mail* published an article in which it asserted support for an independent 'pro-life' candidate at a Parliamentary by-election, whose main plank of campaign was to stop the (alleged) practice in British hospitals of killing new-born handicapped babies, permission to initiate contempt proceedings was denied by the House of Lords - even though at the time of publication of the article, the trial of a well-known paediatrician (one Dr. Arthur) was pending (he was accused of murdering a three month old mongoloid baby by starving

6 These guidelines emphasise (as does the International Covenant on Civil and Political Rights, 1966) that everyone who exercises the right to freedom of expression has "duties and responsibilities" and may be subject to such formalities, conditions, restrictions or penalties as are "prescribed by law" and are "necessary in a democratic society" inter alia "for maintaining the authority and impartiality of the judiciary".

her to death). In fact, at the time of the publication of the article, the trial of Dr. Arthur was actually being conducted on a day-to-day basis in a blaze of media publicity.

Lord Diplock held⁷ that the recently enacted Section 5 of the Contempt of the Courts Act helped the court (the House of Lords) in deciding the matter. He said that the article in *The Daily Mail* was in undisputed good faith on a discussion of public affairs, and though there was the risk of prejudice to the fair trial of Dr. Arthur (created by the publication of the article at the actual stage of trial), this was "merely incidental" to the discussion of the matter with which the article dealt. Lord Diplock then said,

gagging of bona fide public discussion in the press of controversial matters of general public interest, merely because there were in existence contemporaneous legal proceedings in which some particular instance of those controversial matters may be in issue, is what Section 5 of the Contempt of Courts Act, 1981, was in my view intended to prevent. I would allow the appeal.

This case highlights the utility of enacted law. At the same time it also emphasises that there may be different perceptions of enacted law. In *A.G. v. English*; the Court of Appeal (three Judges), whose decision was reversed by the House of Lords (five Law Lords), had opined that Section 5 did not protect the editors and publishers of *The Daily Mail*. This only serves to highlight the fact that more important even than enacted law, is the necessity for the right approach: perhaps the "balance" is best maintained where the judge, as arbiter of press infractions of fair trial, is himself a strong proponent of free speech.

c. Bridges v. California

The principal case in the United States that defines when an extra judicial statement or publication becomes a punishable attempt to interfere with the administration of justice is *Bridges v. California*.⁸

7 *A.G. v. English*, [1982] WLR 278 (HL).

8 (1941), 314 U.S. 252.

In this case the court overturned a contempt and conviction based on the public release of a telegram by one Harry Bridges (leader of a trade union) sent to the Secretary of Labour "predicting" a massive strike if a California State Court attempted to enforce its decision in a jurisdictional dispute over representation of west coast dock workers. The decision was characterised in the telegram as "outrageous" and was published in metropolitan newspapers in general circulation. A motion for a new trial was also pending at the time Bridges made his telegram public.⁹

Mr. Justice Black wrote for the majority of five Justices that, before the State could abridge freedom of expression, the danger of prejudice to the disposition of the pending adjudication must be "extremely serious and the degree of imminence extremely high."¹⁰

Applying this test, the majority found that the release of the telegram and its publication by the press did not present "a clear and present danger" of interference with the administration of justice.¹¹ But applying the same test, on the facts of the same case, Mr. Justice Frankfurter, writing for the minority of the remaining four Justices construed the publication as a definite attempt to coerce the Court into a favourable decision. The minority held that Bridges and the newspaper who published his statement, were guilty of contempt.

By the narrowest of margins, Bridges and the cited newspapers were let off. The rest of the press, however, remained as uninformed as they were before the decision about their right to report or not report on pending cases. The majority opinion in the *Bridges Case* reminded editors in the States of railroad tickets: they were always stamped "valid for single journey only."

Thirty-five years later in *Nebraska v. Stuart*,¹² a different bench of nine justices of the US Supreme Court changed the ground rules.

9 In a companion case, the Supreme Court reversed a contempt conviction where the *Los Angeles Times* had editorially warned a judge, while sentence was pending, against making a "serious mistake" if he granted probation to two convicted members of Teamsters' Union "goon squad".

10 *Ibid.*, at 263.

11 *Ibid.*, at 276-78.

12 427 US 539 (1976).

Fortunately, it was in the interest of free speech. The Justices formulated a differently expressed test of "clear and present danger"; viz. whether the evil, "discounted by its improbability, justifies such invasion of free speech as is necessary to avoid danger." The Court held that a county court order prohibiting reporting or commenting on a criminal jury trial operative only until the jury was empanelled was unconstitutional and invalid.¹³ Was the ratio of the decision in Nebraska limited to jury trial cases, or was it of a more general application? Would the principle extend to cases in which, after publication, citations were issued for contempt? There were no clear answers. The press was bewildered and confused. It still is.

The Necessity for Strictly Formulated Guidelines

In the late twenties, Lord Dunedin, sitting in England's highest court, the Appellate Committee of the House of Lords, wrote a judgement, more appropriately called a speech, in the case of *Sorrell v. Smith*¹⁴ In it he said:¹⁵

The Judges below have embodied in their judgement an appeal for guidance so touching as to recall the prayer of Ajax: "Reverse our judgement as it please you, but at least say something clear to help in the future."

He then added that, "[i]n the present state of the authorities, this is, I think a reasonable request."

The prayer of Ajax is on the lips of every journalist whose business it is to report court proceedings; it is uppermost in the mind of every editor who considers it necessary in the public interest to comment on them.

¹³ In *Nebraska v. Stuart* (1976), 427 U.S. 530 at 613, three of the nine justices laid down as a matter of law that in the context of prior restraint the decision of what, when and how to publish is for editors, not the judges: 427 US 539 at page 613.

¹⁴ (1925), A.C. 700.

¹⁵ *Ibid.*, at p. 716

I suggest that we say "something clear to help in the future." We can only do this if we formulate definitive principles, certain work-a-day rules which would help preserve the delicate balance between a free press on the one hand, and fair trials on the other.

Conclusions

I would suggest the adoption of the following principles which would help mitigate the impact of impediments to free expression and serve the wider interests of justice.

1. Freedom of expression constitutes one of the essential foundations of every society which claims to be democratic. It is incumbent on the press to publish information and ideas about the administration of justice, including cases in court, and the public has a right to receive such information and ideas. This, in turn, involves responsibilities: a greater awareness of press responsibility is necessary. To that end, voluntary codes of conduct¹⁶ are to be encouraged. Such codes assist in the co-ordination of the right to free expression and the right to the fair administration of justice, especially in the pre-trial, pending trial, and actual trial stages.
2. Restrictions by the executive branch to the dissemination of information pertaining to court proceedings are anathema to rule of law. They have a tendency to suppress the freedom of the press and to intervene with the independence of the judiciary.

However, legislative and judicial measures, not unduly restrictive of the freedom of the press, and which do not unduly impinge on the citizens' general right to know, are a

16 The Nebraska Bar-Press Guidelines approved by the US Supreme Court and appended as an Annexure to one of the supporting judgements in *Nebraska Press Association v. Stuart* (1975), 426 US 482 at 613-617 are instructive, merely as an example what can be done by co-operative effort.

common feature in many legal systems. They are, in most cases, inspired by a genuine concern for the freedom of the press as also for the free functioning of a fair judicial system. They can only be tolerated if they conform to the prescriptions set out below.

3. Any interference with the freedom of expression must be detailed in enacted law or prescribed by rules. This would ensure adequate accessibility to law, and foreseeability of the law, and thus enable individuals (including the press) to regulate their conduct in conformity with it. Consequences of reports and comments by the press on pending court proceedings must be clearly foreseeable, so as not to instil lurking doubts and fears about the freedom to exercise the most important right of free expression.
4. Interference with free expression by law may be limited by law only to pre-trial, pending trial and trial publicity. After judgement in the cause of matter, there should be no legal restraints on publications of temperate comments and criticisms, even if an appeal from such judgement is provided for by law. No such restraint should be countenanced or penalty prescribed for reporting or bona fide commenting, on pending appellate court proceedings, on the score that such reports or comments interfere with or prejudice the hearing or decision in the appeal. Under a multi-tier system of justice, impediments to free expression, i.e. reporting and commenting on pending cases, can only be tolerated at the trial stage and not after the judgement is rendered by the trial court.
5. Prior restraints on publication/broadcasting are not normally acceptable and are certainly not when there is no enacted law. Any law which authorises prior restraint of publication "in the interest of fair administration of justice" should be very narrowly framed, and must specify with precision, the criteria for determining the pressing necessity of such prior restraint. The law must prescribe the period of such prior restraint, and provide for prompt time-bound decisions determining challenges to prior restraint orders. Prior restraint of publications without

limit as to time and prior restraints without extremely speedy redress being also provided for is totally inimical to the freedom of expression and of the corresponding right of the public to "know" more especially in this age of instant global mass communication.

6. Courts of justice are the guardians of all public liberties including free expression. The ultimate arbiters of abuse or misuse of freedom of expression must inevitably be and can only be the courts, i.e. the established courts of the land, not special court or military court. The established courts should, as far as possible, judge cases of alleged abuse or misuse of the freedom of expression on the basis of enacted law and should always be inspired by the "Atkin approach." The greatest champion of the free press is the judge who firmly believes in the pre-eminence of free speech.
7. Maliciously motivated publicity of pending proceedings, civil and criminal, may be prohibited by law, and enforced by court injunctions, or suitably punished, where so provided by the law. For example, this could be done by the law of contempt of court, but only when it is proved that it would have the inevitable consequence of deflecting the course of justice.
8. Normally,¹⁷ the bona-fide reporting of events and proceedings, civil or criminal, in courts, including pending proceedings, ought not to be prevented either by law, or by court order.
9. The courts of law should themselves assist in the dissemination of information concerning cases and causes, especially those which are important and controversial.

¹⁷ The word "normally" has been used deliberately, because, in a pluralistic society, it is possible that even fair and accurate reporting of court proceedings may have a tendency to incite violence amounts a section of the community. Hence, regulation may be necessary, not in the interest of a fair administration of justice, but only to accommodate another public interest viz. "public order" - the maintenance of law and order.

The public has a right to know what judges decide and why; and when judges say so (e.g. in the form of a press release) it is one sure way of counter-acting or pre-empting the adverse effect of coloured, garbled or exaggerated reports by the press.¹⁸

10. In a case where it is alleged before the court either that a legally permissible prior restraint order is absolutely necessary in the interest of justice, or that a publication has prejudiced or has a tendency inevitable to prejudice the fair trial of a case, opportunity should be given to representative bodies of the press, radio and television to make their submissions, and their responses should be considered by the court before passing final orders.

18 In a lecture delivered in 1960 by Sir Ninian Stephen, then Chief Justice of Australia, later that country's Governor-General, it was suggested that when a court issues an important judgement, it should, at the same time issue a press notice which would explain in layman's language what the issues were, who won, and why. In fact, the European Court of Human Rights in Strasbourg and the European Court of Justice in Luxembourg do issue such press releases from time to time to assist non-specialists to understand what the judges have decided. These press releases help alleviate misunderstandings which are often the cause of friction between the press and the courts.

An Overview of Media Codes of Ethics and their Relationship to Judicial Independence

*Rainer von Schilling**

The concept of democracy is based on one basic assumption: respect. As outlined in the International Covenant on Civil and Political Rights, 1966 (ICCPR), human rights are indivisible and are to be enjoyed by all citizens of all countries.

Article 19 of the ICCPR guarantees the freedom of opinion and expression. This includes the right to freely impart, distribute and receive information, as carried out by the world's media. Article 14 of the ICCPR determines that all persons shall be equal before the courts and tribunals and that everyone shall be entitled to a fair and public hearing before an impartial, competent and independent tribunal established by law. It also establishes that, under certain circumstances, the media may be excluded from all or part of a trial for certain reasons.

Self-Regulation

There seems to be a conflict between the media and the judiciary. The media, and more specifically journalists, have developed a self-imposed code of ethics which provides guidelines for and regulates their activities. Taken as a whole, written rules laid down in ethical codes, together with the ethical concepts which are their basis, are described by the term "professional ethics". Within the media field, these rules serve to preserve the material and moral interests of the profession and to protect and support the good name of the profession both among its own members and among the public. A

* Chairman, National Committee of the International Press Institute.

code of ethics must also prevent any abuse by members of the profession of the rights and privileges conferred on them by it. These controls and guidelines cover most or all aspects of operations, strategies and elements of the media profession.

One of the main arguments put forward by the press is that in many areas these self-imposed controls based on professional ethics which the press operates itself, render any state or government control unnecessary. Attacks by the State or other actors on the freedom of the press are often motivated by the excuse that the State must protect society against abuses on the part of the mass media. But, when the professional ethics of editors, journalists and other media workers themselves provide a discipline within their own ranks, the State can no longer claim that intervention is necessary. Yet, too often it does.

When codes of ethics are mentioned in a general way with reference to the media these usually refer to rules on honour and professional ethics which apply, generally, to editors and journalists. Nowadays, most countries have national press councils or similar institutions which regulate the profession and which have developed, elaborated and applied self-imposed codes of ethics which editors and journalists use to guide them in their professions. Most countries' codes tend to be similar with various articles and directives covering, in a very general and comprehensive way, the major ethical considerations of the profession. At the same time, every country has adopted specific guidelines into their codes which are particularly relevant to the conditions, type of society and situation of the media in that specific country. Provisions which directly and indirectly address the role of the media vis-à-vis the judiciary in general, and the court and tribunal process more specifically, are contained in all of them. The following are excerpts of some of the codes of ethics in a varied group of countries.

In the United States, for example, the American Society of Newspaper Editors' Code of Ethics outlines even major principles to guide the profession. Among them, is the concept of responsibility under which it is stated that a newspaper's right to attract and hold readers is restricted by nothing but considerations of public welfare. Under freedom of the press, it claims that it is the unquestionable right to discuss whatever is not explicitly forbidden by law, including

the wisdom of any restrictive statute. Furthermore, it mentions that independence, being the freedom from all obligations, except that of fidelity to the public interest, is vital. It sets out further guidelines on sincerity, truthfulness and accuracy, as well as directives on impartiality and fair play which more than adequately create and preserve the integrity of the profession without any need for outside intervention.

In Israel, the Israeli Journalists' Code of Ethics takes up many similar considerations. Among the many directives, journalists are encouraged to maintain professional secrecy, not divulge sources of information, use only honest means to obtain news, respect confidences, and not to publish information given "off the record."

In India, the All-India Newspaper Editors' Conference had, as far back as 1959, elaborated its own Code of Ethics. Its first point claims that, as the press is a primary instrument in the creation of public opinion, journalists should regard their calling as a trust and be eager to serve and guard the public interest and the peace of humanity. As such, they should attach to their duties due value to fundamental human and social rights and shall hold good faith and fair play in news reports and comments as essential professional obligations. In addition, they shall observe special restraint in reports and comments dealing with potential or actual tensions likely to lead or leading to civil disorder. Besides mentioning secrecy of sources and impartiality, the last point also mentions that the press shall refrain from publishing matter likely to encourage vice and crime.

In Japan, the Newspaper Publishers and Editors Association formulated its moral charter, the Canons of Journalism. In it the traditional comments on freedom of the press, sphere of news reporting and editorial writing and impartiality, tolerance and decency are mentioned. These rights are vital rights of mankind and shall be restricted by nothing except when explicitly forbidden by law. Measures of self restraint are to be taken because of the media's share in influencing public opinion. Thus, any information which goes to the detriment of public welfare shall not be published.

In Nigeria, the Guild of Editors has also established a Code of Ethics of its own. Its general guidelines touch on the same subjects as the other above mentioned countries. It is stated that it is the moral

duty of journalists to have respect for the truth and publish only truthful and accurate information. Journalists shall observe the universally accepted principle of secrecy of sources and never divulge these. Journalists shall employ only fair methods in the collection of news photographs and documents.

In Chile, the National Council of the Association of Chilean Newspaper Publishers adopted its own Code of Ethics in 1963. In it, it is mentioned that the journalists shall put their moral responsibility above everything else. It is their mission to provide public information. As such, journalists shall dedicate themselves to the cause of truth, moral understanding and human rights. The right to convey information shall never be used in a manner calculated to prejudice individuals or sections of the community, either physically or morally, intellectually, culturally or economically. Journalists shall be sworn to secrecy concerning the sources of information. Objectivity and impartiality in news gathering, reporting and publishing shall be observed at all times.

In Germany, the German Press Council also guides the profession of journalism along the same lines as in most of the other countries. The respect for truth, impartiality, secrecy of sources, and dignity of persons are among the main guidelines. No information to the detriment of any racial, religious, social, cultural or other segment of society shall be published and the press shall always work to contribute to the peace and prosperity of society. The press shall enjoy total freedom of expression, except where explicitly prohibited by law for going against the public welfare. Journalists may not abuse their position and status for personal or non-ethical purposes.

Sweden was one of the first countries to develop a code of ethics. There, the Publicists' Club, as far back as 1923, established the rules and guidelines concerning the profession. Besides the usual guidelines of publishing true, accurate and impartial information, it encourages journalists not to judge the actions and ideas of no one unheard, and not to publish incomplete information such as, interestingly, detailed descriptions of crimes. The press is to also show consideration and objectivity in reporting information as not to encourage, incite or create civil disorder, confrontation or undue trouble. In difficult cases, particularly those concerning the public welfare, there shall be consultation among the representatives of the profession.

Inter-Governmental Interference

Codes of ethics exist in almost every country of the world, and more could be cited, but this brief tour of some very diverse countries should clearly show that in all of them the press and the profession of journalism have developed enough comprehensive guidelines to guide their activities and to self regulate any abuses by its members, so that any outside intervention to this extent, particularly by governments or the state, is clearly not necessary.

As if the media did not have its hands full already by trying to fight off state and government intervention in its affairs, a new worrying trend is starting to develop. Intergovernmental organisations are at an increasing and alarming rate, getting involved in matters which are none of their business and trying, themselves, to regulate and guide the media profession. Although organisations such as the United Nations and, more specifically, UNESCO, have long had enough to say and discuss in this area, recent events and trends towards involvement have been most worrying. One such example is the Resolution 1003 on the Ethics of Journalism adopted by the forty-fourth Ordinary Session of the Parliamentary Assembly of the Council of Europe in July 1993. This resolution is a clear attempt by governments, indirectly by way of the Council of Europe, to place constraints and limitations on the activities of the media in Europe, which amounts to a severe limitation on freedom of the press. This is not only an unwelcome action but a very unnecessary one as well as most of the text and guidelines provided in it are the same as those adopted by self-imposed codes of ethics in all countries concerned.

Further to those guidelines, this resolution attempts to impose other freedom of the press restricting guidelines such as right of reply and guidelines on restrictions in time of tension or conflict. The issue then becomes a question of principle, since the media does not need governments to tell it what it should do and how to do it. It is true that the media enjoys a certain "fourth power" status, but it is both professional and ethical enough not to have to be told how it should behave by the other three powers.

The Predicament of Freedom of the Media and Judicial Independence

As it can be seen, a fully free, autonomous and independent media is a necessity in a fully functioning democracy. At first glance this may contradict with some of the requirements of a free, autonomous and independent judiciary. However, a closer look and analysis can clearly show that this need not be the case and that both professions can actually complement each other. One of the main concerns is that the media's most important task to inform the public of judicial proceedings may have a negative effect on the proceedings itself as it may help to shape or influence the opinions of judges, jurors, witnesses and other parties. To say this is to assume that the media will not only dig up any kind of information possible, but also to distort it to such an extent that it may alter the truth.

However, as I have mentioned before, the media in all countries guide their activities by certain guidelines, chief among which is the preservation and information of the truth, along ethical and moral lines which will not go against the public welfare. Thus, the more the media can have access to judicial proceedings, the more information that will be known and in this way, it accomplishes a double task; that of reducing uncertainty and that of providing a safeguard against biased or corrupt proceedings. As long as media reports on proceedings are guided by these self imposed guidelines, reporting on them will not only not threaten the party's right to a fair trial, it may actually enhance it.

To address the main question present on everyone's mind of whether restrictions on media reporting are justified in certain instances, the answer, from the media's point of view is, of course, no. In our point of view, the media should be restricted by no one but itself. Not by governments, states, international bodies or the judiciary. There are enough guarantees included in the codes of ethics of the media in all countries to ensure that it will not step out of line. Its reputation and integrity depends on it.

Furthermore, this is a concept that knows no boundaries and is not affected by different ethical, moral, religious, cultural and other characteristics of the various world societies. Although, the concept is the same and the end result remains unchanged we prefer to speak

of a "Professional Code of Conduct", rather than "Code of Ethics" thus ensuring that nobody can claim different "ethics" or "morals" to avoid respecting this code.

Thus the relationship between media independence and judicial independence need not be a mutually exclusive one, but should rather be a co-operative one in which both parties work for the preservation and enhancing of each other's profession and independence.

Reports on Judicial Proceedings and the Effectiveness of Guidelines in Sweden

*Lennart Groll**

Introduction

I must start with a short background on Swedish press law and its origins. History is of some interest because Sweden was the first country in the world to adopt a written press law protecting freedom of the press. This law was passed as early as 1766 and it banned the censorship of all printed publications. It also established freedom of information, i.e., access for the citizens to public documents. At the time, such freedom was not widely recognised by other countries and it remains rare, even today. Barring a short setback at the end of the 18th century, freedom of the press has remained in Sweden since those days, and it can be stated that the media laws which Sweden has today are the most liberal in existence.

Some Features of the Present Laws

At the outset, I would like to mention some features of the laws, to emphasise their very liberal character. The central point is, of course, that no censorship or previous monitoring of printed papers or electronic media is allowed. Every newspaper, radio and television program must have a responsible editor who shall be appointed beforehand. All claims and lawsuits must be directed against the responsible editor, whereas the journalist who wrote the article or

* Judge of the Court of Appeal, Stockholm, Sweden; Vice-President of the International Commission of Jurists; Former Press Ombudsman of Sweden

produced the television-program is exempt from liability and punishment. Journalists' sources are well protected. Not only should the journalist avoid revealing his source, he is prohibited by law from doing so and will be fined if he does. This is a unique legal protection of sources. In combination with the liberal access to public documents, this protection gives the media a very strong position to monitor the work of the government and other state and municipal agencies.

The lack of legal limitations is matched by a relatively strong self-regulation system which the Swedish press established and has run independently. A Code of Ethics has existed since the 1920s and is regularly reviewed and amended. There is a Press Council. For the last 20 years, there is also a Press Ombudsman to help and protect the interests of individuals from damage by false or biased publicity. The newspapers have undertaken to publish the decisions of the Press Council and to pay fines when rebuked by the Council.

I would like to turn to the implications of the system for the relationship between the media and the judiciary. It follows from the ban on all forms of censorship that the courts have no authority to restrain any medium from publishing whatever they want to publish. The institution of contempt of court is, of course, incompatible with this system.

Reporting from the courts is only limited by some provisions in the secrecy laws. These allow courts to proceed behind closed doors for the protection of certain interests carefully delineated in the law. These interests include, for example, the protection of state interests (espionage trials), and the protection of juveniles and other individuals vital private interests. Trials concerning rape, for instance, will be prosecuted *in camera*.

The exemptions from an open court in the secrecy law are restrictive; openness is the rule and, as there are no other limitations by law, it will be up to the media themselves to decide what will be published. Here, the Code of Ethics has an important role to play, probably more than in other countries because the Swedish press is aware of its great freedom and consequently more interested in ensuring that its guidelines are followed.

Some provisions which have significance for the reporting about courts and trials should be mentioned. The Code says that the media shall not anticipate the decision of the court by taking sides on the question of guilt in a criminal case. The position of both sides should be reported. If a report has been published concerning an ongoing trial, the judgement should also be publicised or published

The Code also contains provisions as to publicising names of suspected, indicted or sentenced persons. They should be identified by name or other identifying information only if an obvious public interest makes it desirable. This rule reflects a traditional attitude in the Swedish press that you should be careful not to unnecessarily cause further damage to people with personal problems.

What importance do these rules have in actual life, — in the day-to-day work of newspapers and other media? This is of course a matter for subjective opinion. It can be said, nevertheless, that the Swedish press upholds a certain ethical standard. Sweden does not have any counterparts to the newspapers in England which deal with scandals.

One clear feature of publishing policy in Sweden is that different criteria are applied to public personalities than to persons in whom the general public usually has no interest. The latter can expect generous treatment: names and other identifications will seldom be given. This again, I believe, contrasts, for instance, with Britain, where you can find persons convicted of petty crimes being identified in newspapers by name. On the other hand, persons who are in the public eye, politicians, high ranking officials, business executives and actors can expect much harsher treatment.

Matters relating to sex, marital and family matters will generally be treated cautiously by the press, again I believe in contrast with Britain. On the other hand, the press has a strong demand for honesty in economic dealings. Tendencies of bribery or corruption in high offices will be relentlessly pursued by newspapers and other media.

Finally, I would like to comment on the question of preparing guidelines on the relationship between the media and the judiciary. If guidelines are used to advise courts when to restrict publicity in the

alleged interest of justice, then it must be said that such guidelines are not appropriate in the Swedish environment. If such guidelines are to be considered of value for some of us they should not be formulated to mean that it is generally desirable to give such powers to the Courts. Such propositions would certainly arouse the suspicion of the Swedish media which jealously guards its freedom.

Conclusion

To conclude, the Swedish system is characterised by the relative absence of legal restraints, combined with a relatively well developed self-discipline of the press. Currently, there are no movements to limit freedom of the press, let alone to give the courts power to stop publicity about ongoing cases. This is particularly because the background of Sweden is one of a long peaceful development and stable social and political institutions. Political trials are unknown in our modern history.

Does the system function? Well, there is always a debate going on. Discontent with the media is often voiced, not the least of which, a discomfort with the ever growing importance of the media in public affairs. However it has not been seriously contended that Swedish judges are unduly influenced in their judgements by publicity surrounding trials. Nor has this been seriously contended as far as our lay assessors are concerned, but perhaps this can sometimes be more doubtful.

With respect to everyday jurisdiction, I would say the system functions. In the few cases that attract public interest, for example during the trial of a person indicted for the murder of our former prime minister, the ethical rules are rarely respected by journalists hunting for sensational details.

Appendix One

Documents

Document 1
The Madrid Principles
on the
Relationship between the Media and Judicial
Independence

Introduction

A group of 40 distinguished legal experts and media representatives, convened by the International Commission of Jurists (ICJ), its Centre for the Independence of Judges and Lawyers (CIJL), and the Spanish Committee of UNICEF, met in Madrid, Spain, between 18 - 20 January 1994. The objectives of the meeting were

- to examine the relationship between the media and judicial independence as guaranteed by the 1985 UN Basic Principles on the Independence of Judiciary;
- to formulate principles addressing the relationship between freedom of the expression and judicial independence.

The participants came from Australia, Austria, Brazil, Bulgaria, Croatia, France, Germany, Ghana, India, Jordan, Netherlands, Norway, Palestine, Poland, Portugal, Senegal, Slovakia, Spain, Sri Lanka, Sweden, Switzerland and the United Kingdom.

The following are the Principles:

Preamble

- Freedom of the media, which is an integral part of freedom of expression, is essential in a democratic society governed by the Rule of Law. It is the responsibility of judges to recognise and give effect to freedom of the media by applying a basic presumption in their favour and by

permitting only such restrictions on freedom of the media as are authorised by the International Covenant on Civil and Political Rights ("International Covenant") and are specified in precise laws.

- The media have an obligation to respect the rights of individuals, protected by the International Covenant, and the independence of the judiciary.
- These principles are drafted as minimum standards and may not be used to detract from existing higher standards of protection of the freedom of expression.

The Basic Principle

1. Freedom of expression¹ (including freedom of the media) constitutes one of the essential foundations of every society which claims to be democratic. It is the function and right of the media to gather and convey information to the public and to comment on the administration of justice, including cases before, during and after trial, without violating the presumption of innocence.
2. This principle can only be departed from in the circumstances envisaged in the International Covenant on Civil and Political Rights, as interpreted by the 1984 Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (U.N. Document E/CN.4/1984/4).
3. The right to comment on the administration of justice shall not be subject to any special restrictions.

¹ As defined by article 19 of the ICCPR (see Document 1 attached).

Scope of the Basic Principle

4. The Basic Principle does not exclude the preservation by law of secrecy during the investigation of crime even where investigation forms part of the judicial process. Secrecy in such circumstances must be regarded as being mainly for the benefit of persons who are suspected or accused and to preserve the presumption of innocence. It shall not restrict the right of any such person to communicate to the press information about the investigation or the circumstances being investigated.
5. The Basic Principle does not exclude the holding *in camera* of proceedings intended to achieve conciliation or settlement of private causes.
6. The Basic Principle does not require a right to broadcast live or recorded court proceedings. Where this is permitted, the Basic Principle shall remain applicable.

Restrictions

7. Any restriction of the Basic Principle must be strictly prescribed by law. Where any such law confers a discretion or power, that discretion or power must be exercised only by a judge.
8. Where a judge has a power to restrict the Basic Principle and is contemplating the exercise of that power, the media (as well as any other person affected) shall have the right to be heard for the purpose of objecting to the exercise of that power and, if exercised, a right of appeal.
9. Laws may authorise restrictions of the Basic Principle to the extent necessary in a democratic society for the protection of minors and of members of other groups in need of special protection.

10. Laws may restrict the Basic Principle in relation to criminal proceedings in the interest of the administration of justice to the extent necessary in a democratic society
 - (a) for the prevention of serious prejudice to a defendant;
 - (b) for the prevention of serious harm to or improper pressure being placed upon a witness, a member of a jury, or a victim.
11. Where a restriction of the Basic Principle is sought on the grounds of national security,² this should not jeopardise the rights of the parties, including the rights of the defence. The defence and the media shall have the right, to the greatest extent possible, to know the grounds on which the restriction is sought (subject, if necessary, to a duty of confidentiality if the restriction is imposed) and shall have the right to contest this restriction.
12. In civil proceedings, restrictions of the Basic Principle may be imposed if authorised by law to the extent necessary in a democratic society to prevent serious harm to the legitimate interests of a private party.
13. No restriction shall be imposed in an arbitrary or discriminatory manner.
14. No restriction shall be imposed except strictly to the minimum extent and for the minimum time necessary to achieve its purpose, and no restriction shall be imposed if a more limited restriction would be likely to achieve that purpose. The burden of proof shall rest on the party requesting the restriction. Moreover, the order to restrict shall be subject to review by a judge.

2 For the proper scope of the term "national security", see sections 29-32 of the Siracusa Principles attached as Document 2.

Annex

Strategies for Implementation

1. Judges should receive guidance in dealing with the Press. Judges should be encouraged to assist the Press by providing summaries of long or complex judgements of matters of public interest and by other appropriate measures.
2. Judges shall not be forbidden to answer questions from the Press relating to the administration of justice, though reasonable guidelines as to dealing with such questions may be formulated by the judiciary, which may regulate discussion of identifiable proceedings.
3. The balance between independence of the judiciary, freedom of the press and respect of the rights of the individual - particularly of minors and other persons in need of special protection - is difficult to achieve. Consequently, it is indispensable that one or more of the following measures are placed at the disposal of affected persons or groups: legal recourse, press council, Ombudsman for the press, with the understanding that such circumstances can be avoided to a large extent by establishing a Code of Ethics for the media which should be elaborated by the profession itself.

Document 2
Extracts from the International Covenant
*on Civil and Political Rights**

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

* Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200 A (XXI) of 16 December 1966. Entered into force on 23 March 1976 in accordance with article 49.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;
(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 11

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

Article 14

1. All persons shall be equal before the courts and tribunals.

In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the Parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes of the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
 - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 - (c) To be tried without undue delay;
 - (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

- (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
 - (g) Not to be compelled to testify against himself or to confess guilt.
- 4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
 - 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
 - 6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
 - 7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

- 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the

time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations.

Article 19

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

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Document 3
Extracts from
the Siracusa Principles
on the Limitation and Derogation Provisions
in the International Covenant on Civil
*and Political Rights **

I. Limitation Clauses

*A. General Interpretative Principles Relating
to the Justification of Limitations ***

1. No limitations or grounds for applying them to rights guaranteed by the Covenant are permitted other than those contained in the terms of the Covenant itself.
2. The scope of a limitation referred to in the covenant shall not be interpreted so as to jeopardise the essence of the right concerned.
3. All limitation clauses shall be interpreted strictly and in favour of the rights at issue.
4. All limitations shall be interpreted in the light and context of the particular right concerned.
5. All limitations on a right recognised by the Covenant shall be provided for by law and be compatible with the objects and purposes of the Covenant.

* UN Document E/CN.4/1984/4, reprinted in ICJ Review N° 36 (June 1986), pp. 47-56

** The term "limitations" in these principles includes the term "restrictions" as used in the International Covenant on Civil and Political Rights.

6. No limitation referred to in the Covenant shall be applied for any purpose other than that for which it has been prescribed.
7. No limitation shall be applied in an arbitrary manner.
8. Every limitation imposed shall be subject to the possibility of challenge to and remedy against its abusive application.
9. No limitation on a right recognised by the Covenant shall discriminate contrary to Article 2, paragraph 1.
10. Whenever a limitation is required in the terms of the Covenant to be "necessary", this term implies that the limitation:
 - (a) is based on one of the grounds justifying limitations recognised by the relevant article of the Covenant,
 - (b) responds to a pressing public or social need,
 - (c) pursues a legitimate aim, and
 - (d) is proportionate to that aim.

Any assessment as to the necessity of a limitation shall be made on objective considerations.

11. In applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation.
12. The burden of justifying a limitation upon a right guaranteed under the Covenant lies with the state.
13. The requirement expressed in Article 12 of the Covenant, that any restrictions be consistent with other rights recognised in the Covenant, is implicit in limitations to the other rights recognised in the Covenant.
14. The limitation clauses of the Covenant shall not be interpreted to restrict the exercise of any human rights

protected to a greater extent by other international obligations binding upon the state.

B. Interpretative Principles Relating to Specific Limitation Clauses

i. "prescribed by law"

15. No limitation on the exercise of human rights shall be made unless provided for by national law of general application which is consistent with the Covenant and is in force at the time the limitation is applied.
16. Laws imposing limitations on the exercise of human rights shall not be arbitrary or unreasonable.
17. Legal rules limiting the exercise of human rights shall be clear and accessible to everyone.
18. Adequate safeguards and effective remedies shall be provided by law against illegal or abusive imposition or application of limitations on human rights.

ii. "in a democratic society"

19. The expression "in a democratic society" shall be interpreted as imposing a further restriction on the limitation clauses it qualifies.
20. The burden is upon a state imposing limitations so qualified to demonstrate that the limitations do not impair the democratic functioning of the society.
21. While there is no single model of a democratic society, a society which recognises and respects the human rights set forth in the United Nations Charter and the Universal Declaration of Human Rights may be viewed as meeting this definition.

iii. "public order (ordre public)"

22. The expression "public order (ordre public)" as used in the Covenant may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (ordre public).
23. Public Order (ordre public) shall be interpreted in the context of the purpose of the particular human right which is limited on this ground.
24. State organs or agents responsible for the maintenance of public order (ordre public) shall be subject to controls in the exercise of their power through the parliament, courts, or other competent independent bodies.

iv. "public health"

25. Public health may be invoked as a ground for limiting certain rights in order to allow a state to take measures dealing with a serious threat to the health of the population or individual members of the population. These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured.
26. Due regard shall be had to the international health regulations of the World Health Organisation.

v. "public morals"

27. Since public morality varies over time and from one culture to another, a state which invokes public morality as a ground for restricting human rights, while enjoying a certain margin of discretion, shall demonstrate that the limitation in question is essential to the maintenance of respect for fundamental values of the community.

28. The margin of discretion left to states does not apply to the rule of non-discrimination as defined in the Covenant.

vi. "national security"

29. National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.
30. National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.
31. National security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse.
32. The systematic violation of human rights undermines true national security and may jeopardise international peace and security. A state responsible for such violation shall not invoke national security as a justification for measures aimed at suppressing opposition to such violation or at perpetrating repressive practices against its population.

vii. "public safety"

33. Public safety means protection against danger to the safety of persons, to their life or physical integrity, or serious damage to their property.
34. The need to protect public safety can justify limitations provided by law. It cannot be used for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse.

*viii. "rights and freedoms of others"
or the "rights or reputations of others"*

35. The scope of the rights and freedoms of others that may act as a limitation upon rights in the Covenant extends beyond the rights and freedoms recognised in the Covenant.
36. When a conflict exists between a right protected in the Covenant and one which is not, recognition and consideration should be given to the fact that the Covenant seeks to protect the most fundamental rights and freedoms. In this context especial weight should be afforded to rights not subject to limitations in the Covenant.
37. A limitation to a human right based upon the reputation of others shall not be used to protect the state and its officials from public opinion or criticism.

ix. "restrictions on public trial"

38. All trials shall be public unless the Court determines in accordance with the law that:
 - (a) the press or the public should be excluded from all or part of a trial on the basis of specific findings announced in open courts showing that the interest of the private lives of the parties or their families or of juveniles so requires; or
 - (b) the exclusion is strictly necessary to avoid publicity prejudicial to the fairness of the trial or endangering public morals, public order (*ordre public*), or national security in a democratic society.

Appendix Two

The List of Participants

The List of Participants

Dalmo de Abreu Dallari *	Professor of Law, São Paulo, Brazil
Perfecto Andrés Ibañez	Judge; Board Member, Asociación pro Derechos Humanos de España, Spain; Member, Advisory Board of the Centre for the Independence of Judges and Lawyers (CIJL)
Maria Antonova	Member, Bulgarian Bar Association and Bulgarian Union of Jurists
Narcisa Becirevic	Senior Legal Adviser, Human Rights Desk, Ministry of Foreign Affairs, Croatia
P. N. Bhagwati	Former Chief Justice of India; Chairman, Advisory Board of the Centre for the Independence of Judges and Lawyers (CIJL)
Francisca Cobos Gil	Vice-President, Asociación pro Derechos Humanos de España, Spain
Adama Dieng	Secretary-General, International Commission of Jurists (ICJ), Geneva, Switzerland
Eliane Dupré	Secretary-General, Ordre des Avocats du Barreau de la Seine-Saint-Denis, Paris, France

* Member of the ICJ

Desmond Fernando *	Barrister, Sri Lanka; President, International Bar Association
José Antonio Gimbernat	President, Asociación pro Derechos Humanos de Ordeig España, Spain
Sir William Goodhart *	Barrister; Queen's Counsellor; United Kingdom
Lennart Groll *	Judge, Stockholm Court of Appeal; ICJ Vice-President; former press Ombudsman in Sweden
Louis Joinet	Judge, Court of Cassation, France; U.N. Special Rapporteur on Independence of the Judiciary
Zdravka Kalaydjieva	Project Director, Bulgarian Lawyers for Human Rights
Asma Khader *	Advocate, Jordan
Michael D. Kirby *	President, N.S.W. Court of Appeal, Australia; Chairman, ICJ Executive Committee
Kofi Kumado *	Senior Lecturer in Law, University of Ghana; Chairman of the Media Commission
Daniel Marchand *	Professor of Social Law, Conservatoire national des arts et métiers; France
Norman S. Marsh	ICJ Honorary Member; former Secretary-General of the ICJ; former Director, British Institute of International & Comparative Law, United Kingdom

* Member of the ICJ

José A. Martín Pallín	Judge, Supreme Court, Madrid; Board Member, Asociación pro Derechos Humanos de España, Spain
Jean-Gaston Moore	Advocate; Director, Gazette du Palais, Paris; President, ICJ National Section in France
Caterina Nägeli	Lawyer; Member, ICJ National Section in Switzerland
Fali S. Nariman *	Advocate; President, Indian Bar Association; former Solicitor-General of India
Andrew Nicol	Barrister, Queen's Counsellor; United Kingdom
Natasa Nikitinova	Legal Adviser, International Law Department, Ministry of Justice, Slovakia
Lech Paprzycki	Board Member, ICJ National Section in Poland
Antonio Payan Martins	Vice-President, ICJ National Section in Portugal
Wolfgang Peukert	Secretary-General, ICJ National Section in Germany; Head of Unit, European Commission of Human Rights, Council of Europe, Strasbourg
Mona Rishmawi	Director, Centre for the Independence of Judges and Lawyers, Geneva, Switzerland

* Member of the ICJ

Jacqueline Rochette	Secretary-General, ICJ National Section in France
David Rose	Journalist, The Observer, United Kingdom
Joaquín Ruiz-Giménez *	President of the ICJ; President, Spanish Committee of UNICEF; former Ombudsman of Spain
Rainer von Schilling	Chairman, National Committee of the International Press Institute, Germany
Harald Schwarz	Secretary-General, ICJ National Section in Austria
Oyvind Smukkestad	Judge; Board Member, Norwegian Association of Judges
Frank Stekete	Member, ICJ National Section in the Netherlands
J.J. (Anjo) Tempelman	Press Contacts Advisor (for the Judiciary), Nederlandse Vereniging voor Rechtspraak, Netherlands
Christian Tomuschat *	Professor of International Law, University of Bonn, Germany; Member, U.N. International Law Commission
Britta Wagner	Secretary-General, Constitutional Court, Vienna; Board Member, ICJ National Section in Austria
Giordano Zeli	Advocate; former Judge; Board Member, ICJ National Section in Switzerland

* Member of the ICJ

*Centre for the Independence of Judges
and Lawyers*

Advisory Board

Chairman

P.N. Bhagwati

Former Chief Justice of India

Board Members

Perfecto Andres Ibañez

Judge (Spain)

Lloyd Barnett

President, Organization of Commonwealth
Caribbean Bar Associations (Jamaica)

Amar Bentoumi

Secretary-General, International Association
of Democratic Lawyers (Algeria)

Sir Robin Cooke

President of the Court of Appeal (New Zealand)

Marie José Crespin

Member, Conseil Constitutionnel du Senegal

Dato Param Cumaraswamy

UN Special Rapporteur on the Independence
of the Judiciary; past President, Malaysia Bar Council

Jules Deschênes

Former Chief Justice, Superior Court of Quebec (Canada)

Enoch Dumbutshena

Former Chief Justice (Zimbabwe)

Diego García-Sayán

Andean Commission of Jurists;
Member, UN Working Group on Disappearances (Peru)

Stephen Klitzman

Chairman, Committee on International Human Rights,
American Bar Association (USA)

Pablito Sanidad

Chairman, Free Legal Assistance Group (Philippines)

Beinusz Szmukler

President, American Association of Jurists (Argentina)

Suriya Wickremasinghe

Barrister (Sri Lanka)

Abderahman Youssoufi

Deputy Secretary-General, Arab Lawyers Union
Vice President, Arab Organization for Human Rights
(Morocco)

Director

Mona A. Rishmawi

The Centre for the Independence of Judges and Lawyers (CIJL) was established in 1978 by the International Commission of Jurists (ICJ) to promote world-wide the basic need for an independent judiciary and legal profession and organise support for judges and lawyers who are harassed or persecuted. The CIJL issues two annual publications: The *CIJL Yearbook*, a legal journal devoted to discussing issues related to the independence of the judiciary and the legal profession, and *Attacks on Justice: The Harassment and Persecution of Judges and Lawyers*. The sixth addition of *Attacks on Justice* issued in 1995 analysed legal structures and the human rights situation in 58 countries. It described the cases of 572 jurists who have suffered reprisals for carrying out their professional functions.



Centre for the Independence of Judges and Lawyers
Geneva, Switzerland